JUDICIAL HELLHOLES® 2009 2010

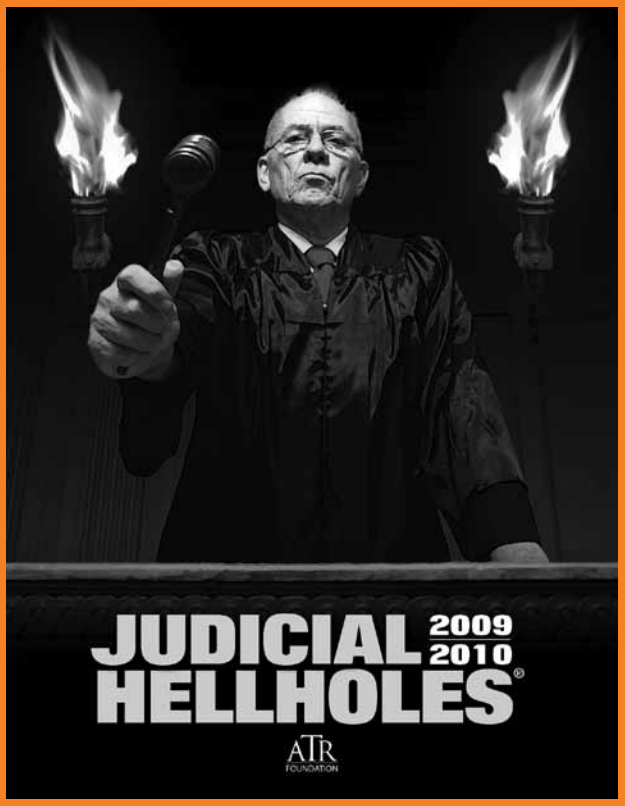
ATR FOUNDATION

"What I call the 'magic jurisdiction,' [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . . These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. 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." [1]

—**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.

"West Virginia was a 'field of dreams' for plaintiffs' lawyers. We built it and they came." [2]

—**West Virginia Judge Arthur Recht**



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Preface

This eighth annual report documents litigation abuses in areas identified by the American Tort Reform Foundation (ATRF) as "Judicial Hellholes®." The purpose of this report is 1) to identify areas of the country where the scales of justice are radically out of balance and 2) to provide solutions for restoring balance, accuracy and predictability to the American civil justice system.

Most judges do a diligent and fair job for modest pay. But their good reputation and goal of providing balanced justice in America are undermined by the small number of jurists who do not dispense justice fairly and impartially.

Judicial Hellholes are places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits. The jurisdictions discussed in this report are not the only Judicial Hellholes in the United States; they are merely among the worst offenders. These cities, counties or judicial districts are frequently identified by members of the American Tort Reform Association (ATRA) and other individuals familiar with the litigation. The report considers only civil cases; it does not reflect in any way on the criminal justice system.

Though entire states may occasionally be cited as "Hellholes," it is usually only specific counties or courts in a given state that warrant this citation. In many states, including some that have received national attention, the majority of the courts are fair and the negative publicity is a result of a few bad apples. Because judges generally set the rules in personal injury lawsuits, and judicial rulings are so determinative in the outcome of individual cases, it may only take one or two judges who stray from the law in a given jurisdiction to give it a reputation as a Judicial Hellhole.

Although ATRF annually surveys ATRA members and others with firsthand experience in Judicial Hellholes as part of the research process, the report has become so widely known that ATRF continually receives and gathers information provided by a variety of additional sources.

To the extent possible, ATRF has tried to be specific in explaining why defendants are unable to achieve fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members are justifiably concerned about reprisals if their names and cases were identified in this report – a sad commentary about the Hellholes in and of itself. Defense lawyers are "loathe" to get on the bad side of the local trial bar and "almost always ask to remain anonymous in newspaper stories."[3]

ATRF interviewed individuals familiar with litigation in the Judicial Hellholes and verified their observations through independent research of press accounts, studies, court dockets and judicial branch statistics, and other publicly available information. Citations for these sources can be found in the nearly 400 endnotes following this report.

The focus of this report is squarely on the conduct of judges who do not apply the law evenhandedly to all litigants and do not conduct trials in a fair and balanced manner. But as scrutiny of the judiciary by the public, the media and the other two branches of government has been heightened in recent years, thanks in part to this annual report and others like it, the adaptive plaintiffs' bar has begun to explore new strategies for expanding liability through legislatures and government agencies. Accordingly, the Judicial Hellholes report also analyzes those strategies.

ATRF welcomes information from readers with additional facts about the Judicial Hellholes in this report, as well as on questionable judicial practices occurring in other jurisdictions. Information can be sent to:

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To download a copy of this report in pdf format, visit **www.atra.org**.

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.

Executive Summary

THE 2009/2010 JUDICIAL HELLHOLES

Judicial Hellholes are places where judges systematically apply laws and court procedures in an inequitable manner, generally against defendants in civil lawsuits. In this eighth annual report, ATRF shines the spotlight on six areas of the country that have developed reputations for uneven justice. Many of the jurisdictions cited this year have been cited before, and positive reforms are often fought tooth-and-nail. Not coincidentally, the local or state economies in many of these Hellholes jurisdictions have suffered more than most during the latest recession. And while reasonable people may disagree about the specific rankings assigned to each, no one can reasonably argue that the jurisdictions cited in this report do not qualify as Judicial Hellholes.

#1 SOUTH FLORIDA

South Florida, the home of WhoCanISue.com, is known for its medical malpractice claims, never-ending tobacco lawsuits and generous verdicts. Trial practices favor plaintiffs, as exemplified by a string of reversals in a Miami-Dade case against Ford Motor Company. Florida is also developing a reputation as the place to bring slip-and-fall lawsuits due to its lower burden of proof compared to other states, making the state ripe for fraudulent claims. Supermarkets, corner stores, and restaurants have no choice but to settle, regardless of whether they could have prevented accidents. In addition, Florida is one of the few states that allow those who drive under the influence of alcohol or drugs to sue the automobile manufacturer for failing to prevent their injuries by designing a safer car, while hiding from the jury the driver's responsibility for the crash. South Florida is home to several legal scandals this year, in which lawyers enriched themselves with their clients' money and bought hospital records to solicit business. Even the organization representing plaintiffs' lawyers in the state has found itself in hot water.

#2 WEST VIRGINIA

West Virginia has gained its poor reputation as a place in which civil defendants often cannot receive justice. This perception is due to the state's unique lack of appellate review; the home court advantage provided by locally elected judges to in-state plaintiffs against out-of-state corporations; unfair trial practices; and the novel, liability-expanding decisions of its high court. West Virginia is also known for its close relationships between the plaintiffs' bar and its long-serving state attorney general. Recently, some businesses have attempted to fight back by exposing fraudulent claims. The recent recommendation of an Independent Commission on the Judiciary that West Virginia establish an intermediate appellate court and an appeal as a matter of right, as detailed in a Point of Light, provides some hope that West Virginia may be turning the corner on the road to reform. Until West Virginia shows tangible change, however, it remains a troubling Judicial Hellhole.

3 COOK COUNTY, ILLINOIS

Cook County is Illinois' center of litigation, hosting 65 percent of the state's lawsuits while serving as home to just 41 percent of its population. This disparity has widened over the past 15 fifteen years. O'Hare is not just busy with tourists, but also with lawyers bringing claims from around the state, across the country, and even from abroad. Lawsuits in hyper-litigious Cook County include claims that a dolphin at a zoo splashed spectators, that fire engine sirens are too loud, and that a camp is responsible for the deaths of teenagers who took a late night joy ride in its boats.

4 ATLANTIC COUNTY, NEW JERSEY & BEYOND

Atlantic County has been identified as a Judicial Hellhole since 2007 in large part because it serves as a center for mass tort actions, often directed at one of the state's own economic generators, pharmaceutical manufacturers. Ninety-three percent of plaintiffs in New Jersey's pharmaceutical mass torts come from outside the state. Atlantic County also spends an astronomical amount defending against lawsuits with a legal services budget that dwarfs other Garden State counties. In other New Jersey courts, advocacy groups have taken aim against food producers, alleging that hot dog makers should warn that this ballpark staple increases the risk of cancer and that restaurants commit fraud by not disclosing the sodium content of menu items.

5 NEW MEXICO APPELLATE COURTS

After several years on the Watch List, New Mexico's appellate courts now get to feel some full-blown Judicial Hellholes heat. This year the New Mexico Court of Appeals even rejected the "baseball rule," which has long recognized spectators' inherent risk of being hit by a batted ball. In another recent case the same court found that the manufacturer of a rock crusher could be held liable for the death of a worker, even though the worker disregarded his training and climbed into the machine while it was still in operation, and even though someone else had altered the machine to expose its moving parts.

6 NEW YORK CITY

Start spreading the news… you can make it in New York by suing the city. The Great Gotham spent more settling slip and falls, medical malpractice, car accident and school-related claims than the next five largest American cities combined. With a personal injury lawyer serving as Speaker of the New York Assembly, that's not surprising. Many observers have also expressed concern with the trial practices of the new judge handling asbestos litigation in the state.

WATCH LIST

Beyond the Judicial Hellholes, this report calls attention to several additional jurisdictions that also bear watching for suspicious or negative developments in litigation or histories of abuse. Watch List jurisdictions fall on the cusp – they may fall into the Hellholes abyss or rise to the promise of Equal Justice Under Law.

CALIFORNIA

Poorly reasoned California court decisions have placed the state's citizens and business owners in jeopardy of expanded liability. California businesses are concerned that they will be unfairly hit with consumer and disabled-access lawsuits by those who have

1 California

2 Alabama

3 Madison County, Illinois

4 Jefferson County, Mississippi

5 Gulf Coast and Rio Grande Valley, Texas

chosen litigation as a lifestyle. Plaintiffs' lawyers have gamed the system to take advantage of procedural rules, and brand-name product manufacturers find themselves on the hook for injuries from competing generic products.

ALABAMA

Attorney General Troy King and personal injury lawyer Jere Beasley teamed up to sue the entire pharmaceutical industry, claiming that pricing practices known to federal and state regulators since the 1970s amounted to fraud. After receiving three multimillion-dollar verdicts in Montgomery County, the streak may have come to a sudden end this October when the Alabama Supreme Court stepped in to stop what it characterized as "regulation by litigation" and threw out all three verdicts. Meanwhile, local District Attorneys in Alabama have grabbed the baton and hired their contingency fee lawyer campaign contributors to sue pharmacies and cable companies.

MADISON COUNTY, ILLINOIS

For many years, Madison County was considered the epitome of a Judicial Hellhole. In recent times, a reform-minded court has made great strides in restoring fairness and predictability to what was once a magnet for class actions, asbestos litigation, and other big-ticket lawsuits from around the country. Madison County still remains substantially more litigious than other Illinois counties and, after a sharp decline in asbestos cases, filings doubled between 2006 and 2008. Judge Daniel Stack, who along with Chief Judge Ann Callis, is responsible for improvements in the court, will retire this year, opening a seat on the court. It remains to be seen what impact his retirement will have on Madison County's movement forward.

JEFFERSON COUNTY, MISSISSIPPI

Comprehensive tort reforms in Mississippi between 2002 and 2004 went a long way to improve the legal climate in this former Judicial Hellhole, but there is still reason for concern. On the one hand, Jefferson County in 2009 was home to a rare plaintiffs' verdict in a case against a lead paint manufacturer in which it was alleged that the manufacturer was responsible for a child's exposure to lead paint, even though all lead had been removed from its paints decades earlier. The plaintiff's mother testified at trial that her child would never be able to go to college due to his injuries, but off to college he went as she took the money and went shopping. On the other hand, adjacent Claiborne County, also a past area of concern, had what appears to be its first defense verdict in a lawsuit claiming three companies were responsible for a plaintiff's silicosis.

GULF COAST AND RIO GRANDE VALLEY, TEXAS

The area's reputation has improved in recent years, but it is still known for being skewed toward plaintiffs. In one case this year, a judge took a rare jury verdict for a defendant and simply declared a "do over" with no written opinion. It is notable that the plaintiffs' bar has joined with tort reform groups to stop "barratry," a fancy legal word for ambulance chasing. Many Texas lawyers have taken to directly soliciting injured people and offering them cash upfront to represent them, even while still at the hospital.

Other areas to watch include **St. Clair County, Illinois; Orleans and Jefferson Parishes, Louisiana; Las Vegas (Clark County), Nevada**; and **several "home run" jurisdictions for asbestos litigation**.

DISHONORABLE MENTIONS

Dishonorable mentions recognize stand-alone abusive practices, unsound court decisions or legislative actions that create unfairness in the civil justice system. This year's dishonorable mentions go to:

- The **Arkansas Supreme Court** for invalidating two important reforms which acted to fairly and accurately apportion liability and medical damages based on who actually caused an injury and what monies actually were expended when such an injury required medical care and treatment;
- The **Minnesota Supreme Court** for failing to seize an opportunity to fix a loophole that has made its courts a home for thousands of old lawsuits from around the country that could not be filed where the plaintiff lives or was allegedly injured;
- The **North Dakota Supreme Court** for a similar ruling that will encourage forum shopping; and

1 Arkansas Supreme Court

2 Minnesota Supreme Court

3 North Dakota Supreme Court

4 Pennsylvania Governor Ed Rendell

- **Pennsylvania Gov. Ed Rendell** for entering a no-bid contingency fee contract with a firm that made substantial donations to his campaign, and which provides private lawyers with carte blanche power to exercise the government's enforcement power.

THE ROGUES' GALLERY

The Rogues' Gallery recognizes some of the cast of characters behind Judicial Hellholes: lawyers who have gone astray and, in some cases, ended up in jail. This year's report tells several of their stories.

POINTS OF LIGHT

There is also good news in some of the Judicial Hellholes and beyond. "Points of Light" are examples of judges adhering to the law and reaching fair decisions, as well as legislative actions that have yielded positive change.

First, the report notes the recommendation of an independent commission established by **West Virginia** Gov. Joe Manchin that the state establish an intermediate appellate court and provide litigants with a right to an appeal. It is a positive first step to reform.

Then the report highlights several courts that took action to stem the substantial rise of subjective pain and suffering awards:

- The **Maryland Court of Appeals** applied its limit on noneconomic damages to all civil claims, preventing plaintiffs' lawyers from circumventing the law by characterizing personal-injury lawsuits as consumer protection actions;

- The **New Jersey Supreme Court** required a new trial in a case in which the judge developed a chip on her shoulder against the defendant, leading to the highest noneconomic damage award in the state's history;

- **Vermont and California courts** rejected new emotional harm damages in cases involving injuries to pets; and

- The **U.S. Supreme Court** reemphasized the need for a plaintiff claiming "fear of disease" to show that the fear is "genuine and serious."

The report also briefly highlights other good news, including Arizona's enactment of medical liability reform, Oklahoma's passage of a comprehensive tort reform package, the Ohio Supreme Court's protection of the finality of written contracts, and the Texas legislature's resistance to trial lawyer efforts to roll back the substantial progress made in the state in recent years.

FUELING THE FIRE

The organized plaintiffs' bar is actively attempting to expand liability in the courts, legislatures and government agencies. Already it has had some success. This includes setting up discovery disputes with the objective of encouraging judges to impose extreme sanctions which permit plaintiffs to prevail in cases regardless of the underlying merits. The report also delves into the tort bar's more indirect means to influence the development of the law and expand liability. Commentary included in a new Restatement project of the American Law Institute, which courts in Judicial Hellholes may seize upon to radically change the traditional duties owed to persons who come on another's property, reduce proof of causation, and admit junk science. In addition, the report identifies a new trend in which the plaintiffs' bar has sought to hold businesses responsible for injuries from products it did not even manufacture or sell, or for injuries caused by others. Plaintiffs' lawyers are also mounting an aggressive campaign to overturn federal preemption, a legal doctrine that restricts state lawsuits that would interfere in accomplishing federal health and safety goals.

SOLUTIONS

Experience shows that one of the most effective ways to improve the litigation environment in Judicial Hellhole jurisdictions is to bring the abuses to light. By issuing its Judicial Hellholes report, ATRF seeks to educate the public and the media, who in turn can persuade judges and other policymakers to work harder to provide Equal Justice Under Law for everyone.

This report also highlights several reforms that can help restore balance to Judicial Hellholes, including stopping "litigation tourism," enforcing consequences for bringing frivolous lawsuits, stemming abuse of consumer laws, ensuring that pain and suffering awards serve a compensatory purpose, strengthening rules to promote sound science, protecting access to health care by addressing medical-liability issues, and prioritizing the asbestos and silica claims of those who are actually sick.

The Making of a Judicial Hellhole:

QUESTION: What makes a jurisdiction a Judicial Hellhole?

ANSWER: 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.[4] 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."[5] 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 Hellhole jurisdiction and events in question.

Not surprisingly, personal injury lawyers have a different name for these courts. They call them "magic jurisdictions."[6] Personal injury lawyers are drawn like flies to these rotten jurisdictions, looking for any excuse to file lawsuits there. When former Judicial Hellhole Madison County, Illinois, was named the worst Judicial Hellhole in the nation, some personal injury lawyers were reported to cheer "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 the tricks of their 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 suits not supported by existing law to go forward. Instead of dismissing these suits, Hellholes judges adopt new and retroactive legal theories, which often have inappropriate national ramifications.

- **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 otherwise unsupported by the evidence.

UNREASONABLE EXPANSIONS OF LIABILITY

- **Private Lawsuits Under Loosely-Worded Consumer Protection Statutes.** 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 neighbors night after night) has been conflated into an amorphous Super Tort for pinning liability for various societal problems on manufacturers of lawful products. Public nuisance theory has always targeted how properties or products are used, not manufactured, which is the province of products liability law. As one court observed, if this effort succeeds, personal injury lawyers would be able to "convert almost every products liability action into a [public] nuisance claim."[7] For instance, recently, a normally highly respected federal circuit court stretched the potential of public nuisance law to cover global warming.[8] The defendants were not India, China, or even the United States, but a handful of energy producers.

- **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 or "loss of companionship" damages in animal injury cases.

JUDICIAL INTEGRITY

- **Cozy Relations.** There is often excessive familiarity among jurists, personal injury lawyers, and government officials.

- **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 contingency 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.

2009/2010 Judicial Hellholes

HELLHOLE #1

SOUTH FLORIDA

South Florida courts have long been known for medical malpractice claims, never-ending tobacco lawsuits wherein defendants begin with two-strikes against them, and generous verdicts. Now, thanks to a lowered standard of proof, the area and entire state also are gaining a reputation as a hot place to bring slip-and-fall lawsuits. Additionally, Florida is one of the few states that allow those who drive drunk or on drugs to sue the automobile manufacturer for failing to prevent their injuries by designing a safer car while also keeping the reason for the crash from the jury.

SOUTH FLORIDA PHYSICIANS CALL FOR HELP

Medical-malpractice insurance rates in South Florida are among the highest in the nation. Although rates have stabilized in recent years, it remains prohibitively expensive to practice in high-risk specialties, such as obstetrics and neurosurgery. As the country debates healthcare reform, physicians in South Florida have been particularly vocal in calling for tort reform as an essential part of any legislative package to bring down costs and improve patient access.

For instance, Dr. Harvey Cohen of Boca Raton wrote to the *Sun-Sentinel* that there is a growing trend of physicians, particularly in South Florida, of "going bare." He explains that some doctors are not obtaining adequate insurance coverage as a means of discouraging medical-malpractice lawsuits seeking big paydays. He also expresses concern with the prevalence of defensive medicine – urging patients to take unnecessary and excessive tests – in order to insulate their doctors from liability.[9] Likewise, Dr. Robert Briskin wrote the *Palm Beach Post* to emphasize that meaningful liability reforms must be included in a healthcare proposal to maximize its effectiveness.[10] Dr. Arthur E. Palamara, a Hollywood physician, notes that while Florida's tort reform efforts in 2003 and constitutional amendment in 2004 have been effective in lowering the cost of malpractice insurance, "[i]n a highly litigious region like South Florida, the cost of health care is about twice that of Minnesota, yet the outcomes are the same. There is no patient benefit."[11]

THOUSANDS OF TOBACCO TRIALS BEGIN IN SOUTH FLORIDA

In 2006, the Florida Supreme Court decided the *Engle* class action, throwing out a $145 billion award against tobacco companies, the largest civil award in U.S. history, but substantially reducing the evidence ordinarily required to bring individual cases in the future.[12] Defendants now enter the courthouse with two strikes against them based on determinations in the class action where the individual plaintiff was not before the court.

The first of thousands of individual cases by smokers following *Engle* went to trial in Broward County in early 2009. It resulted in an $8 million verdict against Philip Morris, including $5 million in punitive damages, for the widow and son of a smoker who died of lung cancer.[13]

But that first $8 million verdict was nothing compared to another in Broward County in November 2009: a $300 million verdict, including approximately $56 million in compensatory damages and $244 million in punitive damages, for the sister of former Fort Lauderdale Mayor Jim Naugle. Ms. Naugle, who developed emphysema, was found only ten percent at fault for her 25 years of smoking.[14]

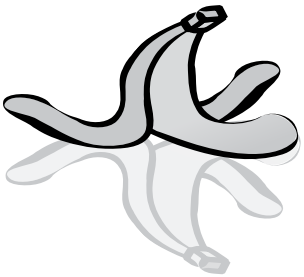
SLIP-AND-FALL INTO A SETTLEMENT

In Florida, as a practical matter, retailers, restaurants and grocery stores are liable to anyone who slips and falls on their property. This unfortunate situation arose in 2001 when the Florida Supreme Court eliminated the need for a plaintiff to show that store's employees had notice of the dangerous condition or should have known of its presence (constructive notice).[15] The high court found that the mere existence of a substance or object on the floor "creates a rebuttable presumption that the premises owner did not maintain the premises in a reasonably safe condition." The decision altered a fundamental of American jurisprudence – that those who sue have the burden of proof. The Court's decision, however, challenges Florida store owners to show that they could not have prevented the accident. Of course, proving a negative is an almost impossible task.[16]

Slip-and-fall cases since the 2001 decision show a troubling trend. These lawsuits almost invariably involved evidence so weak that trial judges would dismiss them, only to have an appellate court reverse and require a jury trial.[17] Recently, a Florida appellate court even reversed a jury verdict that found a store was not responsible for a patron's fall.[18]

The message sent by these cases to Florida business owners is clear: they cannot win even if they have exercised all reasonable care for their customers. Fighting a slip-and-fall claim, even when the evidence suggests the owner maintained safe premises or was not at fault, is likely only to result in substantial legal expenses. Given this environment, Florida businesses are likely to settle cases regardless of whether they are responsible for the injury and even in cases where the claim may be fraudulent. As Rick McAllister, president and CEO of the Florida Retail Federation commented, "[t]he cost to all retailers is substantially up" as a result of the 2001 decision.[19]

To make matters worse, elimination of the need for a plaintiff to show that a business was at fault for a fall encourages false claims. Slip-and-fall scams are one of the oldest tricks in the book, dating back to the turn of the nineteenth century when scam artists tossed banana peels on railroad platforms in order to seek a quick settlement from the deep pocket of the day.[20] Because slip-and-fall injuries are often not witnessed and usually result in soft tissue injuries that are not visible, they are prime candidates for false claims. At that time, railroads were targeted. Now, it is supermarkets and retail stores. Florida's amusement parks face more than twice as many lawsuits stemming from slip-and-fall claims than from injuries related to their rides and attractions.[21]



Reducing the evidence needed to prove a slip-and-fall claim, and shifting the burden of proof from the claimant to the store owner, has made Florida attractive for slip-and-fall lawsuits and ripe for potential fraud.

The National Floor Safety Institute estimates that, overall, 1 in 10 slip-and-fall claims is fraudulent.[22] Experts estimate 14% of claims against some types of business, such as grocery stores, restaurants, and retail stores, are fraudulent.[23] Due to its lax evidentiary standards, the proportion of fraudulent claims is likely much higher in Florida.

In fact, CBS 4 reported the case of a Sunrise, Florida, woman who claimed that she slipped, fell, and injured herself in a local supermarket.[24] After the woman was removed on a stretcher, the store manager rewound the video tape of the accident and viewed the woman in the same aisle minutes earlier opening a bottle of olive oil, spilling it on the floor, and placing the bottle back on the shelf. She then turned to fall into the spill. Fortunately for the store owner, he had invested $30,000 in a video camera system that caught the fraud. Many smaller Florida businesses, however, cannot afford such a system and, even if they have such technology, frauds may not be detected. "If you don't have a system that records everything, you lose money," said store owner Luis Diaz.

In neighboring states, store owners can mount a viable defense in court.[25] Courts in these states recognize that "accidents happen." It is unjust to impose thousands of dollars in liability against responsible businesses for injuries that they could not have prevented.

The Florida Legislature should restore fairness for business owners without forfeiting sound protections for those who are injured due to an employee's negligence.[26] Restoring a logical standard of constructive notice will require negligent business's to compensate individuals with meritorious claims while providing reasonable safeguards for businesses who find themselves subject to a lawsuit.

FLORIDA: WHERE DRUNK DRIVERS GET PAID

If selected to serve on a jury charged with considering responsibility for injuries in a car accident, most citizens would expect to learn during the course of the trial that a driver involved was intoxicated, on drugs, or driving in a reckless manner. Florida, however, is among a shrinking minority of jurisdictions that keep this information from the jury.[27] In fact, Iowa, one of only a handful of states that had taken the Florida approach, reversed direction this October.[28]

This blind spot for Florida's juries, which occurs in "crashworthiness cases," precludes them from fairly apportioning fault among those who are responsible for the plaintiff's injuries.

"Crashworthiness" cases are those in which a driver or passenger seeks to hold an automobile manufacturer liable for "enhanced injuries," those that are in excess of what he would have incurred if the car had greater safety features. In these cases, the plaintiff does not claim that a defect in the automobile, such as defective steering or brakes, caused the accident. Rather the lawsuit alleges that the manufacturer did not use reasonable care to design the vehicle in a way that minimizes injuries in the event of a collision. This theory of liability reflects societal attitudes towards motor vehicle safety, common sense and is settled law. But the implementation of crashworthiness cases by Florida courts has strayed far from common sense.

Florida follows a minority approach that actively conceals from the jury evidence regarding "how" and "why" the accident happened because, the reasoning goes, such evidence is not relevant to a plaintiff's crashworthiness theory. It is based on a view that the initial collision of the vehicle and some object, and a second collision of the driver or passenger inside the vehicle are separate and distinct events and injuries. Such nuanced legal theory, while perhaps clever argument, is absolutely unworkable in actual practice.

An overwhelming majority of courts in other states trust the jury to fairly apportion fault among all those who share responsibility for an accident. But the Florida Supreme Court has said that providing such information would "confuse the jury," even as jurors are called upon to evaluate the testimony of engineers and

scientists and to decide highly technical facts involving complicated engineering in automobile product liability cases.

The Florida approach not only is unworkable, it results in increased risks to public safety. The jury is not permitted to allocate any portion of fault to the individual actually responsible for the accident, so a driver who is under the influence of drugs or alcohol, falls asleep at the wheel, or drives far in excess of the speed limit cannot even appear on the verdict form. This system rewards irresponsible drivers by essentially creating civil immunity—a plaintiff cannot include the drunk driver as a defendant in a product case and still hope to conceal the facts from the jury, and a plaintiff/driver's own wrongful conduct is not taken into account. Sound public policy suggests that reckless drivers bare some responsibility for their actions. They are risking the lives of others on Florida's roads.

A DAY IN THE LIFE OF A SOUTH FLORIDA DEFENDANT

Trial practices that favor plaintiffs over defendants are a staple of Judicial Hellholes. A case out of Miami-Dade County illustrates what defendants in civil cases sometimes face in the area. The case was brought against Ford Motor Company stemming from a rollover of an Explorer in which a teenage passenger was ejected and killed after the driver fell asleep and lost control of the vehicle.

In 2007, a Florida appellate court reversed a $30 million verdict for each of the teenager's parents because it found that the trial court had prejudiced the jury by allowing the plaintiffs' lawyers to make numerous references to other deaths in Ford Explorer accidents without establishing that the accidents were sufficiently similar to the case before them.[29] The case was sent back for a new trial, but even before it began, the appellate court again intervened and issued a scathing opinion.[30]

The plaintiff had filed a motion to have the Ford Explorer declared a "public hazard" under Florida law, which the trial court appeared all too willing to grant. A unanimous three-judge panel of the appellate court characterized the one-sided hearing in this way:

> [I]t was not an evidentiary hearing in any traditional sense of that term, but rather a lengthy colloquy between the [plaintiff's] counsel and the trial court, a limited amount of questioning directed by the court to Ford's counsel, and then a review by the court of documents that were not authenticated or introduced into evidence.[31]

Aside from several other errors, the appellate court observed that the "hearing transcript plainly demonstrates that Ford was not afforded the basic elements of reasonable notice of the evidence to be offered, a chance in court to object to the admissibility of deposition testimony and exhibits, and then a chance to present its own case in opposition."[32]

The appellate court found it was important to immediately reverse the trial court's ruling because "[t]he label 'public hazard' is not to be affixed to an allegedly-dangerous product like you would buckle a collar on a bird dog or paste a tag on an express package that is being forwarded to a friend…."[33] Such a label, the appellate court recognized, "has significant and far-reaching consequences in a day when court orders can make it around the world before the sun sets on the day they are filed."[34] Indeed, the plaintiff's lawyers, who are involved in numerous other lawsuits against Ford, immediately distributed the trial court's findings far and wide to gain a "tactical pejorative for counsel to use in other cases," the appellate court observed.[35] Welcome to the world of a defendant in a Judicial Hellhole.

LAWSUITS ARE GOOD INVESTMENTS IN SOUTH FLORIDA

The nation may be in a recession, but one former lawyer, Curtis Wolfe, has found a money maker in South Florida, www.WhoCanISue.com. ATRA briefly reported the launch of the then-new legal referral service in last year's Judicial Hellholes report.[36] What ATRA did not anticipate was its wild success. The company, based in Boca Raton, is aggressively advertising its website, which allows aspiring plaintiffs to easily select a category of injury, such as "accidents," a subcategory, with "slip-and-fall" among the options, and then provide a zip code to obtain a phone number and e-mail address for a nearby lawyer who might take the claim. The referral service has installed advertisements on billboards and bus shelters for its service, and television spots featuring "buxom nurses and a pack of lawyers chasing an ambulance."[37] Personal injury lawyers, who pay a minimum of $1,000 annually to appear on the website,[38] report that they are receiving twice as many calls as usual.[39]

In addition to its home base in Florida, WhoCanISue.com advertises in California, New York, Pennsylvania and Texas, which, perhaps not coincidentally, are states that are noted in the Judicial Hellholes report. Launched in 2008, WhoCanISue.com predicts that it will be a $10 million plus company just two years later.

Even some members of Florida's personal injury bar have spoken out against the company. Gary Lesser, managing partner of a 10-lawyer West Palm Beach firm started by his grandfather and vice chairman of the Florida Bar's advertising committee, which governs lawyer advertising by reviewing and monitoring ads, is among the critics. WhoCanISue's tactics are "egregious" and "directly appealing to people who want to be litigious, to seek out a claim," commented Lesser.[40]

Not all attorneys, though, need a website to sign up potential claimants. Prominent plaintiffs' firms Weitz & Luxenberg of New York City and Searcy Denney Scarola Barnhart & Shipley of West Palm Beach brought Erin Brockovich to South Florida to recruit claimants for a potential water-contamination suit, claiming higher than average cancer rates in The Acreage. Brockovich told a crowd of 500 that trace amounts of radium were found in a sample of private wells, scaring them as the firms passed out contingency fee contracts and power of attorney forms. What Brockovich failed to mention, however, was that the radium is a naturally occurring metal and that levels in most of the homes tested were within the level set by EPA drinking-water standards. As The *Palm Beach Post* reported, the meeting "revealed two law firms on a fishing expedition for clients."[41]

MIAMI VICE

South Florida also has had its share of legal scandals this year. As detailed in the Rogues' Gallery, p. 25, Ft. Lauderdale lawyer Scott Rothstein was arrested on federal racketeering and fraud charges alleging that he ran a $1 billion Ponzi scheme by selling investments in non-existent legal claim settlements. Personal-injury lawyer Hank Adorno is facing charges for failing to distribute a $7 million class action settlement to Miami property owners and instead enriching himself and a few named plaintiffs. And Miami resident Ruben E. Rodriguez faces allegations that he bought confidential hospital records and sold them to an unnamed lawyer for the purpose of soliciting patients to bring lawsuits. In fact, the organization representing plaintiffs' lawyers, the Florida Association for Justice, is itself in hot water for its involvement in a racially-offensive campaign flier intended to defeat a pro-tort reform candidate for the State Senate.

HELLHOLE #2

WEST VIRGINIA

Since the American Tort Reform Foundation's (ATRF) first annual report in 2002, it has consistently cited West Virginia as a statewide Judicial Hellhole.[42] Understandably, some respected authorities and media in the state have asked: "Why us?"

The reasons for West Virginia's perennial status as a Judicial Hellhole fall into four general areas.[43] First, the state's lack of appellate review places defendants at a unique disadvantage. Second, there is a fact-based perception that the state judiciary generally favors local plaintiffs over out-of-state corporate defendants. Not coincidentally, a federal judge noted this year that plaintiffs' lawyers sometimes "vigorously contest" having their cases heard in federal courts.[44] Third, procedural unfairness, such as prejudicial trial plans, often stack the deck from the get-go and place inordinate pressure on defendants to settle even claimes that lack merit. Finally, jaw-dropping departures from core principles of tort law put the state outside the mainstream. These include court decisions permitting cash awards for medical-monitoring claims without physical injury, rejecting the learned-intermediary doctrine, and allowing tort claims outside of the no-fault workers' compensation system.

It has been a relatively quiet year for West Virginia, and there is some evidence suggesting that members of the state's Supreme Court of Appeals are conducting their business with a more collegial, mutually respectful tone.[45] This year the West Virginia Chamber of Commerce even praised the justices for a banner session in which it followed the rule of law.[46] This may be the first sign that the spotlight on the state's judicial system is having a positive impact. Just before this report went to press an Independent Commission on Reform of the Judiciary appointed by Gov. Joe Manchin recommended establishing an intermediate appellate court and a right to appeal, among other proposals. (See Point of Light, p. 28). The recommendation is praiseworthy. But until West Virginia adopts systemic reforms or shows consistent evidence of fair rulings, it is unlikely to shed its reputation as a Judicial Hellhole.

LACK OF APPELLATE REVIEW

In 48 states, the District of Columbia, and the federal court system, civil defendants have a right to at least one appeal.[47] In West Virginia, however, there is no such right, and the losing party must file a petition for appeal with the states sole appellate court.[48] The West Virginia Supreme Court of Appeals, the state's only appellate court, has complete discretion in granting or denying a petition for appeal.[49] The grant of the petition for review requires approval of three of the court's five justices, an even higher standard than that required for a grant of certiorari by the U.S. Supreme Court, which operates based on a longstanding "rule of four" of the Court's nine justices.

While the West Virginia Supreme Court of Appeals opts to hear one of every three cases for which review is sought – a high percentage for discretionary review[50] – this provides little solace to parties who receive no appeal at all. This has occurred even in cases involving hundreds of millions of dollars in punitive damages,[51] as well as trial court decisions permitting novel and constitutionally questionable practices.[52]

HOME COURT ADVANTAGE

The lack of appellate review is particularly concerning to out-of-state businesses that are hauled into West Virginia courts and placed at a distinct disadvantage against a hometown plaintiff and his or her local attorney. Richard Neely, who served on the West Virginia Supreme Court of Appeals for 22 years, including several terms as Chief Justice, has spoken candidly on this issue:

> As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me.
>
> It should be obvious that the in-state local plaintiff, his witnesses, and his friends, can all vote for the judge, while the out-of-state defendant can't even be relied upon to send a campaign donation.[53]

The focus of a book written by Justice Neely is the political pressure placed on state court judges to favor local plaintiffs (their "constituents") over business interests, particularly those located in other states. His statements on this topic begin on the first

page of the book, where he professes to "sleeping well at night" by requiring a foreign defendant to pay a constituent's lifelong medical expenses even where causation is dubious, and continue throughout the book.[54] For example, Justice Neely writes:

> What do I care about the Ford Motor Company? To my knowledge Ford employs no one in West Virginia in its manufacturing processes, and except for selling cars in West Virginia, it is not a West Virginia taxpayer. . . .
>
> The best that I can do, and I do it all the time, is make sure that my own state's residents get more money out of Michigan than Michigan residents get out of us.[55]

While Justice Neely's statements speak in general terms regarding all state judiciaries, West Virginia's court decisions exemplify this philosophy in practice.

PROCEDURAL UNFAIRNESS

West Virginia courts have placed burdens on defendants that make it difficult, if not impossible, to fairly try cases. These practices include lumping together thousands of individual cases with diverse facts in mass consolidations,[56] allowing cases to proceed against out-of-state defendants that have little or nothing to do with West Virginia,[57] and permitting unorthodox trial plans that have a jury consider whether the defendant's conduct warrants punitive damages even before certifying a class or determining compensatory damages.[58] Each of these practices prompts a common result: forcing defendants to settle and settle early without regard to the merits of the case against them.

DEVIATING FROM FUNDAMENTAL TORT PRINCIPLES

In addition to imposing procedural disadvantages on defendants, the West Virginia Supreme Court of Appeals, year after year, has consistently abandoned fundamental tenants of tort law. As with Hubble's Law, the liability universe in West Virginia is constantly expanding.

For instance, West Virginia law allows uninjured plaintiffs to sue for medical monitoring even when testing is not medically necessary or beneficial, and permits direct monetary damages in which the plaintiff is not required to spend any of the award on medical costs.[59] In 2007, West Virginia became the only state to reject outright the learned-intermediary doctrine.[60] This doctrine generally provides that manufacturers or suppliers of prescription drugs fulfill their duty to warn consumers of potentially dangerous side-effects by conveying accurate warning information to prescribing physicians.[61] West Virginia has also opened a loophole through which a truck can be driven, permitting injured workers to file tort lawsuits rather than pursue their claims through the no-fault workers' compensation system.[62]

BEYOND THE COURTROOM

Relationships between the plaintiffs' bar and key figures in the state's executive and judicial branches, which have been an area of focus in every Judicial Hellholes report, have fostered an inhospitable environment for corporate defendants and, at times, the appearance of impropriety.

One of most controversial public figures in West Virginia is its Attorney General, Darrell McGraw, who routinely deputizes private lawyers on a contingency fee basis to pursue litigation on behalf of the state. This practice raises serious ethical and constitutional concerns because the primary incentive of the contingency fee attorney is to maximize the dollar amount of any recovery;[63] a profit-seeking motive that does not necessarily coincide with the public's interest in assuring justice.[64]

"Mr. McGraw, in more than 14 years as West Virginia's attorney general, has been a pioneer in the practice of filing questionable lawsuits against big companies, secretly doling out the legal work to outside trial lawyer friends who reap millions in fees."[65]

—Kimberley A. Strassel, *Wall Street Journal*

McGraw does not provide an open and competitive bidding process to select law firms, opting instead to base the decision on personal preferences.[66] Such a process not only risks depriving the state of the best possible use of taxpayer dollars, but is prone to a perception of unfairness and cronyism.[67] His office keeps the settlement money, which is doled out to his favorite causes. Moreover, the plaintiffs' lawyers hired to represent the state receive lucrative fees from the litigation.[68] In turn, many donate heavily to McGraw's reelection campaigns. Over this time, the Attorney General's symbiotic relationship with the plaintiffs' bar has only grown more entrenched.

For instance, in October 2009, a federal appeals board found that McGraw improperly distributed the proceeds of a $10 million settlement with the maker of OxyContin. The private lawyers who sued on behalf of the state took home more than $3 million and most of the remainder went into McGraw's own Consumer Protection Fund. McGraw spent the settlement funds on substance abuse programs and to fund a pharmacy school at the University of Charleston. Next to nothing, however, went to the government agencies that were McGraw's actual clients. The Appeals Board ruled that McGraw owed the federal Centers for Medicare and Medicaid Agencies more than $2.7 million from the settlement because the state's Medicaid program is largely funded by the federal government, and it took the funds from the state's account.[69]

DEFENDANT FIGHTS BACK

After being hit with one too many questionable claims in West Virginia, CSX Transportation decided it had had enough. It filed its own lawsuit in federal court against the Pittsburgh, Pennsylvania, law firm Robert Peirce & Associates, P.C. and a physician, alleging that they knowingly conspired to file fraudulent asbestos claims.[70]

CSX's suit originally stemmed from serveral suspicious asbestos claims. For example, Earl Baylor had attended not one but three asbestos screenings sponsored by the law firm between 1999 and 2003. In the first, Dr. Ray Harron found no evidence of asbestosis. The second x-ray was deemed unreadable. In the third, Dr. Harron found signs of asbestosis. Mr. Baylor's claim was one of over two hundred claims brought in a class action against CSX in West Virginia state court, which has been "voluntarily discontinued."[71]

CSX sued the lawyers and doctors involved under the Racketeer Influenced and Corrupt Organizations Act (RICO), usually used to prosecute organized crime. CSX documented a "fraudulent entrepreneurial model" whereby lawyers paid doctors who spent virtually all their time working on litigation to find asbestosis in a certain percentage of screened cases.[72] According to CSX, the screening companies intentionally produced low-quality x-rays that would show more white marks in the lungs, which a doctor could then rely upon to make inaccurate diagnoses. Lawyers also allegedly altered questionnaires filled out by clients without their knowledge in order to suggest that the clients were exposed to the defendant's products. Dr. Harron, the physician relied upon by the lawyers to supply diagnoses for the lawsuits, was exposed by a federal judge in 2005 as part of a virtual litigation machine.[73] After Dr. Harron was discredited, the lawyers hired another doctor and paid him over a million dollars to rubber stamp Dr. Harron's prior findings, which he did 90 percent of the time, according to CSX.

In a series of 2009 rulings, the federal court found that CSX had failed to bring the lawsuit quickly enough and did not provide sufficient evidence of the law firm's actual intent to defraud the company. It dismissed the case.[74] The court held that only actual and direct evidence that the law firm knew that its clients did not have asbestosis would suffice to state a claim for fraud. CSX has appealed the rulings.

In another asbestos lawsuit, CSX responded with evidence that a physician who purportedly treated the plaintiff for asbestosis, Dr. Oscar Frye, was invented by the plaintiff.[75] CSX charged that the same law firm involved in the Baylor case facilitated the fraud by supplying the client with preprinted medical forms, telling him he would need a doctor's signature to obtain a settlement, and then filing the fraudulent paperwork without verification. CSX eventually determined that there had never been a physician by the name of Oscar Frye licensed to practice in West Virginia, that the phone number provided for Dr. Frye belonged to someone else for over a decade, and that the address provided for Dr. Frye in Huntington, West Virginia, did not exist. The fraud was uncovered by CSX in 2006 and the company continues to await a ruling from the West Virginia court. It filed another request that the court take action against the law firm in March of 2009.

THE EFFECT ON WEST VIRGINIA'S BUSINESS CLIMATE AND ECONOMY

Such costly litigation affects the willingness of businesses to locate in West Virginia, and the state's economy suffers. For example, after the West Virginia Supreme Court of Appeals refused to review a $405 million verdict in a royalties lawsuit against Chesapeake Energy Company in May 2008, the company settled for $380 million.[76] Soon after the high court refused its appeal, Chesapeake announced that it would not build a planned $40 million regional headquarters in Charleston.[77] In fact, this year the company opted to downsize its existing Charleston office to just 40 employees, eliminating 215 West Virginian jobs or sending them to Oklahoma.[78]

"The reduction in our employee base in West Virginia became inevitable when we decided last year not to build our $40 million regional headquarters office complex in Charleston following the West Virginia Supreme Court's refusal to consider our appeal in the* Tawney *case. At that time, we realized that until West Virginia's judicial system provides fair and unbiased access to its courts for everyone, a prudent company must be very cautious in committing further resources in the state."[79]

—Aubrey McClendon, Chesapeake Energy Co-founder and CEO

Gov. Joe Manchin deserves praise for his West Virginia is "open for business" mantra. Yet, due in part to liability-expanding rulings from the courts and close relations between the Attorney General and personal injury bar, the Mountain State remains, according to CNBC's "America's Top States for Business '09," ranked dead last for "business friendliness."[80]

"The 'business friendliness' category focuses on regulation and litigation. The state has done some work in this area with reforms in malpractice insurance and workers' comp…. But clearly much more needs to be done."[81]

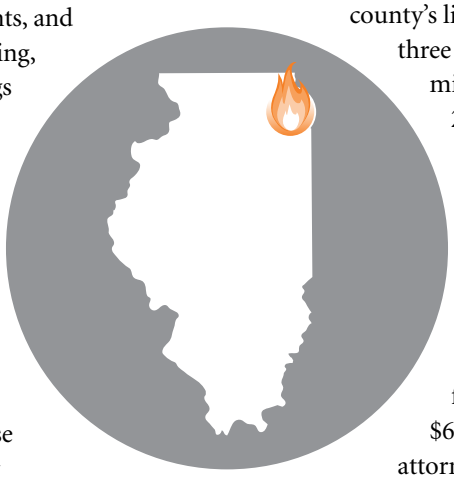
—Editorial, *Herald-Dispatch*

It remains to be seen whether West Virginia will adopt the types of systematic reforms needed to restore the public's faith in its judiciary.

HELLHOLE #3

COOK COUNTY, ILLINOIS

Recalcitrant and unchanging, Cook County remains at the #3 spot on the Judicial Hellholes list for the third consecutive year. Its reputation for hostility toward corporate defendants, and seemingly perpetual problems of forum shopping, excessive awards and suspect evidentiary rulings have shown little signs of improvement. Even in a down economy, Cook County's litigation industry continues to boom.



THE LITIGATION ENGINE THAT COULD…

Past Judicial Hellholes reports have chronicled the disproportionate level of litigation that occurs in Cook County. This year, a study presented to the Illinois Senate and House Judiciary Committees reported that the county hosts 65 percent of Illinois' litigation despite housing only 41 percent of its population.[82] The wide disparity is even more striking when one views the data from 15 years ago – long before Cook County emerged as a Hellhole jurisdiction – when the county accounted for roughly 46 percent of Illinois' litigation while housing 44 percent of the state's population.[83] In other words, Cook County has increased its proportionate share of the state's litigation while the county's share of the state's population has decreased over that same period of time.

For regular readers of this report, these findings probably are not surprising. The increased proportion of claims finding its way to Cook County can, in part, be attributed to the jurisdiction's reputation as both favorable to plaintiffs and as an alternative to former Judicial Hellholes Madison and St. Clair counties. These two rural jurisdictions in the southwestern part of the state have shown a desire to reform themselves in recent years following intense scrutiny (see Watch List, pp. 18 & 21).

STILL A DESTINATION FOR FORUM SHOPPING

One of the primary reasons Cook County is home to a disproportionate level of litigation is that it has become a jurisdiction of choice for out-of-state lawsuits. Consider the recent example of a lawsuit arising out of the August 2008 Spainair Flight 5022 jetliner crash, which killed 154 people.[84] Despite the fact that this tragedy occurred in another country, on a flight from Madrid to Gran Canaria, Spain, a resulting wrongful death lawsuit was filed this year in none other than Cook County.[85] The lawsuit, brought on behalf of 18 crash victims, named 11 aviation product manufacturers as defendants, only one of which is actually based in Cook County.[86] The fact that investigators have concluded pilot error was a major cause of the crash seems of little consequence.[87]

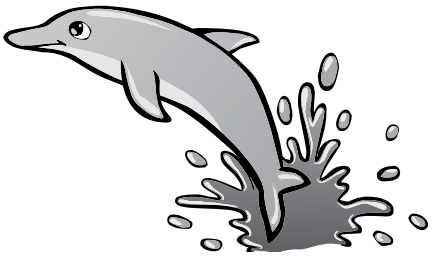
COOK COUNTY RESIDENTS PAY HUGE 'LAWSUIT TAX'

Cook County spent more than $69 million of taxpayers' dollars on lawsuit-related expenses in 2008, according to a recent Illinois Lawsuit Abuse Watch (I-LAW) study.[88] This figure includes nearly $50 million in settlements and adverse judgments. In fact, the county's litigation-related expenses have increased for three consecutive years – $46 million in 2006, $62 million in 2007, and $69 million in 2008. The 2008 figure is 738 times that of neighboring DuPage County, whose population is only six times smaller than Cook County's. This staggering expense contributes to the need for a double-digit sales tax. "In reality, everyone in Cook County is actually paying a hidden 'lawsuit tax' because County government is such a strong magnet for lawsuits," says the I-LAW report.[89] Had the $69 million not gone to claimants and plaintiffs' attorneys, Cook County could have hired 1,540 new police offers, hired 945 nurses for Cook County hospitals, purchased 3,286 new full-sized police cruisers, or resurfaced 200 miles of country roads. The I-LAW report arguably dubs Cook County the "Lawsuit Tax Capital of the U.S."

"Cook County and the state of Illinois seem to be the cash cow for personal-injury lawyers."[90]

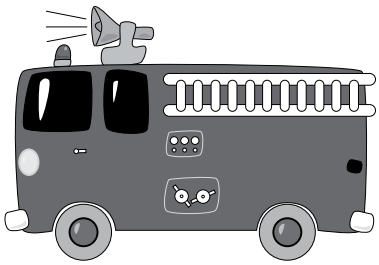
—Timothy Schneider, Cook County Commissioner

LESSONS IN LITIGIOUSNESS



Included in Cook County's thriving litigation environment are unbalanced and potentially frivolous, lawsuits that area courts have allowed. For instance, in 2009 Cook County played host to lawsuits against: a zoo for a dolphin splashing spectators, a manufacturer for making emergency sirens that are too loud, and a leadership camp for failing to prevent teenage campers from absconding with a canoe in the middle of the night.

The first of these head-scratching cases occurred in August when a patron of the Brookfield Zoo sued after slipping and falling at a dolphin show.[91] The ensuing lawsuit alleged that the zoo "recklessly and willfully trained and encouraged the dolphins to throw water at the spectators in the stands making the floor wet and slippery," and claimed as damages, lost wages, medical expenses, and physical and mental suffering.[92] And for these "willful" acts of dolphin aggression (otherwise known as tricks), the lawsuit sought $50,000 in damages.[93]



Elsewhere in Cook County juries were delivering a big payday. In February 2009, siren maker Federal Signal was hit with a $425,000 judgment after a jury found, after only two hours of deliberation, that its emergency sirens were too loud and could allegedly damage hearing.[94] The lawsuit, initiated by a group of firefighters, was the first of its type that the defendant manufacturer has lost, and this Cook County verdict may prove catastrophic to the company because there are currently 3,500 other firefighters lined up with pending lawsuits.[95] Similar lawsuits were voluntarily dismissed in three other jurisdictions. Apparently, the common-sense wisdom of wearing ear plugs has been lost somewhere in translation.

"As a full time firefighter, I have lost hearing too, but now that we have hearing protection on all rigs, it's my fault if it continues. . . . My personal and crew's safety is my responsibility, not a manufacturer's. This appears to be a case of another lawyer looking for a way to make money. It's getting ridiculous." –"FireTim"

"[S]irens are designed and manufactured to get emergency vehicles through traffic with priority…. Those of us who rode in the open cabs of the 50's and 60's made no complaints about excess sound levels, we were more inclined to emphasize our displeasure at drivers who didn't get their butts out of our way. Another factor in favor of really loud sirens is the improved soundproofing in modern cars and habits of a few drivers [to blast their stereos]…. I too have less than perfect hearing. Hearing protection should be required during emergency response." –George Potter

–Reader comments on a fire rescue website[96]

In a final example of the type of some of the lawsuits being brought before Cook County courts, the families of high school students who attended a leadership retreat filed wrongful death actions after their children sneaked out of their dorm in the middle of the night, "borrowed" the YMCA camp's paddleboats, and drowned in the Fox River.[97] The family of a third student who died while attempting to rescue them also sued. Unknown to the young men was that the camp had removed the paddleboat plugs to take the boats out of service for the winter, which caused the boats to fill with water and sink. In spite of the fact that the camp had its property taken in the middle of the night without permission, the school, YMCA, and retreat organizers are now facing lawsuits.[98]

These recent case examples, combined with Cook County's disparate share of the state's litigation and well-established reputation as the forum of choice for out-of-state litigation illustrate why the county still has a long path to climb out of its Hellhole status.

HELLHOLE #4

ATLANTIC COUNTY, NEW JERSEY & BEYOND

Atlantic County, New Jersey has been identified as a Judicial Hellhole since 2007 in large part for its gravitational pull in attracting mass tort actions, especially those involving pharmaceuticals, and for breeding what some local public officials have characterized as a "culture of litigation."[99] As last year's Judicial Hellholes report detailed, the problems in Atlantic County also extend beyond county lines, as suspect claims and decisions at the state's highest levels combine to make the litigation environment even worse.

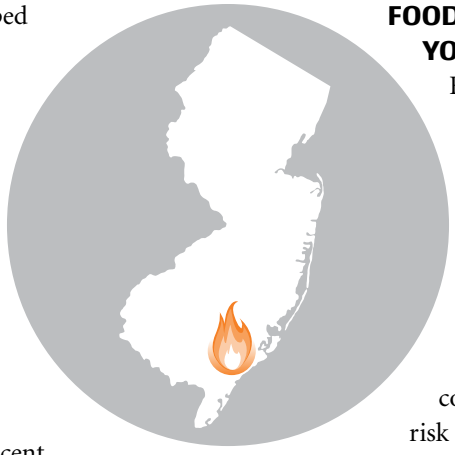
NEW JERSEY'S MASS TORT CAPITAL

In addition to the strain Atlantic County litigation places on its public schools, the real bread-and-butter litigation in the jurisdiction comes from mass tort litigation. Atlantic County houses the central case management for six mass torts in New Jersey, each involving a different pharmaceutical. Statewide, New Jersey is home to the central management for an incredible 18 mass tort designations.[100] This conglomeration of litigation in the Garden State makes it easy to see why both Atlantic County and the state as a whole have developed into *the* jurisdiction of choice for litigating drug claims.

These mass tort actions, however, have taken a heavy toll, and have compromised the affordability and availability of some medications. This year, for instance, the Atlantic County mass tort designation for the popular prescription acne medication Accutane helped prompt the manufacturer, Hoffman-La Roche, LLP, to discontinue making the product. Factoring into this decision was a recent adverse Atlantic County trial court judgment in which the court restricted Hoffman-La Roche's statistical evidence and expert testimony that suggests Accutane does not cause the adverse conditions plaintiffs' attorney alleged. This trial court ruling was ultimately reversed on appeal, with the appellate court stating, "The consequence of that restriction was, unfortunately, an imbalanced presentation" and that "this error is of such a pivotal nature that the judgment in favor of plaintiff must be vacated."[101] Unfortunately, this corrective justice was too little too late, and

now an FDA-approved treatment that had helped thirteen million patients is unavailable.[102]

Ninety-three percent of the plaintiffs in New Jersey's pharmaceutical mass torts come from outside of New Jersey. [103]



Equally troubling is that Atlantic County and New Jersey as a whole have become a dumping ground for out-of-state lawsuits. A recent study performed by the law firm McCarter & English found that 9 out of 10 of the plaintiffs in New Jersey's pharmaceutical mass torts come from outside of New Jersey.[104] Another recent study by Johnson & Johnson found that in 1999 less than 10 percent of the lawsuits brought against the company were filed in New Jersey state courts. By 2007 that figure had climbed to about one third.[105] In other words, over the past decade New Jersey courts have increasingly played a greater role in presiding over pharmaceutical litigation affecting the entire nation.

UNBALANCED LITIGATION ENVIRONMENT HITS ATLANTIC CITY SCHOOLS HARD

Drug manufacturers and the patients who benefit from their products are not the only ones hurt by uneven litigation in Atlantic County. School students suffer, too. The Atlantic City School District reported that it spent roughly $1.5 million on legal services last year, more than every other school district in the state by a substantial margin.[106] This year, neighboring Camden County, which comprises a school district twice as large as Atlantic City, budgeted only $600,000 for its legal costs, or about $48 per student. Atlantic City's $1.16 million legal services budget, however, equates to about $184 per student.[107]

"We have a lot of problems, and a lot of lawsuits… we're trying to recoup costs for frivolous lawsuits."[108]

—Fredrick P. Nickles, Atlantic City School Superintendent

By contrast, 238 New Jersey school districts budgeted less than $25,000 for legal services.[109] Statewide, the average is about $26,000, with some districts budgeting just a few thousand dollars. All told, out of New Jersey's 608 public school districts, Atlantic City is one of only seven districts that budgeted at least $500,000 for legal services in 2009-2010, and its $1.16 million figure dwarfs that of other districts.[110]

FOOD PRODUCERS BEWARE: YOU MAY BE NEXT!

Food producers may also be find themselves targeted by Garden State personal injury lawyers as two class-action lawsuits filed in state courts challenge preservatives and processed foods. One of the lawsuits, brought by an advocacy group that promotes a vegan or meat-free diet, claims that hot dogs should carry a cancer-warning label on all packaging because the nitrates and high fat content in the ballpark staple may increase the risk of colon cancer.[111] While the lawsuit acknowledges the unresolved debate over how much meat consumption may lead to greater cancer risk, it nevertheless concludes that warning labels are necessary, and analogizes a hot dog-colon cancer link to the tobacco-lung cancer link.[112]

The second class-action lawsuit, brought in Middlesex County, accuses the Denny's restaurant chain of fraud under New Jersey's Consumer Fraud Act for the sodium content in many of its menu items.[113]

The plaintiff, who has been going to Denny's for about 20 years, was "shocked" to learn that his favorite "Moons Over My Hammy ham-and-scrambled egg sandwich" was "loaded up with the salt."[114]

—Bloomberg.com, July 23, 2009

The lawsuit, which was filed on behalf of any person who purchased or consumed a meal at Denny's containing over 1,500mg of sodium, alleges that the restaurant chain engages in a purposeful practice of failing to disclose the sodium content of its meals.[115] Denny's, however, makes nutritional information publicly available on its website.[116]

WHY ASK FOR A REFUND WHEN YOU CAN JUST SUE?

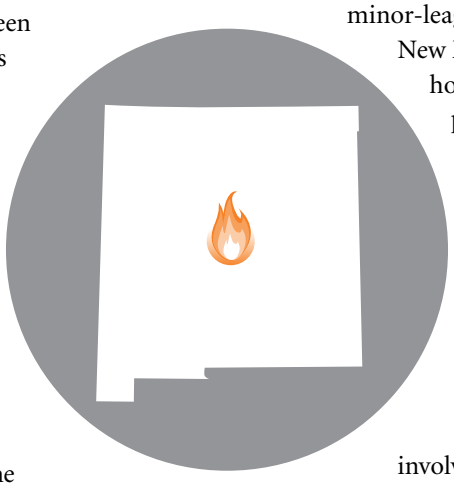
New Jersey's descent to Judicial Hellhole depths was hastened this year by its state Supreme Court when it adopted a "sue first, ask questions later" approach to the filing of claims under the state Consumer Fraud Act. In *Bosland v. Warnock Dodge, Inc.*, the state high court ruled that consumers are not required to ask merchants for a refund before initiating a lawsuit claiming unfair or deceptive practices.[117] Instead, any aggrieved consumer may immediately file a lawsuit, and use the threat and expense of litigation as leverage to invoke or inflate settlements with defendants, even when the defendant is willing to correct a mistake or error.

The underlying case involved a car dealer overcharging a customer by about $40 in registration fees.[118] Instead of asking the dealer for a refund, the customer went straight to a fraud action in the courtroom. The New Jersey Supreme Court's endorsement of such a practice is poised to pave the way for abusive lawsuits, and the decision undermines the court's positive efforts in other areas (see Points of Light, p.29).

HELLHOLE #5

NEW MEXICO APPELLATE COURTS

This report in previous years has noted with growing concern the problems in New Mexico courts, especially within its appellate courts. ATRF first took notice in 2003 after a state supreme court decision allowed a car owner who had left his keys inside the vehicle to be sued for injuries that resulted when a thief led police on a high speed chase and crashed into another vehicle.[119] Since then New Mexico's judicial system has been appropriately criticized for a series of decisions that have made it the state's ad hoc regulator of the insurance industry, often expanding coverage beyond what is provided for by contracts.[120] The state has become a hotbed for insurance class-action litigation and the "settlements have not been free of controversy, with even some policyholder-plaintiffs describing the lawsuits as frivolous and the attorney fees as excessive."[121]



A 2009 report prepared by the Judicial Evaluation Institute (JEI) and Sequoyah Information Systems that evaluated judges of the New Mexico Supreme Court and Court of Appeals on issues of civil liability shows that the courts' inclination to rule for plaintiffs has not changed. In examining the outcome of civil suits spanning several years, the JEI report found in two-thirds of the cases, state supreme court justices ruled in a manner that expanded liability.[122] Intermediate appellate court judges varied in their rankings, but did not fair much better than high court judges.[123]

around the entire stadium and eliminated the hope and joy of kids' catching a batted ball. For that reason courts have long recognized what has become known as the "baseball rule," wherein stadium owners and teams are not liable if a spectator is injured, so long as there is screening behind home plate where the risk of injury is greatest. But on July 31, 2009, the New Mexico Court of Appeals dropped the ball.[124]

"My colleagues reject nearly one hundred years of American jurisprudence today. By refusing to adopt the baseball rule, they isolate our state from others having already considered the matter…."[125]

—Judge Roderick T. Kennedy

The ruling came in a case in which a 4-year-old boy was injured during pregame batting practice at Isotopes Park, a minor-league baseball stadium located in Albuquerque, New Mexico. The boy was with his family when a home run over the left-field fence entered the picnic area and struck him. The court found that the baseball rule provided unwarranted immunity to sports teams and stadium owners, represents a subsidy to business, and "represents the central tenets of a bygone era."[126] Others argue that sympathy for a young child who experienced a severe injury led to an example of the age-old adage: "bad facts make bad law."

By way of contrast, months earlier, in a case involving a woman similarly struck by a ball while standing on a walkway near a picnic area, an Ohio appellate court reached the opposite result and applied the rule to find no liability.[127]

The New Mexico case is on appeal to the state's high court.[128] If allowed to stand, the ruling could have implications for Little Leagues, as well as high school and college baseball.

'BASEBALL RULE' STRIKES OUT

Anyone who has attended a baseball game has seen the signs warning spectators of the risk that a ball may get hit into the stands. It is an inherent risk of attending a game, one that could only be avoided if the team installed netting

DOOR OPENS FOR LAWSUITS BY EMERGENCY RESPONDERS

Baseball fans typically know the risk of being hit by a ball. Likewise, emergency responders, such as firemen and police officers, understand that their job is likely to expose them to dangerous and emotionally difficult situations. It may be traumatic to respond to the scene of a gruesome shooting or to fail to rescue a child from a fire. But most courts recognize that this stress is an unfortunate part of the job and, therefore, under what is known as the "firefighter's rule," does not permit lawsuits seeking damages for emotional distress against property owners. The public policy behind the rule also recognizes that the law should encourage the public to call for help without fear of lawsuits.

After being involved in a traumatic situation, a professional would likely obtain help through services offered through his or her employer. In New Mexico, however, in addition to seeking the help of a mental health professional, firemen now hire lawyers. A 2007 New Mexico Supreme Court ruling opened the door to such claims when it permitted a group of 24 firefighters who responded to the aftermath of a natural gas pipeline explosion to seek damages for emotional distress, claiming the defendant company failed to properly maintain its pipeline.[129] Though the ruling stemmed from a desire to provide compensation for firefighters who responded to a particularly horrific scene, it represents yet another potentially costly expansion of liability that may have adverse public policy consequences.[130] Just as this report was going to press, jurors rejected the firefighters' claims and returned a defense verdict after several weeks of testimony in a first-of-its-kind trial in Roswell.

MANUFACTURER LIABLE, EVEN WHEN PRODUCT UNFORESEEABLY ALTERED

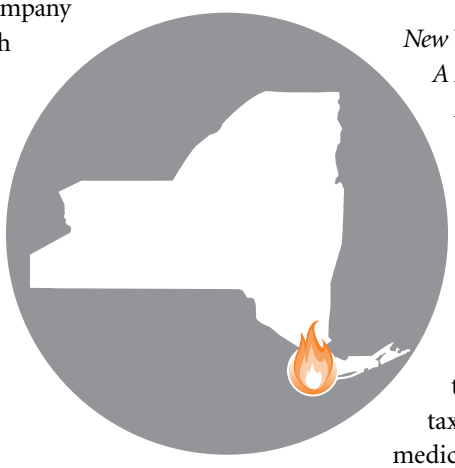
If a worker in New Mexico ignores his training and is injured by a dangerous piece of equipment that has been altered by someone else, making it even more dangerous, the manufacturer of the equipment can nonetheless be held liable. That was the ruling of a New Mexico appellate court, which reversed a trial court's dismissal of a product liability claim brought against the manufacturer of rock-crushing machinery. The plaintiff climbed into the portable rock crushing plant while it was still operating to free a rock jam. Previously, at some point in the 22-year life of this equipment, someone other than the manufacturer had removed metal plating between the hopper and two gigantic flywheels which power the crushing mechanism, exposing the flywheels. As the worker tried to free the jam, he extended his leg into an exposed flywheel. His leg was broken, and he later died as a result of a blood clot.[131]

Evidence showed that no other workers had ever entered the hopper to clear a jam, but instead had stood on a platform above the hopper to do so. A mystery, however, was why someone would remove the metal barrier, exposing the moving parts. The majority of the court could only speculate that it might have been related to some other alteration of the machine. Regardless, the Court of Appeals ruled that a jury could find it reasonably foreseeable that a worker would enter the churning guts of the altered machine before switching it off.

As Judge Roderick Kennedy wrote in dissent, "While [the manufacturer] might reasonably expect that jams need to be cleared, modifications that facilitate the process while the machine is running and expose workers to moving parts is beyond the limits of reasonable anticipation. Misuse of the plant by climbing into a place made even more dangerous by another's modification and yet more so when the plant was still running is something an objective observer could fairly regard as inconceivable."

HELLHOLE #6

NEW YORK CITY



New York, New York,
A Hellhole of town.
Lawsuits are up,
The economy's down.

With apologies to the late Betty Comden, Adolph Green and Leonard Bernstein, New York City is lawsuit happy. In a July 2009 column in *Forbes*, Manhattan Institute Senior Fellow John P. Avlon noted the immense liability costs imposed on city taxpayers by personal injury lawsuits, including medical-malpractice claims against public hospitals, slip-and-falls, and motor vehicle- and school-related lawsuits.[132] For instance, this year a drunk subway rider who stumbled onto the tracks and into the path of an oncoming N train collected from NYC Transit to the tune of $2.3 million.[133] In another case, a girl who was text messaging while walking did not see an open manhole cover and fell in. City workers had stepped away to grab a cone from their truck when the accident occurred. Fortunately, she was quickly rescued by apologetic workers and only suffered minor scraps and bruises. Predictably, the city suffered a lawsuit.[134]

Such lawsuits cost the city $554 million in 2009, just under the $568 million paid the prior year. The largest payouts were in medical-malpractice, sidewalk slip-and-fall, car accident, and school-related cases. While some might argue that a city the size of New York should expect such heavy liability, these recent costs are double what they were 15 years ago and 20 times greater than 30 years ago.[135]

The total money spent on settling lawsuits by NYC is more than the next five largest American cities combined and more than the city allocates to parks, transportation, homeless services, or the city university system.

—John P. Avlon, senior fellow at the Manhattan Institute

Critics point to the state legislature's repeated killing of tort reform legislation as one factor for the high liability. That the powerful Assembly Speaker Sheldon Silver moonlights as a lawyer for a personal injury law firm is not merely coincidence.[136] For instance, upon release of a report making various recommendations for improving New York's civil justice system in November,[137] the organization representing the state's plaintiffs' lawyers declared the proposals dead on arrival.[138]

Other factors include the lack of a specialized state claims court to hear cases against the city and New York's adoption of pure comparative fault, under which a plaintiff may recover even if she is 99 percent responsible for her own accident but the defendant is partially at fault.[139]

In addition to concern over lawsuits against the city, a change in judicial oversight of the city's asbestos claims docket is a situation that bears watching.

Until her recent appointment to the Appellate Division by Governor David A. Paterson,[140] Justice Helen E. Freedman managed all down-state asbestos cases since 1987 and was designated the Presiding Judge of the Litigation Coordinating Panel for Multi-District Litigation in New York State. Overall, lawyers on both sides felt that Justice Freedman was fair, impartial, and efficient in deciding cases before her. For example, if a defendant filed a motion for summary judgment seeking to dismiss a case because there was no evidence that the plaintiff was exposed to its products, Justice Freedman would routinely rule within the week. Justice Freedman would separate out demands for punitive damages and place importance on ensuring that available financial resources were not depleted so as not to preclude recoveries for future claimants.

As a result of Justice Freedman's promotion, all asbestos cases were transferred to Justice Sherry Klein Heitler. According to sources familiar with the litigation, Justice Heitler has rarely ruled on opposed summary judgment motions, deciding only a handful of such motions – in particularly weak cases – since she took over the asbestos docket. Justice Heitler has also reportedly allowed plaintiffs' lawyers to delay filing a response to summary judgment motions for months. This approach places inordinate pressure on defendants to settle cases, even when the plaintiff has not identified their products as responsible. She has also let cases go to trial, even when the evidence is insufficient.[141] We are also told that Justice Heitler has routinely held closed hearings in chambers or without courtroom reporters rather than in open court, and that she has sent cases to trial before the parties completed discovery.

Judge Heitler may be in the process of addressing these issues. Effective October 15, 2009, she modified the manner in which summary judgment motions are handled by permitting the parties only one two-week extension and setting motions for a hearing the following Tuesday.

ATRA's annual "'Sheldon Silver' Medal for the Worst State Civil Justice Legislation."

Watch List

This report calls attention to several additional jurisdictions that bear watching, whether or not they have been cited previously as Judicial Hellholes. These "Watch List" jurisdictions may be moving closer to or farther away from other Hellholes as their respective litigation climates improve or degenerate.

CALIFORNIA

Past Judicial Hellholes reports have focused on out-of-control litigation in Los Angeles, Orange County and San Francisco. Recently, several poorly reasoned California Supreme Court decisions have placed the state's citizens and business owners in jeopardy of expanded liability. California businesses remain concerned that they will be unfairly hit with consumer and disabled-access lawsuits by those who are only looking to sue. Plaintiffs' lawyers have been able to game the system in Los Angeles's substantial asbestos docket. And in a first-of-its-kind ruling, a California appellate court allowed a lawsuit against a brand-name drug manufacturer for injuries allegedly caused by a competing generic drug. Expect more lawsuits and more eye-popping verdicts in California in the future.

LAWSUITS COST CALIFORNIA TAXPAYERS BIG BUCKS

Litigation has become such an inherent part of the California experience that even the state itself spent millions on attorneys as lawyers were "drafted in droves" to challenge cuts needed to address the state's massive deficit.[142]

Individual cities and counties have also been hit hard by lawsuits. Just eight of California's largest cities and nine of its largest counties spent $504.1 million of taxpayers' dollars on judgments, settlements, and outside counsel fees in fiscal years 2007 and 2008, according to a recent study by California Citizens Against Lawsuit Abuse (CALA).[143] With 58 counties and 480 cities in California, this figure "is just the tip of the iceberg."[144] Los Angeles County alone spent $190 million on litigation-related expenses and the City of Los Angeles spent another $136.9 million.[145] The money spent by the city could have funded all infrastructure improvements such as streets, storm drains and bikeways in the city's 2007 budget or paid the starting salaries of 1,271 police officers in 2008.[146] Of course, litigation-related costs paid by public entities ultimately come from taxpayers' pockets. These skyrocketing figures translate into higher income and sales taxes for California residents. But "[v]ery few people pay attention to public lawsuits, which . . . ha[ve] a huge impact on taxpayers."[147]

UNRAVELING OF PROP. 64 AND CLASS-ACTION ABUSE

Several years ago, California became notorious for abuse of its Unfair Competition Law (UCL), also known as "Section 17200" for its place in the California statutes. Courts had interpreted the statute to allow lawyers to sue as "private attorneys general" on behalf of thousands of California residents, regardless of whether anyone was actually deceived by the conduct lawyers alleged to be deceptive. Unlike traditional class actions, lawyers bringing these "private attorneys general" suits did not need to meet safeguards necessary for protection of defendants' due-process rights when facing multiple plaintiffs.

In 2004, California voters intervened to address this situation by passing Proposition 64. Proposition 64 amended the UCL in two ways. First, it provided that private plaintiffs could only sue under the UCL if they "suffered injury in fact" and "lost money or property as a result of such unfair competition."[148] Second, Proposition 64 applied extisting state class-certification standards to such claims.[149]

This year, astonishingly enough, the California Supreme Court ruled that Proposition 64 does not mean what it says. Instead the court found that so long as an individual plaintiff shows he or she experienced a loss, that plaintiff may represent an entire class of any number of others who were *not* injured by the alleged deceptive practice.[150] While language in the court's opinion properly recognized that Proposition 64 now requires plaintiffs to show they relied upon an alleged misrepresentation, the court went on to state that, in some circumstances, the court may "presume" reliance. The court found that a plaintiff may recover even if he or she cannot point to a specific advertisement or statement that is alleged to be false or misleading.

It was a narrow 4-3 decision in which Chief Justice Ronald George recused himself. An intermediate appellate court justice filled his position, potentially shifting the ruling to a position supporting large class action lawsuits on behalf of uninjured individuals.

"I cannot join the majority's erroneous determination, which turns class action law upside down and contravenes the initiative measure's plain intent."[151]

—Justice Marvin R. Baxter, dissenting.

The ruling came in a case alleging deceptive practices by the tobacco industry, an easy target that resulted in a poorly reasoned decision applicable to all who are sued under the UCL in California courts.

For instance, in light of its ruling in the tobacco case, the California Supreme Court remanded for further consideration a class action brought against the manufacturer of Listerine mouthwash, claiming that it is not, as advertised, as "effective as flossing."[152] Consumers buy mouthwash, and a particular mouthwash product, for a multitude of reasons including freshening breath, brand loyalty, taste, comparative pricing, coupons and other promotions, as well as to supplement brushing and flossing. Nevertheless, a trial court certified a class that blended all of these people together even though it is highly probable that many of them never saw or even heard the representations at issue, let alone relied on them when purchasing the product.

Such rulings allow the mass recruiting of thousands or millions of individuals who simply purchased the product at issue, without the need to show that they experienced an injury, physical or economic, as a result of the defendant's conduct. This clearly is contrary to the intent of California voters who overwhelmingly approved Proposition 64's plain language.

California is particularly friendly to class actions for other reasons as well. As discussed in the "Dishonorable Mentions" section (p. 24), California courts have approved class-action settlements that provide millions of dollars for lawyers and next to nothing of value for their purported clients, as demonstrated by a recent suit involving the Ford Explorer. Consumers get a coupon, in this case for $500 toward a new Ford vehicle. The lawyers get their contingency-fee percentage based on the total value of the coupons distributed, not the amount actually redeemed.[153]

Additionally, California plaintiffs have the right to immediately appeal denial of a class certification, whereas defendants do not have a comparable right to appeal a certification. This year the California State Assembly rejected legislation to fix this inequity.[154]

Until these issues are addressed, expect more class actions in California of the type that allege Captain Crunch's "Crunch Berries" are, believe it or not, "not really berries."[155]

NOT YOUR PRODUCT? THAT'S OK, YOU'RE STILL LIABLE

Shortly after last year's Judicial Hellholes report went to press, brand name drug makers were stunned when a California appellate court ruled that they can now be held liable for injuries caused by competing companies' generic products.[156] Perhaps more surprising was the California Supreme Court's decision not to review the appellate court ruling, the first of its kind in the country. Pure common sense, aside from centuries of legal precedent, dictate that a person who opts to purchase a cheaper, generic product and believes he or she was injured by it, does not have a right to sue a competitor brand-name manufacturer who did profit from its sale.

The implications of extending the duties of a manufacturer to those who make competing products are serious, including the cost of the new liability to manufacturers of name-brand pharmaceutical products and the disincentive such a duty would place on research and development of new, potentially life-saving products. Should the law permit purchasers of "no name" products to bring claims against name-brand product manufacturers? Should the law subject Gucci, Louis Vuitton, or Chanel to liability for the quality or safety of replica handbags manufactured by another company based on a duty regarding its own products simply because the copies are quite similar to the originals? The California Supreme Court's denial of review of the appellate court decision sends a message that California courts may do precisely that.

ASBESTOS LITIGATION GAMESMANSHIP

Unfair trial practices are one of the qualities of Judicial Hellholes. This year, Los Angeles Superior Court Judge Aurelio Munoz exposed how plaintiffs' firms are gaming California's legal system and engaging in "judicially sanctioned extortion."[157] Judge Munoz found that the Texas-based Waters & Kraus firm would routinely file its asbestos cases in Texas, take a deposition, then dismiss the case and refile it in California.

"[T]his is the grisly game of asbestos litigation that occurs in the courts."[158]

—Los Angeles Superior Court Judge Aurelio Munoz

Why? As Judge Munoz wrote, "the filing of the Texas action was deliberately done to prevent the defendants from having adequate discovery and to prevent" defendants from seeking dismissal even when the plaintiff did not identify any of that defendant's products as being a possible source of his or her asbestos exposure. This occurs because Texas law is unusual in limiting depositions to just six hours per side, making it nearly impossible for multiple defendants to question the plaintiff on whether he was actually exposed to their products. While Texas law would require a plaintiff to identify the defendant's products as the source of his injury during a deposition to survive dismissal before trial, California law does not. The object is to force a settlement. Finding his hands tied, Judge Munoz suggested that an appellate court intervene. But California's intermediate appellate court and high court both declined to consider the case.[159]

The ability of personal injury attorneys to game the system and the fact that many states have enacted reforms to stem

litigation abuses in recent years while California has not, may explain why law firms based in states such as Illinois and Texas are opening up shop in California. In fact, some are warning that "California is positioned to become a front in the ongoing asbestos litigation war"[160] and that the state is in the midst of an asbestos litigation "gold rush."[161] According to Professors Alan Calnan and Byron Stier of Southwestern Law School in Los Angeles, "there is a sense locally among the bar that Southern California may be in the midst of a surge."[162] Even the judge who managed Madison County, Illinois's asbestos docket has recognized that "Los Angeles is a place that's really starting to take off" in terms of asbestos litigation.[163]

EASY ACCESS TO DAMAGES

As detailed in previous Judicial Hellholes reports, California has hosted many lawsuits, often against small businesses, for unintentional technical violations of disabled access laws. Although federal disability law does not authorize private lawsuits, California's Unruh Disabled Person's Act allows those who bring private claims to recover the greater of three times actual damages or $4,000 for each and every violation.[164] As a result, there is an entire litigation industry in California involving individuals and plaintiffs' lawyers trolling restaurants and retail stores in order to demand that a small-business owner pay up. For example, Jarek Molski sued 400 times under California law before a federal judge branded him a "hit-and-run plaintiff," accused him of systematic extortion of small businesses, and barred him from further suits in the Central District of California, which includes Los Angeles.[165] Some small-business owners, frustrated by the lawsuits and unable to comply with the lawyers' demands due to finances or facilities, have closed shop.[166]

The long popular Sacramento burger joint known as the Squeeze Inn was hit with two recent ADA lawsuits, and the restaurant, which is located in an old 450 square foot building is now being called the "Squeezed Out." It will close and its owners will seek a new location.[167]

In June, the California Supreme Court added fuel to this fire by lowering the proof needed for such claims. In that case, the plaintiff alleged that a door was too narrow, the bathroom was not conducive to wheelchairs, and the entryway lacked a level landing. That's $4,000 times three violations.

Courts had reached varying conclusions as to whether the law required a showing that the business intentionally violated the act to qualify for an award of damages.[168] The high court settled this dispute, coming down on the side of greater liability.[169]

The California legislature recently attempted to rein in abuse of the disability law. A law that took effect in 2009 restricts the availability of statutory damages to instances where the accessibility violation actually denied the plaintiff full and equal access. It also limited statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated.[170]

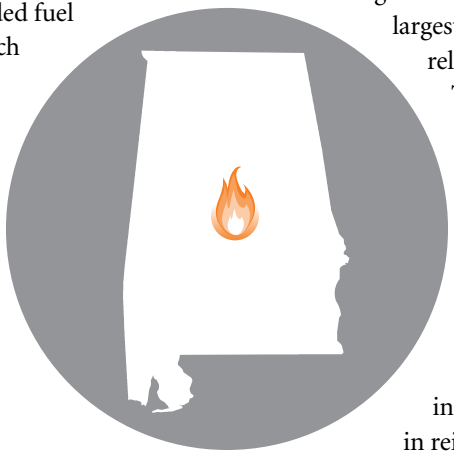
The new law is helpful in addressing trolling, but it did not reach far enough. California needs to adopt legislation providing innocent small-business owners with an opportunity to cure a violation before imposing such harsh monetary penalties.

A CASE TO WATCH: JUSTICE OR PROFIT?

In 2008, a California appellate court effectively abandoned firmly-established California law that precluded state and local government officials from hiring private lawyers on a contingency fee basis. In a 1985 decision, the California Supreme Court properly recognized that the interests of government and private contingency fee attorneys are widely divergent, making such arrangements contrary to the standard of neutrality that an attorney representing the government must meet.[171] The recent appellate court ruling, however, has created a loophole through which an entire firm of lawyers can run. It ruled that private attorneys with a significant profit-interest in the litigation could represent the government so long as they only "assisted" in the litigation, but did not control it.[172] Under this ruling, all a private attorney must do to represent the government on a contingency-fee basis is to include a provision in the agreement stating that final say over the litigation rests with the state. As a practical matter, such a provision cannot be monitored or enforced. ATRA, which filed an amicus brief in the case in April, will be closely watching the California Supreme Court as to how it rules on the issue. Will it maintain California's separation between profit-seeking and the seeking of justice?

ALABAMA

Last year ATRA named the Alabama counties of Montgomery and Macon as Judicial Hellholes. This was in part due to these neighboring counties' claim to several of the nation's largest verdicts, and for the controversial actions and relationship between Alabama Attorney General Troy King and Montgomery personal injury lawyer Jere Beasley.[173] This year was marked with similar controversy, warranting a close eye on further developments in these counties and in the state as a whole.



With King's say-so, Beasley has sued virtually the entire pharmaceutical industry on behalf of the state, claiming that the companies engaged in fraud by reporting inflated prices upon which state officials relied in reimbursing pharmacies for prescriptions

under Medicaid. Some companies settled. The drug companies produced government reports and correspondence showing that the system, which reported list rather than discounted prices, was fully understood by federal and state regulators for three decades. Nevertheless, in 2008 Beasley obtained substantial verdicts against three pharmaceutical companies: AstraZeneca PLC for $215 million (including $175 million in punitive damages), which was later reduced to $160 million;[174] and GlaxoSmithKline PLC and Novartis AG totaling $114 million.[175] Then in February 2009 a Montgomery County Circuit Court jury returned a $78.4 million verdict against generic prescription drug manufacturer Sandoz, Inc., including $50 million in punitive damages.[176] Some companies settled rather than risk this Alabama-style justice. As of September, private attorneys working on lawsuits against pharmaceutical manufacturers in the name of the state had banked about $13 million in 2009, while the state got $38 million in settlement money to finance its cash-strapped budget.[177] But, in October 2009, the Alabama Supreme Court recognized these cases for what they are: "regulation by litigation."[178] It threw out the judgments against AstraZeneca, GlaxoSmithKline and Novartis after finding that, for decades, government officials understood that the reported prices represented list prices and did not reflect discounts routinely provided to pharmacies. The state's cry of fraud, the high court found, was "simply untenable."[179] The Sandoz case is pending appeal and will likely meet a similar fate.


Attorney General Troy King

As this pharmaceutical litigation shows, Attorney General King is one of several state attorneys general who have used private, contingency-fee lawyers to bring actions on behalf of the state, raising questions as to whether law enforcement is about profiting lawyers and campaign contributors or about the public interest.[180] The practice also siphons from taxpayers millions of dollars that the state would otherwise recover had it used its own lawyers rather than outside counsel. These are the same types of agreements currently pending constitutional challenges in California and Pennsylvania. That's not news. What is news, however, is that these highly questionable arrangements are trickling down further in Alabama.

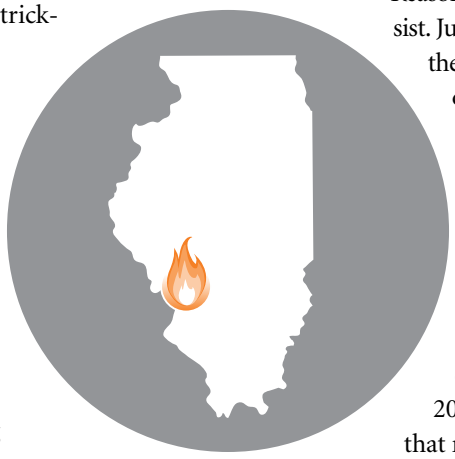
Court documents show that District Attorney E. Paul Jones of the rural Fifth Judicial Circuit had quietly hired three plaintiffs' law firms – Morris Haynes & Hornsby; Badham & Buck, LLC; and Lewis, Smyth & Winter, P.C. – to "investigate" the advertising and service policies of Charter Communications, a multichannel video services provider. Over the course of 10 months the firm completed its investigation, and then settled with Charter without ever filing a formal complaint.[181] Circuit Court Judge Thomas F. Young Jr. of Tallapoosa County allowed Mr. Jones' office and the three law firms, one of which was the top contributor to the DA's last campaign, to evenly divide $1.75 million.[182] The firms were not asked to account for the time they supposedly invested in the case or the level of risk involved for a case that settled within a year (lightning speed for litigation).

In August 2009, District Attorney Bryce Graham of the Thirty-First Judicial District followed suit, hiring private law firms to sue the large pharmacies in his area. In a lawsuit filed in the Colbert County Circuit Court, Mr. Graham alleged that CVS, Rite Aid, Walgreens and Wal-Mart filled prescriptions with a generic drug rather than a brand-name without obtaining express permission from the patients' physicians.[183] The suit sought civil penalties of not less than $2,000 for each and every alleged sale of generic drugs during the four-year statute of limitations period, plus attorneys' fees and the costs of the lawsuit. The three firms hired include Morris Haynes & Hornsby (also hired by Mr. Jones), Hovater & Risner, and Heninger Garrison Davis, LLC.

To his credit, Attorney General King has since moved to quash Graham's cases against the drugstores and others like them, and one can hope he did so out of a sense of fairness. But a cynic might argue that the line between the district attorneys' blatantly extortionist lawsuits and those which King has authorized Beasley to pursue is a rather fine one.

MADISON COUNTY, ILLINOIS

For many years, Madison County epitomized Judicial Hellholes. Lawyers flocked to the small Illinois county from around the state and across the country because of its reputation for welcoming class-actions, forum shoppers, and an anti-corporate lawsuits. That changed when Madison County's judges implemented reforms to stem abuse of its legal system. Perhaps most notable among the improvements in Madison County is the willingness of its judges to perform self-examination and make corrections to promote a more just system. The outlook generally remains positive, but there are those in Illinois and elsewhere who are discouraged by recent developments and still consider it a Judicial Hellhole.



Reasons to keep a close eye on Madison County persist. Judges interested in reform can only do so much; the lawyers practicing in the local court rooms determine much of the local activity. Madison County remains almost twice as litigious as Cook County and more than four times as litigious as the average of the other 101 Illinois counties.[184]

The county's handling of asbestos litigation is being – and should be – closely monitored. After a sharp decline in asbestos cases, the number of filings doubled between 2006 and 2008.[185] As this report goes to press, that number is still rising. With two months

remaining in 2009, the *Madison Record* reported that lawyers had filed 656 new asbestos cases in Madison County, compared with 639 in all of 2008.[186] For the first time asbestos filings in Madison County outnumber non-asbestos filings.[187] Madison County still sees the types of cases where a single plaintiff claims that 200 plus defendants – including everyone from Coca-Cola to the University of Kentucky – are responsible for his injury and that each of them intended to harm him.[188] According to a review by the Illinois Civil Justice League, only 1 in 10 of the asbestos cases involved a plaintiff who lived, worked, or was allegedly exposed to asbestos in Madison County.[189]


Chief Judge Callis


Judge Daniel Stack

In addition, Judge Daniel Stack, a strong ally of reform-leading Chief Judge Ann Callis, will retire this year, opening a seat on the court.[190] Judge Stack serves as chief of the court's civil division and manages its asbestos docket. It remains to be seen what impact his departure will have on the rule of law in Madison County. It will be up to Judge Callis to make sure his replacement does not allow Madison County to regress.

One very encouraging development is the willingness of Judge Callis and other Madison County judges to participate in an open forum on the judicial system in Madison County. Sponsored in part by the Illinois Civil Justice League, the forum is intended to allow a public discussion of the judicial system in Madison County with public and lawyer comments. It is expected to be held in early 2010.

In sum, while Madison County continues to generate some concern, there are positive signs that the judiciary is continuing to implement positive reforms. ATRA encourages the Madison County judiciary to continue its open and constructive dialogue with the legal community.

JEFFERSON COUNTY, MISSISSIPPI

For many years Jefferson County, Mississippi, made the list of Judicial Hellholes. Comprehensive reform in Mississippi between 2002 and 2004, however, dramatically improved the legal climate, moving the state off the Judicial Hellholes list. But there remain troubling signs that it is a place where out-of-state corporate defendants find a fair trial hard to come by.

This year Jefferson County was the site of a rare plaintiffs' verdict against a paint manufacturer. In that case the plaintiff claimed he had experienced brain damage as a result of eating lead-contaminated paint chips when he was a child. Sherwin Williams claimed it was impossible that the plaintiff was exposed to its paint, since it had removed all lead ingredients from its residential paints by 1972.[191] The result was a $7 million verdict for the plaintiff, a result that one of the defense lawyers attributed to the case being in Jefferson County, Mississippi, "where no out-of-state product manufacturer to our knowledge has been able to win a jury verdict."[192]

During the trial, the plaintiff's mother had testified that her son "can't go to college."[193] Expert witnesses testified that, as a result of his brain damage, the plaintiff would never be able to work and needed constant supervision.[194] But off to college he goes. After serving as captain of his varsity basketball team and playing varsity football, he signed a letter of intent to play football at a junior college on a scholarship.[195]

Note to plaintiffs – beware of social-networking websites. According to a post-trial motion from the defendant that asks the court to throw out the verdict, the plaintiff's mother wrote on her MySpace site that her son is definitely going to college and that she will not work anymore, shop until she drops, and buy a larger house.[196]

But there is still reason for optimism that southwest Mississippi is not the Judicial Hellhole it once was. In May, a jury in adjacent Claiborne County found that three defendant companies were not responsible for causing a plaintiff's silicosis. The plaintiff had originally sued 18 companies. Fifteen settled and three decided to take their chances at trial. After some initial difficulty finding jurors in the county who had not been involved in a silica lawsuit, an impartial jury ruled for the defendants. The court reportedly remarked to the defense counsel, "Congratulations. You made history. That's the first defense verdict ever in these cases in Claiborne County."[197]

GULF COAST AND RIO GRANDE VALLEY, TEXAS

A number of counties in the Gulf Coast and Rio Grande Valley have long been subjected to the scrutiny of the Judicial Hellholes report. Some observers suggest that the area is not as hostile as it used to be for civil defendants. Judges are less likely to permit blatant forum shopping, thanks to legislative reforms and court decisions. Though the area continues to be viewed as generally friendly to plaintiffs, verdicts are perhaps less generous than in years past.

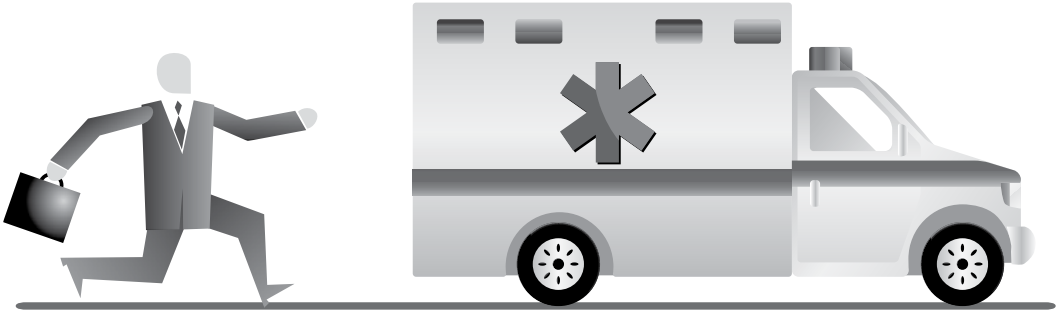
Nevertheless, Jefferson County continues to attract lawsuits from far and wide – though there now must be at least a tenuous local tie. For instance, a lawsuit stemming from a train accident in Vinton, Louisiana, was filed in Jefferson County. While the accident occurred in Louisiana and the family suing is from Louisiana, a railroad claims inspector, named as a co-defendant, lives in Jefferson County.[198]

Jefferson County also remains a place where a judge will take a rare jury verdict for a corporate defendant in a wrongful death case and, without comment, grant a new trial. One such reversal came in an asbestos case against DuPont de Nemours brought by a former employee. No liability? Do over.

"In a defense-hostile courtroom run by plaintiff-friendly Judge Donald Floyd, DuPont proved its innocence at trial. It presented evidence and convinced a jury that it wasn't responsible for the alleged horrors of which it was accused. But the accuser, clout-heavy, multi-millionaire plaintiff's attorney Glen Morgan, had too much at stake to fail. Later, without reason or explanation, Judge Floyd came to the rescue. He nullified the jury's verdict. Even when defendants win in Jefferson County, the scales of justice somehow turns them into losers, it seems."[199]

—Southeast Texas Record

In that case the Texas Supreme Court, in a narrow 4-3 decision, took the miniscule step of requiring Judge Donald Floyd to give a reason for his ruling, but it ordered no further relief.[200] Given this situation, DuPont is now reportedly considering settling the Jefferson County case it already won.



Down the coast from Jefferson County, the Texas Trial Lawyers Association, which represents the plaintiffs' bar, and Texans for Lawsuit Reform have found themselves in a rare area of agreement. In Nueces County lawyers are suing lawyers over "barratry," a fancy legal word for ambulance chasing. Texas law prohibits lawyers, doctors, and other professionals or their representatives from directly soliciting clients. Yet leaders of the plaintiffs' bar believe that many lawyers approach injured people and offer them cash up front to sign on as clients. In some cases plaintiffs' lawyers have called the families of seriously injured persons just hours after accidents, shown up uninvited to hospitals, and signed up clients still dazed from medication.[201]

"Barratry, as improper solicitation is technically known, long has been illegal for lawyers, who are prohibited from contacting prospective clients, directly or indirectly, to win their business. Despite this, the practice flourishes in South Texas."[202]

—San Antonio Express News

In South Texas, some lawyers may go well beyond barratry to make a profit. For instance, prosecutors accused Warren Todd Hoeffner of bribing insurance company employees to settle his clients' silica claims quickly in 2002, treating them to imported cars, spa treatments, entertainment at "gentlemen's clubs," and large checks (See "Rogues Gallery," p. 27). A Houston grand jury charged that Hoeffner induced insurance settlements of more than $34 million, intending to funnel more than $3 million of those funds into bribes and kickbacks for two insurance company employees.[203] Hoeffner allegedly received about $5.3 million in attorney's fees from the settlements. His alleged motivation? Tort reform was on the legislative horizon in Austin then, and his Jefferson County cases might quickly become less lucrative in the future.[204] But in October 2009, after seven weeks of testimony and two days of deliberation, a criminal court declared a mistrial when jurors could not reach a unanimous verdict.[205]

OTHER AREAS TO WATCH

Beyond the areas named on this year's Watch List, ATRF survey respondents and others say several additional jurisdictions have characteristics consistent with Judicial Hellholes. These jurisdictions include:

- **St. Clair County, Illinois**
- **Orleans and Jefferson Parishes, Louisiana**
- **Las Vegas (Clark County), Nevada**
- **'Home Run' Jurisdictions for Asbestos Litigation**

ST. CLAIR COUNTY, ILLINOIS

Madison County's neighbor shares a reputation as inhospitable to corporate defendants, but its standing has improved along with the rest of the Metro East in recent years. Still, it remains a place to watch with some decisions of concern. For example, the *Belleville News Democrat* asked what Judge Andrew Gleeson was thinking when he gave a plaintiff, a convicted felon who sued a finance company on a real estate deal, everything he asked for, including $7.3 million in actual damages, $66.5 million in punitive damages, and $24.6 million in legal fees when the defendant did not respond to his suit. Even after the defendant claimed it never received notice of the suit, Judge Gleeson merely reduced the punitive damages and eliminated the legal fees. Then, after media took up the story, he struck the punitive damages entirely.[206]

ORLEANS AND JEFFERSON PARISHES, LOUISIANA

As the impact of Hurricane Katrina-related litigation becomes clearer, it is looking uglier and uglier. The court system, particularly in these neighboring parishes, has been plagued by attempts at fraud, which have already resulted in at least 141 persons facing charges by federal authorities.[207] Louisiana's antiquated class-action joinder rules have also left some defendants, such as one of the state's major insurers, Louisiana Citizens Property Insurance Corp., defending two nearly identical class-action lawsuits in Orleans and Jefferson parishes.[208] The effect is not only unduly burdensome on defendants, but costly to Louisiana taxpayers trying to rebuild after Hurricane Katrina. At times, the litigation environment has gotten so out of hand that the plaintiffs' lawyers are resorting to infighting among one another. In one case before an Orleans Parish Civil District Court, two plaintiffs' attorneys arguing over whether the court should secure $5 million in Katrina-related attorneys fees to one law firm (thereby leaving each client eligible to receive up to $1,000 in compensation) actually started brawling in the middle of the courtroom.[209] One of the attorneys had to be taken away in handcuffs; a sad image and depiction of the devolving state of affairs in these jurisdictions.

LAS VEGAS (CLARK COUNTY), NEVADA

Controversy continues in Las Vegas as federal prosecutors believe that doctors, lawyers and a "consultant" were involved in a "medical mafia." Prosecutor's claim, according to a CNN report, that the consultant, Howard Awand, would refer individuals who had received minor injuries to doctors for needless visits and even surgeries. The doctors would receive referral fees or kickbacks for running up the lawsuit tab and also protection from medical-malpractice lawsuits from the attorneys involved with Awand. Lawyers who sued these doctors, in turn, would lose lucrative referrals. Testimony was closely scripted and insurers felt they had no choice but to settle. The clients, however, were in the dark. In one case, an attorney who was allegedly part of the ring blamed an anesthesiologist for rendering a woman a paraplegic after routine back surgery, even when evidence pointed to another doctor's error, leading to a much smaller settlement than expected. When prosecutors brought indictments in 2007, all 10 federal judges in Nevada recused themselves, a key witness refused to testify without immunity, and the cases fell apart. One prosecution resulted in a mistrial. A doctor who cooperated with prosecutors "fell on his sword for nothing" and says that he has spread shotguns around his house for protection from the gang of doctors and lawyers.[210] Although the prosecutors have not had success, the State Bar of Nevada is now involved. It filed an ethics complaint against one of the lawyers, Noel Gage, claiming that he split his fees with Awand, paying $1.8 million to Awand and consulting companies he controlled.[211] Nevada has a rule that bars attorneys from splitting fees with non-lawyers. Sounds extraordinary? Such is the litigation environment in Las Vegas.

'HOME RUN' JURISDICTIONS FOR ASBESTOS LITIGATION

Last year this report noted a trend wherein plaintiffs' lawyers from around the country bring their asbestos cases to Delaware, even though it is not typically known as a pro-plaintiff forum. Mark Lanier, a prominent Texas plaintiffs' attorney, recently explained this trend. According to Lanier, plaintiffs' lawyers file in Delaware not because it is particularly friendly to plaintiffs, but because it is a "one-stop shop" where, because so many corporations are incorporated in Delaware, they can get jurisdiction over all defendants. So what are the "home run" jurisdictions for asbestos cases? Lanier answered with admirable candor: "Baltimore; New York; some parts of California, … West Virginia, if you can get jurisdiction there." Next on his list: reviving Texas asbestos litigation, filing lawsuits in Boston, and bringing more claims against pharmaceutical manufacturers.[212] In addition, Lanier's Houston-based firm recently opened two California offices in Los Angeles and Palo Alto.[213]

Dishonorable Mentions

"Dishonorable Mentions" recognize particularly abusive practices, unsound court decisions or other actions that stand alone but nonetheless erode the fairness of a state's civil justice system. This year, court rulings in Arkansas, California, Massachusetts, Minnesota, North Dakota and the hiring of contingency-fee lawyers by Pennsylvania Gov. Ed Rendell have earned this dubious distinction.

ARKANSAS SUPREME COURT NULLIFIES LEGISLATIVE REFORMS

A basic principle underlying a fair system of justice is that an individual should only bear responsibility for his or her share of the harm caused to another. But the Arkansas Supreme Court issued an opinion this year that flies in the face of that principle, striking down two legislative efforts to boost the fairness of the state's civil justice system.[214]

The first of the two reforms simply provided that a defendant could offer evidence identifying a person or business not a party to the lawsuit as the true cause of a plaintiff's injury or as a contributor to the injury. In the case at the heart of the high court's ruling, the plaintiff alleged that a safety feature on a mechanic's "starter bucket" was defectively designed and manufactured because it became electrically powered when it should not have done so.[215] The plaintiff, therefore, sued the product's manufacturer, Rockwell Automation, Inc. Rockwell, however, claimed that after the starter bucket was supplied to the plaintiff's employer, the product was modified without Rockwell's knowledge, and that this modification caused or at least contributed to the plaintiff's injury.[216] Under Arkansas' comprehensive tort reforms passed in 2003, Rockwell was permitted to inform the jury that someone else might have been at fault.

> ***"Even some of the people who agreed with the result reached by the Supreme Court found the court's reasoning unpersuasive. One of these, a prominent lawyer, said it appeared the court had ruled that the legislative branch of government could never touch court procedures."***[217]
>
> —Doug Smith, *Arkansas Times* Reporter.

The Arkansas Supreme Court, however, did not permit the jury to hear this highly-relevant information because the reform supposedly established a rule of "pleadings, practice and procedure" that is in the sole province of the state supreme court.[218] In other words, the Arkansas Supreme Court issued an opinion proclaiming that it alone had the power to develop such rules and the legislature's enactment of meaningful reforms in this area was an unconstitutional violation of separation of powers.

In effect, the court paid lip service to the idea that "every [legislative] act carries a strong presumption of constitutionality, and before an act will be held unconstitutional, the incompatibility between it and the constitution must be clear." It went on to hold that "so long as a legislative provision dictates procedure, that provision need not directly conflict with our procedural rules to be unconstitutional."[219]

Arkansas's high court applied similarly faulty reasoning to strike down another reform that ensured the accurate payment of damages by defendants in medical malpractice claims. In an effort to reduce healthcare costs, this reform provided that only evidence of the amount of medical costs *actually* paid by a plaintiff or on behalf of a plaintiff would be admissible. The often inflated medical care amounts presented to, but not actually paid under medical coverage plans, were, therefore, inadmissible as they did not reflect the actual charges and created the serious risk of overpayment by defendants.

As a result of the court's strained rulings, those sued in Arkansas are no longer able to point the finger at other culprits as the actual cause of an injury unless they are already a party in the case and defendants may be on the hook for damages that inflate the plaintiffs' true losses. These rulings follow a 2007 decision, in which the Arkansas Supreme Court invalidated a requirement that plaintiffs in medical-malpractice claims submit a certificate of merit from a physician supporting their allegations.[220] The nullification of these reforms represents a collectively significant step backwards for fairness within the state's civil justice system, and for that reason the Arkansas Supreme Court earns a Dishonorable Mention.

MINNESOTA SUPREME COURT: 'THE LAND OF 10,000 OUT-OF-STATE LAWSUITS'

On September 2, 2009, the Minnesota Supreme Court effectively kicked wide open the state's courthouse doors to thousands of old, out-of-state personal injury suits, and in doing so may have doomed the state to a dangerous downward spiral toward Judicial

Hellhole status. In *Fleeger v. Wyeth*, the court ruled that the six-year time limit for bringing certain types of personal injury lawsuits in Minnesota applies even to those suits in which the plaintiff, defendant, and conduct giving rise to the lawsuit have no connection to Minnesota.[221]

"[N]o other state has Minnesota's choice-of-law jurisprudence, which basically allows an out-of-state resident to pursue a lawsuit against an out-of-state company in what would be a time-barred claim in the plaintiff's home state."[222]

—ABA Journal

Minnesota's generous six-year period is significantly longer than the deadline for bringing a claim in most other states, providing a strong incentive for litigation tourism to Minnesota courts.[223] Indeed, the court's recent ruling allows more than 4,000 out-of-state plaintiffs to proceed with a case against a Pennsylvania-based pharmaceutical manufacturer in Minnesota that would otherwise be dismissed as untimely in their home states.[224]

The problem stems back to a rule that developed through a series of statutes and court rulings in Minnesota, which allow anyone to bring a product liability lawsuit against a defendant that does business in the state. In 2004 the legislature reinstituted a law that applies the statute of limitations of the plaintiff's home state to such actions, however, since the law only applied to injuries occurring after August 1, 2004, it will not have an impact until August 1, 2010, when the six-year statute of limitations expires on such claims. The result is that only 726 of 9,680 lawsuits against medical device and pharmaceutical manufacturers since 2004 were filed on behalf of Minnesotans.[225] That means 92.5 percent of product liability claims in Minnesota courts are from states such as Alabama, California, Pennsylvania and New York. The situation led *Minnesota Law & Politics* to run a recent cover story,

"The land of 10,000 lawsuits says WELCOME, LITIGATORS! Why Minnesota has become a plaintiffs' paradise."[226]

The Minnesota Supreme Court had an opportunity to address this situation in *Fleeger*, but it declined to roll up the welcome mat. It recognized that a "great deal of legal commentary" supported departing from its pro-forum shopping rule, but it held fast.[227] The result is that Minnesota taxpayers will continue to pick up the tab for judges and court staff to hear claims from out-of-state plaintiffs against out-of-state defendants that would be thrown out if brought in the plaintiffs' own local courts. The court's intransigence suggests that the birth of a new Judicial Hellhole may be inevitable.

NORTH DAKOTA SUPREME COURT PERMITS FORUM SHOPPING

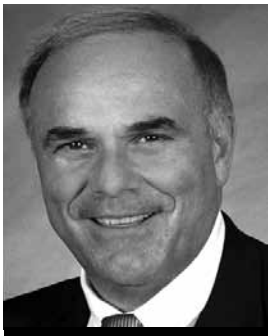
In June 2009 the North Dakota Supreme Court ruled in a case that may open *its* doors to forum shopping by plaintiffs' lawyers who are looking for a last chance to sue.[228] Fifteen plaintiffs had filed claims in Morton County alleging exposure to asbestos, but none of them lived in North Dakota or claimed that their asbestos exposure occurred in the state. In fact, during the proceedings, counsel for the plaintiffs conceded that 13 of the 15 plaintiffs had missed the statute-of-limitations, the period of time within which a lawsuit must be filed, in all jurisdictions except North Dakota.

The trial court dismissed the claims, recognizing that there was no connection between the plaintiffs, their claims, and the state of North Dakota, and that "their only real connection to North Dakota is that the attorneys they have retained to represent them live and work in North Dakota." Nevertheless, the North Dakota Supreme Court found that because the plaintiffs had established that they could not sue elsewhere, the trial court improperly dismissed the case on the grounds of *forum non conveniens* (that it was an inconvenient forum).

Unless the trial court applies the statute of limitations of the forum state rather than North Dakota's unusually long period for bringing a claim, the ruling will encourage plaintiffs who neglected to file a timely case elsewhere to file in North Dakota courts instead.

PENNSYLVANIA GOVERNOR'S CONTINGENT-FEE CONTRACT

Pennsylvania Gov. Ed Rendell hired a law firm on a contingent-fee basis when, at the same time, its principal was making donations totaling approximately $100,000 to his reelection campaign.[229] The state attorney general had opted not to bring this particular lawsuit,[230] which, if successful, would significantly limit the access of low-income and elderly residents to a federally approved prescription drug by finding that the manufacturer of the antipsychotic used to treat schizophrenia, bipolar mania, and irritability associated with autistic disorder, owes Pennsylvania millions of


Gov. Ed Rendell

dollars under both its Medicaid and Pharmaceutical Assistance Contract for the Elderly ("PACE") programs. The state's theory – initiated, developed, and litigated by profit-driven outside counsel – is that all prescriptions for the drug, Risperdal®, are "medically unnecessary."

The private lawyers are suing in the name of Pennsylvania, but government lawyers have not so much as entered an appearance in the two years since the lawsuit was filed. The agreement between the state and the private lawyers includes a clause restricting resolution of the case through nonmonetary relief, protecting the right of the lawyers to receive a cash payment.

At press time, the validity of the contingent-fee arrangement is pending appeal before the Pennsylvania Supreme Court.[231]

OTHER DISHONORABLE MENTIONS

SACRAMENTO COUNTY'S 'NO CLASS' ACTION.

Lawyers who settled a class action with an automobile manufacturer in the Sacramento County Superior Court received $25 million in fees while their clients received only coupons to put toward the purchase of a new vehicle from the company. Lawyers had claimed that Ford had represented its Explorer to consumers as safe, when it was prone to rollovers. Ultimately, just 75 consumers redeemed their coupons for a total value of $37,500. Lawyers, not the consumers, were the primary beneficiaries of the litigation.[232]

MASSACHUSETTS SUPREME JUDICIAL COURT INVALIDATES ARBITRATION AND PERMITS MEDICAL MONITORING CLAIMS.

In July 2009 Massachusetts' highest court ruled that consumer contracts may not require arbitration of disputes or a waiver of class-action claims.[233] Yet Massachusetts consumer protection law broadly protects the ability to bring individual claims by mandating that defendants pay the attorneys' fees of prevailing defendants and authorize plaintiffs to receive double or triple damages. In a separate ruling, the state's high court recognized the ability of plaintiff's to bring lawsuits seeking medical monitoring expenses so long as they can at least show "subcellular changes," if not a present physical injury.[234] It remains to be seen how lower courts will discern subcellular changes.

MONTANA COURT HOLDS BASEBALL BAT MANUFACTURER LIABLE FOR LINE DRIVE.

In a case that is the first of its kind, a Montana court required the maker of Louisville Slugger baseball bats to pay $850,000 to the family of a pitcher who was tragically hit and killed by a line drive. The aluminum bat took the blame under the theory that the manufacturer failed to place a warning on the bat that it can hit balls harder than a wooden bat. The court's decision is contrary to a U.S. Consumer Product Safety Commission study that found that the available data did not show injuries to pitchers were more frequent or severe from aluminum bats compared to wooden bats.[235] The ruling could lead to discontinued use of aluminum bats, which have been popular since the 1970s primarily because they don't break and thus extend the equipment budgets of Little League, interscholastic and other amateur teams.

The Rogues' Gallery

Behind every Judicial Hellhole judge is a supporting cast of personal injury and mass tort lawyers who are constantly pushing courts to expand liability. This "Rogues' Gallery" section reminds policymakers – especially those in Congress – that there are influential plaintiffs' lawyers who have stretched ethics rules and criminal laws beyond acceptable bounds in manufacturing lawsuits, conspiring to bribe judges, disregarding court orders and stealing client recoveries. They warrant aggressive oversight.

Stuart Taylor, a moderate observer of the legal system, wrote in a *National Journal* column that "[n]ow and then events converge to remind us of how often plaintiffs' lawyers pervert our lawsuit industry for personal and political gain, under the indulgent eyes of judges, without rectifying any injustices, at the expense of the rest of us. We have recently witnessed the spectacle of three of the nation's richest and most famous plaintiffs' lawyers heading to federal prison for various criminal frauds…. This industry is rotten."[236]

Taylor's column referred to the litigation industry's former Big Three: securities class-action kingpin William Lerach, his former law partner Melvyn Weiss, and longtime Mississippi legend Richard "Dickie" Scruggs. These three were the focal points of the Judicial Hellholes' inaugural Rogues' Gallery last year. This year's spotlight glares more broadly on new offenders among the personal injury and mass tort bars deserving of this dishonor. These are their stories…

- The year's ***J**unk **A**dvocacy **I**n **L**awyering* award goes to **Juan Dominguez**, a Los Angeles personal injury lawyer accused of filing "phony" claims against Dole Food and Dow Chemical alleging that Nicaraguan men became sterile from exposure to their pesticides.[237] L.A. Judge Victoria Chaney ruled that Dominguez committed a "fraud on the court' and a "blatant extortion" of the defendants.[238] According to a report, Dominguez, "in apparent collusion with local officials, judges, and lab technicians, rounded up 10,000 men whom they coached to claim sterility – and to blame that sterility on Dole's chemicals. In fact, many of the men had never worked for Dole, and many weren't sterile. Some even had multiple children."[239] The *American Lawyer*'s Ben Hallman called this **"the most egregious plaintiffs lawyer extortion and fraud allegations we've seen this side of criminal indictment."**[240]

- New York personal injury and medical malpractice attorney **Marc Bernstein** has been charged with **absconding with $650,000 of settlement funds that should have gone to badly injured clients**. Said Manhattan District Attorney Robert Morgenthau: "He settled these cases pretty cheap, then took the money and ran. You should call him a hit-and-run lawyer."[241]

- Two Brooklyn lawyers, **David Resnick** and **Serge Binder**, have agreed to surrender their law licenses after admitting to enabling a third attorney, Richard Boter, who had been disbarred, to continue practicing law under the firm's name. Boter had been linked to a runner who **bribed hospital employees for information about accident victims** so they could be sold to personal injury lawyers for $500. Boter had pleaded guilty to charges of stealing $148,000 from his clients.[242]

- Across the Hudson River in New Jersey, a federal judge took class action lawyer **David Mazie** to the woodshed for "trying to delay a settlement that helped nearly 600 eating disorder patients so he could pursue a fight with co-counsel over shares of a $2.45 million fee award."[243] U.S. District Court Judge Faith Hochberg criticized the attorney for **putting his own interests above "those of people who are dying."**[244]

- Arkansas securities class action attorney **Gene Cauley** apparently went a step farther, pleading guilty in June to **fraud and criminal contempt** for **stealing $9 million** in settlement money he was supposed to distribute to clients. He told the *Wall Street Journal* that he ran into cash-flow problems and used the settlement money to pay expenses and invest the rest.[245] Cauley has surrendered his law license and was sentenced to seven years and two months in prison.[246] Cauley's former mentor? Bill Lerach, who gave Cauley his start in the class-action racket, er, business.[247]

- Once highflying South Florida lawyer **Scott Rothstein**, arrested by the FBI on December 1, 2009, will face federal racketeering and fraud charges for **allegedly operating a $1 billion Ponzi scheme**. Rothstein, who co-founded a 70-lawyer Fort Lauderdale law firm, Rothstein Rosenfeldt PA, allegedly defrauded investors through a side business that dealt in legal case settlements. Since legal settlements often are paid out over time, it is not unusual for successful plaintiffs to sell their right to collect at a discount in exchange for an up-front cash payment. Rothstein sold investors a stake in collecting these legal settlements. Prosecutors allege, however, that many of

these settlements did not exist. Rothstein, a high-roller by any definition, owned a $5 million yacht, two $1.6 million Bugati Veyrons, two Rolls Royces, three Lamborghinis, four Ferraris, a Bentley, and a Porsche; gave millions to political parties, candidates, and charitable causes; and had an empire of mansions and businesses.

The firm might have known there was a problem when Rothstein sent a firm-wide e-mail on behalf of an unidentified client asking for information on countries that did not have an extradition treaty with the United States. He subsequently wired $16 million to Morocco, made reservations at a Casablanca hotel, and fled the U.S. with $500,000 in cash, according to reports. His partner, Stuart Rosenfeldt, sued him on behalf of the firm, and a court placed the firm in receivership. In November, Rothstein returned to the United States after telling Rosenfeldt that he was considering suicide.

Just prior to his arrest, the Florida Supreme Court permanently disbarred Rothstein at his request, and Gov. Charlie Crist suspended him from a state commission that recommends individuals for appellate court judgeships. Should Rothstein be convicted on all courts, he faces a combined maximum prison term of 100 years, according to court documents.[248]

- Florida personal injury lawyer **Hank Adorno** was charged by the Bar with violations for distributing $7 million in class action settlement funds to seven people, instead of thousands of Miami taxpayers. The state Bar alleges that Adorno **breached his fiduciary duty** to the Miami property owners comprising the class by **making false statements in court, charging excessive fees** and representing one client to the detriment of others. Said the appellate court: "Plainly and simply, this was a scheme to defraud. It was a case of **unchecked avarice** coupled with a **total absence of shame**."[249]

- Also in South Florida, a Miami man has been charged with buying hundreds of confidential patient records from a Jackson Memorial Hospital employee and selling them to a lawyer for the purpose of filing personal injury claims. Federal authorities allege that **Ruben E. Rodriguez** paid Rebecca Garcia, an ultrasound technician, $1,000 a month for the hospital records of patients treated for slip-and-fall accidents, car-crash injuries, gunshot wounds and stabbings. The lawyer, who is unnamed in the court papers, then allegedly paid Rodriguez a percentage of the legal settlements won from the patients' personal injury claims. The scheme allowed the attorney to get around a Florida rule that prohibits lawyers from soliciting potential clients by phone, at their home, or in the hospital. One local attorney called the case a "low water mark."[250]

- Perhaps the biggest trial lawyer scandal in Florida involved their trade group, the **Florida Justice Association** (FJA), which funded a $2.5 million attack mailer in an effort to oppose the State Senate candidacy of John Thrasher, a supporter of tort reform. The *Orlando Sentinel* reported: "a mysterious flier arrived in the mailboxes of Republican voters. It implied they could be attacked at polling booths by black militants. It showed photos of club-wielding Black Panthers, Louis Farrakhan, members of ACORN and President Obama."[251] It turns out that the FJA paid a consultant to produce the ads under the front group "Conservative Voters' Coalition." The chair of Florida's Legislative Black Caucus called on FJA to "clean house." "It is obvious from the mailer," he continued, "that FJA, who created, approved, and funded this mailer has **racially biased proclivities** that are manifested in their thinking and actions."[252] FJA's executive director, general counsel and political director all admitted to their involvement.

- The U.S. Marshals Service in Baton Rouge arrested **William Sibley**, a high-profile Louisiana class action lawyer, based on a warrant from federal prosecutors in Houston. Prosecutors allege that Sibley was part of a **multimillion-dollar conspiracy to launder drug money** for international cocaine traffickers.[253]

- Justice was finally served on two Kentucky personal injury attorneys, **William Gallion** and **Shirley Cunningham, Jr.**, who were found guilty on all eight counts of wire fraud and one count of conspiracy to commit fraud after taking approximately 50 percent of a $200 million fen-phen litigation settlement. Federal Judge Danny Reeves sentenced Gallion to 25 years and Cunningham to 20 years in prison, also ordering them to pay $127.7 million in restitution to 421 former clients they defrauded and victimized. Judge Reeves said the two showed **"unmitigated greed."**[254]

- While we are feeding at the fen-phen trough, a federal appellate court upheld the conviction of personal injury lawyer **Robert Arledge**, who was sentenced to six years in prison for his role in allowing clients to make fen-phen related health claims even though they had no legitimate health problems caused by the diet drug.[255]

ANGELA EARNS HER WINGS

The angel of justice who exorcised Kentucky's fen-phen personal injury lawyer demons was **Angela Ford**, a solo attorney in Lexington. As the Courier-Journal reported, Ford took on "**powerful interests,** virtually by herself" for five years and **"exposed one of the biggest scandals in U.S. history"**[256] – the theft by lawyers of tens of millions of dollars of their clients' settlement funds. Every time a crooked personal injury lawyer goes to jail, Angela gets her wings.

- Houston personal-injury lawyer **Warren Hoeffner** is facing 14 felony counts of conspiracy, fraud and money laundering for allegedly **paying $3 million in bribes and kickbacks to two insurance company employees** in the form of cash, cars, trips, spa treatments, and "gentleman's entertainment" in an effort to secure a $34 million settlement from the insurer.[257]

- Mississippi lawyer **Joey Langston**, who represented Dickie Scruggs, was sentenced to three years in federal prison and fined $250,000 after pleading guilty to **conspiring to influence a judge** in the judicial bribery case against Scruggs. Federal Judge Michael Mills told Langston, "The damage you have done to the rule of law probably is the real tragedy in this case."[258]

- It's more trouble for **The Milberg Firm**, the successor to Milberg Weiss, which had earlier admitted to paying $11.3 million in kickbacks to class action plaintiffs in more than 175 lawsuits filed from 1979 through 2005.[259] In March, the developer of Indian-owned casinos sued the firm and three lawyers including former partner **William Lerach** for **extorting an $18 million settlement** in a 2000 securities class action. The suit alleges that **John Torkelsen**, a damages expert hired by the firm, supplied inflated damage estimates that prompted the settlement. Torkelsen testified that he received a flat fee of $35,000 for his work, when in fact the firm paid him a contingency fee based on the successful results of the case.[260] Torkelsen and his firm earned more than $145,000 for their services. Torkelsen has been sentenced to 18 months in prison after pleading guilty to lying to a federal judge in 1999 about how he was paid.[261]

- The Illinois Supreme Court disbarred six lawyers this year. Most notable was **L. Thomas Lakin**, a prominent Illinois personal injury lawyer who founded Madison County's Lakin Law Firm. Lakin was **disbarred after pleading guilty** to possession with intent to distribute cocaine, distributing cocaine to a person under 21 years of age, and maintaining a drug house. Prosecutors alleged that Lakin held cocaine fueled sex parties at his home with minors. As part of the plea agreement in which Lakin will serve six years, prosecutors dropped charges related to allegations that he had transported a boy across state lines to California for sexual purposes.[262] The Lakin Law Firm was one of the drivers of Madison County's Judicial Hellhole reputation. In fact, the firm subpoenaed ATRA in a case it had nothing to do with as retaliation for holding a legal reform news conference on the steps of the Madison County Courthouse in Edwardsville in 2003.[263]

Points of Light

There are five ways to douse the flames in Judicial Hellholes and to keep jurisdictions from developing an out-of-balance legal climate:

1. **Constructive media attention can encourage change;**
2. **Trial court judges can engage in self-correction;**
3. **Appellate courts can overturn improper lower court decisions and confine future judicial malfeasance;**
4. **Legislatures can enact statutory reforms; and**
5. **Voters can reject lawsuit-friendly judges or enact ballot referenda to address particular problems.**

In its "Points of Light" section, this report highlights jurisdictions where judges, legislators, the electorate and the media intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the desultory depths of a Hellhole or otherwise keep itself from sinking to those depths in the first place.

WEST VIRGINIA TAKES FIRST STEP TO REIN IN WILD COURT SYSTEM

A significant factor in West Virginia's status as a Judicial Hellhole is its unique lack of appellate review. The state lacks both an intermediate appellate court and a guaranteed right to appeal. The result is that civil defendants dragged into West Virginia courts are often hit with eye-popping verdicts and questionable legal rulings, but can be left with no access to appellate review.

Delivering on a promise made in his 2009 State-of-the-State address,[264] Gov. Joe Manchin signed an Executive Order in April establishing an Independent Commission on Judicial Reform to consider "broad systematic reforms," including establishment of an intermediate appellate court.[265] Retired Justice Sandra Day O'Connor served as the Honorary Chairwoman of the nine-member commission, chaired by Carte Goodwin, former general counsel for Gov. Manchin.[266] As the *State Journal* editorial page wrote, "It is a good first step."[267]

In mid-November, the independent commission issued its final report. It urged the legislature to establish an intermediate appellate court and provide parties with a right to appeal, recommendations that are strongly supported by ATRA.[268]

The commissioners deserve a great deal of credit for the thoughtful roadmap they have provided to West Virginia policymakers. Economic growth and job creation have been stymied in the Mountain State because of its courts' reputation among business leaders. Fearing unfair trial court decisions, and frustrated without a guaranteed right to appeal those decisions, too many businesses and companies leave the state or choose to avoid it altogether in the first place. West Virginia trial judges know that there is a high probability that their cases, however extreme, will not be challenged on appeal. This creates the wrong incentives for fair and impartial decision making.

An intermediate appellate court would ease the burden on the Supreme Court of Appeals, freeing the high court to continue hearing a discretionary docket focused on important or novel legal issues. Such a court could also pay for itself within a matter of years as employers nationwide become more confident in establishing themselves in West Virginia, and the state's economy and tax revenues steadily grow.

The hard work of gaining support for and implementing the commission's recommendations lies ahead.[269] Gov. Manchin deserves much credit for empowering the commission to study such important issues, and ATRA urges him to make establishment

of an intermediate appeals court a top priority. The legislature must also take action to implement the commission's recommendations.

COURTS HOLD THE LINE ON RISING DAMAGES FOR EMOTIONAL HARM

Damage awards for emotional harm, which include pain and suffering, are highly subjective and inherently unpredictable. Legal scholars have long recognized that putting a "monetary value on the unpleasant emotional characteristics of experience is to function without any intelligible guiding premise."[270] "[J]uries are left with nothing but their consciences to guide them."[271] Plaintiffs' lawyers understand these dynamics and suggest that juries award extraordinarily large amounts for pain and suffering. After a substantial rise in the size and availability of such awards, a "Point of Light" shone in several jurisdictions this year when courts placed reasonable limits on further expansion.

Huge pain and suffering awards are of fairly recent vintage.[272] Historically, pain and suffering damages were modest in amount and often had a close relationship to a plaintiff's actual pecuniary loss, such as medical expenses.[273] That is not necessarily so today. In recent years, a confluence of factors has led to a significant rise in the size of pain and suffering awards, creating the need for statutory upper limits to guard against excessive and unpredictable outlier awards.[274] Such awards may occur when juries are improperly influenced by sympathy for the plaintiff, bias against a business that is considered a deep-pocket defendant, or a desire to punish the defendant rather than compensate the plaintiff.[275]

The size of pain and suffering awards took its first leap after World War II, as plaintiffs' lawyers began a campaign to increase such awards.[276] In inflation-adjusted terms, the average award grew from $38,000 in the 1940s and 1950s to $48,000 in the 1960s.[277] Between the 1960s to the 1980s, pain and suffering awards in wrongful-death cases grew 300 percent.[278] Eventually, pain and suffering awards became the most substantial part of recovery in personal-injury lawsuits.[279]

In recent years, pain and suffering awards have continued to skyrocket. Between 1994 and 2000, jury awards in personal injury cases grew by an alarming 176 percent.[280] From 1994 to 2001, average jury awards rose from $187,000 to $323,000 in automobile cases, and from $1.14 million to $3.9 million in medical-malpractice cases.[281] The bulk of this rise can be attributed to pain and suffering awards. For instance, one study found that pain and suffering awards accounted for 60 to 75 percent of jury verdicts between 1990 and 2000.[282] Another study reports that pain and suffering totals account for more than half of all tort damages.[283] As the Honorable Paul Niemeyer of the United States Court of Appeals for the Fourth Circuit has recognized, "money for pain and suffering … provides the grist for the mill of our tort industry."[284]

As one Texas lawmaker has reported, the average pain and suffering award in 1989 was $319,000; just 10 years later it was $1,379,000.[285] This rise may be due, at least in part, to increasing statutory and constitutional restrictions on punitive damage awards, which may lead lawyers to seek bolstered alternative forms of recovery.[286]

In 2009 court rulings in Maryland, New Jersey, Wisconsin, Vermont, California, and the U.S. Supreme Court addressed the issue from a variety of angles by faithfully applying statutory limits on noneconomic damage awards, rejecting bias leading to inflated awards, prohibiting new forms of emotional-harm damages, and requiring proof of harm. Stay tuned. As of this writing, ATRA is closely watching important cases challenging limits on noneconomic damages pending in Mississippi, Illinois, and another in Maryland.[287]

MARYLAND COURT OF APPEALS FINDS THAT THE STATE'S STATUTORY LIMIT APPLIES TO ALL CLAIMS

Some inventive plaintiffs' lawyers have sought to evade statutory limits on noneconomic damages, which was their goal in a case decided by Maryland's highest court in July 2009. It was another lead paint case, alleging that a child was injured due to exposure in an apartment. But rather than file a claim for negligence against the landlord or product liability against the manufacturer, the plaintiffs filed a claim under the state's Consumer Protection Act alleging that the landlord, by rendering the apartment, implicitly represented that it was safe to live in, but it was not. They received a $2.3 million verdict, which the trial court reduced to $515,000 consistent with Maryland's statutory maximum for noneconomic damages in place at the time.[288] The plaintiffs appealed, arguing that the statutory limit applied only to personal injury actions stemming from negligence, not statutory claims such as violations of consumer protection law.

The court ruled that the plaintiff's CPA claim was, in fact, a personal injury action, as it sought damages for injuries related to exposure to lead paint. The court agreed with ATRA's position that any lawsuit claiming a personal injury, whether it alleges statutory, constitutional, or common law violations, is subject to the noneconomic damage limit. The court also summarily rejected the plaintiffs' claim that the noneconomic damages limit was an unconstitutional "special law" as having "no merit."[289]

NEW JERSEY SUPREME COURT ADDRESSES PREJUDICIAL TRIAL PRACTICES

In 2009 the New Jersey Supreme Court considered and reversed the highest noneconomic damages award in the state's history, a $70 million award (including $50 million in noneconomic damages). *Pellicer v. St. Barnabas Hospital* involved a medical malpractice allegation stemming from a serious injury to an infant who underwent spinal surgery. In sending the case back for a new trial and, in an unusual step, directing that the matter be assigned to a different

trial judge, the New Jersey Supreme Court found extraordinary evidence of bias on the bench against the defendants.[290]

What did Essex County Judge Francine Schott do wrong? According to the New Jersey Supreme Court, Judge Schott developed a chip on her shoulder against the remaining defendants after the hospital, which settled, had initially failed to disclose evidence that led to a mistrial. In the second trial the judge placed expediency over justice, stating "this case is going to take a lot less time this time around."[291] As a result, the judge permitted potential jurors to discuss their biases in open court. These statements were overwhelmingly against doctors, hospitals and other health care professionals, and included a litany of complaints and personal stories of grief related to poor care at the hospital at issue.[292] The New Jersey Supreme Court recognized that this procedure polluted the jury before it even began to hear the evidence.

Errors pervaded a trial in which many of Judge Schott's rulings "permitted the plaintiffs to shift the jury's focus from a fair evaluation of the evidence to pursue instead a course designed to inflame the jury, appealing repeatedly to inappropriate and irrelevant considerations that had no place in the courtroom."[293] In reversing the decision, the court found that "treatment of the parties was not even-handed, with defendants, but not plaintiffs, being limited in their proofs or criticized for their words."[294] It concluded that a review of the complete record "engenders the distinct impression that defendants were not accorded justice."[295]

The New Jersey Supreme Court also found that the trial court's "conceded outrage about the events that led to the declaration of the mistrial translated into an uneven exercise of discretion all to the detriment of defendants, in spite of the fact that they had not played any role in the events that caused the mistrial."[296] Taken together, the court found that while each of Judge Schott's rulings standing alone might not require a new trial, the cumulative result called for relief.

> ***"…[T]he court's exclusion of proffered expert evidence about the cost of an annuity that would fully fund the life care plan; the failure to intercede to stop the insinuations that these defendants, rather than the hospital, had lost or destroyed evidence; the refusal to address the disparagement of the expert's national origin, education, and experience; the admission of wholly irrelevant evidence relating to the adult plaintiff's emotional distress; the* sua sponte *criticism of defendants' but not plaintiffs' counsel's common parlance reference to the deity; and the rejection of appropriate limiting or curative instructions and jury charges, taken together, satisfy the test for cumulative error and call for relief."[297]***
>
> —New Jersey Supreme Court

The *Pellicer* decision also included a helpful contribution to all future cases of excessive verdicts in New Jersey. The New Jersey Supreme Court instructed that "when the magnitude of the verdict is 'historic' or enormous, a careful and searching review by an appellate court is essential to ensure that the parties have been treated justly and that the trial court's view of the verdict is not itself obscured by compassion or sympathy."[298]

VERMONT AND CALIFORNIA COURTS REJECT NEW EMOTIONAL HARM DAMAGES IN PET CASES

The Vermont Supreme Court and a California appellate court this year joined the chorus of courts rejecting efforts by personal injury lawyers and animal rights activists to include new emotional harm damages in lawsuits over pets.[299] As the courts concluded, new liability for emotional loss based on injuries to pets is unfounded in law and can have significant adverse consequences.

VERMONT

In May 2009 the state's high court acknowledged "that pets have special characteristics,"[300] but forcefully rejected arguments that these characteristics somehow create a "modern regard for pets as family members."[301] The court found it would be improper to create a wrongful death action for companion animals similar to "what the Wrongful Death Act does for the death of immediate relatives."[302]

> ***"[There is no] compelling reason why, as a matter of public policy, the law should offer broader compensation for the loss of a pet than would be available for the loss of a friend, relative, work animal, heirloom, or memento – all of which can be prized beyond measure, but for which this state's law does not recognize recovery for sentimental loss."[303]***
>
> —Vermont Supreme Court

CALIFORNIA

In July an intermediate appellate court in California rejected emotional harm damages in veterinary malpractice claims under all theories, including negligent infliction of emotional distress, loss of companionship, and in calculating value to the owner.[304] In reaching its conclusion, the court recognized that "the love and loyalty a [pet] provides creates a strong emotional bond between an owner and his or her" pet.[305] "Regardless of how foreseeable a pet owner's emotional distress may be in losing a beloved animal, we discern no basis in policy or reason to impose a duty on a veterinarian to avoid causing emotional distress to the owner of the animal being treated."[306]

Claims for emotional harm damages in pet-related cases have been almost universally rejected, historically and in recent times, in most every state where they have been considered. In the past 15 years, state supreme and appellate courts in 25 states have issued similar rulings.[307]

The claims filed have included a variety of circumstances and targeted groomers, boarding kennels, police officers for actions taken in the line of duty, and local dog pounds. They also have been leveled against drivers unable to avoid pets running into roads, farmers protecting livestock from menacing dogs, and pet owners when their pets scuffle with others' pets, among many other situations.

Pet lovers should hope these efforts continue to fail. A few owners may hit the litigation lottery, but the costs of pet services, particularly veterinary care, would be much higher if liability is expanded. Just look at what emotional harm damages have done for the human health care system!

U.S. SUPREME COURT RESTATES IMPORTANCE OF REQUIRING PLAINTIFFS TO SHOW FEAR IS 'GENUINE AND SERIOUS' IN 'FEATURE OF DISEASE' CLAIMS

This year, the U.S. Supreme Court ruled in an important case regarding the ability to sue not for present injuries, but for fear of developing a disease in the future. Not only did the high court reject a $5 million verdict and uphold traditional principles of tort law, in an unusual move it summarily ruled without holding oral argument.

The case, *CSX Transportation v. Hensley*, involved a federal statute known as the Federal Employers' Liability Act (FELA). While state tort law ordinarily governs personal injury actions, in the case of railroad workers the misleadingly named FELA governs. For this reason, U.S. Supreme Court rulings on FELA, while not binding on state courts deciding personal injury actions outside of the railroad context, send a highly persuasive message in other cases.

In this case the plaintiff, Thurston Hensley, a former CSX railroad worker, alleged that occupational exposure to asbestos had caused him to develop asbestosis, a noncancerous scarring of the lungs that may become impairing. At trial Hensley sought pain and suffering damages that included fear of developing lung cancer. The U.S. Supreme Court had addressed this issue in 2003 in *Norfolk & Western Railway v. Ayers*, holding that a plaintiff suffering from asbestosis may seek compensation under FELA for fear of cancer, but only if the plaintiff proves that his alleged fear is "genuine and serious."[308] A Tennessee trial court, however, refused to submit jury instructions proposed by CSX that would have required jurors to find Hensley's alleged fear of cancer to be genuine and serious. The jury deliberated only two hours before finding for Hensley and awarding him damages. The Tennessee Court of Appeals affirmed the decision.

The U.S. Supreme Court concluded that the Tennessee court's ruling "conflicts with *Ayers*" and that "the trial court should have given the substance of the requested instructions." It explained that the jury system is premised on the idea that "rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions." The court recognized the possibility that a jury could be moved by emotion to award damages "based on slight evidence of a plaintiff's fear of contracting cancer" as "a powerful reason to instruct the jury on the proper legal standard."

The Hensley ruling preserves the "delicate balance" that was struck in *Ayers*. The high court appreciated the practical problems that would flow from allowing unbridled fear of cancer damages. This "genuine and serious" requirement was viewed by the court as an important safeguard. The decision will help protect railroad defendants and the courts from a potential flood of flimsy or frivolous lawsuits. Most significantly, the court's opinion sends an important signal to state courts about the need to promote sound public policy in "fear of disease" cases. Courts must be careful to prevent situations that could lead to a flood of less important cases that would swamp the courts, delay recoveries for claimants with serious conditions, and impose an unreasonable burden on defendants.

OTHER POINTS OF LIGHT

- **Arizona Addresses Medical Liability.** Each branch of the Arizona government deserves praise for addressing rising health care costs by controlling medical malpractice lawsuits. In March 2009 the Arizona Supreme Court upheld a challenge to a 2005 law establishing minimum qualifications for expert witnesses who testify in medical liability cases.[309] The court rejected arguments from the plaintiffs' bar that only the courts could establish such rules, and that elected members of the legislature lacked authority to do so. Two months later Arizona Gov. Jan Brewer signed into law a bill that raises the burden of proof required in negligence actions against providers of emergency medical care.[310] The law reflects the fact that nurses, physicians and other health care providers who work in emergency rooms risk particularly high liability because they do not have established relationships with patients, the patient's medical records may not be readily available, and the circumstances may render the patient unable to communicate. The new law requires a plaintiff to show that the emergency service provider violated the duty of care and caused injury by "clear and convincing evidence," rather than the ordinary "preponderance of the evidence" standard. Former Gov. Janet Napolitano had previously vetoed such legislation. Legislators are hopeful that the new law, which took effect on September 30, will encourage prospective emergency room doctors to practice in Arizona.

- **Oklahoma Enacts Comprehensive Reform.** The Oklahoma legislature passed the most comprehensive lawsuit reform bill of any state in 2009.[311] The package has earned Oklahoma State Rep. Dan Sullivan, Senate President Glenn Coffee, and The State Chamber of Oklahoma ATRA's first annual "Gold Medal for the Best State Civil Justice Legislation" in recognition of their tireless efforts. The new law, which went into effect on November 1, 2009, addresses the following areas:

  - ***Appeal Bonds:*** Protects the right to appeal by limiting to $25 million the amount a defendant can be required to pay to secure the right to appeal. Eliminates the bonding requirement to appeal a punitive damages judgment.

  - ***Asbestos/Silicosis:*** Brings Oklahoma law into conformity with many other states by providing that a lawsuit should only be brought if an individual develops a physical impairment due to exposure.

  - ***Certificate of Merit for Professional Negligence:*** Requires an affidavit of merit from a qualified expert within 90 days of a lawsuit being filed.

  - ***Class Actions:*** Defines who can be a member of a class and sets a procedure for the court to determine class attorneys and fees to be paid. Allows the court to appoint an independent attorney to represent the class in any dispute over attorneys' fees. Provides that in coupon settlements, the attorney shall receive fee in coupons.

  - ***Forum Shopping:*** Allows the court to move a case that would be more properly heard somewhere else in the state.

  - ***Frivolous Lawsuits:*** Redefines what a "frivolous lawsuit" is, so a judge can dismiss it earlier in the process.

  - ***Joint & Several Liability:*** Provides that unless a defendant is more than half at fault, the defendant will only be charged its proportionate share of the injury award.

  - ***Junk Science & Expert Witnesses:*** Adopts Federal Rules to strengthen standards for admitting expert testimony.

  - ***Noneconomic Damages:*** Provides that in any civil action arising from bodily injury, the plaintiff may receive his or her full medical expenses plus an amount of compensation for pain and suffering and other intangible harm not to exceed $400,000, except under certain circumstances.

  - ***Obesity Litigation:*** Provides liability protection for purveyors of food for claims of obesity and obesity-related illnesses.

  - ***Prejudgment Interest:*** Provides that prejudgment interest does not begin to accrue until two years after the beginning of a lawsuit; reduces the interest rate charged.

- ***Product Liability:*** Provides that a manufacturer shall not be liable if the product is inherently unsafe, known to be unsafe by the ordinary consumer, and the consumer was adequately warned of the risk posed by the product.

- ***Summary Judgment:*** Adopts the Federal Rules dealing with summary judgment, which will allow judges to dismiss frivolous lawsuits earlier in the process.

- ***Volunteer Liability:*** Permits doctors and other health practitioners from other states to provide care during a declared emergency or disaster without fear of sanction.

- ***School District Liability:*** Protects the ability of school employees to take reasonable measures to control or discipline students without fear of liability.

Unfortunately, Gov. Brad Henry vetoed a separate bill that would have required state agencies to provide open and competitive public bidding when hiring private attorneys.[312]

- **Ohio Supreme Court Protects Finality of Written Consumer Contracts.** In July the Ohio Supreme Court unanimously applied a rule that ensures stability, predictability, and enforceability of consumer contracts. In *Williams v. Spitzer AutoWorld Canton, LLC*, the court held that a final written contract cannot be contradicted by claims of oral or other representations in actions brought under the Ohio Consumer Sales Practices Act (CSPA).[313] Known as the "parole evidence rule," this legal doctrine ensures that written contracts mean what they say. The plaintiff in that case claimed he was entitled to a trade-in allowance on a car in excess of that stated in the written purchase agreement.

- **Texas Legislature Preserves Gains.** The organized plaintiffs' bar and its allies have taken an increasingly aggressive posture in state legislatures to expand liability and roll back tort reforms in an effort to grow their litigation industry. Nowhere was that more evident than in Texas in 2009, as lawyers spent $9 million pushing some 900 bills and working to elect pro-lawsuit legislators.[314]

Among other things, the lawyers' proposed legislation would have reversed hard-earned progress in stemming out-of-control asbestos cases and medical liability. For instance, before the state enacted medical malpractice reforms in 2003, more than 150 of the state's 254 counties had no obstetricians and more than 120 had no pediatrician.[315] Twenty-four counties in the Rio Grande Valley had no primary-care doctors at all.[316] Only four medical malpractice insures continued to do business in the state, down from 17 five years earlier.[317] As a result of the 2003 reforms, Texas doctors saw their insurance rates drop an average of 27 percent and the number of doctors applying to practice in the Lone Star State leaped 57 percent.[318] Since the reforms passed, nearly 15,000 doctors either returned from exile or decided to practice in Texas for the first time, and there are now many more obstetricians, emergency room doctors, and specialists in critical practice areas.[319] Some attribute the 2003 tort reform package, which went beyond medical liability, to creating nearly a half-million jobs in Texas.[320] And Texas created more new jobs in 2008 than the other 49 states combined.[321]

Ultimately the legislature opted to reject the litigation industry's bills and instead continue moving forward, increasing access to healthcare and making the state a good place to do business.

Fueling The Fire

This report annually highlights a number of troubling trends that fuel the flames of injustice in Judicial Hellholes and otherwise damage the reputations of state judiciaries.

'CIVIL DEATH PENALTY' ABUSE: HOW SOME JUDGES ALLOW PLAINTIFFS TO PREVAIL REGARDLESS OF THE MERITS

The civil justice system's ultimate sanction is to strike a party's pleadings, which nullifies any defense a party has to a lawsuit, regardless of the merits of the underlying claims. The defendant is liable by fiat. No trial. No evidence. We call this sanction the "civil death penalty" because it takes away the constitutional right to defend oneself. In the past few years, civil death penalty abuse has become an increasingly disturbing trend in Judicial Hellholes.

Until recently the civil death penalty has been the sanction of last resort, reserved as a response to only the most egregious conduct where no other sanction can work. An example is where a party maliciously destroys key evidence that deprives the other side of its right to a trial on the merits. But in recent years, personal-injury attorneys have sought to use this sanction as a litigation tactic against corporate defendants. Here's the personal injury lawyers civil death penalty playbook:

(1) Incite discovery disputes and accuse defendants of failing to comply with discovery requests and court orders;
(2) Repeat this step several times;
(3) When the judge is sufficiently irritated with the defendants, go for the knock-out punch, arguing that the defendant's repeated attempts to "obstruct justice" show incurable bad faith for which no sanction short of the civil death penalty will do.

In Judicial Hellholes judges are increasingly willing to threaten or hit corporate defendants with the death penalty sanction, even when the alleged misconduct was not committed in bad faith and the plaintiff was not prejudiced in any way.

Cases in Florida and Nevada illustrate this "litigation by sanction" trend. Judges handed down death penalty sanctions in these cases even though the courts provided no support for any findings that the defendants' failure to disclose the information or comply with the discovery order was willful or malicious and/or that the plaintiffs were prejudiced in any way. Yet, defendants were deemed "guilty."

SOUTH FLORIDA

A Broward County, Florida trial judge issued death penalty sanctions against E.I. DuPont De Nemours (DuPont), striking all of DuPont's defenses in a case alleging that a formulation of DuPont's fungicide Benlate™ harmed part of the shrimp population in Ecuador in the early 1990s. Plaintiffs sought the civil death penalty, claiming that they learned only this year that "a new formulation" of Benlate had been shipped to Ecuador in the early 1990s and that this new formulation had not been separately registered with the U.S. Environmental Protection Agency (EPA).

The judge bought their argument, repeating that the civil death penalty was needed because DuPont hid this information, did not distinguish "new" Benlate in its defenses, and argued that Benlate was preempted from the state tort suits under federal fungicide laws.

The lawyers' facts and characterizations, however, were wrong. There was no hiding of anything. Plaintiffs have long been in possession of documents about minor adjustments made to Benlate in 1991; plaintiffs' experts even submitted materials to the court referring to the new formulation in 2005. Furthermore, EPA protocol said that new Benlate need not be separately registered because it was only for export. Most important, the differences were not relevant to the case. New Benlate added two nontoxic, inert ingredients. The active ingredients remained the same. The plaintiffs had not alleged that these differences are relevant to shrimp deaths.

NEVADA

A Nevada trial court recently issued death penalty sanctions against Goodyear Tire & Rubber Co., resulting in a $30 million judgment against the company.[322] The underlying case arose from a fatal automobile accident allegedly caused by a defective tire. The trial judge imposed the extreme sanction for a failure to comply with a discovery request despite no finding of willful or malicious conduct on the part of the defendant, or that the discovery issue involved prejudiced the plaintiffs' case.

During the Nevada Supreme Court's hearing on the case in June 2009, Goodyear's attorney Dan Polsenberg explained the

troubling trend and "phenomena" of judges issuing extreme and unjust sanctions. "Judges are… changing the rules of the game," Polsenberg stated. "Courts are enforcing rules differently from how they used to and differently from each other. And what they are doing is coming in and [issuing] extreme sanctions just for punishment and just for deterrence rather than to actually address willfulness or prejudice."[323]

To stop civil death penalty abuse, courts should set strict, fair guidelines for when the sanction of striking the pleadings can be used. There should be specific findings of (1) intentional, malicious conduct; (2) prejudice on a material part of the case; and (3) the inability of lesser sanctions to remedy the problem. In addition, courts should allow interlocutory appeals of civil death penalty sanctions.

Litigation by sanction is an ill-conceived tactic that courts should abhor because it takes a case away from a jury. Unless a plaintiff is deprived of his or her right to a trial on the merits, a jury should be able to sort through the evidence and reach a verdict – on the merits.

ALLOWING TRESPASSERS TO SUE

As if uneven justice in Judicial Hellholes, plaintiffs' attorneys plotting and lobbying to create expansive new ways to sue, and a global economic recession weren't enough to cause civil defendants' concern, many may soon have to worry about simply for owning property. This year the American Law Institute (ALI), a highly influential body comprising some of the nation's premiere attorneys and judges, issued a report, called a "Restatement," proposing to radically transform the traditional duties owed by property owners to persons who come on their land.[324] If adopted by state jurisdictions, it could mean a wave of new litigation, particularly by trespassers who then might be able to sue property owners successfully.

The new ALI Restatement adopts a unitary duty-of-care standard, meaning that all landowners would owe a duty of "reasonable care" to anyone who comes on their land, whether they be a business invitee or an unannounced and unwelcome trespasser. The only exception to this broad new duty rule would be for a "flagrant trespasser," which is an entirely new classification in the law.[325] A flagrant trespasser appears to mean someone who comes on another's property for an evil or malicious motive, such as committing a crime; however, the precise meaning is left undefined and up to individual states to determine based on their "different values."[326]

Traditionally, the rule for property owner liability is a clearly defined stepladder of duty. An invitee (e.g., customer) is at the top and owed the highest duty of care by the property owner to protect against any known or reasonably knowable harms. The next step down is a licensee, whom the property owner owes a duty to protect against known hazards. The lowest duty is owed to trespassers, and property owners only owe trespassers a duty to refrain from willful or wanton conduct in reckless disregard of another. There is, at present, no generally accepted duty to protect or guard against trespassers, except in narrow and well-defined areas such as accomodations for child trespassers and frequent trespassers on a defined area of the property.

The new Restatement obliterates these clear duty categories and establishes an expansive new duty of reasonable care to ordinary trespassers. This fundamental change, if adopted by state courts, is likely to wreak havoc on litigation and liability exposure, could drastically increase the cost of homeowners' and liability insurance, and result in numerous other costs and adverse consequences. For example, the change in law would impose additional burdens on property owners to take precautionary measures to both deter trespassers from coming on their land and, when they do trespass, to respond and, in effect, rescue them. This is certain to increase litigation, especially where courts apply principles of comparative negligence to determine whether any level of fault – even one percent – could be assigned to a property owner.

Further, the novel status-based distinction for flagrant trespassers would be intentionally left for states to define through litigation. Thus rather than adding clarity to the law, the Restatement contemplates a blank slate that is almost certain to result in unfair surprises for many property owners.

Finally, the Restatement would leave open the door for courts to award emotional harm damages for anyone injured on another's property. This would not only increase the costs of liability insurance across the board, but could also prove catastrophic to businesses and homeowners. Imagine if a trespasser sneaked onto someone's property and a tree limb fell and injured him, leaving the property owner liable for his medical expenses and alleged mental anguish. How could that possibly be considered just?

Overall, the new Restatement proposes fundamental changes that would likely have a substantial adverse impact on property owners. It is also an effort that muddles traditionally clear, status-based liability rules, and replaces them with a novel and purposefully vague status-based classification, which would incite litigation. While the ALI has been a driving force in many sound and important legal changes, this represents one proposal on the horizon that courts should flatly reject and all property owners should strenuously oppose.

LOOSENING CAUSATION AND EXPERT TESTIMONY STANDARDS

The effort of the ALI to formulate a Restatement of Torts, Third, Liability for Physical and Emotional Harm, in general, has been a helpful and useful project. But in addition to suggesting expanded liability for property owners, dangerous commentary in this new Restatement may also lead judges in Judicial Hellholes to loosen standards related to the need to show causation and the soundness of expert testimony.

The new Restatement for Physical and Emotional Harm sets forth the uncontroversial principle that a plaintiff has the burden of proof in showing that a defendant's tortious conduct was the cause of the plaintiff's harm.[327] It then strays from the rule of law, providing that when the plaintiff claims that multiple parties exposed him to a risk of physical harm but he cannot reasonably show which one of them caused the harm, the burden of proof shifts to the defendants.[328] This rule applies even if the plaintiff has not shown that each defendant has been negligent. This is an unusual incursion on a fundamental of evidence law: the plaintiff should have the burden of proof.

In addition to weakening causation requirements, the ALI also deals a blow to standards for ensuring reliable scientific and technical evidence in litigation. The U.S. Supreme Court, in its well known *Daubert* decision, has charged judges with serving as gatekeepers to ensure that only reliable expert testimony enters the courtroom. Although *Daubert* is established, well-reasoned and respected law in most federal courts and many state courts today, the new Restatement minimizes the *Daubert* line of cases by referring to them as "some courts" making decisions in "[a] few celebrated cases."[329] In so doing, the comment sidesteps *Daubert*'s judicial gate-keeping function, claiming that "[c]ausation is a question of fact normally left to the jury, unless reasonable minds cannot differ."[330] Certainly, causation is a question for the jury, but only after the judge, as a gatekeeper, has found the proposed expert testimony both relevant and reliable. By glossing over a substantial body of procedural law, the ALI's new Restatement may confuse courts about the current state of the law governing admission of expert witness testimony.

The ALI commentary also suggests that, in at least two instances, standards for admission of scientific evidence should be relaxed. It observes that epidemiologic evidence is sometimes unavailable, costly and time consuming.[331] For this reason it favors an approach that forgives the lack of epidemiologic evidence on grounds that "some plaintiffs may be forced to litigate long before epidemiologic research is available."[332] Scientists, however, generally consider epidemiology "the best evidence of general causation in a toxic tort case."[333] Although there may be reasons why such evidence has not been developed, unavailability is an insufficient basis on which to do away with legitimate criteria and hold a defendant liable for a harm it did not cause. In addition, the commentary suggests that general causation can be excused so long as there is a "reasonable explanation for the lack of general-causation evidence."[334] Under this approach, plaintiffs would be allowed, in fact encouraged, to bring lawsuits prematurely against manufacturers without *any* sound scientific evidence that their products are capable of causing the alleged injuries or ailments.

In a similar draining of basic science, the comment states that occasionally "general and specific causation issues may merge into a single inquiry."[335] This is fundamentally incorrect. General causation addresses whether the agent is *capable* of causing harm; specific causation addresses whether the agent in fact *did* cause the harm to the individual at issue. Since each calls for a separate analysis, it would take more than the fabled illusionist Houdini to show how the two could harmoniously merge into one inquiry. In fact, cases after *Daubert* recognize general and specific causation as two distinct tests that must be separately considered. These courts require that a "[p]laintiff must first demonstrate general causation because without general causation, there can be no specific causation."[336] In other words, if a product or substance is incapable of causing a certain injury in anyone, it follows even more strongly that that product or substance could not have caused a specific injury to the plaintiff.[337]

If courts follow this comment, there will be more unsupported expert testimony and juries inundated with junk science. The danger is particularly acute in Judicial Hellholes, where judges may fail to serve as adequate gatekeepers.

NOT YOUR PRODUCT? GET SUED ANYWAY

There appears to be a new, troubling trend of plaintiffs' lawyers, looking for a "deep pocket," to sue manufacturers even when the plaintiff did not buy or use its product.

For example, as noted in this report's "Watch List" section on California, an outrageous, liability-expanding decision by an appellate court there can now hold brand-name manufacturers of prescription drugs liable for injuries caused by competing companies' generic products.[338] The California Supreme Court opted not to review this precedent-setting case, despite its dangerous public policy implications. The decision penalizes companies that spend billions on research and development for life-saving and quality-of-life improving drugs. This new liability may well discourage such innovation.

Another example comprises two companion cases recently decided by the Washington Supreme Court, in which it rejected the extension of liability for failure to warn of asbestos-related hazards in products made by others.[339] In the first case, the court held that a manufacturer may not be held liable for failure to warn of the dangers of asbestos exposure resulting from another manufacturer's insulation applied to its products. The court found that the duty to warn of the hazards of a product fall on those in the chain of distribution of the product, such as manufacturers, suppliers, or sellers,

but the court found no authority to extend the duty to warn to the manufacturer of another product.[340] In the second case, the court rejected failure-to-warn claims against pump and valve manufacturers relating to replacement packing and replacement gaskets made by others, concluding, "It makes no difference whether the manufacturer knew its products would be used in conjunction with asbestos insulation."[341] In both cases the court rejected plaintiffs' claims that the foreseeability of harm gave rise to a duty to protect against hazards posed by other company's products.

Plaintiffs' lawyers have also urged courts to extend traditional duties in cases that might be more "emotionally appealing," such as when a plaintiff may not have a viable defendant to sue. For example, the Maryland Court of Appeals recently rejected a claim against a drug manufacturer by a plaintiff who was struck by a driver experiencing a side effect of a medication.[342] The case alleged that the manufacturer's failure to warn of fatigue from taking the drug led the consumer of the drug to drive negligently, which in turn led to the car accident. Extending a duty to unconnected parties, as Maryland's high court explained, however, would "create an indeterminate class of potential plaintiffs."[343]

ANTI-PREEMPTION EFFORTS COULD THREATEN PUBLIC HEALTH AND SAFETY

Preemption – the legal doctrine recognizing that, in some instances, limits on state tort lawsuits are necessary to let federal regulators do their job – is under assault. The stakes are particularly high as more decisions regarding health and safety may be made in the future by Judicial Hellholes courts, manipulated by trial lawyers pursuing their self-interest, rather than by government scientists working in the public interest.

In May 2009, President Obama issued an "executive memorandum" to the heads of all federal departments instructing the agencies to avoid expressing an intent to preempt state law in their regulations.[344] It also requires regulators to identify, review, and potentially reverse, statements on preemption issued during the past decade.

The little noticed memorandum came at the urging of the plaintiffs' bar and its allies, which began an organized lobbying campaign to protect and expand their litigation industry even before the new president took office.[345]

In Congress, the American Association for Justice (AAJ), which represents the trial lawyers, has made a priority of overturning a near unanimous 2008 U.S. Supreme Court decision that properly reaffirmed the federal Food & Drug Administration (FDA), not state judges and lay juries, as the preeminent authority on the safety and effectiveness of certain life-saving medical devices.[346] Even the president of the American Bar Association (ABA), the organization that ostensibly represents *all* attorneys, jumped on the bandwagon, calling for legislation to overrule that 8-1 high court decision.[347] Concern among the ABA's 400,000 members has led association leadership to establish a task force to study federal agency preemption and make recommendations to the ABA House of Delegates. That the task force's membership includes only one representative of a regulated business has been a cause of continuing concern. But there is hope that, through the leadership of respected Professor Edward Sherman of Tulane Law School, who serves as chairman of the task force, a thoughtful and fair report will be produced.

The recent flurry of anti-preemption activity might lead one to conclude that this longstanding rule of law is suddenly the root of all evil. Federal preemption, however, is a very limited doctrine. It applies only where a federal agency charged with protecting the public has closely regulated or specifically approved an aspect of a product or service. Under the Supremacy Clause of the U.S. Constitution, federal laws may displace state legislative, regulatory or judicial decisions. Where preemption exists, the safety regulation put in place by the federal agency precludes a state tort claim that would conflict with or stand as an obstacle to achieving the goal of the federal law.

Government safety standards recognize the need to balance health and safety decisions when a product or a service comes with inherent dangers or necessary trade-offs. Agencies have independent government experts who spend years looking into a specific aspect of the product or service. The regulators broadly consider complex scientific, technical, and public policy issues. They balance the risks and benefits, as well as compare smaller risks to larger ones. Their goal in reaching decisions about the design, required warnings and other health and safety aspects is to provide the biggest benefit for the greatest number of people.

Without preemption, a lay judge and jury, even with the best intentions, can undo such well-reasoned decisions. Further scrutiny of federal regulations may be appropriate, but litigation is not the appropriate vehicle. A lawsuit does not look at the larger picture; it focuses only on a specific plaintiff's injury. The millions of people who may have benefited from a product or service are not in the courtroom, and are absent from the jury's consideration.

Moreover, the information upon which courtroom decisions are based is limited to the evidence and arguments presented by the opposing lawyers, and decisions can be swayed by a desire to help a sympathetic plaintiff. Experience has shown that such litigation may produce a multimillion-dollar award for that one person, but the change the defendant will then have to make to the product or service to avoid future liability may ultimately place the public at greater risk.

Proponents of product liability lawsuits often contend that federal regulations provide only "minimum standards" that may be exceeded by state law. But what constitutes a minimum standard is not always clear. In some cases, "strengthening" one aspect of a design creates new risks or decreases a product's overall safety. Including an additional warning may detract from warnings of more significant risks or discourage use of the product based on unreliable evidence. For instance, courts have dismissed lawsuits that antidepressant drugs should carry a stronger warning about the link between the drugs and suicidality in adults.[348] When such

warnings were required with respect to the risks for children, prescriptions declined and child suicide rates spiked, reversing a decade of progress.[349]

Given that automobile accidents are a bread-and-butter business for personal injury lawyers, it is unsurprising that they are also a preemption battleground. In the 1980s, the U.S. Supreme Court found that the National Highway Transportation Safety Administration's (NHTSA) decision not to require airbags precluded lawsuits seeking otherwise. That was because NHTSA found the airbag technology of the time posed an unacceptable risk of hurting or killing people, particularly "out-of-position" passengers such as small women and young children. In addition, NHTSA found that mandating airbags just as seatbelt usage was slowly gaining public acceptance could lead passengers to abandon seatbelts entirely.

Today, lawyers have new theories to sue auto manufacturers. They claim vehicles should exceed NHTSA's strengthened roof-crush standards, even though the agency had found that heavier roofs would render vehicles more prone to rollovers.[350] Lawyers would claim that manufacturers should cram four seatbelts in the backseat of a car, even as NHSTA cautions that requiring more seat belts reduces safety because cramped seating discourages the use of seatbelts by everyone.[351] Already, the personal injury bar has had some success. In April, at AAJ's urging,[352] NHTSA reversed its previous finding that its strengthened roof-crush resistance standards would be undermined by lawsuits.[353]

President Obama's memorandum may be utilized as another step toward the personal injury bar's collective goal of eliminating all regulatory preemption so that its members can have free rein over public safety. ATRA will closely watch such attempts, particularly when products that meet or exceed federal standards or are specifically approved by federal agencies are challenged as "defective" through lawsuits filed in Judicial Hellholes.

Addressing Problems In Hellholes

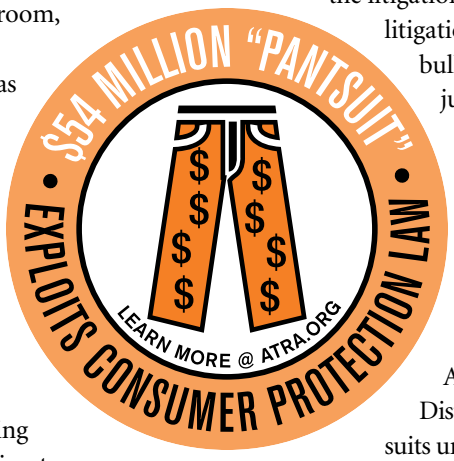
The Judicial Hellholes project seeks not only to identify the problems in Hellhole jurisdictions, but also to suggest ways in which to change the litigation environment so that these jurisdictions can shed the Hellhole label and restore fundamental fairness.

As this report shows, judges have it within their power to reach fair decisions by applying the law equally to both plaintiffs and defendants, or they can tilt the scales of justice in a manner that puts defendants at a distinct disadvantage. But when a jurisdiction continually shows a bias against civil defendants, allows blatant forum shopping, consistently construes the law to expand liability, refuses to reduce awards that are not based on the evidence and permits junk science in the courtroom, legislative intervention may be needed.

Below are a few areas in which legislators, as well as judges, can act to restore balance to the civil justice system.

STOP 'LITIGATION TOURISM.'

As the Judicial Hellholes report demonstrates, certain areas in a state may be perceived by plaintiffs' attorneys as an advantageous place to file lawsuits. As a result, plaintiffs' attorneys become the "travel agents" for the "litigation tourism" industry, filing claims in jurisdictions with little or no connection to their clients' claims. Reasonable venue reform would require a plaintiff's lawyer to file a case in the jurisdiction where the plaintiff lives, was injured, or where a defendant maintains a principal place of business. *Forum non conveniens*, a related concept, allows a court to refuse to hear a case if the case is more closely connected to another state, rather than in a different area of the same state.[354] *Forum non conveniens* reform would oust a case brought in one jurisdiction when the plaintiff lives elsewhere, the injury arose elsewhere and the facts of the case and witnesses are located elsewhere. By strengthening the rules governing venue and *forum non conveniens*, both legislatures and courts can ensure that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff.



RESTORE CONSEQUENCES FOR BRINGING FRIVOLOUS LAWSUITS.

Frivolous lawsuits often leave small businesses, including mom and pop stores, restaurants, schools, dry cleaners and hotels with thousands of dollars in legal costs. The tools to discourage frivolous lawsuits were dulled considerably when Federal Rule of Civil Procedure 11 was modified in 1993 and many states followed the federal judiciary's lead. These changes gave bottom-feeding members of the personal injury bar license to commit legal extortion. Plaintiffs' lawyers found they could bring frivolous claims without being penalized, thanks to a "safe harbor" provision that now allows them simply to withdraw their claim within 21 days if a judge finds fault with it, thus avoiding any sanction. Even if sanctioned, Rule 11 no longer requires the offending party to pay the litigation costs of the party burdened by frivolous litigation. Now with impunity, plaintiffs' lawyers can bully defendants into settlements for amounts just under defense costs. As officers of the court, personal-injury lawyers should be accountable to higher standards of basic fairness, and they should be sanctioned if they abuse the legal system with frivolous claims.

CONSUMER PROTECTION FOR ACTUAL CONSUMERS.

As the infamous $54 million "pantsuit" in the District of Columbia illustrated, private lawsuits under state consumer protection acts (CPAs) have strayed far from their originally intended purpose of providing a means for ordinary consumers who purchase a product based on the misrepresentation of a shady business to be reimbursed. Instead, such claims are now routinely generated by personal injury lawyers as a means to easy profits, or by interest groups as a means to achieve regulatory goals they cannot otherwise achieve through democratic legislative processes. Such claims are often brought on behalf of individuals who have never seen, heard or relied upon the representation at issue. Judges should apply commonsense interpretations to CPAs that recognize the fundamental requirements of private claims while discouraging forum shopping and extraterritorial application. If courts find that statutory language impedes sound public policy or fails to distinguish between public law and private claims, then state legislators should intervene. In other words,

consumer-fraud laws need to be rewritten so that they are helping consumers rather than attorneys.

The American Legislative Exchange Council (ALEC) has adopted model legislation, the Model Act on Private Enforcement of Consumer Protection Statutes, to address the problems associated with private actions under state CPAs. The model act restores fair, rational tort law requirements in private lawsuits under CPAs without interfering with the ability of a person who has suffered an actual financial loss to obtain recovery, or with the state's authority to quickly end unfair or deceptive practices.

PAIN AND SUFFERING AWARDS SHOULD COMPENSATE PLAINTIFFS, NOT PUNITIVELY STRIP DEFENDANTS OF CONSTITUTIONAL PROTECTIONS.

In recent years, there has been an explosion in the size of pain and suffering awards, and there is concern that such awards are being sought as a means to evade statutory and constitutional limits on excessive punitive damage awards.[355] Given the lack of standards in determining fair compensation for something as subjective as pain and suffering, it is imperative that judges properly instruct juries about the compensatory purpose these awards are meant to serve, making clear that they may not be used to punish a defendant or deter future bad conduct. When a jury reaches an extraordinary compensatory damages award, both trial and appellate level judges should closely review the decision to ensure that it was not inflated due to the consideration of inappropriate evidence. This would include evidence based on a defendant's "fault" as contrasted with plaintiff's harm, and also prejudicial evidence. ALEC has developed a model "Full and Fair Noneconomic Damages Act" that would preclude the improper use of "guilt" evidence and enhance meaningful judicial review of pain and suffering awards. Ohio became the first state to adopt such legislation in 2005.[356]

STRENGTHEN RULES TO PRESERVE SOUND SCIENCE.

Junk science pushed by pseudo "experts" has tainted tort litigation for decades. The more complex the science becomes, the more juries tend to be influenced by their personal likes and dislikes of expert witnesses, as opposed to the soundness of the testimony. In 1993, the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom.[357] The *Daubert* standard provides that, in determining reliability, the court must engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue."[358] There is evidence that following adoption of *Daubert*, judges more closely scrutinize the reliability of expert testimony and are more likely to hold pretrial hearings regarding admissibility of expert testimony.[359] But at least twenty states have not adopted anything close to the *Daubert* principles.[360] Even in courts in which *Daubert* governs, some judges are not effectively fulfilling their gatekeeper role.[361] By adopting *Daubert*, taking their gatekeeper roles seriously and seeking competent, independent scientific experts, judges can better control their courts and properly return to plaintiffs in tort cases the fundamental burden of proving causation.

ENSURE ACCESS TO HEALTH CARE WITH REASONABLE MEDICAL LIABILITY REFORMS.

The inequities and inefficiencies of the medical liability system have negatively affected the cost and quality of health care, as well as access to adequate health care for many Americans. Increasing medical liability claims have forced doctors to retire early, stop performing high-risk procedures or move out of states with unfair laws. Consequently, in some areas of the country, certain medical specialists simply are not available. According to the American Medical Association, there are a limited number of states nationwide that are not experiencing an access-to-health care crisis or related problems.[362] Things are likely to worsen with the costly practice of "defensive medicine" becoming ever more pervasive. As reported by *The National Law Journal* online November 20, 2008, a new survey of more than 800 doctors by the "Massachusetts Medical Society … concluded that so-called defensive medicine, or doctors' use of tests, procedures and referrals to avoid lawsuits, costs the state at least $1.4 billion" a year.[363]

Commonsense medical liability reforms can help stabilize health care systems. These include: 1) a reasonable limit on noneconomic damages; 2) a sliding scale for attorneys' contingency fees; 3) periodic payment of future costs; and 4) abolition of the collateral source rule, so that juries may consider compensation that a plaintiff receives from sources other than the defendant for his or her injury in determining damages. Medical liability reform can be achieved state-by-state, though congressional action certainly would be the most sweeping and effective vehicle for comprehensive reform. While some have alleged the need for "further study" of these issues, over 40 states have adopted variations of reforms. In that regard, it is clear that reasonable limits on noneconomic damages reduce the malpractice insurance for physicians and increase accessibility to health care.

PRIORITIZE THE CLAIMS OF THOSE WHO ARE TRULY SICK IN ASBESTOS AND SILICA CASES.

Forum shopping, mass consolidations, expedited trials, multiple punitive damages awards against defendants for the same conduct, and the overall lack of due process afforded to defendants were issues repeatedly raised relative to asbestos litigation by survey respondents in preparation of this report. The heart of the problem is that, according to studies, as much as 90 percent of new asbestos-related claims are filed by plaintiffs who have no impairment.[364] To date, Congress has been unable to reach the

consensus needed to enact a comprehensive solution. Increasingly, state courts are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Meanwhile, state legislatures are requiring that plaintiffs meet medical criteria to proceed with their claims so the truly sick can be compensated first, and so the right to bring a lawsuit later is preserved for those who have been exposed but are not sick now.

CONCLUSION.

The United States includes more than 3,000 counties and 30,000 incorporated cities. In the vast majority of these jurisdictions, diligent and impartial judges apply the law fairly. The 2009/2010 Judicial Hellholes report shines its harshest spotlight on a handful of areas that too often fall short of this standard. In these jurisdictions judges systematically make decisions that unfairly skew personal-injury litigation, often to the detriment of out-of-state defendants and in favor of local plaintiffs.

In issuing its annual Judicial Hellholes report, ATRF works to restore the scales of justice to a properly balanced, neutral position. In that spirit, the report exposes suspect legal rulings and inappropriate relationships of judges or other public officials. This report also highlights the abuses and excesses of some influential members of the trial bar in the Rogues' Gallery and notes several ways lawyers and judges are fueling the fire in Judicial Hellholes by seeking unwarranted and unprecedented expansions of liability. However, the focus of this report, as in years past, remains primarily on the judges who possess significant autonomy when it comes to administering cases before them and thus can create mischief under any system. Ultimately, it is the responsibility of judges to ensure that all civil litigants receive "Equal Justice Under Law."

Endnotes

[1] Asbestos for Lunch, *Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference* (May 9, 2002), *in* Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (transcript of comments of Richard Scruggs).

[2] AEI-Brookings Joint Center for Regulatory Studies, *Judicial Education Program: Critical Issues in Toxic Tort Litigation*, Washington, D.C., April 28-29, 2004.

[3] Paul Hampel, *Madison County: Where Asbestos Rules Court Here is a Magnet for Litigation*, St. Louis Post-Dispatch, Sept. 19, 2004, at A1.

[4] *See, e.g.*, Richard Neely, The Product Liability Mess: How Business Can be Rescued From the Politics of State Courts 4 (1998).

[5] *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002 at 1, 6.

[6] *See* Asbestos for Lunch, *supra* (transcript of comments of Richard Scruggs).

[7] *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).

[8] *Comer v. Murphy Oil USA*, No. 07-60756 (5th Cir. Oct. 16, 2009) (reversing dismissal of class action lawsuit brought by property owners along Mississippi's Gulf Coast alleging that the activities of energy companies had increased global warming and that the environmental conditions in the Gulf of Mexico that fostered the strengthening of Hurricane Katrina were "the direct result of" global warming).

[9] *See* Harvey M. Cohen, Letter, *Medical Liability Reform*, Sun Sentinel (Ft. Lauderdale, Fla.), Aug. 24, 2009, at 16A.

[10] Robert Briskin, Letter, *Save Billions With Liability Reform*, Palm Beach Post, Aug. 23, 2009, at 23A.

[11] Arthur E. Palamara, Op-ed, *Tort Reform Must be Part of Health Reform*, Sun Sentinel (Ft. Lauderdale, Fla.), Aug. 16, 2009.

[12] *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006).

[13] *See* Curt Anderson, *$8 Million for Smoking Lawsuit*, Orlando Sentinel, Feb. 19, 2009, at A2; *Philip Morris Vows to Overturn $8M Verdict*, S. Fla. Bus. J., Feb. 18, 2009, *at* http://southflorida.bizjournals.com/southflorida/stories/2009/02/16/daily46.html.

[14] *See* Brittany Wallman, *Ex-Mayor Naugle's Sister Wins $300 Million Tobacco Verdict*, Sun Sentinel, Nov. 19, 2009, *at* http://www.sun-sentinel.com/news/palm-beach/fl-naugle-smoking-lawsuit-20091119,0,7901233,full.story.

[15] *See Owens v. Publix Supermarkets, Inc.*, 802 So. 2d 315 (Fla. 2001).

[16] The following year, the Florida Legislature, recognizing the court's significant departure from traditional theories of negligence, intervened to shift the burden of proof back to plaintiffs. Unfortunately, the statute did not achieve its purpose because it states that "actual or constructive notice of the transitory foreign object or substance is *not* a required element of proof." Fla. Stat. § 768.0710(2)(b) (emphasis added).

[17] *See, e.g.*, *Aaron v. Palatka Mall, L.L.C.*, 908 So. 2d 574 (Fla. Ct. App. 2005) (reversing dismissal of a claim brought by a patron who tripped over a concrete bumper in a mall parking lot alleging that the bumper was not sufficiently visible even when the trial court found that the bumper was obvious and the type expected in a parking lot); *Gerald v. Eckerd Corp.*, 895 So. 2d 436 (Fla. Ct. App. 2005) (reversing grant of summary judgment for drug store in claim of patron who slipped and fell on a clear liquid while walking in the detergent aisle sued the store despite the unimpeached testimony of the store manager that he had assisted a customer in the aisle within ten minutes of the accident, had inspected the aisle, and found it clean and dry); *Sinfort v. Food Lion, LLC*, 908 So. 2d 521 (Fla. Ct. App. 2005) (reversing grant of summary judgment for grocery store in case where a customer who slipped in the produce aisle of a grocery store claimed that water leaking from the refrigerated displays caused her fall, though she admitted that she did not see the water and could only speculate as to its source and an employee's affidavit affirmed that she had inspected the area and found it dry ten to fifteen minutes before the alleged accident); *Mashni v. LaSalle Partners Management Ltd.*, 842 So. 2d 1035 (Fla. Ct. App. 2003) (reversing grant of summary judgment to mall in case where a customer who slipped and fell in a restroom claimed his fall was a result of water on the floor, but admitted that he noticed and took note of the water when he entered the restroom); *Silvers v. Wal-Mart Stores, Inc.*, 826 So. 2d 513 (Fla. Ct. App. 2002) (reversing summary judgment for Wal-Mart in case where a customer fell on her way to pick up a shopping cart on a rainy day even where the retailer had placed cones in the area to warn customers of the wetness and maintenance personnel were mopping the floor at the time of the incident).

[18] *See Izquierdo v. Gyroscope, Inc.*, 946 So. 2d 115 (Fla. Ct. App. 2007).

[19] Patrick Danner, *Florida's Slip-and-fall Law up for Debate*, Miami Herald, Mar. 2, 2009, at G4.

[20] Ken Dornstein, Accidentally, On Purpose: The Making of a Personal Injury Underworld in America 55 (St. Martin's Press, N.Y., 1996) (noting that a professional accident faker would "take an old [banana] peel from his pocket, then drop it unobtrusively ahead of him, pretend to slip on it, and later to haggle with railway claims men over the amount of money it would take to forget the whole thing").

[21] *See* Scott Powers, *Trips, Slips Dominate Theme-Park Lawsuits*, Orlando Sentinel, Mar. 30, 2009, at A1 (reporting result of study of 477 state and federal lawsuits against Florida's three large theme-park companies filed between January 1, 2004 and December 31, 2008, finding 46 percent of all claims involved alleged slips or trips).

[22] National Floor Safety Inst., *Causes of Slip and Fall Accidents*, *at* http://www.nfsi.org/images/piechart1.jpg.

[23] Greg Hunter, *Aisles of Fraud?: Fake Slip-and-Fall Accidents Cost Customers*, Good Morning America, May 10, 2004, *at* http://abcnews.go.com/sections/GMA/Business/Slip_fall_hunter_040510-1.html; Jan Hogan, *Casino Accidents: Legend of the Falls: Hotel Casinos Remain on Permanent Watch for Unscrupulous Slippers and Sliders*, Las Vegas Review Journal, Oct. 8, 2000, at http://www.reviewjournal.com/cgi-bin/printable.cgi?/lvrj_home/2000/Oct-08-Sun-2000/business/14272512.html.

[24] *Surveillance Camera Captures 'Slip-N-Fall' Scam*, Aug. 1, 2007, *at* http://wcbstv/watercooler/Florida.lawsuit.grocery.2.287437.html.

[25] Neighboring states do not impose liability on a business unless it has actual or constructive notice of the hazard and fails to promptly address it. *See, e.g.*, *Winn-Dixie Atlanta, Inc.*, 594 So. 2d 83 (Ala. 1992); *Douglas v. Devonshire Apartments, L.L.C.*, 833 So. 2d 72 (Ala. Ct. Civ. App. 2002); *Miller v. Archstone Communities Trust*, 797 So. 2d 1099 (Ala. Ct. Civ. App. 2001); *Robinson v. Kroger Co.*, 493 S.E.2d 403 (Ga. 1997); *Roberson v. Winn-Dixie Atlanta, Inc.*, 544 S.E.2d 494, 495 (Ga. Ct. App. 2001); *Wintersteen v. Food Lion, Inc.*, 542 S.E.2d 728, 729 (S.C. 2001); *Legette v. Piggly Wiggly, Inc.*, 629 S.E.2d 375, 377-78 (S.C. Ct. App. 2006); *Shain v. Leiserv, Inc.*, 493 S.E.2d 111, 112-13 (S.C. Ct. App. 1997); *Blair v. West Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004); *Berry v. Houchens Market of Tennessee, Inc.*, 253 SW.3d 141, 146-48 (Tenn. Ct. App. 2008); *Nolley v. Eichel*, 2007 WL 980603 (Tenn. Ct. App. Apr. 2, 2007).

[26] Legislation introduced in the Florida Legislature's 2009 session, H.B. 495 and S.B. 2402, would achieve this goal.

[27] *See D'Amario v. Ford*, 806 So. 2d 424 (Fla. 2002).

[28] *See Jahn v. Hyundai Motor Co.*, No. 07-1595 (Iowa Oct. 9, 2009).

[29] *Ford Motor Co. v. Hall-Edwards*, 971 So. 2d 854, 856 (Fla.3d DCA 2007), *review denied*, 984 So. 2d 1250 (Fla. 2008).

[30] *See Ford Motor Co. v. Joan Hall-Edwards*, No. 3D08-3220 (Fla. 3d DCA Oct. 21, 2009).

[31] Slip Op. at 4.

[32] Slip Op. at 8.

[33] Slip Op. at 8-9 (quoting *Lee v. Sas*, 53 So. 2d 114, 116 (Fla. 1951)).

[34] Slip. Op. at 9.

[35] *Id.*

[36] *See* Bridget Carey, *Lawsuits Made Simple? Website Makes the Claim*, Miami Herald, Aug. 7, 2008, at C1; Siobhan Morrissey, *Who Can You Sue? Click Here*, Time, Aug. 6, 2008, *at* http://www.time.com/time/nation/article/0,8599,1829725,00.html.

[37] Missy Diaz, *'Whocanisue.com' Aggressively Seeks Plaintiffs*, S. Fla. Sun Sentinel, Oct. 12, 2009, *at* http://www.sun-sentinel.com/news/palm-beach/boca-raton/sfl-who-can-i-sue-p100409,0,4368025.story.

[38] Morrissey, *supra*.

[39] Diaz, *supra*.

[40] *Id.*

[41] Editorial, *What Brockovich Didn't Say*, Palm Beach Post, Oct. 19, 2009, at 16A, *at* http://www.palmbeachpost.com/opinion/content/opinion/epaper/2009/10/19/a16a_leadedit_brockovich_1019.html.

[42] West Virginia was named in the "Watch List" of the first Judicial Hellhole report in 2002 and has been named a Judicial Hellhole in each successive report.

[43] *See generally* Victor E. Schwartz et al., *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. Va. L. Rev. 757 (2009).

[44] *See Bowyer v. Countrywide Home Loans Servicing LP*, No. 5:09-cv-00402, 2009 WL 2599307, at *4 (S.D. W. Va. Aug. 21, 2009).

[45] See Editorial, *The Supreme Court Enters Calmer Waters: The Behavior of the State's Judiciary Affects the Image of the Judiciary*, Charleston Daily Mail, Mar. 27, 2009, at 4A.

[46] *See* Editorial, *A Better Grade for the High Court: The State Supreme Court Earns Praise For Evenhanded Rulings*, Charleston Daily Mail, Sept. 8, 2009, at 4A.

[47] The court structures of 39 states include an intermediate appellate court, most of which provide for appeal of civil cases as a mater of right. *See* Nat'l Center for State Courts, Court Statistics Project, State Court Structure Charts, *at* http://www.ncsconline.org/D_Research/Ct_Struct/Index.html. Ten states and the District of Columbia do not have intermediate appellate courts, but nevertheless provide for an appeal as a matter of right in the jurisdiction's high court. *See id.* These states include Alaska, Delaware, Maine, Montana, New Hampshire, Nevada, Rhode Island, South Dakota, Vermont, and Wyoming. *See id.* In fact, in 2003, New Hampshire, the only state that, like Virginia, had no intermediate appellate court and solely discretionary review in its supreme court, restored an appeal as a matter of right in the high court. *See* New Hampshire Supreme Court, News Release, *Supreme Court Announces Expansion of Appellate Review; Accepted Cases Expected to Doub*le, Jan. 22, 2003, *at* http://www.courts.state.nh.us/press/apprev.htm.

[48] W. Va. R. App. P. 3, 5, 7; *see also* W. Va. Const. art. 8, § 4.

[49] W. Va. R. App. P. 7.

[50] *See* Nat'l Center for State Courts, Examining the Work of State Courts, 2005, at 76 (2006) (citing 2005 statistics), *available at* http://www.ncsconline.org/D_Research/csp/2005_files/0-EWWhole%20Document_final_1.pdf.

[51] *See, e.g., NiSource, Inc. v. Estate of Tawney*, 129 S. Ct. 622 (2008) (denying review of $405 million verdict, including $270 million in punitive damages, that found two major natural gas suppliers – Chesapeake Energy and NiSource, Inc. – liable for underpaying landowners under a royalties contract); *Central W. Va. Energy Co. v. Wheeling Pittsburgh Steel Corp.*, 129 S. Ct. 626 (2008) (denying review of $100 million punitive damages award against Massey Energy for a coal-shipment dispute with Wheeling-Pittsburg Steel); see also *Eagle Research Corp. v. Daniels Measurement Servs., Inc.*, No. 070375, *rev. denied* (W. Va. May 27, 2007) (denying review of $10.5 million in undefined consequential damages, in a breach of confidentiality agreement and trade secrets claim, where trial

court judge noted that he was "most troubled" by and "struggling with" the measure of damages).

[52] *Chemtall Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), *cert. denied sub nom., Chemtall Inc. v. Stern*, 128 S. Ct. 1748 (2008) (No. 07-1033) (denying review of highly controversial "reverse bifurcation" approach to deciding punitive damages in a medical monitoring case brought by coal miners, which would permit jury to hear evidence of punitive damages before determining basic liability, essentially finding that that the defendant should be punished before finding the defendant liable).

[53] Richard Neely, The Product Liability Mess: How Business Can be Rescued From the Politics of State Courts 4 (1998).

[54] *See* Neely, *supra*, at 1.

[55] *Id.* at 70-72. If there remains any lack of clarity on Justice Neely's concern that West Virginia's judicial system inherently favors plaintiffs over foreign defendants, then consider his equally candid testimony to Congress, in which he stated:

> If, for example, as a West Virginia judge I insist that West Virginia have conservative product liability law, all I will do is reduce my friends' and neighbors' claims on the existing pool of product liability insurance paid for by consumers through "premiums" incorporated into the price of everything we buy. This is the explicit rationale of Blankenship versus General Motors, 406 S.E.2d 781 (W. Va. 1991). . . . Thus, as a state judge I have admitted in a unanimous opinion written for the highest court of one of the fifty states that we, as a state court, cannot be rational in the crafting of product liability rules.

139 Cong. Rec. S2090-02 (daily ed. Sept. 12, 1991). *Blankenship* showed evidence of a philosophy to protect plaintiffs against corporations through adopting expansive pro-plaintiff liability rules. *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 786 (W. Va. 1991) ("[W]e do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense.").

[56] *See, e.g., In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005) (involving consolidation of 1,000 personal injury cases against cigarette manufacturers); *State ex rel. Mobil Corp. v. Gaughan*, 211 W.Va. 106, 563 S.E.2d 419 (W.Va.) (permitting a Kanawha County court to consolidate the claims of more than 8,000 asbestos plaintiffs into one legal action against more than 250 defendants), cert. denied sub nom., *Mobil Corp. v. Adkins*, 537 U.S. 944 (2002); *see also State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300 (W. Va. 1996) (holding in asbestos action that "[a] creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties").

[57] *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006) (invalidating venue reform), *cert. denied*, 127 S. Ct. 833 (2006); *Abbott v. Owens-Corning Fiberglas Corp.*, 44 S.E.2d 285, 292 (W. Va. 1994) (finding that the "doctrine of forum non conveniens is a *drastic* remedy which should be used with caution and restraint").

[58] *In re Tobacco Litig.*, 624 S.E.2d 738 (W. Va. 2005) (permitting reverse bifurcation in case involving punitive damages, a consolidated action consisting of the personal injury claims of 1,000 individual smokers); *State ex. rel. Chemtall, Inc. v. Madden*, 655 S.E.2d 161, 167 (W. Va. 2007), *cert. denied sub nom., Chemtall Inc. v. Stern*, 128 S. Ct. 1748 (2008).; *State ex rel. Philip Morris USA v. Recht*, No. 072903 (W. Va. Nov. 7, 2007) (unreported).

[59] *Bower v. Westinghouse*, 522 S.E. 2d 424 (W. Va. 1999). Since 1999, seven of the nine state high courts addressing medical monitoring have expressly rejected such actions or damages absent physical injury. *See Sinclair v. Merck & Co., Inc.*, 948 A.2d 587 (N.J. 2008); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 701 (Mich. 2005); *Wood v. Wyeth-Averest Labs.*, 82 S.W.3d 849, 855 (Ky. 2002); *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 440-41 (Nev. 2001); *Hinton v. Monsanto*, 813 So. 2d 827, 829 (Ala. 2001). Indeed, to its credit, the West Virginia Supreme Court of Appeals has scaled back or refused to extend its highly criticized decision in *Bower* to curb potential avenues of abuse. *See, e.g., Carter v. Monsanto Co.*, 575 S.E.2d 342 (W. Va. 2002) (denying extension of *Bowers'* adoption of medical monitoring for individuals to environmental monitoring of real property).

[60] *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 906 (W. Va. 2007).

[61] *See* Restatement of the Law, Third: Products Liability § 6 (1998); *see also* Diane Schmauder Kane, *Construction and Application of the Learned Intermediary Doctrine*, 57 A.L.R.5th 1 (originally published in 1998). The rule is a common-sense approach which recognizes: (1) training and experience place physicians in a better position than the manufacturer to convey complex medical information and terminology to patients; (2) the physician has a relationship with the individual patient, making it possible to evaluate treatment needs and provide an assessment of the potential benefits and likely risks specific to the patient's medical and family history; and (3) it is more effective and efficient for manufacturers to provide a common set of warnings to an intermediary with more definable knowledge and skill characteristics than to a broad spectrum of consumers. *See* Victor E. Schwartz et al., *Marketing Pharmaceutical Products in the Twenty-First Century: An Analysis of the Continued Viability of Traditional Principles of Law in the Age of Direct-to-Consumer Advertising*, 32 Harv. J. L. & Pub. Pol'y 333 (2009).

[62] *Blake v. John Skidmore Truck Stop, Inc.*, 493 S.E.2d 887, 892 (W. Va. 1997); *Mandolidis v. Elkins Indus., Inc.*, 246 S.E.2d 907, 913 (W. Va. 1978).

[63] *See* David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Pariae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 324-25 (2001); *see also See, e.g., Lewis v. Casey*, 518 U.S. 343, 374 n. 4 (1996) (noting that "the promise of a contingency fee should also provide sufficient incentive for counsel").

[64] *See Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963) ("[T]he Government wins its point when justice is done in its courts."); *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that attorneys representing governments are "the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all").

[65] *See* Kimberley A. Strassel, *Challenging Spitzerism at the Polls*, Wall St. J., Aug. 1, 2008, *at* http://online.swj.com/article/SB121754833081202775.html.

[66] *See* West Virginia Citizens Against Lawsuit Abuse, *Special Report: Flaunting Laws You Are Charged to Protect – A Critical Look at Fourteen Years in the Office of Attorney General Darrell McGraw* 7 (June 2007), *available at* http://www.wvrecord.com/content/img/f196361/CALAreport.pdf.

[67] The process at least presents the appearance of impropriety for the public office, especially where the firms selected happen to be large donators to the Attorney General's re-election campaigns. For example, in a 2001 lawsuit brought on behalf of the state against Purdue Pharma, the maker of Oxycontin, the four private firms hired by McGraw to handle the litigation split $3.3 million of a $10 million settlement, and those same firms had contributed tens of thousands of dollars to McGraw's re-election campaigns. *See id.* at 2; *see also* Watching West Virginia: Businesses Look at Litigation Climate and Leave the Mountain State, Update 6, Oct. 2008, *at* http://www.triallawyersinc.com/updates/tli_update_wvirginia_1008.html.

[68] For instance, this year, in settling a case against a drug manufacturer for $22.5 million, private lawyers hired by McGraw received 30 percent of the recovery, $6.75 million. *See* Assoc. Press, *State Settles Lawsuit Against Eli Lilly*, Charleston Gazette, Aug. 21, 2009, *at* http://www.wvgazette.com/News/200908210214; *see also* Editorial, *The Court System Works for a Few*, Charleston Daily Mail, Jan. 2, 2009, at 4A (discussing lawsuit against VISA and MasterCard brought by private lawyers hired by Attorney General McGraw in which the settlement provided the lawyers with $3.9 million in fees, while consumers received questionable benefit).

[69] *See* John O'Brien, *McGraw's OxyContin Case Causes $2.7M Medicaid Hole*, The Record (W. Va.), Nov. 18, 2009, *at* http://www.wvrecord.com/news/223113-mcgraws-oxycontin-case-causes-2.7m-medicaid-hole.

[70] *See CSX Transp., Inc. v. Gilkison*, Civ. Action No. 5:05CV202 (N.D. W. Va.).

[71] *See Adams v. CSX*, Civil Action No. 06-C-72.

[72] *See, e.g.*, Plaintiff, CSX Transportation, Inc.'s Opposition to Defendants Robert Peirce, Jr.'s and Louis A. Raimond's Motion for Summary Judgment Regarding Counts 3 and 4, *CSX Transp., Inc. v. Gilkison*, Civ. Action No. 5:05CV202 (N.D. W. Va. June 16, 2009).

[73] *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

[74] Memorandum Opinion & Order, *CSX Transp., Inc. v. Gilkison*, Civ. Action No. 5:05CV202 (N.D. W. Va. Sept. 15, 2009) (Dkt. 785).

[75] *See* Defendant CSX Transportation Inc.'s Memorandum in Support of its Renewed Motion to Dismiss Plaintiff Rodney Chambers for Fraud in the Prosecution of his Claim, *Chambers v. CSX Transp., Inc.*, Civ. Action No. 02-C-93K (W. Va. Cir. Ct., Kanawha County). Apparently, the plaintiff had met an Oscar Frye, who did not practice medicine and had no involvement in the litigation at a halfway house, and used his name on the form. *See* Steve Korris, *CSX Blames Pa. Firm for Asbestos Forgery*, Legal Newsline, Mar. 25, 2009, *at* http://www.legalnewsline.com/news/220014-csx-blames-pa.-firm-for-asbestos-forgery.

[76] *See* Eric Eyre, *Chesapeake Slashes 215 Jobs*, Charleston Gazette, Feb. 27, 2009, at 1A, *at* http://www.wvgazette.com/News/200902261099.

[77] *Id.*

[78] George Hohmann, *Chesapeake Takes Parting Shot*, Charleston Daily, Feb. 27, 2009, *at* http://www.dailymail.com/Business/200902260832.

[79] *Id.*

[80] CNBC, *America's Top States for Business '09*, *at* http://www.cnbc.com/id/31765926/.

[81] *See* Editorial, *West Virginia Needs to Keep Improving Business Climate,* Aug. 2, 2009, *at* http://www.herald-dispatch.com/opinions/x1532889132/West-Virginia-needs-to-keep-improving-business-climate.

[82] *See* Illinois Civil Justice League, Litigation Imbalance II: A Venue Reform Update, May 5, 2009, at 4, *at* http://www.icjl.org/images/pdfs/090505LitigationIndexII.pdf.

[83] *See id* at 3.

[84] *See Madrid Crash Claims Another Life*, BBC News, Aug. 23, 2008, at http://news.bbc.co.uk/2/hi/europe/7579293.stm.

[85] *See* Steven Malman, *Family Members File Cook County Wrongful Death Lawsuit Against Chicago-Based McDonnell Douglas and 10 Other Companies in 2008 Spainair Crash*, Chicago Injury Attorney Law Blog, Aug., 15, 2009, at http://www.chicagoinjuryattorney-blog.com/2009/08/family_members_file_cook_count.html.

[86] *See id.*

[87] *See Spain: Air Crash Blamed on Both Pilot and Systems*, N.Y. Times, Aug. 18, 2009, at A9.

[88] *See* Illinois Lawsuit Abuse Watch, *Cook County: The Lawsuit Tax Capital of the U.S.* (2009), *available at* http://www.illawsuitabusewatch.org/pdfs/CookCountyStudyfinalDL.pdf.

[89] *Id.* at 4.

[90] Ted Cox, *Study Slaps Cook County Over Lax Approach to Suits*, Daily Herald, Oct. 29, 2009, *at* http://www.dailyherald.com/story/?id=332468&src=1.

[91] *See* Lauren Harrison, *Would You Sue This Face?*, Chic. Trib., Aug. 20, 2009, at 3.

[92] *Id.*; *see also* Stefano Esposito, *Woman Suing Brookfield Zoo After Fall at Dolphin Exhibit*, Chic. Sun-Times, Aug. 19, 2009.

[93] *See id.*

[94] *See* Rob Olmstead, *Oak Brook Siren Maker Ordered to Pay $425,000*, Chic. Daily Herald, Feb. 25, 2009, at 11; James P.

Miller, *Siren Company Loses One in Hearing Loss Suits*, Chic. Trib., Feb. 23, 2009.

[95] *See id.*

[96] Fire Rescue 1, *at* http://www.firerescue1.com/fire-products/articles/456288/.

[97] *See* Barbara Vitello, *Another Suit in River Drownings*, Chic. Daily Herald, Jan. 19, 2009, at 15; Jameel Naqvi, *Family of Drowning Victim Sues School, YMCA*, Chic. Daily Herald, Nov. 20, 2008, *at* http://www.dailyherald.com/story/?id=252143.

[98] *See id.* The lawsuits claim that the camp failed to have sufficient overnight staff and argues that it should have secured the boats.

[99] Diana D'Amico, *Watchdog Report: Costly School District Legal Fees*, Press Atlantic City, Aug. 30, 2009, at A1.

[100] *See* Mass Tort Information Center, New Jersey Courts Online, at http://www.judiciary.state.nj.us/mass-tort/index.htm.

[101] *McCarrell v. Hoffman-La Roche, Inc.*, 2009 WL 614484, at *41 (N.J. Super. Ct., Mar. 12, 2009).

[102] *See* Press Release, *NJLRA Statement in Response to Roche's Discontinuation of Accutane*, June 26, 2009, *at* http://www.njlra.org/recent.html.

[103] *See NJLRA Executive Director Marcus Rayner's Testimony to the NJ Supreme Court on proposed changes to NJ's Rules of Evidence*, May 19, 2009, *at* http://www.njlra.org/recent.html.

[104] *See id.*.

[105] *See id.*

[106] Diane D'Amico, *Atlantic City School District's Budget For Legal Fees is Highest in New Jersey*, Press of Atlantic City, Aug. 29, 2009, *at* http://www.pressofatlanticcity.com/news/top_three/article_5c142618-9405-11de-af27-001cc4c03286.html.

[107] *See id.*

[108] *Id.*

[109] *See id.*

[110] *See id.*

[111] *See* Jerry Hirsch, *Hot Dogs Should Carry a Warning Label, Lawsuit Says*, Chic. Trib., July 23, 2009.

[112] *See id.*

[113] *See* Jerry Hirsch, *Denny's is Sued Over High-Salt Food*, L.A. Times, July 24, 2009, *at* http://www.latimes.com/business/la-fi-denny24-2009jul24,0,734556.story.

[114] Thom Weidlich, *Denny's Restaurants Sued Over Salt Content of Meals*, Bloomberg.com, July 23, 2009, *at* http://www.bloomberg.com/apps/news?pid=conewsstory&tkr=DENN%3AUS&sid=al0kNHVmBfzI.

[115] *See* Class Action Complaint, *DeBenedetto v. Denny's Corp.* (N.J. Super. Ct., July 22, 2009).

[116] *See* Nutritional & Allergen Information, Denny's Restaurants, *at* http://www.dennys.com/en/cms/Nutrition%2FAllergens/23.html.

[117] *Bosland v. Warnock Dodge, Inc.*, 964 A.2d 741 (N.J. 2009).

[118] *See id.* at 745.

[119] *See Herrera v. Quality Pontiac*, 73 P.2d 181, 194 (N.M. 2003).

[120] *See, e.g., Montano v. Allstate Indemnity Co.*, 92 P.2d 1255 (N.M. 2004) (requiring that all uninsured motorist (UIM) bodily injury coverages be stacked unless the insured specifically rejects stacking in writing, and that the plain language of a contract limiting stacking to two vehicles was against public policy); *Government Employees Ins. Co. v. Welch*, 90 P.3d 471 (N.M. 2004) (holding that family exclusion provisions contained in umbrella policies were unenforceable as a matter of New Mexico public policy when the injury resulted from a motor vehicle accident); *see also Hovet v. Allstate Ins. Co.*, 89 P.3d 69 (N.M. 2004) (ruling that a third party may sue an insurance company directly under the Unfair Claims Practices Act); *Sloan v. State Farm Mutual Auto. Ins. Co.*, 85 P.3d 230 (N.M. 2004) (ruling that a punitive damage instruction must be given in every case in which there is evidence that the refusal to pay the claim was based on frivolous or unfound reasons or that a refusal to settle was based on dishonest or unfair balancing of interests, and overruling a prior case that required additional evidence of a culpable mental state).

[121] *See* Thomas J. Cole, *Skewed Values? New Mexico's Supreme Court to Review Award of $6.5 Million in Attorney Fees in Suits Against Insurer*, Albuquerque J., Feb. 14, 2008, at 1; *see also* Thomas J. Cole, *Lawyers Reap Millions in Suits Against Insurers*, Albuquerque J., Feb. 18, 2001, at A1; *Winthrop Quigley, Insurance Firm Offers Settlement*, Albuquerque J., Sept. 26, 2002, at 1; Assoc. Press, *Attorneys Getting Rich off Insurance Settlements*, Santa Fe New Mexican, Feb. 19, 2001, at A3; Beth Healy, *To Lawyer Go Spoils in Lawsuit While Attorney Nets $8M in Settlement*, Clients Get $350,000, Boston Globe, Jan. 25, 2001, at E1.

[122] *See* Judicial Evaluation Inst. & and Sequoyah Information Systems, The Economic Judicial Report, New Mexico Supreme Court: Judicial Evaluation (2009), *available at* http://www.nmlegalreform.org/NMSC.aspx.

[123] *See id.*

[124] *Crespin v. Albuquerque Baseball Club*, No. 27864 (N.M. Ct. App. July 31, 2009), *available at* http://www.nmcompcomm.us/nmcases/NMCA/Slips/CA27,864.pdf.

[125] *Id.* at 12 (Kennedy, J., concurring in part, dissenting in part).

[126] *Id.* at 7 (quoting David Horton, *Comment, Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. Rev. 339, 376 (2003)).

[127] *See Warga v. Palisades Baseball*, No. 08 MA 25, 2009 WL 695438, 2009-Ohio-1224 (Ohio App. 7 Dist., Mar. 10, 2009) (holding plaintiff, who was struck by a baseball while she was standing at the end of a walkway in the park, which overlooks a picnic area and a parking lot behind the bleachers, assumed inherent risk of injury), *review denied*, 910 N.E.2d 478 (Ohio 2009).

[128] *Crespin v. Albuquerque Baseball Club*, *cert. granted* (N.M. Sept. 15, 2009).

[129] *See Baldonado v. El Paso Natural Gas Co.*, 176 P.3d 277 (N.M. 2007).

[130] It also results in an oddity in New Mexico law: A firefighter who experiences severe emotional trauma after responding to an explosion that resulted from a earthquake or cigarette near a leaking stove has no tort claim for compensation, but another firefighter who responds to a similar explosion that may have resulted from reckless conduct can sue for damages.

[131] *Chairez v. James Hamilton Constr. Co*., No. 27,581/28,201 (N.M. Ct. App. May 15, 2009).

[132] *See* John P. Avlon, *Sue City*, Forbes, July 14, 2009, *at* http://www.forbes.com/2009/07/14/new-york-city-tort-tax-opinions-contributors-john-p-avlon.html.

[133] *See* Editorial, *He Wins- You Pay*, N.Y. Post, Feb. 19, 2009, at 30.

[134] *See* Peter N. Spencer, *Call it "Sue York" as City Loses Over $500 Million in Lawsuits*, Staten Island Advance, Oct. 3, 2009, at http://www.silive.com/news/index.ssf/2009/10/call_it_sue_york_as_city_loses.html.

[135] *See id*.

[136] *See* Avlon, *supra*.

[137] *See* Lawrence J. McQuillan, An Empire Disaster: Why New York's Tort System is Broken and How to Fix It (Pacific Research Inst. 2009), *at* http://liberty.pacificresearch.org/docLib/20091117_NY_Tort_Report.pdf.

[138] *See* Carl Campanile, *NY Suer System Stinks: Legal Costs Rob Economy of $16B*, N.Y. Post, Nov. 18, 2009, *at* http://www.nypost.com/p/news/local/ny_*suer*_system_stinks_SNyiYMroDLN9rTnY8JiU8N#ixzz0XG13Z4E5 (citing comments of Jeffrey Bloom, head of a medical panel for the New York Trial Lawyers Association).

[139] *See* Spencer, *supra*. Some states have alternatively adopted "modified" comparative fault systems whereby the plaintiff can recover only if she is less than 50 percent at fault for her own injury.

[140] *See* New York State, Press Release, *Governor Paterson Appoints Justice Helen E. Freedman To Fill An Appellate Court Vacancy In The First Judicial Department*, July 23, 2009, *at* http://www.ny.gov/governor/press/press_0723087.html.

[141] Justice Heitler took a similar leave-it-to-the-jury approach in 2006 case involving a bike rider in New York City who admitted that he saw a green garden hose across the pathway 25 feet before reaching it, nevertheless attempted to ride over it, and fell, breaking his hip. While curbs and sewer grates are considered inherent risks in bicycle riding and would have led to a dismissal, Justice Heitler found that a garden hose in New York City is about as common as a tree growing in Brooklyn. She sent the case to trial. *See* Mark Fass, *Judge Declines to Find Garden Hoses Inherent Danger to Bicyclists in Manhattan*, N.Y.L.J., May 10, 2006, *at* http://www.law.com/jsp/article.jsp?id=1147165534260 (discussing *Eagle v. Chelsea Piers*, L.P., No. 109877/03, 2006 WL 6103059 (N.Y. Super. Ct. Apr. 19, 2006)). The Appellate Division affirmed Justice Heitler's decision, finding that a garden hose was not an inherent risk of riding a bike in an urban environment. *See Eagle v. Chelsea Piers, L.P*., 848 N.Y.S.2d 59 (N.Y. Super., App. Div. 1st Dep't 2007). More recently, however, New York appellate courts have reached better reasoned decisions finding that skiers who engage in rail sliding and golf players hit by stray balls assume the obvious, inherent risks of the activities in which they participate. *See* Joel Stashenko, *Expert Skier Assumed Risk of Injury, N.Y. Court Finds in Barring Suit*, N.Y.L.J., May 20, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202430833517 (discussing *Martin v. State*, 878 N.Y.S.2d 823, (App. Div. 3d Dep't 2009); Jeff Storey, *Golfer Had No Legal Duty to Yell 'Fore' Before Shot, Split Panel Finds*, N.Y.L.J., Apr. 28, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202430253891 (discussing *Anand v. Kapoor*, 877 N.Y.S.2d 425 (App. Div. 2d Dep't 2009)).

[142] *See* Evan Halper, *Lawsuits are the Latest Roadblock for California Budget*, L.A. Times, Aug. 10, 2009.

[143] *See* California Citizens Against Lawsuit Abuse, The Hidden Impact of Lawsuit Abuse on Taxpayers: California's Cities and Counties Litigation Costs Revealed, at 11 (Nov. 2009), *at* http://www.cala.com/images/pdf/2009costreport.pdf. The report examined legal expenditures in Alemeda, Fresno, Kern, Los Angeles, Orange, Sacramento, San Diego, San Francisco, and Santa Clara counties and the cities of Anaheim, Bakersfiled, Fresno, Los Angeles, Oakland, Sacramento, San Diego, and San Jose.

[144] Chris Rizo, Legal*Newsline*.com, *Report: Calif. Local Governments Shell Out Big Bucks on Lawsuits*, Nov. 5, 2005, *at* http://legalnewsline.com/news/223844-report--calif.-local-governments-shell-out-big-bucks-on-lawsuits (quoting California Citizens Against Lawsuit Abuse Executive Director Tom Scott).

[145] The Hidden Impact of Lawsuit Abuse on Taxpayers, *supra*, at 5, 8.

[146] *Id*. at 4, 6.

[147] Rizo, *supra*.

[148] Cal. Bus. & Prof. Code § 17204.

[149] The language of Section 17203 now unambiguously states that representative claims by private individuals are permitted "only if the claimant meets the standing requirements of Section 17204 and complies with Code of Civil Procedure Section 382 [governing class actions]." Cal. Bus. & Prof. Code § 17203 (emphasis added); see also id. § 17535 (providing same standing requirements with respect to representative actions for untrue or misleading advertising).

[150] *In re Tobacco II Cases*, 207 P.3d 20 (Cal. 2009).

[151] *In re Tobacco II Cases*, 207 P.3d at 42 (Baxter, J., dissenting, joined by Chin and Corrigan, JJ.).

[152] Order, *Pfizer v. Superior Court* (*Galfano*), No. S145775 (Cal. Aug. 19, 2009) (transferring to the Court of Appeal, Second District, Division Three, with directions to vacate its decision and to reconsider in light of *In re Tobacco II* (2009) 46 Cal.4th 298).

[153] *See* Editorial, *Reform This Scam*, San Diego Union Trib., Mar. 11, 2009, *at* http://www3.signonsandiego.com/stories/2009/mar/11/lz1ed11bottom221323-reform-scam/?uniontrib.

[154] *See* A.B. 298, Reg. Sess. (Cal. 2009) (failed passage on Mar. 31, 2009).

[155] *Sugawara v. PepsiCo, Inc.*, No. 2:08-cv-01335, 2009 U.S. Dist. LEXIS 43127 (E.D. Cal. May 21, 2009); *see also McKinnis v. Kellogg USA*, No. CV 07-2611 ABC, 2007 WL 4766060 (C.D. Cal. Sept. 19, 2007) (involving similar claim related to Fruit Loops). Fortunately, this case was dismissed by a federal judge, but similarly ridiculous cases brought under California's expansive UCL have survived.

[156] *Conte v. Wyeth, Inc.*, 168 Cal. App.4th 89, 85 Cal. Rptr. 3d 299 (Cal. App. 1 Dist. 2008), *review denied* (Cal. Jan. 21, 2009).

[157] Order on Motion for Summary Judgment by Defendants Crane Co. and McWane Inc.; Motions by Various Defendants to Exclude the Deposition Testimony of Decedent John Washington, Jr., *Washington v. American Standard, Inc.*, No. BC 376 529, Apr. 7, 2009. *available at* http://www.calbizlit.com/WatersKrausdepo.pdf.

[158] *Id.*

[159] *See Crane Co. v. Superior Court* (*Washington*), No. S173141, *rev. denied* (Cal. July 8, 2009); *see also* Amanda Bronstad, *Calif. Supreme Court Declines to Review 'Judicially Sanctioned Extortion,'* Nat'l L.J., July 14, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202432225907; Amanda Bronstad, *Judge Blasts Plaintiffs Firm Over Asbestos Suit*, Nat'l L.J., May 6, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202430510230.

[160] Emily Bryson York, *More Asbestos Cases Heading to L.A.*, L.A. Bus. J., Feb. 27, 2006, at 8.

[161] Mark Behrens & Phil Goldberg, *Home of the Asbestos Litigation 'Gold Rush'?*, Daily J. (Cal.), Nov. 18, 2009.

[162] Behrens & Goldberg, *supra*.

[163] *Plaintiffs' Attorneys Weathered the Asbestos Political Storm*, The Record (Madison-St. Clair County, Ill.), Jan. 8, 2009, *at* http://madisonrecord.com/news/216724-plaintiffs-attorneys-weathered-the-asbestos-political-storm.

[164] Cal. Civil Code § 52.

[165] *Molski v. Mandarin Touch Restaurant*, 359 F. Supp. 2d 924 (C.D. Cal. 2005), aff'd sub nom, Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Cir. 2007), cert. denied, 129 S. Ct. 594 (2008); *see also* Carol J. Williams, *After More Than 400 Lawsuits, Disabled Man Can Sue No More*, L.A. Times, Nov. 18, 2008, *at* http://articles.latimes.com/2008/nov/18/local/me-wheelchair18.

[166] *See* Bill Lindelof & Bobby Caina Calvan, *Facing Suit, Sacramento Burger Joint Plans to Move, Sacramento Bee*, July 10, 2009, *at* http://www.sacbee.com/ourregion/story/2014866.html.

[167] Lindelof & Calvan, *supra*.

[168] *Compare Lentini v. California Center for the Arts*, 370 F.3d 837 (9th Cir. 2004) (not requiring intentional conduct) *with Gunther v. Lin*, 144 Cal. App. 4th 223 (2006) (requiring a showing of intent).

[169] *Munson v. Del Taco, Inc.*, No. S162818, 2009 Cal. LEXIS 5183 (Cal. June 11, 2009).

[170] S.B. 1608, Reg. Sess. (Cal. 2008).

[171] *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347 (Cal. 1985).

[172] *County of Santa Clara v. Superior Ct.* (Atlantic Richfield Co.), 74 Cal. Rptr. 3d 842, 848 (Ct. App. 2008).

[173] *See* American Tort Reform Found., Judicial Hellholes 14 (2008/09).

[174] *See Alabama Wins $215 M Verdict from AstraZeneca*, Forbes.com, Feb. 22, 2008, *at* http://www.forbes.com/afxnewslimited-/feeds/afx/2008/02/22/afx4684334.html.

[175] *See* Bob Johnson, *Drug Firms to Appeal $114M Fraud Verdict*, Assoc. Press, July 4, 2008.

[176] *See $78.4 Million Judgment in Drug Trial*, Press-Register (Mobile, AL), Feb. 25, 2009, at B6.

[177] *See* Bob Johnson, *Ala.'s General Fund Gets $38M From Drug Lawsuits*, Forbes, Sept. 3, 2009, *at* http://www.forbes.com/feeds/ap/2009/09/03/business-health-care-financial-impact-us-drug-suits-settlements-alabama_6845785.html.

[178] *AstraZeneca LP v. State of Alabama*, No. 1071439, Slip Op., at 42 (Ala. Oct. 16, 2009).

[179] *AstraZeneca*, Slip Op. at 41.

[180] *See, e.g.*, E. Berton Spence, *Alabama AG Uses Contingency Fee Agreements to Sue Drug Manufacturers*, State AG Tracker Vol. 1, No. 3 (Federalist Society, Aug. 11, 2009), *at* http://www.fed-soc.org/publications/pubID.1567/pub_detail.asp.

[181] *See* Consent Decree and Order Approving Settlement Agreement and Mutual Release, *State of Alabama v. Charter Communications, Inc.*, Civil No. CV-2008-48-Y (Ala. Cir. Ct., Tallapoosa County, Jan. 8, 2009).

[182] Order on Motion for the Award of Attorneys' Fees and Costs, *State of Alabama v. Charter Communications, Inc.*, Civil No. CV-2008-48-Y (Ala. Cir. Ct., Tallapoosa County, Jan. 8, 2009).

[183] *See* Complaint, *District Attorney Bryce Graham v. CVS Caremark Corp.*, Civil Action No. CV-09-182 (Ala. Cir. Ct., Colbert County, Aug. 3, 2009).

[184] Illinois Civil Justice League, Litigation Imbalance II: A Venue Reform Update, at 3 (2009), *at* http://www.icjl.org/images/pdfs/090505LitigationIndexII.pdf.

[185] *See* Scott Sabatini, *Bottom Line in Asbestos: A Matter of Convenience*, The Record (Madison County, Ill.), Jan. 15, 2009, *at* http://madisonrecord.com/news/216881-bottom-line-in-asbestos-a-matter-of-convenience. Asbestos filings in Madison County hit their high point in 2003 at 953 and declined to 325 in 2005 before rising back to 639 in 2008. *See* Litigation Imbalance II, *supra*, at 8.

[186] Ann Knef, *Madison County Asbestos Cases Top Last Year's Total*, Nov. 13, 2009, *at* http://www.madisonrecord.com/news/222243-madison-county-asbestos-cases-top-last-years-total. Madison County's asbestos docket peaked with 953 new filings in 2003. *Id.*

[187] *See* Litigation Imbalance II, *supra*, at 8.

[188] *See* Steve Korris, *Gori and Julian Name 200-Plus Defendants in New Asbestos Suit*, Apr. 10, 2009, *at* http://madisonrecord.com/news/218407-gori-and-julian-name-200-plus-defendants-in-new-asbestos-suit.

[189] Litigation Imbalance II, *supra*, at 9.

[190] *See* Sanford J. Schmidt, *Stack to Leave Bench, Mudge Seeks Seat*, The Telegraph (Alton, Ill.), Aug. 18, 2009, *at* http://www.thetelegraph.com/news/stack-30294-judge-mudge.html; Steve Horrell, *Judge Stack Set for Retirement*, Edwardsville Intelligencer, Aug. 19, 2009, *at* http://www.goedwardsville.com/articles/2009/08/19/local_news/doc4a8c1c253ade6457277141.txt; Terry Hillig, *Madison County Judge to Retire*, St. Louis Post-Dispatch, Aug. 18, 2009, *at* http://www.stltoday.com/stltoday/news/stories.nsf/illinoisnews/story/E5A6FA1694C1656C862576160072FE52?OpenDocument.

[191] Shelia Byrd, *Mississippi Jury Rules Against Sherwin-Williams in Lead Paint Contamination Lawsuit*, Washington Examiner, June 26, 2009, *at* http://www.washingtonexaminer.com/economy/ap/49239382.html; "Pollard v. SHW" - "Sherwin – Williams Will Appeal the Jury Verdict," Chuck Moellenberg, Jones Day, Law and More, June 29, 2009, *at* http://lawandmore.typepad.com/law_and_more/2009/06/pollard-v-shw-sherwinwilliams-will-appeal-the-jury-verdict-chuck-moellenberg-jones-day.html.

[192] "Pollard v. SHW," *supra*.

[193] John O'Brien, *Sherwin-Williams Says $7M Verdict for Football Player Unfair*, July 21, 2009, *at* http://www.legalnewsline.com/spotlight/222127-sherwin-williams-says-7m-verdict-for-football-player-unfair.

[194] "Pollard v. SHW," *supra*.

[195] O'Brien, *supra*.

[196] *See id*. The trial court denied the motion in October, and the company is appealing to the Mississippi Supreme Court. *See* Rita Cicero, *Sherwin-Williams to Appeal $7 Million Award in Lead-Paint Case*, Toxic Torts Litig. Rep., Vol. 27, Issue 20, Nov. 3, 2009, *at* http://news.findlaw.com/andrews/en/tox/20091103/20091103_pollard.html.

[197] Jerry Michell, *Jury Reverses Trend in Case Against Firms*, Clarion Ledger, May 27, 2009, *at* http://www.clarionledger.com/article/20090527/news/905270346/1001/news/jury+reverses+trend+in+case+against+firms.

[198] *See* Colin Guy, *'Forum Shopping' Makes Filing Lawsuits a Strategy, Not Just a Trip to the Courthouse*, Beaumont Enterprise, Apr. 3, 2009.

[199] Editorial, *Our Settlement Machine*, Southeast Texas Record, July 26, 2008, *at* http://www.setexasrecord.com/arguments/213909-our-settlement-machine.

[200] *See* Marilyn Tennissen, T*exas SC Orders Floyd to Give Reasons for New DuPont Trial*, S.E. Texas Record, July 4, 2009, at http://www.setexasrecord.com/news/contentview.asp?c=219832 (discussing *In re E.I. du Pont de Nemours & Co.,* No. 08-0625 (Tex. July, 2, 2009) (per curiam), *available at* http://www.supreme.courts.state.tx.us/historical/2009/jul/080625.htm.

[201] *See* John MacCormack, *Texas Ambulance Chasers Getting Away With it*, Express News (San Antonio, Tex.), May 5, 2009, *at* http://www.mysanantonio.com/news/local_news/Texas_ambulance_chasers_getting_away_with_it_.html.

[202] *See* John MacCormack, *Ambulance Chasing Thrives*, Express-News (San Antonio, Tex.), Oct. 4, 2009, *at* http://www.mysanantonio.com/news/local_news/63461637.html (reporting on similar "case running" practices in nearby Bexar County involving lawyers and chiropractors).

[203] Marilyn Tennissen, *Mistrial Declared in Houston Attorney's Silica Kickback Case*, S.E. Texas Rec., Oct. 7, 2009, *at* http://www.setexasrecord.com/news/221508-mistrial-declared-in-houston-attorneys-silica-kickback-case.

[204] *See* Mary Flood, *Lawyer Accused of Giving Bribes*, Houston Chron., Aug. 25, 2009, at B3.

[205] Tennissen, *supra*.

[206] Editorial, *Can't Fathom Judge's Thinking*, Belleville News Democrat, July 22, 2009.

[207] *See* Brendan McCarthy, *18 Face Katrina Fraud Charges*, Times-Picayune (New Orleans, La.), Aug. 29, 2009, at 1.

[208] *See* Rebecca Mowbray, *Class Actions Point Up Shortcoming in Louisiana Court System*, Times-Picayune (New Orleans, La.), Feb. 1, 2009.

[209] *See* Rebecca Mowbray, *Citizens Lawsuit Attorneys Feuding*, Times-Picayune (New Orleans, La.), Dec. 10, 2008.

[210] *See* Katherine Eban, *Las Vegas' Medical Mafia*, CNN Money, Aug. 19, 2009, *at* http://money.cnn.com/2009/08/18/news/economy/las_vegas_medical_mafia.fortune/index.htm; *see also* Adrienne Packer, *Spine Surgeon Indicted*, Las Vegas Rev. J., Mar. 12, 2009, at 1A.

[211] Carri Geer Thevenot, *State Bar Alleges LV Attorney Shared Fees With Nonlawyer*, Las Vegas Rev.-J., Aug. 7, 2009.

[212] Alison Frankel, *Texas Torts Firm Says Business is Booming, Expands Houston Office*, AmLaw Litigation Daily, Apr. 6, 2009, *at* http://www.law.com/jsp/tal/digestTAL.jsp?id=1202429695200.

[213] The Lanier Law Firm, *at* http://www.lanierlawfirm.com/.

[214] *Johnson v. Rockwell Automation, Inc.*, No. 08-1009, 2009 WL 1218362 (Ark. Apr. 30, 2009).

[215] *See id*. at *1.

[216] *See id*.

[217] Doug Smith, *Court Bites Fat Cats*, Ark. Times, May 13, 2009, *available at* 2009 WLNR 9124612 (emphasis added).

[218] *Id*. at *2.

[219] *Id*. at 2-3.

[220] *Summerville v. Thrower*, 253 S.W.3d 415 (Ark. 2007).

[221] *Fleeger v. Wyeth*, 771 N.W.2d 524 (Minn. 2009).

[222] Mark Hansen, *Lawsuits Travel Up North: Land of Ten Thousand Lakes is Flooded with Thousands of Out-Of-State Filings*, ABA J., Dec. 2007, *at* http://www.abajournal.com/magazine/lawsuits_travel_up_north/.

[223] *See* Minn. Stat. § 541.05 subd. 1.

[224] *Fleeger,* 71 N.W.2d at 526.

[225] *See* Erin Gulden, *The Land of 10,000 Out-of-State Lawsuits, and Scott Smith Has Had Enough of Them*, Minnesota Law &

Politics, Dec./Jan. 2009, at 37 (citing attorney Scott Smith of Halleland Lewis).

[226] *See* Gulden, *supra*.

[227] *Fleeger,* 71 N.W.2d at 529.

[228] *Vicknair v. Phelps Dodge Indus., Inc*., 767 N.W.2d 171 (N.D. 2009).

[229] *See* Miriam Hall, *Lawsuit Arguments Center on Pa.'s Hiring of Rendell Contributor*, Oct. 22, 2009, Philadelphia Inquirer, Oct. 22, 2009, *at* http://www.philly.com/inquirer/breaking/business_breaking/20091021_Lawsuit_arguments_center_on_Pa_s_hiring_of_Rendell_contributor.html.

[230] In fact, Pennsylvania Attorney General Tom Corbett reportedly declined to bring an action against Janssen Pharmaceutica when initially approached by the private firm because he "was not impressed" with the evidence presented. John O'Brien, *Corbett 'Not Impressed' With Major Firm's Case Against Janssen*, Legal Newsline, Apr. 15, 2009, *at* http://www.legalnewsline.com/news/220421-corbett-not-impressed-with-major-firms-case-against-janssen (quoting Kevin Harley, press secretary for Attorney General Corbett). Governor Rendell's General Counsel, however, opted to permit the private firm to proceed with the litigation under the auspices of his office. *See id*.

[231] *Commonwealth v. Janssen Pharmaceutica Inc*., No. 24 EAP 2009 (Pa. 2009).

[232] *See* Paul Elias, *Lawyers Emerge as the Winner in Ford Settlement*, Wash. Post, Aug. 3, 2009; *see also* Cheryl Miller, *Ford Explorer Settlement Called a Flop*, The Recorder, July 13, 2009.

[233] *Feeney v. Dell Inc*., 908 N.E.2d 753 (Mass. 2009).

[234] *Donovan v. Philip Morris USA*, Slip Op., No. SJC-10409 (Mass. Oct. 19, 2009); *see generally* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer Ex Rel. Coplin v. Fluor Corp.: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135 (2007) (discussing why permitting medical monitoring claims absent present physical injury is unsound public policy).

[235] *See* Letter from Todd Stevenson, Secretary, U.S. Consumer Product Safety Commission, to J.W. MacKay, Jr., *at* http://www.cpsc.gov/LIBRARY/FOIA/foia02/petition/baseball.pdf (denying petition requesting that the Commission issue a rule requiring all non-wood bats to perform like wood bats).

[236] Stuart Taylor, *Lawsuits that Benefit Only Lawyers*, Nat'l L.J., May 17, 2008.

[237] Alan Zarembo & Victoria Kim, *L.A. Lawyer Accused of Fraud in Pesticide Litigation*, L.A. Times, Aug. 5, 2009.

[238] Ben Hallman, *Finding Plaintiffs Lawyers Committed Fraud, Judge Dismisses Tort Cases Against Dole and Dow Chemical*, Am. L., April 27, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202430211082.

[239] *Id*.

[240] *Id*.

[241] Jose Martinez, *District Attorney Robert Morgenthau Calls Injury Attorney a $650G Crook*, N.Y. Daily News, May 20, 2009.

[242] Daniel Wise, *Two More Lawyers Plead Guilty in Decade-Old 'Runner' Investigation*, N.Y.L.J., July 31, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202432668317.

[243] Henry Gottlieb, *Lawyer Chided for Dragging Out Deal in Blue Cross Suit*, N.J.L.J., Oct. 9, 2009 (quoting U.S. District Judge Faith Hochberg).

[244] *Id*.

[245] Nathan Koppel, *High-Profile Lawyer Close to a Guilty Plea*, Wall St. J., May 30, 2009.

[246] David Glovin, *Arkansas Lawyer Cauley Gets Seven Years for Fraud*, Bloomberg.com, Nov. 23, 2009, *at* http://www.bloomberg.com/apps/news?pid=20601087&sid=acQHa52.tizo&pos=7#.

[247] Nathan Koppel, *High-Profile Lawyer Close to a Guilty Plea*, Wall St. J., May 30, 2009.

[248] *See* Curt Anderson, *Fla. Lawyer Charged With $1B Investment Fraud*, Assoc. Press, Dec. 1, 2009, *at* http://www.washingtonpost.com/wp-dyn/content/article/2009/12/01/AR2009120101044.html; Julie Kay, *Fla. High Court Permanently Disbars Disgraced Attorney Scott Rothstein*, Daily Bus. Rev., Nov. 30, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202435860968; Nathan Koppel & Mike Esterl, *Lawyer Crashes After a Life in the Fast Lane*, Wall. St. J., Nov. 14, 2009, *at* http://online.wsj.com/article/SB125815195177647583.html; Jay Weaver, *FBI Wants Information on Embattled Lawyer Scott Rothstein*, Miami Herald, Nov. 12, 2009, *at* http://www.miamiherald.com/news/florida/AP/story/1329415.html; *Rothstein's Vast Empire*, S. Fla. Sun Sentinel, Nov. 8, 2009, *at* http://www.sun-sentinel.com/news/broward/fort-lauderdale/fl-rothstein-empire-20091106,0,1851159.story; Bob Van Voris et al., *Rothstein, Accused Florida Lawyer, Returns to U.S.*, Bloomberg.com, Nov. 4, 2009, *at* http://www.bloomberg.com/apps/news?pid=20601127&sid=acEuftcBvyrU; Damien Cave, *Fraud Accusations Against Florida Lawyer Set Off a Race to Return his Donations*, N.Y. Times, Nov. 3, 2009, at http://www.nytimes.com/2009/11/04/us/04lawyer.html.

[249] Billy Shields, *Class Action Settlement Lands Law Firm CEO in Hot Water with State Bar*, Daily Bus. R., July 14, 2009.

[250] Jay Weaver, *Feds: Jackson Memorial Patients' Records Were Sold in Scheme*, Miami Herald, July 30, 2009, *at* http://www.miamiherald.com/486/story/1165065.html.

[251] Mike Thomas, Column, *Racist Flier Makes Lawyers Look Even Worse*, Orlando Sentinel, Oct. 20, 2009, *at* http://www.orlandosentinel.com/news/local/orl-lawyers-racist-fliers-florida-10102009,0,7864462.column.

[252] Letter from Sen. Gary Siplin, Chairman, Florida Legislative Black Caucus, to Michael Haggard, President of Florida Justice Ass'n, Sept. 24, 2009 (on file with ATRF).

[253] David Mitchell, *Prominent La. Lawyer Charged in Drug Conspiracy*, Advocate, June 3, 2009, at A1, *at* http://www.2theadvocate.com/news/46776402.html.

[254] Bob Van Voris, *Diet-Drug Lawyers Get 20, 25 Years for Stealing Funds*, Bloomberg, Aug. 17, 2009.

[255] Assoc. Press, *5th Circuit Upholds Attorney's Conviction in Fen-Phen Case*, Dec. 24, 2008.

[256] Andrew Wolfson, *Attorney Toppled Diet-Drug Case Goliaths*, Courier-J., Sept. 7, 2009 **at** http://www.courier-journal.com/article/20090907/NEWS01/909080301/Attorney+toppled+diet-drug+case+Goliaths.

[257] Mary Flood, *Lawyer Accused of Giving Bribes*, Hous. Chronicle, Aug. 25, 2009, *available at* 2009 WLNR 16545660.

[258] Associated Press, *Attorney Gets 3 Years in Major Judicial Bribery Case,* Law.com, Dec. 17, 2008.

[259] *See* Gina Keating, *Last Two Milberg Defendants Sentenced*, Forbes, Nov. 3, 2008, *at* http://www.forbes.com/feeds/afx/2008/11/03/afx5641936.html .

[260] *See* Ben Hallman, *Milberg Sued for $54 Million for Allegedly Conspiring with Expert Witness in Securities Fraud Case*, American Lawyer, Mar. 26, 2009, *at* http://www.law.com/jsp/article.jsp?id=1202429391417 (discussing *Lakes Entertainment Inc. v. Milberg LLP,* No. 0:2009cv00677 (D. Minn.)).

[261] Pamela A. MacLean, *Suit Accuses Milberg Firm, Lerach, Other Attorneys of Allegedly Extorting Settlement*, Nat'l L.J., Mar. 25, 2009.

[262] *Supreme Court Pulls License of 6 Lawyers and Suspends 17*, Chicago Daily L. Bull., Jan. 21, 2009; *see also State Watch*, Pantagraph (Bloomington, Ill.), Feb. 2, 2009, *at* http://www.pantagraph.com/news/article_92c9db91-26b4-501a-99fa-efc40603683a.html; Ann Knef, *Tom Lakin Disbarred on Consent by Illinois Supreme Court*, The Record (St. Clair County, Ill.), Jan. 22, 2009, *at* http://www.stclairrecord.com/news/217010-tom-lakin-disbarred-on-consent-by-illinois-supreme-court. Not surprisingly, this year, the Lakin Law Firm merged and changed its name to LakinChapman LLC. *See* http://www.lakinlaw.com/CM/Custom/History.asp.

[263] *See* Alan J. Ortbals, *Is Madison County the 'Judicial Hellhole' that Tort Reformers Claim?*, Ill. Bus. J., July 12, 2004, *at* http://www.ibjonline.com/print_madison_county_judicial_hellhole.html; Editorial, *Lawyers v. First Amendment*, Wall St. J., June 30, 2003, *at* http://online.wsj.com/article/0,,SB105693717642723000,00.html%3Fmod%3Dopinion. The subpoena was ultimately withdrawn.

[264] Governor Joe Manchin's 2009 State of the State Speech, *at* http://www.wvgov.org/sec.aspx?id=114.

[265] Exec. Order No. 6-09 (Apr. 3, 2009), *at* http://wvrecord.com/content/img/f218310/executiveorder.pdf. The Commission will also consider changes to West Virginia's method of selecting judges, judicial campaign finance, and establishment of chancery or "business courts" to decide matters of commercial law and complex litigation between businesses. *See id.*

[266] Press Release, Office of the Governor, *Governor Makes Appointments to Independent Judicial Reform*, June 15, 2009, *at* http://www.wv.gov/news/governor/Pages/GovernorMakesAppointmentsToIndependentJudicialReform.aspx.

[267] Editorial, *Judicial Reform Takes a First Step*, State J. (W. Va.), Apr. 9, 2009, *at* http://statejournal.com/story.cfm?func=viewstory&storyid=56270&catid=159.

[268] West Virginia Independent Comm'n on Judicial Reform, Final Report, Nov. 19, 2009, *at* http://www.judicialreform.wv.gov/reports/Documents/FinalReport.pdf. The Commission also recommended adopting a pilot public financing system for one seat in the 2012 West Virginia Supreme Court of Appeals election, formalizing the merit selection system (appointment my the governor with consideration of the recommendations of an advisory committee) used to fill interim vacancies, adopting a similar merit selection system for all judges on the new appellate court, rather than partisan elections, publishing a voter guide for judicial elections, and further studying the feasibility of establishing a court that specializes in complex corporate and contract disputes.

[269] In fact, when the Commission on the Future of the West Virginia Judicial System issued its final report in 1998, it called for establishment of an intermediate appellate court, one appeal as a matter of right, and issuance of a written decision in each appellate case heard. *See* Commission on the Future of the West Virginia Judicial System, Final Report, Dec. 1, 1998, at 25-27. Over the past decade, West Virginia's appellate docket has only further increased, but the Commission's 1998 recommendations were not implemented.

[270] Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Probs. 219, 222 (1953).

[271] Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 Cal. L. Rev. 772, 778 (1985).

[272] Prior to the 20th Century, there were only two reported cases affirmed on appeal involving total damages in excess of $450,000 in current dollars, each of which may have included an element of noneconomic damages. *See* Ronald J. Allen & Alexia Brunet, *The Judicial Treatment of Non-economic Compensatory Damages in the Nineteenth Century*, 4. J. Empirical Legal Stud. 365, 396 (2007).

[273] *See id.* at 379-87 (finding that high noneconomic damage awards were uniformly reversed); *see also* Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408, 411 (1959) (observing that an award in excess of $10,000 was rare).

[274] Scholars largely attribute this rise to several factors: (1) the availability of future pain and suffering damages; (2) the rise in automobile ownership and personal injuries resulting from automobile accidents; (3) the greater availability of insurance and willingness of plaintiffs' attorneys to take on lower-value cases; (4) the rise in affluence of the public and a change in attitude that "someone should pay"; and (5) the better organization of the plaintiffs' bar. *See* Merkel, *supra*, at 553-66; *see also* Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. Rev. 163, 170 (2004).

[275] *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

[276] *See* Melvin M. Belli, *The Adequate Award*, 39 Cal. L. Rev. 1 (1951).

[277] *See* David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. Rev. 256, 301 (1989).

[278] *See id*.

[279] As the U.S. Court of Appeals for the Third Circuit found, "in personal injuries litigation the intangible factor of 'pain, suffering, and inconvenience' constitutes the largest single item of recovery, exceeding by far the out-of-pocket 'specials' of medical expenses and loss of wages." *Nelson v. Keefer*, 451 F.2d 289, 294 (3d Cir. 1971).

[280] *See There is an Attack on Medical Profession*, Sunday News (Lancaster, Pa.), May 16, 2004, at P3 (citing Jury Verdict Research).

[281] *See* Robert P. Hartwig, *Liability Insurance and Excess Casualty Markets: Trends, Issue & Outlook*, at 51 (Ins. Info. Inst., Oct. 2003) *available at* http://server.iii.org/yy_obj_data/binary/686661_1_0/liability.pdf.

[282] *See Attack on Medical Profession*, *supra*, at 1 (citing Jury Verdict Research).

[283] *See* Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update, Trends and Findings on the Costs of the U.S. Tort System 17 (2003), *at* https://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf (pain and suffering awards represent 24% of U.S. tort costs; economic damages represent 22%).

[284] Niemeyer, 90 Va. L. Rev. at 1401; *see also* Stephen D. Sugarman, *A Comparative Law Look at Pain and Suffering Awards*, 55 DePaul L. Rev. 399, 399 (2006) (noting that pain and suffering awards in the United States are more than ten times those awarded in the most generous of the other nations).

[285] *See* Kim Brimer, *Has "Pain and Suffering" Priced Itself Out of the Market*, Ins. J., Sept. 8, 2003, *at* http://www.insurancejournal.com/magazines/southcentral/2003/09/08/partingshots/32172.htm.

[286] *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002).

[287] *See Lebron v. Gottlieb Memorial Hosp.*, No. 105741 (Ill.) (challenging constitutionality of $500,000 limit on noneconomic damages in medical-liability claims against a physician or other health care professional, and a $1 million limit on the noneconomic damages awarded against a hospital, its affiliates, or their employees); *Lockshin v. Semsker*, Case No. 78 (Md.) (considering whether Maryland's general limit on noneconomic damages no longer applies in medical-liability cases absent engaging in arbitration); *Double Quick Inc. v. Lymas*, No. 2008-CA-01713 (Miss.) (challenging the constitutionality of Mississippi's generally applicable $1 million limit on noneconomic damages in civil cases).

[288] *Green v. N.B.S. Inc.*, 976 A.2d 279 (Md. 2009).

[289] The court, however, did not address a second important issue raised by ATRA -- whether the lower courts had confused the issue by assuming the availability of noneconomic damages in a consumer-protection action and improperly measured damages based on personal injury rather than economic harm. ATRA suggested that the Court clarify that noneconomic damages are not available in consumer-protection actions, since such lawsuits are meant to reimburse consumers who did not get what they paid for, not serve as a substitute for personal injury actions.

[290] *Pellicer v. St. Barnabas Hospital*, 974 A.2d 1070, 1091-92 (N.J. 2009).

[291] *Id*. at 1083.

[292] *Id*. at 1083-85.

[293] *Id*. at 1089.

[294] *Id*.

[295] *Id*. at 1089-90.

[296] *Id*. at 1090.

[297] *Id*.

[298] *Id*. at 1091.

[299] *See McMahon v. Craig*, 97 Cal. Rptr. 3d 555 (Cal. Ct. App. 2009); *Goodby v. Vetpharm, Inc.*, 974 A.2d 1269 (Vt. 2009).

[300] *Goodby*, 974 A.2d at 1272.

[301] *Id*. at 1273.

[302] *Id*.

[303] *Id*. at 1274.

[304] *See McMahon*, 97 Cal. Rptr. 3d 555 at 558 ("Emotional distress damages for negligence are not available to McMahon because she was neither a witness nor a direct victim of defendants' negligent acts. Finally, McMahon cannot recover damages for loss of companionship based on her dog's peculiar value to her.").

[305] *Id*. at 568.

[306] *Id*. at 563.

[307] *See* Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 236 (2006).

[308] *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003).

[309] *Seisinger v. Siebel*, 203 P.3d 483 (Ariz. 2009).

[310] S.B. 1018, 1st Reg. Sess. (Ariz. 2009) (codified at Ariz. Rev. Stat. §§ 12-572, 12-573).

[311] *See* Comprehensive Lawsuit Reform Act of 2009, H.B. 1603, 52nd Leg., 1st Sess. (Okla. 2009).

[312] H.B. 2167 would have prohibited state agencies from retaining legal services in which services are expected to exceed $5,000 without first undergoing a request for proposal process. For proposed contracts for legal services that are expected to exceed $500,000, the legislation would have provided the Governor with an opportunity to review the contract. Law firms working for the state on a contingency fee basis would be required to provide the state with a statement of the hours worked on the case, expenses incurred, the aggregate fee amount, and a breakdown as to the hourly rate based on hours worked divided into fee recovered, less expenses, at the conclusion of the litigation. The legislation

provided that contingency fees may not exceed the equivalent of $1,000 per hour.

[313] *Williams v. Spitzer AutoWorld Canton, LLC*, 913 N.E.2d 410 (Ohio 2009).

[314] *See* Editorial, *Texas Tort Victories*, Wall St. J., June 13, 2009, *at* http://online.wsj.com/article/SB124484677048211303.html; *see also* Marilyn Tennissen, *Texas Trial Lawyers Spend Millions in 2008 Cycle to Support Democratic Candidates*, S.E. Texas Record, Nov. 24, 2008 (detailing trial lawyer contributions).

[315] See Editorial, *Tort Reform Works; Don't Mess With It – It Could be Worse – Much Worse*, Tyler Morning Telegraph, Apr. 13, 2009.

[316] Rick Perry, Op-ed, *Tort Reform Must be Part of Health Care Reform*, Washington Examiner, Aug. 13, 2009, *at* http://www.washingtonexaminer.com/opinion/columns/OpEd-Contributor/Tort-reform-must-be-part-of-health-care-reform-8096175.html.

[317] *See* Marilyn Tennissen, *Beaumont Doctor Talks Tort Reform with Republican Lawmakers in Washington*, S.E. Tex. Record, Mar. 19, 2009, *at* http://www.setexasrecord.com/news/218044-beaumont-doctor-talks-tort-reform-with-republicans-lawmakers-in-washington (interview with Dr. David Teuscher, an orthopedic surgeon with the Beaumont Bone and Joint Institute).

[318] Perry, *supra*.

[319] *See id.; see also* Press Release, *Texas Senate, Tort Reform Bringing More Doctors to Texas, Says Lawmaker*, Feb. 3, 2009 (stating that according to the Texas College of Emergency Room Physicians, 76 Texas counties have experienced a net gain in ER doctors, including 24 counties that previous had none).

[320] *See id.* (citing a study by economist Ray Perryman).

[321] *See Texas Tort Victories*, *supra*.

[322] *See Babena v. Goodyear Tire & Rubber Co.*, Case No. 49207 (Nev. 2009).

[323] Oral Argument, *Babena v. Goodyear Tire & Rubber Co.*, Case No. 49207 (Nev. 2009).

[324] *See* Tentative Draft No. 6, Restatement (Third) of Torts: Liability for Physical & Emotional Harm, Chapter 9, Mar. 2, 2009.

[325] *Id.* at 94.

[326] *Id.* at 95; *see generally* James A. Henderson, Jr., *The Status of Trespassers on Land*, 44 Wake Forest L. Rev. 1071, 1073-74 (2009).

[327]. Tentative Draft No. 6, Restatement (Third) of Torts: Liability for Physical & Emotional Harm, Chapter 9, Mar. 2, 2009, § 28(a).

[328].*Id.* § 28(b).

[329].*Id.*

[330].*Id.* § 28 cmt. c(1).

[331].*Id.* § 28 cmt. c(3).

[332].*Id.*

[333].*Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 882 (10th Cir. 2005).

[334].Restatement (Third) of Torts: Liability for Physical Harm § 28 cmt. c(4) (Proposed Final Draft No. 1, 2005).

[335].*Id.* § 28 cmt. c(1).

[336].*Norris*, 397 F.3d at 881.

[337].*See id.*

[338] *Conte v. Wyeth, Inc.*, 168 Cal. App. 4th 89, 85 Cal. Rptr. 3d 299 (Cal. App. 1 Dist. 2008), *review denied* (Cal. Jan. 21, 2009).

[339] *See Simonetta v. Viad Corp.*, 197 P.3d 127 (Wash. 2008); *Braaten v. Saberhagen Holdings*, 198 P.3d 493 (Wash. 2008).

[340] *Simonetta*, 197 P.3d at 133.

[341] *Braaten*, 198 P.3d at 385.

[342] *See Gourdine v. Crews*, 955 A.2d 769 (Md. 2008).

[343] *Id.* at 776.

[344] Memorandum for the Heads of Executive Departments and Agencies, Subject: Preemption, May 20, 2009, *available at* http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/.

[345] *See, e.g.,* Letter to Peter Orszag & Cass Sunstein, Jan. 13, 2009, *at* http://www.citizen.org/documents/Preemption_letter_to_orszag_sunstein_20090114.pdf (signed by Gerie Voss, Director of Regulatory Affairs, American Association for Justice, among fourteen organizations, and including draft executive order); Am. Ass'n for Justice, Press Release, *AAJ Sends Obama Team Strategies to Reverse Bush "Complete Immunity" Regulations*, Jan. 12, 2009, *at* http://www.justice.org/cps/rde/xchg/justice/hs.xsl/6157.htm; Am. Ass'n for Justice, Transition Notebook – Executive Summary, Submission to Obama-Biden Transition Team, Dec. 11, 2008, *at* http://otrans.3cdn.net/2e11933b9f3cd56f51_cjm6i6lsp.pdf; William Funk *et al.*, Limiting Federal Agency Preemption: Recommendations for a New Federalism Executive Order (Center for Progressive Reform, Nov. 2008), *available at* http://www.progressiveregulation.org/articles/ExecOrder_Preemption_809.pdf (included in AAJ's materials submitted to the Obama Administration).

[346] *Riegel v. Medtronic, Inc.*, 552 U.S. --, 128 S. Ct. 999 (2008).

[347] Letter from H. Thomas Wells, Jr., President, American Bar Association, to Representative Frank Pallone, Jr., Chairman Subcommittee on Health, Committee on Energy and Commerce, Dec. 29, 2008, *available at* http://www.abanet.org/poladv/letters/tortlaw/2008dec29_medicaldeviceh_l.pdf.

[348] *See Colacicco v. Apotex Inc.*, 521 F.3d 253 (3d Cir. 2008), *vacated*, 129 S. Ct. 1578 (2009); *see also Dobbs v. Wyeth Pharmas.*, 530 F. Supp.2d 1275 (W.D. Okla. 2008) (same).

[349] *See, e.g.,* Lawrence Y. Katz et al., *Effect of Regulatory Warnings on Antidepressant Prescription Rates, Use of Health Services and Outcomes Among Children, Adolescents and Young Adults*, 178 Canadian Med. Ass'n J. 1005 (2008); Robert D. Gibbons et al., *Early Evidence on the Effects of Regulators' Suicidality Warnings on SSRI Prescriptions and Suicide in Children and Adolescents*, 164 Am. J. Psychiatry 1356 (2007).

[350] Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49,223, at 49,245-46 (daily ed. Aug. 23, 2005).

[351] Final Rule, Federal Motor Vehicle Safety Standards; Designated Seating Positions and Seat Belt Assembly Anchorages, 73 Fed. Reg. 58,887, at 58,894-95(daily ed. Oct. 8, 2008).

[352] *See, e.g.*, Am. Ass'n for Justice, Press Release, *AAJ Calls on New NHTSA Chief to Address Roof Crush Standard*, Apr. 9, 2009, *at* http://www.justice.org/cps/rde/xchg/justice/hs.xsl/8528.htm.

[353] *See* Final Rule, Federal Motor Vehicle Safety Standards; Roof Crush Resistance; Phase-In Reporting Requirements, 74 Fed. Reg. 22,348, at 22,349 (daily ed. May 12, 2009).

[354] *See Black's Law Dictionary* 680 (8th ed. 2004).

[355] *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 S.C. L. Rev. 47 (2002), *also printed in* 52 Def. L.J. 737 (2003); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004); Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Center Piece of Our Tort System*, 93 U. Va. L. Rev. 1401 (2004).

[356] *See* Ohio Rev. Code Ann. § 2315.19.

[357] *See Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).

[358] *Id.* at 600.

[359] *See* Molly T. Johnson et al., *Expert Testimony in Federal Civil Trials: A Preliminary Analysis* 1 (Fed. Jud. Ctr. 2000), *at* http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf.

[360] *See* Defense Research Inst., *Frye/Daubert: A State Reference Guide* 3-4 (2006). Some of these states, such as California, Florida, and Illinois, continue to apply the less rigorous *Frye* "general acceptance" test, which the federal courts abandoned with the adoption of the *Daubert* standard in 1993. *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Donaldson v. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002). Other states apply their own standard to determine the admissibility of expert testimony. *See, e.g.*, *In re Robert R.*, 531 S.E.2d 301, 303 (S.C. 2000).

[361] *See generally* Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217 (2007).

[362] *See* American Medical Ass'n, Medical Liability Crisis Map, *at* http://www.ama-assn.org/ama/noindex/category/11871.html.

[363] Sheri Qualters, *Survey: 'Defensive Medicine' Costs Massachusetts $1.4 Billion*, Nat'l L.J., Nov. 20, 2008, *at* http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jsp?id=1202426160155.

[364] *See* Behrens & Cruz-Alvarez, *supra*.

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