



**Judicial  
HELLHOLES<sup>®</sup>  
2004**

*“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.”<sup>1</sup>*

—Richard “Dickie” Scruggs,  
Mississippi trial lawyer, whose firm will collect \$1.4 billion in legal fees from the tobacco settlements and has now shifted his focus to lawsuits against HMOs and asbestos claims.

*“You may not like it . . . but we’ll find a judge. And then we’ll find a jury that will find restaurants liable for their customers’ overeating.”<sup>2</sup>*

—John Banzhaf,  
George Washington University Law School Professor and personal injury lawyer.

*“As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so.”<sup>3</sup>*

—Hon. Richard Neely,  
who served as a West Virginia Supreme Court of Appeals Justice, including several terms as Chief Justice, for over 22 years until 1995, and is now in private practice at a firm primarily handling personal injury cases.

*“There’s some merit to the accusations of bias in Madison County. I don’t know if it’s a Judicial Hellhole, but just figure it out. When people come from hither and thither to file these cases, there’s gotta be an inducement, doesn’t there? They’re not coming to see beautiful Madison County.”<sup>4</sup>*

—Hon. Judge John DeLaurenti,  
who heard cases in Madison County for 27 years until 2000.

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# Preface

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This report documents litigation abuses in jurisdictions identified by a survey of the membership of the American Tort Reform Association (ATRA), which includes nonprofit organizations, small and large companies, as well as state and national trade, business and professional associations. The purpose of the report is two-fold: (1) to identify areas of the country where the scales of justice are radically out of balance; and (2) to illustrate how accuracy, efficiency and predictability can benefit the American civil justice system.

Judicial Hellholes are places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants. The jurisdictions discussed in this report are not the only Judicial Hellholes in the United States; they are the worst offenders. These cities, counties, or judicial districts were most frequently identified by the respondents to ATRA's survey.

ATRA's 2003 survey was featured in more than 300 articles and editorials including:

- *The Wall Street Journal*
- *Newsweek*
- *USA Today*
- *Chicago Tribune*
- *The Washington Times*
- *L.A. Times*
- *Beaumont Enterprise* (Tex.)
- *Belleville News-Democrat* (Ill.)
- *Clarion-Ledger* (Jackson, Miss.)
- *Charleston Gazette & Daily Mail* (W. Va.)
- *Chicago Sun-Times*
- *The Dallas Morning News*
- *The Herald-Dispatch* (Huntington, W. Va.)
- *Houston Chronicle*
- *Los Angeles Daily News*
- *The Pantograph* (Bloomington, Ill.)
- *Philadelphia Daily News*
- *Sante Fe New Mexican*
- *St. Louis Post-Dispatch*
- *The Sun Herald* (Biloxi, Miss.)

While some have suggested that entire states may be labeled Judicial Hellholes, as respondents to ATRA's survey have demonstrated, it is usually only specific counties or courts in the state that deserve this title. 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 earn it a reputation as a Judicial Hellhole.

To the extent possible, the report has explained why defendants are unable to achieve fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members were justifiably concerned about reprisals if their names and their cases were identified in this report – a sad commentary about the Judicial Hellholes in and of themselves.

This concern is not hypothetical or speculative. As reported in the 2003 Judicial Hellholes report, that year, leaders of ATRA, the Illinois Civil Justice League, the Illinois Chamber of Commerce, and the U.S. Chamber of Commerce were subpoenaed in a class action product liability lawsuit in Madison County, Illinois, after a joint press event to discover lawsuit abuse in Madison County.<sup>5</sup> The subpoena served on ATRA sought to compel the organization to release confidential financial information and membership lists, and require it to either pay the travel expenses of appearing for a deposition in Madison County or the legal fees in fighting the subpoena.<sup>6</sup> ATRA had no knowledge of the case or any involvement in the case. Ultimately, after ATRA was forced to spend thousands of dollars in legal costs to defend against the assault on its First Amendment rights, the subpoena was withdrawn.

This year, several businesses defending against a lawsuit in Madison County experienced a similar

intimidation tactic. They were served with a series of interrogatories in a product liability lawsuit requiring that they disclose their membership and support for any “tort reform” group and any tort reform-related activities. Further, in its series on Madison County courts, the *St. Louis Post-Dispatch* noted that 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.”<sup>7</sup>

A number of individuals familiar with litigation in the Judicial Hellholes verified their observations through independent research of press accounts, studies, court dockets, and other publicly available information. Citations for these sources can be found in the nearly four hundred 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. The Judicial Hellhole project is not an effort to obtain a special advantage for defendants or to criticize the service of those who sit on juries.

Additional information is welcomed 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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Washington, D.C. 20036  
Email: [judicialhellholes.atrf@atra.org](mailto:judicialhellholes.atrf@atra.org)

*To download a copy of this report in pdf format, visit [www.atra.org](http://www.atra.org).*

## About the American Tort Reform Foundation

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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 and inform the general public on 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 2004 Judicial Hellholes Report shines a spotlight on the nine judicial districts that this year showed the most systematic bias. These are places where the law is not applied evenhandedly to all litigants, generally favoring local plaintiffs' lawyers and their clients against out-of-state defendants in civil lawsuits.

Judicial Hellholes are sometimes referred to as "magic jurisdictions" – they seemingly can pull million or billion dollar verdicts out of a hat and create causes of action previously unknown or procedural rules foreign to due process.<sup>8</sup> They also are called "magnet courts" because their well-deserved plaintiff-friendly reputation attracts lawsuits from around the nation.

While high-profile issues such as medical malpractice, asbestos lawsuits, and class action abuse dominated headlines in this year's Judicial Hellholes, we believe that such examples indicate a broader lack of fairness that is occurring in these courthouses. To highlight the ways in which a judge can affect the outcome of a case, this year's report details the tricks of the Judicial Hellholes trade in a new section titled, "The Making of a Judicial Hellhole."

In a section called, "The Tale of Two Cities," this report underscores the choice local judges and policymakers have when identified as a Judicial Hellhole: fix the problems or sink further into the abyss. There is no better example of that than the divergent paths taken by last year's top Judicial Hellhole: Madison County, Illinois, and Mississippi's 22<sup>nd</sup> Judicial Circuit. Madison County sunk deeper and deeper as a Judicial Hellhole; Mississippi, through the resolve of the executive, judicial and legislative branches, has started to turn its judiciary around. It is too early to give Mississippi a 100% bill of health, as many reforms only recently went into effect, but Mississippi is well on its way to judicial — and economic — recovery.

In addition to Madison County and lingering concerns about Mississippi, ATRA members named

eight other jurisdictions as Judicial Hellholes for 2004:

2. St. Clair County, Illinois
3. Hampton County, South Carolina
4. West Virginia (entire state)
5. Jefferson County, Texas
6. Orleans Parish, Louisiana
7. South Florida
8. Philadelphia, Pennsylvania
9. Los Angeles, California

In addition to these Judicial Hellholes, the report calls attention to four "dishonorable mentions" – places where particular abusive practices or warped litigation environments could lead them to being named a Judicial Hellhole in the future.

- Oklahoma
- Utah Supreme Court
- District of Columbia
- New Mexico Appellate Courts

The report also highlights several "points of light," where judges and legislators intervened to stem abusive practices. These include:

- upholding of several tort reform laws by state supreme courts, indicating an increasing respect for the policymaking authority of legislatures;
- growing evidence of improvement in health care access in Texas due to the enactment of medical malpractice reform; and
- the stemming of excessive punitive damage awards by judges that faithfully apply the U.S. Supreme Court's 2003 *State Farm v. Campbell* decision.

Finally, this report highlights several reforms that can restore balance to Judicial Hellholes, including:

- tighten venue and *forum non conveniens* laws to rein in forum shopping in the jurisdictions;
- ensure that pain and suffering awards serve a compensatory purpose only and are not used to

evade statutory or constitutional safeguards on other damages;

- enact legislation to properly protect the authority of federal courts to decide cases with national implications;
- address the asbestos crisis by prioritizing claims to the truly sick and setting aside claims from people with no physical injury; and
- enhance the reliability of expert testimony by encouraging courts to be “gatekeepers” in keeping “junk science” out of the courtroom.

Experience shows that one of the most effective ways to improve the litigation environment in a Judicial Hellhole is to bring the abuses to the surface so everyone can see them. The public and the media can persuade the courts in Judicial Hellholes to adhere to “Equal Justice Under Law” – for all.

## Judicial HELLHOLES® 2004

1. Madison County, Illinois
2. St. Clair County, Illinois
3. Hampton County, South Carolina
4. West Virginia (entire state)
5. Jefferson County, Texas
6. Orleans Parish, Louisiana
7. South Florida
8. Philadelphia, Pennsylvania
9. Los Angeles, California

### DISHONORABLE MENTIONS

- Oklahoma
- District of Columbia
- Utah Supreme Court
- New Mexico Appellate Courts



# Introduction: The Making Of A Judicial Hellhole

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*Question: What makes jurisdictions “Judicial Hellholes”?*

*Answer: The judges.*

**Equal Justice Under Law.** It is the motto etched on the façade of the Supreme Court of the United States and the reason why few institutions in America are more hallowed 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, some judges in Judicial Hellholes do not. A few judges may simply favor local plaintiffs’ lawyers and their clients over corporations. Some, in remarkable moments of candor, have admitted their biases.<sup>9</sup> 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 being places where legitimate victims can seek compensation from those who caused their injuries.

Weaknesses in evidence are routinely overcome by pre-trial and procedural rulings. Product identification and causation become “irrelevant because [they know] the jury will return a verdict in favor of the plaintiff.”<sup>10</sup> Judges approve novel legal theories so that plaintiffs do not even have to be injured to receive “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. Extraordinary verdicts are upheld, even when they are unsupported by the evidence and in violation of constitutional standards. And often, judges allow cases to proceed even if the plaintiff, the defendant, and the witnesses do not live in the jurisdiction, and the allegations of the lawsuit have little or no connection to the area in which it is filed.

Not surprisingly, personal injury lawyers have a different name for these courts. They call them “magic jurisdictions.” Personal injury lawyers are drawn to these jurisdictions like magnets and look for any excuse to file lawsuits there. Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt business and cost jobs, and can result in a local judge regulating an entire industry.

This year, in addition to naming the worst Judicial Hellholes in the country, ATRA asked its members to explain how judges in Judicial Hellholes influence a case. According to ATRA members, here are the tricks-of-the-trade:

## Pre-Trial Rulings

- **Forum shopping:** Judicial Hellholes are known for being plaintiff friendly, so many personal injury lawyers file cases there even if no connection to the jurisdiction exists. Judges in these jurisdictions often do not stop this forum shopping.
- **Novel legal theories:** Judges allow suits to go forward that are not supported by the law. Instead of dismissing these suits, the judges adopt new legal theories, which often have inappropriate national ramifications.
- **Discovery abuse:** Judges allow unnecessarily broad, invasive, and expensive discovery requests to increase the burden on a defendant litigating the



case. Judges also may apply discovery rules in an unbalanced manner that denies 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, in 2002, the 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 certification:** Judges certify classes that do not have sufficient commonality of facts or law – which may confuse a jury and make the case 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. In Madison County, Illinois, for example, judges are known for scheduling numerous cases against a defendant to start on the same day or only giving defendants a week or so notice of when a trial is to begin.

### Decisions During Trial

- **Excessive damages:** Judges facilitate and allow to stand extraordinary punitive or pain and suffering awards that are not supported by the evidence, tainted by passion or prejudice, or influenced by improper evidentiary rulings.
- **Junk science:** Judges do not act as gatekeepers to ensure that the science admitted in a courtroom is credible. Rather, they allow plaintiffs' lawyers to introduce highly questionable "expert" testimony that purports to link the defendant to the plaintiffs' injuries, but has no credibility in the scientific community.

- **Uneven application of evidentiary rules:**

Judges allow plaintiffs greater flexibility in the kinds of evidence that can be admitted at trial while rejecting evidence that might be favorable to a defendant.

- **Jury instructions:** Giving improper or slanted jury instructions is one of the most controversial, yet under reported abuses of discretion in Judicial Hellholes.

### Judicial Integrity

- **Trial lawyer contributions:** Trial lawyer contributions make up a disproportionate amount of donations to locally-elected judges. In a recent poll, 46 percent of judges said donations influenced their judicial decisions.<sup>11</sup>
- **Cozy relations:** There is a revolving door among jurists, plaintiffs' lawyers, and government officials.

# A Tale of Two Cities

When a jurisdiction is identified as a Judicial Hellhole, local judges and policymakers have a choice: fix the problems or sink further into the abyss. There is no better example of that than the divergent paths taken by two of last year's most prominent Judicial Hellholes: Mississippi's 22<sup>nd</sup> Judicial Circuit and Madison County, Illinois.

Mississippi, through the resolve of the executive, judicial and legislative branches, has started to turn its judiciary around. Madison County, Illinois, on the other hand, chose a different path. Madison County, which sank deeper and deeper, at times became a caricature of itself. While some hope emerged towards the end of the year, Madison County remains the quintessential Judicial Hellhole.

*“We have re-struck the balance of fairness in our civil justice system so that defendants and their insurers will have a level playing field and not be subjected to a litigation lottery.”*

— Mississippi Governor Haley Barbour

## JUSTICE GRANTED: THE REDEMPTION OF MISSISSIPPI JUSTICE

Like Illinois, Mississippi developed a nationwide reputation as an unfavorable legal forum for many civil defendants, particularly employers with their principal place of business in other states, over the past decade.<sup>12</sup> Unlike Illinois, however, Mississippi has transformed its litigation environment for the better over the past three years, making it this report's brightest “point of light.”

Over the past decade, Mississippi became known as the “lawsuit capital of the world.”<sup>13</sup> The national media, including the *New York Times*,<sup>14</sup> *Los Angeles Times*,<sup>15</sup> and *The Washington Times*,<sup>16</sup> all recognized the Mississippi lawsuit phenomenon as front-page news. The popular television news program, “60 Minutes,” awarded Jefferson County, Mississippi, the distinct privilege of being named the “jackpot

justice capital of America” in a program examining why plaintiffs from all over the country flocked to Mississippi courts.<sup>17</sup> Locally, Jackson's *Clarion-Ledger* newspaper ran a series of front-page articles describing a legal environment where “the litigation industry has saturated the community with bias” against civil defendants.<sup>18</sup> Even the federal appellate court with jurisdiction over Mississippi recognized that the state's courts were “a Mecca for plaintiffs' claims against out-of-state businesses.”<sup>19</sup> ATRA named Mississippi's 22<sup>nd</sup> Judicial Circuit, which includes Copiah, Claiborne, and Jefferson Counties, as a Judicial Hellhole in both 2002 and 2003, with Holmes and Hinds Counties joining the list last year.

## How Mississippi Gained its Reputation as a Judicial Hellhole

The state's reputation as an unfavorable forum for civil defendants stemmed from a confluence of factors. First, a permissive joinder rule allowed for the aggregation of cases with diverse facts and questions of law that would not be consolidated elsewhere.<sup>20</sup> In addition, a liberal venue rule encouraged plaintiffs' lawyers to flood the friendliest courts with cases having little or no connection to the state,<sup>21</sup> while naming a local retailer or other product seller to avoid federal jurisdiction.<sup>22</sup> The number of plaintiffs suing in Jefferson County rivaled the number of residents living in the county.<sup>23</sup> Mississippi's reputation was further tarnished by a multitude of verdicts of \$100 million and above.<sup>24</sup> The state's extreme appeal bond requirement also made it difficult for defendants to exercise their right to appeal extraordinary judgments.<sup>25</sup>

Out-of-state lawyers came to view Mississippi as a profitable place to bring lawsuits. In fact, according to Mississippi Board of Bar Admissions records, in February 2004, more out-of-state attorneys who already were licensed in other states took the Mississippi bar exam than Mississippi residents.<sup>26</sup> The enactment of tort reform in neighboring Alabama and Texas is thought to have exacerbated the flow

of claims to Mississippi courts.<sup>27</sup> As one Jackson lawyer commented, “Out-of-state plaintiffs’ lawyers can hardly be criticized for coming to Mississippi to litigate when liberal joinder and venue rules present the best forum for huge awards for their clients’ alleged injuries.”<sup>28</sup>

*It was standing-room only as more than 120 attorneys and a handful of Fayette locals jammed the Jefferson County courtroom of Circuit Court Judge Lamar Pickard for a Friday hearing to consider the dismissal of thousands of asbestos lawsuits.*

*The Clarion-Ledger, Oct. 16, 2004*

### The Transformation of Mississippi’s Litigation Environment

Mississippi’s litigation environment has dramatically improved over the past three years. Each branch of government had an important role in restoring equal justice to the state’s courts.

#### Mississippi Judiciary Acts to Check Litigation Abuse

Judicial efforts to achieve a balanced and fair civil justice system are critical since the vast majority of tort law continues to be made, and applied with a large degree of discretion, by state court judges, even after the enactment of tort reform legislation.

Since 2001, the Mississippi judiciary has taken significant steps to address the problem of litigation abuse. The Mississippi Supreme Court amended its appeal bond rule,<sup>29</sup> so that high priced appeal bonds can no longer act as financial barriers for defendants to appeal unjust verdicts. The court also strengthened the standard for admissibility of expert evidence to weed out unreliable “junk science” testimony.<sup>30</sup>

The court that watched over a flood of multimillion dollar awards since 1995 has, over the past two years, reversed course. In a series of cases, the court has applied the law to ensure that punitive damage awards meet constitutional and statutory safeguards, and that all damage awards are supported by the evidence.

In five cases over a seven month period between February and September 2004, the Mississippi Supreme Court repeatedly acted to rein in the joining of numerous lawsuits into “mass actions” and blatant forum shopping, which brought plaintiffs from around the nation into Mississippi courts.<sup>39</sup> The court now summarily dismisses the claims of out-of-state plaintiffs and requires the claims of Mississippi residents who file claims in magnet courts to be transferred to a county with a connection to their claims.<sup>40</sup> According to one local plaintiffs’ lawyer, “Mass torts are dead and over.”<sup>41</sup> Jefferson County Circuit Judge Lamar Pickard, who began cracking down on joinder abuse in 2001,<sup>42</sup> is now considering whether the Mississippi Supreme Court’s recent rulings require him to dismiss thousands of asbestos claims that come from states as far away as Hawaii.<sup>43</sup>

#### Controlling Run-Away Awards: 2002-2004

- ❑ reduced an award of \$345,000 in compensatory damages to about \$6,000 to reflect the plaintiff’s actual loss rather than speculative lost profits and an unsubstantiated claim of emotional distress, and struck a \$5 million punitive damage award for a lack of evidence of evidence of malice;<sup>31</sup>
- ❑ set aside \$3.5 million in damages where the award was purportedly for emotional distress, primarily due to “loss of sleep,” without evidence of any medical treatment or professional counseling;<sup>32</sup>
- ❑ reversed a \$5 million punitive damage award where there was no request for compensatory damages, no instruction to the jury on awarding compensatory damages, and no award of compensatory damages;<sup>33</sup>
- ❑ reversed an award of \$2.5 million in compensatory damages and \$15 million in punitive damages in a case involving a workplace accident when the trial court did not permit the defendant to introduce important evidence;<sup>34</sup>
- ❑ reduced an extraordinary pain and suffering award of nearly \$500,000 in an ordinary car accident case in which a business was named as a defendant due to the actions of an employee by \$300,000;<sup>35</sup>
- ❑ reversed a \$30 million punitive damage award against an insurer and \$6 million punitive damage award against its subsidiary for failing to refund \$637.99 in unearned premiums on a credit life insurance policy;<sup>36</sup>
- ❑ reversed a \$1.5 million award for emotional distress when the only evidence produced at trial was vague testimony of nightmares, sleeplessness and visits to an unidentified doctor, and struck a \$5 million punitive damage award where there was no evidence of malice;<sup>37</sup> and
- ❑ reduced a \$5 million punitive damage award to \$500,000 when the verdict “clearly evidenced bias and prejudice.”<sup>38</sup>

### Executive Branch Leadership

The change in Mississippi's litigation climate also can be credited to the strong leadership of Mississippi Governor Haley Barbour and Lieutenant Governor Amy Tuck. Both made enactment of tort reform a prominent issue in their 2003 campaign platforms and a top priority for 2004.<sup>44</sup> Governor Barbour devoted a significant portion of his 2004 State-of-the-State address to improving Mississippi's litigation climate, calling for the end of lawsuit abuse, joinder and venue reform, a limit on noneconomic damages, "proportionate" liability in place of "deep pocket" joint liability, and liability protections for innocent sellers and premises owners.<sup>45</sup>

### Legislative Action

In late 2002, during a lengthy special session called by Governor Ronnie Musgrove, the Mississippi Legislature passed a civil justice reform package, H.B. 19,<sup>46</sup> with the support of business, labor, and doctors.<sup>47</sup> The new law became effective on January 1, 2003. The 2002 legislation amended the state's venue law to require that lawyers file claims in counties with some relationship to the facts of the case.<sup>48</sup> As part of this package, the legislature provided for modest "sliding caps" on punitive damages based on the net worth of the defendant.<sup>49</sup> The 2002 reforms also provided some relief to innocent sellers, abolished joint liability for noneconomic damages (i.e. pain and suffering) for any defendant found to be less than thirty percent at fault, and protected premise owners from liability stemming from criminal acts of third parties on their property. In addition, the legislation stopped duplicative recovery of "hedonic" or lost enjoyment of life damages, limited advertising by out-of-state attorneys, and authorized the imposition of a small penalty for frivolous pleadings. In a separate bill, H.B. 2, the legislature enacted changes to Mississippi's medical malpractice laws, including the establishment of a \$500,000 limit on noneconomic damages, such as pain and suffering. H.B. 2 also required plaintiffs to give defendants sixty days' written notice before commencing a medical malpractice lawsuit and to attach an affidavit to the complaint certifying that an expert has concluded there is a reasonable basis upon which to commence the case.<sup>50</sup>

In June 2004, the Mississippi Legislature, prompted by the efforts of Governor Barbour and Lieutenant Governor Tuck, enacted a comprehensive civil justice reform bill, H.B. 13, in a special session.<sup>51</sup> The new law, which generally went into effect on September 1, 2004, includes several significant reforms that strengthen and go beyond the legislation enacted in 2002. The new law revisited venue and joinder abuse by requiring a "substantial" connection between the lawsuit and the county in which it is filed. Most notably, the new law eliminated the problematic "good for one, good for all" rule by requiring venue to be proper for each plaintiff. The 2004 law limited recovery of noneconomic damages against any civil defendant (other than a health care liability defendant) to \$1 million, while keeping in place the existing \$500,000 limit on noneconomic damages in medical liability actions enacted in 2002. The legislation also placed tighter limits on punitive damages that may be awarded against medium and small businesses. The legislature enacted several other civil justice reforms, including abolishing joint and several liability for all defendants. Innocent sellers of a product, such as retailers or distributors, were given greater protection against being pulled into lawsuits directed at manufacturers. H.B. 13 also met Governor Barbour's goal of easing the burden of jury service so that all people could serve. After enactment of H.B. 13, Governor Barbour declared that "We have re-struck the balance of fairness in our civil justice system so that defendants and their insurers will have a level playing field and not be subject to a litigation lottery."<sup>52</sup>

### The Electorate

Voters played a direct and important role in creating a political environment that was supportive of the reforms necessary to address out-of-control litigation. In addition to electing Governor Barbour and Lieutenant Governor Tuck on a tort-reform platform, voters also changed the composition of the Mississippi Supreme Court. In what was the most expensive judicial campaign in the state's history for a seat on the court, Mississippi voters cast Justice Charles McRae from the court in 2002.<sup>53</sup> McRae, a former president of the Mississippi Trial Lawyers Association, received nearly all of his financial support from plaintiffs' attorneys.<sup>54</sup> Instead, voters elected Jess Dickinson, a lawyer who campaigned

against out-of-control litigation, and who had a diverse base of support.<sup>55</sup> Two plaintiff-lawyer backed incumbents also lost their seats, showing that Mississippians saw the need for change.<sup>56</sup>

In November 2004, voters returned incumbent Justices Michael Randolph (recently appointed by Governor Barbour to replace retired Chief Justice Edwin Lloyd Pittman), William Waller, Jr., and George Carlson, Jr. to the bench by wide margins.<sup>57</sup> The Business & Industry Political Education Committee (BIPEC) endorsed all three justices as “best for business.”<sup>58</sup> Incumbent Justice James Graves, Jr., who was not endorsed by BIPEC, also was returned to the bench, leaving the current court in place.<sup>59</sup> The results of the November 2004 election indicate that Mississippi is likely to continue to progress in developing a fair litigation environment, and not slide back to pre-2000 days.

### Cracking Down on Corruption

In June 2003, it was reported that the Federal Bureau of Investigation (FBI) was probing possible corruption in connection with some multimillion-dollar awards in Jefferson County.<sup>60</sup> The first public action stemming from this investigation occurred on August 30, 2004, when the FBI arrested twelve people who allegedly forged prescriptions to cash in on a \$400 million settlement with American Home Products (now Wyeth) involving the diet drug combination Fen-Phen in Jefferson County in 1999.<sup>61</sup> Each individual was charged with receiving at least \$250,000 in settlement funds through submitting false prescriptions.<sup>62</sup> One plaintiff was charged with fraudulently receiving \$2.75 million in settlement funds through forging prescriptions for family members, and went to the purchase of personal items such as a new Jaguar automobile.<sup>63</sup> Four faced additional charges of wire fraud and money laundering.<sup>64</sup> Less than one month later, three of those charged plead guilty to fraud, will forfeit their settlement money, and may face fines and potential jail time when they are sentenced in December 2004.<sup>65</sup> According to prosecutors, more arrests in Jefferson County are anticipated.<sup>66</sup>

A separate investigation by the FBI and state law enforcement authorities spurred by extraordinary trial lawyer giving during the 2000 judicial elections resulted in the indictment of a prominent trial lawyer and a

state Supreme Court Justice in July 2003, with further charges added through another indictment in February 2004.<sup>67</sup> Plaintiffs’ lawyer Paul Minor was charged with bribery, conspiracy, and extortion on grounds that he provided the Mississippi judges with gifts and helped them pay off loans in return for favorable treatment in the courts.<sup>68</sup> The charges involve Justice Oliver Diaz, Jr., his former wife, and two lower court judges. Justice Diaz has temporarily stepped down from the bench until the charges against him are resolved. A trial is expected to begin some time in 2005.<sup>69</sup>

*“Mississippi has signaled that it is once again open for business.”*

— MassMutual upon reentering the state’s municipal bond market

### Evidence of a Changing Legal Environment

Mississippi has already begun to reap some of the benefits of the improving legal climate in the state. For instance, Massachusetts Mutual Life Insurance Company (MassMutual) announced on the day Governor Barbour signed the 2004 reform law that it would re-enter the market for Mississippi municipal bonds.<sup>70</sup> The company indicated that it made this decision, because “Mississippi has signaled that it is once again open for business.”<sup>71</sup> More recently, Mississippi’s Insurance Commissioner, George Dale, indicated that St. Paul Travelers, the nation’s second largest commercial insurance company, will provide consumers with more choice and more competitive rates by increasing its homeowners and auto insureds, and in the state as a result of “positive steps the state of Mississippi has taken towards creating a balanced legal climate that makes the state a more attractive place in which to do business.”<sup>72</sup> Dale also has attributed a leveling-off of Mississippi’s medical malpractice insurance rates to the changes.<sup>73</sup> There are indications that several insurance companies may soon begin writing new policies in the state.<sup>74</sup> As Steve Browning, executive director of Mississippians for Economic Progress, said on the day the 2004 legislation took effect: “It’s going to be the beginning day for courtroom fairness. . . . You will see more balance for businesses and industry in the courtroom.”<sup>75</sup>



The full effect on Mississippi's economy and other benefits flowing from the recent changes in the state's legal climate will take more time. Many of the reforms have just recently gone into effect. In addition, investor and insurer confidence does not change overnight. Businesses need to gain assurance that the changes that have taken place will be long lasting. One business predicted that "as the new legislative changes come on-line and the jackpot justice we have seen comes more under control that should greatly reduce loss costs and create a much more healthy insurance environment."<sup>76</sup>

## HELLHOLE #1 (AGAIN) MADISON COUNTY, ILLINOIS

When Madison County was named the nation's Number One Judicial Hellhole last year, the local trial lawyers exclaimed, "We're number one! We're number one!"<sup>77</sup> This year, they should be even happier, because when it comes to the big business of trial lawyering, again there is no better place to set up shop than Madison County.<sup>78</sup>

The area's newspapers have come to the same conclusion, calling Madison County "lawyer heaven,"<sup>79</sup> a "jackpot jurisdiction," a "hotbed of megabuck litigation," a "local slot machine," and "the most magic of all" magic jurisdictions.<sup>80</sup> What is more, the judicial climate in the county has sunk to even lower depths.

### A Scenic Destination . . . for Litigation

Madison County continues to be the number one destination for the litigation tourist guided by "travel agent" trial lawyers who shop for the best forum to have their cases heard, regardless of whether the case has any logical connection to the local community. As former Circuit Judge John DeLaurenti, who heard cases in Madison County for twenty-seven years until 2000, acknowledged before passing away this summer: "When people come from hither and thither to file these cases, there's gotta be an inducement . . . They're not coming to see beautiful Madison County."<sup>81</sup>

One of the most significant problems with the civil justice system in Madison County is venue. Specifically, Madison County judges allow claims to proceed in Madison County courts where the

plaintiff and defendant are located out-of-state, the plaintiff's exposure occurred outside the state, medical treatment was provided outside the state, no witnesses live in Illinois, and no evidence relates to the state.<sup>82</sup> As a result of these lenient venue rules and the County's well-deserved reputation for being plaintiff-friendly, Madison County has become a magnet court, attracting national class actions, asbestos claims, welding rod litigation and other types of legal actions from around the country.<sup>83</sup>

*"When people come from hither and thither to file these cases, there's gotta be an inducement . . . They're not coming to see beautiful Madison County."*

— Judge John DeLaurenti

### The Anti-Business Climate

It is difficult to overstate the anti-business litigation climate that suffocates Madison County. It is a place where eating a bad piece of chicken in a local restaurant leads to a lawsuit for thousands of dollars against Cracker Barrel and Tyson Foods.<sup>84</sup> Businesses know the shakedown routine. For instance, this is the 19<sup>th</sup> time in recent years that Cracker Barrel has been hit with a lawsuit in Madison County.<sup>85</sup> Tyson Foods is one of the many companies defending against a class action there.<sup>86</sup> Consider that in just one recent week prior to publication of this report, the following employers, among others, were defending against lawsuits in this small county court: American Standard, Champion International, Firestone Ford, General Dynamics, General Motors, Georgia-Pacific, Honeywell, Ingersol-Rand, Kimberly-Clark, K-Mart, Mead Corporation, MetLife, Pfizer, Roto Rooter, Scott Paper, Sears Roebuck & Co., Union Carbide, Union Pacific, Uniroyal, and Viacom.<sup>87</sup> That's all in a week's work in the Madison County courthouse.

### Class Action Paradise

In most areas, if a person has a minor dispute with a business, they ask for a refund and, if necessary, file a small claims complaint. Not so in Madison County where local lawyers will instead bring class action lawsuits on behalf of their clients and all others

in the United States of America. These lawsuits typically ask for no more than \$75,000 per class member in order to ensure that the case is heard by a friendly Madison County judge and not moved to federal court. In the three months preceding publication of this report, class actions were either filed or heard in Madison County involving:

- American Express for “increase[ing] revenue” by charging a currency conversion fee on purchases made abroad;<sup>88</sup>
- Sears Roebuck and Co. for selling gas ranges without “anti-tip brackets” even when the absent brackets had caused no injury;<sup>89</sup>
- America’s Moneyline for charging a \$30 fee at closing for a courier to deliver loan documents to a title company when its actual cost may have been less;<sup>90</sup>
- Option One Mortgage Corp. for allegedly overcharging \$9.46 in interest by allowing interest to accrue one day past the payoff date;<sup>91</sup>
- A Memphis-based bank for charging non-account-holders a \$5 fee to cash checks;<sup>92</sup>
- Intel for purportedly misleading consumers into believing the Pentium IV microchip is better than the Pentium III;<sup>93</sup> and
- Ford for selling 2000 and 2001 F-150 Pick-up with a “stock” radiator rather than the “upgraded” radiator expected by the plaintiff.<sup>94</sup>

*“Plaintiffs’ attorneys are rolling in from all over to file cases at the little courthouse in Edwardsville. Madison County’s judges bend over backwards for plaintiffs’ attorneys.... Those lawyers, in turn, fill up judges’ election campaign coffers. This system stinks.”*

— *St. Louis Post-Dispatch*,  
Oct. 17, 2004

A single local law firm, the Lakin Law Firm, appears to have brought each of these class action lawsuits. With their services, filing class action lawsuits in Madison County has become commonplace:

- Ashley Peach, who has three pending class action lawsuits in Madison County, filed another in 2004.

*“For some reason, these class action lawyers do not want to go to Federal courts. Now, why is that? Because they can forum shop into Madison County, IL, where they get judges and jurors to hammer the defendants with outrageous verdicts that benefit basically only the attorneys. Now, that is wrong.”*

—Sen. Orrin Hatch  
Remarks on Senate Floor, Oct. 20, 2003.

- In June, she sued Fashion Bug for the \$8.39 balance on a gift card that a cashier would not provide in cash. Then, in November, she added Wal-Mart and K-Mart to her complaint, making a similar claim. The claim against Wal-Mart is for \$1.39. K-Mart apparently refused to hand over 52 cents;<sup>95</sup>
- Armettia Peach, Ashley Peach’s mother, has filed her own class action. She claims that when she bought an “extended protection plan” on a new car from an insurance company, the car dealership did not tell her it was making money on the deal;<sup>96</sup>
  - Mark Eavenson, who filed 20 class actions in 2003 against medical insurance providers, filed another in 2004. This time, he claims that a healthcare management company and an insurance company paid doctors at discounted rates, as agreed by contract, but did not provide them with promised patient referrals.<sup>97</sup>

These and other class actions are filed in Madison County because local judges have “frequently decided to hear cases that other courts have refused to hear.”<sup>98</sup> For instance, Madison County is home to the notorious \$10.1 billion verdict in a class action lawsuit that claimed labeling “light” cigarettes is deceptive.<sup>99</sup> The Manhattan Institute has reported that from 1998 to 1999, the number of class actions filed in Madison County jumped from two to sixteen.<sup>100</sup> The number of filings has risen steadily every year since, and in 2003, there were 106 class actions filed in Madison County.<sup>101</sup> With three months left in 2004, lawyers already have filed 60 class actions this year in Madison County.<sup>102</sup> Even Judge Edward Fergusson, Madison County’s chief circuit judge, acknowledged that the judges “need to be more astute about certifying.”<sup>103</sup>



## A National Haven for Asbestos Claims

When it comes to asbestos, Madison County judges, particularly Judge Byron, apparently consider themselves judges for the country, not just for Madison County residents.<sup>104</sup> Over the last five to ten years, Judge Byron’s “rocket-docket,” where “questions of venue, jurisdiction and liability fly out the window as trial dates are quickly set,” has become a national haven for asbestos claims.<sup>105</sup> The number of asbestos cases filed in “Mad County” increases every year: 953 asbestos cases were filed in 2003, up from about 884 in 2001, 411 in 2000, 176 in 1998, and 65 in 1986.<sup>106</sup> In 2003, of the 1,500 or so mesothelioma cases filed nationally, 457 of them were filed in Madison County.<sup>107</sup> In addition, 300 mesothelioma cases were set for trial last year, which is more than in New York or Chicago, places with substantially larger populations.<sup>108</sup>

*“In Madison County, the judges have never found a proposed class action they would not certify.”*

— Professor Lester Brickman,  
Benjamin Cardozo School of Law

## Welding Rod Litigation

Welding rod litigation has become a unique Madison County practice. Plaintiffs in these novel suits claim that fumes emitted during the welding process cause Parkinson’s disease. The *Belleville News-Democrat* reported that in the seven trials across the country dealing with this theory, jurors sided with the defense six times and were unable to reach a unanimous decision in the seventh.<sup>109</sup> In Madison County on October 28, 2003, a welding rod plaintiff received an unprecedented million-dollar verdict.<sup>110</sup>

## Case Management

Another significant problem in Madison County that often does not receive media attention is the way in which the judges schedule their cases. Often, the Madison County courts set dozens of claims against a particular defendant to go to trial in the same week, making it “impossible for defense attorneys to prepare for any of them.”<sup>111</sup> The plaintiffs’ lawyers then can

choose which cases to call, which gives the plaintiffs’ lawyer a huge advantage. As one defense attorney noted, “We have to prepare for dozens of cases from around the country and we don’t know which case (the plaintiff lawyer) is going to call. ... But Randy Bono [a plaintiffs’ lawyer] can focus like a laser.”<sup>112</sup>

## There Isn’t a Doctor in the House

As further discussed in the portion of this report discussing Madison County’s Judicial Hellhole neighbor, St. Clair County, the two counties encompassing the Metro-East share a common healthcare crisis. Physicians are leaving the area or cutting services due to the extraordinary and rising medical malpractice insurance costs caused by the number of medical malpractice lawsuits and high awards.<sup>113</sup> This year, seventy-nine physicians left or are planning to leave Madison County, and most blame their departures on rising medical malpractice insurance costs.<sup>114</sup>

## Evidentiary Decisions

Once the trials start, one of the largest evidentiary hurdles for Madison County defendants is the “*Lipke* Rule.” Under the *Lipke* rule, a defendant is not permitted to present evidence to a jury that the plaintiff’s alleged injury may have been caused by another person or company who is not a party to the suit.<sup>115</sup> In asbestos cases, where exposure can come from any of a number of sources, the *Lipke* Rule can produce monumentally unfair results.

Take, for example, a person who was regularly exposed to asbestos while working for thirty years at a Naval base. Suppose he used an asbestos containing joint compound for a few days while doing some home improvement. Under the *Lipke* Rule, in the suit against the joint compound maker, the jury will only be allowed to hear about the exposure to the joint compound. There can be no mention of the thirty years of exposure at the naval base. No other state has a similar rule.<sup>116</sup>

## Campaign Contributions: Pay to Play?

When asked “What makes a Judicial Hellhole?,” a frequent response from ATRA members is “trial lawyer contributions.” It should not be a surprise then that in the returning Number One Judicial Hellhole, “the plaintiff bar dominates these

donations, creating a chubby system in which [plaintiffs lawyers] promote the election of [politically aligned] judges, many of whom are former law partners or relatives of their donors.”<sup>117</sup> Of the ten law firms to give *more than* \$200,000 in judicial campaign contributions in the past two years, nine of them were plaintiff firms.<sup>118</sup>

*“[J]udges are beholden to trial lawyers for campaign contributions.”*

— *St. Louis Post-Dispatch*,  
Sept. 26, 2004

Had the plaintiffs’ lawyers not taken advantage of a reporting loophole, it is possible the number would have been higher. In noting that contributions under \$150 do not need to be itemized by name of the donor, one local plaintiff lawyer conceded, “We can give quite a bit at \$150 a check, if we don’t want our name in lights. Some of them, we give as much (that way) as we do under our own names.”<sup>119</sup> For some lawyers, contributing may not be a choice. For example, one lawyer who worked for a plaintiffs firm said, “There would be a walk down the hall, and (the manager) would say, ‘I need a check for \$500 for (a judge’s) campaign, now.’ And you wrote the check.”<sup>120</sup>

Given the fact that Madison County is a litigation destination, it also may not be surprising that contributions to local judges come in from all around the country. The Dallas, Texas firm of Stanley, Mandel & Iola, which often files claims in Madison County on behalf of individuals from around the country who are sick from asbestos exposure, gave a campaign contribution to Judge Byron who presided over its cases.<sup>121</sup>

In an editorial on its expose of Madison County judges, the *St. Louis Post-Dispatch* acknowledged that “judges are beholden to trial lawyers for campaign contributions,” and that as a result, the judges and trial lawyers have been “rigging the courts” against defendants.<sup>122</sup> In short, the paper continued, Madison County judges “are not providing fair and even-handed justice” and have “tarnished” this noble pursuit.<sup>123</sup>

## A Culture of Intimidation & Reprisal

In addition to “rigging the courts,”<sup>124</sup> as the *St. Louis Post-Dispatch* put it, the judges and plaintiffs’ lawyers have declared war on those who would dare to challenge their way of doing business.

In the most notorious episode of the year, Judge Nicholas G. Byron, who administered the asbestos docket for nearly a decade, banished the Atlanta law firm King & Spalding from his courtroom because former U.S. Attorney General Griffin Bell, now an attorney with the firm, called for a Department of Justice investigation into Madison County courts. At an April 14, 2004 symposium at the Washington University School of Law in Missouri, Bell said that jurisdictions that have a reputation for treating civil defendants unfairly, such as Madison County, bring a “stain on our system” because they deprive defendants of their constitutional rights.<sup>125</sup> Ironically, as the *Bloomington Pantagraph* pointed out, Judge Byron “ignored the U.S. Constitution” in issuing his edict against the law firm, which was not even a party before the court at the time.<sup>126</sup> Judge Byron also barred the media from a hearing in which two local plaintiffs’ firms were going to divvy up “the legal-fee spoils from yet another class-action settlement.”<sup>127</sup>

While the Judge Byron episode received the most media attention, the SimmonsCooper firm’s McCarthyistic intimidation tactics were just as disturbing. In a number of asbestos cases the firm had pending in Madison County, the firm issued interrogatories to defendants demanding that they disclose whether they are members of, or have contributed to, organizations that promote legal reform or regard Madison County as a “Judicial Hellhole.” *The Wall Street Journal* responded with: “We thought the ‘are you now or have you ever been, known or associated with’ line of questioning went out with the 1950s.”<sup>128</sup> First Amendment rights to free association and free speech were well established in the civil rights case *NAACP v. Alabama*.<sup>129</sup>

It is not just law firms, defendants, and civil justice reform organizations that are subject to retribution in Madison County. Some judges appear threatened by them.<sup>130</sup> As one court observer reportedly stated, “The major plaintiffs’ lawyers have an inordinate amount of money, and if judges don’t show some helpful attitude on cases, then come retention time, they are

screwed.”<sup>131</sup> This report further stated that judges in Madison County have been “scared” of plaintiff lawyer retribution since 1980, when Tom Lakin, the founder of The Lakin Law Firm, ran a “vendetta” campaign against a local judge when Lakin lost three trials in that judge’s courtroom.<sup>132</sup>

These events and other practices, which will be discussed in more detail, led Congressman Charlie

The result of an Illinois Supreme Court race in the November 2004 general election also may lead to greater fairness in Madison County and throughout the state. Voters signaled that they were ready for change in the hotly contested race for the Illinois Supreme Court seat from the Fifth District, which includes one-third of Illinois’ counties (37 of 102).<sup>139</sup> Justice Gordon Maag of Madison County

*“[R]ecords indicate that the taxpayers of Madison County are actually being enriched by this docket. The filing fees are such that with the volume of cases filed and the fact that there are so few trials, the Madison County general fund receives a large deposit of money from these fees while the cost of administration is negligible, when compared to the amount of the fees. The problem with this is, however, that it is not the function of the courts to make money. This is not a ‘business’. It is the function of the courts to administer justice.”*

— Madison County Circuit Court Judge Daniel J. Stack,  
who took over the asbestos docket from Judge Byron in September 2004.

Norwood to call for a federal investigation of whether Madison County courts were routinely discarding defendants’ constitutional rights. In a letter to U.S. Attorney General John Ashcroft, Representative Norwood wrote, “Litigants must be able to go to court believing they will win or lose on the merits of the case or controversy.”<sup>133</sup>

### Light at the End of the Litigation Tunnel?

As 2004 comes to a close, there may be some light at the end of the tunnel. Judge Byron stepped down as head of the massive asbestos docket this summer.<sup>134</sup> Judge Daniel Stack, who took over the docket September 8, has already dismissed several cases because they had no connection to Madison County.<sup>135</sup> Judge Stack also pointed out that while Madison County benefits from the filing fees (last year, Madison County generated more than \$4 million in filing related fees, much of which came from the asbestos docket<sup>136</sup>), the court should not be a “cash cow” for the county.<sup>137</sup> The docket will be closely monitored throughout the next year.

Madison County also adopted a deferred docket for asbestos cases to prioritize claims of those who are truly ill over the claims of those who claim to have been exposed to asbestos, but have not developed an injury.<sup>138</sup>

was defeated by Lloyd Karmer, a trial court judge from Washington County. The race, which was the most expensive for an Illinois Supreme Court seat in history, was seen by many as a referendum on civil justice and medical liability reform.<sup>140</sup> Karmer, who emphasized the Metro-East’s reputation as a lawsuit haven, even carried the traditionally Democratic Madison and St. Clair counties.<sup>141</sup> It is the first time since 1969 that the Fifth District seat will not be held by a resident of Madison County.<sup>142</sup> During the campaign, Maag stated, “I don’t know if there is anything wrong in Madison County.”<sup>143</sup> The voters knew.

In addition to losing the Supreme Court race, Justice Maag also lost the retention election to keep his seat on the appeals court with jurisdiction over Madison County. Upon his seat on the court, Karmer will have the opportunity to recommend the appointment of two appellate judges to the full Illinois Supreme Court — one to fill a vacancy created by a retirement and the other to fill Maag’s seat on the court of appeals.<sup>144</sup> Karmer’s election and appointment of two new appellate court judges has the potential to help restore balance in Madison County.<sup>145</sup>

# The 2004 Hellholes...Continued

## HELLHOLE #2

### ST. CLAIR COUNTY, ILLINOIS

St. Clair County, the southern neighbor of Madison County, has emerged from Madison County's shadow and achieved a reputation as a Judicial Hellhole all its own. The first time ever deemed a Judicial Hellhole in this report, St. Clair County ranks as the second worst jurisdiction in 2004.

#### The Lawsuit Industry: Now Expanding into St. Clair County

Lawsuits have become an industry in St. Clair County. Court records show that St. Clair, with a population of 258,606, is just behind Madison, a county of comparable size, in revenues from the filing fees for civil lawsuits. Only four substantially larger counties in Illinois took in more filing fees from lawyers than each of St. Clair and Madison Counties.<sup>146</sup> The amount of filing fees raised, according to one local judge, is "a heck of a lot more money than it costs to run the court."<sup>147</sup>

*The number of class actions filed in St. Clair County increased from 2 in 2002 to 24 in 2004 — an 1100% increase in 2 years.*

#### Class Actions Arrive in St. Clair County

In recent years, the class action mess has had its national epicenter in Madison County, which topped the country for the number of class actions per capita in 2002 and 2003. Evidence suggests that St. Clair County has decided to get into the litigation tourism business as well. In fact, some of the same firms that made Madison County a playground for class actions have opened a new park in St. Clair County.<sup>148</sup> According to St. Clair County court clerks, the county had only two class actions filed in 2002.<sup>149</sup> A search of court records by the Illinois Civil Justice League found that, as of early October 2004, plaintiffs' lawyers had filed at least twenty four class actions in St. Clair County during that calendar year. You may recognize some of the defendants that span the gamut of

industries and are located across the country: Emerson Electric, MasterCard, Home Depot, Bank of America, DaimlerChrysler, Lowes Home Centers, Allstate, Best Buy Stores, Hasbro, 3M, Hewlett-Packard, GlaxoSmithKline, and Kia Motors, among others. This rise, from two in 2002 to twenty four in 2004 is extraordinary. It is reminiscent of Madison County, where class actions rose from two in 1998 to thirty nine in 2000, and then continued to rise.<sup>150</sup>

One notable St. Clair County class action was filed against Ford in June 2003. Plaintiffs' lawyers chose St. Clair County as the most favorable court to file a lawsuit against Ford purportedly on behalf of all Illinois law enforcement alleging that a defect in its popular Crown Victoria Police Interceptor caused it to explode when hit from the rear at high speeds. Far less than 1% of police districts opted to join the lawsuit, which was certified as a class action by the St. Clair County Circuit Court. None of the fourteen officers that died in crashes over a twenty-year period when their Interceptors were hit were from the state of Illinois, let alone St. Clair County.<sup>151</sup>

#### Contributing to a Healthcare Crisis in the Metro-East Region

Medical malpractice lawsuits have led physicians to flee the Metro-East area, where doctor's pay premiums that are the highest in the state. A recent study found that almost 1,100 defendants were named in over four hundred lawsuits in St. Clair and Madison Counties from 2000 to 2003, with nearly three out of four of these defendants being individual doctors or physician-owned practices and the remainder being local hospitals or other healthcare. The report estimated that more than half of the Metro-East region's 950 licensed physicians were personally named or had their practices named in lawsuits in the last four years.<sup>152</sup> Records also showed that 85% of medical malpractice claims closed in St. Clair County between 1999 and 2003 resulted in no payment to the plaintiff,<sup>153</sup> demonstrating that many of the accusations against doctors are unfounded. Most of these cases are brought by a handful of local law firms.<sup>154</sup>

According to Henry Maier, the President of Memorial Hospital in Belleville, Metro-East hospitals will have lost 161 physicians by the end of 2004, including 82 from St. Clair County and 79 from Madison County.<sup>155</sup> Anderson Hospital, which lost four obstetricians, three surgeons, two internists, two family practice doctors, an ear-nose-throat specialist, a neurosurgeon and an anesthesiologist in 2003, was forced to shelve an expansion plan to its Women's Pavilion.<sup>156</sup> Alton recently lost five of its physicians due to rising insurance costs.<sup>157</sup>

Clair and Madison County for anesthesiologists was \$41,296 compared to \$20,900 in Wisconsin and \$13,808 in California. St. Clair obstetricians/gynecologists paid \$139,696 compared with \$58,020 in Indiana and \$39,508 in Wisconsin. Neurosurgeons paid an extraordinary \$228,396, almost twice as much as they would pay in Missouri, three times what they would pay in Indiana, and five times that of their colleagues in Wisconsin. St. Clair orthopedists and surgeons also pay extraordinarily high insurance rates compared

*“The idea of an unsigned affidavit is almost non-sequitur. An affidavit that doesn't identify the affiant is not an affidavit. I don't know of any other view of it. Unsigned information, anonymously rendered information, seems somewhat suspect.”*

*-Circuit Judge Donald Bernardi of Bloomington, reacting to St. Clair County's practice of permitting anonymous certificates of merit.*

Some doctors and hospitals have severely curtailed their practices, opting to avoid high-risk procedures. Others, like obstetrician-gynecologist Lorna O'Young, who saw her premiums double from \$69,500 to \$139,000 in 2003, are considering how much they can take. “I'm not leaving yet,” she said, “I want to make that clear. But, if all of a sudden I'm named in a lawsuit, my rates go up. . . . I'm scared the rate is going to go to \$280,000. That would definitely be the limit.”<sup>158</sup> Obstetricians and neurosurgeons have been hit particularly hard. In the past two years, Belleville hospitals have eliminated most neurosurgery, on-call trauma surgery and other complex medical procedures.<sup>159</sup> In August 2004, St. Elizabeth's stopped its practice of having on-call trauma surgery 24 hours a day.<sup>160</sup> In fact, the elimination of emergency room trauma surgery at both Belleville hospitals forces those with serious, life-threatening injuries to travel to St. Louis, or even as far as Springfield, a 100-mile trip.<sup>161</sup>

According to the St. Clair County Medical Society, primary physicians leaving St. Clair County typically save \$20,000 per year by moving to Clinton or Randolph County, or as much as \$150,000 by leaving Illinois for Indiana or Wisconsin. As of July 2003, premium rates for St.

to other states, and rates across-the-board were set to rise by appropriately ten percent in 2004.<sup>162</sup>

One reason that 85% of medical malpractice cases are closed without payment to the plaintiff may be the practice of the St. Clair County judges to allow anonymous “certificates of merit” in medical malpractice cases.<sup>163</sup> Illinois, as well as several other states, requires a medical malpractice lawsuit to be accompanied by a signed evaluation by an independent medical professional finding the plaintiff has a potentially valid claim. Metro-East courts, however, permit certifying doctors to remain anonymous - which does not allow defense lawyers to challenge the credentials of a doctor who may lack expertise in the procedure at issue and who is receiving a substantial fee, as much as \$10,000, for providing a single opinion. In some cases, plaintiffs' lawyers who cannot find a doctor to certify the case disregard the law and file it in St. Clair County anyway, costing doctors and their insurers thousands of dollars in legal fees to get it dismissed.<sup>164</sup>

Frustrated by the downward spiral in the courts and the lack of action by the state legislature, St. Clair County, as well as several home-rule cities within St. Clair County, were considering local ordinances to protect their doctors from mounting lawsuits and rising insurance premiums.<sup>165</sup> Rather



than take this route, in late September, the St. Clair County Board unanimously approved a resolution supporting a constitutional amendment to limit pain and suffering awards in medical malpractice cases (the Illinois Supreme Court nullified such a law as unconstitutional in the mid-1990s).<sup>166</sup> A second adopted resolution called upon Governor Rod Blagojevich to hold a special session before the November 2, 2004 election to address medical malpractice insurance issues, including caps on noneconomic damages.<sup>167</sup> Such bipartisan local actions underscore the need for legislative and judicial action to stem the frivolous lawsuits, excessive awards, and unscrupulous practices that are causing a healthcare crisis in the Metro-East.

### HELLHOLE #3 HAMPTON COUNTY, SOUTH CAROLINA

ATRA's survey and conversations with local attorneys and residents indicate that something is amuck in Hampton County, a dishonorable mention in 2002 and 2003. Some of those we spoke with indicated that the problem is spreading to neighboring counties in South Carolina's 14<sup>th</sup> Judicial Circuit, such as Allendale and Colleton Counties.

#### A Forum Shopping Spree

Due to South Carolina courts' lax interpretation of the state's venue law, personal injury lawyers can choose to sue businesses in virtually any county in the state. As this report shows, they chose Hampton County and some of its surrounding neighbors because they expect to receive favorable treatment and large verdicts. No regard is paid to the site of the claimed injury, the plaintiff's home, and the fact that a defendant's headquarters may be hundreds of miles away.

Currently, South Carolina's venue statute provides that a lawsuit may be filed where a corporate defendant "resides" — a term the state's courts have interpreted to include anywhere that a defendant "own[s] property and transact[s] business." To compound matters, trial court judges in Hampton County, in particular, appear to have shunned their traditional discretion to transfer a

case when it serves the convenience of witnesses and the interests of justice. This practice allows cases to remain in the 14<sup>th</sup> Judicial Circuit, even when it would be more logical for the specific case to be heard in another area of the state, such as where the alleged injury occurred or witnesses reside.

For example, Michigan-based General Motors and Ohio-based Cooper Tire faced a lawsuit in Hampton County simply because their products are sold in the county; the plaintiff lived 90 miles away and the accident occurred 350 miles away in Tennessee.<sup>168</sup> In another case, a Beaufort County resident sued Continental Airlines because she was injured during a rough landing on a flight between Savannah, Georgia, and New Jersey claiming that the airline does business in Hampton County because it sells tickets over the internet.<sup>169</sup> There are numerous other such cases.<sup>170</sup>

*"Many out-of-town attorneys . . . are 'terrified' to have to come to Hampton County for a trial because of the unusually high verdicts and the number of plaintiffs' cases won in this County."*

— Lee S. Bowers, Hampton County  
Councilmember and local attorney.

According to a study of court filings by Jim Daniel, Executive Director of Hampton County Economic Development Commission, in 2002 about 583 civil lawsuits were filed in Hampton County. Of that number, 388 cases (67%) were filed by residents of other counties and other states. Approximately 239 cases (41%) included alleged incidents that did not occur in Hampton County.<sup>171</sup> While some suits named national corporations as defendants, such as CSX Transportation, General Motors, Ford, Bridgestone/Firestone, and Sears Roebuck & Co., others involved ordinary car accidents and slip and fall claims brought by plaintiffs who live or were injured in other counties.<sup>172</sup>

This term, the Supreme Court of South Carolina has a chance to stop this abuse of the state's venue law, as it is considering a venue case that came out of Hampton County.<sup>173</sup> In that case, CSX Transportation, Inc., a railroad that frequently is sued in Hampton County simply because its tracks run

through the jurisdiction, faces a lawsuit from a resident of Abbeville County, where his family has lived for nearly 250 years. As a locomotive engineer, the plaintiff regularly worked on a sixty-mile, round-trip route between Greenwood and Laurens Counties. It was on this route that Mr. Whaley was allegedly injured through exposure to excessive heat. His employer maintains an office and agent in Greenwood County, where the courthouse is just thirteen miles away from the plaintiff's home. Each and every fact witness for both parties lived in Abbeville, Greenwood, or Laurens County, yet Mr. Whaley's lawyer filed a complaint six counties and 145 miles away in Hampton County. The almost predictable result was a verdict for an extraordinary \$1 million in compensatory damages, which the trial court refused to reduce. The Supreme Court of South Carolina heard oral argument in October 2004 and is considering whether or not to state that the place a corporation "resides" only refers to the county where the company has its principal place of business.

### An Increasing Number of Lawsuits

The number of lawsuits filed in Hampton County and statewide has substantially increased over the past five years. According to South Carolina Judicial Department statistics, the number of cases filed in Common Pleas courts statewide increased from 54,293 cases in fiscal year 1998-99 to 77,626 cases in 2003-04, a 30% increase.<sup>174</sup> During that period,

*The number of lawsuits filed annually in Hampton County has nearly doubled over the past five years.*

the number of lawsuits filed increased from 437 to 762 (+43%) and from 3,616 to 5,056 (+40%) in Hampton County and the full 14<sup>th</sup> Judicial Circuit, respectively.<sup>175</sup> In 2003-04, two to four times as many lawsuits were filed in Hampton County than in other South Carolina counties of comparable size, such as Barnwell (316), Lee (293), Fairfield (416), Edgefield (242), and Saluda (159).<sup>176</sup> Filings in Allendale County and Colleton County also were substantially higher than counties of comparable size.<sup>177</sup>

### A One-Firm Show

When speaking with residents, businesses, and local attorneys about the reasons for Hampton County's reputation for litigation, the name "Johnny Parker" often comes into the conversation. *Forbes* has reported that Mr. Parker, an attorney with deep roots and who is well-respected in the local legal community, "has deftly exploited a state law that has turned him and his small, poor county into a litigation machine."<sup>178</sup> Parker's firm, Peters, Murdaugh, Parker, Elzroth & Detrick, P.C., brings many of the major lawsuits in Hampton County. According to the Hampton County courthouse roster, attorneys in Mr. Parker's firm represent plaintiffs in an impressive 96 of the 156 pending civil jury cases in the county.<sup>179</sup>

*A single law firm represents plaintiffs in 96 of 156 pending jury cases in Hampton County.*

### Intimidation Through Use of Subpoenas

Use of the subpoena power to attack those seeking legal reform is not unique to Madison County, Illinois. During pre-trial motions in a Hampton County false arrest case brought by a suspected shoplifter against Wal-Mart, the plaintiff's attorney, Mark Tinsley, subpoenaed Hampton County Councilmember Lee Bowers for any communications he had with Wal-Mart, the Town of Varnville, CSX Transportation or others relating to changing South Carolina's venue law.<sup>180</sup> In addition, Tinsley subpoenaed twelve other people — the Mayor of Varnville, Don DeLoach, a second councilmember, several local defense attorneys and lobbyists, Wal-Mart representatives, and an officer of the South Carolina Chamber of Commerce — on their activities related to venue reform.<sup>181</sup>

Mr. Tinsley claimed that he was trying to determine whether Councilmember Bowers was engaged with others in a conspiracy to "pollute the jury pool," apparently by trying to improve the state's venue law. In response to the subpoenas, Bowers said, "The subpoenas were a total abuse of the subpoena process and were intended only to aggravate those individuals who were perceived



to want the venue law changed.”<sup>182</sup> As in Madison County, the plaintiffs’ attorney eventually withdrew the subpoenas,<sup>183</sup> but after the recipients most likely incurred thousands of dollars in legal fees.

### Discouraging Business

Not surprisingly, there is evidence that the litigation climate in the Hampton County area is scaring away businesses. The best known case occurred about three years ago, when Wal-Mart considered opening a store in Hampton County, but decided against it at the last moment. A lawyer reportedly warned company executives that locating a store there could place the retailer’s entire South Carolina operation at risk.<sup>184</sup> The City of Varnville lost over two hundred potential jobs, \$8 million in investment, and thousands of dollars in tax revenue due to that decision. The city responded by passing a resolution urging the legislature to close the forum shopping loophole that chased Wal-Mart out of the county.<sup>185</sup>

## HELLHOLE #4 WEST VIRGINIA

West Virginia returns to the 2004 Judicial Hellholes report as the only statewide Judicial Hellhole. While the legislature stepped up and enacted venue reform last year, there was no such cause for optimism in 2004.

### Medical Monitoring: Dolling Out Cash Awards to Those Without Injuries

A number of judicial decisions this year fanned the flames in this Judicial Hellhole. Most notably, medical monitoring suits sunk to a new low, and that is not a reference to the number of claims. These are suits where people with no injuries collect awards from local businesses by claiming that they should get regular check-ups for disease because they may have been exposed to a dangerous substance. West Virginia is the only state where people can collect cash awards in these suits even without showing that there is a reasonable probability that they will become ill and there is no medical benefit to the check-ups. Also cash is awarded to the plaintiffs to use as they please. The award is not reserved for medical monitoring purposes.

In September 2004, DuPont was forced to settle a medical monitoring claim class action even though the plaintiffs offered no evidence that the substance at issue — C8, which is a by-product of Teflon production — is even dangerous or has the potential to cause any ill health effects.<sup>186</sup> DuPont is spending \$70 million up front, which includes funds for a panel to see if there is a link to health effects — something the plaintiffs generally have to show before filing such a suit. If so, DuPont will spend up to \$235 million more on a medical monitoring program. The plaintiffs attorneys are guaranteed \$22.6 million regardless of what the study shows.

### Taking Employment Protection to a Whole New (and Dangerous) Level

It seems that in West Virginia, an employer is damned if it does and damned if it doesn’t. When a local company fired its safety director for on-the-job cocaine use, the state Supreme Court ruled in April 2004 that the company could do no such thing. Apparently, the employee’s contract said he could only be let go for “dishonesty.” Even though he lied about his drug use, in an opinion authored by Justice Starcher, the state Supreme Court said that there was no contractual violation.

As Justice Maynard observed in dissent, “This court says that [the company] was wrong to fire a deceitful, coke-head safety director in a plant where

“What a terrible message this case sends to small West Virginia employers and businesses! This Court tells this company that it should not have fired an employee who:

- (1) admitted that he used cocaine;
- (2) reported to work with cocaine in his system;
- (3) failed a drug test in which he tested positive for cocaine;
- (4) misrepresented his drug use by failing to truthfully answer management’s inquiries about drug use;
- (5) worked in a plant where steel fabrication involving constant welding occurs;
- (6) continually worked around large quantities of explosives and highly volatile gases and liquids including acetylene, oxygen tanks, thinner paint, and other explosive substances; and, here is the icing on the cake; and
- (7) was the SAFETY DIRECTOR of the company!! Appalling!”

Justice Maynard, dissenting in *Benson v. AJR, Inc.*,  
No. 31542 (W. Va. July 6, 2004).

tanks of acetylene, oxygen, and other explosives are everywhere! The irony is that if there had been some explosion or other accident which killed or seriously injured another employee, the victim of that accident could have successfully [sued] under our workers' compensation deliberate intent statute and obtained a large verdict. The Court would doubtless have upheld the large verdict based on the fact that the company allowed a cocaine user to be its safety director."<sup>187</sup>

### No Defenses, No Problem

In Wetzel County, a jury was told by the trial judge to award a plaintiff punitive damages against Oxford Insurance Company after the judge stripped the company of its defenses and held a damages-only trial.<sup>188</sup> The jury returned a \$39 million verdict, including \$34 million in punitive damages. While the West Virginia Supreme Court of Appeals said the judge could not require punitive damages, it upheld the judge's decision to strip the company of its defenses and remanded the case for a special hearing on punitive damages.<sup>189</sup>

### Another West Virginia First

Need another sign that Judicial Hellholes spread like wildfire in West Virginia? Roane County, West Virginia, which in its first 150 years had never had a class action lawsuit filed in its courthouse, has had two class action suits filed in the last year and a half.<sup>190</sup>

### An Unbalanced Civil Justice System Adversely Affects the State

A 2003 study prepared for the West Virginia Chamber of Commerce detailed the cost to the state of its imbalanced civil justice system.<sup>191</sup> According to the report, litigation activity in West Virginia has increased 53.6% more rapidly in West Virginia than in the nation as a whole, with the expense of litigation nearly doubling over the last decade.<sup>192</sup> The study estimated that between 2001 and 2006, the state's legal system would result in the loss of \$98.5 million in annual Gross State Product and over 16,000 permanent jobs.<sup>193</sup> West Virginia citizens experience higher inflation, less personal income, and few job prospects due to the unbalanced system.<sup>194</sup> The report estimated, that in absence of

meaningful reform, by 2006 West Virginians would pay an annual \$997.06 tort tax relative (in 2001 dollars) to the United States as a whole.<sup>195</sup>

### A Reason for Optimism

The past editions of this report have documented the close hold of the plaintiffs' bar over West Virginia's justice system, both through campaign contributions and family relationships. This year, there is an indication that the strangle-hold may have loosened.

The result of the November 2004 judicial election provides cause for optimism. In what one newspaper described as "one of the biggest upsets in West Virginia politics,"<sup>196</sup> political newcomer Brent Benjamin unseated West Virginia Supreme Court of Appeals Justice Warren McGraw. Justice McGraw was known as one of the most anti-business members of the court.<sup>197</sup> In fact, the *Charleston Daily Mail* opined that Justice McGraw's "willingness to shape law to produce awards for plaintiffs and their attorneys has caused businesses and doctors to flee West Virginia."<sup>198</sup> The West Virginia business community deemed the 2004 race most critical to the state's future.<sup>199</sup>

Upon learning of his victory, Benjamin stated, "From the very beginning I said I intend to be fair and give everybody equal access. Just as I don't believe it's right for a judge to be a partisan in favor of trial lawyers or any groups like that, it's also wrong for a judge to be in favor of big business, no matter who it is."<sup>200</sup> Benjamin also told reporters that his election "will mean a stable, predictable and balanced Supreme Court."<sup>201</sup> He will serve a twelve-year term.

Benjamin's ascension to the bench may tip the balance of power on the court ending the anti-business 3-2 majority led by Justice McGraw, and including Justices Larry Starcher and Joe Albright.<sup>202</sup> Instead of addressing the economic mess his court has contributed to, Justice Starcher, whose term expires in 2008, has reacted to criticism of the judiciary for its questionable legal decisions by arguing that lawyers have a "duty" to defend the court — not criticize it.<sup>203</sup>

## HELLHOLE #5

### JEFFERSON COUNTY, TEXAS

Last year's report spot-lighted Jefferson County's dubious distinction as an asbestos lawsuit magnet. At present, Jefferson County has escaped this ignominious title — through no effort of its own. A multi-district litigation panel (MDL) was established to handle the pre-trial proceedings for all asbestos cases filed in Texas after September 1, 2003. Although asbestos defendants can breathe a sigh of relief that the MDL has freed them from Beaumont for the time being, they are still far from flame-retardant. First, cases filed in Beaumont will still be tried in Beaumont, and second, Judge Mark Davidson, who administers the MDL, recently rejected the defendants' request to establish an unimpaired docket. Such a docket would have set aside claims from unimpaired claimants and prioritized claims of the truly sick, thereby allowing sick plaintiffs' timely compensation.<sup>204</sup> While the business of trying asbestos cases in Beaumont has slowed, plaintiffs' attorneys' ability to derive billion dollar verdicts has not.

#### One Billion Dollars

Unfortunately, the title of this subsection is not a joke from an *Austin Powers* movie. In 2004, a Jefferson County jury handed down a whopping \$1.013 billion verdict to one family — one of the largest verdicts ever — in the latest Beaumont boondoggle: Fen-Phen litigation. The award in *Coffey v. Wyeth*, a Primary Pulmonary Hypertension (PPH) case,<sup>205</sup> consisted of \$113 million in compensatory damages and \$900 million in punitive damages. This figure is even more astounding considering that Wyeth had settled the majority of its Fen-Phen cases, more than 125,000 claims from those alleging heart valve damage, for \$3.75 billion. While heart valve cases are generally less serious than PPH cases, with 70,000 claims outstanding, Wyeth had amassed roughly \$16 billion to cover *all* of its remaining Fen-Phen heart valve liability.

The award in *Coffey* flies in the face of Texas law, which caps punitive damages at twice the amount of economic damages plus an amount equal to noneconomic damages up to 750,000.<sup>206</sup> Wyeth attorney Tim Atkeson said that those compensatory damages in this case amounted to \$1.5 million, which would

have resulted in a \$3 million punitive damage award. Judge Donald J. Floyd, however, did not apply the limit because jurors accepted plaintiff's lawyer John M. O'Quinn's argument that Wyeth committed a felony, which breaks the statutory limit.<sup>207</sup> Responding to this, Atkeson said, "We are quite confident that a court of appeals will find this was not a felony and that the jury applied the wrong law and that the evidence did not back up the finding."<sup>208</sup> Many expected the judge to reduce the staggering verdict. Not in Beaumont. Judge Floyd entered a judgment consistent with the jury's verdict three weeks after it was handed down.<sup>209</sup>

Despite civil justice reform legislation enacted in Texas in 2004 which should correct problems in the state's former Judicial Hellholes, the size of the award and the judge's endorsement of it were enough to rank Jefferson County the only remaining Judicial Hellhole in Texas. Judge Floyd's evidentiary rulings were just as alarming and likely prejudiced the jury's decision-making. Judge Floyd refused to admit evidence that the plaintiff had taken four other prescription diet drugs after she had taken Fen-Phen. Some of these drugs also included warnings about the risk of PPH.<sup>210</sup> This evidence, coupled with the fact that the plaintiff did not develop PPH until more than four years after she stopped taking Fen-Phen, raises serious questions about the cause of her PPH and willingness to treat her obesity with diet drugs despite the risks.

#### Fen-Phen or Bust

Not surprisingly, Fen-Phen litigation is quickly becoming the new gravy-train for plaintiffs' lawyers in Beaumont. "All I'm going to do is try [Fen-Phen] cases until I bust [Wyeth] and they start settling," said O'Quinn, the "king" of silicon breast implant litigation.<sup>211</sup> O'Quinn predicts that Fen-Phen lawsuits will far surpass breast implant lawsuits.<sup>212</sup> Peter Kraus, a lawyer at Waters & Kraus in Dallas agreed: "There's no question that [the \$1.013 billion award] will have an impact on what plaintiffs' lawyers are willing to take, and it's going to embolden more plaintiffs' lawyers to try more of those cases."<sup>213</sup> Tommy Fibich, a Houston plaintiffs' attorney echoed that sentiment: "I've got ... a PPH case and clearly this verdict has made me think it was worth more than it was yesterday."<sup>214</sup> Certainly, Mr. Fibich would have given the same attention to his case before it was worth a potential billion dollars in Beaumont.

## Even Plaintiffs' Attorneys Are Alarmed at the Size of Their Own Awards

Also on the Fen-Phen front, a Beaumont jury awarded Deborah Hayes \$1.36 million after it concluded that Fen-Phen damaged her heart. Doctors found plaque in the 46-year-old woman's heart valve, a condition usually found in the elderly. In a bizarre twist, apparently even the plaintiff's own attorney, Jim Morris, Jr., thought this award was too high. Morris filed a motion to reduce the size of the verdict by more than half to \$588,000.<sup>215</sup> "We asked the figure be adjusted to what the evidence showed," said Morris.<sup>216</sup> "We would rather do it now than on appeal two years down the road." Mr. Morris had asked for merely \$35,000 for future medical expenses, but the jury saw fit to award \$810,000 for the same.<sup>217</sup> Mr. Morris said his unusual motion was not an attempt to persuade Wyeth to drop its appeal. Rather, Morris claims it would have been counter-productive to his client to have an award entered that he knew could not survive appeal.<sup>218</sup>

## HELLHOLE #6 ORLEANS PARISH, LOUISIANA

If anything is easy in the Big Easy, it is certainly getting huge jury awards and giant settlements on questionable facts or law. Orleans Parish, Louisiana, remains among America's Judicial Hellholes. From mold litigation to judicially-dictated tobacco cessation programs, Orleans Parish has continued to build its notoriety as a cradle for brainchildren of the plaintiffs' bar at the expense of the State of Louisiana and companies across the nation. In Orleans Parish, it is *laissez les bon temps rouler* (let the good times roll) for the plaintiffs' bar.

### The King Has Left the Building

Last year's Judicial Hellholes report discussed the inner workings of Judge C. Hunter King's New Orleans Civil District Court. Among his highly questionable acts, Judge King took a photo-op with Johnnie Cochran (who was the plaintiff's attorney before the court) and jurors after they returned a \$51.4 million dollar award. He also forced members of his staff to sell his campaign fundraiser tickets and sold some of these \$250 tickets himself... at a funeral. He then fired those who did not raise enough and lied about it. *Reader's Digest* named Judge King as one

of "America's Worst Judges."<sup>219</sup> Soon after the 2003 Judicial Hellholes report came out, the Louisiana Supreme Court, in a 7-0 ruling, removed Judge King from the bench and barred him from running for a judicial office for at least five years: "In our view, any discipline less than removal would undermine the entire judicial discipline process and diminish the strict obligation of judges to be truthful in the face of an investigation by the commission."<sup>220</sup>

### Old Mold, Still Gold

Last year's Judicial Hellholes publication reported on how opportunistic plaintiffs' attorneys are turning mold into gold in Orleans Parish. Plaintiffs' attorneys blamed moldy buildings for causing numerous health problems — the "sick building syndrome" — despite the fact that a recent study by the Institute of Medicine that found that available evidence does not support an association between mold and the wide range of health complaints that have been ascribed to it, and noting that "Anecdotal reports of health problems attributed to mold indoors often dominate mass-media attention, but they are not a source of reliable information."<sup>221</sup> The mold saga continues in Orleans Parish. One sick building, the Plaza Tower, coughed up a \$4.25 million dollar settlement in March 2004 to hundreds of state workers who claimed that mold was responsible for a myriad of ailments.<sup>222</sup>

That settlement was just the beginning. In July 2004, Orleans Parish Civil District Judge Louis DiRosa certified a class of nearly six hundred state employees who worked in the Plaza Tower between 1995 and 2002. This time, they went after the government. The lawsuit alleges that several state agencies that occupied the building, just like the building's owners and managers, failed to respond to worker complaints about faulty elevators, leaky windows, a leaky roof, and poor heating and air conditioning. The complaint alleges that each of these problems contributed to mold growth, making workers sick. Just to cover the bases, asbestos exposure was also cited in the complaint. Plaintiffs' attorney Robert Creely was not shy to point out that the state could provide "deep pockets."<sup>223</sup> This saga continues with a countersuit by the building owners against the state for breach of its lease.<sup>224</sup>

## Regulation Through Litigation

The principle goal of tort law is to obtain compensation for a person who was injured by the wrongful acts of another. But there are increasing efforts by entrepreneurial plaintiffs' lawyers and activist judges to distort tort law and use the threat of massive damages awards to change the lawful behavior of an industry. Former Secretary of Labor Robert Reich aptly described this practice as "regulation through litigation."<sup>225</sup> Regulation through litigation circumvents the considered public policy decisions made by state legislators — those democratic representatives who are elected by the public at large to serve the will of the people.

A prime example of regulation through litigation occurred in Orleans Parish in May 2004. In the first ruling of its kind, an Orleans Parish court ordered tobacco companies to pay \$591 million, not for medical costs or other physical injuries, but to help 500,000 Louisiana smokers kick the habit.<sup>226</sup> The case was *Scott v. American Tobacco Co.* and the size of the award could grow by as much as \$300 million because Louisiana permits interest to accrue on judgments from the time of filing.<sup>227</sup> Rather than awarding actual damages, the jury created a "comprehensive smoking cessation program."<sup>228</sup> The \$591 million program, which was upheld by the trial judge, will fund public education campaigns, telephone hotlines, and the distribution of nicotine patches, among other activities, over a ten-year period. Since the tobacco industry already is paying for a public-education campaign pursuant to the 1998 Master Settlement Agreement (MSA), which settled the states' attorneys general actions against the industry, "It does beg the questions, 'Isn't this done already?'"<sup>229</sup> The defendants, however, were barred by the judge from introducing evidence of the MSA resources during trial. Edward Sewda, a senior attorney for the pro-plaintiff Tobacco Products Liability Project, praised the verdict as "unique" and "certainly a major precedent that I'm sure the tobacco industry is very concerned about."<sup>230</sup> He expressed hope that it could "be replicated in other states."<sup>231</sup> The verdict will face appeal.<sup>232</sup>

## Runaway Jury Upset by Slip and Fall

Large awards on questionable liability continue to be a staple of practice in Orleans Parish and one successful

lawsuit can set a dangerous precedent for others. For example, a jury ordered the Jewish Community Center (JCC) of New Orleans to pay roughly \$12 million to a man who slipped and fell while playing basketball. The complaint alleged that the JCC, which was not air-conditioned, failed to adequately ventilate the gym to keep moisture from collecting on the basketball court. The complaint also alleged that the JCC failed to warn the basketball players of the danger. In a tragic, freak accident, Clinton Schreiber was paralyzed when he slipped and fell, striking his head on the knee of a fellow player, when retrieving a loose ball.<sup>233</sup>

The jury ruled for Mr. Schreiber despite a lack of proof that there was moisture on the gym floor where he slipped, according to the JCC. Even if there was moisture on the floor, it is hard to discount the JCC's argument that moisture and slip and falls are inherently unavoidable risks of playing basketball, or of any other sport for that matter. Certainly, Mr. Schreiber's injury is heartbreaking. Nonetheless, a \$12 million award for an injury sustained while playing basketball sets a dangerous precedent.<sup>234</sup> According to a JCC official, the Center is now facing another lawsuit — this time from a man claiming that he suffered a heart attack because the gym's lack of air-conditioning made the gym too hot.

## HELLHOLE #7 SOUTH FLORIDA

Last year, this report named Miami-Dade County, Florida, as a Judicial Hellhole, due primarily to skyrocketing medical malpractice rates and extraordinary damage awards. Respondents to ATRA's 2004 survey indicated that Miami-Dade County's civil justice system has seen no improvement over the past year and that the problems appear to have spread throughout Southern Florida.

## Failing to Adequately Address the Medical Malpractice Insurance Crisis

The entire state of Florida is feeling the impact of a medical malpractice insurance crisis, but Southern Florida is particularly hard hit. The *Palm Beach Post*, for example, found that emergency neurosurgery patients in Palm Beach County increasingly are being



*“[I]n the foreseeable future, patients will start to die of neurological, obstetric, vascular surgical and other problems because of a lack of physicians to care for their life-threatening conditions. The only method to prevent this disaster is to implement tort reform and develop a situation in which realistic expectations are in place rather than the expectation that whenever a problem arises, someone is to blame and a lawsuit will follow.”*

— Michael Patipa, M.D.,  
West Palm Beach, in the *Palm Beach Post*, Apr. 3, 2004.

transported to neighboring counties and elsewhere in the state because the right specialists are not available in local hospitals. Apparently, many such specialists have dropped their liability insurance and are trying to reduce the risk of being sued in county emergency rooms. At least one patient who suffered a stroke has died because no neurosurgeon was available in Palm Beach County to treat her.<sup>235</sup>

Governor Jeb Bush called three contentious special sessions in 2003 to urge the legislature to adopt a \$250,000 limit on noneconomic damages in medical malpractice cases. The legislature ultimately enacted a law allowing for a sliding cap on noneconomic damages ranging from \$500,000 to \$1.5 million. According to reports, medical malpractice premiums in Florida continue to increase, but at a slower rate.<sup>236</sup> A few insurers reentered the Florida market after the legislation passed, but, according to the Florida Medical Association, many carriers continue to exclude high-risk specialties.<sup>237</sup>

### *“What do I tell the taxpayers of Palm Beach County? Why should they be burdened?”*

-Judge Timothy McCarthy noting in a July 9, 2004 hearing that it costs \$3,000 per day to provide a courtroom, staff, and jurors to decide the thousands of asbestos cases pending in his court.

### **Asbestos Cases Clog the Courts**

South Florida is one of several magnet jurisdictions across the United States that has attracted a flood of asbestos cases over the past decade. In some instance, there is a legitimate local connection stemming from W.R. Grace & Co. formerly being located in Boca Raton and the large number of retirees in Southern Florida. But in thousands of

other cases, there is no local connection. According to one Miami attorney who represents corporate defendants in the area, her firm has handled 4,000 to 7,000 cases in counties with no direct relation to the plaintiffs or defendants. It is estimated that active asbestos lawsuits total 4,000 in Broward County, 1,750 in Miami-Dade County, 1,500 in Palm Beach County (until recently, see below), 1,600 in Hillsborough County, and 800 to 1,000 in Duval County.<sup>238</sup>

The three South Florida counties have become destinations for asbestos litigation because each of them has a separate asbestos division and a set of rules called an “omnibus order” for processing the claims. These special asbestos “rocket dockets” move claims quickly and allow the plaintiffs’ lawyers to schedule hundreds of cases for trial at once. This scheduling maneuver pressures defendants to settle cases because of the difficulty of defending cases with little preparation time. Plaintiffs’ lawyers can file claims from outside the area because Florida’s venue law allows lawyers to choose any county in the state to file as long as the complaint names one defendant company as doing business in that particular county. Further, a lawsuit cannot be moved to another county or state if any of the defendants object to a venue change. To keep the cases in South Florida, Bingham Insulation & Supply, which does business in Palm Beach and Miami Dade Counties, has been named in 3,000 current lawsuits.<sup>239</sup>

Florida judges have started to recognize and deal with this situation. Chief Judge Edward Fine held a hearing on eliminating the court’s asbestos division.<sup>240</sup> In addition, Judge Timothy McCarthy, who presides over all the asbestos cases in South Florida, dismissed numerous lawsuits that had no connection with the area. His August 2004 ruling

requires most South Florida asbestos cases to be re-filed in more appropriate jurisdictions, either elsewhere in Florida or in other states.<sup>241</sup> Judge McCarthy computed that it would take three to four years to try each of the asbestos cases on the court's docket, during which time no cases involving Palm Beach County taxpayers could be heard: "The taxpayers of Palm Beach County ought not to be burdened with expending its resources associated with the high cost of lengthy asbestos trials between non-residents of the State of Florida where the cause of action accrued elsewhere. . . . This is not only expensive but unfair to the thousands of Florida citizens whose access to the court is being delayed, while Florida funds and provides court access to strangers. . . . Palm Beach County has no interest in committing its judicial time and resources to the litigation of claims outside Palm Beach County. This Court had the right, if not the duty, to protect its dockets from claims such as those at issue here."<sup>242</sup>

### Improper Class Certification

Last year, this report highlighted a Florida appellate court's May 2003 reversal of a \$145 billion punitive damage award to a class of approximately 700,000 Florida smokers against the tobacco industry in what the court called a "fundamentally unfair proceeding." That decisive ruling provided a 68-page laundry list of egregious errors that occurred in the Miami-Dade Circuit Court trial, including constitutional violations, inappropriate class certification because the plaintiffs did not have sufficiently similar claims, and plaintiffs' counsel's outrageous use of inflammatory arguments and "racial pandering" throughout the trial. That case is still pending before the Florida Supreme Court.<sup>243</sup>

Florida appellate courts have since decertified another purported class action. This lawsuit alleged that Philip Morris's marketing of Marlboro Lights and Ultra Lights in Florida was deceptive in that the cigarettes did not actually reduce the level of nicotine or tar inhaled by the smoker. A three-judge appellate panel unanimously decertified the case, saying that the manner in which the cigarettes were smoked and the smoker's reason for choosing to smoke light cigarettes would be different for each plaintiff and would not allow a fair defense in a mass trial of the claims.<sup>244</sup>

## HELLHOLE #8

### PHILADELPHIA, PENNSYLVANIA

The survey results for this repeat offender showed overwhelmingly that this Judicial Hellhole has not improved over the past year and by some reports has worsened.

Once again this year, it is the medical liability insurance crisis and the subsequent loss of doctors and limitations to accessing medical care in Philadelphia and other parts of Pennsylvania that continues to garner most of the attention; perhaps because its impact is most poignantly felt by residents. In a letter in the *Centre Daily Times*, State Senators Jake Corman and Jeffrey Piccola and Representative Mike Turzai stated that, "Pennsylvania's jackpot legal system is out of control. There are simply too many frivolous lawsuits which hurt Pennsylvanians in many ways, particularly access to quality healthcare and lost wages."<sup>245</sup>

*"Pennsylvania's jackpot legal system is out of control. There are simply too many frivolous lawsuits which hurt Pennsylvanians in many ways, particularly access to quality healthcare and lost wages."*

— Letter from State Senators Corman and Piccola and Representative Turzai to the *Centre Daily Times*.

Medical malpractice jury awards in the Philadelphia area, "are among the highest in the nation."<sup>246</sup> For example, in a single day in February 2004, Philadelphia courts awarded two multimillion dollar awards. The first award, \$15 million, went to Linda Ripa, sister of Kelly Ripa, co-host of "Live with Regis & Kelly," after a doctor turned down her offer to settle for \$2.4 million stemming from surgery to treat her after a serious car accident in which she was nearly killed.<sup>247</sup> The second award, \$30 million, came down after a surgeon refused an offer to settle for \$350,000 in a case involving complications from gall bladder surgery.<sup>248</sup> One mistake the doctors made is certain — they took their chances in Philadelphia's lawsuit lottery.



## Doctors are Continuing to Flee

There have been disputes over the actual numbers of doctors coming and going in the state,<sup>249</sup> but the most recent data prepared by the Pennsylvania Medical Society shows that physicians are indeed leaving the state at a higher rate than before the liability crisis started in 1998.<sup>250</sup> What is more, departing physicians are not being replaced. The Medical Society's report indicates there has been a significant decline in the number of physicians choosing to come to Pennsylvania since 1998 as well as an unprecedented drop in 2003 of the number of new physicians practicing in the state.

With a net loss of physicians in 1999, 2002, and 2003, Pennsylvania is well behind the national physician growth rate. While critics claim that the state has more doctors than in 1990, the Medical Society report states that physician growth rates have not kept up with the state's population, leading to a substantial decline in the physician to population ratio.

In addition, specialists in high-risk practices have been fleeing the state, retiring early, or cutting back services. This trend is in direct response to the high premiums specialists pay for medical malpractice insurance.<sup>251</sup> According to data from the American Medical Association, there were twenty-six fewer neurosurgeons in Pennsylvania in 2003 than in 1996.<sup>252</sup>

Moreover, more doctors are leaving the state after finishing their medical training. In 2001, 704 doctors remained after their residency training.<sup>253</sup> In 2003, the number of doctors choosing to stay in Pennsylvania dropped to a shockingly low 285, which represented a mere 17% of the 2003 graduating class and the lowest absolute number and percentage ever recorded.<sup>254</sup> These numbers in combination with other factors have lowered the proportion of young doctors practicing in Pennsylvania to an all-time low.<sup>255</sup> It is in the public interest for doctors to practice medicine where their services are needed. An evenhanded application of tort law rules would assure that public policy goal.

Many Pennsylvanians are concerned that the "best and brightest" doctors are fleeing to states with more comprehensive malpractice insurance reforms. Personal testimonials and insurance rate comparisons support that notion.<sup>256</sup> An orthopedic surgeon

who relocated from Philadelphia to Maryland was paying \$103,000 a year for malpractice insurance in Philadelphia. Upon applying for insurance in Maryland, he received a quote of \$8,000.<sup>257</sup> Maryland has long had a cap on noneconomic damages.<sup>258</sup>

Within Pennsylvania, Philadelphia doctors pay more than physicians in other areas of the state. According to the Pennsylvania Medical Society Liability Insurance Co., rates for a neurosurgeon practicing in York County, PA, would start at \$36,381 compared with \$60,634 in Philadelphia.<sup>259</sup> A Philadelphia family doctor can expect to pay a base rate of \$10,365 for insurance versus paying \$6,219 in York.<sup>260</sup>

## Impact on Patient Care

The exodus and cutting back in provider services has made it difficult for the remaining doctors when referring patients to specialists in higher risk areas.<sup>261</sup> Obstetricians and gynecologists have been particularly hard hit by high malpractice insurance rates because of the number of complications that can arise during pregnancy and delivery — complications that often are beyond the control of any physician.<sup>262</sup> According to one physician who chose to stop delivering babies, "You do about six months' worth of deliveries just to pay the malpractice."<sup>263</sup> General surgeons, cardiovascular surgeons, and orthopedic surgeons also have been disproportionately affected by high insurance rates.<sup>264</sup>

Besides losing their doctors, residents are feeling the sting of rising health care costs. *The Philadelphia Inquirer* reported that a majority of Pennsylvanians have a difficult time affording health care or getting insurance coverage.<sup>265</sup> One-third of voters surveyed said malpractice lawsuits were chiefly to blame for increases in healthcare costs.<sup>266</sup>

## The Effects are Spreading

As this report shows in South Florida, Oklahoma, the Metro-East area of Illinois, and South Carolina's 14<sup>th</sup> Judicial Circuit, a Judicial Hellhole can undermine the legal environment in an entire region. The same is true in Philadelphia, where the medical malpractice lawsuit problem has spread to other areas of Pennsylvania. One Pennsylvania

county is in the midst of a malpractice crisis because its insurance rates are affected by Philadelphia's higher rates of malpractice suits and awards.<sup>267</sup> In addition, recently enacted venue laws intended to combat forum shopping in Philadelphia have shifted many malpractice lawsuits to other counties. Filings in neighboring Montgomery County, for example, have increased by 529 percent.<sup>268</sup>

### Signs of Progress or Further Set Backs?

Philadelphia doctors have been granted marginal relief due to the new litigation requirements passed in 2002. Under the reforms, malpractice cases must be filed in the county where the alleged negligence took place<sup>269</sup> and medical malpractice lawsuits must be certified by an independent physician or expert.<sup>270</sup> While some reports show a reduction in the number of filings in Philadelphia in 2003,<sup>271</sup> the apparent decline in 2003 filings may be because plaintiffs previously rushed to file cases before the reforms went into effect. Nevertheless, awards in Philadelphia still remain far higher than in other counties.<sup>272</sup>

To bring immediate relief to the state, Governor Ed Rendell has proposed additional measures, such as limiting attorney fees in medical malpractice cases to a smaller percent of the jury awards.<sup>273</sup> The Governor has said that lower attorney fees should discourage plaintiffs' attorneys from filing meritless claims and pursuing "jackpot awards."<sup>274</sup>

One possible fix — a state constitutional amendment to allow for a \$250,000 limit on noneconomic damages — failed to make it out of the state legislature.<sup>275</sup> Many doctors believe that without some limit on the size of awards reforms will not go far enough.<sup>276</sup> The defeat of the amendment sets back at least two years the effort to improve the litigation environment in Philadelphia and Pennsylvania.<sup>277</sup> Assuming the measure is revived in January 2005, the earliest doctors and residents can expect relief is 2007 when the proposal may be placed on the ballot for voter approval.<sup>278</sup>

### Strike One on Asbestos Liability

In February 2004, the Supreme Court of Pennsylvania struck down legislation that protected companies that were never involved in the manufacture, sale, or

use of asbestos or asbestos-containing products from unlimited liability due solely to their acquisition of a company with some such past activity.<sup>279</sup> The bill, enacted in 2001, would have reasonably limited the innocent company's liability to the fair market value of the total assets of the acquired company as of the time of the merger or consolidation. It was designed to address the problem faced by Philadelphia's Crown Holdings, which faces hundreds of asbestos lawsuits as a result of its ninety day ownership in the 1960s of a small insulation company that may have used asbestos materials, but not during the time Crown Holdings owned the company.<sup>280</sup> Crown Holdings, which produces packaging and beverage containers and has nothing to do with asbestos, paid more than \$336 million to settle asbestos lawsuits and is now facing bankruptcy.<sup>281</sup>

## HELLHOLE #9 LOS ANGELES, CALIFORNIA

For the third consecutive year, Los Angeles County has earned the dubious honor of being featured in this report.

### "Shakedown" Lawsuits

This year, the focus is on a long standing oddity in California's Unfair Competition Law, Section 17200,<sup>282</sup> which allows for private attorneys to bring lawsuits against businesses for unfair *or* unlawful *or* fraudulent practices on behalf of the general public. The statute does not require the filing party to suffer any personal harm or have any connection to the defendant. This law is increasingly being abused by plaintiffs' attorneys throughout the state, but particularly in Los Angeles County,<sup>283</sup> where they are filing section 17200 unfair competition claims for almost any business practice, regardless of whether the conduct was harmful.

Often referred to as "shakedown lawsuits," plaintiffs' attorneys can file them on their own initiative, as they do not need to find a plaintiff who has been injured, sustained damages, or actually misled. Typically, the plaintiffs' attorneys have no intention of taking the matter to court. Rather, the attorneys write a letter to the intended target demanding payment of money over trivial technical

errors. In most cases, these errors and oversights have not harmed or misled anyone. For example, Section 17200 suits have:

- named businesses and professionals that fail to include their license number on a website or ad;
- attacked auto dealers' and home builders for technical violations like using the wrong font size or using an abbreviation instead, such as "APR," instead of "Annual Percentage Rate";<sup>284</sup>
- gone after hardware stores for advertising locks as "Made in the U.S.A.," when the locks included six screws made in Taiwan;<sup>285</sup>
- hit nail salons that use the same nail polish bottle for more than one customer;<sup>286</sup> and
- included a restaurant with a bathroom mirror an inch too high for it to meet disability requirements.<sup>287</sup>

The form letters demand payment of several thousand dollars to settle the matter or risk facing a more costly lawsuit. Many business owners find it is cheaper to pay the settlement "demand" and avoid the legal expense of fighting the claim.

No business is safe. Small businesses including restaurants, convenience stores, and travel agents across the state have been hit by these predatory attorneys. AOL Time Warner, Disney, and Metro-Goldwyn-Mayer all have been victims of these suits for using movie reviews from critics who receive perks for their reviews.<sup>288</sup> Most recently, plaintiffs' attorneys have set their sights on the pharmaceutical industry and prescription drug contractors, claiming the companies promote "off-label" use of pharmaceutical products, corroborate to boost sales of particular drugs, and attempt to influence the prescribing habits of physicians.<sup>289</sup>

One particularly disturbing example of Section 17200 abuse involved the filing of over 2,200 claims against restaurant and auto repair shops by the Beverly Hills, Trevor Law Group, on behalf of a sham organization that was located at the law firm's address.<sup>290</sup> The claims were based on minor violations of the state's Automotive Repair Act, many of which already were listed on the Bureau of Automotive Repairs websites. Following the normal course of procedures in these suits, the law firm sent defendants settlement "offers" soon after filing the claims demanding payments ranging from \$6,000 to \$26,000.<sup>291</sup> In

early 2003, California Attorney General Bill Lockyer turned around and filed a Section 17200 lawsuit on behalf of the state against the Trevor Law Group in the Los Angeles Superior Court for abusing Section 17200.<sup>292</sup> Ultimately, the lawyers surrendered their licenses rather than face disbarment after the state bar association became involved.

### Change is Coming

Change to fix the legal loophole in California's unfair competition laws has been very slow in coming, but, this year, Californians took matters into their own hands. In the 2004 general election, voters passed a ballot initiative, Proposition 64, that will revise Section 17200.<sup>293</sup> The initiative will preclude lawyers from bringing purported consumer protection actions on behalf of people who have not been harmed, while continuing to allow the California Attorney General to sue on behalf of the general public. It also requires lawyers seeking to represent large groups or the public at large to comply with the same procedural protections applicable to class action lawsuits.<sup>294</sup>

### Future Concerns

Of additional note, an alarming trend may have been set when a Los Angeles Superior Court jury recently slapped a retail store with a \$4.1 million verdict for selling a plaintiff a dietary supplement product that allegedly caused the plaintiff to suffer a stroke.<sup>295</sup> Jurors stated they were trying to send a message to retail stores that "if you are going to sell something that is dangerous, you better warn the consumer or take it off your shelf;" otherwise the retailer is "at least partly at fault" for any injuries.<sup>296</sup> Particularly disturbing is that the product label included a manufacturer warning that the plaintiff did not follow. This was the first decision of its kind, and it could potentially have far-reaching and dire consequences for retail stores — both in dietary supplemental cases and future products liability actions.

## The 2004 “Dishonorable Mentions”

Several states and jurisdictions were identified by respondents to ATRA’s survey because of a particular abusive practice or warped litigation environment. These areas have the potential to develop into Judicial Hellholes. This year, they are “Dishonorable Mentions.”

### OKLAHOMA: LAWYERS ARE EYEING THE SOONER STATE

In 1889, “Unassigned Lands” in Oklahoma were opened to settlers pursuant to “The Land Run Act.” Thousands of people lined up on the border and, when the signal was given, they raced into the territory to claim their land. People who entered the district illegally to lay claim to lands, before the designated entry time, were called “Sooners.” Though not official, Oklahoma is popularly known today as “The Sooner State.” Those events have relevance today, as plaintiffs’ lawyers from surrounding states, particularly Texas, stand ready at the Oklahoma border. Some have already begun to stake a claim on its courthouses.

Last year, the Texas Legislature passed the Omnibus Civil Justice Reform Act of 2003, a comprehensive tort reform bill that was applauded as a Point of Light in this report. Following Texas’s clamping down on abusive forum shopping and strengthening of product liability, class action, proportionate responsibility, and appeal bond laws, personal injury lawyers began eyeing its neighbor, Oklahoma, as the next best place to channel their lawsuits. The smoking gun on this issue is an undated “Dear ATLA Colleague” letter sent by Oklahoma attorney Stratton Taylor. Mr. Taylor also happens to be President Pro Tempore Emeritus of the Oklahoma State Senate, and a current member of the state legislature. In his sales pitch, Senator Taylor leads, “With recent events that have occurred in Texas, you may be looking to file cases in Oklahoma.” He goes on to note that his firm has offices in several Oklahoma cities, has experience in class action litigation, and offers their services, presumably to act as local counsel.

In May 2004, the Oklahoma Legislature passed a tort reform bill, H.B. 2661. With the exception

of several medical malpractice reforms,<sup>297</sup> however, many of the bills’ other provisions were substantially diluted.<sup>298</sup> Left out of the new law were various proposed class action and products liability reforms, an across-the-board limit on noneconomic damages, changes to the collateral source rule, teacher liability protection, limitations liability for companies that acquire old companies involved in asbestos litigation, and a ‘junk science’ provision aimed to ensure the court hears credible expert testimony. This led some previous supporters of the bill, such as Oklahomans for Lawsuit Reform and the Oklahoma State Chamber of Commerce, to cry foul.

Oklahoma will need to keep a close watch for cases that plaintiffs’ lawyers might have formerly filed in Texas Judicial Hellholes making their way into Oklahoma courts.

*“With recent events that have occurred in Texas, you may be looking to file cases in Oklahoma.”*

— Letter from Senator Stratton Taylor  
to ATLA members

### UTAH SUPREME COURT — DEFYING THE U.S. SUPREME COURT

In April 2004, the Supreme Court of Utah decided *State Farm Mutual Automobile Insurance Company v. Campbell* for the second time after the Supreme Court of the United States reversed the state court’s previous ruling and provided it with strict standards for evaluating the constitutionality of punitive damage awards.<sup>299</sup> The Utah court responded by reducing the punitive damage award enough to avoid another reversal, but, in doing so, defied both the language and the spirit of the U.S. Supreme Court decision.

*State Farm* involved a claim that the insurer denied coverage in bad faith, the jury had rendered a verdict of \$2,086.75 in special damages, \$2.6 million in noneconomic damages (for emotional distress), and \$145 million in punitive damages. The

trial judge had reduced the award to \$1 million in compensatory damages and \$25 million in punitive damages, but the Utah Supreme Court reinstated the original punitive damages verdict leaving a 145:1 ratio of punitive to compensatory damages. The U.S. Supreme Court reversed, finding the punitive damage award excessive and unconstitutional, and remanded to the Utah Supreme Court for reconsideration in light of its decision.<sup>300</sup>

On remand, State Farm argued that the punitive damage award should be no more than \$1 million (a 1:1 ratio). The Utah Supreme Court reduced the punitive damage award to \$9,018,780.75, a 9:1 ratio between punitive and compensatory damage.<sup>301</sup> In so doing, it characterized its actions as following the U.S. Supreme Court's ruling that single-digit multipliers provide an acceptable range for punitive damage awards.<sup>302</sup>

The Utah court's action recognized and dismissed the fact that the U.S. Supreme Court clearly found that "[a]n application of the [relevant] guideposts to the facts of this case . . . likely would justify a punitive damage award at or near the amount of compensatory damages."<sup>303</sup> The Utah court took this to be a mere "prediction, not direction" that it needed to follow.<sup>304</sup> The Utah court did not recognize that the U.S. Supreme Court also had stated that in most cases, a 4:1 ratio would reach the "outer limit" of constitutionality. Instead, the Utah court found the defendant as more blameworthy than the U.S. Supreme Court did, and that the high court did not mean to restrain Utah's discretion in determining an award based on its independent assessment of the facts, according to the state's own values and traditions.<sup>305</sup>

In order to address the U.S. Supreme Court's concern that high compensatory damage awards already may contain a punitive element in the form of pain and suffering, the Utah court countered that the \$600,000 award to Mr. Campbell and the \$400,000 award to Ms. Campbell were supported by extensive evidence and served a purely compensatory purpose. Virtually all of this award was for noneconomic damages for the alleged emotional distress caused by the insurance policy's failure to honor its policy obligations. Undoubtedly, this "compensatory" award already contained an element

of punitive damages. The Utah court then based its punitive damage award on the already inflated noneconomic damages.

The Utah court also created what appears to be an exception to the 1:1 ratio rule. It found that "conduct which causes \$1 million of emotional distress and humiliation is markedly more egregious than conduct which results in \$1 million of economic harm. . . . Simply put, the trial court's determination that State Farm caused the Campbells \$1 million of emotional distress warrants condemnation in the upper single-digit ratio range rather than the 1-to-1 ratio urged by State Farm."<sup>306</sup> Thus, under the Utah court's reasoning, punitive damages should be even higher when rooted in what is already a virtually unlimited pain and suffering award.

The Utah court considered a 1:1 ratio to be appropriate where there is both a sizeable compensatory award AND "conduct of unremarkable reprehensibility."<sup>307</sup> This reading seems to consider a 1:1 ratio as a minimum, rather than a maximum, where there is already a large compensatory award. One also is left to wonder why punitive damages would be awarded at all in a case of "unremarkable reprehensibility."

The U.S. Supreme Court's decision does not support such a ruling. The Court was clear that a 1:1 ratio was appropriate in any case in which compensatory damages were substantial; that ordinarily 4:1 will be the constitutional maximum; and that awards in the upper range of single digits and beyond were appropriate only in exceptional cases where compensatory damages were very low.

The Utah Supreme Court's decision provides one of the most blatant examples of a court failing to faithfully apply the ruling of the U.S. Supreme Court in *State Farm*. While many judges have properly applied *State Farm* (see Point of Light, p. 39), unfortunately, a minority of judges, prompted by smart plaintiffs' lawyers, have stretched the law to continue to allow for extraordinary awards and created loopholes and exceptions to its application. Some of these tactics include considering speculative potential harm, rather than actual harm. This allows the court to justify punitive damages far in excess of that warranted by the harm in the case. For example, *Simon v. San Paolo U.S. Holding Co.*, a California appellate court



allowed a punitive damage award of \$1.7 million on a \$5,000 award for actual “out of pocket” damages based on the court’s belief that the plaintiff actually suffered a lost opportunity to purchase an asset worth \$400,000.<sup>308</sup> The U.S. Supreme Court ordered the punitive damage award be reconsidered, twice — the second time being in light of *State Farm*. Both times the California Court of Appeals affirmed the jury award, as it considered the ratio of punitive damages to actual harm to be just over 4:1, rather than 340:1. The Wisconsin Supreme Court also has upheld a \$3.5 million punitive award in a bad faith insurance case when compensatory damages were just \$17,570 because the court reasoned that the plaintiff could have suffered potential harm of \$490,000.<sup>309</sup> Some courts have also avoided applying *State Farm* by exempting certain types of cases, such as where the economic harm is difficult to quantify, from constitutional limits on punitive damages,<sup>310</sup> or by labeling what are actually punitive damages as compensation for pain and suffering.<sup>311</sup>

### **DISTRICT OF COLUMBIA: ON THE VERGE OF A MEDICAL MALPRACTICE CRISIS**

The rise in medical malpractice insurance rates stemming from the costs of lawsuits has marched across the country and straight into the nation’s capital.<sup>312</sup>

Slowly, the effects of unlimited damages in medical malpractice cases are rippling through the District, which, according to D.C. Mayor Anthony A. Williams, has experienced a rapid rise in premiums over the last few years. According to Peter E. Lavine, MD, president of the Medical Society of the District of Columbia (MSDC), the District is “heading down a very dark path where access most assuredly will become an issue.”<sup>313</sup> The American Medical Association, while not yet declaring a full-out emergency in the capital region, has recognized the warning signs of a potential crisis.<sup>314</sup> Dr. Lavine has noticed that an increasing number of physicians are leaving the District, retiring early, or opting not to perform high-risk procedures. A Medical Liability Report Card prepared by NORCAL Mutual Insurance Company in 2000 gave D.C. a “D” rating.

The American College of Obstetricians and Gynecologists (ACOG) has declared that the District of Columbia is one of fourteen jurisdictions with the highest risk of a medical liability insurance crisis.<sup>315</sup> Most recently, the preliminary results of an MSDC-conducted survey of 190 D.C. obstetri-

*“It is clear that the District is at risk of becoming a crisis area if nothing is done to address this trend.”*

—D.C. Mayor Anthony A. Williams

cians and gynecologists found that nearly nine out of ten indicated that they moved, plan to move, or are considering moving their entire medical practice out of the District. Many also had retired or were considering retiring early. Three-quarters had discontinued or were considering discontinuing obstetric services. The survey followed a 2002 poll of D.C. physicians conducted by the American Medical Society that found that due to increases in medical malpractice premiums, 39% were considering reducing hours, 31% were considering discontinuing certain services, and 28% were considering relocating over the next year.

The District, unlike neighboring Maryland or Virginia,<sup>316</sup> has no limits on damages for pain and suffering in medical malpractice cases, which has driven up insurance rates. Malpractice insurance rates are typically one-third less in Maryland and Virginia, which are also states declared at-risk by the AMA. For example, according to NCRIC, Inc., a physician-directed medical professional liability insurer in the District, in 2004, D.C. orthopedic surgeons pay \$82,584 compared to the \$52,288 paid by their colleagues in Maryland; D.C. OB/GYNs pay \$122,323 compared to the \$72,425 paid by physicians in Virginia; and D.C. neurosurgeons pay \$123,206 compared to the \$76,104 paid by Maryland doctors. Insurance rates for internal medicine in the District are also 30% higher than Maryland and Virginia. “The escalating costs are a direct result of the irresponsible lottery-style awards enjoyed by trial attorneys,” said Dr. Lavine.

Mayor Williams agrees. “As a result [of the city’s current system], the District has much higher medical liability insurance costs compared to Maryland and Virginia,” said the Mayor in a June, 10, 2004 letter to D.C. Councilmembers.<sup>317</sup> That letter accompanied the “Health Care Liability Reform Act of 2004,” which the Mayor sent to the D.C. Council for formal introduction.<sup>318</sup> The bill provides a comprehensive plan for stopping the pending malpractice crisis in the District by placing a \$250,000 limit on noneconomic damages, expanding the District’s “good Samaritan” law to provide immunity from liability for all doctors that offer free care, limit attorneys’ fees in medical malpractice cases so that more money goes to the patient, and provides for closer review and public comment when significant increases in medical liability insurance rates are proposed.

### NEW MEXICO’S APPELLATE COURTS

In January 2003, New Mexico Governor Bill Richardson appointed Edward L. Chavez to replace retiring Justice Gene Franchini. In making the appointment, Governor Richardson candidly predicted that Chavez would be “an activist judge.” “That’s what I want, activist judges . . . somebody that will shake things up, somebody that will have supreme respect for the law . . .” A “supreme oxymoron,” as one commentator observed,<sup>319</sup> because judicial activists make rulings based on innovative and novel interpretations of constitutional provisions and statutes to reach the result they personally prefer, rather than follow the law. Chavez, a personal injury lawyer who led the New Mexico Trial Lawyers Association in the 1990s, was the only one of three candidates for the high court that was not a sitting judge.

This year, in seeking election to a full eight-year term, Justice Chavez attracted more than \$277,000 in contributions. Not surprisingly, according to reports, most of his financing came from plaintiffs’ lawyers, including \$60,000 from a political committee of New Mexico trial lawyers, the deceptively-named Committee on Individual Responsibility.<sup>320</sup>

*“That’s what I want, activist judges . . .”*

— New Mexico Governor Bill Richardson  
on his latest appointment to the state Supreme  
Court

They contribute for good reason. As this report discussed in 2003, New Mexico appellate courts appear to demonstrate an anti-business bias, particularly in acting as the state’s ad hoc regulator of insurance coverage. Examples of this trend continued into 2004 with several rulings that expanded coverage beyond the terms of the policy,<sup>321</sup> and other out-of-the-mainstream decisions that place higher costs on insurance companies.<sup>322</sup> Consumers are likely to see increases in their automobile insurance rates as a result of such court-imposed requirements.

A July 2003 ruling by the court also should raise concern for the future independence and fairness of New Mexico’s judiciary. In *State ex rel. New Mexico Judicial Standards Comm’n v. Espinosa*, the Chavez court ruled that the lay members of the state’s Judicial Standards Commission are subject to indiscriminate removal at the Governor’s discretion, allowing Governor Richardson to dismiss all sitting members of the Commission and stack it with his appointees.<sup>323</sup> The decision consolidates the dominance of the Governor—in this case, one that has declared a preference for judicial activists—over the judiciary. The ruling compromises the independence of the Commission, which oversees the conduct and fitness of members of the judiciary and is meant to be free from political influence.<sup>324</sup>



# Points Of Light

Citizen action and judicial changes in Judicial Hellholes yield positive results. Four ways to douse the fires in the Judicial Hellholes will keep jurisdictions from developing an out-of-balance legal climate:

- (1) legislatures can enact statutory fixes;
- (2) appellate courts can overturn improper local decisions and confine future judicial malfeasance;
- (3) voters can reject lawsuit-friendly judges or enact ballot referenda to fix the problems; and
- (4) negative media attention can encourage change.

In the “Points of Light” section, the report highlights jurisdictions where the media, legislators, judges and the electorate intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county, or state can emerge from the depths of being a Judicial Hellhole, or stop itself from sinking into Judicial Hellhole status.

## HOPE IN JUDICIAL HELLHOLES

Where points of light exist in a particular Judicial Hellhole, they have been pointed out in the jurisdiction’s listing in this report. The brightest point of light clearly was the transformation of the litigation climate in Mississippi (See page 10). In addition, consider the following:

- **California Voters Stop Shakedown Lawsuits.** California voters helped fix the frivolous lawsuit problem in that state by passing a ballot initiative to require someone to have injury in order to file a lawsuit under the state’s consumer protection statute. (See page 32).
- **West Virginia Voters Add Balance to State Supreme Court.** West Virginia voted against re-electing Justice McGraw, whose opinions are part of the reason West Virginia repeatedly has been designated a Judicial Hellhole. (See page 24).
- **Reason for Optimism in Madison County.** After an onslaught of media attention on Judge Byron’s actions in Madison County, Illinois, Judge Byron withdrew as the head of the asbestos docket. His replacement immediately recognized the inequity in the court. In addition, voters chose Lloyd Karmeier

over Justice Gordon Maag to serve a ten-year term on the Illinois Supreme Court. Karmeier will have the opportunity to immediately appoint two appellate level judges. (See page 18).

There were several other events in 2004 that provided cause for optimism.

## BETTER HEALTHCARE AVAILABILITY FOR TEXANS

Texas’ medical malpractice problems appear to be stabilizing thanks to last year’s tort reform legislation, which includes a general limit on noneconomic damages of \$250,000 in health care liability claims, among other helpful provisions.<sup>325</sup>

A study by the Texas Hospital Association (THA) revealed that the number of lawsuits against Texas hospitals has dropped by 70 percent. In addition, the THA found that, after ten consecutive years of increasing premiums, its member hospitals’ insurance premiums dropped by an average of 8 percent in 2004, and, overall, there was 17 percent decrease for the upcoming 2004-2005 renewal period.<sup>326</sup> Also promising, ten medical liability insurers have applied to the Texas Department of Insurance to do business in Texas.<sup>327</sup> This will create more competition among insurance providers, and competition lowers premiums.

In addition, hospitals are reinvesting their insurance premium savings into the health care system. For example, Christus Health intends to use its \$21 million in savings to build a clinic for the indigent and to develop a diabetes program in Corpus Christi. Hospital Corporation of America (HCA) intends to use a portion of its \$28 million in savings to improve a program for medication errors prevention.<sup>328</sup> Hospitals already have indicated that emergency medicine, neurosurgery and orthopedics will see a positive impact. Hospitals also are better able to recruit emergency medicine physicians, as well as specialists in orthopedic surgery, obstetrics/gynecology, anesthesiology and neurosurgery.<sup>329</sup> It also has become easier to recruit doctors to clinical practices.<sup>330</sup>

While doctors have not yet seen the level of reduction in insurance premiums that hospitals have, this can be attributed to the “rush to the courthouse” during the three months prior to September 1, 2003, the date the damage restriction took effect.<sup>331</sup> To illustrate, plaintiffs’ attorneys filed 746 medical malpractice lawsuits in Harris County in the summer before the legislation’s effective date. In the eleven months following September 1, 2003, only 105 cases were filed in Harris County. Because insurance companies will be defending the barrage of lawsuits filed before September 1, 2003, for the next year or so, it will take some time before Texas physicians experience the full benefit of the new law.<sup>332</sup>

As Dr. Bohn Allen, the Texas Medical Association President, said: “We’ve started to turn the corner, but we still have a long way to go.”<sup>333</sup>

## REQUIRING INJURY FOR ASBESTOS CLAIMANTS IN OHIO

In June 2004, Ohio became the first state to enact legislation requiring asbestos, silica and mixed-dust related claimants to demonstrate actual impairment in order to file such a claim in its state court system.<sup>334</sup> Whether the claimant is, in fact, impaired from asbestos, silica or mixed dust exposure will be based on objective medical criteria established by the American Medical Association. Recent national reports estimate that unimpaired claimants represent up to ninety percent of new asbestos filings.<sup>335</sup> Both bills also set rules for premises liability actions and prescribe requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil.<sup>336</sup>

Ohio had become a magnet jurisdiction for asbestos litigation. Of the 300,000 cases pending around the country, more than 40,000 of them are in the Cuyahoga County court system and that number “continues to increase exponentially.”<sup>337</sup> Ohio companies also have been forced into bankruptcy from asbestos litigation. For example, when Owens Corning laid off 275 workers at a local plant, the loss to the community overall was assessed at \$15-\$20 million in an annual income.<sup>338</sup>

Local plaintiffs attorneys already have filed a challenge to the new asbestos statute in the Cuyahoga County courts.<sup>339</sup>

## COURTS UPHOLDING NEW LIABILITY LAWS

The high courts in North Carolina, Wisconsin, and Michigan earned their “Points of Light Section” designation because they showed proper deference to the exercise of legislative power in the area of civil justice reform.

**North Carolina:** In April 2004, the Supreme Court of North Carolina rejected a broad challenge to the constitutionality of a statute limiting punitive damages to the greater of three times compensatory damages or \$250,000.<sup>340</sup> The court understood that “it is well settled that North Carolina common law may be modified or repealed by the General Assembly, except [for] any parts of the common law which are incorporated in our Constitution” and that the legislative branch “is without question the policy-making agency of our government.”<sup>341</sup> Thus, the court said, the legislature acted within its authority in limiting punitive damages, which are awarded on the basis of public policy and not as compensation to plaintiffs. The court recognized that the statute bore a rational relationship to the state’s legitimate interest in preserving economic development, assuring public confidence in the judicial system, and providing clear notice of potential penalties to defendants.<sup>342</sup> The court noted that the statutory limit is closely in line with the constitutional standards adopted by the Supreme Court of the United States to prevent grossly excessive awards.<sup>343</sup>

**Wisconsin:** In July 2004, the Supreme Court of Wisconsin upheld a law that limited noneconomic damages in medical malpractice wrongful death cases to \$150,000 per occurrence. The law was enacted to address extraordinary medical malpractice awards and control rising medical insurance costs.<sup>344</sup> The opinion characterized the constitutional challenge as “provid[ing] this court an opportunity to either validate the legislature’s authority in this area or shatter the long held understanding of legislative power.”<sup>345</sup> The court ruled that a plaintiff has a right to have a jury decide liability, but the legislature retains the authority to limit the amount of recovery in its best judgment as to the maximum amount of damages that fully compensates for loss of society and companionship. The court understood that “[w]hen it comes to creating, limiting, and suspending causes of action, the legislature shares power with the judiciary.”<sup>346</sup> The

court also recognized that the legislature could best determine the impact that large noneconomic damage awards have on the availability of health care to the greater public.

**Michigan:** The Supreme Court of Michigan upheld a law limiting the vicarious liability of rental car companies when the people they rent to cause automobile accidents that injure others.<sup>347</sup> The Michigan

Court's decision in *State Farm v. Campbell*,<sup>352</sup> many courts have, and it is having a real impact on stemming extraordinary punitive damage awards. In the Supreme Court's own words, those principles include:

1) Punitive damages "must have a nexus to the specific harm suffered by the plaintiff." They cannot reflect generalized harm to society.

*"Reinforcing the findings of a majority of state supreme courts on this issue is the analysis of the United States Supreme Court that 'statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.' What these courts have been unwilling to do is to usher in a new Lochner era."*

— Supreme Court of Michigan,  
comparing judicial nullification of tort reform to the now-discredited period in which the U.S. Supreme Court threw out economic regulations that had been won in the political process.

court found that "[d]amage caps are constitutional in causes of action springing out of the common law because the Legislature has the power under our Constitution to abolish or modify nonvested, common-law rights and remedies."<sup>348</sup> The court recognized that the legislature had a rational basis for enacting the law, which could be its desire to reduce insurance costs or to increase consumers' choice of providers.<sup>349</sup> The court noted that it, and other state supreme courts, were not willing to "usher in another Lochner era," referring to turn of the 20<sup>th</sup> century rulings in which the Supreme Court of the United States invalidated various "economic" laws, such as regulation of hours and wages, a trend later repudiated by the high court.<sup>350</sup> It aptly concluded that "economic regulation, such as the measure we deal with today, has consistently been held to be an issue for the political process, not for the courts."<sup>351</sup>

These decisions may very well signal the end of the era of judicial nullification, where courts struck down such reasonable legislative public policymaking in the area of civil justice reform. Should the new liability laws in Mississippi, Ohio and Texas be challenged, eyes likely will be on supreme courts in those states to see if this trend continues.

## STEMMING EXCESSIVE PUNITIVE DAMAGE AWARDS

Although some courts, such as the Utah Supreme Court, have not adhered to the U.S. Supreme

- 2) A jury "may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." This is beyond the state's interest and can result in a defendant being punished over and over for the same conduct.
- 3) "[F]ew awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process."
- A ratio of 4:1 is "close to the line of constitutional impropriety." A higher ratio may be permissible only where "a particularly egregious act has resulted in only a small amount of economic damages."
  - "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Thus, when a court awards \$1 million in compensatory damages, an award of over \$1 million in punitive damages may be unconstitutional.
- 4) Courts must compare the size of the punitive damage award to civil penalties that could be imposed by law.<sup>353</sup>

Most judges are making serious efforts to rein in excessive punitive damage awards by faithfully applying the U.S. Supreme Court's decision in *State Farm*. Here are a few recent examples of courts that have worked

to ensure that punitive damage awards do not violate a defendant's right to due process:

- **Beaumont, Texas:** In a case against a car dealership for providing a customer with a Toyota Highlander rather than the more expensive Toyota Highlander Limited that she ordered, the jury awarded approximately \$30,000 in compensatory damages and \$250,000 in punitive damages. The appellate court applied *State Farm* to reduce the punitive damage award to \$125,000, recognizing that a 4:1 ratio of punitive to actual damages is close to the line of constitutional impropriety.<sup>354</sup>
- **West Virginia:** A claim against an insurance company involving its settlement practices resulted in an award of \$39,000 in damages for attorneys fees and costs and \$50,000 in damages for annoyance and inconvenience. While the West Virginia Supreme Court granted a new trial on other grounds,<sup>355</sup> two justices, including the Chief Justice, wrote concurring opinions emphasizing that with regards to punitive damages, they would consider the U.S. Supreme Court's admonition against consideration of out-of-state conduct and the bounds of the single-digit ratio.<sup>356</sup> Justice McGraw, who issued a third concurring opinion appearing to support a large punitive damage award, was removed from office by voters in November 2004.<sup>357</sup> These opinions, coupled with Justice McGraw's defeat, should send a signal to the West Virginia trial courts that *State Farm* is to be adhered to.
- **South Dakota:** The state Supreme Court reversed and remanded a \$500,000 punitive damage award where the plaintiff received \$25,000 in compensatory damages in an employment discrimination/invasion of privacy case. The court found a "shocking disparity" between compensatory and punitive damages and noted that the compensatory award already included a punitive element. The plaintiff had accused his former employer of going through his mail after terminating him.<sup>358</sup>
- **Kentucky:** A state appellate court reversed a jury verdict against a corporation for negligence, nuisance, and trespass brought by a landowner for \$7.6 million in compensatory damages and \$210 million in punitive damages.<sup>359</sup> The court struck down the verdict due to the plaintiff lawyer's repeated characterization of the defendant as a wealthy California corporation, which was meant to bias the jury against businesses without a strong local presence. The court

noted that had it not reversed the verdict on these grounds, it would have reduced the punitive damage award of 28 times the compensatory damages in order to be consistent with the dictates of *State Farm*.

- **California:** On numerous occasions, state appellate judges have applied *State Farm* to reduce excessive punitive damage awards into the single digit range.<sup>360</sup>
- **Arkansas:** While the state Supreme Court did not find the 4.2 ratio for punitive damages in a wrongful death against a nursing home to be "breathtaking," it reduced the punitive damage award by two-thirds — from \$63 million to \$21 million — because it shocked the conscience of the court. The court said that had the lower court considered civil and criminal penalties as required, it would have seen that punitive damages substantially exceeded potential fines.<sup>361</sup>
- **Oregon:** A state appellate court remitted a \$22.5 million punitive damage award to \$3.5 million; compensatory damages were \$500,000. The court began with a presumption that a punitive damage award should not be in excess of 4:1 unless there are exceptional circumstances meriting punishment in excess of that ratio. Finding such circumstances, the court permitted a 9.4:1 ratio.<sup>362</sup> In this case, a doctor sued a pharmaceutical company for not providing him with sufficient information on a drug and his patient experienced seizures and brain damage.

## MICHIGAN HOLDS THE LINE ON PAIN & SUFFERING AWARDS

The Supreme Court of Michigan has held the line on pain and suffering awards. In Michigan, punitive damages are not allowed, and plaintiffs' lawyers may try to inflate pain and suffering awards to make up the difference. In a single plaintiff sexual harassment case against DaimlerChrysler, plaintiff's counsel repeatedly compared his client to survivors of the Holocaust and highlighted the defendant, DaimlerChrysler, as being of German national origin — even stating that the company considers itself "God Almighty."<sup>363</sup> The jury responded returning a \$21 million verdict, largely for purported pain and suffering (\$30 million with prejudgment interest), the largest compensatory award of its kind in history. The Supreme Court of Michigan struck down the verdict, recognizing that "the due process concerns articulated in *State Farm* are arguably at play regardless of the label given to damage awards."<sup>364</sup>

# Solutions to Problems in Judicial Hellholes

The report seeks not only to identify the problems in Judicial Hellhole jurisdictions, but also to highlight the ways in which the litigation environment can achieve “Equal Justice Under Law.”

## STATE VENUE AND *FORUM NON CONVENIENS* REFORM

Venue and *forum non conveniens* are two concepts that relate to ensuring that lawsuits have a logical connection with the jurisdiction in which they are heard. Venue rules govern where, within a state, an action may be heard. As Judicial Hellhole examples demonstrate, certain areas in a state may be perceived by plaintiffs’ attorneys as an advantageous place to have a trial. As a result, plaintiffs’ attorneys become the “travel agents” for the “litigation tourist” industry, filing claims in jurisdictions with little or no connection to their clients’ claims. Fair venue reform would require plaintiffs’ lawyers to file cases where the plaintiffs live, where they were injured, or where the defendant’s principal place of business is located. This reform would help stop the forum-shopping that allows Judicial Hellholes to become magnet jurisdictions.

*Plaintiffs’ attorneys become personal “travel agents” for “litigation tourists,” guiding them to file claims in jurisdictions with little or no connection to their claim.*

*Forum non conveniens*, a related concept, allows a court to refuse to hear a case if there is a more appropriate forum in which the case could and should be heard. Although similar to venue, *forum non conveniens* contemplates that the more appropriate forum will be in another state, rather than in a different area of the same state. *Forum non conveniens* reform would oust a case brought in one jurisdiction where 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 (who pass the rules) and courts (who apply the rules) 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.

## A FEDERAL SOLUTION TO FORUM SHOPPING & FRIVOLOUS LAWSUITS

Representative Lamar Smith (R-TX) introduced the Lawsuit Abuse Reduction Act (LARA), H.R.4571, in June 2004. LARA provides a federal solution to forum shopping and frivolous lawsuits — two factors that largely contribute to the development of Judicial Hellholes.

LARA provides a nationwide solution to forum shopping. LARA’s authors appreciated that if one state improves its tort law, for example, Texas, plaintiffs’ lawyers will simply move to another jurisdiction in their forum shopping legal tour, for example, Oklahoma. The concentration of lawsuits in Judicial Hellholes adversely affects interstate commerce. Often, these lawsuits are filed against out-of-state businesses and can lead to the loss of jobs both within and outside the state. Litigation tourists do not help the states that they visit. They pay no taxes, only burdening the courts of that state that are paid for by local taxpayers. They delay justice to those who live there. LARA provides a national means of stemming unfair forum shopping. It would limit personal injury lawyers to filing their clients’ lawsuits where they live, where they were hurt, where they worked, or where the defendant has its principal place of business.

LARA also addresses the frivolous lawsuits that leave small businesses including mom and pop stores, restaurants, schools, dry cleaners and hotels with thousands of dollars in legal costs. For plaintiffs’ lawyers, it takes little more than a \$100 filing fee and often no more time than generating a form complaint to begin a lawsuit. Additional



defendants, who may have nothing to do with the case, can be named at no charge. Plaintiffs' lawyers realize that the cost of defending a case for a small business or its insurer, even when it has no factual or legal basis, will typically be more than \$10,000. Thus, a plaintiffs' lawyer may suggest a settlement amount less than the expected defense costs to make the case "go away." The defendant's insurer is then placed in a dilemma — if it fights the case and a judge allows the case to go to a jury, and the jury renders a verdict above policy limits, the insurer could be subject to a claim by its insured for wrongful failure to settle. On the other hand, if the insurer settles such a case, over time such action will cause the defendant's insurance costs to increase exponentially. Under the current system, small businesses can be subject to legal extortion and have no effective recourse when hit with a frivolous lawsuit.

The weaponry against frivolous lawsuits was considerably weakened when Federal Rule of Civil Procedure 11 was modified in 1993. Many states tie their rules of civil procedure to the federal rules, meaning that many state sanctions were weakened by the 1993 modifications as well. These changes allowed the bottom feeders in the personal injury bar to commit legal extortion. Plaintiffs' lawyers could bring frivolous claims, knowing that they would not be penalized, because a new "safe harbor" provision allowed them to simply withdraw their claim within 21 days and escape any sanction. Even if sanctioned, Rule 11 no longer required the offending party to pay the litigation costs of the party burdened by a frivolous lawsuit, motion, or other pleading. Thus, plaintiffs' lawyers could safely force defendants to settle cases for amounts just under defense costs. Ultimately, small businesses paid more for insurance, and the public at large ended up with the bill. The weakening of Rule 11 has led to an almost total failure of attorney accountability. As officers of the court, personal injury lawyers should be accountable to basic, fair standards: they should be sanctioned if they abuse the legal system with frivolous claims.

LARA would eliminate the "safe harbor" for frivolous lawsuits. The bill would restore mandatory federal sanctions on attorneys, law firms, or parties

who file frivolous lawsuits. In addition to paying the fines, the sanctioned lawyers also would have to pay all costs associated with sanction proceedings. LARA also allows a court to impose sanctions for frivolous or harassing conduct during discovery. The sanctions available under Rule 11 would apply in federal courts as well as in state cases that affect interstate commerce. The House Judiciary Committee added a "three-strikes" provision to the bill to suspend an attorney from practicing before that court for one-year if he or she files more than three frivolous claims in that court.

In the closing days of the 108<sup>th</sup> Congress, September 14, 2004, LARA passed the House of Representatives by a vote of 229-174. LARA is unlikely to be considered by the Senate before the end of the year 2004. But LARA should have a good chance for enactment in the 109<sup>th</sup> session or the Congress. The Act should receive strong bipartisan support. In fact, both Senator Kerry and former Senator Edwards are on record as supporting "tough, mandatory sanctions" and a "three strikes" provision in the medical malpractice context.<sup>365</sup> According to newspaper reports, however, Kerry and Edwards limited their endorsement against sanctions for frivolous claims to medical malpractice claims.<sup>366</sup> Small businesses and other employers merit the same protection as doctors. No litigant should be subject to frivolous claims.

### **ENSURING THAT PAIN AND SUFFERING AWARDS SERVE A COMPENSATORY PURPOSE**

How much does it take to compensate for a person's pain and suffering? One million dollars? Twenty million dollars? How about one hundred million dollars or more? These are levels of actual "compensatory" awards reached by juries in 2004.<sup>367</sup> Do such awards truly serve a compensatory purpose or are they really a form of punitive damages masquerading under the veneer of pain and suffering awards?

Given the lack of standards for setting pain and suffering awards, it is imperative that judges properly instruct the jury on the purpose of pain and suffering awards. Each jury must understand that these awards serve a compensatory purpose and may not be used to punish a defendant or

deter future bad conduct. When a jury reaches an extraordinary compensatory damage award, both trial and appellate level judges must closely review the decision to ensure that it was not inflated due to the consideration of inappropriate evidence. Without proper oversight by the court, the jury can be directed away from the plaintiff and toward the wrongdoing of the defendant by a carefully constructed maze of “guilt evidence.” As a result, the fundamental purpose of pain and suffering awards — to compensate the plaintiff — is upended. Moreover, the inflated award may not be subject to the extensive constitutional and statutory controls that help assure that real punitive awards are based on the appropriate evidence, serve their proper function, and are not excessive. The inflated “compensatory” award can then be used to justify and uphold a higher punitive damage award than would otherwise be constitutionally permissible.<sup>368</sup>

Several cases discussed in this report including the \$1 billion award in *Coffey v. Wyeth* (Jefferson County, Texas), the decision on remand in *State Farm v. Campbell* (Utah dishonorable mention), and *Gilbert v. DaimlerChrysler* (Michigan Supreme Court case discussed in State Farm Point of Light) exemplify this troubling and growing trend.<sup>369</sup> In addition, a prominent judge on the U.S. Court of Appeals for the Fourth Circuit, Paul Niemeyer, has recognized this problem and called for legislative reform.<sup>370</sup>

The American Legislative Exchange Council (ALEC) has developed a model “Full and Fair Noneconomic Damages Act” that would preclude the improper use of “guilt” evidence in the calculation of pain and suffering damages. ALEC’s model act also would enhance the opportunities for meaningful judicial review of such awards.

## **PRESERVING THE AUTHORITY OF FEDERAL COURTS TO HEAR NATIONWIDE CLASS ACTIONS**

Abusive class actions and mass joinders allow plaintiffs’ lawyers to bring hundreds or thousands of claimants together in a favorable state court, thereby putting enormous pressure on defendants to settle even non-meritorious claims.<sup>371</sup>

Congress has been trying for years to overhaul class action lawsuit procedures, and, in the past year, Congress has never been closer to achieving needed reform. The Class Action Fairness Act was introduced in both houses in the 108<sup>th</sup> Congress.<sup>372</sup> If enacted into law, this legislation would have allowed a defendant to move these lawsuits from state to federal court when a substantial percentage of the plaintiffs are not residents of the state in which they are filed. The bill also contains consumer protections directed at settlements where attorneys make millions in fees while class-action members end up receiving little or actually losing money. This legislation would help alleviate lawsuit abuse in jurisdictions such as Madison County, Illinois, and address the mass actions seen in West Virginia and, now to a lesser degree, in Mississippi.

The Class Action Fairness Act passed the House of Representatives by a vote of 253-170 on June 12, 2003. The Senate Judiciary Committee favorably reported a similar bill, S. 2062. But in October 2003, the Senate failed by one vote to obtain the 60 votes necessary to move to a vote on the Senate floor. After lengthy negotiations to carve out exceptions on cases going to federal courts, several Democrats, including Mary Landrieu of Louisiana, Christopher Dodd of Connecticut and Charles Schumer of New York, agreed on a compromise bill. This new bill would ensure that smaller class actions, where the majority of plaintiffs and the defendant were from the same state, would remain in state courts. Nevertheless, the hope this compromise inspired was fleeting, as some of the Democrats supporting the class action bill decided to link it to several unrelated proposals, such as those affecting the minimum wage, controls on gases that are thought to cause global warming, mental health insurance and native Hawaiian rights. The Act again failed to gain cloture on July 8, 2004, this time by a vote of 44-43, effectively killing it for this legislative session.<sup>373</sup>

## ADDRESSING THE ASBESTOS CRISIS

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 by respondents in the asbestos litigation context. What is more, since the Supreme Court of the United States described the litigation as a “crisis,”<sup>374</sup> the litigation has mushroomed. Right now, trial courts are clogged with more than 300,000 pending cases, and more than 100,000 claims were filed last year alone. The RAND Institute for Civil Justice has said that as many as one million more claims may be filed.<sup>375</sup>

The heart of the problem is that, according to recent reports, as much as ninety percent of new asbestos-related claims are filed by plaintiffs who have no impairment.<sup>376</sup> Lawyers who represent cancer claimants have expressed concern that trends in the litigation may have the effect of threatening the ability of their clients to obtain adequate timely compensation.<sup>377</sup>

Payments to individuals who are not impaired also have had the effect of encouraging more lawsuits, setting off a chain reaction of liability in the business community. These filings already have forced dozens of so-called “traditional” asbestos defendants into bankruptcy. With more than seventy defendants in bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider to sue more defendants. Now, more than 8,400 defendants have been named in asbestos cases — up from 300 in 1982.<sup>378</sup> Many have only a peripheral connection to the litigation, such as engineering and construction firms, and plant owners.<sup>379</sup> These defendants have only become targets of litigation because they provide fresh “deep pockets.”

These dynamics have led lawmakers and jurists on both the federal and state levels to explore with even greater urgency ways to enhance the asbestos litigation environment.

Thus far, the U.S. Congress has failed to address the asbestos litigation crisis. In the 108<sup>th</sup> Congress, the Fairness in Asbestos Injury Resolution Act (“FAIR Act”) proceeded further than any asbestos bill in the past decade. That bill, which is sponsored by Senator Orrin G. Hatch, would establish a trust

fund financed by contributions from insurers and defendant companies, that would pay compensation to claimants who meet certain medical criteria. Lengthy discussions among Democrats and Republicans, insurers and corporate defendants, labor and the trial bar, however, did not yield a compromise bill with the support necessary for Senate approval, which was particularly difficult in an election year. Senator Don Nickles, who is retiring from the Senate, also had introduced a bill with a more narrow approach. It would provide that courts must dismiss asbestos claims of those who do not meet a set of objective medical criteria until such time as they meet the standards provided in the legislation. Both approaches have merit and would greatly help curb out-of-control asbestos litigation.

Meanwhile, in 2004, Ohio became the first state to enact legislation setting minimum medical requirements for asbestos and silica/mixed dust claims.<sup>380</sup> This approach is modeled after judicially created asbestos docket management plans that exist in a number of courts. The legislation also set rules for premises liability actions and prescribe requirements for shareholder liability for asbestos claims under the doctrine of piercing the corporate veil.

State courts increasingly are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Under these plans, the claims of individuals who cannot meet objective minimum medical criteria specified by the court are suspended. Otherwise applicable statutes of limitations are tolled so that claimants may sue later should they develop an asbestos-related impairment. Claimants on the inactive docket can have their cases removed to the active docket and set for trial when they develop an impairing condition. Boston, Chicago, Baltimore, and the federal MDL<sup>381</sup> were the first to adopt such plans in the late 1980s and early 1990s.<sup>382</sup> A couple of years ago, New York City, Syracuse, and Seattle followed.<sup>383</sup> And in 2004, they were joined by Madison County, Illinois; Cuyahoga County, Ohio; and Portsmouth, Virginia. Other jurisdictions that have adopted innovative case management orders simply dismiss claims of unimpaired plaintiffs without prejudice with the understanding that they can re-file should they develop a disease.<sup>384</sup>

While a comprehensive solution to the asbestos litigation crisis will have to come from the U.S. Congress, state legislative and judicial actions help reduce litigation abuse in some significant jurisdictions.

### **STRENGTHENING RULES TO PRESERVE GOOD SCIENCE IN EXPERT TESTIMONY**

Junk science pushed by pseudo “experts” has tainted tort litigation for decades. The more complex the scientific matters, the more trials tend to be determined by which “experts” the jury likes the best or believes the most — not on the sound principles of science. Typical trial lawyer tactics include the following: using statistics and anecdotes to cover up the scientific flaws in their theories, using family doctors to testify on matters completely unrelated to their expertise, and trying unreliable scientific techniques to engineer studies in their favor.<sup>385</sup>

The result is large-scale injustice. Contrary to in-court findings, it is now accepted scientific fact that silicon breast implants do not cause systematic disease, and there is no connection between Bendectin and birth defects. Another example is Dalkon Shield litigation, where the plaintiffs’ experts “showed almost compete [sic] disregard for epidemiologic principles in its design, conduct, analysis and interpretation of results.”<sup>386</sup> Nevertheless, billions of dollars were lost, products were taken off the market and thousands of innocent workers lost their jobs.

Ten years ago, the *U.S. Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>387</sup> told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom. 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.”<sup>388</sup> In addition, when determining scientific reliability the trial judge should consider (1) whether the proffered knowledge can be or has been tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) whether the theory

or technique has gained general acceptance in the relevant scientific discipline.<sup>389</sup>

Still, twenty-two states have not adopted anything close to the *Daubert* principles.<sup>390</sup> Even in states where *Daubert* governs, some judges are not doing their jobs effectively, as they have difficulty distinguishing between real and fake science<sup>391</sup> — the same problems that juries have faced for years. By adopting *Daubert*, taking their gatekeeper roles seriously, and seeking competent independent science experts, judges can take more control over their courts and restore the essential burden on plaintiffs to prove causation in tort cases.

### **ADDRESSING MEDICAL LIABILITY AND PROTECTING ACCESS TO HEALTH CARE**

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 to states with fair laws. Consequently, in some areas of the country, certain medical specialists simply are not available. According to the American Medical Association, there are only 6 states nationwide that are *not* in an access-to-health care crisis or showing signs of crisis. The situation is bound to worsen, as the practice of “defensive medicine” as a means of reducing or avoiding tort liability for individual doctors, when aggregated, is a major contributor to America’s rising health care costs.

The only way to stabilize the current medical liability system is to enact common sense medical liability reforms: (1) a reasonable limit on non-economic 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 reform.

## Conclusion

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This report is not intended to tip the scales of justice in any direction. Rather, it is intended to raise awareness of and spark dialogue about the few jurisdictions where the scales of justice are fundamentally uneven.

A message emphasized since the first Judicial Hellholes report in 2002 is that “Judicial Hellholes do not need to remain hellholes.” As Mississippi has proven, if the leaders in a state or jurisdiction are

committed to fairness, the legal climate can change and the availability of even-handed justice can be salvaged. In some instances, in some jurisdictions, no changes to the actual laws or procedural rules are necessary. Judges just need to decide to begin applying existing procedures and laws in a fair and unbiased manner. Ultimately, the judges and legislators in these jurisdictions must decide that, indeed, all litigants deserve “Equal Justice Under Law.”



# Endnotes

- 1 See *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 MSNBC, Abrams Report, Jan. 23, 2003.
- 3 RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1998).
- 4 Martin Kasindorf, *Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 28, 2004.
- 5 *Phillips v. Ford Motor Co.*, No. 99-L-1041 (Madison County Cir. Ct.).
- 6 ATRA's motion to quash is available online at [http://www.atra.org/files.cgi/7589\\_motion.pdf](http://www.atra.org/files.cgi/7589_motion.pdf).
- 7 Paul Hampel, *Madison County: Where Asbestos Rules Court Here Is a Magnet for Litigation*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004, at A1.
- 8 See *Asbestos for Lunch*, *supra* note 1, at 5 (transcript of comments of Richard Scruggs).
- 9 See, e.g., Neely, *supra* note 3, at 4.
- 10 *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.
- 11 Editorial, *Getting Politics Out of Courts*, BUSINESS WEEK, Sept. 27, 2004, at 140.
- 12 See Jerry Mitchell, *Out-of-State Cases, In-State Headaches*, CLARION-LEDGER, June 17, 2001, at A1.
- 13 Tim Lemke, *Lawyers in Paradise: Mississippi has a Reputation as a Haven For Trial Lawyers Pursuing Mega-Lawsuits*, INSIGHT ON THE NEWS, Aug. 12, 2002.
- 14 See Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1.
- 15 See Ken Ellingwood, *Mississippi Curbs Big Jury Awards Caps on Liability Verdicts Are Seen as Pro-Business. Critics Say Companies Will be Less Accountable*, L.A. TIMES, Dec. 4, 2002, at 1.
- 16 See Tim Lemke, *Best Place to Sue?*, WASH. TIMES, June 30, 2002, at A1.
- 17 Transcript, *Jackpot Justice*, 60 MINUTES, Nov. 25, 2002.
- 18 See e.g., Mitchell, *Out of State Cases, In-State Headaches*, *supra* note 12; Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER, June 17, 2001, at A1.
- 19 *Arnold v. State Farm Fire & Cas. Co.*, 277 F.3d 772, 774 (5<sup>th</sup> Cir. 2001).
- 20 A study commissioned by the Center for Legal Policy of the Manhattan Institute, a nonprofit think tank, issued a compelling and well-documented indictment of Jefferson County's treatment of mass actions. According to the study, mass actions increased four-fold in Jefferson County between 1999 and 2000. That study also found that the number of civil filings was "vastly disproportionate" to Jefferson County's population and civil docket. These cases had little, if any, legitimate relationship to Jefferson County. See JOHN H. BEISNER ET AL., MANHATTAN INST., CTR. FOR LEGAL POL'Y, ONE SMALL STEP FOR A COUNTY COURT . . . ONE GIANT CALAMITY FOR THE NATIONAL LEGAL SYSTEM, CIVIL JUSTICE REP., No. 7, at 16-30 (Apr. 2003).
- 21 The flood of cases into certain Mississippi counties was facilitated by the state's liberal venue rule, which some described as the "good as to one, good as to all" rule. Mississippi Rule of Civil Procedure 82 provided that when several parties were joined in one action, venue would be proper for all of the parties if it would be proper for any of the parties. This meant that if either a single plaintiff or a single defendant resided in a county, a lawsuit could be brought in that county. This practice allowed plaintiffs' counsel to obtain exorbitant settlements from civil defendants by grouping hundreds or even thousands of claims together in the court of their choosing. For example, "in April 2000, 398 people who took diet drugs joined in a single lawsuit suing 203 physicians and pharmacies in Jefferson County Circuit Court. None of the plaintiffs and only one defendant lives in Jefferson County." Mitchell, *Jefferson County Ground Zero for Cases*, *supra* note 18.
- 22 One small business, the Bankston Drug Store in Fayette, became known as "ground zero" in pharmaceutical litigation because, as the only pharmacy in Jefferson County, the store was named as a defendant in numerous lawsuits targeting out-of-state pharmaceutical companies. See, e.g., David W. Clark, *Life in Lawsuit Central: An Overview of the Unique Aspects of Mississippi's Civil Justice System*, 71 MISS. L.J. 359, 367 (2001).
- 23 See Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1.
- 24 Prior to 1995, there were no verdicts greater than \$9 million in Mississippi courts. Between 1995 and 2001, twenty-four verdicts in Mississippi exceeded \$9 million and at least seven of those awards were for \$100 million or more. According to the National Law Journal, for the period between 1994 and 2000, Mississippi had the second highest percentage of verdicts over \$100 million of any state in the nation, ranking only behind Alabama, which enacted tort reform addressing the issue in 1999. See Andrew Harris, *Report Maps Million Dollar Verdict States but Trial Lawyers are Skeptical of the New Study's Award Data*, NAT'L L.J., Feb. 12, 2001, at A4; see also Clark, *supra* note 22, at 363-64 (citing Current Award Trends in Personal Injury, 2001 Edition, Jury Verdict Research Series (LRP Publications, 2002), at 35-36; Tom Wilemon, *Judicial Probe Looking at Big Jury Awards*, SUN HERALD, July 12, 2003; Betty Liu, *The Poor Southern County That's Big on Lawsuits*, FIN. TIMES, Aug. 20, 2001, at 5; Melody Petersen, *Jury Levies \$100 Million Award Against Heartburn Drug Maker*, N.Y. TIMES, Sept. 30, 2001, at A1.
- 25 See Miss. R. App. P. 8(b)(2)(c) (2001) (stating that "the appellant shall be entitled to a stay of execution pending appeal if the appellant gives a supersedeas bond . . . of 125 percent of the amount of the judgment appealed."); *O'Keefe v. Loewen Group, Inc.*, No. 91-67-423 (Cir. Ct. Hinds County, Miss. 1995) (in which a Canadian corporation that owned a chain of funeral homes was forced into bankruptcy due in large part to its inability to post the \$625 million bond necessary to appeal a \$500 million Hinds County verdict arising from a \$4 million contract dispute).
- 26 See *Out-of-State Lawyers in Majority at Exam*, MISS. BUS. J., May 28, 2004; see also Mississippians for Economic Progress, *Out Of State Lawyers Hijacking Mississippi's Justice System*, OUR PROGRESS, vol. 2, issue 1, at 4 (Aug. 2003) (finding that 43% of those passing the February 2003 Mississippi bar exam were attorneys from out-of state, a percentage that rose to 55% in February 2004).
- 27 See THE PERRYMAN GROUP, THE POTENTIAL IMPACT OF PROPOSED JUDICIAL REFORMS ON ECONOMIC ACTIVITY IN MISSISSIPPI, at 2 (Mississippians for Econ. Progress Feb. 2002).
- 28 See, e.g., Clark, *supra* note 22, at 367.
- 29 See Miss. R. App. P. 8(b)(2)(c) (2001) (providing that "absent unusual circumstances, the total amount of the required bond or equivalent security for any case as to punitive damages shall not exceed \$100 million").
- 30 See Miss. R. EVID. 702 (amended May 29, 2003 to be identical to the Federal Rule of Evidence); see also *Mississippi Transp. Com'n v. McLemore*, 863 So. 2d 31, 38 (Miss. 2003) (recognizing Mississippi's adoption of *Daubert*, which had "effectively tightened, not loosened, the allowance of expert testimony").
- 31 *Community Bank v. Courtney*, No. 2001-CA-01657-SCT, 2004 WL 2360391 (Miss. Oct. 21, 2004).
- 32 *Wilson v. General Motors Acceptance Corp.*, No. 2003-CA-00233-SCT, 2004 WL 1688355 (Miss. July 29, 2004).
- 33 *United States Fidelity & Guaranty v. Knight*, 882 So. 2d 85 (Miss. 2004) (en banc); see also *AmSouth Bank v. Gupta*, 838 So. 2d 205 (Miss. 2002) (reversing a \$2.5 million punitive damage award on top of \$600,000

- in compensatory damages where the trial court improperly allowed the jury to consider punitive damages before determining liability and compensatory damages, and there was insufficient evidence of willfulness or maliciousness to support a punitive damage award).
- 34 *Crane Co. v. Kitzinger*, 860 So. 2d 1196 (Miss. 2003).
- 35 *Entergy Mississippi, Inc. v. Bolden*, 854 So. 2d 1051 (Miss. 2003).
- 36 *MIC Life Ins. Co. v. Hicks*, 825 So. 2d 616 (Miss. 2002).
- 37 *Illinois Central RR Co. v. Hawkins*, 830 So. 2d 1162 (Miss. 2002).
- 38 *Mississippi Power & Light Co. v. Cook*, 832 So. 2d 474 (Miss. 2002).
- 39 *See Janssen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004) (en banc); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31 (Miss. 2004); *Janssen Pharmaceutica, Inc. v. Scott*, 876 So. 2d 306 (Miss. 2004); *Harold's Auto Parts, Inc. v. Mangialardi*, No. 2004-IA-01308-SCT (Miss. Aug. 26, 2004) (slip. op.); *Culbert v. Johnson & Johnson*, Nos. 2003-IA-00881-SCT, 2003-IA-00918-SCT, 2004 WL 2110580, at \*1 (Miss. Sept. 23, 2004). The Mississippi Supreme Court also amended Miss. R. Civ. P. 82 to recognize the forum non conveniens doctrine and provide trial judges the discretion to transfer a case to another county that is more convenient.
- 40 *See Culbert v. Johnson & Johnson*, 2004 WL 2110580, at \*1.
- 41 Jerry Mitchell, *New Attitude for Miss. Supreme Court*, CLARION-LEDGER, Oct. 30, 2004, at 1 (quoting plaintiffs' lawyer Jim Shannon of Hazlehurst).
- 42 In July 2001, Jefferson County's Circuit Court Judge Lamar Pickard scrutinized his court's practices and announced that he would be taking "a much, much different view as to joinder. . . . And the joinder rule was never intended to be a class rule in Mississippi. . . . And we have very—we have some very, very fine legal talent, legal minds in Mississippi that have crafted a class action rule into our joinder rule and that's not what it was intended for." *See* Beisner, *supra* note 20, at 17 (quoting statement of J. Lamar Pickard, Tr. of Mot. Hearing at 9-10, *Conway v. Hopeman Bros.* (Cir. Ct. Jefferson County, Miss. July 25, 2001)). Since that time, Judge Pickard has reportedly only permitted joinder if all plaintiffs reside in Jefferson County. *See id.*
- 43 Jerry Mitchell, *Asbestos Claims Hinge on Judge's Ruling*, CLARION-LEDGER, Oct. 16, 2004.
- 44 *See, e.g.*, Gov. Haley Barbour, *The Need for Tort and Judicial Reform*, Address at the Mississippi College School of Law (Mar. 27, 2003), at <http://www.haleybarbour.com/MCLaw.htm>; *Geoff Pender, Tuck Vows End to 'Lawsuit Abuse'*, SUN HERALD, Sept. 30, 2003.
- 45 Gov. Haley Barbour, *State of the State Address*, Jan. 26, 2001.
- 46 H.B. 19, 2002 Leg., 3rd Ex. Sess. (Miss. 2002).
- 47 *See* Becky Gillette, *Debate Heats Up With Unusual Coalition of Business, Labor, Doctors*, MISS. BUS. J., (June 10-16, 2002).
- 48 *See* H.B. 19, § 1 (amending MISS. CODE ANN. § 11-11-3(1)).
- 49 The 2002 Act limited punitive damages to no more than \$20 million (for a defendant with a net worth of more than \$1 billion), \$15 million (for a defendant with a net worth between \$1 billion and \$750 million), \$10 million (for a defendant with a net worth between \$750 million and \$500 million), \$7.5 million (for a defendant with a net worth between \$500 million and \$100 million), \$5.5 million (for a defendant with a net worth between \$100 million and \$50 million), or four percent of the defendant's net worth if the defendant has a net worth of \$50 million or less. *See id.* § 6 (amending Miss. Code Ann. § 11-1-65(3)).
- 50 *See* H.B. 2, 2002 Leg., 3rd Ex. Sess. (Miss. 2002) (codified at Miss. Code Ann. § 11-1-60). The limit on noneconomic damages increases to \$750,000 in 2011 and to \$1 million in 2017.
- 51 H.B. 13, 2004 Leg., 2d Ex. Sess. (Miss. 2004).
- 52 Denise Bedell, *A Time for Change*, U.S. INSURER, Fall 2004, at 39, 41.
- 53 This amount does not count soft money contributions, such as television advertising by organizations not linked to the candidates.
- 54 *See* Robert Lenzner & Matthew Miller, *Buying Justice*, FORBES, July 21, 2003, at 64.
- 55 *See id.*; *see also* Michael Orey, *Business Targets Judicial Race in 'Tort Mecca'*, WALL ST. J., Oct. 30, 2002, at B1.
- 56 *See* Ben Bryant, *Tort Reformers Get Big Boost*, SUN HERALD, Nov. 7, 2002, at 4.
- 57 *See* Mississippi Supreme Court Election Results, available at [http://network.ap.org/dynamic/files/elections/2004/general/by\\_state/ballot\\_other/MS.html?SITE=MSJA D&SECTION=POLITICS](http://network.ap.org/dynamic/files/elections/2004/general/by_state/ballot_other/MS.html?SITE=MSJA D&SECTION=POLITICS).
- 58 *See* BUSINESS & INDUSTRY POLITICAL EDUCATION COMMITTEE, MISSISSIPPI SUPREME COURT CANDIDATES BEST FOR BUSINESS RECOMMENDATIONS (2004).
- 59 *See* Jimmie E. Gates, *Graves Wins High Court Runoff*, CLARION-LEDGER, Nov. 17, 2004, at 1A.
- 60 *See* Tom Wilemon, *Judicial Probe Looking at Big Jury Awards*, SUN HERALD, July 12, 2003, at 1; *'Jackpot Justice' Awards Spur Mississippi Investigation*, WASH. TIMES, Oct. 4, 2003; *see also* Tom Wilemon & Beth Musgrave, *Indictments Cast Doubt on Justice System Fairness*, SUN HERALD, July 26, 2003, at A6.
- 61 *See* Jimmie E. Gates, *Suspects Face More Charges in Drug Suit*, CLARION-LEDGER, Sept. 11, 2004, at 1; Jerry Mitchell, *Probe Nets 11 Arrests in Diet Drug Fraud Case*, CLARION LEDGER, Sept. 1, 2004, at 1A.
- 62 *See* Mitchell, *Probe Nets 11 Arrests in Diet Drug Fraud Case*, *supra* note 61.
- 63 *See id.*
- 64 *See* Gates, *Suspects Face More Charges in Drug Suit*, *supra* note 61.
- 65 *See* Jimmie E. Gates, *3 Plead Guilty in Fen-Phen Probe*, CLARION LEDGER, Sept. 22, 2004, at 1A (reporting that in exchange for light sentences, the three defendants agreed to cooperate in the ongoing federal investigation.).
- 66 *See* Jerry Mitchell, *Fen-Phen Arrests Revive Rap on County*, CLARION-LEDGER, Sept. 5, 2004, at 1. Several individual lawsuits also were reportedly brought against some of the lawyers who brought the Fen-Phen case; these cases were brought by clients that allege the lawyers signed up fake clients to boost the lawyers' share of the settlement funds, and by "runners" who claim they were promised fees for signing up clients who used Fen-Phen, but were never paid by the lawyers. *'Jackpot Justice' Awards Spur Mississippi Investigation*, *supra* note 60.
- 67 *See* Jonathan Groner, *Mississippi: Battleground for Tort Reform*, LEGAL TIMES, Vol. 27, No. 4, Jan. 26, 2004, at 1; *see also* Michael Orey, *Contributions in Mississippi are Investigated*, WALL ST. J., Oct. 8, 2002, at A6; Timothy R. Brown, *Investigation of Two Prominent Lawyers and Judges Sparks More Questions*, ASSOC. PRESS NEWSWIRE, Oct. 9, 2002.
- 68 *See* Geoff Pender, *Judge Probe Date Mired in Argument*, SUN HERALD, Aug. 21, 2004, at 1.
- 69 *See id.*; Jimmie E. Gates, *Corruption Case Unlikely to See 2004 Trial Date*, CLARION-LEDGER, Aug. 21, 2004, at 1B.
- 70 *See* MassMutual Fin. Group, Press Release, *MassMutual Re-Enters Mississippi Municipal Bond Market Company Cites Passage of Tort Reform Legislation*, June 16, 2004.
- 71 *Id.*
- 72 Assoc. Press, *St. Paul Travelers Set to Increase Business in Mississippi*, SUN HERALD, Oct. 8, 2004 (noting that St. Paul Travelers also plans to offer other lines of insurance to industries like construction and financial institutions).
- 73 *See* Editorial, *Tort Reform is Making a Difference*, HATTIESBURG AMERICAN, Oct. 10, 2004, at 8C (reporting that Medical Assurance Co. of Mississippi, which provides medical malpractice insurance for about 60 percent of the doctors in Mississippi, would not raise its insurance premiums in 2005).
- 74 *See* *A Time for Change*, *supra* note 52, at 40.
- 75 Assoc. Press, *Flurry of Lawsuits Filed Ahead of Today's Deadline*, SUN HERALD, Sept. 1, 2004.
- 76 *A Time for Change*, *supra* note 52, at 40.
- 77 Paul Hampel & Tim Bryant, *Report Rips Madison County Court: To Plaintiffs' Lawyers, Tort Reform Group's Designation is Badge of Honor*, ST. LOUIS POST-DISPATCH, Nov. 6, 2003, at C1.
- 78 For a detailed discussion of why Madison County is considered a Judicial Hellhole, *see* Victor E. Schwartz, Mark A. Behrens & Kimberly D. Sandner, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, 16 WASH. U. J.L. & POL'Y 235, 237-43 (2004).
- 79 Editorial, *Lawsuit Heaven*, ST. LOUIS POST-DISPATCH, Jan. 13, 2003, at B6.
- 80 Greg Burns, *Lawyers Bring an International Class Action to Rural Madison County . . . Why? Because It's the Lawsuit Capital*, CHI. TRIB., Mar. 8, 2004, at 1; Christi Parsons, *Downstate County is a 'Plaintiff's Paradise'*, CHI. TRIB., June 17, 2002, at 1; Amity Shlaes, *Commentary, Big Judgments*,

- Bigger Mistakes; Legal Windfalls in Madison County Demonstrate the Need to Limit Forum Shopping of Class-Action Lawsuits*, CHI. TRIB., June 29, 2004, at 15; Editorial, *The Judges of Madison County*, CHI. TRIB., Sept. 6, 2002, at 22; Editorial, *A Madison County Jackpot*, CHI. TRIB., Apr. 2, 2003, at 22.
- 81 Martin Kasindorf, *Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limits*, USA TODAY, Mar. 8, 2004, at A1; see also *Bland v. Norfolk & Co.*, 506 N.E.2d 1291, 1297 (Ill. 1987) (describing Madison County's "burden of . . . imported litigation."); Jim Copland, *The Tort Tax*, WALL ST. J., June 11, 2003, at A16; Alan J. Ortobals, *Is Madison County the 'Judicial Hellhole' that Tort Reformers Claim?*, ILL. BUS. J., July 2004, at 3.
- 82 Schwartz, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, supra note 78.
- 83 See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & Pub. Pol'y 143 (2001).
- 84 See Steve Gonzalez, *Alton Woman Wants \$50k+ Over Chicken Breast*, THE RECORD (Madison County, Ill.), Oct. 11, 2004 (reporting on *Burks v. Cracker Barrel et al.*, No. 04 L 1119).
- 85 See *id.*
- 86 See *id.*
- 87 See THE RECORD (Madison County, Ill.), at www.madisonrecord.com (providing a list of companies in court between Nov. 15 and 19, 2004).
- 88 See Steve Gonzalez, *Class Action: Steve Faulkner v. American Express*, THE RECORD (Madison County, Ill.), Oct. 1, 2004 (reporting on Case No. 03 L 530).
- 89 See Steve Gonzalez, *Class Action: Darrell Nash v. Sears Roebuck*, THE RECORD (Madison County, Ill.), Sept. 29, 2004 (reporting on Case No. 04 L 716).
- 90 See Steve Gonzalez, *Class Action: Josephine Coleman v. American's Moneyline*, THE RECORD (Madison County, Ill.), Sept. 28, 2004 (reporting on Case No. 02 L 1557).
- 91 See Steve Gonzalez, *Freitag's Class Action Against Option One in Court*, THE RECORD (Madison County, Ill.), Oct. 18, 2004 (reporting on Case No. 04 L 809).
- 92 See Steve Gonzalez, *Class Action: Belinda Vardell v. Union Planters Bank*, THE RECORD (Madison County, Ill.), Sept. 23, 2004 (reporting on Case No. 04 L 146).
- 93 See Steve Gonzalez, *Class Action: Neubauer v. Intel Corp.*, THE RECORD (Madison County, Ill.), Sept. 22, 2004 (reporting on Case No. 02 L 788).
- 94 See Steve Gonzalez, *Glen Ahlers v. Ford Motor Company*, DEARBORN, MI, THE RECORD (Madison County, Ill.), Sept. 9, 2004.
- 95 See *Peach v. Charming Shoppes, Inc. d/b/a/ Fashion Bug*, Case No. 04 L 601 (Madison County, Ill., filed June 7, 2004); see also Steve Gonzalez, *\$1.39? Wal-Mart Next in Line for Peach*, THE RECORD (Madison County, Ill), Nov. 7, 2004; Steve Gonzalez, *Shopper Peach Amends Complaint*, THE RECORD (Madison County, Ill), Nov. 1, 2004; Steve Gonzalez, *Ashley Peach v. Kmart Holding Corporation, Detroit, MI*, THE RECORD (Madison County, Ill.), Sept. 9, 2004. The complaint also challenges the retailers' practice of charging a small service fee on cards that go unused for a long period of time.
- 96 See Steve Gonzalez, *Conference Set in Peach v. CIM*, THE RECORD (Madison County, Ill.), Oct. 20, 2004 (reporting on *Peach v. CIM*, Case No. 02 L 1253); *Another Peach Gets Her Day in Court*, THE RECORD (Madison County, Ill.), Sept. 30, 2004.
- 97 See Steve Gonzalez, *Eavenson at it Again: New Suit from Litigious Chiro*, THE RECORD (Madison County, Ill.), Sept. 16, 2004.
- 98 Shlaes, supra note 80.
- 99 That award in that case, *Price v. Phillip Morris*, is currently on appeal before the Supreme Court of Illinois. The award included \$1.77 billion in legal fees for the plaintiffs' lawyers.
- 100 See Beisner & Miller, supra note 83.
- 101 See *id.*; Brian Brueggemann, *Class-Action Lawsuits Top Old County Record*, BELLEVILLE NEWS-DEMOCRAT, Jan. 2, 2004, at 1A.
- 102 See Steve Gonzalez, *New Filings, Madison County Circuit Court Law Division*, Oct. 1-7, THE RECORD (Madison County, Ill.), Oct. 7, 2004 (reporting that *Caruso v. Merck & Co.*, No. 04 L 1090, was the 60<sup>th</sup> class action filed in Madison County in 2004).
- 103 Hampel, *Madison County: Where Asbestos Rules*, supra note 7.
- 104 Paul Hampel, *Illinois Supreme Court Has Yet to Weigh in on Venue for Asbestos Suits*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004.
- 105 Paul Hampel, *Speedy Court Docket Leaves Justice in Dust, Critics Say*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004.
- 106 Schwartz, *Asbestos Litigation in Madison County, Illinois: The Challenge Ahead*, supra note 78, at 243.
- 107 Hampel, *Madison County: Where Asbestos Rules*, supra note 7.
- 108 Hampel, *Speedy Court Docket Leaves Justice in Dust, Critics Say*, supra note 105.
- 109 Brian Brueggemann, *Welders Seem Unworried About Parkinson's After Jury Awards \$1 Million to Ailing Man*, BELLEVILLE NEWS-DEMOCRAT, Nov. 2, 2003; see also Brian Brueggemann, *Ailing Plaintiff Wins \$1 Million Award From Jury*, BELLEVILLE NEWS-DEMOCRAT, Oct. 29, 2003, at 1B.
- 110 See John Shaffery, *Welding Rod Injury and its Current Litigation: A Brief Overview*, HARRISMARTIN'S TOXIC TORT WATCH, Mar. 2004, at 6.
- 111 Hampel, *Speedy Court Docket Leaves Justice in Dust, Critics Say*, supra note 105.
- 112 *Id.*
- 113 See George Pawlaczyk & Beth Hundsdorfer, *Lawyers, Insurers Point to Each Other for Malpractice Crisis*, BELLEVILLE NEWS-DEMOCRAT, Feb. 2, 2003, at 40 (reporting that, according to the Deputy Director of the Illinois Department of Insurance, an insurance company that left Madison County received \$3.5 million in premium payments, but paid out \$12 million in malpractice court awards in the county in 2002, and expected to pay another \$9.3 million for pending cases or expected losses on policies still in effect).
- 114 Patrick J. Powers, *Hospitals Lose 161 Doctors This Year*, BELLEVILLE NEWS-DEMOCRAT, Aug. 8, 2004, at A1.
- 115 *Lipke v. Celotex Corp.*, 505 N.E.2d 1213, 1220-21 (Ill. App. Ct. 1987).
- 116 Paul Hampel, *"Lipke Rule" is Unfair to Defendants, Many Argue*, ST. LOUIS POST-DISPATCH, Sept. 19, 2004.
- 117 Kevin McDermott, *Plaintiff Bar Gives Top Dollar to Judges' Campaign*, ST. LOUIS POST-DISPATCH, Sept. 20, 2004, at A1.
- 118 *Id.*
- 119 *Id.*
- 120 *Id.*
- 121 *Id.*
- 122 Editorial, *Madison County: Where Asbestos Rules*, ST. LOUIS POST-DISPATCH, Sept. 26, 2004, at B2.
- 123 *Id.*
- 124 Editorial, *Madison County: Where Asbestos Rules*, supra note 122.
- 125 Trisha L. Howard, *Big Clash Over Class Actions; Lawyer in Big-Money Suits Is Scornful of Ex-Attorney General*, ST. LOUIS POST-DISPATCH, Apr. 15, 2004, at C1; see also Brian Brueggemann, *Forum Participants: Investigate Madison County Court System*, BELLEVILLE NEWS-DEMOCRAT, Apr. 15, 2004; Sanford J. Schmidt, *Lawyers Spar Over Asbestos Filings*, THE TELEGRAPH, Apr. 15, 2004. Judge Bell's remarks were made at an April 14, 2004 conference sponsored by the Washington University Journal of Law & Policy and by Washington University School of Law's Trial and Advocacy Program. The next day, a Madison County judge barred Judge Bell and his law firm from representing clients in cases in Madison County. See Paul Hampel & Trisha Howard, *Criticism of Court Leads to Ban on Atlanta Law Firm*, ST. LOUIS POST-DISPATCH, Apr. 17, 2004, at 10; "Judicial Hellhole" Deepens With Law Firm's Banishment, THE PANTAGRAPH, Apr. 27, 2004, at A8; Editorial, *The Fringes of Madison County*, WALL ST. J., May 26, 2004, at A16.
- 126 Editorial, *Judicial Hellhole Deepens with Law Firm's Banishment*, supra note 125.
- 127 Editorial, *Madison County: What's the Judge Hiding?*, ST. LOUIS POST-DISPATCH, May 1, 2004, at 34; see also Brian Brueggemann, *Class-action Lawyers Fight Over Money*, BELLEVILLE NEWS-DEMOCRAT, Apr. 20, 2004.
- 128 *NAACP v. Alabama*, 357 U.S. 449 (1958).
- 129 Editorial, *The Fringes of Madison County*, supra note 125.
- 130 Paul Hampel, *Speedy Court Docket Hijacks Justice, Defendants Say*, supra note 105.
- 131 *Id.*
- 132 *Id.*
- 133 Letter from U.S. Representative Charlie Norwood to Hon. John Ashcroft, Attorney General of the United States (Sept. 10, 2004) (on file with ATRA).
- 134 Judge Byron will continue to hear other types of civil cases.

- 135 See *Walraven v. Am. Standard, Inc.*, No. 04-L-274, slip op. at 7 (3d Jud. Cir. Oct. 6, 2004); see also Paul Hampel, *Asbestos Judge Tosses Out 3 Lawsuits*, ST. LOUIS POST-DISPATCH, Sept. 18, 2004, at A1.
- 136 Hampel, *Madison County: Where Asbestos Rules*, *supra* note 7.
- 137 *Palmer v. Riley Stoker Corp.*, No. 04-L-167, slip op. at 6 (3d Jud. Cir. Oct. 4, 2004); see also *Editorial, Cash Cow Cashed Out*, ST. LOUIS POST-DISPATCH, Oct. 12, 2004, at C6.
- 138 Paul Hampel, *Lack of Trust Poisons Efforts to Overhaul System*, ST. LOUIS POST-DISPATCH, Sept. 22, 2004, at A1.
- 139 See Brian Brueggemann, *Maag Suffers 2 Losses in Judicial Contests*, BELLEVILLE NEWS-DEMOCRAT, Nov. 5, 2004.
- 140 See, e.g., Christi Parsons, *Doctor Shortage Cited in GOP Win*, CHIC. TRIB., Nov. 4, 2004, at 12.
- 141 See Brian Brueggemann, *Karmeier Poised for Win After Aggressive Campaign*, BELLEVILLE NEWS-DEMOCRAT, Nov. 3, 2004.
- 142 See Michael J. Berens, *Business Running in Judicial Contest; Class-action Foes Target Relection*, CHIC. TRIB., Mar. 8, 2004, Business, at 1.
- 143 See *id.*
- 144 See Brian Brueggemann, *Panel to Aid Karmeier on Judgeships; New Justice Will Have to Fill Vacancies*, BELLEVILLE NEWS-DEMOCRAT, Nov. 5, 2004.
- 145 See *Editorial, Fresh Starts for Winners*, BELLEVILLE NEWS-DEMOCRAT, Nov. 4, 2004 (“Karmeier’s decisions on the high court need to help restore balance and fairness in the state’s courts, which now are tilted unfairly in plaintiffs’ favor.”).
- 146 See Brian Brueggemann, *Courts Generate Millions in Filing Fees*, BELLEVILLE NEWS-DEMOCRAT, Mar. 14, 2004. The only counties with a greater number of lawsuits were many times larger than St. Clair or Madison Counties – Cook County, DuPage County, Lake County, and Will County.
- 147 *Id.* (quoting Madison County Chief Judge Edward Ferguson).
- 148 According to court records, five firms are largely responsible for the surge in class actions filed in St. Clair County. Attorneys at two of these firms, The Lakin Law Firm and Carr Korein Tillery (which broke up last year) are substantially involved in Madison County class action litigation. See Brian Brueggemann, *Disputed Attorney’s Fees to Remain at \$10 Million*, BELLEVILLE NEWS-DEMOCRAT, May 21, 2004 (noting that “Carr Korein Tillery has filed many of the class actions in Madison County”); JOHN H. BEISNER & JESSICA DAVIDSON MILLER, *CLASS ACTION MAGNET COURTS: THE ALLURE INTENSIFIES*, MANHATTAN INST., CTR. FOR LEGAL POL’Y, CIVIL JUSTICE REP. NO. 7, at 3 (Manhattan Inst. July 2002) (noting that The Lakin Law Firm, in conjunction with other firms, brought a majority of the class action lawsuits in Madison County). Other firms bringing class action lawsuits in St. Clair County include Peel Beatty Motil (with both of its two offices in Madison County), and two St. Clair County firms, Cates Kurowski Bailey & Shultz LLC and Nester & Constance.
- 149 See Brian Brueggemann, *Class-action Lawsuits Set a Record*, BELLEVILLE NEWS-DEMOCRAT, Jan. 2, 2004.
- 150 See Beisner & Miller, *Class Action Magnet Courts*, *supra* note 148, at 1.
- 151 See Beth Hundsdorfer, *Ford Named in Police Vehicle Suit*, BELLEVILLE NEWS-DEMOCRAT, June 26, 2003.
- 152 See ILLINOIS CIVIL JUSTICE LEAGUE, *THE DIRTY LITTLE SECRET: MEDICAL MALPRACTICE LAWSUITS AGAINST METRO-EAST DOCTORS 5* (2004).
- 153 *Id.* at 6 (citing ISMIE Mutual Insurance Company legal outcomes data). Over the same period in Madison County, 71 percent of closed claims resulted in no payment to the plaintiff.
- 154 *Id.* at 7.
- 155 See Powers, *Hospitals Lose 161 Doctors This Year*, *supra* note 114.
- 156 See Elizabeth Donald, *Doctor Drain Forces Delay of Hospital Expansion*, BELLEVILLE NEWS-DEMOCRAT, Feb. 28, 2004.
- 157 See Patrick J. Powers, *5 More Move Practices Out of Metro-East*, BELLEVILLE NEWS-DEMOCRAT, July 22, 2004, at A1.
- 158 George Pawlaczyk, *Obstetrician With No Claims Sees Her Malpractice Premium Double*, BELLEVILLE NEWS-DEMOCRAT, June 8, 2003.
- 159 See Powers, *supra* note 157.
- 160 See *id.*
- 161 See Pawlaczyk, *supra* note 158.
- 162 See St. Clair Medical Society, <http://www.stclairmed.org/Information.html>, providing rates obtained from the Illinois State Medical Society and from research by the *Chicago Tribune* on Mar. 12, 2003, and providing estimated rates for July 2004.
- 163 See Mike Fitzgerald & Patrick J. Powers, *Secrecy Adds to Malpractice Puzzle*, BELLEVILLE NEWS-DEMOCRAT, June 13, 2004.
- 164 See Patrick J. Powers, *Medical Experts Often Left Out of Suits*, BELLEVILLE NEWS-DEMOCRAT, June 20, 2004.
- 165 See William Lamb, *Illinois Cities Take on Insurance Reform*, ST. LOUIS POST-DISPATCH, Sept. 5, 2004, at D1; Joyce Morrison, *Southern Illinoisans Revolt; Take Tort Reform Into Their Own Hands*, ILLINOIS LEADER, Aug. 27, 2004; Patrick J. Powers, *Towns Urged to Pass Their Own Tort Reform*, BELLEVILLE NEWS-DEMOCRAT, Aug. 5, 2004, at A1.
- 166 See William Lamb, *Board Urges Limit to Jury Awards*, ST. LOUIS POST-DISPATCH, Sept. 28, 2004, at B1.
- 167 See Nicklaus Lovelady, *St. Clair Board Takes Up Malpractice; Resolutions Call on State to Take Action*, BELLEVILLE NEWS-DEMOCRAT, Sept. 28, 2004, at B1.
- 168 See Michael Freedman, *Home Court Advantage; How a Small-town South Carolina Lawyer Instills Fear in Corporations Everywhere*, FORBES, June 10, 2002, at 74.
- 169 See *Editorial, Wide-open Venue Law Undermines Confidence in Court*, THE STATE, Apr. 10, 2003, at A16.
- 170 See *id.*; Memorandum from Jim Daniel, Executive Director, Hampton County Economic Development Commission to the Board of the Hampton County Economic Development Commission, dated Feb. 25, 2003 (on file with ATRA).
- 171 Daniel, *supra* note 170.
- 172 See *id.* (providing eighteen such examples).
- 173 *Whaley v. CSX Transportation, Inc.*, Case No. 01-CP-25-127 (S.C. Sup. Ct. 2004).
- 174 See S.C. Jud. Dep’t, *Statistical Trends, Cases Filed by Circuit/County 1997/98 thru Current*, at <http://www.judicial.state.sc.us/trends/index.cfm>.
- 175 See *id.*
- 176 See *id.*
- 177 For example, 450 lawsuits were filed in Allendale County (pop. 11,000) in 2003-04 compared with 211 lawsuits filed in Calhoun County (pop. 15,000) and 207 filed in McCormick County (pop. 10,000) during the same period. In Colleton County (pop. 39,000), 983 lawsuits were filed in 2003-04 compared with 531 in Chester (pop. 34,000), 550 in Chesterfield (pop. 43,000), 506 in Newberry (pop. 37,000), 525 in Marion (pop. 35,000), 505 in Williamsburg (pop. 36,000). See *id.*
- 178 See Freedman, *supra* note 168.
- 179 See Hampton County Clerk of the Court, *Master Trial Roster for Nov. 15, 2004*, at [http://www.judicial.state.sc.us/clerks/hampton/pt\\_displayRoster.cfm?type=masterjury](http://www.judicial.state.sc.us/clerks/hampton/pt_displayRoster.cfm?type=masterjury).
- 180 See Linda Lyly, *Attorney Seeks Connection Between Wal-Mart Suit, Efforts to Change Law*, HAMPTON COUNTY GUARDIAN, Mar. 2003, at 1A.
- 181 See Lee S. Bowers, *Letter to the Editor, Subpoenas Abused in Attempt to Stifle Venue Debate*, HAMPTON COUNTY GUARDIAN, Mar. 20, 2003; Linda Lyly, *Motions Seek More Info in Wal-Mart Case*, HAMPTON COUNTY GUARDIAN, Mar. 13, 2003, at 3A.
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- 185 See Town of Varnville, *Resolution*, Feb. 3, 2003 (on file with ATRA). The Hampton County Economic Development Commission also has called for venue reform. See Hampton County Econ. Dev. Comm. Meeting Minutes, Mar. 25, 2003 (on file with ATRA).
- 186 Ken Ward, Jr., *DuPont Agrees to Pay \$107 Million*, CHARLESTON GAZETTE, Sept. 10, 2004, at 1A.
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- 188 Toby Coleman, *Court Strikes Down Much of Jury Award*, CHARLESTON DAILY MAIL, June 18, 2004, at 5A.
- 189 *Kocher v. Oxford Life Ins. Co.*, 602 S.E.2d 499 (W. Va. 2004).
- 190 *Editorial, Second Class Action Suit Filed in County*, THE TIMES RECORD & ROANE COUNTY RPTR, Aug.



- 5, 2004.
- 191 THE NEGATIVE IMPACT OF THE CURRENT CIVIL JUSTICE SYSTEM ON ECONOMIC ACTIVITY IN WEST VIRGINIA (2003) (Study by The Perryman Group of Waco, Texas, for the West Virginia Chamber of Commerce).
- 192 See *id.* at 3.
- 193 See *id.* at 9.
- 194 See *id.*
- 195 See *id.* at 9-10.
- 196 See Christian Giggenbach, *Benjamin Unseats McGraw*, REGISTER HERALD (Beckley, W.Va.), Nov. 3, 2004.
- 197 For example, in the Oxford Insurance case discussed above, Justice Warren McGraw was the only Justice to dissent, stating that the trial judge should have been allowed to require punitive damages. *Kocher*, 602 S.E.2d at 504.
- 198 See Editorial, *Court Contest is About Jobs*, CHARLESTON DAILY MAIL, Oct. 11, 2004, at 4A.
- 199 See Steve Roberts, *Commentary, To Change W. Va., Change the Court*, CHARLESTON DAILY MAIL, Sept. 30, 2004, at 4A; Kenneth H. Busz, *We Must Restore Fairness to the W.Va. Supreme Court*, HERALD-DISPATCH, Oct. 8, 2004, at 6A.
- 200 *Id.*
- 201 *Id.*
- 202 See *id.*
- 203 See Lawrence Messina, *Starcher Upbraids Lawyers for Anti-Court Campaign*, ASSOC. PRESS STATE & LOCAL WIRE, Aug. 5, 2004.
- 204 See Matt Schwartz, *Judge Rejects Motion to Put Asbestos Cases on Hold/Say Inactive Docket Violates Legal Authority*, HOUSTON CHRON., May 8, 2004, at 29.
- 205 See Reed Abelson & Jonathan D. Glater, *A Texas Jury Rules Against A Diet Drug*, N.Y. TIMES, Apr. 28, 2004, at C1; Linda Loyd, *\$1.013 Billion Award in Wyeth 'Fen-Phen' Case: The Drugmaker Said it Would Appeal the Texas Verdict. Analysts Predicted it Would Not Stand. One Called the Amount "Absurd."* PHILADELPHIA INQUIRER, Apr. 28, 2004, at E1. Only a fraction of one percent of Fen-Phen cases allege PPH.
- 206 See TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (Vernon 2003).
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- 211 Brenda Sapino Jeffreys, *supra* note 207.
- 212 Tony Freemantle & Rosanna Ruiz, *Beaumont Jury Awards \$1 Billion in Diet Drug Suit*, Houston Chronicle, Apr. 28, 2004, at A1.
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- 215 See Motion for Entry of Final Judgment, *Hayes v. American Home Prods. Corp.*, Cause No. B-165,374 (60<sup>th</sup> Jud. Dist., Jefferson County, filed Dec. 8, 2003).
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- 230 Brett Martel, *Tobacco Industry Told to Help Smokers Quit/Jury Delivers \$590 Million Verdict to Help Louisianans Make It Happen*, HOUSTON CHRON., May 22, 2004, at 3.
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- Claims Practices Act); *Sloan v. State Farm Mutual Auto. Ins. Co.*, 85 P.3d 230 (Chavez, J.) (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 unfounded 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).
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- 337 Kurtis A. Tunnell et al., Commentary, *New Ohio Asbestos Reform Law Protects Victims and State Economy*, ANDREWS ASBESTOS LITIG. REP., Vol. 26, No. 22, Aug. 26, 2004, at 10.
- 338 *Id.*
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- 342 *Id.* at 16.
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- 344 *Maurin v. Hall*, 682 N.W.2d 866 (Wis. 2004).
- 345 *Id.* at 887. The court also held that plaintiffs could not receive both wrongful death awards and noneconomic damage awards where malpractice proved to be fatal. In cases where the malpractice leads to death, the wrongful death limit applies in lieu of—not in addition to—the medical malpractice limit. *Id.* at 885-86.
- 346 *Id.* at 889 (emphasis in original).
- 347 *Phillips v. Mirac, Inc.*, 685 N.W.2d 174 (Mich. 2004).
- 348 *Id.* at 183.
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- 352 *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).
- 353 See Victor E. Schwartz, Mark A. Behrens & Rochelle M. Tedesco, *Selective Due Process: The United States Supreme Court Has Said that Punitive Damages Awards Must be Reviewed for Excessiveness, But Many Courts Are Failing to Follow the Letter and Spirit of the Law*, 82 OR. L. REV. 33 (2003).
- 354 *Chapa v. Tony Gullo Motors I, L.P.*, No. 09-03-568-CV, 2004 WL 1902533, at \*8-9 (Tex. Ct. App. Aug. 26, 2004).
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- 356 See *id.* at 360-63 (Davis, J., concurring); see *id.* at 363-66 (Maynard, C.J., concurring).
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- 358 See *Roth v. Farner-Bocken Co.*, 667 N.W.2d 51 (S.D. 2003).
- 359 See *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604 (Ky. Ct. App. 2003).
- 360 See, e.g., *Bardis v. Oates*, 119 Cal. App.4<sup>th</sup> 1 (Cal. Ct. App. 2004) (in a case involving real estate investors, reversing a \$7 million punitive damage award when compensatory damages were \$165,527 and the jury considered speculative damages suffered by other potential plaintiffs, rather harm to the individual in the lawsuit, and finding that the punitive damage award could not exceed the single-digit ratio even when the compensatory award is relatively small); *Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 118 Cal. App.4<sup>th</sup> 1061 (Cal. Ct. App. 2004) (reducing \$10 million punitive damage against an insurer to \$1.7 million where the economic harm to the plaintiff was \$90,000 and the maximum fine was \$10,000); *Henley v. Philip Morris Inc.*, 112 Cal. App. 4<sup>th</sup> 198 (Cal. Ct. App. 2003), corrected by and transferred on unrelated issues, 11 Cal. App. 4<sup>th</sup> 1429 (Cal. Ct. App. 2004) (remitting a \$50 million punitive damage verdict, which had been reduced by the trial court to \$25 million, to \$9 million when compensatory damages were \$1.5 million, resulting in a 6:1 ratio of punitive to compensatory damages); *Diamond Woodworks, Inc.*, 109 Cal. App. 4<sup>th</sup> 1020 (Cal. Ct. App. 2003) (in breach of contract, insurance, and bad faith case involving a workplace accident, remitting a \$14 million punitive damage award, which the trial court had reduced to \$5.5 million, to \$1 million, where compensatory damages were \$424,100, resulting in a 4:1 of punitive to compensatory damages and rejecting looking at conduct toward the "world at large"); *Taylor Woodrow Homes, Inc. v. Acceptance Ins. Co.*, 2003 WL 21224088 (Cal. Ct. App. 2003) (unpublished) (in a homeowner insurance dispute, remitting a 17:1 ratio of punitive to compensatory damages to a 3.1:1 ratio); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003) (in a wrongful death SUV rollover case, remitting the award to result in a 5.18:1 ratio where the jury awarded over \$6.2 million compensatory damages and \$290 million in punitive damages); *Johnson v. Ford Motor Co.*, F040188 & F040529, 2003 Cal. App. Unpub. LEXIS 11038 (Cal. Ct. App. Nov. 25, 2003) (unpublished) (in an auto-dealer "lemon" case where the jury awarded buyers \$10 million in punitive damages, reducing the award to \$53,435, resulting in a 3:1 ratio of punitive to compensatory damages).
- 361 *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003), cert. denied, 124 S. Ct. 535 (2003).
- 362 *Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669 (Or. Ct. App. 2003); modified, 79 P.3d 908 (Or. Ct. App. 2003). The facts of the case are wrong (the doctor's claim should not have been allowed at all for lack of standing), but the court's analysis on punitive damages was correct.
- 363 *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 394-95 (Mich. 2004).
- 364 See *id.* at 400 n.22.
- 365 See The Kerry-Edwards Plan: A Stronger America Through More Affordable Health Care, at [http://www.johnkerry.com/issues/health\\_care/kit/plan\\_kerry.htm](http://www.johnkerry.com/issues/health_care/kit/plan_kerry.htm) (in support of "preventing and punishing frivolous lawsuits by putting in place tough, mandatory sanctions, including a 'three strikes and you're out' provision that forbids lawyers who file three frivolous cases from bringing another suit for the next 10 years"); Transcript of Vice Presidential Debate, Oct. 5, 2004 (in which Vice Presidential Candidate John Edwards stated "have a three-strikes-and-you're-out rule so that a lawyer who files three of these cases without meeting this requirement loses their right to file these cases").
- 366 See Charles Hurt, *House OKs GOP Bill to Prevent Trifling Lawsuits*, WASH. TIMES, Sept. 14, 2004, at A3.
- 367 See *Campbell v. State Farm Mutual Auto. Ins. Co.*, No. 981564, 2004 UT 34, 2004 WL 869188 (Apr. 23, 2004) (sustaining a \$1 million award

- for emotional distress on remand from the Supreme Court of the United States); *Coffey v. Wjeth*, No. E-167-334 (Jefferson Co., Tex., Dist. Ct. Apr. 27, 2004) (awarding \$100 million in damages for pain and suffering, in addition approximately \$1.6 million in special damages and a \$900 million punitive damages award); *Rankin v. Janssen Pharmaceutica, Inc.*, No. 2000-20 (Miss. Cir. Ct., Jefferson County, verdict rendered Sept. 28, 2001), discussed in *Nation's First Rezulin Trial Ends in Settlement*, 6 No. 22 MEALEY'S EMERGING DRUGS AND DEVICES 19 (Nov. 15, 2001) (reversing a \$100 million compensatory award to ten plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid); Myron Levin, *Jury Orders Ford to Pay \$122.6 Million*, L.A. TIMES, June 3, 2004, at C1. (reporting an award of \$123 million in compensatory damages including \$4.6 million for economic losses including medical expenses and lost income, \$105 million for pain and suffering, and an additional \$13 million to the plaintiff's husband for loss of consortium).
- 368 In *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 419, 425 (2003), the Supreme Court of the United States recognized that "few awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process," and that a ratio of 4:1 is "close to the line of constitutional impropriety." Thus, when a pain and suffering award is inflated, a court may find that this higher amount of compensatory damages permits a higher punitive award.
- 369 In May 2004, the Mississippi Supreme Court properly reversed a \$100 million compensatory award to ten plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid. Although the trial was required by statute to be bifurcated for separate consideration of punitive damages, the plaintiffs introduced evidence during the liability phase that clearly sought to target the defendants' supposed "bad acts." In his closing argument, plaintiffs' counsel stressed the defendants' "guilt" and discussed a passage from the Bible about Jesus throwing out the money changers whose greed defiled the temple, which "made Jesus mad." Despite all of counsel's talk about the defendant's wrongdoing, the court found that there was insufficient evidence that the defendants acted maliciously to allow the jury to consider punitive damages. *Janssen Pharmaceutica, Inc. v. Bailey*, No. 2002-CA-00736-SCT, 2004 WL 1067165, at \*28-29 (Miss. May 13, 2004).
- 370 See Paul V. Niemeier, *Awards for Pain and Suffering: The Irrational Center Piece of Our Tort System*, 93 U. VA. L. REV. 1401 (2004).
- 371 See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7<sup>th</sup> Cir.) (Posner, J.), cert. denied, 516 U.S. 867 (1995).
- 372 The Class Action Fairness Act, H.R. 1115, 108<sup>th</sup> Cong. (2003) and S. 274, 108<sup>th</sup> Cong. (2004).
- 373 See Jim Abrams, *Senate Abandons Class-Action Lawsuit Bill*, USA TODAY, July 8, 2004.
- 374 *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).
- 375 Carroll, *supra* note 335.
- 376 See Parloff, *supra* note 335 (reporting that "according to estimates accepted by the most experienced federal judges in this area, two-thirds to ninety percent of the nonmalignants are 'unimpaireds'"); Henderson & Twerski, *supra* note 335; see also Mark D. Taylor & Scott Alberino, *Who is Authorized to Vote on a Plan of Reorganization?*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 2, No. 6, Jan. 2003, at 1.
- 377 See, e.g., Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7 ("solution is simple: defer the non-sick claims unless and until the claimants actually suffer an asbestos-related disease").
- 378 Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1; Carroll, *supra* note 335, at 49.
- 379 See Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1.
- 380 H.B. 292, 125<sup>th</sup> Gen. Assem., Reg. Sess. (Ohio 2004).
- 381 In 1992, Judge Weiner adopted procedures, which although not technically an inactive docket, had the purpose of prioritizing "malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury." *In re Asbestos Prod. Liab. Litig.* (No. VI), MDL 875, Admin. Order No. 3, at 1 (E.D. Pa. Sept. 8, 1992).
- 382 See *Mass. State Ct. Asbestos Pers. Injury Litig.*, Order (Mass., Middlesex Super. Ct., Sept. 1986) (adopting adopted the Massachusetts Inactive Asbestos Docket); *In re Asbestos Cases* (Cir. Ct., Cook County, Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters); *Asbestos Pers. Injury and Wrongful Death Asbestos Cases*, File No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases).
- 383 See *In re New York City Asbestos Litig.*, Order Amending Prior Case Mgmt. Orders (S. Ct. N.Y. City, N.Y. Dec. 19, 2002); *In re Fifth Jud. Dist. Asbestos Litig.*, Am. to Am. Case Mgmt. Order No. 1 (N.Y. Sup. Ct. Jan. 31, 2003); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties, at 1 (Dec. 3, 2002).
- 384 See, e.g., *In re Wallace & Graham Asbestos-Related Cases*, Case Mgmt. Order (Greenville County, SC 2002); *In re Cuyahoga County Asbestos Cases, Gen. Pers. Injury Asbestos Case Mgmt.* Order No. 1 (as amended Jan. 4, 2002).
- 385 See David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 ALB. L.J. SCI. & TECH. 517, 526 (2003).
- 386 *Id.* at 527-28.
- 387 *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).
- 388 *Id.* at 593-94.
- 389 See *id.* at 593-95.
- 390 Some of these states, such as Alabama, 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. See, e.g., *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000); *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).
- 391 Kathleen Burge, *Science of Evidence Puts Judges to the Test*, BOSTON GLOBE, May 19, 2002, at B1.





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