



JUDICIAL HELLHOLES

2019/2020

“The Philadelphia courts are overly congested and a Philadelphia jury should not be taxed with trying a case with which it has no relation.”

– Pennsylvania Superior Court Judge William Platt reversing a decision by the Philadelphia Court of Common Pleas, finding the court lacked personal jurisdiction to hear the case. [Hovatter v. CSX Corp.](#) (April 27, 2018)

“The current construction of PAGA by California courts [which have their own constitutional infirmities] gives rise to the following unconstitutional framework: valid and binding arbitration agreements are rendered unenforceable; private contingency-fee attorneys are permitted to litigate on behalf of the state without oversight or coordination with any state official; private attorneys are allowed to negotiate settlements that enrich themselves at the expense of everyone but themselves.”

– California Business & Industry Alliance in its suit against the State of California alleging a [lack of governmental oversight](#) of PAGA litigation

“The trial lawyers are the single most powerful political force in Albany. That’s the short answer. It’s also the long answer.”

– New York Governor Andrew Cuomo, [explaining](#) why efforts to reform the state’s antiquated, growth hindering “scaffold law” have been thwarted. (April 23, 2014)

“Welcome to St. Louis, the new hot spot for litigation tourists. The city’s circuit court is known for fast trials and big awards.”

– Margaret Cronin Fisk, [Bloomberg News](#)

“I talk to business owners and lobbyists who represent business owners and they would not come here for anything... I’m sorry I get flustered when I hear people say we are bringing in money. I’m sorry we are losing.”

– Madison County Board member and Judiciary Chair Mike Walters talking about the “[terrible drain](#)” the infamous asbestos docket has been on the county’s economy. (January 2018)

“The majority arrives at this counter-textual conclusion by employing an all-too-familiar interpretive device: when a statute doesn’t say what the Court thinks it ought to say, it declares the statute ambiguous and then, under the guise of ascertaining ‘legislative intent,’ resolves the so-called ambiguity by assigning to the statute whatever meaning aligns with the Court’s policy preferences.”

– Justice Patrick Wyrick in his dissenting opinion in [McIntosh v. Watkins](#), in which the Court used an inapplicable statute to triple a damage award. (February 26, 2019)

PREFACE

Since 2002, the American Tort Reform Foundation's (ATRF) Judicial Hellholes® program has identified and documented places **where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner**, generally to the disadvantage of defendants. More recently, as the lawsuit industry has aggressively lobbied for legislative and regulatory expansions of liability, as well, the Judicial Hellholes report has evolved to include such law- and rule-making activity, much of which can affect the fairness of any given jurisdiction's civil justice climate as readily as judicial actions.

The content of this report builds off the American Tort Reform Association's (ATRA) real-time monitoring of Judicial Hellhole activity year-round at JudicialHellholes.org. It reflects feedback gathered from ATRA members and other firsthand sources. And because the program has become widely known, ATRA also continually receives tips and additional information, which is then researched independently through publicly available court documents, judicial branch statistics, press accounts, scholarship and studies.

Though entire states are sometimes cited as Hellholes, specific counties or courts in a given state often warrant citations of their own. Importantly, jurisdictions singled out by Judicial Hellholes reporting are not the only Judicial Hellholes in the United States; they are simply among the worst. The goal of the program is to shine a light on imbalances in the courts and thereby encourage positive changes by the judges themselves and, when needed, through legislative action or popular referenda.

ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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EXECUTIVE SUMMARY

The 2019 – 2020 **Judicial Hellholes** report shines its brightest spotlight on 10 jurisdictions, courts or legislatures that have earned reputations as Judicial Hellholes. Some are known for allowing innovative lawsuits to proceed or for welcoming litigation tourism, and in all of them state leadership seems eager to expand civil liability at every given opportunity.

JUDICIAL HELLHOLES

#1 PHILADELPHIA COURT OF COMMON PLEAS

Philadelphia is home to an astounding \$8 billion product liability verdict in 2019. Mass tort cases have inundated the Philadelphia Court of Common Pleas due to judges' loose application of venue laws, a reputation for high jury verdicts, and an overall lack of legal reform. Trial lawyers spend millions of dollars on television advertisements to increase the pressure on defendants to settle cases. The city also remains one of the preferred jurisdictions for asbestos litigation.

#2 CALIFORNIA A perennial Judicial Hellhole, California's fall from the No. 1 spot in 2019 cannot be attributed to any improvement in the state's liability climate, but rather results from the severity of the problems plaguing Philadelphia. California courts allow innovative lawsuits to proceed and the burdensome Prop-65 law is exploited by the plaintiffs' bar. The state is a magnet for class action lawsuits, and given the courts' and legislature's anti-arbitration stance, it is not expected to improve. In addition, California has adopted expansive employment law liability that is expected to lead to extensive lawsuit abuse.

#3 NEW YORK CITY New York trial lawyers continue to target small businesses with American with Disabilities Act claims, and the number of consumer lawsuits filed against the food and beverage industry remain on the rise. The legislature pursued a very plaintiff-friendly agenda while much-needed reform to New York's "Scaffold-Law" continued to stall. Businesses are fleeing the state, as liability expands at every given opportunity.

#4 LOUISIANA The state of Louisiana, led by Governor John Bel Edwards, has developed a propensity to hire former campaign donors to represent the state in litigation. Rampant lawsuit abuse is driving up the cost of auto insurance. The legislature has failed to address these problems. Judicial misconduct by Louisiana judges also dominated the news cycles in 2019.

JUDICIAL HELLHOLES

2019/2020

- 1 PHILADELPHIA COURT OF COMMON PLEAS
- 2 CALIFORNIA
- 3 NEW YORK CITY
- 4 LOUISIANA
- 5 THE CITY OF ST. LOUIS, MISSOURI
- 6 GEORGIA
- 7 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS
- 8 OKLAHOMA
- 9 MINNESOTA SUPREME COURT/TWIN CITIES
- 10 NEW JERSEY LEGISLATURE

#5 THE CITY OF ST. LOUIS, MISSOURI Judges in St. Louis continue to disregard both state law and U.S. Supreme Court precedent. They are reluctant to end forum shopping and allow plaintiffs' lawyers to introduce junk science in the courtroom. The Missouri Supreme Court also issued several liability-expanding decisions and provided windfalls to plaintiffs' lawyers in 2019. The Missouri legislature has enacted modest reforms, but there is more to be done.

#6 GEORGIA A newcomer to the list of Judicial Hellholes, Georgia makes an appearance due to the courts' dramatic expansion of premises liability and nuclear jury verdicts. Medical liability is on the rise following the Georgia Supreme Court's decision to strike down commonsense reforms. Several important cases also are pending before the high court. It has the opportunity to realign itself in a fair and just manner or further solidify the state's status as a Judicial Hellhole.

#7 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS This trio of Illinois counties is a magnet for no-injury class action lawsuits. The courts also have allowed frivolous lawsuits to proceed under the state's Biometric Information Privacy Act, a goldmine for the plaintiffs' bar. The counties are a hotbed for asbestos litigation and the preferred jurisdictions by trial attorneys. There is little hope for change as the legislature is hyper-focused on a liability-expanding agenda.

#8 OKLAHOMA Another newcomer in 2019, Oklahoma makes its first appearance on the Judicial Hellholes list due in part to Attorney General Mike Hunter's mishandling of the state's opioid litigation. The Oklahoma Supreme Court has made a habit of issuing liability-expanding decisions and the state's legislature has failed to address the growing problems.

#9 MINNESOTA SUPREME COURT/ TWIN CITIES The Minnesota Supreme Court issued several troubling decisions in 2019. It expanded medical liability and employer liability under workers' compensation laws. In addition, an appellate court upheld unwarranted sanctions against an in-state employer. The legislature continues to turn a blind eye to the abuses and proposed reforms once again stalled.

#10 NEW JERSEY LEGISLATURE In 2019, the New Jersey Legislature distinguished itself as one of the most plaintiff-friendly legislatures in the country. While the Judicial Hellholes report typically focuses on the courts, the New Jersey Legislature is an exception because of its drastic liability-expanding agenda. The legislature enacted a so-called "Wage Theft" bill with excessive penalties and advanced its attack on arbitration.

WATCH LIST

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

COLORADO SUPREME COURT Following yet another year of pro-plaintiff legislative activity and a failure by the Colorado Supreme Court to push back on liability-expanding decisions by lower courts, the Centennial State is yet again on the Watch List. The legal climate in Colorado continues to deteriorate with the playing field becoming more unfair and unbalanced in 2019.

FLORIDA A former No. 1 Judicial Hellhole, Florida took great strides toward improving its legal climate in 2019. Although there is much work to be done, the election of Governor Ron DeSantis (R) has heralded a sea change in Florida's legal landscape, beginning with the appointment of several new Florida Supreme Court justices. This new court is deferential to legislative efforts to stop lawsuit abuse and poised to correct the course set by the prior activist court.

MARYLAND GENERAL ASSEMBLY As Baltimore courts took steps toward a more fair and balanced judicial system, plaintiffs' bar pursued a lawsuit-friendly agenda in the state legislature. The legislature considered multiple

liability-expanding bills and looked for creative ways to provide benefits to the politically powerful personal injury firm of Peter Angelos. Despite pushback from Governor Larry Hogan (R), more of the same is expected in 2020.

MONTANA SUPREME COURT The Montana Supreme Court's penchant for expanding liability, judicial activism, and defiance of U.S. Supreme Court precedent once again landed it on the Watch List.

SUPREME COURT OF PENNSYLVANIA The Supreme Court of Pennsylvania is at a crossroads – the Court is considering several important cases that will have a lasting impact on Pennsylvania's litigation environment. In recent years, both the intermediate appellate courts and the state's high court have issued liability-expanding decisions and have swung courtroom doors open to out-of-state plaintiffs whose claims have no connection to the state.

SOUTH CAROLINA ASBESTOS LITIGATION South Carolina asbestos litigation has developed a reputation for pro-plaintiff rulings and unfair treatment of defendants. A concerning pattern of discovery abuse, unwarranted sanctions, low evidentiary requirements, and multi-million-dollar verdicts elevated the jurisdiction to the Watch List.

WEST VIRGINIA SUPREME COURT OF APPEALS After a tumultuous 2018, the West Virginia Supreme Court of Appeals has temporarily stabilized, but all will be up for grabs in the 2020 election. Three of the five seats on the state high court will be on the primary ballot as individual non-partisan elections.

DISHONORABLE MENTIONS

Dishonorable Mentions comprise singularly unsound court decisions, abusive practices, legislation or other actions that erode the fairness of a state's civil justice system and are not otherwise detailed in other sections of the report.

Included among this year's list is the American Law Institute's troublesome Restatement on Consumer Contracts, judicial nullification of liability limits in the Sixth Circuit and Kansas, and Alaska's allowance of "phantom damages." The Oregon Supreme Court also issued a series of liability-expanding decisions and the Utah Supreme Court struck down a law that will expose doctors to more liability.

POINTS OF LIGHT

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

Among the positive decisions, the North Dakota Supreme Court upheld a statutory limit on noneconomic damages and the South Dakota Supreme Court refused to expand bad faith liability for insurers.

Another encouraging development occurred in Missouri. A federal court dismissed a case for lack of personal jurisdiction, after it was transferred to it from the City of St. Louis Circuit Court, this year's #5 Judicial Hellhole.

In addition to court actions, legislatures in 7 states enacted 15 significant, positive civil justice reforms in 2019, including asbestos trust transparency legislation in Alabama, assignment of benefits and bad faith reform in Florida, and e-Discovery reform in Missouri.

CLOSER LOOKS

THE EXPANSION OF PUBLIC NUISANCE LAW AND LOCALITY LITIGATION Pushing an expansive view of public nuisance law, the trial bar is seeking to represent local and state governments in a concerted effort to hold industries liable for public crises. The flood of lawsuits creates legal chaos and confusion and lines the pockets of trial lawyers – but does little to help the victims of these crises.

A TOXIC BREW: NEW THEORIES OF EMPLOYMENT LIABILITY AND THE WAR ON ARBITRATION The trial bar has launched an ambitious effort to expand its business model of driving class action lawsuits into the employment liability arena. New theories of employment liability and the war on arbitration are creating a toxic brew that will lead to more lawsuits and less jobs.

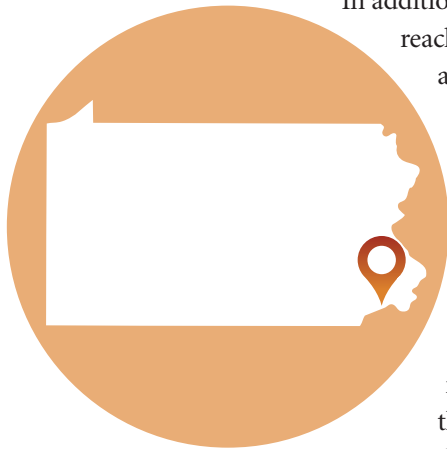
THE COMING WAVE OF PRIVACY CLASS ACTIONS: A CAUTIONARY TALE FROM ILLINOIS Privacy and security litigation is poised to become a “feeding frenzy” as plaintiffs’ lawyers look to the next cash cow. Illinois provides a stark warning, fanning the flames of abusive privacy litigation against businesses. These no-injury lawsuits are not new, but they are becoming more prevalent and are imposing significant costs on legitimate businesses offering useful services—all without enhancing consumer privacy.

JUDICIAL HELLHOLES

#1 PHILADELPHIA COURT OF COMMON PLEAS

The Philadelphia Court of Common Pleas remains the center of the universe for pharmaceutical litigation and for good reason. Johnson & Johnson was hit with an astounding \$8 billion verdict in 2019. The court's reputation for excessive verdicts and its "open door" policy to out-of-state plaintiffs attracts plaintiffs' lawyers from across the country. [Eighty-six percent](#) of the new pharmaceutical suits in Philadelphia are brought by out-of-state plaintiffs.

In addition to the voluminous pharmaceutical litigation, medical liability payouts have reached new highs – or rather lows – and the city continues to be a hotbed for asbestos litigation. Trial lawyers pour millions of dollars into advertisements to drive up the number of lawsuits and increase the pressure on defendants to settle. Little is expected to change in "The City of Unbrotherly Torts." State leadership has established a pro-plaintiff agenda, signaling to state courts that decisions to expand liability are fully supported.



- Mass tort cases inundate court system
- Trial lawyers spend millions on advertisements
- A magnet for asbestos litigation
- Courts misapply venue rules, allow forum-shopping

MASS TORT CASES INUNDATE PHILADELPHIA COURT

Trial lawyers spend millions of dollars on advertising in the Philadelphia media market to drive up the number of claimants. The volume increases the pressure on defendants to settle. Trial lawyers spent [\\$10.9 million](#) on 73,000 lawsuit advertisements on local broadcast stations in the first half of 2019.

Philadelphia residents saw an additional [28,000 ads](#) soliciting claims related to alleged injuries caused by medications and medical devices airing on national broadcast and cable networks during nationally syndicated programming. It is estimated that over \$45 million was spent on this advertising.

RISPERDAL LITIGATION

If there was any doubt that Philadelphia is a Judicial Hellhole, that was put to rest by the [\\$8 billion](#) verdict out of the Court of Common Pleas' Complex Litigation Center (CLC) in a single-plaintiff Risperdal case in October 2019. According to [The Legal Intelligencer](#), the award is the largest verdict since the publication began tracking them in 1994. The award includes over \$7 billion in punitive damages, despite the plaintiff receiving only [\\$680,000](#) in compensatory damages. The award ratio blows past the outer limit of the [U.S. Supreme Court's guidelines](#) for what is constitutionally permitted. The Court has stated that punitive damage awards should not typically exceed single-digit multipliers of the compensatory damages.

Litigation concerning Risperdal, an antipsychotic drug, dominates the CLC docket. In addition to using the drug to treat schizophrenia, doctors prescribe it to help children with conditions such as autism. The lawsuits allege that the manufacturer did not sufficiently warn that a side effect some may experience is gynecomastia,

LEGAL SERVICES ADS IN PHILADELPHIA RUN MORE FREQUENTLY THAN ADS FOR MANY POPULAR ADVERTISERS



2 legal services ads ran locally in Philadelphia for every furniture store ad



12 times as many legal TV ads ran locally in Philadelphia from January through June as ads for clothing stores



Legal ads ran 44 times as often as ads for home centers and hardware stores on local Philadelphia TV stations during this time

which causes male breast growth. Risperdal litigation has grown to about [6,700 cases](#) – or [about two-thirds](#) of the court’s inventory.

It was the first of these cases to go to trial that resulted in the \$8 billion punitive damage verdict against Johnson & Johnson subsidiary Janssen Pharmaceuticals Inc. The case, brought by a Maryland resident, resulted in a \$1.75 million compensatory damage award in 2015, which was reduced on appeal to \$680,000. Last year, a Pennsylvania Superior Court ruling opened the door to punitive damages by finding that the law of each plaintiff’s home state applies, rather than the law of J&J’s home state, New Jersey, which precludes punitive damages in cases challenging FDA-approved warnings. A second phase of trial followed, resulting in the jaw-dropping award.

What may be more astonishing than the size of the award is what followed. After the verdict, **Judge Kenneth Powell** reportedly [high-fived](#) some of the jurors and posed with them for photos taken by the plaintiff’s lawyer. As Janssen stated in its motion for a new trial, “To a defendant who had sat through unbalanced ruling after unbalanced ruling . . . the message was clear: the jury had received and acted on the pro-plaintiff message that the judge had sent.” Janssen asked that the judge recuse himself from the requested retrial, a request that was later [denied](#). Janssen’s [motion](#) alleges classic Judicial Hellhole-type conduct: Lopsided rulings that did not allow the company to present key evidence about the benefits and risks of the drug, the label, or the company’s compliance with regulations, while allowing the plaintiffs’ lawyers to present a case designed to punish the company on behalf of “the children of the world.”

There’s more to come. According to the [court docket](#), there are over 7,000 Risperdal lawsuits pending in the CLC. Many of those cases seemed likely to be dismissed because **CLC Judge Arnold New** had found that by June 2009 plaintiffs would have had notice of the risk as a result of medical literature, newspaper articles, and, of course, attorney advertising. A state appellate court [ruled](#) that plaintiffs should have been aware of the cause of their injuries even earlier, as the manufacturer added information about the risk of gynecomastia to the medication’s label in 2006. Pennsylvania law requires personal injury claims to be filed within two years of accrual. Thanks to a November 20, 2019 Pennsylvania Supreme Court [ruling](#), however, the Risperdal cases will move toward [trial](#), regardless of when they were filed, and increase the pressure for a large settlement.

XARELTO SETTLEMENT

2019’s [Xarelto settlement](#) demonstrates that in mass torts litigation, the merits of lawsuits seem not to matter much, if at all. The reality is that it is the sheer volume of cases that a defendant faces that now drives corporate litigation strategy.

In March, Bayer and Johnson & Johnson agreed to settle more than 25,000 cases involving their jointly developed blood-thinning medication, Xarelto, for \$775 million. They made this decision despite an unblemished record in court. Rather, the company understandably [settled](#) “to avoid the distraction and significant cost of continued litigation.”

Plaintiffs claimed the companies failed to warn of the danger of excessive bleeding when taking the FDA-approved medication. Xarelto is prescribed for patients who have atrial fibrillation, deep vein thrombosis, and other serious ailments. The medication is intended to thin the patient’s blood in order to avoid clotting because the patients for whom it is prescribed are at risk for stroke, pulmonary embolism, and other life-threatening conditions.

Prior to the March 2019 settlement, plaintiffs’ lawyers aggressively searched for a viable case against the defendants. There were close to 2,000 active cases in the **Philadelphia Court of Common Pleas**, but the defendants had been victorious in the only three cases tried to completion. The plaintiffs’ bar was strategic in targeting Philadelphia, as it is known for its plaintiff-friendly judges and low barriers of entry. There were 1,854 cases targeting Xarelto in June 2018, and out-of-state plaintiffs accounted for 84 percent of these cases.

Plaintiffs’ lawyers and so-called “aggregators” spent millions of dollars on advertisements to increase the number of potential claimants. In 2016, Xarelto was the [most targeted product](#) of mass-torts lawyer advertisements on television. A total of \$37 million was spent on 128,800 national television ads to identify potential plaintiffs. This does not include the money spent on local cable ads.

These ads have developed into an essential piece of mass tort lawyers’ marketing strategies. While they are annoying, the most significant problem is that they can frighten viewers to the point they decide to stop taking their physician-prescribed medications. A recent [2019 study](#) authored by nine FDA researchers showed the real-life dangerous consequences

of these ads. Through November 15, 2017, the FDA received 66 reports of adverse events following patients discontinuing their blood thinner medication (Pradaxa, Xarelto, Eliquis, and Savaysa) after viewing a plaintiffs' lawyer ad. Most of these patients were elderly (median age 70) and 98 percent of these patients stopped their use of the medication without consulting with their doctor.

Thirty-three patients experienced a stroke, 24 experienced another serious injury, and seven people died.

Dr. Ilana Kutinsky, the physician for one of the deceased, [directly associated](#) these ads with patients' deaths: "Patients are dying because they are afraid to take the medications prescribed for them due to the fear brought on by these negative and one-sided campaigns."

"Patients are dying because they are afraid to take the medications prescribed for them due to the fear brought on by these negative and one-sided campaigns."

– Dr. Ilana Kutinsky

PELVIC MESH LITIGATION UPDATE

The CLC also hosts litigation alleging that pelvic mesh implants, which are widely used to address stress urinary incontinence in women, are improperly designed despite FDA approval. Philadelphia juries have hammered Johnson & Johnson subsidiary Ethicon with more than \$345 million in verdicts.

In May 2019, Ethicon [filed a motion](#) seeking to have the pelvic mesh litigation moved outside the Philadelphia area or have a "pretrial cooling-off period" before the next trial due to inaccurate media coverage that has tainted the Philadelphia jury pool. This came after two massive verdicts in the spring totaling \$200 million. "Defendants are entitled to a trial by impartial jurors based on the evidence adduced at trial, not by a jury inflamed by plaintiff's counsel outside the bounds of the courtroom," Ethicon said [in its motion](#). The Philadelphia media inaccurately reported on an FDA decision to remove transvaginal pelvic organ prolapse kits from the market, which did not apply to any of Ethicon's products. Less than a month later, **Philadelphia Court of Common Pleas Judge Arnold New** [denied](#) the motion. Ethicon faces [90 additional cases](#) in Philadelphia.

PHILADELPHIA: A MAGNET FOR ASBESTOS LITIGATION

The city remains in the Top 5 most popular jurisdictions to file lawsuits claiming injuries from exposure to asbestos. Plaintiffs' lawyers filed [215 new asbestos lawsuits](#) in Philadelphia in 2018 (a drop from the 263 lawsuits filed the previous year). There are currently [516](#) pending asbestos cases in the **Complex Litigation Center**.

In keeping with the Court of Common Pleas' "open door" policy, the number of out-of-state plaintiffs who brought asbestos cases in 2018 increased from 47 percent to [60 percent](#). This is the [highest percentage](#) of out-of-state plaintiffs since at least 2010.

LOOSE APPLICATION OF VENUE LAWS AND FORUM SHOPPING CONTINUES OUTSIDE OF MASS TORT DOCKET

In May 2019, the **Pennsylvania Superior Court** [declined](#) Philadelphia Court of Common Pleas Judge Arnold New's request to reconsider venue rules as applied to defamation cases. The **Court of Common Pleas** previously [permitted](#) a Chester Heights mayoral candidate to sue for defamation in Philadelphia even though she was a resident of Delaware County and the information was aimed at Delaware County residents. The lawsuit alleged the candidate was the victim of a smear campaign and that the defamatory statements were available to Philadelphia residents online.

Judge New based his ruling on a 1967 case, [Gaetano v. Sharon Herald](#), and held that in a defamation action, "publication" occurs in any county where the statement is read and understood to be defamatory. Applying the law to allow a lawsuit to be filed anywhere in the state is inconsistent with the purpose of a defamation action, which is to restore a person's name in his or her community. In his opinion, Judge New stressed that his job as a trial court judge is to [apply the law](#), rather than "make new law." He urged the state's appellate court to reevaluate the state's venue rules related to defamation to change the law to reflect modern communication technology and prevent clear forum shopping by plaintiffs' lawyers. Unfortunately, his request largely fell on [deaf ears](#).

BRITISH PLAINTIFFS SUE IN PHILADELPHIA COURT OF COMMON PLEAS

The Philadelphia Court of Common Pleas' reputation as a pro-plaintiff courthouse extends far beyond the commonwealth of Pennsylvania and even the United States. In 2019, a group of British plaintiffs filed a lawsuit over a London apartment fire in the **Philadelphia Court of Common Pleas**.

On June 14, 2017, a fire raged through the Grenfell Tower apartment complex in London, England resulting in 72 deaths. The successors to these British victims filed a lawsuit in Philadelphia alleging that two Pittsburgh-based defendants, who produce building materials, created highly flammable insulation and cladding materials that were used to build the apartment complex. Despite the unquestionable convenience of filing a lawsuit in a court in the United Kingdom, they chose to file their lawsuit in Philadelphia, a city to which they have no obvious connection. Their most likely reasons according to [Philadelphia Magazine](#) - unlike courts in the U.K., the **Philadelphia Court of Common Pleas** is "known to award [huge damages](#)" and is "a place where the scales of justice are [weighted](#) in favor of the plaintiffs."

#2 CALIFORNIA

Though it was last year's [No. 1 Judicial Hellhole](#), California's courts and legislature continue to look for novel ways to expand liability at almost every given opportunity. California's fall from the No. 1 spot cannot be attributed to any improvement in the state's liability climate, but rather results from the severity of the new problems plaguing Philadelphia.

All major industry groups, including small businesses, are impacted by the burdensome regulations and excessive litigation plaguing the state. **The Perryman Group** estimates that excessive tort litigation in California results in \$11.6 billion in direct costs annually and costs the state 197,776 jobs when dynamic effects are considered. This results in a "[tort tax](#)" of \$855 per person in San Francisco and \$726 per person in Los Angeles. In 2019, the state dropped to 32nd in CNBC's rankings for "[business friendliness](#)" from 25th, thanks in large part to these high costs and stifling regulations.

- **Courts allow innovative lawsuits to proceed**
- **Burdensome Prop-65 law exploited by plaintiffs' bar**
- **A magnet for class action lawsuits**
- **Anti-arbitration stance**
- **Expansive employment law liability**

CALIFORNIA'S INNOVATIVE LAWSUITS



PROPOSITION 65

[Proposition 65](#), the originally well-intentioned law, enacted in 1986, is now one of the plaintiffs' bar's favorite tools to exploit. Baseless Prop-65 litigation unjustly burdens companies that do business in California. The money spent by companies on compliance and litigation unnecessarily drives up the cost of goods for California consumers. It also [subjects consumers](#) to Henny Penny-like warnings declaring that everything from [brass knobs to Disneyland](#) cause cancer.

Under **Prop-65**, businesses are required to place ominous warning signs on products where tests reveal the presence of even the slightest, non-threatening trace of close to [1,000 listed chemicals](#) that state environmental regulators deem carcinogenic or otherwise toxic. A troublesome part of the law allows private citizens, advocacy groups and attorneys to [sue on behalf of the state](#) and collect a portion of the monetary penalties and settlements, creating an incentive for the plaintiffs' bar to create these types of lawsuits. Each year, they send thousands of notices to companies threatening Prop-65 litigation and demanding a settlement. Food and beverage companies are among the [prime targets](#).

According to the California Attorney General’s website, businesses settled 829 Prop-65 claims in [2018](#) totaling \$35,169,924 – that’s nearly \$9.5 million more than the amount in 2017. Three-quarters of this money, \$27,250,534, went to the attorneys who brought the lawsuits to cover their fees and costs. Proposition 65 bounty hunter actions have nearly doubled since 2015 and quadrupled over the past decade. In the first ten months of 2019, plaintiffs’ lawyers and advocacy groups filed [2,039 60-day Notices of Violations](#), indicating their intent to pursue a lawsuit. This puts the state on pace for another record high.

The state might see an onslaught of litigation targeting products that contain polyfluoroalkyl substances (PFAS) after the state [added](#) them to its ever-growing Prop 65 list in November 2017. For decades, per- and polyfluorinated substances, PFAS (pronounced PEE-fas) were commonly used in nonstick cookware, electronics, and a wide range of household products, such as stain-repellent carpets and fast-food packaging. Firefighting foams incorporating PFAS were also standard use at airports and in the military because of their effectiveness in suppressing fuel fires. Over time, PFAS made their way into the water table and were detected in drinking water, raising public health concerns, particularly with respect to two substances in this group, PFOA (perfluorooctanoic acid) and PFOS (perfluorooctane sulfonate). Once California adds a chemical to its Prop-65 list, businesses have just one-year to add cancer warnings to products with any trace of the substance. As a result, any company that makes or sells products with any trace of PFOA or PFOS that has not added a warning is now an easy target for the plaintiffs’ bar.

The entrepreneurial plaintiffs’ bar is a significant factor behind the sudden flood of PFAS lawsuits in California and across the country. As an article in the ABA Journal [observed](#), “there appears to be little new scientific support that justifies newfound concern regarding this class of chemicals. Indeed, some of the new data appear to indicate that PFAS pose a lower risk to human health and the environment than previously believed.” Several studies conducted before the lawsuits were filed found no statistically significant adverse health effects from PFAS exposure.

California did have a [moment of sanity](#) when it removed the Prop-65 labeling requirement from coffee in June 2019. The regulatory regime acknowledged the scientific consensus that coffee is not harmful and may even be beneficial to one’s health. Not surprisingly, the plaintiffs’ bar was upset. **Raphael Metzger**, who has made more than \$700,000 suing coffee companies, has promised to challenge the new rule in court and seek retroactive penalties. He has [sought up to \\$2,500](#) in civil penalties for each cup of coffee sold over the last decade.

The most infamous Prop-65 case working its way through the judicial system involves Bayer’s Roundup® products. California added the popular weed killer’s active ingredient, [glyphosate](#), to the Prop-65 listing in July 2017. The following year, **Judge William Shubb** of the **U.S. District Court for the Eastern District of California** halted a Prop-65 requirement that Bayer place warning labels on its Roundup® products, ruling that there was “[insufficient evidence](#)” that glyphosate causes cancer. He [wrote](#) that the required warning “conveys the message that glyphosate’s carcinogenicity is an undisputed fact, when almost all other regulators have concluded that there is insufficient evidence that glyphosate causes cancer.” He continued, “As applied to glyphosate, the required warnings are false and misleading.”

“As applied to glyphosate, the required warnings are false and misleading.”

– Judge William Shubb

Aside from Prop 65 litigation involving glyphosate, there are also several personal injury lawsuits. Bayer was hit with a nearly [\\$2.5 billion judgment](#) in a California state court in May 2019, including \$2 billion in punitive damages. In that lawsuit, a couple blamed Roundup® after they developed non-Hodgkin’s lymphoma (NHL) (the cause of NHL is [unknown](#) and has many common risk factors). This was the third verdict against Bayer, with both of the other verdicts also coming in California. The award came just days after the **U.S. Environmental Protection Agency (EPA)** [reaffirmed](#) that glyphosate is safe. The plaintiffs’ lawyer in the case urged the jury to send a clear message to Bayer and award [\\$1 billion in punitive damages](#) – the jury doubled it, awarding the couple \$1 billion each. It should be pointed out, however, that **Alameda County Superior Court Judge Winifred Smith** later found the award excessive and unconstitutional, and [reduced it](#) to \$86.7 million.

Prior to the verdict, **Judge Smith**, who oversaw the case, ruled that Bayer was [not allowed](#) to mention the [EPA’s announcement](#) that glyphosate, when used in accordance to its label, is not carcinogenic. Instead, the jury was allowed to rely solely on a “junk science” report by the **International Agency for Research on Cancer**

(IARC), which found glyphosate was a “probable” carcinogen. IARC is a specialized cancer agency of the **World Health Organization**, known to be [outmoded](#), [heavily politicized](#), and [sub-standard](#) in the quality of its science.

In July 2019, in another Roundup® case, **U.S. District Judge Vince Chhabria** [reduced](#) a jury’s award of \$75 million in punitive damages against Bayer to \$20 million, finding the original award was “constitutionally impermissible.” “The jury’s punitive damage award was [approximately 15 times](#) the size of the compensatory damages award. Bayer’s conduct, while reprehensible, does not warrant a ratio of that magnitude, particularly in the absence of evidence showing intentional concealment of a known or obvious safety risk.”

This ruling comes after a juror in the case took the highly unusual step of sending the judge a letter, asking that he uphold the \$75 million punitive damages award. The juror stated that the award was “no accident” and the result of “[meticulous planning](#)” by the jury. The letter is believed to be written by Juror No. 5, who also was seen hugging the plaintiff and his wife and talking with the plaintiff’s lawyer during a hearing. During the trial, Juror No. 5 also alleged that one of the other jurors had made [improper comments](#) and succeeded in getting the juror dismissed without allowing Bayer a chance to argue against the dismissal.

Following these landmark verdicts, in August 2019, the EPA [advised](#) pesticide and herbicide registrants that it will no longer approve or permit labeling of glyphosate-containing products that include California’s Prop 65 warnings. The EPA disagreed with IARC’s 2015 classification of glyphosate. After conducting its own independent evaluation with a more extensive dataset, the EPA concluded that glyphosate is “not likely to be carcinogenic to humans.” For this reason, the EPA announced that it considers Prop 65 warnings regarding glyphosate, which is a federally-approved herbicide, to be “false and misleading.” A glyphosate-containing product bearing the Prop 65 glyphosate warning language would be “[misbranded](#)” in violation of the **Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)**. EPA stated that registrants whose products include Prop 65 warnings must submit an amended label within 90 days of August 7 notice.

The **California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment (OEHHA)** responded on August 13, defending its listing, noting its reliance on the IARC report, and ignoring the EPA’s findings. [The IARC report](#) is in stark contrast to more than [800 scientific studies](#) as well as analyses by the **U.S. Environmental Protection Agency**, the **National Institutes of Health**, and [Health Canada](#).

Closer scrutiny of the IARC process reveals that it was advised by an “invited specialist,” **Christopher Portier**, in its work on glyphosate. At the same time Mr. Portier was working for the agency, he was [reportedly affiliated with](#) the [Environmental Defense Fund](#), an anti-pesticide group. Moreover, Mr. Portier received [\\$160,000](#) from personal injury law firms that allege glyphosate is to blame for their clients’ cancer. When asked about this potential conflict of interest, Mr. Portier initially claimed to be advising firms on other IARC-related lawsuits and not glyphosate litigation. He later acknowledged that his statement was wrong. It is also worth noting that Mr. Portier had [no experience](#) with glyphosate prior to his work on the subject for IARC.

Following Mr. Portier’s arrival at **IARC**, the final glyphosate study was altered in [at least 10 ways](#) to remove or reverse conclusions finding no evidence of carcinogenicity. The agency removed multiple scientists’ conclusions that studies found no link between glyphosate and cancer in lab animals and statistical analyses of studies with negative findings were turned into positive ones. The determination that glyphosate was “probably carcinogenic” was based on “[limited evidence](#)” of carcinogenicity in humans and “sufficient evidence” in animal studies.

The shakiness of the scientific methods used by **IARC** in developing the glyphosate report are cause for grave concern given the importance of glyphosate in food production and in managing parkland, forests, and residential and commercial areas. Even more troublesome is the influence IARC’s classification has on litigation in the United States.

CALIFORNIA’S “SUE YOUR BOSS” LAW

Enacted in 2004, California’s **Private Attorneys General Act (PAGA)** has become known as the “[Sue Your Boss](#)” law. While it’s initial purpose was to [protect workers](#), it has done little to help them. The plaintiffs’ bar has been the true beneficiary. “PAGA lawsuits have made it more difficult for family-owned businesses like mine to be flexible with employees,” [according](#) to **Ken Monroe**, chairman of the Family Business Association of California and president of Holt of California.

“PAGA lawsuits have made it more difficult for family-owned businesses like mine to be flexible with employees.”

– Ken Monroe

PAGA authorizes “aggrieved” employees to file lawsuits seeking civil penalties on behalf of themselves, other employees and the State of California for labor code violations. Many PAGA lawsuits revolve around technical nitpicks, such as an employer’s failure to print

its address on employees’ pay stubs, even though the address was printed on the paychecks themselves.

[Seventy-five percent of the penalties](#) paid by non-compliant employers go to the state’s **Labor and Workforce Development Agency** while only 25 percent goes to the “aggrieved employees” and their lawyers who take a third or so of that. In some cases, the plaintiffs’ lawyers receive even more. For example, in *Price v. Uber Technologies* (2019), a \$7.75 million settlement resulted in [\\$2.325 million for plaintiffs’ counsel](#) and just over \$1 for the average Uber driver.

In 2019, Walmart [once again](#) was hit with a [massive judgment](#) for violating PAGA. U.S. District Judge **Lucy Koh** ordered the company to pay [a total of \\$102 million](#) – \$48 million in statutory damages for violating the **California Labor Code** and \$54 million in PAGA penalties. The company had technical errors on its pay stubs and did not properly pay workers who missed meal breaks or who had shortened breaks.

Also in 2019, Judge **Brad Seligman** of the **Alameda County Superior Court** approved Walgreen’s [\\$15 million settlement](#) of claims that the company failed to provide seats to cashiers, a violation of PAGA. The lead plaintiff was awarded \$50,000, and the judge said that the award was “way higher” than anything he had seen. Class counsel received [\\$5.2 million in fees](#) and an additional \$590,000 in costs, and the lead attorney, **James F. Clapp**, said that the large award was necessary because courts should give plaintiffs an incentive to pursue PAGA actions.

As evidenced by these decisions, the situation has rapidly deteriorated. In November 2018, the **California Business & Industry Alliance** [sued the State of California](#) alleging a lack of governmental oversight turned PAGA into an “unconstitutional ’tool of extortion’ used by employees and their attorneys.” The suit [states](#):

The current construction of PAGA by California courts [which have their own constitutional infirmities] gives rise to the following unconstitutional framework: valid and binding arbitration agreements are rendered unenforceable; private contingency-fee attorneys are permitted to litigate on behalf of the state without oversight or coordination with any state official; private attorneys are allowed to negotiate settlements that enrich themselves at the expense of everyone but themselves.

The complaint warned of “business-crushing lawsuits” due to a “complete lack of oversight.” Unfortunately, **Orange County Superior Court Judge Peter Wilson** [narrowed the suit](#) in September 2019, finding there was insufficient support to show PAGA violated separation of powers or due process rights.

The complaint warned of “business-crushing lawsuits” due to a “complete lack of oversight.”

– California Business & Industry Alliance

Positive News

Plaintiffs’ lawyers sometimes bring lawsuits under PAGA to avoid agreements between employers and employees to arbitrate disputes. A September 2019 **California Supreme Court** ruling [strikes a blow](#) to the benefits of using PAGA to circumvent arbitration agreements by allowing PAGA lawsuits to only seek civil penalties, not other damages. In reaching this result, the high court [reversed](#) an intermediate appellate court ruling that had allowed plaintiffs to recover unpaid wages through a PAGA action.

EXPANSION OF CALIFORNIA’S PUBLIC NUISANCE LAW

Traditionally, a viable claim for public nuisance involved instances in which a property owner’s activities unreasonably interfered in a right that is common to the public, usually affecting land use. Typical cases include blocking a public road or waterway, or permitting illicit drug dealing or prostitution on one’s property. The usual remedy in a public nuisance claim is to require the party engaged in the improper activity to “abate” or stop the nuisance. California is looking to expand public nuisance law, however, to extend to harm associated with public health crises and climate change.

In June 2019, the state joined scores of others in suing drug companies for their role in the opioid crisis. **California Attorney General Xavier Becerra** claims Purdue Pharma violated the state's [public nuisance laws](#) by expanding the market for opioids through deceptive marketing campaigns involving misrepresentations and omissions about its lawful, heavily-regulated, non-defective product. If the attorney general is successful, California would join fellow Judicial Hellhole Oklahoma as the only two states to adopt this expansive interpretation of public nuisance law. In May 2019, a North Dakota judge [dismissed a similar claim](#) against Purdue Pharma.

The cities of **Oakland** and **San Francisco** filed a similar public nuisance lawsuit against BP for its role in causing climate change. The local governments are trying to make energy companies pay for climate-change-related infrastructure projects. The case is [on appeal](#) to the Ninth Circuit, after **U.S. District Judge William Alsup** [dismissed](#) the suit in June 2018. As he [observed](#), “[t]he problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case.”

While the litigation around climate change and the opioid crisis are different matters, they each intend to establish public policy through litigation while attempting to “solve” complex problems. Attempts to resolve public health and environmental crises in court require a court to assume the responsibilities and authority of the policy-making branches of government, rather than resolve disputes between parties.

A SURGE OF CLASS ACTION LAWSUITS IS COMING, THANKS TO CALIFORNIA’S NEW DATA PRIVACY LAW

The **California Consumer Privacy Act (CCPA)** will go into effect on January 1, 2020. While businesses have been preparing for the CCPA, most say they [will not be ready](#) for it. True to form, California took the opportunity to impose over-burdensome regulations on businesses and enacted the [most radical privacy law](#) in the country. In September 2019, the legislature [rejected amendments](#) that would have eased some of the immense burden this law puts on business in the state.

The law provides for treble damages and attorneys’ fees, creating large incentive for the plaintiffs’ bar to file massive class actions. Consumers also can sue for cash awards following a data breach without proving an actual injury, making it easy for trial lawyers to bring massive class actions.

Efforts are already underway to make the **CCPA** even more plaintiff friendly. Legislation that would have added a “[sweeping and unrestricted](#)” private right of action, authorizing lawsuits for any potential noncompliance, did not pass in 2019, but is likely to return. In addition, in September 2019, a [2020 ballot initiative](#) was [launched](#) that would create new pitfalls for any company that gathers, uses, or sells consumer information.

CALIFORNIA AG SUING JOHNSON & JOHNSON IN FIRST TRIAL OF ITS KIND

The first case brought by a state attorney general alleging that a manufacturer of pelvic mesh devices did not sufficiently warn of the risks of its products went to trial in July 2019. **California AG Xavier Becerra** alleges that Johnson & Johnson’s Ethicon unit [misrepresented](#) the safety of its mesh devices to doctors and patients and violated the state’s unfair competition and false advertising laws. **Washington Attorney General Bob Ferguson** settled a similar claim for [\\$9.9 million](#) in April 2019, but this is the first case to go to trial and the stakes are far higher. The California trial [concluded](#) in late September 2019 with the AG’s office asking **San Diego County Superior Court Judge Eddie Sturgeon**, who will decide the case without a jury, to order Ethicon to pay roughly \$800 million in penalties.

TRIAL COURT JUDGES CONTINUE TO CIRCUMVENT STATE’S LEMON LAW

Trial court judges across the state continue to allow plaintiffs and their lawyers to circumvent California’s [Song-Beverly Consumer Warranty Act](#), otherwise known as the **California Lemon Law**, an issue first highlighted in [last year’s report](#).

The [Song-Beverly Consumer Warranty Act](#) clearly defines the obligations of consumer goods manufacturers. Under the law, a manufacturer [guarantees](#) that a product is in order when sold. Should a product fail in utility or performance, the manufacturer must repair or replace the product or make restitution to the buyer in the form of a purchase refund. The Act also limits punitive damages to no more than twice the amount of actual damages.

The intent of the law was to ensure manufacturers would repair, replace, or repurchase a consumer’s defective

vehicle as quickly as possible. However, plaintiffs' lawyers have learned to exploit loopholes in the law and create windfalls for themselves at the expense of a fair resolution for consumers.

A full refund or vehicle replacement is no longer sufficient. California trial courts have permitted these straight-forward Lemon Law cases to morph into fraud and breach-of-contract cases, allowing balloon payments many times the value of the vehicle in question. For example, in one case out of the **Riverside Superior Court**, the plaintiff suffered less than \$70,000 in actual damages (the average price of the pickup truck), but the court allowed a punitive damages award of [\\$1.5 million](#) and then attorney's fees of more than [\\$700,000](#). In another case, the very same court approved attorneys' fees of close to [\\$300,000](#) for handling what should have been a straightforward Lemon Law case.

CALIFORNIA COURTS ARE A MAGNET FOR CLASS ACTION LAWSUITS

While California accounts for 12% of the population in the United States, its courts are home to more than [50% of all class actions](#). Plaintiff-friendly judges, favorable laws and the availability of high statutory damages make the state an attractive place for class action lawsuits. To make matters worse, a July 2019 California Supreme Court ruling made it easier to certify a class. The justices adopted a [more lenient](#) class certification process, finding that plaintiffs are not required to demonstrate how they will identify and notify individual class members of the litigation conducted on their behalf. The ruling is certain to attract even more consumer class actions to the Golden State.

FOOD COURT

"No-Injury" Lawsuits

California courts, both state and federal, are a hotbed for "no-injury" consumer protection lawsuits targeting the food and beverage industry. Significant factors behind the state's appeal include California's size (makes for large classes), a plaintiff-friendly consumer law, and a perception of a plaintiff-friendly and health conscious jury pool.

Plaintiffs' lawyers often target any food marketed as "natural." For example, in Karen Nelson's [complaint](#) against Coca-Cola, she alleged that its Hansen's Natural brand sodas are not natural because they contain ascorbic acid, citric acid, and caramel color. That case, like many others, ended in a confidential individual settlement about five months after it was filed, in February 2019.

In recent lawsuits against [Ferrara Candy Co.](#) (which makes SweeTarts), [Talking Rain](#), (which makes Sparkling Ice beverages), and [Outernational Brands](#) (which makes Vivaloe beverages), plaintiffs claimed that the use of malic acid in foods labeled "natural" or "no artificial flavors" is misleading. Malic acid is an ["organic compound made by all living organisms."](#)

The SweeTarts lawsuit was particularly sweet for plaintiffs' lawyers. Under the class action settlement, the court approved [\\$272,000](#) in fees and costs for the attorneys and \$3,000 for the named plaintiff. For consumers, it is more tart, than sweet. They can buy the same candy, but it won't say "no artificial flavors."

Clif Bar has been sued in California over the amount of sugar in its snack foods. The plaintiffs allege that Clif Bar's labeling is misleading because it promotes the snack foods as healthy despite having a lot of sugar. Clif Bar observes that a reasonable consumer would clearly realize the bars were sugar heavy from their names (i.e. [Chocolate Chip](#)) and the added sugar amounts are below the limit that experts recommend. **U.S. District Judge James Donato** [found](#) in August 2019 that state law claims could continue, even as the products' labeling properly discloses their sugar content, as required by federal regulations that also recognize [added sugars](#) can be included as part of a healthy diet.

All of this activity comes despite a good decision released by the notoriously plaintiff-friendly "food court" – the **U.S. District Court for the Northern District of California**. In December 2018, the court [dismissed](#) a case against General Mills finding it preempted by the federal **Food, Drug and Cosmetic Act**. A serial plaintiff claimed that the company violated California's **Unfair Competition Law** because its Duncan Hines, Pillsbury, and other baking mixes contain trans fat, even though Congress set a reasonable timeline for manufacturers to phase out trans fat from their products, which had not concluded.

As California courts and legislators look to increase the labeling requirements for the food and beverage industry, California consumers can expect to see higher prices for a small amount of [likely negligible](#) food-labeling information.

Slack Filled Packages

California's federal courts have recently [certified](#) such nonsense as whether Mike and Ike and Hot Tamales, which are sold in five-ounce labeled boxes that contain five-ounces of candy, could fit more candy. Lawyers hope for a big payout. A few months earlier, a district court awarded lawyers over [\\$725,000](#) in fees and expenses as part of a [class settlement](#) in a similar case targeting candies such as Jujufruits and Now & Later. These types of lawsuits, which can target any product sold in a bag or box that appears to include empty space that may result from legitimate packaging needs, are called "slack fill" claims.

In response to the rise in these types of lawsuits, the California legislature passed a [bill](#) that provides companies with three new ways to design product packaging to avoid slack fill lawsuits. The bill was enacted in September 2018 and went into effect at the beginning of 2019. The new law provides that a product does not contain "non-functional slack fill" when (1) the dimensions of the product are visible to the consumer through the exterior packaging; (2) the packaging indicates the actual size of the product inside; or (3) the packaging includes a line or graphic showing consumers the level to which it is filled.

More 2019 Food Court Nonsense in California

- A California plaintiff has brought a class action against the [maker of Oreo](#), alleging that its cookies aren't made with "real" cocoa, but instead only contain mere cocoa powder.
- Cento Fine Foods is being sued by customers claiming its [San Marzano tomatoes](#) are grown in an adjacent area to where "authentic" San Marzano tomatoes are grown.
- Coca-Cola Co. settled a case for [\\$2.5 million](#) in which the plaintiff alleged that Seagram's ginger ale was misleading because it is not made with real ginger, but rather with ginger extracts and flavorings. Plaintiffs' lawyers will get about \$800,000 in fees and costs.

CALIFORNIA'S ATTACK ON ARBITRATION CATCHING EYE OF U.S. SUPREME COURT

California courts continue to look for ways to roll back the availability of arbitration, ignoring clear guidance from the U.S. Supreme Court and federal law. The state is an outlier in its approach to arbitration clauses in employment contexts, finding California state laws are not preempted by the **Federal Arbitration Act (FAA)**, a decision that directly contradicts the U.S. Supreme Court's decision in [AT&T Mobility LLC v. Concepcion](#) (2011).

For example, in November 2018, a California appellate court found the FAA does not preempt the state's arbitration-specific rules and requirements. The court's ruling in [Winston Strawn v. Ramos](#) also found that when an arbitration clause has more than one invalid term, the entire provision is [presumptively invalid](#), forcing parties to litigate. Earlier this year, the **California Supreme Court** [denied](#) a petition for review, leaving the lower court's decision in place. While the **U.S. Supreme Court** has [consistently pushed back](#) against anti-arbitration actions by state legislatures and courts, it unfortunately [denied certiorari](#) in this case.

The **California Supreme Court** also set itself up for another [direct confrontation](#) with the **U.S. Supreme Court** in September 2019. It [invalidated](#) a pre-dispute arbitration agreement in an employment contract after finding it the product of oppression, unfair surprise, and "an unusually high degree of procedural unconscionability." The case arose when a former car dealership employee sued the dealership for unpaid wages. The majority took the bizarre position that the arbitration agreement was invalid because it included procedural rights and protections that were too similar to those afforded to parties in litigation. As **Justice Ming Chin** observed in dissent, "the majority holds that an arbitration agreement is substantively unconscionable — and therefore unenforceable — precisely because it prescribes procedures that, according TO the majority, have been 'carefully crafted to ensure fairness to both sides.' If you find that conclusion hard to grasp and counterintuitive, so do I."

EXPANSION OF EMPLOYMENT LAW LIABILITY

In the wake of a 2018 liability-expanding California Supreme Court decision, the flood gates opened, inundating employers with wage and hour lawsuits filed by individuals who were viewed as independent contractors. In

Dynamex Operations West, Inc. v. Superior Court, the Court [rejected](#) a decades old standard used to determine whether or not a worker was classified as an independent contractor or an employee. In its place, the Court adopted the much stricter [“ABC Test,”](#) that most states only use in deciding unemployment insurance cases. Under the “ABC Test,” an employer has the burden of proving three elements, and if they fail to meet this burden on just one, the employer loses and the worker is classified as an employee. In September 2019, the **Ninth Circuit** [asked](#) the **California Supreme Court** to decide whether the Dynamex decision applies retroactively, a decision that will have large ramifications for business across the state.

Uber already has seen the immediate impact of this decision. In March 2019, the company [settled](#) a case for \$20 million with thousands of California drivers who were previously characterized as independent contractors. The company now estimates that settlement totals could run between [\\$146 to \\$170 million](#) if the California ruling is extended across the country.

In September 2019, the California legislature [codified](#) the *Dynamex* decision in [A.B. 5](#). The bill revamps the law by presuming workers are employees unless the business can prove the three elements of the “ABC Test.” The law specifically [targets the gig economy](#) like Uber, Lyft and DoorDash that use digital platforms to connect workers with customers. It will serve as a goldmine for plaintiffs’ lawyers and they will no longer be stymied by arbitration clauses when suing these companies for misclassifying workers.

OVER-BURDENSOME WAGE AND HOUR LAWS

Companies are feeling the true weight of California’s [highly technical and unforgiving](#) wage and hour laws – laws that have been described as [“silly”](#) by a prominent California federal judge. In 2019, G4S Secure Solutions settled a meal and rest period class action for at least \$100 million and up to \$130 million depending on the class administration process. The settlement includes 13,500 employees and is one of the largest in the history of the state.

California’s law allows an employee to [allege a violation](#) every shift if an employer has an invalid on-duty meal period agreement. Also, if an employer has an improper on-call rest period or fails to give employees a proper break, plaintiffs can allege a violation every shift. Employers are subject to meal period premium pay, and civil and statutory penalties – leading to staggering damage awards.

Other outrageous wage and hour settlements from this year include:

- Dick’s Sporting Goods’ [settlement for \\$2.9 million](#) with workers over claims they were not paid for time they spent in mandatory security checks. It also covered claims that it was inappropriate for the employer to expect employees to dress a certain way and then not reimburse them for money spent on purchasing clothes that satisfied the company’s policy.
- A security company’s [\\$14.5 million settlement](#) over claims that it failed to pay dog handlers for the time they spent training the dogs at home.

LEGISLATIVE ACTIVITY

The California legislature also targeted employers with a liability-expanding agenda in 2019. In addition to [A.B. 5](#), the plaintiff-friendly agenda included a bill to [increase liability under PAGA](#) and a bill that would extend the [statute of limitations](#) for employment discrimination cases. The legislature also looked again to [prohibit arbitration](#) agreements in employment contracts. **Former Governor Jerry Brown (D)** vetoed that bill in [2018](#). The bill also adds a [new private right of action](#), allowing an employee to sue his or her boss in a class action lawsuit on behalf of all of the company’s employees.

AMERICANS WITH DISABILITY LAWSUIT ABUSE

A stunning number of lawsuits were filed under the **Americans with Disabilities Act** in federal court against California businesses in 2018 — [4,249 lawsuits](#) — up from 2,751 in 2017. California had the most ADA accessibility lawsuits of any state and had almost 2,000 more than the next closest state, New York (2,338). These numbers do not include the many extortionate demand letters sent to businesses, nor does it include lawsuits filed in state courts.

In California, penalties for ADA violations are much higher than other states due to the state's [Unruh Civil Rights Act](#), which provides for a fine of [\\$4,000 per violation](#), a fine [other states](#) do not provide, plus attorneys' fees. Often these so-called "violations" are as minor as a mirror that is an inch too high or a sidewalk or parking lot that is angled one degree too much.

Government officials and small business owners have started to fight this abuse.

For example, in April 2019, **Riverside County District Attorney Mike Hestrin** sued multiple attorneys, alleging in a civil action they engaged in ADA "shakedowns" of small businesses. The [complaint](#) claims that the attorneys violated the **California Unfair Competition Law** and false advertising laws. The lawyers sought to abuse the system by seeking out minor ADA violations to make easy money at the expense of small businesses.

The following month, a federal grand jury [indicted](#) another ADA attorney, **Scott N. Johnson**, on three counts of making fraudulent tax returns on money he received from the thousands of ADA claims he filed against small businesses. He filed almost 3,000 ADA lawsuits, settling each case for \$4,000 to \$6,000. Some of the businesses he [targeted](#) were forced to [shut down](#).

Small business owners also have fought back by suing attorneys, law firms, serial plaintiffs, and others who conspire in these lawsuit-generating schemes under the **Racketeer Influenced and Corrupt Organizations (RICO) Act**. The [Mission Law Firm APC](#), formerly known as the Moore Law Firm, finds itself facing RICO claims after filing more than [1,400 ADA lawsuits](#) against businesses across California. In June 2019, a California federal judge [sanctioned attorney Randy Moore](#) and his certified ADA specialist **Geoshua Levinson** for pressuring a witness to give false statements about how the firm scouted out businesses for lawsuits. The court entered a default judgment against those two defendants, giving a victory to the owners of a now-closed Fresno restaurant. The litigation continues against the law firm and others involved.

California's ADA litigation abuse will continue to expand and evolve. This year, the **U.S. Court of Appeals for the Ninth Circuit** [ruled](#) in a case against Domino's Pizza that the ADA requires accessibility not only in physical premises, but also in website use. Now, plaintiffs' lawyers no longer even have to pretend to step foot in a California business's premises to find a violation – they can search online for small businesses who have not incorporated features in their websites that allow people who are blind or visually impaired to use them. In October, the **U.S. Supreme Court** [denied certiorari](#), allowing the ruling to stand.

#3 NEW YORK CITY

As **New York Governor Andrew Cuomo (D)** continues to promote New York as a business-friendly state, the litigation and regulatory climate tells a very different story. Businesses are fleeing the state, as the legislative and judiciary branches expand liability at every given opportunity.

New York trial lawyers continue to target small businesses with American with Disabilities Act claims, and the number of consumer lawsuits filed against the food and beverage industry remain on the rise. The legislature pursued a very plaintiff-friendly agenda, while much-needed reform to New York's "Scaffold-Law" continued to stall.

- "ADA" lawsuit abuse on the rise
- Frivolous class action lawsuits targeting food and beverage industry
- City on the forefront of climate change litigation
- Lack of reform to address litigation abuse
- Liability-expanding agenda pushed in legislature

NEW YORK BUSINESS TARGETED BY FRIVOLOUS LAWSUITS

ACCESSIBILITY LAWSUITS CONTINUE TO TARGET SMALL BUSINESSES

The volume of lawsuits filed under the **Americans with Disabilities Act (ADA)** continues its meteoric rise in New York. These types of lawsuits typically are brought by a small group of attorneys and serial litigants who visit restaurants, grocery stores, and other businesses to look for violations of any of numerous accessibility regulations.

The attorney then sends a letter to the business identifying the alleged violation, such as a bathroom mirror that is too high or a parking lot at a slight slope, and demanding that the business pay thousands of dollars to settle the case or face a lawsuit.

In 2018, [2,338 federal ADA lawsuits](#) were filed in New York, far outpacing the 1,488 claims filed the prior year. Halfway through 2019, New York already had [1,212](#) ADA accessibility lawsuits, putting it on pace to set another record. New York is second only to California (4,249) in hosting these lawsuits.

This year, one of New York's most notorious plaintiffs' lawyers, **Stuart Finkelstein**, was discovered to have engaged in a massive scheme to [shake down](#) small mom-and-pop stores across the state. He filed multiple lawsuits on behalf of unknowing plaintiffs, threatening stores with additional litigation if they refused to immediately settle. All of the settlement money went straight into his bank account. Finkelstein previously had his [law license suspended](#) from 2007 to 2016 after the state ethics panel found he had submitted "false and misleading answers" in response to two professional-misconduct complaints.

New York leads all states with a new brand of ADA lawsuit abuse using the 1990-era law to target company websites. Following the 9th Circuit's [2019 decision](#), which affirmed that ADA law applied to websites and apps, New York has seen a flood of claims about non-ADA compliant websites. Entrepreneurial plaintiffs' lawyers file cut-and-paste lawsuits against stores whose [websites](#) lack screen-reading software. They seize the opportunity to capitalize on a grey area in federal law on web accessibility. Unlike the lawsuits against brick-and-mortar stores, in these cases, serial plaintiffs and their lawyers can search for targets without leaving their desks.

ADA plaintiffs filed [1,564](#) of these website accessibility lawsuits in New York's federal courts in 2018, accounting for more than two-thirds of all federal website cases filed in the nation that year. As of the first quarter of 2019, another [396 web accessibility claims](#) were reportedly filed in the Empire State.

"It's [profit-seeking attorneys](#) abusing the legal system and using handicapped people as a front," said **Tom Stebbins**, executive director of the Albany-based **Lawsuit Reform Alliance of New York**. Two well-known ADA

"This particular litigation feels to me like a cynical effort by a few lawyers to extract payment from our clients and others."

– Thomas Danzinger

lawyers, [Jeffrey Gottlieb](#) and [Joseph Mizrahi](#), have filed hundreds of lawsuits over the past few years on behalf of just a [handful of plaintiffs](#). One client, Deshawn Dawson, a legally blind person, filed 37 lawsuits against a wide range of art galleries and bookstores in the state. Another plaintiff, Henry Tucker, filed 80 similarly-worded complaints against

art galleries in November of 2018. While Gottlieb and Mizrahi will earn several thousand dollars in fees, New York law [prohibits their clients](#) from receiving more than \$500 per case. Art law expert **Thomas Danzinger**, who is representing several New York galleries, [stated](#), "While the galleries we work with certainly support accommodating people with disabilities, this particular litigation feels to me like a cynical effort by a few lawyers to extract payment from our clients and others."

Jeffrey Gottlieb also has targeted businesses that sell gift cards for failing to include braille on the cards. In less than 10 days in October 2019, [over 100 putative class action lawsuits](#) were filed in the Empire State. Eleven plaintiffs and four law firms filed nearly identical claims and all assert the same theory – businesses do not provide a braille version of their gift cards.

FRIVOLOUS CONSUMER PROTECTION LAWSUITS

"Slack fill" litigation remains prevalent in New York, with plaintiffs continuing to file consumer lawsuits alleging that boxes or containers of food mislead consumers because there appears to be space inside that could fit more of the product. The state also is home to numerous lawsuits challenging the "natural" description of products due to



certain ingredients or manufacturing processes. In 2018, there was a [33 percent increase](#) in food and beverage class action filings in New York, with 42 new cases filed. The state is second only to California (77).

The most entertaining of all the food lawsuits currently pending in New York were filed by Long Island attorney Spencer Sheehan. He is famous for handling some of the most outrageous cases in the state. For example, he defended “subway vigilante” Bernard Goetz’s right to keep a [pet squirrel](#) in his Manhattan apartment. In 2019, he filed a class action lawsuit against Welch Food over [marketing claims](#) that the products were “Made with REAL fruit” and contained fiber. The case alleges that the fiber actually comes from chicory root, not real fruit. Another suit filed this year against KIND alleges that the company misled consumers into believing its energy and snack bars contained whole, [unsullied fruit](#), when it was processed, simply because the packages contain images of whole fruit, which are listed as ingredients.

Sheehan also is [suing](#) 27 different food companies, alleging that they are [misleading customers](#) with their labeling of vanilla-flavored food products. The lawsuits claim that the labels on the food products mislead customers to believe they contain “real vanilla” and/or “natural flavors,” despite actually containing only a small amount of natural flavors and vanilla extract, with the rest of the flavoring coming from synthetic vanillin. Some of the lawsuits also allege that these companies improperly classify their products as “ice cream,” and should instead use the words “frozen dairy dessert.” Sheehan is claiming \$5 million in damages in each suit – for a total of \$135 million.

Perhaps on a mission to steal the title of the “food court” from California, [Senator Leroy Comrie \(D\)](#) introduced legislation that would further increase consumer litigation in New York. The [bill](#) would significantly increase minimum damages in lawsuits alleging misleading business practices from \$50 to \$1,000 per violation – allowing plaintiffs to recover these damages without showing any actual loss as a result of buying the product or service. The bill also would change New York law by making these statutory damages available in class action lawsuits, incentivizing massive no-injury lawsuits. This provision would make New York [an outlier](#) when compared to the rest of the country. Less than one-third of states allow for statutory damages, and when allowed, most states do not make them available in class actions. Statutory damages are intended to provide an incentive for lawyers to bring small claims, but that purpose is unnecessary in class actions because the aggregation of hundreds of claims fills that need.

The legislation also proposes prohibiting “unfair” and “abusive” practices – adding two vague terms to New York’s consumer protection law that will spark more lawsuits. This bill also would limit or eliminate certain defenses currently available in consumer lawsuits. Icing on this plaintiffs’ lawyer layer cake is that the legislation takes away the need for them to find a consumer who actually purchased a product and believes he or she was misled in some way. Instead, the bill authorizes nonprofit organizations with extreme agendas to bring class action lawsuits to pressure businesses into meeting their demands. The bill stalled in the **Senate Committee on Rules**; however, it is expected to be considered in 2020.

ASBESTOS AND TALC LITIGATION

New York City continues to lead the nation in terms of high mesothelioma verdicts and settlements; however, in November 2018, the **New York Court of Appeals** dealt **New York City Asbestos Litigation (NYCAL)** a [strong dose of reality](#). In its highly anticipated *Juni* opinion, the Court rejected the “cumulative exposure” theory embraced by NYCAL and said it “is irreconcilable with the [well-recognized scientific requirement](#) that causation be established based on consideration of the amount, duration and frequency of the plaintiff’s exposure.” It [overturned](#) an \$11 million NYCAL verdict, finding that proof that a substance can cause harm is not enough to show that it actually did.

This decision should have positively impacted litigation brought against Johnson & Johnson alleging that talc has traces of asbestos that caused a plaintiff’s injury; however, the company was hit with a \$300 million punitive damages judgment on top of a \$25 million verdict for compensatory damages in May 2019. The \$325 million verdict is [one of the highest](#) in more than two years of litigation across the country. A [Manhattan Supreme Court jury](#) found in favor of a woman who claimed prolonged exposure to talc powder caused her to develop mesothelioma, despite the **U.S. Food and Drug Administration** and the **National Institute for Occupational Safety and Health**, among other organizations, finding the [powder to be safe](#).

In October 2019, the **New York Civil Justice Institute** released a [report](#) highlighting some of the troubling ways the plaintiffs bar looks to disadvantage defendants and mislead juries in asbestos litigation. The report discusses how plaintiffs’ attorneys “[intentionally delay](#) the filing of asbestos bankruptcy trust claims” in order to mislead juries “as to the source of and significance of a plaintiff’s exposure to asbestos.” The study reviewed more than 100 asbestos-related personal injury claims filed in New York jurisdictions. “This analysis makes clear that New York’s current court rules and procedures are inadequate to prevent trust claim manipulation and abuse within the system,” said Tom Stebbins, executive director at the lawsuit Reform Alliance of New York.

“This analysis makes clear that New York’s current court rules and procedures are inadequate to prevent trust claim manipulation and abuse within the system.”

– Tom Stebbins

NEW YORK CITY AT FOREFRONT OF CLIMATE CHANGE LITIGATION

The Michael Bloomberg-funded **State Energy & Environmental Impact Center at New York University School of Law (the Center)** pioneered the new practice of embedding staffers to advance litigation. The Center was established and initially funded in 2017 with a \$6 million grant from **Bloomberg Philanthropies**. Its mission is to “support state attorneys general in defending and promoting clean energy, climate and environmental laws and policies,” including through “direct legal assistance to interested attorneys general on specific administrative, judicial or legislative matters...” As the Center touts, it is “[w]orking with interested attorneys general to identify and hire NYU Law Fellows who serve as special assistant attorneys general in state attorney general offices, focusing on clean energy, climate and environmental matters.” In other words, the fellowship program is designed to wage war on [energy companies](#) by placing lawyers funded by the Center in the offices of friendly attorneys general across the country, empowering them to bring climate change litigation.

The Center reportedly had 18 fellows embedded within the offices of attorneys general in at least eleven jurisdictions in 2019, including New York. **The Center**, through NYU, fully funds these legal positions, meaning attorneys general use outside dollars for this work. The effort is aided by the Center’s communications arm, which aims to promote and defend the legal strategy of supportive state attorneys general in the media.

The Center’s fellows are far from student interns or junior lawyers. To be considered for the program, the Center requires an applicant to have between five and ten years of experience with climate change, clean energy, and environmental issues, as well as litigation and/or regulatory experience. If accepted, a lawyer must make a minimum two-year commitment to the state attorney general office in which he or she is placed.

Functionally, the program places these lawyers into the offices of state attorneys general by initially [pitching the program](#) to either the targeted state official or a top aide. Assuming there is interest, the state attorney general’s office then makes a formal request to the Center outlining its needs. Should all go according to plan, the program then farms out the lawyers to the state attorney general office that made the request.

New York Attorney General Letitia James currently has two NYU fellows on staff. One of the fellows, [Gavin McCabe](#), signed off on an amicus brief that was filed in June of 2018 in New York City’s lawsuit against ExxonMobil, BP and several other energy companies attempting to pin them with costs related to climate change. In addition, **New York City Mayor Bill de Blasio** continues his push to hold these companies responsible for climate change, openly stating, “Let’s help bring the [death knell](#) to this industry that’s done so much harm.”

A [landmark bench trial](#) over claims that Exxon Mobil “deceived its investors about climate change risks to its business” took place in New York state court in October 2019. No decision was announced prior to the report going to press, but ATRF will keep a close eye on future developments.

THIRD PARTY LITIGATION FUNDING

Third-party litigation financing increases the amount of litigation and provides benefits to plaintiffs’ lawyers in New York. New York hedge funds drive mass tort litigation in the state by lending money to law firms that repre-

sent plaintiffs in a variety of lawsuits against prescription medications and medical devices. In return, the lenders become entitled to a portion of any recovery. It is estimated that the third party litigation funding global industry has approximately [\\$100 billion](#) available to funders and firms.

A leading global litigation-finance firm, **Burford Capital**, came under fire in 2019 after [Muddy Waters Research](#) claimed the company [egregiously misrepresented](#) the value of its legal cases, basing its stock valuation and earnings on “meaningless” metrics manipulated by the company.

In July 2018, the [New York City Bar Association](#) published a [formal opinion](#) concluding that lawyers may not enter into a litigation financing arrangement with a non-lawyer funder under which the funder is paid out of any recovery. Such arrangements, the NYCBA found, violate ethical rules that have long prohibited lawyers from partnering with or sharing fees with non-lawyers. While the bar association has said it “will not be revisiting” last year’s Ethics Opinion, it held a comment period for its **Litigation Funding Working Group** during the summer of 2019. The Working Group is expected to issue a full report by the end of the year. [One proposal](#) the group is considering would require lawyers to disclose litigation funding contracts to both the court and opposing parties. This would create transparency and allow all parties to know who has an interest in the outcome of the litigation.

The New York Legislature also must address rampant abuse. Legislation introduced to [rein in predatory lawsuit lending](#) in 2019 stalled in committee.

SCAFFOLD LAW CONTINUES TO DRAIN CITY’S ECONOMY

New York’s [Scaffold Law](#) continues to disincentivize real estate investors and builders from investing in the city and in construction site safety. The Scaffold Law was enacted to “protect workers who helped build New York’s now-iconic skyline in the 19th century.”

Under this law, courts [hold](#) contractors and property owners liable for workers’ “gravity-related injuries,” whether that injury occurred due to a fall from a stepstool or New York’s tallest tower. New York courts have found that liability under this law is “absolute,” meaning that businesses must pay up regardless of whether the fall occurred due to the workers’ carelessness or reckless conduct. No other state has such a law.

The absolute liability standard imposed by the **Scaffold Law** has led to a massive exodus of underwriting companies from the state, leading to higher premiums and an overall high cost of doing business. It is estimated that money wasted on the Scaffold Law could be spent to create [12,000 new jobs](#), boosting the state’s economy by over \$150 million.

Not only does the law cost the state money, it also fails to achieve its main goal – making construction sites safer. An objective analysis of the impact of absolute liability for gravity-related injuries has revealed that having this law in place actually increases the number of falls that result in injury or death by a [rate of 5.5 per thousand](#). This is because under the current law, no amount of safety equipment, training, or workplace controls reduce the liability to which builders are subjected. It is a proven disincentive to invest in construction site safety. In locations where the law has been repealed, there has been a documented increased investment in worker safety, and as a result, the rate of accidents has dropped significantly.

A small number of New York lawmakers have long sought to address this excessive liability but continue to come up short. Opposition from powerful special interests - especially the trial lawyers - has stymied efforts to reform the law.

LIABILITY EXPANDING LEGISLATIVE AGENDA

[Last year’s report](#) warned of the potential impact of **Lavern’s Law**, enacted in January 2018, on New York’s medical liability payouts. The new law [extended the statute of limitations](#) for medical liability cases alleging a missed cancer diagnosis. As a result of the state’s liability-expanding approach, New York continues to lead the nation in medical liability payouts both per capita and total amounts. In 2018, New York had an average payout of [\\$446,461](#). The national average payout was \$348,065, almost \$100,000 less than the New York average. 1,535 claims were paid in New York in 2018, totaling \$685,317,000, marking an 11% increase from 2017. Rather than address the growing

medical liability crisis in the state, the New York legislature failed to enact meaningful reforms and considered legislation that would further exacerbate the problem.

[S. 4006](#), introduced by **Senate Judiciary Chair Senator Brad Hoylman (D)**, would expand existing law to permit the families of wrongful death victims to recover additional compensation for subjective things like loss of companionship and consortium, loss of nurture and guidance, pecuniary injuries, including loss of support or assistance, and grief or anguish. It is estimated that, if enacted, insurance premiums paid by New York residents and businesses will increase by [\\$2.2 billion](#), or 12.6%. Medical professional liability premiums are predicted to increase by 47%, thereby further discouraging doctors from practicing medicine in New York. The bill remains in the **Senate Finance Committee** and is expected to advance in 2020.

Two liability expanding bills that passed both houses of the legislature, mostly on party lines, await action from the governor. [S.6552](#), introduced by **Senator James Skoufis (D)** permits a plaintiff to recover directly against a third-party defendant when the judgment against the original defendant has not been satisfied after thirty days. Troublingly, if signed into law, this would allow plaintiffs to bypass defendants and collect directly from a party which they had no legal standing to sue.

Another bill, [S.6081](#), introduced by **Senate Judiciary Chair Brad Hoylman (D)**, would require settling co-defendants to choose between limiting their liability by either their equitable share of fault or by the remaining balance of the final jury award before the award is determined. If signed into law, a plaintiff could receive more damages than the amount awarded by a jury verdict. Defendants in asbestos cases will be at an even greater disadvantage because other defendants rarely know the identities or settlement amounts of all parties in the litigation.

Senator Kevin Thomas (D) introduced the [New York Privacy Act](#), which would, among other things, create a private right of action for individuals to sue companies over alleged data privacy violations. This measure is more expansive than California's recently passed Consumer Privacy Act, which does not contain a private right to file a lawsuit and only applies to businesses that take in more than \$25 million in gross revenue.

Lastly, **Governor Cuomo** signed [legislation](#) that expands liability for workplace discrimination. The new law lowers the threshold for filing a complaint by eliminating the need for "severe or pervasive" behavior, extends the statute of limitations to file such cases, bans non-disclosure agreements related to discrimination claims, prohibits arbitration of discrimination claims, and authorizes punitive damages. These changes are expected to lead to a flurry of new lawsuits and will expand liability even for companies that have abided by all of the laws and regulations to create and promote a safe workplace.

END NOTES

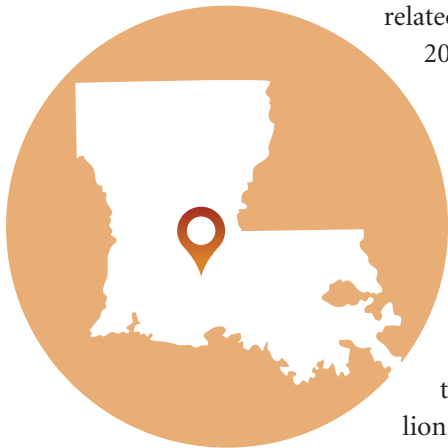
- In February of 2019, the **Appellate Division, First Department** upheld a [record-setting \\$6.1 million](#) pain-and-suffering award in an ankle fracture lawsuit. A Bronx jury awarded the plaintiff a total of \$10.4 million. This is the largest amount upheld by the court, outside an amputation or brain damage case. The award included future medical expenses, despite no evidence that the plaintiff would require future care.
- A Manhattan federal court jury convicted three men of running a ["trip-and-fall" scheme](#), defrauding New York City businesses and insurance companies out of more than \$31 million. The men recruited "patients," coached them on how to stage the accidents, and then steered them to complicit lawyers, doctors and chiropractors.
- **Governor Cuomo** signed a bill that [reinstates](#) the six-year statute of limitations for filing a lawsuit under the **Martin Act**. This reverses a decision by the state's high court in 2018, which interpreted the law to have a three-year statute of limitations. New York leadership has made a habit of politicizing the state's unique Martin Act, a 1921 law which grants the Office of the Attorney General far-reaching powers to investigate alleged financial fraud – without ever having to prove intent.

#4 LOUISIANA

The Bayou State continues to climb up the Judicial Hellholes list, due to the costly combination of former plaintiffs' attorney and current Governor John Bel Edwards' (D) aggressive litigation agenda, the plaintiff-friendly legislature, and inescapable advertising practices by the plaintiffs' bar.

Lawsuit abuse continues to drain the Bayou State's economy. Families and businesses in the Bayou State paid nearly [\\$7 billion](#) in expenses related to tort litigation in

2016 – that's more than \$4,000 paid by every Louisiana household. The impact of this hidden "tort tax" on the Louisiana economy ranks among the top 5 states in the nation, with litigation costs equaling almost 3 percent of the state's Gross Domestic Product (GDP). The total current impact of [excessive tort costs](#) on the Louisiana economy amounts to estimated losses of \$1.1 billion in annual direct costs and \$1.5 billion in output (gross product) annually. More than 15,500 jobs are lost when dynamic effects are considered. All major industry groups are negatively impacted, with retail trade, business services, health services and other service industries showing the greatest losses. As of 2018, the yearly fiscal losses are estimated at \$76.4 million in state revenues and \$64.3 million to local governments.



- **State continues to hire contingency-fee lawyers**
- **Legislature fails to address lawsuit abuse**
- **Fraud and lawsuit abuse continue to drive up cost of auto insurance**
- **Judicial misconduct and lack of transparency plague courts**

STATE CONTINUES TO USE CONTINGENCY FEE LAWYERS TO 'REGULATE THROUGH LITIGATION'

COASTAL LAWSUITS DRIVE JOBS OUT-OF-STATE

Current coastal lawsuits targeting Louisiana's critical energy industry stretch the law far beyond its intent, ignore critical facts and involve private lawyers in a space meant for democratically elected decision makers who are accountable to the public. As pointed out by **Lana Venable** of the **Louisiana Lawsuit Abuse Watch**, "Strategies for protecting and enhancing the coast through innovative, science-based partnerships [increase](#) economic development opportunities. Lawsuits only reinforce Louisiana's reputation as one of the most litigious states in the country while driving up the cost of doing business."

Even though these companies provide [thousands](#) of quality jobs for hard-working Louisianans and [millions](#) in tax dollars for state coffers, these baseless lawsuits continue to move forward under **Governor John Bel Edwards (D)** and his high-paid trial attorney friends. These coastal lawsuits only continue to move the state in the wrong direction and further weaken Louisiana's struggling economy, which has lost thousands of jobs and major manufacturing projects in recent years. For example, the parishes of **Houma** and **Thibodaux** [lost 2,500 oil and gas jobs](#) from March 2018 to March 2019, marking the sixth consecutive over-the-year losses. According to an article in the [Wall Street Journal](#), the oil and gas industry employs about 5 percent of the state's workforce, contributes about 10 percent of aggregated payroll, and accounts for 10-15 percent of tax revenue. The industry has generated billions of dollars in [royalty payments](#) to landowners and has provided thousands of high-wage jobs to generations of Louisiana citizens. The continued litigation onslaught will only hurt these hard-working taxpayers and drive oil and gas companies to [do business elsewhere](#).

"Lawsuits only reinforce Louisiana's reputation as one of the most litigious states in the country while driving up the cost of doing business."

– Lana Venable

In 2019, **Orleans Parish** [took the governor's bait](#) and joined the lawsuit fray along with the six parishes to originally file more than [43 suits](#) against these companies. Edwards began to pressure the oil and gas industry shortly after he took office in 2016. He issued an [ultimatum](#) to the state's oil and gas industry: either spend billions of dollars restoring the eroding coast line or face a drawn-out, costly legal battle. This attempted [shake-down](#) failed and the two sides have been tied up in litigation ever since.

Yet another development involved **Terrebonne Parish** joining in the parade of lawsuits, at the urging of **Governor Edwards** and the **Louisiana Department of Natural Resources**. In January 2019, **DNR Secretary Tom Harris** appointed the parish district attorney, **Joe Waitz Jr.**, as a "[special designee](#)" of the state to investigate any potential environmental damage allegedly caused by oil and gas activities in the parish. In turn, the DA deputized private plaintiffs' lawyers to pursue the [investigation](#) under an [apparent fee-shifting agreement](#). **Parish President Gordon Dove** [fired back](#) by [challenging](#) the legality of such a move, suggesting that the state and district attorney are navigating around local leaders who do not want their parish involved in the litigation.

GOVERNOR EDWARDS' DONORS LEAD STATE'S OPIOID LITIGATION

More than [100 lawsuits](#) have been filed in Louisiana seeking damages from pharmaceutical makers and distributors for their alleged roles in the opioid crisis. Most of these suits were filed by Louisiana cities, towns, parishes and sheriffs through private contingency-fee lawyers. These suits are included in a vast docket of more than [2,000 similar cases](#) from across the U.S. pending in federal court in Ohio.

In addition to this multi-district litigation, Governor Edwards' administration [filed its own lawsuit](#) in state court and agreed last year that **Attorney General Jeff Landry** would represent the state in its case against 17 pharmaceutical companies. Both Edwards and Landry agreed to choose [private attorneys](#) to handle the case. A [2014 law](#) precludes the state from hiring attorneys on a contingency-fee basis. This law [responded](#) to how Louisiana's prior attorney general repeatedly hired and paid lucrative fees to politically-connected attorneys (the law does not extend to local governments).

Of the 19 private attorneys representing the state in these cases, [ten](#) donated directly to Edwards or to **Gumbo PAC**, a political action committee that supports the Democratic governor. Leading the state's roster of private lawyers is [Mike Moore](#), a former state attorney general. From 2011 to 2018, **Governor Edwards** received almost [\\$470,000](#) in campaign contributions from the Louisiana trial bar's top campaign contributors. Gumbo PAC received [more than \\$1 million](#).

The opioid epidemic is a serious public health crisis both nationally and in Louisiana, specifically. This growing problem needs to be addressed by elected policymakers, the expert regulators they appoint, the medical and scientific communities, and law enforcement. These groups must work cooperatively to advance public health and safety and ensure that these interests are not compromised by profit-driven lawyers.

Billions of dollars are at stake, and as [Pete Adams](#), executive director of the **Louisiana District Attorneys Association** stated, "In addition to the seriousness of the issue, everybody is looking to get any dollars they can get." The plaintiffs' attorneys hired by Louisiana's state and local governments stand to [gain millions of dollars](#) of any state recovery. As a result, their incentive is to maximize their fees irrespective of the public interest.

LAWSUIT ABUSE AND LEGISLATIVE INACTION

Several bills aimed at improving Louisiana's plaintiff-friendly litigation climate were introduced during the 2019 legislative session. Not surprisingly, none passed. The fatal combination of an election year, a Senate committee stacked with trial lawyers, and a powerful trial lawyer-turned-governor all but sealed the fate of any meaningful reforms.

AUTO INSURANCE RATES – SECOND HIGHEST IN THE COUNTRY

The most comprehensive of these measures sought to lower auto insurance rates in Louisiana, which are the [second highest](#) in the country. It was dubbed the "**Omnibus Premium Reduction Act**," and considered the [most important](#) legislation of the session by the **Louisiana Association of Business and Industry**. Several of the bill's broad and diverse base of supporters addressed these issues with legislators at the Capitol, pleading for relief from the job-

killing costs of auto insurance. Though the bill received overwhelming bipartisan support in the House, picking up nearly two dozen coauthors, it met its [expected demise](#) with the **Senate Committee on Judiciary A**.

Fueled by a climate of lawsuit abuse, the high cost of auto insurance continues to plague Louisiana families and businesses. Litigation plays a significant role in increasing insurance company costs, subsequently leading to premium increases of [52 percent](#) since 2011 for Louisiana drivers. Some insurance companies are no longer writing policies in the state, leaving fewer companies to compete. Louisianans are feeling the effects on their pocketbooks, and some businesses are considering whether to relocate to less litigious states or close their doors.

Louisiana drivers pay a whopping [\\$2,298](#) per year annually for auto insurance, which is \$841 more than the national average and second only to Michigan – a no-fault insurance state. Further, roughly [53 percent](#) of Louisiana drivers are either uninsured or underinsured, encouraging those who are in a car accident to turn to the legal system to get a bigger payout.

Also, the state has more than twice the national average in bodily injury claims. According to the **Independent Insurance Agents & Brokers of Louisiana**, the state is about [average](#) when it comes to the number of accidents and property damage claims by individuals, but [bodily injury claims](#) are out of line with the rest of the country.

TRIAL LAWYERS TAKE ADVANTAGE OF HIGH JURY TRIAL THRESHOLD

Louisiana's jury trial threshold remains the nation's highest at [\\$50,000](#), which allows trial lawyers to go “judge shopping” for favorable venues, denying many citizens their fundamental right to a trial before a jury. This practice manipulates the system and increases insurance costs.

By comparison, this is [233 percent](#) higher than Maryland, which has the next highest jury trial threshold at \$15,000. Most states have significantly lower thresholds for jury trials, and [36 states](#) have no threshold at all. It is no coincidence that [53 percent](#) of claims in Louisiana are less than \$50,000.

The **14th Judicial District Court of Lake Charles, Calcasieu Parish**, is one of the preferred venues for plaintiffs' lawyers. They have filed a multitude of lawsuits targeting the oil and gas industry in the court over the years, [never asking](#) for more than \$50,000 in damages in order to stay below the jury trial threshold. Despite having low medical expenses, total damage amounts typically received by the plaintiff are close to the \$50,000 threshold.

SCAM TARGETING COMMERCIAL DRIVERS

A rash of recent lawsuits targeting semi-trucks in the metro New Orleans area [appear to be staged](#). The lawsuits [typically involve](#) multiple people in the claimant's vehicle, minimal (usually unnoticeable) damage to claimant's vehicle, little to no damage to the insured truck, and a commercial driver that is unaware of an accident or disputes that a collision occurred. Many of these cases involve the same attorneys and doctors and allege serious bodily injury and negligence against the trucking company, seeking a big payout. Damages sought include medical expenses, mental anguish, loss of enjoyment of life, physical pain and suffering and inconvenience.

One area transport company found evidence of more than [30 other accidents](#) in New Orleans fitting this description. Many insurance companies settle these cases, rather than expend the time and resources involved in going to trial – and facing Louisiana's “hometown justice.” Now that the scheme has been exposed, the tide may be turning. A federal judge [dismissed](#) a claim seeking \$1 million from a trucking company in April 2019, after the plaintiffs' attorney indicated that his clients would assert their Fifth Amendment right against self-incrimination due to a criminal investigation into the potential fraud. What the court did not dismiss, however, was a [counter-claim](#), filed by the insurer, alleging “that the plaintiffs conspired together to cause and/or stage [the] accident,” and that the lawsuit follows multiple similar claims wherein “18-wheelers on the I-10 or 610 in New Orleans are flagged down regarding accidents of which their drivers are unaware.” The criminal investigation into the staged accidents is [ongoing](#).

According to the **Louisiana Motor Association**, industry insurance costs are estimated at [three to five times](#) higher than the national average, with the state's litigious culture largely to blame. According to **Louisiana Insurance Commissioner Jim Donelon**, accident fraud adds [\\$600](#) in insurance costs for each family in Louisiana.

SEAT BELT GAG ORDER

For the second year in a row, two separate measures that would have made evidence of use of a seat belt admissible in civil proceedings failed to advance out of the **Louisiana Senate Committee on Judiciary A**. Under current state law, a jury is [not allowed](#) to consider the highly relevant evidence of whether vehicle occupants were wearing seat belts when determining damage awards.

TRIAL LAWYER ADVERTISING

The proliferation of trial lawyer advertising has become a real problem in Louisiana, cementing the trial bar as its own cottage industry. These advertisements promise “[jackpot justice](#)” versus sustainable jobs for Louisiana’s citizens. While Louisiana only has about 2 percent of the nation’s roadways, it is home to about 10 percent of the nation’s billboards. Of the state’s roughly [7,000 billboards](#), about 1,000 of them are paid for by attorneys.

A [recent study](#) by the **American Tort Reform Association** found television viewers in Louisiana’s three largest media markets were bombarded by more than 250,000 ads for lawyers, lawsuits and legal services on local television broadcasts in the second half of 2018. That translates into one legal services ad aired every minute on average in **New Orleans, Baton Rouge and Shreveport**, purchased at an estimated cost of \$16 million.

While there was no significant legislation to address this problem, one point of light during the legislative session was the passage of a [concurrent resolution](#) requesting the **Louisiana State Bar Association** and **Louisiana Supreme Court** review rules governing solicitation advertising by attorneys.

JUDICIAL MISCONDUCT AND LACK OF TRANSPARENCY

Louisiana’s judges are governed by the **Code of Judicial Conduct** and the **Louisiana Constitution**. In 2018, the **Judiciary Commission of Louisiana** received and docketed a total of [543 complaints](#) against judges and justices of the peace. Of this number, [216 complaints](#) were further reviewed to consider the need for investigation. The Commission filed [six notices](#) of hearing against four judges and two justices of the peace, with two judges retiring after formal proceedings were initiated.

One of these was [Judge Henry Brown](#), the chief judge of the state appeals court in Shreveport for 27 years. Brown [abruptly retired](#) after being suspended amid complaints that he had created a hostile environment toward colleagues who were hearing an appeal of a civil lawsuit against a friend.

In another case of alleged misconduct, the **Louisiana State Police** investigated and subsequently charged **St. John the Baptist Parish Judge Jeff Perilloux of the Fortieth Judicial District Court** with [three felony counts](#) of indecent behavior with a juvenile and one count of misdemeanor sexual battery. Perilloux has taken a leave of absence from the bench.

Meanwhile, [Louisiana Supreme Court Justice Jeff Hughes](#) has been the target of a [secret FBI investigation](#) for more than two decades. The investigation came to light after an exposé by a local media outlet. Allegations against Hughes include blatant conflicts of interest in cases before him and refusal to recuse himself. In one instance, Hughes declined to bring in another judge and ruled on his own alleged conflict. Not surprisingly, he [found none](#). Pointing to an ongoing lack of transparency, the [Judiciary Commission’s findings](#) are not routinely made public and there is no record of what – if anything – was done to address complaints about Hughes’ behavior. After Hughes advanced to the state’s high court, he filed a [federal lawsuit](#) against four of his fellow justices challenging their decision to [force his recusal](#) in two lawsuits against oil and gas companies because the plaintiffs’ attorneys contributed hundreds of thousands of dollars to his election in 2012. (A federal judge [dismissed](#) Hughes’ claim).

Prior to joining the Supreme Court, **Justice Hughes** claimed to have spent more than \$140,000 in legal expenses related to the federal probe. When it was all over, state taxpayers [picked up](#) most of the tab for his legal expenses, despite there being no public record of the allegations against him or public recriminations. Hughes recouped nearly \$100,000 of his legal costs by taking advantage of an obscure state law designed to protect state officials against unfair criminal allegations.

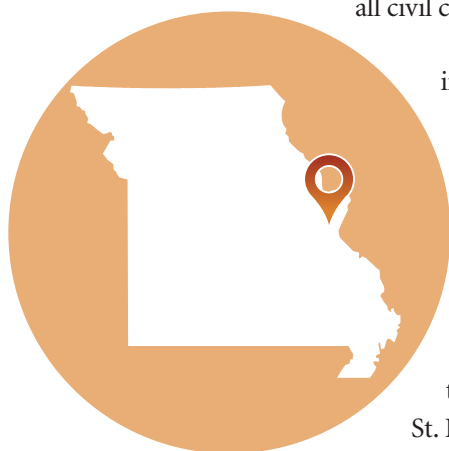
#5 CITY OF ST. LOUIS, MISSOURI

A perennial Judicial Hellhole, City of St. Louis once again appears on the list due to lack of reforms and a continuation of the status quo. St. Louis City judges continue to allow blatant forum shopping and excessive punitive damage awards.

Plaintiffs' lawyers flock to the city. In FY 2018, they filed [13,542 civil cases](#) in the City of St. Louis Circuit Court—in a city with an estimated population of [308,626](#). By comparison, the Circuit Court for St. Louis County had [5,366 cases](#) filed in it that year (about 40% of St. Louis City's volume) in a county with [996,726 people](#). St. Charles County only had [1,335 cases](#) filed (10% of the cases filed) in a county that is 33% larger than St. Louis City. In fact, [more than half](#) of

all civil cases pending in Missouri are in the City of St. Louis Circuit Court.

Excessive tort litigation in the greater St. Louis area results in [\\$909.1 million](#) in direct costs annually and a loss of 15,512 jobs. The excess costs result in a “tort tax” of \$571.95 per person. **Governor Michael Parson (R)** and key legislative leaders have taken some important steps to reform the system, but more remains to be done.



JUNK SCIENCE IN THE COURTS

Judges in the “Show-Me-Your-Lawsuit” state fail to ensure that cases they oversee are guided by facts that reflect the consensus of scientific and technical disciplines. Lawyers flock to plaintiff-friendly jurisdictions such as St. Louis because of their [reputation](#) for big awards, favorable rulings, and low barriers of entry. They aggressively recruit plaintiffs through extensive advertising to increase the pressure on defendants to settle. In one recent three-month period, trial lawyers spent [\\$1.2 million](#) on 14,000 television ads in St. Louis.

TALC LITIGATION

St. Louis is home to the largest talc verdict to date. In July of 2018, a City of St. Louis jury awarded [\\$550 million in actual damages and \\$4.14 billion](#) in punitive damages to a group of [22 plaintiffs](#). The women [claimed](#) that their ovarian cancer was caused by [exposure to asbestos](#) allegedly found in Johnson & Johnson's baby powder. Of the 22 women involved in the lawsuit, 17 had [no connection to Missouri](#). Each was awarded the same amount of money, despite there being “[different facts](#) for each, and differences in relevant law.” [After a six-week trial](#), jurors deliberated for less than a full day before reaching this astounding result.

Now, J&J is appealing the decision on several grounds, including whether the City of St. Louis was the proper venue for the case. This argument was strengthened following a decision by the **Missouri Supreme Court** in February 2019 when it dismissed a similar case against J&J after finding that St. Louis was not the proper venue. The Court held that plaintiffs who cannot themselves establish venue in St. Louis City cannot enter that forum through the backdoor by joining with one St. Louis City resident. This decision could have a far-reaching impact on talc litigation in the state. Of the [roughly 700 talc cases](#) filed in St. Louis, just 40 involve Missouri residents.

In addition to forum shopping, there is concern that St. Louis City judges allow plaintiffs' lawyers to introduce junk science. Expert testimony plays a crucial role in talc cases. Plaintiffs' “experts” tell jurors that talcum powder causes ovarian cancer, even though **the American Cancer Society** has found that research regarding this link is “mixed” and potentially “biased,” and that if there is an increased risk, the risk “is likely to be very small.”

- **Courts allow “junk science”**
- **Windfalls to plaintiffs' lawyers**
- **Liability-expanding decisions by high court**
- **Legislature enacts modest reforms, more to be done**

Even in generally plaintiff-friendly **New Jersey**, a judge [dismissed](#) two talc cases scheduled for trial after finding that the plaintiffs' experts who had testified in St. Louis were not qualified to testify in the Garden State.

The U.S. Food & Drug Administration has found that studies have not proven a link between talcum powder and cancer.

Nevertheless, defendants' pleas to have those so-called experts excluded from St. Louis trials have largely fallen on deaf ears. Despite the legislature enacting expert evidence reform in 2017, St. Louis judges have allowed this junk science to be heard in their courtrooms.

LIABILITY EXPANDING DECISIONS BY MISSOURI COURTS

'PHANTOM DAMAGES' PROVIDE WINDFALL TO PLAINTIFFS

In 2005, the **Missouri Legislature** passed [legislation](#) to improve the state's civil justice system that included a provision intended to prevent inflated damage awards. It provided that when seeking compensation for medical expenses, there is a presumption that the amount a healthcare provider accepted as payment for treatment is the value of the medical care (rather than initially invoiced amounts, which may be much higher). Five years later, the **Missouri Supreme Court** effectively [flipped](#) the statute on its head by [interpreting](#) it to [allow](#) plaintiffs' lawyers to present evidence of the invoices that no one ever paid, which was the very practice that the legislators intended to stop, and recover these phantom damages.

In 2017, the Legislature responded by [amending](#) the statute to explicitly state that lawyers may introduce evidence of the actual cost of medical care at trial, which is defined as not exceeding what the plaintiff or the plaintiff's insurer paid. That progress was again short lived. In December 2018, a Missouri appellate court allowed a plaintiff to recover fictional damages for overstated medical bills that were never actually paid or even owed. In [Brancati v. Bi-State Development Agency](#), the court held plaintiffs may still introduce the full amount indicated on a medical bill, even if no one paid it. The appellate court reasoned that the statute states that actual costs of medical treatment "may" be offered into evidence, but does not explicitly state that the amount charged cannot also be considered. Reading the statute in this manner, however, ignores the basic rule that when interpreting legislation, a court should not read it in a manner that renders it [meaningless](#), which is exactly what the appellate court did.

MEDICAL LIABILITY DECISION WILL LEAD TO LARGER AWARDS AGAINST DOCTORS AND HEALTHCARE PROVIDERS

A January 2019 Missouri Supreme Court decision is expected to result in significantly higher awards in medical liability cases against doctors and healthcare providers. To control medical liability costs while providing reasonable compensation for individuals whose injuries will require future care, the state legislature enacted a law allowing healthcare providers to pay some future damages in periodic installments, rather than upfront, and pay a lower interest rate on those damages. This year, in a case alleging a hospital failed to diagnose a rare genetic disorder, the state high court [invalidated](#) the lower interest rate, finding it would not provide a plaintiff with the full value of the jury's award.

COURTS ALLOWING ABUSE OF '065 AGREEMENTS

Missouri law permits a defendant to allow a plaintiff to obtain a judgment against it in court, so long as the plaintiff only seeks to collect the award from the plaintiff's insurer. Such agreements are known as '065 Agreements. In 2017, the Missouri legislature amended this law to require that parties give notice to the insurer of these types of agreements, so that the insurer can intervene and protect its interest if needed. In July 2019, the **Missouri Supreme Court** did not allow an insurer to use this law to intervene in a case that led to a \$6.9 million judgment against a nightclub it insured. In that case, [Desai v. Seneca](#), the Court found that the 2017 law did not apply because the agreement between the parties occurred before the legislature enacted the change.

Attorneys have found an additional loophole in the law to utilize the process of arbitration to shut out would-be intervenors from participating in the arbitration process. This is yet another egregious example wherein the court allows lawyers to undermine the legislative effort to rein in this abusive litigation practice of **Section 537.065**.

In 2019, the **Western District Court of Appeals** determined that an insurance company could not intervene in the arbitration proceeding or after the arbitration award was entered as a judgment. In [Britt v. Otto](#), the court denied the insurance company's motion to intervene and confirmed an arbitration award of almost \$6 million. The court ruled that the insurer, American Family, did not have a right to intervene in a suit to confirm an arbitration award based on a motor vehicle accident because the insurer did not show that it had the requisite interest relation to the property or transaction that was the subject of the suit. The court stated that "the liability of an insurer as potential indemnitor of the judgment does not constitute a direct interest in such a judgment so as to implicate intervention as of right in that action." Since this was American Family's stated interest in intervening, it did not have the right to intervene.

The dispute stemmed from an automobile accident. The parties involved in the accident executed an "Arbitration Agreement" and a separate Section 537.065 agreement in which they agreed to binding arbitration with respect to all issues arising out of the accident. The insured notified American Family of this agreement and provided the company with a copy of the Arbitration Agreement. The injured party was awarded nearly \$6 million in arbitration.

MODEST PROGRESS, BUT MORE NEEDS TO BE DONE

The **Missouri Legislature** and **Governor Parson** should be applauded for taking the first step towards addressing the blatant forum shopping that St. Louis judges have allowed to occur in the state for years. Missouri courts have been bogged down with claims from out-of-state plaintiffs, [as fewer than 10 percent](#) of plaintiffs in mass tort lawsuits filed in Missouri are actually state residents. This year, legislators enacted [S.B. 7](#) (2019), which prevents lawyers from combining the lawsuits of multiple plaintiffs to establish venue in a plaintiff-friendly court, such as the City of St. Louis. It [requires](#) individuals file a lawsuit where they live, where they were injured, or where the defendant has its principal place of business. The new law also generally requires those looking to join cases to have been injured in the same instance or under the same circumstances.

Governor Parson also signed [S.B. 30](#) into law during the 2019 legislative session, a bill that allows a jury to consider evidence of a plaintiff's failure to wear a seat belt when deciding who is at fault for injuries resulting from auto accidents in product liability cases. The bill appropriately allows a jury to place some of the responsibility on the plaintiff for actively choosing not to wear his or her seatbelt.

While the enactment of these bills is a positive development, several other key reforms failed to pass in 2019. Among the reforms considered were amendments to the **Missouri Merchandising Practices Act (MMPA)**, punitive damages reform, and an asbestos trust transparency bill. Similar legislation also [failed](#) to pass in 2018.

PUNITIVE DAMAGES

As the recent multimillion and multibillion dollar awards out of St. Louis show, punitive damage awards have gotten out of hand in Missouri. The Legislature had the opportunity to restore punitive damages to their intentional tort roots to provide clear notice of conduct that may result in punishment. [S.B. 65](#) provided that punitive damages should be available when there is clear and convincing evidence that the defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others. The bill was reported favorably from a Senate committee, but did not receive a floor vote before the session ended.

MISSOURI MERCHANDISING PRACTICES ACT (MMPA)

Lawyers have long abused the state's consumer law, the **MMPA**. They generate shakedown class action lawsuits alleging that product labels, advertisements, or other business practices are misleading where no reasonable consumer has been misled or lost money. They take advantage of a 2016 Missouri Court of Appeals [decision](#) that subjects companies to lengthy and expensive litigation, even for the most ridiculous of claims. The statute has become [overstretched](#) and expanded well beyond the intent of the drafters.

The **MMPA** is a popular vehicle for lawsuits because it provides for things such as attorney's fees and punitive damages. This [incentivizes](#) the trial bar to include an MMPA claim when filing personal injury and other lawsuits.

This poses a [real threat](#), particularly for small businesses, because punitive damages are not covered by insurance policies. Businesses faced with MMPA claims often settle given the unwillingness of Missouri courts to dismiss meritless cases, the cost of lengthy litigation, and the liability exposure if the case goes to trial.

In 2019, the legislature considered a package of reforms that would have reduced the opportunity for attorney-generated “[no-injury](#)” lawsuits. Claims that a business practice is misleading would be evaluated from the perspective of a “[reasonable consumer](#)” and there would be no award of damages unless consumers have actually suffered financial loss. The legislation also would have required any fees awarded to lawyers who bring these class actions to have a [reasonable relationship](#) to the amount of the judgment – making it more likely that these lawsuits provide a benefit to consumers, not just the lawyers who file them.

ASBESTOS TRUST TRANSPARENCY

St. Louis had the [6th highest amount of](#) asbestos lawsuit filings of any jurisdiction in the country in 2018, according to the consulting firm KCIC. The legislature, however, failed to enact [asbestos trust transparency reform](#). This legislation would have prevented plaintiffs’ lawyers from seeking compensation from trusts set up by companies that have already filed for bankruptcy as a result of asbestos litigation, asserting those companies are responsible for the plaintiff’s exposure to asbestos, then hiding this information when suing solvent companies in court.

#6 GEORGIA

Conditions in the “Peach State” have rapidly deteriorated over the past few years to the point that the state has become a full-blown Judicial Hellhole for the first time. Following the Georgia Supreme Court’s lead, trial courts across the state have issued liability-expanding decisions. Outrageous nuclear verdicts have become the norm. Premises liability and medical liability are the areas that have been targeted most heavily. The legislature must take immediate action to improve the legal environment if

Georgia hopes to be removed from the list anytime soon.

- **Dramatic expansion of premises liability**
- **Nuclear verdicts**
- **Medical liability on the rise**



DRAMATIC EXPANSION OF PREMISES LIABILITY

The **Georgia Supreme Court** set the stage for courts across the state to expand premises liability for landowners with its landmark decision in [Martin v. Six Flags Over Georgia](#). Here, the plaintiff was attacked by assailants at a bus stop outside of a Six Flags Over Georgia amusement park. A Georgia jury reached a \$35 million dollar verdict, imposing 92% of the damages on Six Flags and just 2% to each of the four named attackers. The state high court unanimously ruled that businesses are subject to liability for harm to a customer even when it is a result of crime that occurred off of its property if criminal activity is allegedly “foreseeable.” The Court required a retrial, but only because the trial court had improperly refused to allow the jury to even consider the fault of additional individuals involved in the attack.

This decision opened the floodgates to outrageous lawsuits and nuclear verdicts in premises liability cases. In 2019, for example, a [DeKalb County](#) jury awarded [\\$81 million](#) to a plaintiff that was shot by carjackers in a Kroger Store parking lot. Kroger was responsible for paying \$69.6 million of the award (just 14% of the fault was placed on the two attackers) despite a security presence. The supermarket was located in a high-crime area and had a security guard at the store entrance, but not in the parking lot.

In yet another 2019 case, a [Fulton County jury](#) awarded [\\$43 million](#) to a plaintiff who was shot in a CVS parking lot, where he had arranged to buy an iPad from another person. CVS was closed at the time. CVS argued that the plaintiff did not intend to purchase anything from the pharmacy and simply used the parking lot for his own convenience. The prevailing argument was CVS knew its store was in a dangerous location yet failed to provide adequate security.

The **Court of Appeals for Georgia** also weighed in on premises liability in 2019. The court [revived](#) a trucker's claim against a truck parts shop where the plaintiff was run over by another trucker following a robbery attempt. The trial court ruled that such an egregious attack was not foreseeable and the business could not be held liable. On appeal, however, the intermediate court reversed. Although the prior crimes involved thefts, not attacks, the appellate court found it foreseeable that someone could be hurt in the parking lot. The Court of Appeals failed to recognize what the trial court distinguished – acts of theft and property damage and physical assault are separate crimes. One type of crime occurring may not make the other crime foreseeable.

Finally, a **Muscogee County** jury awarded [\\$125 million](#) against a landlord to plaintiffs who alleged that the condition of an apartment, including the lack of air conditioning, led to a tenant's death, rather than the tenant's poor health.

NUCLEAR VERDICTS – THE NEW NORMAL IN GEORGIA

A Georgia-based trucking company will have to pay [\\$280 million](#) following a 2019 Columbus, Georgia verdict. The case arose out of a tragic accident in which five people were killed after a tractor-trailer operated by a Schnitzer Southeast driver collided with their vehicle. The jury awarded an astounding \$150 million for the value of the life of one passenger, \$30 million for pain and suffering, plus \$100 million in punitive damages and \$65,000 in attorney's fees. The jury expressed frustration over the company not apologizing for the accident; however, the plaintiffs' attorney moved to exclude the mention of any apologies during the trial. The plaintiffs' attorney also accused the company of putting a fatigued driver on the road; however, the driver had been on vacation for four days and the morning of the accident was his first day back at work. Finally, local nightly news coverage contained "inflammatory inaccuracies" that may have impacted the jury.

Also in 2019, a **Clayton County** jury awarded [\\$8 million](#) to a motorcyclist who was injured in a highway construction site. The plaintiff fractured his wrist and ankle after hitting a barrel that had ricocheted into his path after being clipped by a dump truck turning into the construction site.

These "nuclear verdicts" follow several other extraordinary awards in 2018. For example, a **Clayton County** jury issued a [\\$1 billion verdict](#) against a security company after an employee committed a sexual assault at an apartment complex. The plaintiff alleged that the company should not have hired the employee because he did not have a license to be an armed security guard.

More deep-pocket jurisprudence is expected, as litigants begin to feel the effects of a 2018 Georgia Supreme Court [decision](#) that allows plaintiffs' lawyers to introduce highly prejudicial evidence of a defendant's wealth, which was previously considered off limits. In that case, plaintiffs' lawyers presented the compensation, stock options, and other information about an automaker's CEO's personal assets. The jury considered this information when deciding compensatory damages in a tragic case involving a child killed by a reckless driver in a high-speed rear end collision. The result was a \$150 million verdict—the largest wrongful death award in the state's history. The trial court reduced the award to \$40 million, which Georgia's appellate court affirmed. By issuing this decision, the **Georgia Supreme Court** eliminated an outright prohibition on introduction of wealth evidence, and replaced it with an open-ended balancing test.

MEDICAL LIABILITY PAYOUTS ON THE RISE

In 2005, the **Georgia Legislature** enacted reasonable limits on noneconomic damages in medical liability cases. [S.B. 3](#) (2005) limited noneconomic damages awards, also known as "pain and suffering" awards, to \$350,000 per healthcare provider with an overall aggregate limit of \$1.05 million. The [purpose](#) of this bill was to "avoid a dimi-

nution in the access of healthcare services, which diminution would adversely impact the health and well-being of the citizens of the state.” Unfortunately, the **Georgia Supreme Court** [struck down](#) the statute on constitutional grounds in 2010. In doing so, the Court became an outlier, as [a majority of courts](#), both state and federal, have found these statutory limits to be constitutional. Since the Court’s 2010 decision, medical liability payouts in Georgia have been on a steady rise, reaching new shocking highs in recent years.

For example, a patient was awarded \$18 million in a medical liability suit alleging her doctor failed to timely diagnose and treat a spinal infection that ultimately caused the patient to become a paraplegic. This is the [largest medical malpractice verdict](#) in the history of the **Chatham County** court. The doctor argued that she complied with the standard of care and medical experts testified that the paralysis was a result of a stroke that stemmed from the patient’s known infection.

Next, a **DeKalb County** jury awarded \$12 million to a child who was born with birth defects and her family after her mother continued to take blood pressure medication while pregnant. Despite notes from her doctor recommending that she discontinue the use of the medication and prescription [warnings of danger](#) during pregnancy, claims against her OB/GYN were still permitted to go before a jury and he was found liable for over \$6 million.

Another family was awarded \$31 million in a suit alleging a hospital negligently handled an infant’s circumcision. This award is believed to be the [largest in the country](#) in a case of this kind.

HIGH COURT REFUSES TO REVIEW TROUBLESOME SANCTIONS

In November 2019, the Georgia Supreme Court denied a petition for certari in a case about whether a trial court’s imposition of “[death penalty](#)” sanctions (which strip a party of all its defenses) was extreme and exceeded its authority. The trial court issued these sanctions after veering away from relevant issues to the claim and traveling waywardly down a rabbit hole instead, prohibiting the case from being tried on the merits and eliminating the defendant’s access to justice. The sanctions did not actually address the mundane conduct at issue, which was an expert’s improper testimony. The sanctions treated as established that the automaker knew of the danger and sold the trucks with a willful and reckless disregard for life, and that the defect caused the plaintiff’s deaths. The **Georgia Court of Appeals** [refused to review](#) the sanctions immediately, forcing Ford to sit through a damages-only trial and then appeal the order once a final verdict has been rendered.

IMPORTANT CASES TO WATCH IN 2020

The **Georgia Supreme Court** is poised to rule in a case that will have vast implications for many Georgia businesses. After hearing [oral arguments](#) in August 2019, the Court is deciding whether a person whose information was stolen by a criminal must suffer [actual financial loss](#) to obtain a cash award or whether the threat of future harm is enough to obtain damages. In the spring of 2016, Athens Orthopedic Clinic refused to pay ransom to a hacker that obtained the personal information of 200,000 patients. The lawsuit alleges that the clinic is responsible for the data breach and seeks damages for what the patients have paid and will pay for credit monitoring, identity theft protection, and placing freezes on their accounts. The **Georgia Court of Appeals** ruled that because there is no actual financial loss or harm, the plaintiffs are not entitled to recover damages for potential or future injuries.

The **Georgia Supreme Court** also is considering whether to review another important case that could either further solidify the state’s position on the Judicial Hellholes list or represent the first steps toward improving the state’s legal climate.

On March 6, 2019, the **Georgia Court of Appeals** affirmed certification of a class action against SunTrust Bank that alleged as many as 400,000 customers were charged excessive overdraft fees. Customer contracts included a class action waiver as well as an agreement to have a judge decide the case, rather than a jury. The Court of Appeals found that these provisions were unenforceable. These types of provisions have gained [wide acceptance](#) across the country in a range of contractual settings because they allow disputes to be resolved in far less time and with less expense. The **Georgia Supreme Court** has the opportunity to bring the state closer to the mainstream.

END NOTES

- Trial lawyers are gearing up to [challenge](#) the constitutionality of the state’s \$250,000 limit on punitive damages. A Cobb County jury awarded a plaintiff \$5 million plus \$50 million in punitive damages, which under the statute would be reduced to \$250,000. The plaintiff’s lawyer, **Naveen Ramachandrapa**, has stated that once the judge enters a final judgment, “We’re going to ask the court to hold that the punitive damage cap cannot be constitutionally sound, because, under the Georgia Constitution, the issue of punitive damages is one for the jury to decide, not the Legislature.”

#7 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS

The powerful plaintiffs’ bar continues to dominate Cook, Madison and St. Clair Counties, and the legal climate has further deteriorated following the 2018 elections. The three counties are on the forefront of “no-injury” lawsuits and remain hotspots for asbestos litigation. Not only are the prospects for reform grim, but the state legislature passed an aggressive pro-plaintiff agenda in 2019 with more of the same expected in 2020.

This is disappointing news for a state in desperate need of economic growth and job creation. Excessive tort costs to the Illinois economy result in \$4.5 billion in annual direct costs and 81,685 jobs when dynamic effects are considered, according to a Perryman Group [study](#). Excessive tort litigation costs the [Chicago-Naperville-Elgin](#) metro area \$3.8 billion in direct costs and 68,024 jobs alone. These excess costs result in a “tort tax” of \$811.13 per person. Chicago has the [second worst](#) financial condition among the 75 most populous cities in the country.

- **Frivolous “BIPA” lawsuits allowed to proceed**
- **A hotbed for asbestos litigation**
- **A magnet for no-injury class action lawsuits**
- **Liability-expanding agenda pursued by legislature**

HYPER-LITIGIOUS CLIMATE OVERBURDENING ILLINOIS BUSINESS

ILLINOIS SUPREME COURT OPENS THE FLOODGATES TO “NO-INJURY” BIPA LAWSUITS



Illinois lawmakers enacted the [Biometric Information Privacy Act \(BIPA\)](#) in 2008, which provides a private right of action for those whose biometric information is collected, used, sold, disseminated or stored in a manner that does not fully comply with the state law. This made businesses vulnerable to massive potential liability in Illinois. Just since January 2018, more than [250 lawsuits](#) have been filed.

BIPA requires companies to inform an individual in writing and receive a written release prior to taking or retaining his or her biometric data. If a company fails to follow this procedure or meet other requirements, then any “aggrieved” person can seek the greater of \$1,000 or actual damages for each negligent violation, and the greater of \$5,000 or actual damages for each violation they allege was recklessly or intentionally committed.

Following BIPA’s enactment, class action trial lawyers immediately sought to cash in by targeting businesses that use iris scans, fingerprints and facial recognition data that are used increasingly to keep physical workplaces and sophisticated communications and cyber systems safe. These lawsuits do not allege any harm from collection of the information (which is encrypted) but seek substantial civil penalties along with attorney’s fees and litigation costs.

In January 2019, the **Illinois Supreme Court** issued its long-awaited decision in [Rosenbach v. Six Flags Entertainment](#). The court found that a plaintiff does not need to have suffered actual harm to maintain and win a lawsuit filed under BIPA. This liability-expanding decision immediately led to a flurry of BIPA class action filings.

In *Rosenbach*, the plaintiff sued the amusement park company for BIPA violations after the park collected and stored his son's fingerprints when they purchased a season pass so that they could easily enter and reenter the park. In a unanimous decision, the Court held that the mere violation of the statute was sufficient, meaning that a plaintiff only needs to show that a company took and stored biometric information without following the law's consent and disclosure rules.

Following the Rosenbach decision, BIPA lawsuits against [Walmart](#) and [Whole Foods](#) were filed by their employees. Employees in both suits allege that the employer improperly collected and stored employee fingerprint data. It is common practice for employers to collect this data when employees "clock-in," to keep track of hours worked. Plaintiffs simply allege that they weren't properly notified by the company before their fingerprints or handprints were scanned. They do not allege real world harm – i.e. the companies disclosed, profited from, or failed to secure the information.

Recently, the **U.S. Court of Appeals for the Ninth Circuit** made a similar ruling against Facebook, handing plaintiffs' lawyers a [big win](#). A three-judge panel [ruled](#) in August 2019 that three lawsuits using BIPA to target Facebook's photo tagging tool could move forward as a consolidated class action, despite class members not suffering any actual harm. The [risk of future harm](#), the Ninth Circuit found, was sufficient to provide the plaintiffs with standing to proceed in federal court.

The Illinois Supreme Court and Ninth Circuit rulings open the door to [even more aggressive no-injury](#) class actions and may discourage development and use of innovative technology.

For additional information about the growing liability concerns around BIPA and data privacy, see the "Closer Look" section later in the report.

A HOTBED FOR ASBESTOS LITIGATION

Madison County remains the preferred jurisdiction in the United States for plaintiffs' lawyers to bring asbestos claims, with [1,091 filings](#) in 2018, a slight decrease from the 1,129 in 2017. It still has almost [three times](#) the number of filings than its next closest competing jurisdiction, New York (347). Madison County makes up [twenty-seven percent](#) of 2018 filings nationwide, an increase in the concentration from 2017, despite the overall decrease in concentration in the Top 15 asbestos jurisdictions.

The playing field was further stacked against defendants when judges appointed **Barry Julian** as an Associate Judge on the Circuit Court that hears Madison County cases. Julian is a founding partner of [Gori Julian & Associates](#), one of the top asbestos filers in the nation. He was appointed to the bench to fill a vacancy in 2019 despite the fact that he had become a [Florida resident](#).

St. Clair County also continues to rise up the ranks as filings once again increased from 207 cases in 2017 to 268 in 2018. This marks a 30% increase, largely due to a [thirty-five percent increase](#) in lawsuits by the Gori Julian law firm claiming that asbestos is to blame for a client's lung cancer. Plaintiffs flock to both the Madison County and St. Clair County courthouses due to their plaintiff-friendly reputation, low evidentiary standards, and judges' willingness to allow meritless claims to survive.

"NO-INJURY" CONSUMER CLASS ACTION LAWSUITS

Illinois attracts consumer class action lawsuits targeting the food and beverage industry. Its courts are among the [most popular](#) in the United States for lawsuits alleging that something about a product's labeling or packaging could mislead a consumer.

For example, a class of consumers recently targeted Barilla in Illinois federal court over its "[no preservatives](#)" label on its Tomato Basil Sauce, asserting that the presence of citric acid makes this marketing misleading. While the lead plaintiff purchased the sauce in New York, he filed his lawsuit in Illinois. The plaintiff is represented by C.K. Lee of [Lee Litigation Group](#), who has filed numerous lawsuits targeting food companies across the country. Reason prevailed in that case, as the judge [ruled](#) that the plaintiff could not apply **Illinois Consumer Fraud and Deceptive Business Practice Act** claims to consumers nationwide.

Another significant type of food lawsuit filed in Illinois is one in which plaintiffs assert that a company falsely claims that the food is “natural” or contains no artificial ingredients. For instance, a plaintiff [sued](#) National Beverage Corporation in October 2018 over the “100% Natural” label on its LaCroix Sparkling Water. The company pushed back, arguing that its products were tested at an independent lab and were found to be “biobased” and “sourced entirely from plants.” The court, however, [denied](#) the company’s request for sanctions in July 2019, allowing the litigation to continue.

Slack fill lawsuits—those that allege that a product’s box, bag, or container has space that could fit more food—are also popular. This year, an Illinois federal court dismissed a lawsuit alleging that consumers are entitled to more Junior Mints. The court’s March 2019 [ruling](#) found that even if large boxes led consumers to buy the candy, the complaint did not claim that consumers overpaid.

Plaintiffs’ lawyers know that while some of their lawsuits will fail, in many cases, companies will settle even some of the most ridiculous claims to avoid the expense of litigation. Even an Illinois case claiming that consumers may think that Dunkin’ Donuts’ glazed blueberry donuts contain real blueberries led to a [private settlement](#) in October 2018, after a court [denied a motion to dismiss](#) the lawsuit.

ILLINOIS SUPREME COURT EXPANDS LIABILITY OF NON-MANUFACTURERS

Businesses that sell products in Illinois face heightened liability exposure in the state, following a state high court ruling that subjects sellers and distributors of products to product liability actions when a plaintiff is unable to collect a judgment against the responsible foreign manufacturer. Illinois, like many states, has an “[innocent seller](#)” law, which protects companies that merely sell or distribute a product, but play no part in designing, manufacturing, or labeling it, from claims alleging a product defect. To obtain this protection, the seller or distributor must identify the manufacturer so that the plaintiff can seek recovery for the injury from the responsible party.

The **Illinois Supreme Court** previously interpreted an exception in that law to allow suits against a non-manufacturer when the manufacturer is bankrupt or no longer exists. In [Cassidy v. China Vitamins](#), however, the Court found “other circumstances that effectively bar recovery of the full measure of judgment damages awarded” from the manufacturer permit an action to proceed against any non-manufacturer in the chain of distribution of the product. In that case, an injured worker obtained a \$9 million default judgment against a Chinese manufacturer in the **Cook County Circuit Court**, but was unable to collect the judgment. The court allowed the plaintiff to proceed with an action against the New Jersey company that imported the product.

This decision will have a large impact on non-manufacturers in the state – [\\$2.9 trillion](#) in products are imported from foreign manufacturers into the United States, and almost 80% come from Asian countries. This decision increases the risk of liability for companies who have an otherwise [faultless role](#) in the chain of commerce.

LEGISLATURE FOCUSES ON ‘PRO-PLAINTIFF’ AGENDA

The Illinois plaintiffs’ bar is one of the most powerful in the country. From 2001 to 2016, trial lawyers donated more than [\\$35 million](#) to campaigns of Illinois office seekers. The Illinois Trial Lawyers Association’s legislative political action committee contributed \$6 million, while the top 25 largest Illinois plaintiffs’ firms, their lawyers, friends and family contributed the remaining \$29 million. The trial bar looked to cash in on these donations after Governor J.B. Pritzker’s 2018 election. Following his victory, the floodgates opened and the legislature pursued an aggressive liability-expanding agenda in 2019.

The following bills were enacted:

- [SB 1596](#) – Eliminates the statute of repose for asbestos-related occupational diseases and excludes the cases from the **Illinois Workers’ Compensation Act** to allow them to sue employers.
- [HB 2233](#) – Places the use of special interrogatories at the discretion of trial judges, places inconsistent verdicts back into the hands of juries, and provides discretion to trial court judges to order new trials if there are inconsistencies between interrogatories and verdicts. The legislation seeks to “fix” a problem that did not exist.
- [HB 2472](#) – Expands liability under the **Illinois Consumer Fraud and Deceptive Business Practices Act (CFA)**.

The new law carves out from the statute’s regulatory compliance exemption claims alleging that the manufacture, distribution, or sale of product or service caused or contributed to cause bodily injury, death, or property damage. This change is an invitation to plaintiffs’ lawyers to use the state’s consumer protection law, which is intended to provide compensation for economic loss stemming from misleading advertising, to circumvent traditional requirements for product liability and other personal injury actions. The law guts the CFA’s existing safe harbor. Now, a defendant will no longer be able obtain dismissal of a CFA claim when a government agency specifically approved the practice or labeling at issue, if the plaintiff alleges the product contributed to personal injury.

The legislature considered additional bills that would expand liability. While they did not pass in 2019, they are expected to once again be introduced next year. This includes [multiple bills](#) that would expand liability under Illinois’ problematic BIPA law.

#8 OKLAHOMA

Once a national leader in enacting fair and balanced civil justice reform for plaintiffs and defendants, Oklahoma, regrettably, has become a place where pervasive liability expansion threatens to destabilize the economy.

Oklahoma Attorney General Mike Hunter and his litigation against pharmaceutical companies over the state’s opioid crisis have dominated the news cycles in 2019. His actions, coupled with liability-expanding decisions by the state’s Supreme Court and a legislative bottleneck caused by legislators backed by the plaintiffs’ bar, earned Oklahoma the unenviable distinction of being added to the Judicial Hellholes list.

- **Attorney General mishandles opioid litigation**
- **Court adopts expansive view of “public nuisance” law**
- **Court makes habit of issuing liability-expanding decisions**
- **Legislature’s failure to address problems**

ATTORNEY GENERAL CHOOSES POLITICAL DONORS TO BRING UNPRECEDENTED STATE LAWSUITS



AG Hunter’s opioid litigation came to a head in 2019 as the state began its long-awaited trial against Johnson & Johnson in May. Prior to the start of the trial, he reached settlements with Teva Pharmaceutical Industries and Purdue Pharma.

Time and time again, litigation has failed to solve the broader societal problems proponents state they want to address. Public health problems, like the opioid crisis, require comprehensive solutions designed by Congress, state legislators and federal and state public health officials and regulators. They are obligated to serve and protect the public, and they are accountable to us all. By contrast, lawsuits like AG Hunter’s case are driven by a profit motive that risks putting private interests above those of the broader public.

OUTSIDE LAW FIRMS HIRED BY THE STATE

In 2017, when AG Hunter joined scores of other states and municipalities in suing the makers of opioids, he chose not to rely on his own office’s lawyers or even hire one of the many plaintiffs’ firms experienced in pharmaceutical litigation. Instead, without any competitive bidding process, he awarded contracts to three law firms that had generously contributed to his campaigns over the years. In fact, one of the firms he selected – [Glenn Coffee & Associates](#) – does not even tout litigation as a service offered on its website. **Glenn Coffee** is a former Senate Pro Tem and was an advisor to Hunter’s 2018 campaign. Prior to the start of the Johnson & Johnson trial, Coffee [withdrew his services](#), but not before his firm became entitled to collect [millions](#) of dollars from the settlements with Teva and Purdue Pharma.

Another firm, Texas-based [Nix Patterson](#), a key player in the tobacco litigation in the '90s, boasts to clients the availability of its private plane – because apparently flying commercial just takes too long. All told, the employees and families of the three firms selected by Hunter contributed at least [\\$72,500](#) to his political campaigns.

When asked to justify the hiring of outside counsel in the opioid litigation, governments and their lawyers point to the “success” of the tobacco litigation from a generation ago. A closer examination of the experience proves that corruption can be a real problem in such cases when enormous sums of money are on the line, and litigation cannot assure that settlements address the underlying problem.

SETTLEMENTS AND FIRST VERDICT

In April of this year, **AG Hunter** reached a [\\$270 million settlement](#) with Purdue Pharma, just weeks before the case was scheduled to go to trial. In doing so, AG Hunter [spurned the legislature’s fundamental authority](#) regarding state funds and apportioned the money himself. The generous campaign donors he hired to represent the state on a contingency fee basis are to be paid almost \$60 million in fees, nearly five times more than the amount designated for municipalities and counties in the state. The [bulk of the settlement](#) went toward establishing a Health and Wellness Center at AG Hunter’s alma mater, **Oklahoma State University**, [where his son also happens to be employed](#).

In a sharp rebuke of AG Hunter following the Purdue settlement, the Oklahoma Legislature and **Governor Kevin Stitt (R)** joined forces to preserve the legislature’s authority to expend state funds and determine how settlement money is allocated.

This new law jeopardized the validity of Hunter’s settlement with Teva reached just days before the company’s May trial was scheduled to begin. Following enactment, the judge in the opioid litigation demanded full transparency from Hunter and [requested](#) that he explicitly state how the money would be allocated in compliance with the new law. This request came in response to [concerns raised](#) by **Governor Stitt** and two high-ranking lawmakers who feared that the AG’s handling of the settlement might violate the new law. In a June 2019 filing, **AG Hunter** laid out the [details of the Teva settlement](#) and disclosed that the outside counsel would receive \$12.75 million – 15 percent of the \$85 million settlement.

While Purdue and Teva settled, Johnson & Johnson went to trial. After a bench trial, **Cleveland County District Court Judge Thad Balkman** [ruled](#) that the company had created a public nuisance through its marketing of ingredients used to make opioids. Judge Balkman [awarded](#) \$572 million to fund an “abatement program” in August 2019—an amount he viewed as equal to that which is needed to combat the opioid epidemic in the state for one year. It is an extraordinary sum, though far less than the \$17.5 billion sought by the state. About six weeks later, however, Judge Balkman admitted that he had made a \$107 million [math error](#), and indicated that he would reduce the judgment to \$465 million. J&J has filed an [appeal](#), which, among other issues, raises the question of whether a nuisance must be connected to a property. [According](#) to J&J, the judgment has “grave implications for all businesses operating in the state,” carries “immense public policy implications” and is “threatening wide-ranging liability” for companies that operate in the Sooner State.

INVENTIVE PUBLIC NUISANCE LEGAL THEORY

Historically, public nuisance law involved instances in which a property owner’s activities unreasonably interfered in a right that is common to the public, usually affecting land use—not the manufacturing of a legal and highly regulated product. Typical cases include blocking a public road or waterway, or permitting illicit drug dealing or prostitution on one’s property. Now, Oklahoma has expanded the law to cover costs related to a public health crisis. Oklahoma law now is well outside of the legal mainstream as evidenced by a May 2019 decision [in North Dakota where a judge dismissed a similar claim](#) against Purdue Pharma.

Manufacturers should view the Oklahoma judgment with great concern, as the applicability of vague public nuisance law to other activities will grow, particularly as states look to perceived deep pockets to fund public health or other programs. By this logic, cell phone manufacturers could be held liable for harm caused by distracted drivers. Similarly, auto-manufacturers might be held liable for accidents caused by drunk drivers. And manufacturers of alcoholic beverages could be liable for economic costs and injuries associated with alcoholism. If allowed to stand, this case certainly opens the door to those possibilities.

Hunter’s use of public nuisance law in the opioid context is of particular interest given that he took a dramatically different position regarding public nuisance law in another high-profile case. In May 2019, Hunter joined 17 fellow state AGs in filing an [amicus brief](#) in a climate change case in a federal appeals court in California. In that instance, the AGs argued that use of public nuisance law is inappropriate. The brief states that “the issues surrounding climate change and its effects—and the proper balance of regulatory and commercial activity—present political questions that cannot be resolved by judicial decree.” It also should be noted that in July of 2018, Hunter authored an op-ed entitled, “[Lawsuits are not the answer to climate change](#).” In this piece, he explicitly stated, “you cannot litigate what legislators refuse to legislate and regulators refuse to regulate.”

This is a sound and reasoned analysis, but he fails to follow the same reasoning in the state’s opioid litigation. In fact, one could switch out the words “climate change” for “opioids” as done [here](#), and Hunter’s op-ed, in our view, would be equally true. He also cautions that if the courts adopt this expansive view of public nuisance law, it would lead us into a situation in which virtually anything could be deemed a public nuisance. We agree with AG Hunter – in the context of the climate change case.

While the litigation around climate change and the opioid crisis are different matters, they each intend to “solve” complex problems through litigation. Attempting to resolve a public health crisis in court, however, requires the court to assume the responsibilities and authority of the other two branches of government.

OKLAHOMA SUPREME COURT MAKES HABIT OF ISSUING LIABILITY-EXPANDING DECISIONS

Throughout the first half of 2019, the **Oklahoma Supreme Court** significantly diminished the role of the legislature with regard to civil justice policy by handing down activist opinions that either strike down existing laws or interpret them with a complete disregard for their plain meaning.

COURT STRIKES DOWN CHECK ON EXCESSIVE AWARDS

In April 2019, the **Oklahoma Supreme Court** issued its long-awaited [decision](#) in *Beason v. I.E. Miller Services*. In doing so, the court abandoned established legal precedent and held that the state’s statutory limit on noneconomic damages was a “special law,” and therefore, unconstitutional.

In 2011, the state enacted legislation that generally limited noneconomic damages, such as awards for pain and suffering, to \$350,000 per person in personal injury cases. The law did not impact the ability to recover other damages such as current and future lost wages and medical expenses. In striking down the law, the court applied head-scratching reasoning. Since Oklahoma’s constitution prohibits limiting damages in cases in which a person has died, the Court reasoned that the legislature could not treat cases in which a person was injured, but lived, differently. Logic suggests precisely the opposite: A constitutional provision that says the legislature cannot limit recovery in cases in which injuries result in death suggests that it can do so in other cases.

This was a blatant overreach by the court. As **Justice James Edmonson** stated in the dissent, “[a] legislative cap on damages...is included within the historically recognized role of a legislature in defining, creating, or abolishing a legal cause of action.” Most courts have [respected](#) the prerogative of legislatures to enact reasonable limits on awards for pain and suffering. Unfortunately, the Oklahoma Supreme Court did not.

ACTIVIST COURT EXPANDS DAMAGES DESPITE CLEAR LEGISLATIVE LANGUAGE

The Court’s elimination of the statutory limit on noneconomic damages is far from the only way in which it has increased liability exposure in 2019. The Court also expanded a treble (triple) damages statute, which it described as “absurd.”

In *McIntosh v. Watkins*, an intoxicated driver rear-ended a vehicle, injuring the two occupants. Both vehicles pulled over to discuss the accident, but when the plaintiff stated that he needed to call the police to report the accident, the intoxicated driver returned to his vehicle and fled. He was later arrested and charged with driving a motor vehicle while under the influence of alcohol and leaving the scene of an accident involving damage.

Months later, the parties settled all of plaintiff's bodily injury claims, but did not resolve whether the plaintiff was entitled to treble damages for the damage sustained to his vehicle. An Oklahoma law provides that treble damages are available "in an accident resulting only in damage to a vehicle" when the driver that caused the damage leaves the scene of the accident. The intent of the law, it would seem, is to provide additional compensation to the owner of a damaged vehicle who might otherwise have to go to court to pursue a relatively small amount and to discourage negligent drivers from hitting and leaving a vehicle, even if no one is harmed. Since the plaintiff had sustained physical injuries, the trial court properly ruled he was not entitled to treble damages.

In a 5-4 decision, the **Oklahoma Supreme Court** reversed the lower court, finding that the treble damages statute applied even when the accident involves more than property damage. The majority decided that, in its view, the statute was ambiguous and its opinion prevented an "absurd interpretation" that would lead to greater harm.

In a [strongly worded dissent](#), **Justice Patrick Wyrick** wrote, "The majority arrives at this counter-textual conclusion by employing an all-too-familiar interpretive device: when a statute doesn't say what the Court thinks it ought to say, it declares the statute ambiguous and then, under the guise of ascertaining 'legislative intent,' resolves the so-called ambiguity by assigning to the statute whatever meaning aligns with the Court's policy preferences."

"When a statute doesn't say what the Court thinks it ought to say, it declares the statute ambiguous and then, under the guise of ascertaining 'legislative intent,' resolves the so-called ambiguity by assigning to the statute whatever meaning aligns with the Court's policy preferences."

– **Justice Patrick Wyrick**

It is the legislature's job to establish public policy, and it is inappropriate for the judiciary to substitute its judgment for that of the legislature, no matter how misguided it believes the legislature to be. Judges who allow their decision-making to be guided by policy preferences, rather than the plain meaning of a statute, undermine adherence to the rule of law.

OKLAHOMA SUPREME COURT IMPEDES WORKERS' COMPENSATION REFORM

In March of 2019 the **Oklahoma Supreme Court** once again undermined the Legislature's civil justice reform efforts by [shifting the burden of proof](#) in workers' compensation cases onto the employer. The case arose out of a "slip-and-fall" incident in which a nursing assistant injured her knee when it gave out and she fell.

When asked at her hearing whether she had slipped on any substance on the floor, the nursing assistant stated that she was not aware of anything on the floor; in fact, she said that had she seen anything on the floor, she "would have picked it up or wiped it up with paper towels." It was thus uncontroverted that her fall was not caused by some slippery substance on the floor, but rather was the result of her knee giving out.

An expert for her employer concluded that the assistant suffers from patella-femoral malalignment, a previously unidentified pre-existing condition that can cause her right kneecap to dislocate out-of-socket and to relocate into socket.

An administrative law judge, the **Workers Compensation Commission** sitting en banc, and a three-judge panel of the Court of Civil Appeals, reviewed the evidence and unanimously concluded that the assistant failed to prove that her knee injury was work-related. Crucial to this conclusion was that her expert witness had based his compensability conclusion on a fact that did not exist: that the assistant "slipped on a wet floor while getting ice." That fatal flaw in the expert's conclusion left the assistant unable to meet her burden of proof.

The divided **Supreme Court** reversed the denial of benefits, finding no credible evidence that the claimant had a pre-existing injury and improperly shifted the burden of proof to show a medical condition is work-related from the employee to the employer. In his [dissenting opinion](#), **Justice Wyrick** wrote that, "the majority's apparent adoption of a standard of review expressly rejected by the Legislature when it enacted the AWCA [**Administrative Workers' Compensation Act**, Oklahoma's Workers' Compensation reform] is indicative of a broader and more troublesome trend of decisions of this Court reverting our workers' compensation laws to what they were prior to the AWCA." And that these efforts are "merely the latest in the Court's death-by-a-thousand-cuts dismantling of the

Legislature’s efforts.” Once again, the **Oklahoma Supreme Court** substituted its judgment for that of the elected – and accountable – legislators.

LEGISLATORS DO TRIAL LAWYERS’ BIDDING, REFUSE TO MOVE MUCH-NEEDED LEGAL REFORMS

The **Oklahoma Legislature** has a [rich history](#) of addressing civil justice issues through legislative reforms. For much of the early 2000’s, the state was a [national leader](#) in enacting legislation to ensure a fair and balanced judicial system. This contrasts sharply with recent years when the legislature has failed to enact commonsense reforms.

[House Judiciary Chairman Chris Kannady](#) has been a key member of the Oklahoma legislature since 2014. A [well-known beneficiary](#) of trial lawyer campaign contributions, Representative Kannady works for [Foshee & Yaffe](#), an Oklahoma City law firm with a robust personal injury practice. The firm currently is looking to [aggregate plaintiffs](#) for litigation over medical conditions they seek to blame on Roundup®.

Representative Kannady took the highly unusual step of [leading a movement](#) to oust several legislators during the 2018 elections. Unfortunately, many of these legislators were consistent supporters of legal reform in the past.

A return by Oklahoma to its legal reform mindset would be a welcome development. In particular, legislation such as the **Transparency in Private Attorney Contracting Act (TiPAC)**, a version of which has been enacted in [23 states](#), would ensure greater transparency in the hiring of outside counsel by the state, and, in the process, help to ensure that litigation brought by the state serves the interests of Oklahomans, not the profit motives of outside law firms. This would be a good start to return to national leadership on reforms and to remove the state from the Judicial Hellholes list.

#9 MINNESOTA SUPREME COURT/TWIN CITIES

Making its first appearance on the Judicial Hellholes list in 2018, the Twin Cities continue to move in a troubling direction. The Minnesota Supreme Court issued a series of liability expanding decisions that will impact a number of industries and lead to higher insurance costs for consumers. Additionally, much-needed reforms stalled in the legislature, making prospects of improvement grim.

LIABILITY EXPANDING DECISIONS BY COURTS

Minnesota courts, led by the state Supreme Court, have developed a propensity for issuing liability expanding decisions that have a broad impact on both consumers and businesses across the state.

- **Court expands medical liability**
- **Court continues to disregard U.S. Supreme Court precedent**
- **Court upholds unwarranted sanctions**
- **Legislative reforms continue to stall**



MINNESOTA SUPREME COURT EXPANDS LIABILITY FOR HEALTH CARE PROVIDERS

The **Minnesota Supreme Court** issued a troublesome medical liability decision that will drastically increase liability for doctors practicing in the state. In [Warren v. Dinter](#), the Supreme Court found that a doctor can face a medical liability suit even when no traditional physician-patient relationship exists. The suit arose when a doctor refused to admit a patient who was being treated by a third-party nurse. After examining the patient, the nurse contacted Fairview Range Medical Center to arrange for hospitalization. Fairview randomly assigned the call to the defendant and after speaking for a short time, the doctor did not admit the patient. The nurse then released

the patient and he died a few days later from an untreated infection. The lower court rejected the plaintiff's lawsuit, but the high court reversed their decision and held that a physician [can be held liable](#), even in the absence of a physician-patient relationship, if it is "reasonably foreseeable that the third party will rely on the physician's acts and be harmed by a breach of the standard of care."

The medical community worries about the unintended consequences of this decision. The [Minnesota Medical Association](#) fears that "this expansion of liability has the potential to curtail physician collaboration and informal consultation, and will ultimately result in harming patients." This decision places the state outside the mainstream, with a majority of states requiring a patient-physician relationship. As a result, health care providers might refuse to collaborate with other healthcare providers, since they put themselves at risk for a lawsuit. The decision also is certain to drive up the price of medical malpractice insurance, which will ultimately be passed on to patients. Minneapolis already is the [most expensive city](#) in the country for a primary care visit.

COURT RULES "PROOF OF INDIVIDUAL RELIANCE" NOT REQUIRED UNDER STATE'S CONSUMER LAW

In November 2019, the **Minnesota Supreme Court** ruled that "[proof of individual reliance](#)" is not required to establish causation of harm under the **Minnesota Consumer Fraud Act (MCFA)**. This more relaxed standard creates a rebuttable presumption that the harm suffered by a sizeable number of victims exists for hundreds or thousands of similarly situated consumers. In [State of Minnesota v. Minnesota School of Business](#), students sued two for-profit schools that offered undergraduate and graduate programs in the field of criminal justice. The schools advertised that these degrees could be used to get jobs as police or probation officers. The degrees did not meet the standards for these jobs, so the schools were sued by the attorney general under the state's consumer fraud statute. Testimony by 15 witnesses was used to establish harm to over 1,000 other students who attended the same schools, in order for those students to also recover monetary damages. The Court improperly assumed that all 1,000 plus students chose to attend the schools because of the deceptive advertisements, and ignored [other possibilities](#) such as location, favorable review from other attendees, or personal education or career goals.

COURT EXPANDS BUSINESS LIABILITY UNDER WORKERS' COMP LAWS

The **Minnesota Supreme Court** overturned a [30-year-old precedent](#) by allowing a person who experienced a work-related injury to bring a lawsuit under the state's **Human Rights Act** in addition to seeking workers' compensation. Under previous court rulings, an employee could generally only sue under the **Workers' Compensation Act** or the **Human Rights Act** – not both. In [Daniel v. City of Minneapolis](#), the Court ruled that the exclusivity provision of the Workers' Compensation Act does not preclude some disabled employees from also filing claims under the Human Rights Act.

The Court based its reasoning on its perceived differences between the two statutes. It said that the **Human Rights Act** is not intended to compensate workers for injuries. Rather, it [redresses discrimination](#) in the workplace "as well as the loss of a fair employment opportunity because of the alleged failure to accommodate his physical disability."

As pointed out by the dissent, however, this decision will allow some employees to receive double recovery for the same injury and may lead to a proliferation of [failure-to-accommodate](#) litigation over workplace injuries.

MINNESOTA SUPREME COURT ALLOWS JURISDICTION OVER OUT-OF-STATE COMPANY, DISREGARDING CLEAR GUIDANCE FROM SCOTUS

In July 2019, the **Minnesota Supreme Court** [upheld](#) a trial court's decision to exercise jurisdiction over a business located in another state that had no connection to the plaintiff or product involved in the lawsuit.

In [Bandemer v. Ford Motor Corp.](#), a Minnesota resident injured in a car accident sued Ford Motor Company, alleging the vehicle's airbag did not properly deploy.

The **U.S. Supreme Court** has [instructed](#) that in order for a state court to consider a lawsuit against an out-of-state business, the lawsuit must arise out of or relate to the business's contacts with that state. "There must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State," the high court said.

Ford asked the court to dismiss the lawsuit because it lacked personal jurisdiction over the company, since

the car involved in the accident was not designed, manufactured, or originally sold in Minnesota. Despite this lack of connection to the state, the **Minnesota Supreme Court** upheld the trial court's finding that it could exercise jurisdiction because Ford had "target[ed] Minnesota for sales of passenger vehicles, including the type of vehicle at issue." The Court held that due process requirements are met as long as a defendant can "relate to" a claim. As the [dissent](#) observed, however, all of Ford's conduct alleged by the plaintiff – i.e. negligently designing and warning about the car and placing it into commerce – took place outside Minnesota.

This decision put Minnesota outside the mainstream as a majority of courts do not allow the exercise of specific personal jurisdiction when a defendant's in-state contacts have no causal connection to a plaintiff's claim. The decision is on appeal to the **U.S. Supreme Court**.

EXPANSION OF BAD FAITH LAW

Following the liability-expanding path laid out by the **Minnesota Supreme Court**, the **Court of Appeals** expanded bad faith liability for insurers. As a result of [Peterson v. Western National Mutual Insurance Company](#), insurers who lose first party coverage disputes will be found to be operating in bad faith.

In this case, the plaintiff, injured in a car accident, made a claim under her underinsured-motorist policy to cover costs not picked up by the driver at fault. The plaintiff had demanded the insurer pay the full policy limit, \$250,000. Western National, however, questioned the need for a lifetime of Botox injections to treat headaches after a minor car collision, particularly given her previous car accidents and existing health problems. The company believed she was fully compensated by the \$45,000 settlement she received from the driver and \$20,000 paid by Western National in no-fault medical benefits. Western National made multiple settlement offers, which the plaintiff rejected. The parties went to trial and the plaintiff was awarded more than \$1.4 million, including \$900,000 for past and future medical expenses. She then brought and won a bad faith claim against the insurer.

At issue on appeal was the meaning of an "absence of a reasonable basis" for denying a claim, which is not defined by the statute and allows a bad faith action. The insurance company interpreted the statute to preclude bad faith liability if facts or evidence supported its decision to deny coverage. The court, however, [adopted](#) a more expansive, pro-plaintiff interpretation. It required an insurer to "conduct a reasonable investigation and fairly evaluate the results." This opens the door to courts imposing bad faith liability in hindsight, based on what a jury ultimately finds in the underlying case, rather than whether the insurer had a legitimate basis for denying the claim.

Adoption of this pro-plaintiff standard signals that Minnesota courts are prepared to impose bad faith liability on insurers, even when there is a good faith reason for denying coverage. The **Minnesota Supreme Court** has accepted the appeal of this decision and oral arguments are expected to take place in the near future.

SUPREME COURT PROMOTES FORUM SHOPPING

In October 2019, the **Minnesota Supreme Court** [held](#) that Minnesota's post judgment interest rate, not the federal post judgment interest rate, applied to **Federal Employers' Liability Act (FELA)** suits. The Court had to determine "whether the state law is substantive or procedural in nature," in order to determine which interest rate applied. The Court found that post judgment interest affects procedural rights, and therefore, state law applied. Minnesota has a statutory post judgment interest rate of 10 percent, much higher than the federal rate of .058 percent.

As the [dissent](#) points out, one of the underlying purposes of FELA is to provide "uniformity between state and federal courts." According to dissenting **Justice Barry Anderson**, "questions concerning the measure of damages in an FELA action are federal in character ... even if the action is brought in state court." The majority erred in finding interest rate laws to be governed by state law. By allowing plaintiffs to recover the higher post judgment interest rate specific to Minnesota, the court is opening the door to forum shopping. Plaintiffs will flock to Minnesota courts in order to recover higher damages not available in other courts.

HIGH COURT ALLOWS 'PHANTOM DAMAGES' AWARD UNDER COLLATERAL SOURCE RULE

In October 2019, the **Minnesota Supreme Court** [ruled](#) that a defendant is not permitted to reduce an award of past medical expenses based on the difference between the amount billed for medical services and the amount

actually paid under the state's Medicaid program. This allowance of "phantom damages" unfairly provides a wind-fall for the plaintiffs at the expense of the defendant.

A motorist was injured when she crashed her car into a bus which failed to yield at an intersection. She sued the bus driver and the bus company. The plaintiff's medical expenses were fully covered by two managed-care organizations that contracted with the state's Medicaid program. The plaintiff incurred medical expenses of \$224,998. The jury awarded the plaintiff \$224,998 in damages, even though the two managed-care organizations negotiated the actual price paid down to \$45,979. The trial judge allowed in evidence of these discounts under the state's collateral source statute to reduce the award from \$224,998 (medical expenses billed) to \$45,979 (expenses actually paid after discounts).

APPELLATE COURT UPHOLDS UNWARRANTED SANCTIONS

[Judge Amy Dawson](#) of the [Hennepin County District Court](#), the largest trial court in Minnesota and the court for Minneapolis, imposed sanctions on BNSF Railway in a case lacking basic fairness. The trial judge's actions helped solidify the Twin Cities designation as a [Judicial Hellhole](#) in 2018. Unfortunately, a state appellate court [upheld](#) her problematic ruling in April 2019.

The facts are as follows – a railroad employee alleged that exposure to "hazardous chemicals" while working next to a specific railcar in BNSF's yard in January 2014 led to permanent injuries. BNSF conducted an immediate and [thorough investigation](#) with the local fire department, company hazmat responders and two emergency-response contractors. They found no odors, signs of leakage, or abnormalities in the railcar identified by the plaintiff.

It was not until [three years later](#), in the midst of litigation, that the plaintiff for the first time declared his injuries resulted from exposure to "hydrocarbons" leaking from one of eleven different railcars, not owned or leased by BNSF, located on a different track in the yard. The court ordered BNSF to make those eleven cars available for inspection during the discovery stage of the litigation. The railroad was unable to do so because three years had passed and they did not own or lease the cars in question.

Following BNSF's inability to produce the cars, the plaintiff asked the court to sanction the railroad. The motion of sanctions was not limited to the missing cars but broadly claimed the railroad had discarded evidence and other misconduct, [without supporting evidence](#).

In the sanctions motion, the plaintiff did not show the product transported in the specified cars on the day of his alleged injury were "hydrocarbons," also known as "natural gas condensate." He argued, however, that he ["unearthed" documentation](#) that BNSF reported to the federal government on six different occasions the unintentional release of "natural gas condensate" around the same time period of his alleged exposure. Plaintiff argued that this proved BNSF had additional documents concerning the exposure that it failed to produce and that the material in the cars must have been "natural gas condensate."

BNSF repeatedly disputed the accuracy of this information and offered to provide testimony in support of its position. But the court refused to consider the evidence, and instead, wholly accepted and adopted the plaintiff's claims.

Data in the documents relied upon by the plaintiff were [later corrected](#) by the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration because a technical glitch in the reporting system inaccurately reported "natural gas condensate" as the technical/trade name for BNSF's submission of the materials involved in the incidents. Despite this fact, the judge [relied on the inaccurate data](#) and denied BNSF's attempt to introduce refuting evidence.

As a [sanction](#), [Judge Dawson](#) struck all of BNSF's [liability and causation defenses](#), allowing the case to proceed to trial solely on the issue of damages, and ordered BNSF to pay the plaintiff's attorney's fees and costs. Essentially, BNSF was forced to go to trial with both hands tied behind its back. BNSF was denied the opportunity to present evidence indicating that the plaintiff's condition actually resulted from an [underlying pre-existing](#) condition and natural causes, not the alleged exposure to chemicals. The judge unfairly stripped BNSF of its right to have a jury decide the question of liability, and it simply became a question of how much money the plaintiff should be awarded.

In a result that should surprise no one, the jury returned a [\\$15 million verdict](#). In April 2018, **Judge Dawson**, again [without a hearing](#) or any responses by Plaintiff to BNSF's post-trial motions, denied BNSF's post-trial motions and [entered final judgment](#) against the company. Three months later, the court [fined](#) BNSF an additional \$4.6 million, in addition to ordering the railroad to pay \$1.1 million of the plaintiff's attorneys' fees and \$89,600 in expenses.

LEGISLATIVE REFORMS CONTINUE TO STALL

Once again, the **Minnesota Legislature** failed to move meaningful reforms in 2019. While the **Senate Judiciary Committee** passed a number of bills, they stalled once out of committee. The much-needed reforms included (1) a repeal of the state's [Seat Belt Gag Rule](#), which would allow evidence as to whether plaintiffs were wearing their seatbelts; (2) [judgment interest rate reform](#) bill that would lower the current excessive 10% rate to a more reasonable 4%, which is the current rate for all government entities in the state; and (3) a bill that would merely [codify existing law](#) that there is no duty of care owed to trespassers to guard against judicial adoption of an extreme proposal of the **American Law Institute**. [Twenty-four other governors](#) of both parties have signed such legislation since 2011. All three bills were previously passed by the legislature in 2017, but were [vetoed](#) by **then-Governor Mark Dayton (D)**.

The plaintiffs' bar pursued its own agenda in 2019, and while nothing passed, many bills are expected to return in 2020. One significant liability-expanding [bill](#) introduced in 2019 would declare that any private lawsuit alleging a violation of the state's consumer protection law is "in the public interest." This designation would allow courts to award plaintiffs' lawyers their attorneys' fees and encourage an onslaught of lawsuits.

Another bill would prohibit so-called "[family exclusions](#)" in property-casualty insurance policies, which insurers say are necessary to prevent moral hazard where two related parties both benefit from the proceeds of a liability insurance claim. Courts in Minnesota have long upheld the exclusions, noting the severe damage to insurance markets that lack protection from fraudulent and severely overinflated claims from spouses filing lawsuits against each other. Only three other states allow similar exclusions to be prohibited. In addition to also potentially clogging the courts, the bill could lead to higher insurance premiums.

Finally, plaintiffs' lawyers pushed a bill that would eliminate the ability of businesses to offer a service that has inherent risks so long as consumers agree to waive liability for [ordinary negligence](#). Current law prohibits waivers of liability for more serious conduct, such as reckless, grossly negligent, or intentional acts. By adding ordinary negligence, the bill would completely bar waivers as "void and unenforceable." The plaintiffs' bar has tried to eliminate such waivers since 2013. If enacted, the bill would have an extreme impact on Minnesota's economy and recreational lifestyle.

END NOTES

- **Justice David Lillehaug** announced he will not run for reelection next year due to health issues. **Governor Tim Walz (D)** will appoint a replacement in 2020.
- **Lori Sklar**, a Minnesota class action lawyer, was disciplined for inappropriate behavior. She sought [\\$24 million in attorneys' fees](#) for her work on a Toshiba case, stating that she worked up to 16.75 hours, seven days a week, even on holidays, for 22 months. Toshiba questioned whether this was accurate and asked to search through metadata on her computer to see if she legitimately had worked that long, but she refused to turn anything over. She was disciplined for ignoring various orders that stemmed from attempts to search her metadata.
- **Paul Hansmeier**, a notorious former attorney who was convicted of fraud, perjury and money laundering, was sentenced in June 2019 to more than [14 years](#) in federal prison. Hansmeier was convicted and ordered to pay \$1.5 million in restitution in connection with his "porn trolling" scheme. The disgraced lawyer was also known as the [mastermind](#) behind another extortionate scheme – demanding that small businesses across Minnesota [pay up](#) or face a lawsuit because their property purportedly violates an Americans with Disabilities Act accessibility standards.

#10 NEW JERSEY LEGISLATURE

In a report that primarily focuses on courts, New Jersey is an exception due to the legislature's focus on drastically expanding liability.

The New Jersey Legislature has distinguished itself as one of the most plaintiff-friendly legislatures in the country.

Among the most troublesome legislation is a radical, overreaching wage-and-hour bill and an anti-arbitration bill that already has been challenged in federal court. Once again, the Legislature continued to turn a blind eye to the problems caused by unsound laws that plague the state. Legislators did not even entertain the most modest of tort reforms, such as a limit on appeal bonds, and instead expanded liability for both businesses and individuals alike.

A LIABILITY-EXPANDING AGENDA

This year, the **New Jersey Legislature** enacted laws that will drastically increase the cost of doing business in the state and give businesses more reasons to stay away from New Jersey. Alida Kass, president of the **New Jersey Civil Justice Institute**, acknowledged the [growing challenges](#) in the state in stating, "You're putting a bounty on this litigation so you encourage a lot of it, so what you wind up with is a lot of shake-down settlements."

- **Legislature enacts "Wage Theft" bill with excessive penalties**
- **Continued attack on arbitration**

"You're putting a bounty on this litigation so you encourage a lot of it, so what you wind up with is a lot of shake-down settlements."

– Alida Kass



LEGISLATURE ENACTS "WAGE THEFT" BILL WITH EXCESSIVE PENALTIES

In August 2019, **Governor Phil Murphy** (D) signed a so-called "[wage theft](#)" bill that will expose businesses to excessive penalties if they otherwise do not carefully navigate the complexities of the state's wage and hour laws.

The new law triples the statute of limitations from two to six years of wages, allowing class actions that look back further and seek significantly higher awards. Employees can also recover up to triple damages. New Jersey practitioners [observe](#) that the law's "provision for treble damages and tripling of the limitations period could result in recoveries up to nine times larger than would have been available before" the bill's enactment.

In addition, the law provides for three to five years jail time applied to "stackable" offenses, creating a "pattern" of nonpayment on a first enforcement action. It threatens businesses with excessive penalties in order to extract concessions from good-faith employers, forcing them to choose between protecting their business or defending their rights in court.

As a result of these and other draconian provisions of the new law, New Jersey employers are bracing for an aggressive wave of new litigation.

LEGISLATURE LOOKS TO ENACT BURDENSOME "ABC TEST"

The **New Jersey Legislature** also is considering [S.B. 4204](#), which would "[effectively prohibit](#)" employers from classifying workers as independent contractors. The bill would adopt the highly restrictive "ABC Test," implemented by California in 2019. Under the "ABC Test," all workers are presumed to be employees, placing the burden on businesses to prove that (A) the worker is free from the control or direction of the hiring entity, (B) the worker performs work that is outside of the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

National Federation of Independent Business has raised concerns that this bill could cause [substantial harm](#) to free-lance business owners and subcontractors.

ATTACKS ON ARBITRATION

In March 2019, **Governor Murphy** signed a bill into law that prohibits “[waivers of procedural rights](#)” – effectively banning arbitration agreements. Any employer who attempts to enforce an arbitration provision that is deemed against public policy under the bill would be responsible for attorney’s fees and costs, in addition to any available damages.

Following enactment of this dangerous bill, the **New Jersey Civil Justice Institute** and the **U.S. Chamber of Commerce** filed a [complaint](#) in federal court asking for both declaratory and injunctive relief. They argue that the legislation will have a sweeping negative impact on New Jersey business and is preempted by the **Federal Arbitration Act**.

Another anti-arbitration bill, [S.B. 2996](#), is currently pending in the Senate. While it provides that “certain fraudulent arbitration agreements are invalid,” the bill will do much more. The language of the bill is vague, and could therefore have unforeseen consequences restricting the enforceability of arbitration agreements even further. This bill will target instances where a business is alleged to have used the personal identifying information of their customers or clients to create new fraudulent agreements. It invalidates any arbitration that might apply to the business and customer relationship. For example, if a business was alleged to have used the personal information of an existing customer to enroll that customer in new services without his or her authorization, this legislation would purport to invalidate a preexisting agreement to arbitrate all claims and disputes arising between that customer and the business.

The Legislature also went after arbitration organizations. [A. 4972](#) would establish a regime of requirements specific to organizations that conduct arbitration, much of which exceeds the state’s legislative authority. The bill would require the arbitration organization to waive all fees in certain circumstances. It also would place new disclosure obligations on any arbitration organization operating in New Jersey. The legislation misses the point of consumer arbitration: to give parties the opportunity to resolve disputes more efficiently, fairly, and at less cost than litigation.

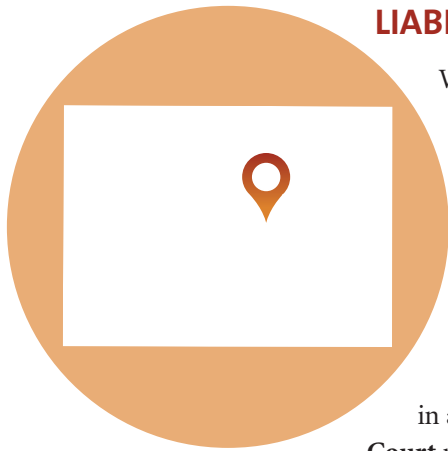
There is one last bill implicating arbitration that is pending in the legislature – [S.B. 327](#). This bill would require that all forum selection clauses require that disputes be heard in New Jersey.

WATCH LIST

The Judicial Hellholes report also calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from a designation as a Judicial Hellhole. But unlike the rankings of Hellholes relative to one another, jurisdictions on the **Watch List** are simply presented in alphabetical order.

COLORADO SUPREME COURT

Following yet another year of pro-plaintiff legislative activity and a failure by the **Colorado Supreme Court** to push back on liability-expanding decisions by lower courts, the Centennial State is yet again on the Judicial Hellholes Watch List. The legal climate in Colorado continues to deteriorate with the playing field becoming more unfair and unbalanced in 2019.



LIABILITY EXPANDING DECISIONS BY COLORADO COURTS

While the **Colorado Supreme Court** has been consistently inconsistent with its civil justice rulings, the **Colorado Court of Appeals** is making the high court's job even more challenging with rulings that creatively expand liability on many fronts. In 2019, the high court denied the petitions for certiorari in troubling lower court cases, allowing the decisions to stand.

In [Walmart v. Forfar](#), the **Court of Appeals** ruled that a plaintiff was able to “recover” medical expenses for the full amount billed by the plaintiff's Medicare provider, although that amount was far in excess of the actual amount the provider may legally recover under Medicare. This case is the latest in a long list of “phantom damages” rulings in which the **Colorado Supreme**

Court ruled that juries cannot consider the actual amount paid for medical expenses, creating a windfall for plaintiffs and their lawyers.

In a similar ruling, the **Court of Appeals** [found](#) that the state's collateral source rule barred evidence of the medical expenses actually paid by a workers' compensation insurer, while allowing the plaintiff to present evidence of the higher amounts initially billed by medical providers. The case arose after the plaintiff was injured while driving a luggage tug that collided with another at the Denver International Airport. Before filing the lawsuit, the plaintiff received workers' compensation benefits that covered his medical expenses and some of his lost wages arising from the incident. The ruling reversed the trial court, which had allowed the jury to consider the amounts actually accepted as payment for medical expenses and not allowed plaintiff's lawyers to present inflated invoiced amounts that no one ever paid.

The high court also is considering a case that will have a significant impact on businesses and nonprofits across the state. In [Wagner v. Planned Parenthood](#), the **Court of Appeals** ruled that a Planned Parenthood affiliate could be held liable for the premeditated acts of a mass shooter. The decision reversed a trial court ruling that placed the blame on the shooter and dismissed the case. The appellate ruling expands liability and upends settled Colorado premise-liability law. It creates [third-party civil liability](#) on the part of landowners for premeditated criminal acts of others and effectively mandates security measures that are impossible to attain as a practical matter. The **Colorado Supreme Court** [granted review](#) in September 2019.

LEGISLATORS CONTINUE TO EXPAND LIABILITY FOR COLORADO EMPLOYERS

Prior to the 2018 elections, Colorado's legislature remained balanced due to its bipartisan composition – with Republicans controlling the Senate and Democrats controlling the House of Representatives and Governor's mansion. While the trial bar consistently pushed an aggressive liability-expanding agenda in the House, it stalled in the Senate. That changed in November 2018. The 2018 elections brought a significant shift in the legislature and the offices of the governor and AG that empowered the plaintiffs' bar.

The most troubling employment bill passed in 2019 was [S.B. 85](#). While the bill's intended goal of addressing pay disparities is noble, legislators rejected a provision that would have allowed employers to show a jury that a wage disparity was due to a legitimate factor other than gender. They also refused to provide employers with an opportunity to address a disparity before an employee files a lawsuit. Business groups across the state fear an onslaught of frivolous lawsuits. Most Colorado small businesses do not have a legal department and the risk of bankruptcy due to litigation is very real.

Another new law, [H.B. 1267](#), makes individual employees, officers and directors personally liable for company errors in wage disputes. The legislature sought to overturn the Colorado Supreme Court's decision in *Leonard v. McMorris*. Wage theft now will be considered a felony when the amount in controversy is greater than \$2,000. It also removes the exemption from criminal penalties for an employer who is unable to pay wages or compensation because of a bankruptcy action or other pending court action resulting in the employer having limited control over its assets.

Yet another problematic bill, [H.B. 1289](#), amends Colorado's consumer law in a way that will lead to more lawsuits. Most significantly, the act includes a vague, new catchall prohibition outlawing “any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice.” In addition, for certain violations of the act, the new law lowers the standard for liability. Rather than requiring a showing that a business knew it was engaging in a deceptive practice, a showing of reckless conduct will be sufficient. The new law also will lead to more lawsuits by the state attorney general and district attorneys. It eliminates a requirement that enforcement actions brought by the state's attorney general or district attorneys address business' practices that have a significant public impact. It also spikes the potential penalties for violations of the act from \$2,000 to \$20,000 and from \$10,000 to \$50,000 when a deceptive practice affects elderly individuals.

The Legislature also enacted a bill that will allow [higher awards](#) for subjective noneconomic damages, like pain and suffering, in personal injury lawsuits, as well as larger awards in other types of actions. The amount permitted for noneconomic damages is expected to rise from \$468,000 to \$584,210 in 2020. As one plaintiffs' law firm put it, the “[even better news](#)” is that these amounts will automatically go up every two years. This law will result in insurance policyholders facing the choice of either paying [higher premiums](#) to protect themselves against higher awards and settlement demands or seeing their coverage simply erode due to an act of the legislature.

The **Colorado Legislature** considered several other problematic bills this session, and while they failed to pass in 2019, the trial bar is expected to aggressively pursue them again next year. For example, [S.B. 237](#) would have moved Colorado toward the type of consumer class action abuse seen in Judicial Hellholes. The bill would have explicitly authorized class actions in this context. In addition, the bill would have authorized larger awards for people who experienced no financial loss. The proposal would have allowed a minimum damage award of \$500 to be multiplied “per violation” in individual lawsuits.

In addition, the Legislature considered [S.B. 217](#), which would have legitimized medical lien companies. These companies make their money from “the spread” between the amount billed for medical services and the much lower amount that is ultimately paid to the doctor or specialist. The bill prohibited discovery and introduction of evidence of an existing medical lien for any purpose, including for proof of the reasonable value of medical services. The bill would have allowed medical lien companies to set their own prices for medical services.

FLORIDA

A former No. 1 Judicial Hellhole, Florida took great strides towards improving its legal climate in 2019. Although there is much work to be done, the election of **Governor Ron DeSantis (R)** has heralded a sea change in Florida's legal landscape, beginning with the appointment of several new Florida Supreme Court justices. This new court is deferential to legislative efforts to stop lawsuit abuse and poised to correct the course set by the prior activist court. As a result, the jurisdiction has dropped to the Watch List and ATRF will continue to keep a close eye on the Sunshine State.



FLORIDA'S NEW RESTRAINED SUPREME COURT

In years past, the **Florida Supreme Court** was known for its liability-expanding decisions and contempt for the lawmaking authority of the state legislature. But the court's three activist members left the bench in January 2019 after reaching the mandatory retirement age. These three justices, along with the swing vote of **Justice Jorge Labarga**, constituted the court's activist majority that signed onto many of the decisions increasing liability and nullifying civil justice reform legislation in Florida.

In January 2019, newly elected **Governor Ron DeSantis** replaced these three retiring justices with three textualists, **Barbara Lagoa**, **Robert Luck**, and **Carlos Muñoz**. The three new justices join historically conservative justices Charles Canady, Ricky Polston, and Alan Lawson. With these new appointments, the Court has been called the "[most conservative Florida Supreme Court in decades](#)."

Although it is still early in its tenure, the new **Florida Supreme Court** is beginning to correct the course charted by the prior, activist supreme court and is returning sense to Florida's civil justice system. However, the Court's composition is already in flux. In September, **President Trump** [nominated](#) **Justices Lagoa** and **Luck** for seats on the **U.S. Court of Appeals for the Eleventh Circuit**. **Governor DeSantis** now has two seats to again fill on the state high court. ATRF will continue to keep a close eye on the court to see if it continues its fair and balanced approach.

Rejecting the Prior Court's Endorsement of Junk Science

In 2013, Florida's legislature brought state law on the admissibility of expert evidence in line with the federal courts and the majority of state courts. That law adopted the standard established by the 1993 decision of the **U.S. Supreme Court** in *Daubert v. Merrell Dow Pharmaceuticals*. The statute effectively tasks judges with acting as gatekeepers to ensure that expert testimony presented to jurors is indeed reliable and not "junk science."

As noted in the [2018-2019 Judicial Hellholes report](#), the earlier, activist **Florida Supreme Court** rejected the legislature's efforts to improve Florida's expert witness standard as encroaching upon the Court's authority to set rules. Instead, it maintained an anything-goes approach to expert testimony, which allowed "[pure opinion](#)." Less than five months after Governor DeSantis appointed the three new justices, the Supreme Court — of its own volition — [adopted the Daubert standard as the governing standard for admissibility of expert evidence in Florida](#), observing that the prior court's "constitutional concerns" with the law "appear unfounded." The Court agreed that the adoption of Daubert "will create consistency between the state and federal courts with respect to the admissibility of expert testimony and will promote fairness and predictability in the legal system, as well as help lessen forum shopping."

A REVITALIZED FLORIDA LEGISLATURE BEGINS ENACTING REFORMS TO ADDRESS THE STATE'S LIABILITY CLIMATE

With a new governor, new legislative leadership, and a shift in Florida's courts, the state legislature finally enacted several reforms in 2019 designed to address lawsuit abuse that long had plagued the state. While progress was made, more work remains to be done in 2020.

REMOVING INCENTIVES TO FILE ASSIGNMENT OF BENEFITS LITIGATION

The Florida Legislature finally passed — and Governor DeSantis approved — much-needed legislation to curb abuse of assignment of benefits (AOB) in 2019.

Under an AOB, an insured transfers his or her insurance claim rights or benefits to a third party, most often a contractor such as a water mitigation company or a roofer, so that the third party may “stand in the shoes” of the insured and seek direct payment from the insurance company. Unfortunately, these arrangements have been exploited. As one Florida defense lawyer [recognized](#), “South Florida has been the epicenter for the proliferation of a cottage industry led by water mitigation and restoration contractors focused on gouging insurance companies and taking advantage of innocent policyholders.” It is this cottage industry that has been the primary driver of increased insurance litigation in Florida — a “[man-made litigation flood](#)” — not storms.

“South Florida has been the epicenter for the proliferation of a cottage industry led by water mitigation and restoration contractors focused on gouging insurance companies and taking advantage of innocent policyholders.”

– A Florida defense lawyer

According to a recent report from the **Florida Justice Reform Institute**, AOB lawsuits accounted for more than half of litigation against insurance companies statewide in 2018, and over the last decade, [such lawsuits grew 900 percent](#). Holders of AOBs, like water mitigation companies, and their lawyers were incentivized to file these suits because of a one-way attorney fee statute, which allowed the assignee to file suit without the risk of having to pay the insurance company’s attorney’s fees in the event the assignee lost.

This increased litigation has resulted in high-dollar consequences for innocent insureds. For example, Florida homeowners paid an additional [\\$1.38 billion](#) in premiums between 2013 and 2018 due to the rising number of lawsuits stemming from AOB abuse.

In the 2019 legislation session, however, Florida [enacted H.B. 7065](#) to address this crisis, after seven years of legislative efforts. The law applies to all AOBs signed after July 1, 2019.

The new law, a summary of which is available [here](#), is expected to [rein in](#) out-of-control AOB litigation that has overrun Florida courts, “[curtailing a longstanding legal abuse by plaintiff attorneys](#).” Among other things, the law replaces the one-way attorney fee for assignees with a defined prevailing party formula and provides additional protections for insureds in assigning insurance benefits.

NARROWING THE DANGEROUS INSTRUMENTALITY DOCTRINE

In the past, the **Florida Supreme Court** has imposed vicarious liability on companies that simply rent equipment used by others. In [Newton v. Caterpillar](#), Anthony Newton, while working for an independent contractor to clear debris from a vacant, private lot, was injured when a tree stump was accidentally released from a loader and rolled across his hand. Newton blamed Caterpillar for his injury because the company had leased the loader that caused the injury. The Florida Supreme Court expansively interpreted the state’s “dangerous instrumentality” doctrine to find Caterpillar vicariously liable for the injury. The Court’s ruling greatly expanded the doctrine to include equipment and conduct not previously included within the doctrine.

In response, the legislature passed, and the governor approved, [SB 862](#), which provides that the lessor of special mobile equipment (i.e., construction equipment) that causes injury, death, or damage while leased is not liable for the acts of the lessee or lessee’s agent or employee if the lease agreement requires documented proof of insurance coverage meeting certain limits.

DISCOURAGING UNNECESSARY BAD FAITH ACTIONS

In addition to targeting AOB litigation, the **Florida Legislature** also passed reforms in 2019 designed to curtail unnecessary bad faith litigation against insurance companies. This [new law](#) will provide a more reasonable time for insurers and their policyholders to resolve disputes through an appraisal process. Under the 2019 [legislation](#), a person may not file a civil remedy notice—the first step to pursue a bad faith lawsuit against an insurance com-

pany—for 60 days after the right to an appraisal is invoked in a residential insurance dispute. The appraisal process is a form of alternative dispute resolution that may be invoked by the insurer or policyholder when they cannot agree on the value of a loss. If the insurer pays the appraised value within 60 days of a receiving a notice, a bad faith lawsuit may not be filed.

REFORMS STILL NEEDED

FIXING THE “NO-FAULT” PERSONAL INJURY PROTECTION SYSTEM

The history of fraud in Florida’s “no-fault” personal injury protection (PIP) system has been long chronicled in the Judicial Hellholes report. Under the current [PIP system](#), insurers are required to pay [up to \\$10,000](#) for medical expenses stemming from auto accidents no matter who is at fault. Florida lawyers and their associates have been [abusing](#) the system [for years](#), contributing to why Floridians have some of the [highest car insurance rates](#) in the country. Legislators must come together and address the rampant fraud plaguing the system.

INFLATED AWARDS FOR MEDICAL EXPENSES

Plaintiffs’ lawyers have long abused what are known as “letters of protection.” Letters of protection are agreements between a person who needs medical care, his or her lawyer, and a healthcare provider under which the healthcare provider agrees to not seek to collect a fee for medical treatment from the patient, but wait to collect out of an expected settlement or judgment. Letters of protection can serve a legitimate purpose when a person is uninsured and unable to pay for medical expenses. However, some Florida lawyers recommend that their clients not use their insurance to cover medical expenses, but rely on a letter of protection.

Under Florida law, at trial, jurors learn the initially invoiced amount of medical expenses, which is essentially a “[sticker price](#)” that is often three or more times the amount that is ultimately accepted by the healthcare provider as full payment. After a verdict, Florida law requires judges to adjust the award to reflect the actual amount of medical expenses paid and accepted, a process called a “set off.” Florida’s personal injury lawyers often use letters of protection to avoid this set off. By avoiding evidence of the actual value of medical treatment, there is no amount paid for a judge to set off the award.

This type of abuse benefits no one but the lawyers and medical clinic that may be in cohorts with them. The lawyers get to inflate the damage award and collect a larger contingency fee. The medical provider gets paid a rate that is much higher than market value. The plaintiff, however, has these high rates taken from his or her share of the judgment, even if they would have been covered by insurance.

At a February 2019 [hearing](#) before a committee of the Florida House of Representatives, a representative of the popular supermarket Publix testified that the grocer’s costs run 65 percent higher per claim in Florida than in other states in which it operates, and 50 percent higher in South Florida than the rest of the state, precisely because of this type of abuse. Letters of protection, she noted, result in “manufactured medical damages that have no basis in reality.”

Legislation can ensure that jurors receive accurate information on the actual value of medical expenses and prohibit abuse of letters of protection. The legislature should also [revisit](#) the need to place reasonable constraints on subjective and unpredictable noneconomic damage awards, which are particularly important for preserving access to affordable medical care.

MISLEADING AND JURY-TAINING LAWSUIT ADVERTISING

Trial lawyer advertisements flood televisions in homes across the Sunshine State. From July 1 to September 30, 2018 in the Tampa-St. Petersburg, Florida market, [57,000 lawsuit advertisements](#) aired – at a cost of \$4.6 million. In Miami and Fort Lauderdale, [29,000](#) ads aired – at a cost of \$4.5 million during the same time period.

While these ads may be irritating, they also have negative effects further down the line. These advertisements affect jurors’ perceptions of certain issues or products and increase the chance that a juror will enter a case with preconceived notions they would not have otherwise held.

A [survey](#) conducted by Trial Partners, Inc. found that 90 percent of jurors would be somewhat or very concerned if they saw an advertisement claiming a company’s product injured people. Further, 72 percent of jurors

agreed somewhat or strongly that if there are lawsuits against a company claiming its products have injured people then there is probably truth to the claim.

Jury bias is not the only issue caused by rampant trial lawyer advertisements. Many ads claim a certain prescription or medical device causes harm, and without consulting a doctor, viewers who are prescribed these medications may cease use due to the fear created by these exaggerated claims. As discussed in the Philadelphia Court of Common Pleas Judicial Hellholes section, these advertisements are having [dangerous](#) real-life consequences.

MARYLAND GENERAL ASSEMBLY

As Baltimore courts took steps toward a more fair and balanced judicial system, the **Maryland General Assembly** filled the void and pursued an extremely plaintiff-friendly agenda in 2019. The legislature considered multiple liability-expanding bills and looked for creative ways to provide benefits to the politically powerful personal injury firm of **Peter Angelos**. Despite pushback from **Governor Larry Hogan (R)**, more of the same is expected in 2020.



INDIVIDUAL REVIEW OR MASS CONSOLIDATIONS?

Baltimore City consistently ranks among the [most popular](#) jurisdictions to file asbestos lawsuits in the United States. But unlike other leading “magnet courts,” the docket has very few mesothelioma cases. Most cases filed by the [Peter G. Angelos firm](#) involve non-malignant conditions. For years, the firm has flooded the court with cases, many by asymptomatic plaintiffs, and stockpiled non-viable cases. Today, more than half the cases on the Baltimore City asbestos docket are non-viable.

Defense interests have long questioned the reliability of cases filed by the Angelos firm in Baltimore City that allege non-malignant conditions. The Baltimore Sun [reported in 2013](#) when the Angelos firm last “[sought] to revive thousands of dormant asbestos cases,” that an investigation showed more than 1,500 claims to be duplicates. Of the remaining 11,383 claims scrutinized, nearly 70 percent involved diagnoses by one or more of the same five doctors, one of whom signed off on nearly 50 percent of those diagnoses, including an astounding 77 in just one day. Even more remarkable was the identity of this super doctor, **William Goldiner**. He was and remains the team doctor for the **Baltimore Orioles**, which **Peter Angelos** purchased with the contingency-fee riches he won as Charm City’s most successful asbestos lawyer in the early 1990s.

The Angelos firm has stockpiled these questionable cases because they are hoping for a bailout that will make them millions of dollars in fees for their largely worthless inventory. The firm wants mass trials where they can use higher value cases as leverage to force settlements on all of the cases. The judiciary went along with this unfair scheme a couple of times in the early 1990’s but the docket soon became clogged again because the practice simply encouraged the firm to file more cases of questionable merit. In 2014, when the Angelos firm tried a third attempt at mass trials, the court was onto their tactics and rejected their request.

Instead, the Baltimore City court adopted a version of an innovative approach adopted by the manager of the federal asbestos litigation. The Baltimore judges began requiring individual review of the pending cases in monthly status conferences. This system is effectively filtering out the non-viable cases while allowing the cases of deserving plaintiffs with viable cases to advance. The Angelos firm is voluntarily dismissing most of its cases when they are called up for a status conference because the firm knows the cases are not viable.

November 2019 was Groundhog Day again, as the **Angelos Firm** pushed the **Maryland House Judiciary Committee** to [address the supposed backlog](#) of asbestos claims in Baltimore City through mass consolidation of claims. Instead, the court should be permitted to continue its effort to clean up the asbestos docket by requiring plaintiffs with long-dormant claims to submit credible evidence of an asbestos-related impairment, giving priority to sick claimants, and dismissing claims that are not viable.

LIABILITY-EXPANDING LEGISLATION

Maryland was named one of the [worst states](#) to start a business in 2019 despite significant access to resources. Rather than address the growing problem, Maryland’s legislature considered an agenda that would drive up the cost for doing business in the state.

MEDICAL LIABILITY

A survey of Maryland’s hospitals found that in 2018, annual hospital payouts were [\\$176 million](#) – nearly 140 percent higher than in 2008, despite the frequency of claims remaining relatively stable. The Maryland General Assembly enacted a bill that will further drive up these costs. [S.B. 773](#) will increase the maximum amount of time that professionals can devote towards giving expert witness testimony in trials from 20 percent to 25 percent. The more time experts spend testifying in court, the less time they spend actually treating patients. This creates a [niche culture](#) of professional witnesses providing less informed testimony.

The legislature also again considered a bill that would significantly increase the amount Maryland law allows plaintiffs to collect for subjective, noneconomic damages, such as pain and suffering. That bill, [S.B. 813](#), would have eliminated the lower limits established in medical liability cases to preserve affordable and accessible healthcare and instead applied higher limits applicable in other personal injury cases. The bill also would have significantly increased those limits in wrongful death cases “per beneficiary.” The result would be a law that allowed awards for noneconomic damages as high as \$3.4 million – far exceeding other states with similar laws. The bill ultimately failed.

As health care providers look for ways to avoid costly litigation, the use of defensive medicine has increased. It now makes up 13 percent of all hospital costs, or \$2 billion in unnecessary health care spending in Maryland. Bills like [S.B. 773](#) and [S.B. 813](#) will only exacerbate these costs and will lead to an access-to-care crisis for Maryland residents.

EMPLOYMENT LIABILITY

The **Maryland General Assembly** considered several bills that would expand liability for businesses across the state. First, the legislature passed [H.B. 994/S.B. 839](#), which would have prevented some employers from asking job applicants about their criminal history until the first in-person interview. The “Ban-the-Box” legislation not only would have led employers to waste time and resources, it would have opened employers up to potential liability by discouraging them from screening applicants for legitimate safety reasons. **Governor Hogan** [vetoed](#) the measure and the legislature did not override him.

Another liability-expanding provision considered by the legislature was [H.B. 661](#), a bill that would have amended the definition of “employer” by repealing a requirement that an employer have at least 15 employees for purposes of Maryland’s broad employment discrimination laws. Ultimately, the legislature enacted a [separate bill](#), [H.B. 679](#), that eliminated the 15-employee requirement for claims alleging harassment, among other changes, such as allowing giving independent contractors the ability to sue companies that hire them as if they were an employee. As one Maryland law firm [observes](#), these changes “expand the risk of employer liability” and “make Maryland courts a more attractive forum for pursuing such claims” than federal courts.

These changes “expand the risk of employer liability” and “make Maryland courts a more attractive forum for pursuing such claims” than federal courts.

– A Maryland law firm

MONTANA SUPREME COURT

The Montana Supreme Court once again finds itself on the Watch List, as its penchant for expanding liability and not following U.S. Supreme Court precedent continues.

PREEMPTION

In June 2019, the **U.S. Supreme Court** [agreed to review](#) a Montana Supreme Court decision that allowed a state environmental lawsuit seeking cleanup remedies that conflicts with an ongoing federally-ordered cleanup plan.

In 2008, a group of private property owners in Opportunity, Montana sued Atlantic Richfield, alleging that a copper smelter, which closed in 1980, contaminated their land. After being shut down, the Anaconda Smelter site was placed on the U.S. Environmental Protection Agency's [priority list](#) for Superfund cleanups pursuant to the federal **Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**.

The EPA's cleanup began in 1988 and, although it is still ongoing, the property owners filed a lawsuit asserting claims for trespass, nuisance, and strict liability, and seeking restoration damages. They hired their own experts who recommended the removal of the top two feet of soil and the installation of permeable walls to remove arsenic from the groundwater, among other recommendations that went well beyond what the EPA found necessary and required.

After years of litigation, Atlantic Richfield filed a writ of supervisory control with the **Montana Supreme Court**, seeking reversal of trial court orders that allowed claims seeking restoration damages to continue. The company argued that restoration claims are preempted by federal law because they directly conflict with the CERCLA cleanup plan.

As federal appellate courts [explained](#), "Congress concluded that the need for [swift execution of CERCLA cleanup plans] was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean up the site and remove the hazard, may not be brought while the cleanup is in progress."

Nonetheless, in its split [decision](#), the Montana Supreme Court held that the property owners' claims were not a challenge to the CERCLA cleanup plan and that state courts are free to impose additional liability on companies that are complying with the federal effort. It [allows](#) a state court to view the EPA's generally binding recommendations as suggestions, and requires companies to take actions that the EPA may have specifically considered and rejected.

With this ruling, the **Montana Supreme Court** overstepped into an area governed by federal law. Preemption is in place to prevent duplicative or inhibitive actions by a state that may interfere with a cleanup effort that is more properly handled by the federal government.

Justice Laurie McKinnon pointed out in her dissenting opinion that "[a]n action constitutes a challenge [to a CERCLA cleanup] if it is related to the goals of the cleanup." As the property owners' proposed restoration plan would impose different requirements than the EPA plan, it was "plainly contrary" to the federal cleanup, and directly interfered with the ongoing project.

The Montana Supreme Court's decision turns the law of preemption upside down and threatens every company that works in good faith with the EPA on clean-up projects with new lawsuits that would require them to spend millions of dollars on top of the work they have already completed.

PERSONAL JURISDICTION

Despite the **U.S. Supreme Court** overturning its *BNSF Railway Co. v. Tyrell* decision in 2017, the **Montana Supreme Court** continues to hesitate to properly apply constitutional principles that prevent plaintiffs' lawyers from filing lawsuits in Montana that lack a connection to the state.

In July 2019, the **Montana Supreme Court** joined a minority of courts that allow the exercise of specific personal jurisdiction when a defendant's activities in the state have no causal connection to a plaintiff's claim. The Court allowed a product liability case to proceed in Montana state court against Ford in which there was no



link between Ford's operations in the state and the estate's claims. The vehicle involved in the accident was not designed, made, sold, or serviced by Ford in Montana, though it was later resold and registered in Montana.

Ford filed a [petition](#) for certiorari with the U.S. Supreme Court in September 2019. ATRA has [urged](#) the high court to grant review.

GUIDANCE NEEDED ON CONSTITUTIONALITY OF PUNITIVE DAMAGE LIMIT

The **Montana Supreme Court** is expected to finally decide the constitutionality of the state's limit on punitive damages, which permits awards of up to \$10 million or 3 percent of a defendant's net worth. The Court previously ducked the issue back in 2015 when it [ruled](#) that Michigan law applied to the case before it and did not allow for punitive damages. For that reason, the Court did not rule on the constitutionality of Montana's cap at that time.

In September 2019, the Court heard oral arguments in another case challenging the limit on punitive damages. In 2018, a jury awarded \$4 million in compensatory damages and [\\$31 million in punitive damages](#) to a woman who claimed she was abused by a member of the Thompson Falls Jehovah's Witness congregation, but the church failed to alert authorities. She is challenging the limit on punitive damages as applied to her award.

Montana trial court judges have split on whether to apply the statutory limit, some [finding](#) it violates the right to jury trial or due process. These rulings are contrary to courts in the vast majority of states, which recognize that setting constraints on punishment is firmly within the legislature's policymaking authority.

It is up to the Montana high court to issue a definitive ruling, finding that the law is constitutional. ATRA will watch closely in the hopes the Court will uphold the reasonable punitive damages limit enacted by the legislature.

SUPREME COURT OF PENNSYLVANIA

The **Supreme Court of Pennsylvania** is at a crossroads – the Court is considering several important cases that will have a lasting impact on the state's litigation environment. In recent years, both the intermediate appellate courts and the state's high court have issued liability-expanding decisions and have swung courtroom doors open to out-of-state plaintiffs whose claims have no connection to the state. As more key cases reach the state high court, it once again will have to choose whether to adhere to traditional principles of tort law and follow statutory law, or accept the plaintiffs' bar's invitation to expand liability and welcome more lawsuits to Pennsylvania.



THOUSANDS OF RISPERDAL CASES REINSTATED

Statutes of limitations exist to ensure that the civil justice system evaluates liability promptly, not years or decades after the alleged conduct occurred. That principle took a hit this November, when the **Supreme Court of Pennsylvania** effectively [reinstated](#) thousands of Risperdal cases that were filed long after plaintiffs were on notice that the antipsychotic medication came with a small risk that boys could experience gynecomastia, which causes breast growth.

CLC Judge Arnold New had found that by June 2009 plaintiffs would have had notice of the risk as a result of medical literature, newspaper articles, and, of course, attorney advertising. A state appellate court [ruled](#) that plaintiffs should have been aware of the cause of their injuries even earlier, as the manufacturer added information about the risk of gynecomastia to the medication's label on October 31, 2006. Any claim not filed within two years of that date, the appellate court found, would be barred by the statute of limitations and dismissed.

In a pair of rulings in *Saksek v. Janssen* and *Winter v. Janssen*, however, **the Supreme Court of Pennsylvania** reversed the lower courts and adopted an everything-goes-to-trial approach. The high court ruled that trial courts cannot determine when the clock for filing a claim begins based on objective evidence of public knowledge of the

risk involved, but that juries must decide whether the statute of limitations has run on a case-by-case basis. While the high court ruling involved just two cases, it has much broader implications. Thousands of Risperdal cases in the CLC, the No. 1 Judicial Hellhole, had been placed [on hold](#) due to the time frames established by the lower courts. Those late-filed cases can now move forward. Of course, few Risperdal cases are likely to actually reach trial, especially after the jaw-dropping \$8 billion award in a CLC Risperdal case in October. Rather, the effect of the ruling is to increase the pressure to settle all of the lawsuits.

EXPANSION OF MEDICAL LIABILITY

A RETURN TO FORUM SHOPPING IN MEDICAL LIABILITY CASES?

Constraints that have prevented lawyers from picking the most plaintiff-friendly jurisdiction for filing medical liability actions are in jeopardy.

In late 2018, the **Supreme Court of Pennsylvania's Civil Procedure Rules Committee** [proposed](#) easing the court's 17-year-old restraints on medical liability lawsuits. At issue was a 2002 court rule that required plaintiffs to file medical malpractice lawsuits in the [county](#) where the error occurred, not where a jury might view the claim most favorably. The purpose was to reduce forum shopping and create a more fair and balanced playing field. Forum shopping increases the number of meritless lawsuits and drives up doctors' insurance costs. It leads to increased costs for patients and reduces patients' ability to access doctors.

The Committee's new [recommendation](#) would allow attorneys to file suit for medical malpractice in jurisdictions not only where medical treatment took place, but also where the healthcare provider operates a hospital or office or where a physician lives, among other options. Of course, the state's personal injury bar, through the **Pennsylvania Association for Justice**, supports the change. Plaintiffs will flock to areas like **Philadelphia**, the No. 1 Judicial Hellhole in 2019, where juries are [more willing](#) to award higher verdicts in favor of plaintiffs.

At the urging of Pennsylvania legislators, the Court agreed to [postpone](#) further consideration of the amendments until 2020.

EXTENDED TIME TO SUE IN MEDICAL LIABILITY CASES

In [Yanakos v. University of Pittsburgh Medical Center](#), the **Supreme Court** struck down the state's seven-year time limit to bring medical liability claims. The Court said the statute was "[not substantially related](#) to lawmakers' goal of keeping health care costs down." It said it was [unconstitutional](#) because it does not allow all injured patients to "exercise their constitutional right to a remedy."

As pointed out in the [dissent](#) by **Justice David Wecht**, the Court [substituted](#) the policymaking authority of the legislature with the decision. "It is not the court's role to upend duly enacted legislation simply because we might sometimes deem it imperfect or unwise," he said.

Plaintiffs urged the **Supreme Court** to adopt an exception to the state's seven-year time limit to bring medical liability claims. There, the plaintiffs filed a lawsuit 12 years after a failed liver transplant, and said that they had not discovered the patient's medical condition until after the seven-year period expired. While the legislature carved out other exceptions to the statutory period, and had not done so for this situation, the plaintiff asked the court to find the statute unconstitutional and create its own exception.

The intermediate appellate court properly [rejected](#) this invitation, finding the seven-year statute of repose reasonable and in line with the government's interest in promptly determining whether there was medical negligence. Creating an exception and extending this period, the court ruled, "would expose health care providers to further liability, undermining the equally legitimate government interest of keeping medical professional liability insurance affordable for the benefit of citizens of this Commonwealth."

"It is not the court's role to upend duly enacted legislation simply because we might sometimes deem it imperfect or unwise."

– Justice David Wecht

ABILITY TO CONSULT WITH OUTSIDE PROFESSIONALS

A recent Supreme Court of Pennsylvania decision provides guidance to lawyers who consult with crisis management and other professionals.

In June 2019, Pennsylvania's high court [ruled](#) in *BouSamra v. Excelsa Health* that a client waives the attorney-client privilege, and its otherwise confidential communications with its lawyers can be disclosed, when its lawyer shares those communications with a public relations firm. However, the broader privilege for work-product protection, which prevents disclosure of the mental impressions of the attorney, may still apply. To decide whether this protection is available, a court must decide on a case-by-case basis whether the disclosure significantly increased the likelihood of an adversary or potential adversary obtaining the information.

Attorneys frequently rely on advice from other professionals and must be able to speak candidly with them. Pennsylvania lawyers will need to closely consider the decision and take [steps](#) to guard against a waiver of privilege.

HIGH COURT EXPANDS GOVERNMENT LIABILITY

In late December 2018, the **Supreme Court of Pennsylvania** [held](#) a school district liable for a student running into an unpadding concrete wall in a gym, even though governmental immunity usually protects schools from lawsuits. The Court stated that this incident fell under the real property exception to governmental immunity under Pennsylvania's **Tort Claims Act** and thus the school was not granted immunity.

Also, in December 2018, the **Supreme Court of Pennsylvania** [ruled](#), in *Justice v. Lombardo*, that a state trooper accused of using excessive force during a traffic stop is not immune from a civil lawsuit seeking damages. The Court reasoned that a reasonable jury could find that the trooper acted outside the bounds of his duties and sovereign immunity did not apply. As **Justice Sally Mundy** observed in her dissent, “[t]he consequence of the Majority’s decision today will be to introduce a chilling effect on troopers performing their duties.”

KEY RULINGS EXPECTED IN 2020

WILL THE SUPREME COURT CLOSE THE DOOR TO OUT-OF-STATE DEFENDANTS?

In April 2019, the **Supreme Court of Pennsylvania** granted review of an appeal with [wide-reaching](#) ramifications for the state’s litigation environment. Pennsylvania courts have been slow to apply the U.S. Supreme Court’s 2017 ruling instructing state courts to dismiss cases that have no connection to the state. In *Bristol-Myers Squibb Co. v. Superior Court of California*, the Court held that a state cannot exercise personal jurisdiction over a company that is not incorporated or headquartered in that state, when the plaintiffs do not live in the state, and events related to the alleged injury did not occur there.

The first opportunity for a Pennsylvania Superior Court to properly apply the Bristol-Myers Squibb (BMS) ruling on claims brought by out-of-state plaintiffs was in *Hammons v. Ethicon*. The facts were similar to BMS — an out-of-state plaintiff brought suit in Philadelphia against Ethicon and its parent company, Johnson & Johnson, neither of which are incorporated or headquartered in Pennsylvania. The plaintiff did not receive medical treatment in Pennsylvania, and all relevant actions related to her claim alleging a pelvic mesh device was defective took place where she lived, in Indiana, or where Ethicon is based, in New Jersey.

The only connection between the parties and Pennsylvania was that Ethicon contracted with a Pennsylvania company to “design, test, and manufacture” the mesh and the plaintiffs’ lawyer decided it would be a more favorable jurisdiction. Doing business with third parties does not automatically subject an out-of-state business to personal jurisdiction where that company is located unless there is a specific connection between the forum and the injury. The **U.S. Supreme Court** in BMS held that the “bare” decision to contract with a California company to distribute the drug nationally did not provide a sufficient basis for jurisdiction in California. As in BMS, Ethicon’s link to a Pennsylvania company should not have provided a sufficient basis for a Pennsylvania court to decide the case.

Nevertheless, in June 2018, the **Superior Court**, one of two intermediate appellate courts in Pennsylvania, [declined to throw out](#) a \$12.8 million judgment reached in Philadelphia’s mass tort program in late 2015. The court never explained how a third party’s actions specifically contributed to the plaintiff’s specific injury.

The **Supreme Court of Pennsylvania** has the opportunity to realign the state with U.S. Supreme Court precedent. ATRA [urges the Court](#) to display leadership by giving clear guidance to lower courts to end litigation tourism.

WILL THE COURT REQUIRE DEFENDANTS TO PAY MORE THAN THEIR FAIR SHARE IN ASBESTOS AND OTHER PRODUCT LIABILITY CASES?

In March 2019, the **Supreme Court of Pennsylvania** held [oral arguments](#) in an appeal of a Superior Court decision holding that a state law that allocates liability in proportion to a defendant's level of responsibility for an injury, known as the **Fair Share Act**, applies to asbestos cases.

The Superior Court [reversed](#) a Philadelphia Court of Common Pleas ruling that exempted asbestos cases from the [same rules](#) for allocating fault that apply in other cases. Without such a rule, a single business that is found to have contributed to a plaintiff's exposure to asbestos could end up having to pay the entire damage award, even if the plaintiff's exposure was caused largely by others. Under the Fair Share Act, a defendant can be required to pay the full award only if found more than 60 percent responsible. In addition, the ruling more broadly could exempt other strict product liability cases from the Fair Share Act.

The **Supreme Court** also will have the opportunity to require plaintiffs to provide the court with any evidence of bankruptcy trust claims or settlements. The **Superior Court** appropriately held that when a jury apportions fault among potentially responsible parties, the **Fair Share Act** requires that they consider evidence of any settlements by the plaintiffs with bankrupt entities. Ideally, the Supreme Court should require plaintiffs to provide all evidence of past and future bankruptcy trust claims and settlements, or consider them waived. If the high court does not do so, or worse, blindfolds juries from considering such settlements, passing a law to provide transparency in claims made against asbestos-related bankruptcy trusts will become even more critical.

WHAT IS THE TRIAL COURT JUDGE'S ROLE AS GATEKEEPER?

In October 2019, the **Supreme Court of Pennsylvania** held [oral arguments](#) in a case that will explore the role of a trial court judge as a [gatekeeper](#) over the reliability of expert testimony.

The issue [arose](#) in a wrongful death suit that attempts to connect a golf course groundskeeper's development of Acute Myelogenous Leukemia (AML) to his exposure to pesticides. In *Walsh v. BASF Corp.*, the **Allegheny County Court of Common Pleas** excluded the plaintiff's causation experts' testimony, finding they failed to offer a study tying AML to the chemicals at issue. Their proposed testimony, the trial court found, was not supported under the **Frye standard**, which requires that experts follow methods generally accepted by the scientific community. However, in May, the **Superior Court** reversed that decision, ruling that the trial court went beyond examining the expert's methods and improperly considered whether the studies supported the witnesses' conclusions.

The superior court's decision [incorrectly denied](#) that trial courts can exercise any role as gatekeepers in determining whether expert testimony is generally accepted under **Frye**. The court stated Pennsylvania law requires that particular products must have caused specific injuries, not that a product generally, pesticides, may cause cancer. The **Supreme Court of Pennsylvania** should firmly establish that trial court judges have a duty to carefully scrutinize the scientific basis of proposed expert testimony and not permit unsupported theories to be presented in court.

DOES STRICT LIABILITY APPLY TO CONSUMER LAWSUITS?

The **Supreme Court of Pennsylvania** [is considering](#) whether the catchall provision of the state's consumer protection law, which prohibits any deceptive conduct, imposes strict liability regardless on a business regardless of whether it acted intentionally, negligently, or innocently.

Gregg v. Ameriprise arises from a judgment for plaintiffs who alleged that a financial advisor misled them into buying life insurance policies. The **Superior Court** upheld the award.

The lower courts concluded that the legislature intended to transform the catchall provision from one [requiring proof](#) of fraudulent intent to one that renders state of mind irrelevant and imposes strict liability. By relying on the perceived purpose of the statute rather than its actual language, however, the court reached a result that is [wholly inconsistent](#) with the statute's plain meaning and legislative history.

SOUTH CAROLINA ASBESTOS LITIGATION

South Carolina asbestos litigation has developed a reputation for pro-plaintiff rulings and unfair treatment of defendants. A concerning pattern of discovery abuse, unwarranted sanctions, low evidentiary requirements, and multi-million-dollar verdicts elevated the jurisdiction to this year's Watch List.

On March 3, 2017, the **Supreme Court** [appointed](#) retired **South Carolina Supreme Court Chief Justice Jean Toal** to preside over South Carolina's asbestos docket. Since Justice Toal's appointment, businesses named as defendants in asbestos litigation have had faced challenges in court.

According to individuals familiar with the litigation, now, in South Carolina's asbestos docket, nearly all pre-trial motions are decided in plaintiffs' favor. Under South Carolina law, even a "[scintilla](#)" of evidence that a defendant's product was present in the plaintiff's workplace is sufficient to survive a motion for summary judgment.

Defendants also face abuse in the discovery process, as plaintiffs' lawyers demand that they produce excessive documents that are irrelevant to the claim at issue. When disputes arise, the court discounts or disregards defendants' arguments, which may lead to [severe and improper sanctions](#) that often sway the litigation heavily in the plaintiff's favor. Any failure to produce documents, even for legitimate reasons, may lead to sanctions. **Judge Toal** [has stated](#) that she has "no hesitation about having sanctions hearings on people that don't produce documents when they're supposed to."

In addition, the court has allowed abuse with respect to disputes over a defendant's designation of a corporate witness for a deposition (known as a 30(b)(6) deposition). Plaintiffs' lawyers have demanded that corporate witnesses sit for depositions on an overbroad array of topics. The court, however, has [refused to intervene](#), characterizing overbroad corporate witness notices as "rare as hen's teeth."

As a result of these types of rulings, plaintiffs' counsel are filing more motions for sanctions in South Carolina asbestos cases. Plaintiffs' lawyers strategically demand that defendants produce excessive documents and witnesses for depositions on matters beyond the scope of the litigation. Then, upon a defendant's inability to respond, they immediately seek sanctions. The court has even made habit of granting sanctions against defendants on the eve of trial based on discovery violations asserted by plaintiffs, sometimes without first asking the court to order a defendant to [comply](#) with the discovery request, as traditionally required. These sanctions typically result in the court instructing the jury that it should consider the plaintiff's key allegations as established fact.

For example, in one case, defense counsel indicated that key documents were [destroyed in a warehouse fire](#). Based on mere allegations by plaintiffs' counsel that the defendants intentionally destroyed the documents, the court [instructed](#) the jury that it must assume that the plaintiff was, in fact, exposed to asbestos insulation supplied and installed by the defendant. Astoundingly, even after the jury received this instruction, it ultimately returned a defense verdict. One source deemed this verdict one of the "[Top 10 Most Impressive Defense Verdict\[s\] of 2018](#)," further highlighting the difficulty of the defense counsel's feat.

In another 2019 sanctions order, the court [said](#) that despite plaintiffs being unable to "specifically identify a date" when a duty began for defendants to preserve records, the company should have assumed that litigation was to reasonably follow based on testing it was doing. The plaintiff [did not identify](#) what specific evidence had been destroyed, but the court said "there is reason to believe that the destroyed evidence would have aided Plaintiffs' case."

In addition to allowing abusive discovery practices and imposing unwarranted sanctions, the court has issued plaintiff-friendly post-verdict rulings. The court also has added several hundred thousand dollars to verdicts that were less than \$1 million. For example, in one mesothelioma case, a jury awarded [\\$700,000](#), but the court [increased](#) the award to \$1.1 million. In another case, a jury awarded a mechanical inspector who developed mesothelioma \$200,000 and his wife \$100,000 for loss of consortium, but the court [raised](#) these amounts to \$1.58 million and \$290,000, respectively.



On March 28, 2019, **Chief Justice Donald Beatty** issued a [surprise order](#) removing **Justice Toal** from her position as the sole arbiter of the asbestos docket in South Carolina. In so doing, Chief Justice Beatty provided an impetus for the state's asbestos docket to return to its normal operation. Unfortunately, just two months later, Chief Justice Beatty reversed course. He issued a May 28 order [re-appointing](#) Justice Toal as the Chief Judge overseeing all of the state's asbestos litigation and designating two other judges to preside over the cases.

Unless the state of South Carolina addresses these issues and returns the handling of asbestos cases to the individual counties in ordinary course, plaintiffs will likely continue to exploit these troubling and inequitable practices.

WEST VIRGINIA SUPREME COURT OF APPEALS

After a tumultuous 2018, the **West Virginia Supreme Court of Appeals** has temporarily stabilized, but all will be up for grabs in the 2020 election. Three of the five seats on the state high court will be on the primary ballot as individual non-partisan elections. All eyes will be on the results, as the state has the opportunity to continue to move in a fair and balanced direction, potentially moving off the Watch List once and for all.

HIGH COURT INSTABILITY

Last year, the **West Virginia Supreme Court of Appeals** was thrown into chaos with investigations and removals of many of the justices for improper spending of government funds. Fortunately, the [investigations](#) are complete and the Court is recovering from a turbulent 2018.

Disgraced **former Supreme Court Justice Allen Loughry** [was sent to prison](#) for his mail and wire fraud crimes. He was found to have improperly used state resources for personal use, crimes which he then tried to cover up. **Former Supreme Court Justice Menis E. Ketchum**, who pled guilty to fraud, will face three years' probation, a \$20,000 fine and restitution to the state. **Former Supreme Court Justice Robin Davis** [retired after her impeachment](#). She is [suing the Governor and the legislators](#) who supported the impeachment proceedings, claiming that her constitutional rights to free expression and due process were violated. She engaged in misconduct similar to her colleagues by [spending approximately \\$500,000 on office renovations](#). Lastly, **Justice Margaret Workman** was impeached but has [managed to stall her removal](#).

Governor Jim Justice (R) [appointed](#) U.S. Representative **Evan Jenkins**, and **previous House of Delegates Speaker Tim Armstead**, to serve as interim Justices on the West Virginia Supreme Court of Appeals in August 2018, filling the vacancies created by the resignation of Justices Ketchum and Davis. Jenkins and Armstead [were formally elected](#) to the court by voters in the 2018 November election.

The future is uncertain for the Supreme Court of Appeals, as the composition of the court will be decided at the 2020 ballot box. **Justice Tim Armstead** will seek a 12-year term, **Justice Hutchison** will seek the remainder of the term for his seat (four years), and **Justice Workman** will not seek re-election.

West Virginia is one of only nine states that does not have an intermediate appellate court, making it that much more important that the court provide balance and fairness.

LEGAL REFORM STALLS IN 2019

An impressive record of [legislative achievements](#) in addressing excessive liability and lawsuit abuse between 2015 and 2018 helped West Virginia shed its status as a Judicial Hellhole. This year, however, several long-needed legal reform proposals did not cross the finish line.

Legislation to establish an intermediate appellate court has [repeatedly](#) fallen short of enactment. A [2019 bill](#) passed the Senate, but failed to advance in the House. Although most West Virginians support establishing an intermediate appellate court, some members of the state's high court and the plaintiffs' bar have opposed doing so.



The main sticking point was the [cost](#) of the new court for the state, which, of course, is ironic given the allegations regarding the justices' own wasteful spending.

In addition to the legislature once again failing to establish an intermediate appellate court, other important legislation stalled.

Legislation introduced, but not enacted, included a commonsense [proposal](#) that would have allowed jurors in West Virginia to learn whether people involved in car accidents were wearing their seatbelts. West Virginia law currently allows the court to reduce a plaintiff's damages by [no more than 5 percent](#) for not wearing a seatbelt, even though wearing a seatbelt is often the difference between those who live and survive a car accident and is required by law. Keeping this law in place blindfolds the jury from fairly considering irresponsible behavior, as it would in any other personal injury case.

West Virginia also failed to address its status as an outlier in allowing plaintiffs who believe they were exposed to a hazardous substance to collect cash awards for [medical monitoring](#) without a present physical injury. Legislation is needed to rein in a 1999 West Virginia Supreme Court of Appeals [decision](#) that allows such claims even if the amount of exposure to a toxic substance is insufficient to cause injury and regardless of whether there is a medical benefit to early detection of a disease. While some other states allow claims seeking medical monitoring, the requirements for doing so are tightly circumscribed and there are safeguards requiring any money spent to actually go toward medical tests. In West Virginia, plaintiffs can take the quick cash.

DISHONORABLE MENTIONS

This report's **Dishonorable Mentions** generally comprise singularly unsound court decisions, abusive practices, legislation or other actions that erode the fairness of a state's civil justice system and aren't otherwise detailed in other sections of the report.

TROUBLESOME CONSUMER CONTRACTS RESTATEMENT

The **American Law Institute (ALI)** is scheduled to vote on its **Restatement of Law, Consumer Contracts** in May of 2020. This Restatement is the latest in a troubling series of work published by the ALI. ALI Restatements receive great deference from judges around the country; therefore, this Restatement is of serious concern.

According to the [ALI Style Manual](#), Restatements are supposed to present “clear formulations of common law... as it presently stands or might appropriately be stated by a court.” The Restatement of Law, Consumer Contracts deviates from this most basic objective by attempting to create out of whole cloth a separate area of contract law for “consumer contracts” where it does not appear that any court has articulated a separate set of consumer contract rules that operate differently than the general law of contracts. And, rather than “restating” existing law, the project plainly seeks to promote major public policy innovations rather than its stated purpose.

In many ways, this Restatement is no different than an article in a law journal advocating expanded civil liability, and judges should treat it that way as the late **Justice Antonin Scalia** [suggested](#). Among the troubling aspects of the **Restatement of Law, Consumer Contracts**:

- Undermining pre-dispute arbitration agreements.
- Expanding the unconscionability doctrine, which would provide courts with a new basis for invalidating terms in contracts between businesses and consumers.
- Creating a “deceptive contract” theory that establishes a novel basis for a consumer to void any “contract or term adopted as a result of a deceptive act or practice.” This would be a broad and amorphous new common law rule.
- Permitting the re-writing of contract terms that would give courts unfettered discretion to refuse to enforce all or part of any consumer contract, as well as reform contract terms to “operate against the business.”

Unfortunately, this Restatement is [not a one-off](#) and continues the troublesome trend that began with the liability-expanding section on [trespasser liability](#) several years ago and continued with the 2018 [Restatement of the Law of Liability Insurance](#). The ALI now has turned its attention to several new projects, including ones on [remedies](#) and [conflicts of law](#). ATRF will follow the process closely in hopes that the ALI correctly presents the law as it stands.

SIXTH CIRCUIT RULES TENNESSEE DAMAGES CAP UNCONSTITUTIONAL

In late December 2018, **U.S. Court of Appeals for the Sixth Circuit** found Tennessee's statutory limit on punitive damages [unconstitutional](#). In *Lindenberg v. Jackson National Life Insurance Co.*, the jury awarded the plaintiff \$3 million in punitive damages, which the district court judge reduced to \$700,000 in accordance with Tennessee's statutory limit on punitive damages.

Despite recognition that federal courts should be careful in adopting substantive innovations in state law and that Tennessee statutes should receive a “strong presumption” of constitutionality, the Court found the punitive

damages limit violated the right to a jury trial and was therefore unconstitutional. The vast majority of courts have upheld such laws as a legitimate, constitutional public policy decision.

ALASKA SUPREME COURT ALLOWS ‘PHANTOM DAMAGES’

In August 2019, the **Alaska Supreme Court** [ruled](#) that “an injured party is allowed to introduce the full, undiscounted medical bills into evidence at trial.” The Court stated that the lower court erred when it excluded evidence of the medical bills that were not discounted because the amounts actually billed by the providers were relevant evidence of the reasonable value of the medical services.

By interpreting the law in this way, damage awards will be improperly inflated. There is a presumption that the amount a healthcare provider accepts as payment for treatment is the value of the medical care (rather than initially invoiced amounts, which may be much higher). Phantom damages provide a windfall to plaintiffs and their attorneys at the expense of defendants.

KANSAS SUPREME COURT STRIKES DOWN STATUTORY LIMIT ON NONECONOMIC DAMAGES

In June 2019, the **Kansas Supreme Court** [struck down](#) the state’s statutory limit on noneconomic damages in personal injury cases for violating the right to a trial by jury. The Court found it interferes with the jury’s determination of compensation owed to plaintiffs.

The state law permitted plaintiffs to recover their full economic damages, such as medical expenses and lost income, but limited the subjective, intangible portion of awards for items such as pain and suffering. Statutory limits ensure liability insurance is available at a reasonable cost and safeguards against “[runaway juries](#)” that award huge verdicts. Limits also make it easier for parties to reach fair settlements. The vast majority of courts have upheld such laws as a legitimate, constitutional public policy decision.

OREGON SUPREME COURT ISSUES TWO LIABILITY-EXPANDING DECISIONS

In March 2019, the **Oregon Supreme Court** [limited](#) the application of Oregon’s statutory “social host” immunity. The Court refused to grant immunity to an employer that hosted a happy hour after an employee was injured while intoxicated at a work-related event. She claimed that her supervisor pressured her to attend the event. The Court said the statute only granted immunity for claims against servers and social hosts when voluntary intoxication was a cause of the injuries.

In June 2019, the Oregon Supreme Court [decided](#) a criminal case that indicated comparative fault will not be evaluated in tort cases if the defendant was reckless in committing the tort. Even though this was a criminal case, the Court indicated that this would be the standard for torts as well by stating that, “comparative fault applies only to fault of the type to which contributory negligence would have been a defense.” As a result, if a defendant in a tort case is found to be more culpable than grossly negligent, the defendant will be held fully liable for damages.

UTAH SUPREME COURT STRIKES DOWN MEDICAL LIABILITY LAW

In July 2019, the **Supreme Court of Utah** ruled a state law that required medical malpractice claimants to obtain a “certificate of compliance” from a state agency was [unconstitutional](#). The Court found the law violated the Separation of Powers doctrine because the law gave an agency the power to terminate a claim. The case arose after the patient’s widow attempted to obtain a certificate of compliance, as previously required by Utah law, failed, and then filed suit against the hospital claiming the certificate requirement was unconstitutional.

POINTS OF LIGHT

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

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

In its “Points of Light” section, the Judicial Hellholes report commends actions taken by judges, lawmakers and others to stem abuses of the civil justice system not detailed elsewhere in the report.

This report’s Points of Light typically comprise noteworthy actions taken by judges and lawmakers to stem abuses of the civil justice system not detailed elsewhere in the report.

IN THE COURTS

MISSOURI COURT DISMISSES MESH CASE FOR LACK OF PERSONAL JURISDICTION

On June 19, 2019, the **United States District Court for the Eastern District of Missouri** [held](#) that the court did not have personal jurisdiction over 99 plaintiffs’ claims because there was no connection between the plaintiffs and Missouri. The defendants were not “at home” in Missouri, nor were 96 of the 99 plaintiffs. The court properly relied on recent U.S. Supreme Court precedent and found that the plaintiffs, even if they were injured, [were not injured](#) by any activity committed by the defendant in Missouri.

The complaint was [originally filed](#) in the **City of St. Louis Circuit Court** but was removed to Missouri federal court by defendants.

NORTH DAKOTA SUPREME COURT UPHOLDS \$500,000 NONECONOMIC DAMAGE LIMIT

In April 2019, the **Supreme Court of North Dakota** [overruled](#) a district court that found the state’s \$500,000 limit on noneconomic damages to be unconstitutional.

The **Supreme Court** compared the legislative limit to a previous limit on medical malpractice liability that had been found unconstitutional but distinguished the new law because it did not limit a person’s economic damages. The previous court was worried about limiting the amount a plaintiff could recover to less than what was required to satisfy their medical bills, which is not an issue if there is no limit on economic damages.

The Court found convincing the fact that the limit was put in place at the recommendation of a task force that was created to improve the health care system. The goals of the task force were to (1) increase access; (2) control costs; and (3) to maintain or increase quality of health care in the state. The Court concluded that there was a close correspondence between the damages limit and the legitimate legislative goal of improving the health care system such that the law was not unconstitutional.

These limits protect access to healthcare and ensure that affordable medical liability insurance is available to doctors. Placing reasonable constraints on medical liability reduce and stabilize medical liability insurance rates, improve access to critical specialists for local residents, and lessen the incentive to engage in costly defensive medicine. Statutory limits on the subjective and unpredictable portion of an award also make it easier for parties to reach fair settlements.

SOUTH DAKOTA SUPREME COURT REFUSES TO EXPAND “BAD FAITH” LIABILITY FOR INSURERS

In September 2019, the **South Dakota Supreme Court** [ruled](#) that liability for insurance bad faith requires a showing of an insurer’s knowledge or reckless disregard of the lack of a reasonable basis for denial of a claim. The Court rejected a more expansive view of the state’s bad faith law put forth by the plaintiff. It stated, “[s]uch an expansion of the bad faith doctrine is not supported by our case law or the facts before the Court.”

An employee who was denied workers’ comp benefits brought a bad faith action against her employer’s insurer, alleging the insurer pursued a frivolous appeal of a state agency’s benefits decision to avoid paying benefits.

IN THE LEGISLATURES

- **Alabama** enacted the Asbestos Exposure Transparency Act ([S.B. 45](#)), which addresses the misleading practice of plaintiffs claiming in litigation that their exposure to asbestos was due to the named solvent companies, but asserting in claims for compensation from trusts established by bankrupt companies that their exposure is due to those businesses. The new law requires a plaintiff to file a sworn statement regarding the plaintiff’s exposure to asbestos or, alternatively, to file available asbestos trust claims and produce all trust claims materials before trial. It also creates a rebuttable presumption that asbestos trust claim materials are admissible as evidence in litigation and permits a defendant to seek discovery from an asbestos trust.
- **Florida** enacted legislation to curb abuse of assignment of insurance benefits ([H.B. 7065](#)) and provide a more reasonable time for insurers and their policyholders to resolve disputes before resorting to litigation ([H.B. 301](#)). The legislature also enacted legislation overturning a Florida Supreme Court decision that had imposed vicarious liability on companies that lease construction equipment. ([S.B. 862](#))
- **Mississippi** adopted the “Landowners Protection Act,” which will reduce premise liability exposure. The new law provides that a person who owns, leases, or manages property is generally not liable for criminal conduct that occurs on its property by a third party. The new law will stop lawsuits that seek to make businesses that operate in dangerous neighborhoods pay large awards for criminal attacks that occur in a store or parking lot unless the business truly knew of the danger and failed to address it. The law also allows a jury, when allocating fault in a premises liability action, to consider an attacker’s conduct. ([S.B. 2901](#)).
- **Missouri** enacted legislation that will reduce excessive, costly discovery. The bill requires discovery requests to be proportional to the needs of the case and places other limits on depositions, document requests, and production of electronically-stored information. ([S.B. 224](#)). The Show Me state also adopted legislation that will allow juries in product liability actions alleging that an automobile is defective to learn whether a plaintiff wore his or her seatbelt ([S.B. 30](#)). Lastly, Missouri enacted legislation designed to prevent the practice of out-of-state plaintiffs whose claims have no connection to the state from joining with local residents to bring lawsuits in a plaintiff-friendly court, such as in the City of St. Louis. ([S.B. 7](#))
- **Tennessee** became the first state to enact a law prohibiting specific misleading lawsuit advertising practices, such as presenting an ad as a “medical alert.” The law also requires certain disclosures in lawsuit ads, such as the identity of the sponsor and a warning to speak with a doctor before discontinuing a prescribed medication that is targeted by the ad. Those who use, obtain, sell, transfer, or disclose protected health information for the purpose of soliciting individuals to bring lawsuits are subject to criminal penalties. ([H.B. 352](#)).
- **Texas** became the first state to address the [barrage of lawsuits](#) filed by local governments at the invitation of contingency-fee lawyers. The law requires transparency when retaining outside counsel and provides the attorney general with authority to review and approve a political subdivision’s outside counsel contracts to ensure to lawsuit is not duplicative of, or conflict with, state litigation or policy. ([H.B. 2826](#)). Texas also reduced the potential for excessive “per violation” penalties under the state’s Deceptive Trade Practices Act

([S.B. 2140](#)), provided that the American law Institute’s Restatements of the Law are not controlling in Texas courts ([H.B. 2757](#)), and prohibited misleading lawsuit advertising practices ([S.B. 1189](#)).

- **Virginia** addressed the practice of outside advocacy groups [embedding](#) private lawyers in state attorneys general offices by providing that the sole source of compensation to employees of the Office of the Attorney General must be state appropriations ([H.B. 1700](#)). The Commonwealth also adopted a law that will make it possible to obtain summary judgment in certain types of litigation, which, until now, was generally not available even in the weakest of cases. ([H.B. .2197/S.B. 1486](#)).

CLOSER LOOKS

PUBLIC NUISANCE CLAIMS AND LOCALITIES LITIGATION

Pushing an expansive view of public nuisance law, the trial bar is seeking to represent local and state governments in a concerted effort to shift costs associated with public crises to businesses. The flood of lawsuits creates legal chaos. It may fill government budget gaps and line the pockets of trial lawyers, but it does little to help people or solve problems.

Historically, public nuisance law has been applied in cases involving land use and public spaces. A successful claim for public nuisance usually involves instances in which there is an [unreasonable interference](#) in a right that is common to the general public. Typical cases include manufacturing plants emitting noxious fumes or restaurants blaring loud music.

The new expansive view of public nuisance law exploits the vague definition of the tort and applies it to costs associated with products, sometimes long after they are made and sold. This trend is concerning to all industries and is likely to continue as state and local governments look for sources of funding for public health and other problems. By this logic, cell phone manufacturers could be held liable for harm caused by distracted drivers. Similarly, automakers might be held liable for accidents caused by drunk drivers. Snack food makers could be held liable for the costs of obesity. And beverage companies could be required to shoulder the cost of plastic in the ocean. These costs would be imposed regardless of what was understood when a company sold the product, whether the product complied with government regulations or even was approved by the government, and a company's actual share of responsibility for a concern that later developed.

LEAD PAINT LITIGATION

The trial bar first sought to expand the law of public nuisance in the context of lead paint. The [U.S. Environmental Protection Agency](#) banned the use of lead in paint in 1978, but most of the lawsuits were not filed until years later. They claimed children [were harmed](#) by ingesting lead particles from flaking and deteriorating paint. Looking to shift the focus from individual landowners who are responsible for maintaining their property to paint manufacturers viewed as having deep pockets, plaintiffs' lawyers initially filed lawsuits alleging traditional product liability claims. Courts rejected these claims, and the trial bar was left searching for a new legal theory of liability.

The trial bar then [recast the lawsuits](#) in hopes of capitalizing on the antiquated and vague law of public nuisance. Courts repeatedly [rejected](#) this proposed expansion of liability, [recognizing](#) that decades after selling the paint at issue, the companies [lacked](#) the critical element of "control" of the nuisance. They no longer sold the paint and had no authority to remove it from private property.

Courts in California, a perennial Judicial Hellhole, however, ultimately adopted this approach. In 2014, in a lawsuit brought by California cities and counties, a court ordered the companies to pay [\\$1.15 billion](#) to inspect and abate the affected homes. An appellate court in 2017 limited the companies' liability to homes built before 1951 (reducing the award to \$409 million), but left undisturbed the finding that lead paint is a public nuisance.

In a 2018 [landmark lead paint](#) ruling, the **California Supreme Court** upheld the award. After the U.S. Supreme Court [declined](#) to review the decision, the case settled for [\\$305 million](#) this year. About [\\$65 million](#) of this sum will go to plaintiffs' lawyers for their fees and expenses. Plaintiffs' lawyers now use that outcome to entice local governments to bring public nuisance lawsuits against other industries.

CLIMATE CHANGE LITIGATION

At least nine cities and counties and [three states](#) have sued energy producers for costs that they attribute to climate change. These lawsuits, which began with a handful of California municipalities in 2017, generally allege that, by

producing the energy Americans use every day, the companies created a public nuisance. The lawsuits include [inflammatory allegations](#) of industry secrecy and conspiracy. They blame the oil and gas industry for changes in weather patterns and sea level increases, and attempt to make the companies pay for local infrastructure projects, such as sea walls. These climate change lawsuits [are driven](#) by private law firms. The litigation's backers are actively recruiting mayors to file carbon copy lawsuits.

In June 2018, a federal judge [dismissed](#) a case brought by the cities of Oakland and San Francisco. **Judge William Alsup** recognized that the [limited role](#) of the judiciary is to solve disputes between parties before the court, not develop national policy. "The problem [of global warming] deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case." The cities are appealing the ruling to the Ninth Circuit. Judge Alsup also found that all parties agreed that fossil fuels have contributed to global warming and a rise in sea levels, but also understood that these anticipated harms must be weighed against the positive effects of oil and coal, without which our modern world would not be possible.

That decision is on appeal. In May 2019, 18 state AGs filed an [amicus brief](#) in the **U.S. Court of Appeal for the Ninth Circuit** arguing that public nuisance law is inappropriate in the matter. The brief states that "the issues surrounding climate change and its effects—and the proper balance of regulatory and commercial activity—present political questions that cannot be resolved by judicial decree."

In July 2018, on the opposite coast, a similar climate change lawsuit filed by New York City [resulted](#) in dismissal. **U.S. District Judge John M. Keenan** found that it is inappropriate to use state laws and the courts to address costs attributed to greenhouse gases that cross state and national boundaries. Solutions to global warming, he found, must be developed through federal legislation and foreign policy, not local lawsuits. That ruling is now on appeal to the Second Circuit.

Despite these setbacks for the plaintiffs' bar, more climate change lawsuits filed by contingency-fee lawyers on behalf of localities are expected.

OPIOID CRISIS

Lawsuits have been filed by about 2,000 state and local governments alleging that companies that made, sold, or distributed painkiller medications, known as opioids, created a public nuisance, as addiction to the drugs and illegal alternatives has soared.

Two state courts properly rejected such claims in early 2019. In January 2019, a Connecticut state court judge [tossed](#) a public nuisance claim brought by [37 municipalities](#), finding they failed to show how the companies named as defendants directly caused the opioid addiction related costs that the cities sought to recoup. Allowing the claims to proceed, **Judge Thomas Moukawsher** observed, "would risk letting everyone sue almost everyone else about pretty much everything that harms us." He concluded that "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money and moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the state. But it's bad law."

Allowing the claims to proceed "would risk letting everyone sue almost everyone else about pretty much everything that harms us." He concluded that "it might be tempting to wink at this whole thing and add pressure on parties who are presumed to have lots of money and moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the state. But it's bad law."

– Judge Thomas Moukawsher

Four months later, in May, a trial court in North Dakota became the [first to dismiss](#) a claim in the opioid litigation brought by a state attorney general. The court [found](#) the public nuisance claim not viable due to the lack of control over the product after it enters the market. The court recognized that manufacturers do not control how doctors prescribe opioids and how individual patients use the drugs. No North Dakota court, the judge observed, had extended public nuisance law to cases that involve the sale of goods. Quoting precedent from the asbestos context, the court recognized that extending the application of public nuisance law to a situation where one party

has sold to another a product that later is alleged to constitute a nuisance would make nuisance law “a monster that would devour in one gulp the entire law of tort.”

Oklahoma, a newly minted Judicial Hellhole, became the first state to adopt an overly expansive view of public nuisance law as applied to the opioid crisis. **Oklahoma Attorney General Mike Hunter** argued that the companies created a public nuisance by expanding the market for opioids through deceptive marketing campaigns involving misrepresentations and omissions about their lawful, highly-regulated, non-defective product. He made this argument, despite [previously stating](#), “you cannot litigate what legislators refuse to legislate and regulators refuse to regulate.” His statement was regarding other states pursuing public nuisance claims in climate change litigation.

As the first trials approached in the opioid litigation, Purdue reached a [\\$270 million settlement](#) in March and TEVA reached an [\\$85 million settlement](#) in May with the state of Oklahoma. Johnson & Johnson, however, opted to go to trial. While the state sought \$17 billion, **Oklahoma Judge Thad Balkman** [imposed](#) a [\\$572 million](#) judgment to fund an “abatement program” in August, which he viewed as the amount to pay costs associated with the opioid crisis for one year. (He later admitted that, due to a [math error](#), he was about \$100 million too high).

Oklahoma has codified its public nuisance law, [defining](#) a nuisance as “unlawfully doing an act, or omitting to perform a duty” that “annoys, injures, or endangers the comfort, repose, health, or safety of others.” The court disregarded a century of state case law applying nuisance claims to resolve property disputes, not product sales, noting the statute does not limit its reach, and, even if state law requires use of a property, that is met because some of the company’s employees were trained in their Oklahoma homes and used company cars traveling on state and county roads – a tenuous and questionable way to characterize a nuisance. The ruling also places the entire responsibility for opioid addiction on one company without recognizing many other companies and contributing factors leading to the epidemic. The case is on appeal and the judgement is viewed as highly vulnerable.

Opioid litigation continues. Cases in the federal judicial system are in multi-district litigation before a judge in Cleveland, Ohio. As the first bellwether trials involving two Ohio counties, Summit and Cuyahoga, approached, the **Sixth Circuit** [rejected](#) a [petition](#) filed by **Ohio Attorney General Dave Yost** asking the federal appellate court to dismiss these cases. His petition, which was supported by 13 other state attorneys general, observed that allowing the county cases to move forward would intrude on the state’s authority, and lead to inconsistent verdicts and misallocated funds. On the eve of trial in October, three pharmaceutical distributors and TEVA agreed to a [\\$260 million](#) settlement with the two counties. Plaintiffs’ lawyers, a few attorneys general, and defendants also are floating a [\\$48 billion](#) settlement proposal that would require five companies to pay \$22.25 billion in cash over 18 years and to fund \$26 billion in addiction services over the next decade. Other state AGs and lawyers representing local governments, however, oppose the proposal. Unsurprisingly, one of the sticking points is how much of the money goes to the many contingency-fee lawyers who brought the local lawsuits.

VAPING CRISIS

Quick to capitalize on emerging public health crises, the trial bar now has turned its attention to e-Cigarettes. Plaintiffs’ firms once again are leading the effort and urging school districts to sue Juul Labs and other e-Cigarette companies for the public nuisance caused by their products. They [claim](#) Juul has created a public nuisance through deceptive marketing giving rise to a vaping epidemic that has harmed students and disrupted schools.

For example, [Wagstaff & Cartmell](#), a Kansas-based law firm, has successfully engaged several Kansas school districts and will represent them on a [contingency-fee basis](#). The firm [approached](#) the Kansas school boards and actively recruited them as clients. The plaintiffs’ bar is using a similar playbook to the one used in the opioid litigation – flood the courts with lawsuits by local governments to pressure businesses to settle and maximize their personal gain.

CONCLUSION

While each of these areas are very different matters, they all seek to establish public policy through litigation while ostensibly “solving” complex problems. Attempting to resolve a public health crisis requires a court to assume the responsibilities and authority of the other two branches of government.

The simple reality is that significant problems arise when states, cities, towns, counties, and other local entities across the country each bring lawsuits seeking money or action on the same issue. The authority to fully resolve the litigation is complicated by the number of entities involved. Competing interests make judicial resolution much more difficult, if not impossible, to achieve. The protracted litigation may delay implementation of programs to actually help those in need.

Plaintiffs' lawyers actively court governments as "clients" because they understand that bringing lawsuits in the name of a government may provide them with power and leverage not present in ordinary "private" civil litigation. It also entitles them to what are expected to be outsized legal fees in the event of a verdict or a settlement. The incentive for these lawyers is to maximize their fees regardless of what is truly in the public interest.

Experience demonstrates that lawsuits motivated and brought by contingency-fee lawyers on behalf of governmental entities will not solve complex public policy issues and proceeds are diverted for other purposes. Governments and their lawyers point to the "success" of the tobacco litigation from a generation ago as a basis to justify litigation. A closer examination of that experience, however, shows that the tobacco settlement did little for smoking cessation efforts. For example, in FY 2019, states will collect \$27.3 billion from the 1998 tobacco settlement and tobacco taxes, but will spend just [2.4 percent](#) of it on prevention and cessation programs. Locality-based contingency fee lawsuits will do little to help the victims while lining the pockets of trial lawyers.

States must ensure that any litigation it initiates serves the public interest and they should combat problems that arise with localities litigation. Major public crises demand a major response by government leaders, but the continued wave of contingency-fee litigation brought by state and local governments is the wrong approach. It won't do much to help victims or solve the crisis, and instead creates lasting problems for the civil justice system.

A TOXIC BREW: NEW THEORIES OF EMPLOYMENT LIABILITY AND THE WAR ON ARBITRATION

The trial bar has launched an ambitious effort to expand its business model of driving class action lawsuits into the employment arena. New theories of employment liability and the war on arbitration are creating a toxic brew that will lead to more lawsuits and less jobs.

ANTI-ARBITRATION EFFORTS

In 2019, **California**, **Illinois**, **New Jersey**, and **New York** each passed legislation seeking to ban arbitration in certain employment liability cases. This is the trial bar's first step towards banning arbitration in all civil litigation. These newly-enacted bills contributed to each state's status as a Judicial Hellhole, as they are certain to lead to an increase in expensive and protracted litigation. The wave of new lawsuits will benefit the entrepreneurial plaintiffs' bar – while doing very little to protect employees.

The [California bill](#) prevents employers from including language in their contracts with applicants, employees and independent contractors to "waive any right, forum, or procedure for a violation" of the **California Fair Employment and Housing Act** and the **Labor Code**. Without specifically mentioning arbitration, it [guts arbitration agreements](#) because that is exactly what they are - a waiver of a right, forum, and procedure. It is doubtful that the California law complies with U.S. Supreme Court precedent, which [recognizes](#) that the **Federal Arbitration Act** does not permit states to enact laws that ban arbitration. The **California Chamber of Commerce** has labeled the bill a "job killer" due to the significant increased costs employers will face as a result of more litigation and the expense of delayed dispute resolutions.

Illinois enacted a similar bill, although it is not as broad as the California approach. [S.B. 75](#) bans unilateral agreements to arbitrate work-related harassment, discrimination and retaliation claims. It limits the use of non-disclosure agreements and arbitration clauses.

In **New Jersey**, **Governor Murphy** signed a bill into law that prohibits "[waivers of procedural rights](#)" – effectively banning arbitration agreements. Any employer who attempts to enforce an arbitration provision that is deemed

against public policy would be responsible for attorney’s fees and costs, in addition to any available damages. Following enactment of this dangerous bill, the **New Jersey Civil Justice Institute** and the **U.S. Chamber of Commerce** filed a [complaint](#) in federal court asking for both declaratory and injunctive relief. They argue that the legislation will have a sweeping negative impact on New Jersey business and is preempted by the **Federal Arbitration Act**.

Finally, **New York** enacted [legislation](#) that [prohibits the use](#) of arbitration for all employment discrimination cases. The bill also [extends](#) the statute of limitations to file sexual harassment claims from one year to three years. **Frank Kerbein**, director of the Center for Human Resources at the Business Council of New York State warns of the high costs to businesses and the ramifications of the new law. “We support a workplace free from harassment, the vast majority of employers do that... Our concern is looking out for employers that are doing everything right and in spite of that could be on the hook substantially.”

NEW PRIVATE RIGHTS OF ACTION AGAINST EMPLOYERS

The trial bar has engaged a two-part strategy to increase employment litigation – first, restrict the availability of arbitration in employment litigation and then create new theories of employment liability to sue employers. The new private rights of action are a goldmine for plaintiffs’ attorneys, particularly when combined with the elimination of arbitration. They authorize extensive remedies, creating greater incentive for plaintiffs’ lawyers to sue employers. Now, lawyers can file class action lawsuits on behalf of all similarly situated employees, exponentially increasing their fees.

New areas of employment liability include equal pay, predictive scheduling, sexual harassment and anti-discrimination laws, and employee misclassification or anti-independent contractor laws. Many of these new laws expansively define violations, some shift the burden of proof to the employer, and others expand the statute of limitations for filing claims. The new statutes are likely to lead to a litigation explosion in the employment context, driving up legal costs for employers and killing jobs in the states.

PREDICTIVE SCHEDULING

Predictive scheduling laws essentially [require](#) employers to post employee work schedules [in advance](#). If the schedule is changed after a certain time, employers must provide their employees extra pay. The laws also require employers to give employees an adequate rest period. In 2018, [Oregon](#) became the first state to enact a predictive scheduling law. Other [states and municipalities](#) have followed, including New York City, Philadelphia, San Francisco, San Jose, Seattle, and Washington, D.C. While the laws vary, remedies include compensatory damages, liquidated damages, attorneys’ fees and equitable relief—all of which provide an incentive to sue employers.

MANDATORY EMPLOYEE REIMBURSEMENT

Mandatory employee reimbursement laws demand employers compensate employees to pay for expenses they incur within the scope of employment. Under these laws, for example, employers are required to reimburse employees for work clothes, equipment, or other items employees are required to wear or use at work. These laws could also lead to reimbursement demands stemming from use of home internet service, printers, and cell phone data plans for work-related purposes, or use of personal vehicles for anything beyond normal commuting. [Illinois](#) and **California** are among the states to have passed this type of law. In [California](#), failing to reimburse employees for an incurred expense can lead to class action lawsuits.

EMPLOYEE MISCLASSIFICATION

The ability to rely on workers who are independent contractors, rather than employees, is both important to businesses that do not want the strict legal obligations imposed on employers and to workers who value flexibility and being their own boss. It is particularly important for [gig economy](#) like Uber, Lyft and DoorDash that use digital platforms to connect workers with customers.

Whether a worker is viewed as an employee or an independent contractor has significant impacts on how that person is compensated, such as whether that person is entitled to minimum wage, overtime, breaks, reim-

bursement of expenses, workers' compensation, or benefits. The distinction between who is an employee versus an independent contractor typically turns on the level of control the businesses has over a person's work.

In 2018, the **California Supreme Court** [adopted](#) a standard that presumes all workers are employees and placed the burden on businesses to prove that (A) the worker is free from the control or direction of the hiring entity, (B) the worker performs work that is outside of the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed (known as the "ABC Test"). Rather than consider these as factors in determining whether a person is an employee or independent contractor, *Dynamex Operations West, Inc. v. Superior Court* requires a company to show a worker meets each of these requirements to rebut a claim that a person is an employee.

This year, the California legislature [codified](#) this problematic decision and expanded it to apply to any type of claim (Dynamex addressed only wage-and-hour violations). The [new law](#) will serve as a goldmine for plaintiffs' lawyers who will no longer be stymied by arbitration clauses when suing these companies for misclassifying workers. The new law applies retroactively. As a result, lawyers [caution](#) that "California businesses can expect to be defendants in class actions brought on behalf of individuals they never hired, supervised, compensated or scheduled who will seek from them the reimbursement of many years of claimed expenses and losses."

In November 2019, a similar bill was introduced in the New Jersey Legislature. [S.B. 4204](#) would "[effectively prohibit](#)" employers from classifying workers as independent contractors. The bill would adopt the highly restrictive "ABC Test," implemented by California. **National Federation of Independent Business** has raised concerns that this bill could cause [substantial harm](#) to free-lance business owners and subcontractors.

ADDITIONAL EXPANSIONS OF EMPLOYER LIABILITY

Five states and Washington, D.C. have mandated paid family and other types of leave. This [includes](#) California, New Jersey, New York, Rhode Island, and Washington state. For example, the [New Jersey Family Leave and SAFE Acts](#) expands situations in which an employee is entitled to paid leave. Aggrieved employees can sue for monetary damages, attorneys' fees and costs, injunctive relief and reinstatement to his or her former position.

California, Illinois, Massachusetts, New Jersey, New York, and Oregon are among states that have passed equal pay legislation. Under Illinois law, in cases alleging unlawful wage disparities, employees [can recover](#) not only lost wages and other compensatory damages, but also up to \$10,000 in special damages as well as punitive damages. Prior to the bill's enactment, employees were entitled to lost wages and attorney's fees and costs. The additional remedies provide greater incentive for plaintiffs' lawyers to sue employers.

THE COMING WAVE OF PRIVACY CLASS ACTIONS: A CAUTIONARY TALE FROM ILLINOIS

Privacy and security litigation is poised to become a "feeding frenzy" as [plaintiffs' lawyers](#) look to the next cash cow. Illinois provides a stark warning, fanning the flames of abusive privacy litigation against businesses. Interpreting the state's Biometric Information Privacy Act ("BIPA"), the highest court in Illinois endorsed suits brought by consumers and employees who—often by their own admission—have not suffered any real harm. These no-injury lawsuits are not new, but they are becoming more prevalent and are imposing significant costs on legitimate businesses offering useful services—all without enhancing consumer privacy. Illinois' BIPA is not the only emerging threat, but it provides a sobering illustration of why legislatures should be skeptical about creating new privacy-based private rights to sue.

As the [National Law Review explained](#), other states have some biometric privacy regulation, but "Illinois' law is unique in that it allows for a private right of action. The BIPA provides for a minimum of \$1,000 or actual damages, whichever is greater, per violation (i.e. per fingerprint)."

In January—in a case called [Rosenbach v. Six Flags Entertainment](#)—the Illinois Supreme Court found that plaintiffs could sue organizations for "bare procedural violation[s]" of the Illinois BIPA without showing any harm

as a result of those procedural violations. In other words, if someone voluntarily agrees to scan their fingerprint as a quick way to get into an amusement park with their season pass, she can later sue the amusement park for not informing the customer “in writing that [fingerprint] information was being collected or stored.” While the fact of collection would seem obvious—by virtue of one providing their fingerprint to the amusement park and then repeatedly using it to scan into the park—that was of no concern to the Illinois Supreme Court. A mere technical violation of a statutory requirement can open the floodgates to class action liability. The *Rosenbach* court has given the green light for BIPA suits against legitimate companies offering useful services that harm no one. A few days after the *Rosenbach* decision, hundreds of BIPA cases were filed. One law firm reported that in the first 5 months after the decision, the Illinois plaintiff’s bar filed nearly as many BIPA class actions as it did during the prior 10 years, and that the overwhelming majority were filed in Illinois’ Circuit Court of Cook County, a 2019 Judicial Hellhole.

The Illinois courts took a broad view of their statutory right to sue, but after *Rosenbach*, court-watchers wondered whether federal courts would hold the line on the traditional requirements under the federal Constitution that plaintiffs be able to show actual or imminent injury to sue. At least one federal appeals court has said no and opened the courthouse doors to no-injury privacy suits, based on a claimed violation of BIPA.

In *Patel v. Facebook*, the Ninth Circuit allowed a plaintiff to bring a suit for alleged BIPA violations stemming from a service that the litigant himself [described](#) as a “nice feature” that he chose not to opt out of even though he knew he could do so. The court refused to dismiss the suit even though the plaintiff readily admitted that he did not suffer any adverse effect from using that “nice feature.” It hardly seems fair to let someone enjoy a service and then turn around and collect millions of dollars in “damages” (statutory damages that is, not any real-world harm). And these BIPA lawsuits don’t come cheap.

BIPA provides for liquidated damages of up to \$1,000 per negligent violation and \$5,000 per intentional violation. Silicon valley giants are currently looking at [billions](#) of dollars in liability for offering features that consumers voluntarily used and from which they suffered no harm. And it’s not just the tech giants. Brick and mortar businesses of all sizes are in the cross hairs.

In *Colon v. Dynacast*, employees sued their employer—a manufacturing company—for utilizing a system where employees scanned their fingerprints to clock in to work. These biometric time clocks are [increasingly common](#) in American workplaces, and, as a result, many companies may be at risk of astronomical damages. Indeed, suits over biometric time clocks [have been filed](#) against a gas station owner, a metalwork company, a grocery store chain, a car brake maker, and an office furniture vendor. One commentator has [opined](#) that BIPA penalties for using biometric time clocks could be up to \$2,000 per employee per day: \$1,000 per negligent violation, counting clocking in and clocking out as separate violations. Perhaps unsurprisingly then, in *Dynacast*, the plaintiff alleged that the use of the fingerprint system by 200 employees resulted in “well-over \$5,000,000” in liability.

BIPA suits are the latest iteration in a troubling trend of [“no-injury” lawsuits](#). We have seen this play out before. The Fair Credit Reporting Act (“FCRA”) is an older federal law that [requires](#) employers to disclose—“in a document that consists solely of the disclosure”—that they are going to obtain credit or background reports on a potential hire. FCRA’s statutory damages provision [allows](#) for plaintiffs to obtain between \$100 and \$1,000, an amount that can quickly add up in a class action lawsuit. For example, Frito-Lay paid \$2.4 million to [settle](#) a class action claim for a highly technical FCRA violation: it provided the required FCRA disclosures, just not in a stand-alone document. The plaintiffs conceded that the violation “d[id] not result in measurable economic damages,” but, under FCRA’s statutory damage regime, actual harm isn’t necessary. As a result, plaintiffs can extort companies who have—by the plaintiffs’ admission—not harmed anyone.

Another private right to sue has gone haywire and created a massive wealth transfer to plaintiffs’ lawyers. The Telephone Consumer Protection Act (“TCPA”) was intended to prevent intrusive telemarketing calls, but litigation using the TCPA has been a major payday for plaintiff’s firms. The statute authorizes plaintiffs to recover statutory damages from \$500 to \$1500 per violation. Because of ambiguity about what constitutes a violation, serial plaintiffs have gone to extreme lengths to manufacture lawsuits. Forbes [described](#) one plaintiff who “bought and collected at least 35 different pre-paid cell phones and stored them in a shoebox[.]” She would then document all calls received

on the phones in a log and file TCPA lawsuits against big companies. When asked why she did so, her response was illuminating: “It’s my business. It’s what I do.”

Some laws empower professional plaintiffs and their lawyers to make suing legitimate companies their livelihood. One serial FCRA plaintiff utilized [a scheme](#) where he would “apply for employment and get to the point where the hiring entity would provide him with the FCRA required disclosure and authorization as part of the background check/investigation.” He would then send a demand letter or file a lawsuit alleging violations of FCRA. A judge ultimately threw out one such case after finding that the plaintiff brought FCRA claims against more than 40 different companies. Recently, a federal judge in California rejected a plaintiff’s attempt to secure a settlement under the California Invasion of Privacy Act, where the individual had “filed 10 class actions alleging violations of the California privacy law, eight of them within the last two years” and his cases yielded payments of more than \$80,000 to him and over \$420,000 to his lawyers.” The purported plaintiff appears to have “made more money as a CIPA plaintiff than he did in his fulltime job.”

Some plaintiff’s firms facilitate the same charades. Here’s how one firm [describes](#) TCPA suits:

What you are going to see is that this can really add up fast. We have seen some folks get 100 calls or texts.

I call it the joy of math.

Let’s say you got 50 illegal texts. 50 times \$1,500 = \$75,000

But it is worth it if you only get \$1,500 or \$3,000.

Who couldn’t use the extra money.

Perhaps worst of all, these types of lawsuits fail to protect consumers. A 2019 [study](#) concluded that “privacy-related statutes that do not include private rights of action and instead delegate enforcement power to agencies are often far superior to private litigation.” And those results jive with the facts on the ground. There have been [more than 2,500](#) TCPA suits this year—costing an average of [\\$6.6 million](#) to settle—yet Americans still receive [more than 50,000](#) illegal phone calls **every minute**. The data is clear: private rights of action can hurt businesses and are a poor way to protect consumers.

Legislatures should be wary of privacy-based private rights of action. Opening the door to abusive and expensive litigation like that described above weakens states’ business and innovation climate; it can put companies out of business and deter them from offering beneficial services. And they do this while lining the pockets of lawyers and failing to protect consumers.

THE MAKING OF A JUDICIAL HELLHOLE:

QUESTION: What makes a jurisdiction a Judicial Hellhole?

ANSWER: The judges.

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

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

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

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

Weaknesses in evidence are routinely overcome by pretrial and procedural rulings. Judges approve novel legal theories so that even plaintiffs without injuries can win awards for "damages." Class actions are certified regardless of the commonality of claims. Defendants are targeted not because they may be culpable, but because they have deep pockets and will likely settle rather than risk greater injustice in the jurisdiction's courts. Local defendants may also be named simply to keep cases out of federal courts. Extraordinary verdicts are upheld, even when they are unsupported by the evidence and may be in violation of constitutional standards. And Hellholes judges often allow cases to proceed even if the plaintiff, defendant, witnesses and events in question have no connection to the jurisdiction.

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

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

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

PRETRIAL RULINGS

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

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

DECISIONS DURING TRIAL

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

UNREASONABLE EXPANSIONS OF LIABILITY

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

JUDICIAL INTEGRITY

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



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