

EQUAL JUSTICE UNDER LAW*

*EXCEPT IN JUDICIAL HELLHOLES

JUDICIAL HELLHOLES®

2008/2009

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

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

“That venue probably adds about 75% to the value of the case.... [W]hen you’re in Starr County, traditionally you need to just show that the guy was working, and he was hurt. And that’s the hurdle....”²

—Tony Buzbee, West Texas trial lawyer, on filing lawsuits in Starr County, a jurisdiction in Texas’ Rio Grande Valley.

“There’s one thing I have learned in the State of West Virginia the hard way, this ain’t Texas, this ain’t Kansas, this is West Virginia, and we don’t give summary judgment. Every time I do, I get reversed.... And I’m going to allow all of these [cases] to go to a jury.”³

—Judge O.C. “Hobby” Spaulding, presiding over a claim for breach of a confidentiality agreement when the jury ultimately returned a verdict for \$14.9 million in compensatory damages, despite the lack of evidence that the plaintiff actually experienced a financial loss.

“West Virginia was a ‘field of dreams’ for plaintiffs’ lawyers. We built it and they came.”⁴

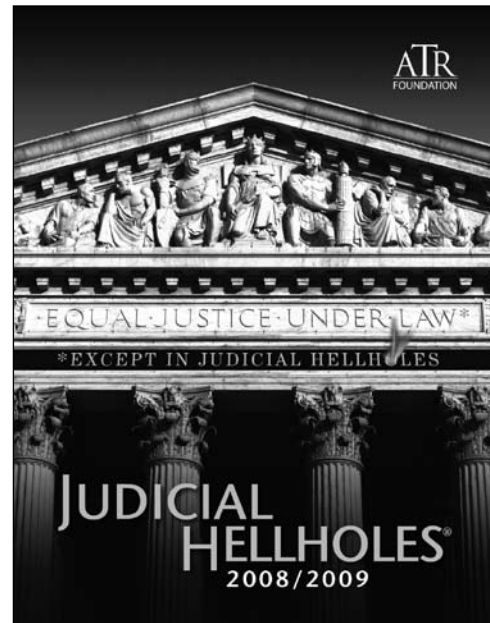
—West Virginia Judge Arthur Recht

ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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PREFACE

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

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

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

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

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

To the extent possible, ATRF has tried to be specific in explaining why defendants are unable to receive fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members are justifiably concerned about reprisals if their names and cases were identified in this report – a sad commentary about the Hellholes in and of itself. Defense lawyers are “loathe” to get on the bad side of the local trial bar and “almost always ask to remain anonymous in newspaper stories.”⁵

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

The focus of this report is squarely on the conduct of judges who do not apply the law evenhandedly to all litigants, and do not conduct trials in a fair and balanced manner. But as scrutiny of the judiciary by the public, the media and the other two branches of government has been heightened in recent years, thanks in part to this annual report and others like it, the adaptive plaintiffs’ bar has begun to work additional angles.

Accordingly, this year’s Judicial Hellholes report offers additional analyses that highlight disturbing new efforts by tort lawyers to expand liability and litigation. These efforts include working with their political allies in Congress and in state legislatures to roll back recent tort reforms and otherwise grow their business model. “Building on momentum at the federal level, state trial lawyer associations and consumer groups are well positioned to continue advancing” what the nation’s largest trial lawyers association euphemistically called “strong, pro-consumer civil justice measures in the states over the next few years” in the November 2008 edition of its monthly magazine, *Trial*. And speaking of state political alliances, tort lawyers are increasingly working hand-in-glove with some state attorneys general to bring often speculative lawsuits against “deep-pocketed” companies in a trend that dangerously mixes private interest in profits with the public interest in justice.

Finally, just as the tireless tort bar continually revises its plans of attack, the Judicial Hellholes project must innovate, too. The addition of a plaintiffs’ bar Rogues’ Gallery to this year’s report serves as a not-so-subtle reminder to policymakers in Washington and around the country that they have a responsibility to oversee and limit abuses of the civil justice system so it can provide Equal Justice Under Law.

While waiting for that responsibility to be met, readers of this report can send information about questionable judicial practices to:

Judicial Hellholes
American Tort Reform Foundation
1101 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036
Email: judicialhellholes.atrf@atra.org

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

EXECUTIVE SUMMARY

JUDICIAL HELLHOLES 2008/2009

Judicial Hellholes are places where judges systematically apply laws and court procedures in an inequitable manner, generally against defendants in civil lawsuits. In this seventh annual report, ATRF shines its brightest spotlight on seven areas of the country that have developed reputations for uneven justice.

1. WEST VIRGINIA

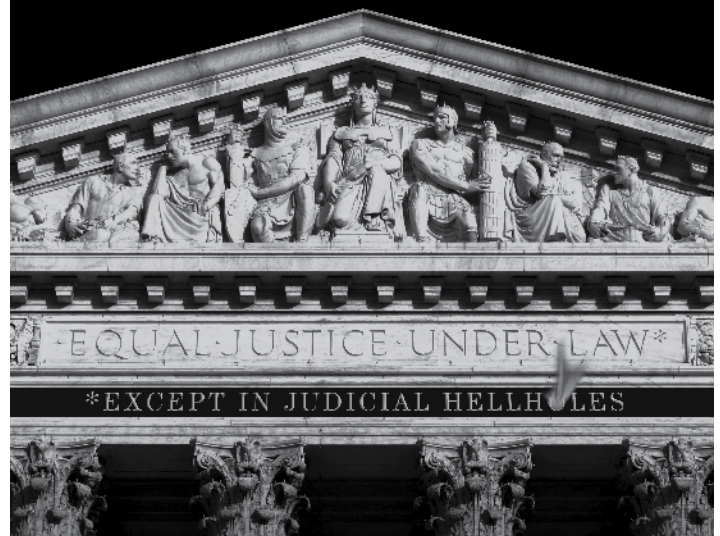
West Virginia reclaims the #1 ranking this year for its near perfect storm of anti-business rulings, massive lawsuits and cozy relationships between the personal injury bar, the state attorney general and some in the judiciary. The state's highest court has a history of plaintiff-biased decisions, paying damages to those who are not injured, allowing mass trials, permitting lawsuits outside the workers' compensation system, rejecting long-established legal principles, and welcoming plaintiffs' lawyers from other states to take advantage of its generous rulings. To make matters worse, West Virginia is one of only two states that do not guarantee a right to appeal a civil verdict, even if a multimillion-dollar award is clearly excessive under the law or the trial court violated procedural fairness by allowing a jury to decide punitive damages before it found a defendant legally responsible for a claim. There also may be no state with a closer alliance between the state attorney general and politically-connected personal injury lawyers. This alliance has wreaked havoc at the expense of civil justice.

2. SOUTH FLORIDA

South Florida maintains its reputation for legally excessive awards and plaintiff-biased rulings that make it a launching pad for class actions, dubious claims and novel legal theories creating new types of lawsuits. This year South Florida was home to a record-breaking award in an asbestos case. And though medical malpractice claims may be coming down off their peak, the area is still home to some of the largest such awards. Not surprisingly, its doctors pay among the highest insurance premiums in the nation. It is also a place where professional plaintiffs patrol small business sites for technical violations of the Americans with Disabilities Act, hoping to gin up litigation. Broward County has recently seen more than its share of judicial misconduct allegations. So yet again, this hellhole has many problems.

JUDICIAL HELLHOLES[®] 2008/2009

- 1 West Virginia
- 2 South Florida
- 3 Cook County, Illinois
- 4 Atlantic County, New Jersey
- 5 Montgomery & Macon Counties In Alabama
- 6 Los Angeles County, California
- 7 Clark County, Nevada



3. COOK COUNTY, ILLINOIS

Cook County, Illinois, with its reputation for hostility toward corporate defendants, has long been known as a receptive host for lawsuits. In past years, the Chicago area experienced a surge in asbestos claims, embraced class action lawsuits and became known for excessive awards. Cook County still hosts significantly more than its proportional share of lawsuits in the state, as its courts permit “forum shopping” whereby lawyers from other parts of the state or country can bring lawsuits that have little or no connection to Cook County. It was also a Cook County court that threw out a state law aimed at solving medical liability problems that had set physicians fleeing the state. At press time, the Illinois Supreme Court was still considering the appeal.

4. ATLANTIC COUNTY, NEW JERSEY

Atlantic County, New Jersey, and the state known as the “nation’s medicine cabinet,” has become the destination of choice for those suing the pharmaceutical industry. Believe it or not, some of these cases are brought on behalf of people who do not even claim to have been harmed by taking a drug. Instead, lawyers are seeking massive payouts for anyone who merely purchased a drug. Other areas of the state have problems, too, such as particularly large personal injury awards in Monmouth County and an astounding appellate court ruling in a Cape May case holding restaurant and bar owners responsible for accidents caused by drunken patrons, even if those patrons didn’t consume alcohol while at their establishments. Such decisions are certainly bad for small businesses, but lawyers are doing all right: An advisory committee to the New Jersey Supreme Court found that a contingency fee lawyer may in some cases take as much as half of his or her client’s recovery.

5. MONTGOMERY & MACON COUNTIES IN ALABAMA

Montgomery & Macon Counties in Alabama this year moved up from their recent Watch List rankings thanks to legally excessive verdicts, controversial alliances among government officials and personal injury lawyers, and suspect court rulings. Montgomery County courts returned two of the most excessive verdicts against pharmaceutical companies in the country totaling almost a quarter-billion dollars. Alabama’s attorney general outsourced lawsuits to trial lawyers who may be motivated more by their personal interests than by the public interest. Meanwhile, in nearby Macon County, two judges gave new meaning to the phrase “jackpot justice” in awarding a plaintiff 1,000 times the maximum payout of a gaming park’s malfunctioning slot machine.

6. LOS ANGELES COUNTY, CALIFORNIA

Los Angeles County, California, has returned to the ranks of Judicial Hellholes, in part, for allowing “shakedown” lawsuits brought primarily against small businesses under the Americans with Disabilities Act, and for otherwise hosting astonishingly

excessive verdicts. The county long known as “the bank” has remained one of the most desirable places in the nation to file lawsuits. Los Angeles this year produced a startling number of large asbestos awards. And in one recent string of lawsuits stemming from a practical joke, just about everyone walked away with a payment.

7. CLARK COUNTY, NEVADA

Clark County, Nevada, lawyers recognize that they have a problem – and it isn’t gambling or drinking. According to one recent allegation by the FBI in Las Vegas, plaintiffs’ attorneys try to game the system in favor of their clients by contributing politically to the judges before whom they appear. Defense lawyers feel the scales of justice are tipped against them, as shown by one instance in which a court ordered a new trial when a defense lawyer had the audacity to mention frivolous lawsuits and individual responsibility in his closing argument. Meanwhile, courts do not appear to show the same concern when a personal injury lawyer exhorts jurors to “send a message” by returning a huge verdict. Many Clark County lawyers are also looking for a way to exceed a voter-passed limit on damages for pain and suffering in medical malpractice cases, which would cause more doctors to flee the state.

WATCH LIST

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

- 1 The Gulf Coast & Rio Grande Valley of Texas
- 2 Madison County, Illinois
- 3 Baltimore, Maryland
- 4 St. Louis (the City of), and St. Louis and Jackson Counties, Missouri



1. **The Gulf Coast & Rio Grande Valley of Texas**, collectively, have long been counted among Judicial Hellholes, despite the rest of the state's strong support for tort reform. But these counties have finally moved from among the very worst to Watch List status. If for no other reason, Texas appellate courts are reining in lower court decisions that fly in the face of evidence and/or yield excessive awards. The litigation environment has also improved for doctors and their patients, who are now experiencing the benefits of the state's medical liability reforms.
2. **Madison County, Illinois**, perennially ranked among Judicial Hellholes from 2002 through 2006 before dropping to the Watch List last year, continued progress in restoring judicial fairness led by Chief Judge Ann Callis and Judge Daniel Stack. Thus ATRF keeps Madison County on the Watch List once again, despite serious concerns about a recent hellhole-like spike in asbestos filings.
3. **Baltimore, Maryland**. Lead paint suits, asbestos litigation and large verdicts characterize the litigation environment that is the home for baseball's Orioles, the owner of whom just happens to be personal injury lawyer superstar Peter Angelos. With the state's longstanding limit on noneconomic damages – the one pitch that's kept plaintiffs' lawyers from really crowding the plate – now under attack, the tort bar's shamelessly self-interested sluggers are again swinging for the fences.
4. **St. Louis (the City of), and St. Louis and Jackson Counties, Missouri**. These areas host many of Missouri's biggest verdicts and settlements, including some recent record-breakers. St. Louis County is generally considered a more balanced jurisdiction than its city neighbor, which ATRF has previously included in this report. Recent decisions, however, leave that reputation in doubt.

Other Areas to Watch include: Orange County, California; St. Clair County, Illinois; Madison, Wisconsin; Seattle, Washington; New Orleans, Louisiana; Minnesota; Santa Fe, New Mexico; and Oklahoma.

DISHONORABLE MENTIONS

Dishonorable mentions recognize particularly abusive practices, unsound court decisions or legislative actions that create unfairness in the civil justice system. This year's dishonorable mentions include:



- 1 **Massachusetts Supreme Judicial Court**
- 2 **Missouri Supreme Court**

1. The **Massachusetts Supreme Judicial Court** for taking medical liability to the next level by ruling that not only do doctors have a duty to warn their patients about the potential side effects of prescribed medications, but the doctors also must somehow warn everyone else who might be injured if those patients suffer side effects.
2. The **Missouri Supreme Court** for one-upping its 2007 ruling that allowed awards for medical monitoring in absence of injury with a decision that effectively invites plaintiffs from all around the country to file claims in the Show Me (Your Lawsuits) State.

POINTS OF LIGHT

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

- **Maryland Court of Appeals’ rejection** of “a duty to the world” for prescription drug manufacturers who won’t be obliged to warn anyone who might be injured by a person as a result of a medication’s side effect.
- **Rhode Island Supreme Court’s decision** to maintain the well-defined boundaries of public nuisance law, setting an important precedent for other courts around the country.
- **Pennsylvania and Texas legislative reforms** that have improved accessibility to healthcare.
- **New Jersey and Oregon high court decisions** reaffirming the fundamental legal principle that people cannot sue for damages unless they have suffered an injury.

TORT DEFORM

Now more than ever, personal injury lawyers and organizations that represent them are on the offensive. They have embarked on an ambitious lobbying campaign at the state and federal levels to increase business, which, in their case, means more lawsuits and greater liability. In this context, it is especially important that judges uphold the due process rights of defendants, avoid creating new types of lawsuits unless explicitly authorized by the legislature, and interpret laws in a commonsense manner that does not vastly expand liability.

STATE AGs & THE TORT BAR

With increasing regularity, some state attorneys general are hiring personal injury lawyers from the private sector to perform legal work for the state, and hundreds of millions of dollars in contingency fees are sometimes at stake. Yet often enough, some state AGs award such lucrative contracts to their political supporters without competitive bidding and with little or no oversight from the public or state legislatures.

ROGUES’ GALLERY

As judges and prosecutors ferret out misconduct and corruption among plaintiffs’ lawyers, some of the most prominent of those lawyers are being sent to prison. Fraudulent medical diagnoses, fictitious doctors, paid-for plaintiffs, judicial bribery, release of protected documents, eavesdropping on jury deliberations, embezzlement of client money – it’s all happened recently in our nation’s courts. How widespread is this corruption of our civil justice system? Congress should investigate.

SOLUTIONS

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

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

THE MAKING OF A JUDICIAL HELLHOLE:

QUESTION: WHAT MAKES A JURISDICTION A JUDICIAL HELLHOLE?

ANSWER: THE JUDGES.

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

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

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, Judicial Hellholes judges do not. Instead, these few jurists may favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases.⁶ 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 judges 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 for injuries caused by others' wrongful acts.

Weaknesses in evidence are routinely overcome by pre-trial and procedural rulings. Product identification and causation become "irrelevant because [they know] the jury will return a verdict in favor of the plaintiff."⁷ Judges approve novel legal theories so that even plaintiffs without injuries can win awards for "damages." Class actions are certified regardless of the commonality of claims. Defendants are named, not because they may be culpable, but because they have deep pockets or will be forced to settle at the threat of being subject to the jurisdiction. Local defendants may also be named simply to keep cases out of federal courts. Extraordinary verdicts are upheld, even when they are unsup-

ported by the evidence and may be in violation of constitutional standards. And judges often allow cases to proceed even if the plaintiff, defendant and witnesses, and events in question have no connection to the jurisdiction.

Not surprisingly, personal injury lawyers don't refer to such jurisdictions as Judicial Hellholes. Instead, they call them "magic jurisdictions,"⁸ and look for any excuse to file lawsuits there. Rulings in Judicial Hellholes often have national or interstate implications because they involve parties from across the country, can result in excessive awards that wrongfully bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.

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

PRE-TRIAL RULINGS

- **Forum Shopping.** Judicial Hellholes are known for being plaintiff-biased and thus attracting 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 unsupported by existing law to go forward. Instead of dismissing these suits, Hellholes judges adopt new and retroactive legal theories, which often have inappropriate national ramifications.
- **Discovery Abuse.** Judges allow unnecessarily broad, invasive and expensive discovery requests to increase the burden of litigation on defendants. Judges also may apply discovery rules in an unbalanced manner, denying defendants their fundamental right to learn about the plaintiff's case.
- **Consolidation & Joinder.** Judges join claims together into mass actions that do not have common facts and circumstances. In one notorious 2002 example, West Virginia courts consolidated more than 8,000 claims and 250 defendants in

a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.

- **Improper Class Action Certification.** Judges certify classes without sufficiently common sets of facts or law. These classes can confuse juries and make the cases difficult to defend. In states where class certification cannot be appealed until after a trial, improper class certification can force a company into a large, unfair settlement.
- **Unfair Case Scheduling.** Judges schedule cases in ways that are unfair or overly burdensome. For example, judges in Judicial Hellholes have scheduled numerous cases against a defendant to start on the same day or otherwise given defendants short notice before a trial begins.

DECISIONS DURING TRIAL

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

UNREASONABLE EXPANSIONS OF LIABILITY

- **Private Lawsuits under Consumer Protection Statutes.** The vague wording of state consumer protection laws has led some judges to allow plaintiffs to sue even if they can't demonstrate an actual financial loss that resulted from their reliance on allegedly deceptive conduct.
- **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. Public nuisance theory has always targeted how properties or products are used, not manufactured, which is the province of products liability law. As one court observed, if this effort succeeds, personal injury lawyers would be able to "convert almost every products liability action into a [public] nuisance claim."⁹
- **Expansion of Damages.** There also has been a concerted effort to expand the scope of damages, which may hurt society as a whole, such as "hedonic" damages in personal injury claims or "loss of companionship" damages in animal injury cases.

JUDICIAL INTEGRITY

- **Trial Lawyer Contributions.** Trial lawyer contributions make up a disproportionate amount of donations to locally elected judges. A poll found that 46 percent of judges said donations influenced their judicial decisions.¹⁰
- **Cozy Relations.** There is often excessive familiarity among jurists, personal injury lawyers and government officials.
- **Alliance Between State Attorneys General and Personal Injury Lawyers.** Some state attorneys general routinely work hand-in-glove with personal injury lawyers, hiring them on a contingency fee basis. Such arrangements introduce a profit motive into government law enforcement, casting a shadow over whether government action is taken for public good or private gain.

JUDICIAL HELLHOLES 2008/2009

HELLHOLE # 1

WEST VIRGINIA

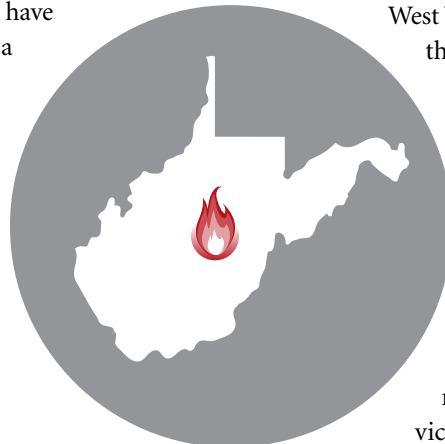
LIABILITY EXPANDING, PLAINTIFF-BIASED COURT DECISIONS

It seems as if the West Virginia Supreme Court of Appeals, the state's highest court, is hell-bent on repeatedly reminding the public that the state is known as "wild and wonderful" not simply for its natural beauty, but also for its lawsuits. Why has this report recognized West Virginia as its sole statewide Judicial Hellhole for so many years? Let us review:

West Virginia's one-of-kind medical monitoring lawsuits. In 1999, the court ruled that those who may have been exposed to a dangerous substance can get a cash award even if they have no symptoms of illness.¹¹ Most states that have recently considered the issue either reject such a cause of action entirely or require that damages go toward medical expenses.¹² Yet West Virginia's speculative law allows thousands of plaintiffs to sue for future injuries and receive awards that can then be used to buy cars, vacation getaways or anything else they choose. A \$381 million verdict including medical monitoring claims against DuPont is currently on appeal to the state's high court.

West Virginia's mass trials. In 2002, the court allowed to proceed a mass asbestos trial that batched together "thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs."¹³ Such trials put enormous pressure on defendants to settle, and severely limit the ability of courts and defendants to focus on the merits of individual claims. Writing separately upon the West Virginia Supreme Court of Appeals' upholding of the trial court's consolidation, Justice Elliott Maynard noted that he was "deeply concerned" regarding the trial court's practices and the likely denial of the defendants' due process rights, adding, "and some federal court will eventually tell us so."¹⁴

West Virginia welcomes residents of other states to take advantage of its favorable courts. In 2003, the state legislature passed a law intended to curb the forum shopping that led to the filing of thousands of asbestos suits in the state.¹⁵ That reform barred suits in West Virginia courts by those who do not live in West Virginia unless a "substantial part" of the acts or omissions giving rise to the claim occurred in the state or the plaintiff was unable to sue in another state. In addition, the legislature required that every plaintiff satisfy the new venue requirements so as to prevent out-of-state plaintiffs from riding on the coattails of a plaintiff for whom venue is proper. But the West Virginia Supreme Court of Appeals struck down the law in 2006, saying that it discriminated against out-of-state residents under the Privileges and Immunities Clause of the United States Constitution.¹⁶ Though courts in other states have upheld rational forum shopping limits in order to protect the tax dollars and court resources of their own states' residents, West Virginia's legislature ultimately was forced by the high court to pass a less effective law.



West Virginia courts are chipping away at the state's workers' compensation system. Ordinarily, state workers' compensation systems provide the sole avenue for recovery available to workers injured in the workplace, thereby barring the injured employee from recovering against the employer via a civil tort claim. This exclusive remedy is rooted in a trade-off whereby employers accept vicarious liability for work-related injuries and forfeit all traditional defenses while employees waive traditional tort remedies in exchange for a system of compensation without consideration of fault or the cost and delay of litigation. The West Virginia Supreme Court of Appeals, however, has so broadly interpreted an exception for deliberate acts in the state workers' compensation law that the exception is swallowing the rule.¹⁷ For instance, in 2006, the court ruled that an employer's failure to follow a safety regulation is akin to intending harm to an employee.¹⁸ As one West Virginia lawyer noted, "our state Supreme Court has continually interpreted the exception liberally in favor of finding liability at nearly every opportunity."¹⁹ According to West Virginia University economics professor Russell S. Sobel, such decisions have a negative impact on the state's business climate.²⁰

West Virginia doesn't recognize that doctors are in the best position to warn their patients of potential side effects of treatment. Last year, this report noted the West Virginia high court's 3-2

decision that made it the first state to entirely reject the “learned intermediary” exception to pharmaceutical product liability cases.²¹ In plain English, that means that, unlike courts in most every state, plaintiffs in West Virginia courts can hold a manufacturer of prescription drugs directly liable for failing to warn a patient of risks, even if the company gave all pertinent information to the patient’s physician, who was in a much better position to assess and discuss the risks to that individual plaintiff based on his or her unique medical and family history. Mandating direct warnings to consumers could have the unintended effect of discouraging the use of beneficial drugs when certain risk factors may not apply to particular patients or when benefits clearly exceed even applicable risks. Such complicated assessments are ordinarily left for doctors to discuss with their patients.

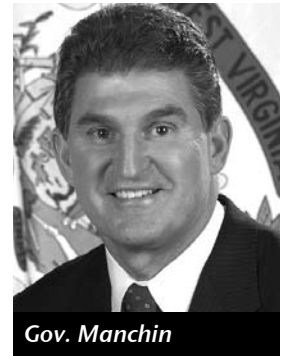
West Virginia courts backwardly allow juries to decide on punishments for defendants before deciding whether defendants are even liable. This year, the state’s high court tacitly authorized a highly controversial “reverse bifurcation” approach to punitive damages awards by permitting jurors in a medical monitoring case brought by coal miners to hear evidence of punitive damages before determining basic liability. The West Virginia Supreme Court of Appeals refused to stop a trial court’s plan to use this approach.²² Observers have argued that this practice violates basic due process rights of defendants.²³

There’s no right to an appeal in civil cases in West Virginia. West Virginia is one of only eight jurisdictions that do not have an intermediate appellate court, making the Supreme Court of Appeals the only venue for an appeal. Moreover, the state’s only appellate court

has full discretionary jurisdiction in civil cases, meaning it can choose whether or not to consider a case. The practical reality of that almost unique combination is that a defendant has no assurance of judicial review of a completely lawless decision.

Last year this report highlighted a case in which the court refused to review a \$10.5 million verdict in a breach of confidentiality agreement and trade secrets claim, wherein even the trial court judge noted that he was “most troubled” by and “struggling with” the measure of damages, concluding, “I’m not going to reduce it, though I am concerned with it.”²⁴

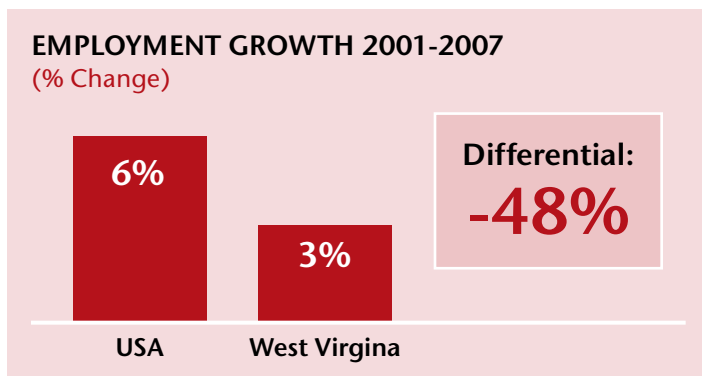
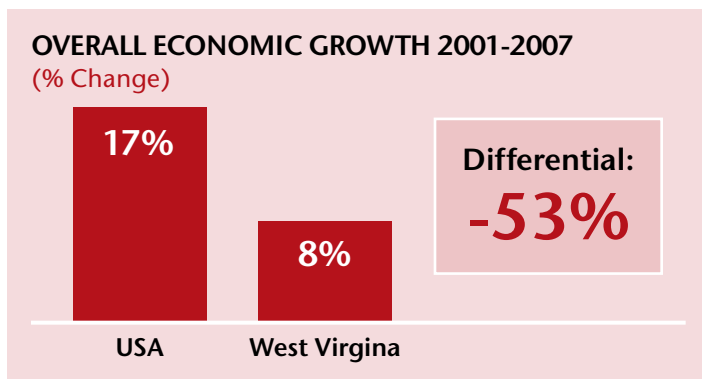
This year the Supreme Court of Appeals denied review of a dubious \$405 million verdict, including \$270 million in punitive damages, which found two major natural gas suppliers – Chesapeake Energy and NiSource, Inc. – liable for underpaying landowners in a royalties contract dispute. One week following the verdict, Chesapeake Energy announced it was cancelling a \$35 million commitment to build a state-of-the-art regional headquarters near the state’s capital city.²⁵ The high court this year also denied review of a \$100 million punitive damages award against Massey Energy for a coal shipment dispute with Wheeling-Pittsburgh Steel.²⁶ Following denial of review, both the NiSource and Massey cases were appealed to the U.S. Supreme Court – part of a disturbing trend wherein the highest court in the country has become the *de facto* court for first appeal in West Virginia.²⁷ The business climate has gotten so bad that Governor Joe Manchin this year filed an *amicus curiae*, or “friend of the court” brief, urging the court to hear the appeal of a case in which the trial court ordered DuPont – still a significant employer in the state – to pay \$381 million in medical monitoring and clean up costs, punitive damages and lawyers’ fees.²⁸ The court voted 4-1 to hear DuPont’s appeal.²⁹



THE ATTORNEY GENERAL’S ALLIANCE WITH THE PERSONAL INJURY BAR

West Virginia Attorney General Darrell McGraw hires private personal injury attorneys to pursue litigation for the state rather frequently, relative to other state AGs (see *Dangerous Liasons*, p. 34). It is a lucrative arrangement that has the potential to put profit before justice. McGraw’s is a long-standing practice, dating back to the 1990s when he hired outside counsel to obtain nearly \$1.8 billion from the tobacco industry, a substantial amount of which went not to the state but to those private sector attorneys. Often enough, these attorneys are not paid on an hourly basis but instead receive a portion of the award that ought to go to the State and its citizens.³⁰ State Senator Vic Sprouse has called McGraw’s use of private firms the largest concern facing the West Virginia Legislature.³¹

For example, in 2004, a settlement against drug companies for alleged deceptive advertising of the drug OxyContin also earned outside firms \$3.3 million of a \$10 million award.³² Currently, private law firms assisting the state attorney general may receive about \$3.9



Source: U.S. Government

million for their work on an antitrust case against Visa and MasterCard. The settlement, which is pending final approval, would direct the credit card companies to pay \$11.6 million in order to fund sales tax holidays on energy efficient appliances in West Virginia.

Attorney General McGraw does not use a competitive bidding process to hire these attorneys. And it should come as no surprise that several of these firms have been significant contributors to McGraw's reelection campaigns. Indeed, the two firms that McGraw named as deputies in the lawsuit against Visa and MasterCard were contributors to his most recent campaign.³³ Such arrangements lead to questions about whether the state's taxpayers are getting the best lawyers for their money.

Perhaps of greatest concern, however, is whether McGraw has intruded on the powers of the state legislature. By using contingency fee agreements, McGraw does not need to seek an appropriation from the legislature to pursue his goals as other state agencies would. Moreover, when he wins, he keeps millions of dollars for distribution by his office after his favorite personal injury lawyers get their cut. McGraw doles out funds recovered in lawsuits for politically popular organizations around the state, such as the Charleston Black Ministerial Alliance, the Boys and Girls Club of Weirton, and the Monongalia County Truancy Task Force, issuing self-congratulatory news releases in the process.³⁴ While any number of these recipients may pursue noble goals, it is for the legislative branch of government – not the executive branch as represented by the attorney general – to fund them, if at all, from the state's general fund and in accordance with all other spending priorities as democratically determined.



“Darrell McGraw turned the attorney general’s office into a plaintiffs’ law firm that uses the power of the state to extract money from corporations. It is one more reason why the business world views the state as one big judicial hellhole.”³⁵

—Charleston Daily Mail

MEDICAL MALPRACTICE: GOOD NEWS AND BAD NEWS

First the good news. The number of West Virginia practicing physicians has steadily grown from 4,873 in 2004 to 5,513 this year,³⁶ as medical malpractice premiums have decreased significantly. A general surgeon paid \$82,821 per year for insurance in 2005 and now pays \$58,219.³⁷

Thus laws enacted in 2001 and 2003 to stem rising medical malpractice insurance rates appear to be working. The 2001 law

limited damages for pain and suffering in medical liability cases to \$1 million.³⁸ Then the Medical and Professional Liability Act of 2003 included a sliding scale of between \$250,000 and \$500,000 and required plaintiffs to file certificates signed by independent doctors attesting to their claims’ merits before proceeding.³⁹ The idea is to protect doctors from lawyers who file bogus suits first and hope questions can be postponed until later – after a quick settlement has been reached.

Shortly after publication of the 2007 Judicial Hellholes report, the West Virginia Supreme Court of Appeals rejected an attempt to circumvent the \$1 million limit of the 2001 law when a plaintiff diagnosed with a bacterial infection after a knee surgery claimed the limit did not apply because the case involved an outbreak in a hospital rather than during direct patient care provided by a doctor.⁴⁰ In another case, West Virginia’s high court avoided addressing the constitutionality of the 2003 law’s requirement that plaintiffs submit certificates of merit to support their medical malpractice claims, ruling on technical grounds and leaving the law intact, at least for now.⁴¹

The bad news is that the number of medical malpractice lawsuits increased 34 percent from 130 cases in 2004 to 174 last year, according to the West Virginia Medical Association.⁴² The relatively modest rise in filings may not reflect increased liability and, hopefully, will not spur increased insurance premiums for physicians and decreased health care accessibility for patients.

PLAINTIFF SUES FOR \$10 MILLION IN DAMAGES!

Embarrassed by frivolous lawsuits filed in West Virginia, the state legislature passed a law that prohibits claiming a specific dollar amount for damages in personal injury or wrongful death complaints.⁴³ The law came about in response to a headline-making lawsuit filed in 2007 when the plaintiff, after biting into a McDonald’s Quarter Pounder, alleged he suffered an allergic reaction to melted cheese and claimed \$10 million in damages.⁴⁴



WEST VIRGINIA’S REPUTATION PRECEDES IT

The Judicial Hellholes report is not alone in citing West Virginia’s dubious and economy-sapping litigation environment. The state again ranked dead last this year in the U.S. Chamber of Commerce Institute for Legal Reform’s “Legal Climate” study.⁴⁵ Forbes ranked the state last for the second year in a row in its annual rankings of “The Best States for Business.”⁴⁶ In addition, a U.S. Census Bureau study reports “Brain Drain” in the state as young professionals between 21 and 45 are leaving the state in droves to search for more promising career opportunities elsewhere. More broadly, federal statistics also show that only two of West Virginia’s larger cities experienced any significant growth during the past seven years.⁴⁷

HELLHOLE # 2

SOUTH FLORIDA

South Florida – particularly Miami-Dade and Palm Beach counties, and, to a somewhat lesser extent, Broward County – has a reputation for excessive awards, lenient class certifications and abusive medical malpractice lawsuits. Previous Judicial Hellholes reports have also discussed asbestos litigation and the admission of unreliable expert evidence in local courts, as well as the unpredictability of the Sunshine State’s highest court. The state is also one of the most popular in the country for those bringing tobacco lawsuits, thanks to rulings that give plaintiffs significant advantages. And it appears to be generating, with factory-like productivity, a robust new line of disabled-access claims.

DOCTORS REMAIN WORRIED

After years of increases, medical malpractice cases appear to have peaked in Florida in 2006, at 3,811. South Florida attorneys are now scaling down their medical malpractice work. Nevertheless, the impact of the litigation has led to medical malpractice insurance premiums that are among the highest in the nation, with a significant number of uninsured or under insured doctors.⁴⁸

Many medical malpractice cases stem from true tragedies, particularly when childbirth is involved. But extraordinarily high awards, like the \$35 million to a family in Broward County this year, limit access to healthcare for everyone.⁴⁹ According to Carlos Muhletaler, executive director of Florida Stop Lawsuit Abuse, “Due to the high liability surrounding childbirth, many physicians have opted to practice gynecology exclusively and walk away from obstetrics,” and fewer medical students are considering obstetrics as a career. OB-GYNs pay \$300,000 on average for medical malpractice insurance in Florida, while internal medicine practitioners pay about \$70,000.⁵⁰

The Palm Beach Medical Society has found that the county’s supply of doctors in certain specialties is insufficient to meet patient needs and has reached critical levels for on-call coverage in emergency departments.⁵¹ The Medical Society anticipates that the gap will significantly increase over the next three years – especially for general surgeons, neurosurgeons, and OB-GYNs – as the area’s older physicians retire and Florida’s population keeps growing.⁵²

Dr. Augusto Lopez-Torres, a practicing physician in South Florida for more than 35 years, believes that part of the problem is that Florida courts permit hired-gun expert witnesses to substantiate bogus claims. These purported “experts” are often not Florida-licensed medical physicians, meaning that the Florida Medical Board has no authority to sanction them.⁵³

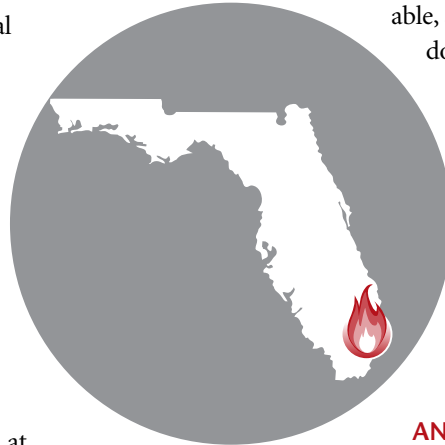
RECKLESS DISREGARD FOR THE AVAILABILITY OF MEDICAL CARE?

A Broward County judge has permitted a patient to seek punitive damages in a medical liability case revolving around plastic surgery, according to a December 2008 report in the Daily Business Review. Punitive damages are rarely available in medical liability cases, which are generally based on a doctor’s negligence, not intentional conduct or reckless disregard for human life. Such instances are

and ought to be rare, as punitive damages are not insurable, and if permitted, would come directly out of the

doctor’s own pocket. If this case signals that South Florida courts are to be more accepting of such claims for punitive damages, doctors may well flee the state for safer legal environments.

The Florida personal injury bar, according to the report, has embraced the case as a promise of new opportunity and has scheduled the winning lawyer to speak at its annual convention about “how to get punitive damages in a medical malpractice case.”



ANOTHER RECORD BREAKER

Outlier verdicts are not limited to medical malpractice cases. A Miami-Dade court this year entered a \$24.2 million compensatory damages award against Honeywell International in what is believed to be the largest verdict with a single defendant in Florida asbestos litigation history. The jury reached its determination after just three hours of deliberations, though Honeywell itself did not manufacture products containing asbestos. Its involvement in the case resulted from a series of corporate mergers dating back over 25 years. From 1981 through 2007, Honeywell prevailed in all but 10 of the 135 asbestos cases against it that went to trial. But it seems to have learned the hard way that going to trial in South Florida risks an outlier verdict.⁵⁴

APPELLATE COURT LIMITS EFFECTIVENESS OF ASBESTOS REFORM

South Florida courts sometimes seem bent on resisting efforts to enhance the administration of justice. In response to the filing of thousands of lawsuits by plaintiffs who were not sick but nonetheless claimed “injury” from asbestos exposure, the state legislature enacted the Florida Asbestos and Silica Compensation Fairness Act in 2005.⁵⁵ The reform law sought to preserve court resources for meritorious asbestos claimants by prioritizing them so that they can be resolved more quickly, and deferring the enormous number of asbestos claims made by plaintiffs who show no symptoms of illness. But the Fourth Appellate District based in Palm Beach County this year held that the law could not be applied to “non-sick” claims that were already pending.⁵⁶ The decision reverses 13 decisions by Palm Beach Circuit Court Judge Elizabeth Maass, who had upheld the law’s retroactivity.⁵⁷ Some plaintiffs’ lawyers estimate that the appellate court’s ruling will revive as many as 4,000 asbestos cases in Florida courts.⁵⁸ (The case is now pending appeal

to the Florida Supreme Court. In stark contrast, the Ohio Supreme Court upheld a similar law in October of this year.⁵⁹

Of course asbestos litigation has a long and sordid history in South Florida. By the 1990s these collective Hellholes jurisdictions had become a “[M]ecca for asbestos lawsuits.”⁶⁰ In 2004 Broward County was handling up to 8,000 active cases, and Miami-Dade, Palm Beach, Hillsborough and Duval counties each had an estimated 800 to 1,750 asbestos cases.⁶¹ In 2002 Palm Beach County alone had 3,200 asbestos cases.⁶² As recently as June 2006 a Florida appellate court noted “the large volume of asbestos personal injury cases in Miami-Dade County.”⁶³

“It seems we have built a machine here.... It’s like building the Sawgrass Expressway in the middle of nowhere. Build it, and they will come.”⁶⁴

—Palm Beach Judge Timothy McCarthy
on the influx of asbestos claims filed by nonresident
plaintiffs with little or no connection to Florida

Fueled by questionable mass screening practices, the volume of asbestos lawsuits by unimpaired claimants continues to clog courts and thus delay or deny justice, not only for those who have truly been sickened by the substance, but also for countless other non-asbestos civil plaintiffs and defendants who wait needlessly for their rightful days in court.⁶⁵

IMPROVE GRADUATION RATES – OR I’LL SUE!

In South Florida some believe in education reform by lawsuit. This year the American Civil Liberties Union (ACLU) chose Palm Beach County to bring a class action lawsuit that is the first of its kind in the country, suing the school district for its low graduation rate as a violation of the state’s constitutional mandate to provide a high-quality education for all. Judge Jonathan D. Gerber dismissed the claim, however, noting that if there is a constitutional obligation, it falls on the state, not individual school districts. Since the Palm Beach district’s graduation rate is higher than most similarly sized districts in the state, many question why it was sued in the first place and what more it could do.⁶⁶ “We do have a gap [in graduation rates],” said Palm Beach County schools superintendent Arthur Johnson. “But so does the state, so does the nation . . . Suing Palm Beach County is not going to solve it.”⁶⁷

THE EPICENTER OF SMOKING LITIGATION

The 12-year saga of the *Engle* case continues with Florida providing the backdrop as lawsuit central.

The Florida Supreme Court in 2006 decertified a statewide class of smokers in *Engle*, throwing out a \$145 billion verdict from Miami-Dade County.⁶⁸ But that was not the end of the litigation.

Florida’s high court sent an invitation for individuals to proceed with their respective claims, and it made it much easier for them to do so by relieving individuals of the need to show: the addictive nature of smoking, that smoking causes cancer and a wide range of diseases, and that cigarette companies sold defective products and concealed the truth about the dangers. Each plaintiff would, however, still need to prove that smoking caused his or her illness.

The Florida Supreme Court had set a deadline of January 11, 2008 for “*Engle* progeny” cases to be filed, and about 8,000 individuals made the deadline. That’s a huge number of lawsuits, but one that pales in comparison to the estimated 700,000 plaintiffs comprising the original class action. The cases are about evenly divided between Florida’s state and federal courts. Some of the federal court judges are questioning whether the Florida Supreme Court decision, by essentially requiring the cigarette companies to cede much of their defense in the individual actions, violated the defendants’ federal due process rights. “This court will not sacrifice the fundamental right of due process upon the altars of expediency, thrift and ‘pragmatism,’” wrote U.S. District Judge Howard Schlesinger of Jacksonville in an order certifying the issue to the U.S. Court of Appeals for the Eleventh Circuit.⁶⁹

Also stemming from the suit is the \$600 million “*Engle* Trust Fund,” which was set up by the tobacco companies in 2001 so they could appeal the \$145 billion verdict without having to put up a potentially bankrupting bond to do so. In April 2008, a Miami-Dade court ruled that it would distribute the money equally among the Florida smokers who became ill before November 21, 1996, rather than consider the severity of respective claimants’ illnesses.⁷⁰ Approximately 61,400 Florida smokers filed claims for compensation before a June 2008 deadline – that’s more than triple the number of anticipated claims and likely resulted from aggressive lawyer advertising.⁷¹ As the *Daily Business Review* reported, “Attorneys from across the state have scrambled to find any piece of evidence that could prove someone had a history of smoking” in order to get a cut of the award.⁷² In October 2008, the first distri-



tribution of \$9,000 went out to each individual who had submitted a valid claim.⁷³ More distributions may follow.

In addition to the aftermath of *Engle*, the Florida Supreme Court is currently deciding whether to uphold a \$540,000 award by a Broward County court against Liggett Group. The plaintiff in that case alleged that Liggett’s Chesterfield cigarettes were defective because they could have been safer. “How can cigarettes be made safer?” one might ask. Well, the plaintiffs’ lawyers didn’t believe that was a detail their claim had to spell out, and the court did not require them to do so. The Florida Supreme Court is now con-

sidering whether a plaintiff is required to show a safer alternative design to prevail on a strict liability design defect claim.⁷⁴

ADA LAWSUIT FACTORY

Is there anything wrong with actively scouting out business facilities that do not precisely provide the level of access required by the Americans with Disabilities Act (ADA) for the sole purpose of bringing litigation, whether or not the plaintiff had been denied access as a legitimate customer of those businesses? Allen Fox doesn't think so. He's a disabled former member of the Riviera Beach city council who has teamed up with lawyer Samuel Aurilio to bring 139 ADA lawsuits over the past six years. Aurilio is a pro. He's brought 274 cases under the ADA in Florida courts. Rather than ask business owners to make improvements, Fox and Riviera sue first and ask questions, if ever, at trial.⁷⁵ Win or lose, such lawsuits are largely risk-free for plaintiffs and their attorneys – and can actually be quite lucrative – since the law requires losing defendants to pay attorneys fees. Such cases may often involve a small business that made an innocent mistake or was unaware of a technical requirement. Most cases settle, on average, for about \$5,000. Some see these claims as part of a righteous fight for the disabled, but others view them as shakedowns by professional plaintiffs who extort money from crucial employers and otherwise weaken local economies.

WHAT IS GOING ON IN BROWARD COUNTY?

Broward County in 2008 appears to have experienced a banner year for judicial shenanigans with at least three cases of alleged judicial misconduct making headlines. Such conduct and infighting reflects poorly on the county's judiciary, even if it doesn't affect the majority of civil cases.



In February the Miami-Dade State Attorney's Office considered, but decided against, bringing criminal charges against Broward County Judge Robert Zack for taking loans and fancy dinners from a criminal defense lawyer who appeared before him. "In Broward County, traditionally, that is what happens; judges don't pay," the attorney reportedly told prosecutors. The prosecutor's office closed the case for insufficient evidence to prove bribery, misconduct and unlawful

compensation beyond a reasonable doubt, and referred the matter to the Judicial Qualifications Commission (JQC) for possible disciplinary action.⁷⁶

The following month Broward County Chief Judge Victor Tobin reassigned Judge Jay S. Spechler, who had heard civil cases for twenty years, to traffic and parking ticket hearings at a satellite courthouse, barring Judge Spechler from the main Ft. Lauderdale courthouse.⁷⁷ The demotion came within days of the JQC notifying Spechler of a complaint against him for allegedly bullying his colleagues, including fellow County Judge Peggy Gehl. Days later, Judge Spechler resigned, taking a job at a mediation firm and opting to sue the chief judge. Spechler contends Tobin's animosity

toward him stems from an unsuccessful 2007 election challenge posed to Tobin by Spechler's best friend, former law partner and surfing buddy, Thomas Lynch IV.⁷⁸ The case was removed from Broward County to federal court, where it is pending.⁷⁹

In September the Florida Supreme Court voted to publicly reprimand Broward County Circuit Judge Cheryl Alemán and require her to pay the costs of investigating her conduct when, during a murder trial, she imposed unreasonable demands on defense attorneys and threatened them with contempt charges.⁸⁰ "Far from patient, dignified, or courteous, the JQC concluded that Judge Alemán's undisputed conduct was 'arrogant, discourteous, and impatient,' as well as '[in]adequate, improper, unacceptable, and unreasonable,'" said the high court.⁸¹ In one instance, for example, she handed defense counsel a pen and paper and set a 15-minute time limit for submission of a motion.⁸²

BUSINESSES CONCERNED WITH WORKERS' COMP DECISION

The purpose of the workers' compensation system is to provide employees with a no-fault alternative to litigation. An employee is relieved of the need to show that the employer was negligent and caused his or her injury, and does not need to hire a lawyer who will take a substantial portion of the recovery. In turn, the employer benefits because its liability is generally limited to the cost of medical care and lost wages.

In 2003 when Florida's legislature enacted a sliding scale for attorneys' fees in workers' compensation cases (providing for a maximum 20% fee for the first \$5,000 of recovery, 15% for the next \$5,000 of recovery, and 10% above that amount), it tried to limit the damage being done to a no-fault administrative system designed to minimize the role of lawyers in the first place. Apparently eschewing the logic of such limits, the Florida Supreme Court in October ostensibly voided that sliding scale.⁸³ The state's high court decided that lawyers for claimants can receive their ordinary fee for work on workers' compensation claims because of ambiguity in the language of the statute. The business community had credited the limit on attorneys' fees to a 50% drop in workers' compensation insurance rates over five years.⁸⁴

"What scares us now is that it's 'game-on' again with trial lawyers."⁸⁵

—Allen Douglas, Legislative Director,
National Federation of Independent Business

WHO CAN I SUE?

A South Florida attorney, Curtis Wolfe, has started a new Web site, "WhoCanISue.com." But have no fear. Despite its name, Wolfe claims his site is only an attorney referral service, not a means by which to identify potential defendants for litigious individuals in plaintiff-biased South Florida.⁸⁶

HELLHOLE # 3

COOK COUNTY, ILLINOIS

Cook County joined the list of Judicial Hellholes in 2005 and has since maintained its reputation as one of the jurisdictions of greatest concern to civil defendants who fear they will not receive fair trials there. The county has a long-established reputation as a friendly host for lawsuits and is known for its hostility toward corporate defendants. In recent years this Chicagoland county has experienced a substantial surge in asbestos claims, embraced improper class actions, rendered evidentiary decisions that favored plaintiffs, hosted excessive awards and otherwise shown an unwillingness to dismiss claims with little or no connection to the jurisdiction. Many of these problems continue.⁸⁷

STILL AT THE CENTER OF ILLINOIS LITIGATION

Home to roughly 41 percent of Illinois' population, Cook County continues to handle about 65 percent of the state's major civil litigation, roughly the same proportion as last year.⁸⁸ Not so long ago, however, Cook County maintained a flow of litigation roughly commensurate with its population.⁸⁹

The increase in the number of claims can, in part, be attributed to the jurisdiction's reputation for plaintiff-biased rulings and as an alternative venue to the southern Illinois courts of Madison and St. Clair counties, which have historically drawn more scrutiny

and negative media attention. Consequently, when plaintiffs' attorneys look to file a major lawsuit, they now often look no further than the Circuit Court of Cook County.

APPELLATE COURT SAYS 'NO' TO LITIGATION TOURISM

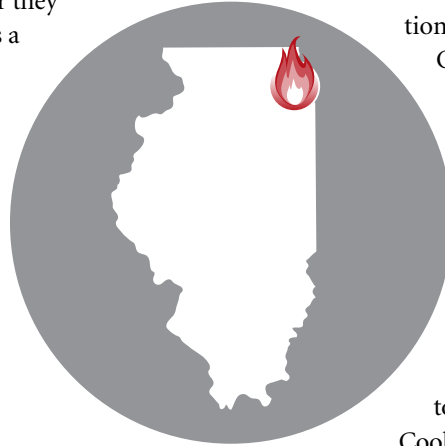
Law school professors often provide hypothetical situations to students and ask how the court should rule.

Consider this hypothetical: A plaintiff who lives in Minnesota is injured while riding a lawnmower in Minnesota. He receives medical treatment in Minnesota and all three of the plaintiff's witnesses are Minnesota residents. The lawnmower was designed, tested and built in South Carolina, where the defendant has based its lawnmower operations. Where may the plaintiff sue?

You don't need to be a sharp law student to know that common sense would preclude

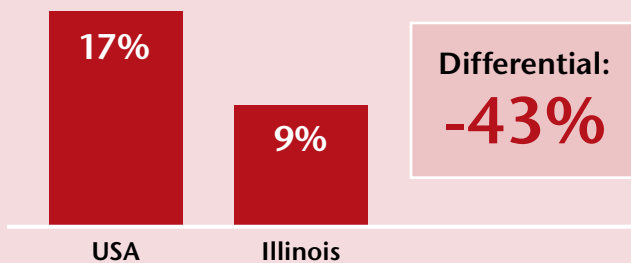
Cook County, Illinois, as a possible answer. Yet Judge Elizabeth Budzinski found that the Minnesota plaintiff in this case could sue Sears in Cook County simply because the company has its corporate headquarters there. Never mind that none of the witnesses or records related to the case was situated there.

Shortly after publication of last year's Judicial Hellholes report, Judge Budzinski's decision was reversed on appeal under the doctrine of *forum non conveniens*, which provides judges with the ability to dismiss or transfer cases that are more appropriately heard elsewhere.⁹⁰ The appellate court found that the case belonged in Minnesota, not Cook County, Illinois. But what would have happened if the defendant could not have afforded to appeal? Judicial fairness should not solely depend on having a cop on the beat in the appellate process.



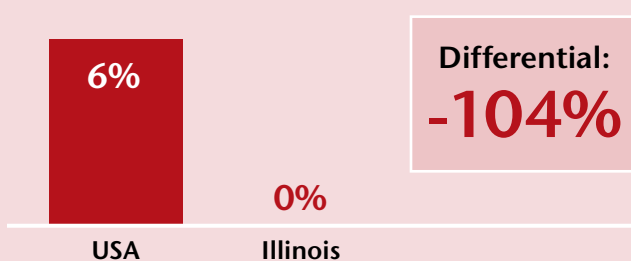
OVERALL ECONOMIC GROWTH 2001-2007

(% Change)



EMPLOYMENT GROWTH 2001-2007

(% Change)



Source: U.S. Government

“Illinois residents should not be burdened by serving on a jury for a matter that did not occur in their jurisdiction.”⁹¹

—Justice Leslie E. South, Appellate Court of Illinois, First District, Second Division

The appellate court reversal once again shows that judges can and should rein in forum shopping by personal injury lawyers looking for friendlier courts and favorable law or procedures. The Illinois legislature can also strengthen the state's venue law by passing reasonable venue reform. For example, this year the Illinois House considered H.B. 5289, which would have required dismissal of claims against defendants who are not located in Illinois when the action stems from an incident occurring outside the state and when lawsuits target out-of-state defendants. The bill stalled, but the legislature should again consider such measures in 2009.



NEVER TOO LATE TO FIX A MISTAKE?

As previous Judicial Hellholes reports have noted, Cook County is known for class actions. This year, one such claim came to a head after more than a decade of litigation, and it was an Illinois first.

In 1995 attorneys filed a class action lawsuit in Cook County on behalf of residents of Blue Island, Illinois, claiming that fumes from an oil refinery were a nuisance to those living around it. Three Cook County judges, including the judge who tried the case, certified and confirmed the case as a class action. It went to trial resulting in a \$120 million verdict against the defendant, including \$40 million in punitive damages. During the trial, however, it became apparent to the court that those living near the plant suffered dramatically different injuries than those living farther away, and that it was impossible to determine the extent of the damage to those individuals who were not directly before the court. For that reason, trial Judge Cheryl Starks found that the class should never have been certified.⁹² A year following the November 2005 verdict she ordered new trials on the individual nuisance claims. The decision is the first time an Illinois trial court decertified a class after the jury had reached a verdict and the court had entered a judgment in the case.⁹³

A victory for reasonableness? Not exactly. “Too late,” said a divided appellate court in June 2008, a majority of which found that the trial court did not have authority to fix its mistake after a jury verdict.⁹⁴ The appellate court did not consider, however, whether Judge Starks was right or wrong in decertifying the class. That means that as soon as the court reinstates the verdict, the issue is almost certain to again come before the appellate court, wasting the resources of plaintiffs, defendants and taxpayers who fund Illinois’ judiciary.

WILL MEDICAL MALPRACTICE REFORM HOLD UP THIS TIME?

As last year’s Judicial Hellholes report went to press, Cook County struck again. Cook County Circuit Court Judge Diane Larsen declared uncon-

stitutional the state’s 2005 medical malpractice liability reform law that limits awards for pain and suffering to \$500,000 in cases against doctors and to \$1 million in cases against hospitals.⁹⁵ The law does not place any limit on recovery of economic damages, such as medical expenses or lost wages.

“[The Cook County ruling] is a step backward for Illinois’ patients and physicians as it once again puts patients’ access to care in jeopardy.”⁹⁶

—Robert M. Wah, M.D., American Medical Association Board of Trustees

The Illinois Supreme Court heard arguments in the case this fall and was considering the reform law’s constitutionality at press time.⁹⁷ When the state’s high court last considered the issue as part of a comprehensive tort reform package in 1997, it invalidated the legislation in its entirety,⁹⁸ criticizing the legislature’s reasoning.

One year prior to enactment of the 2005 law, Cook County alone had more than 44 verdicts or settlements in excess of \$5 million.⁹⁹ Observers say the law has helped stabilize insurance costs throughout Illinois, which in turn have encouraged new physicians to move into the state. For example, after a five-year absence, one of Illinois’ top neurosurgeons announced plans to re-open his practice in Belleville (St. Clair County). The high costs of medical liability insurance for all physicians, and particularly among specialists, in Southwestern Illinois had prompted Dr. William Sprich to leave the area. For years, area residents suffering a head injury had to be airlifted to St. Louis hospitals to receive treatment.¹⁰⁰ Now, for the second year in a row, Illinois’ largest insurer, ISMIE Mutual, announced its base premiums will not go up.¹⁰¹

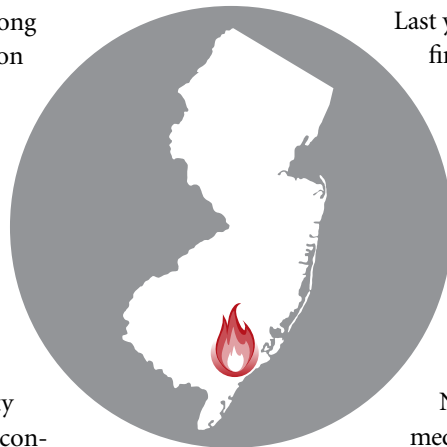
HELLHOLE # 4

ATLANTIC COUNTY, NEW JERSEY & BEYOND

Last year Atlantic County, New Jersey, received its first citation as a Judicial Hellhole, in large part, because of its handling of a mass torts panel involving pharmaceutical litigation. Land on “courthouse” in the birthplace of Monopoly and you might lose some real money. The litigation environment in Atlantic County and throughout New Jersey continues to worry many who live and work in the state.

...THIS IS THE LEGAL SYSTEM ON DRUGS

New Jersey, sometimes referred to as “the nation’s medicine cabinet,” has become a destination of



choice for those suing pharmaceutical companies. Even though pharmaceutical manufacturers contribute \$27 billion to the state's economy, pay \$1 billion in state taxes and rebates, and provide more than 61,000 good-paying Garden State jobs to the tune of \$6.5 billion in annual payroll, they enjoy no home court advantage when it comes to lawsuits filed against them there.¹⁰² In fact, of the 18 mass torts certified in New Jersey courts, 16 of them are pharmaceutical-based torts, and a recent study of those mass claims found that 93 percent of them have been filed by plaintiffs who live in other states.¹⁰³ Pharmaceutical companies should be prepared for high awards.¹⁰⁴ In fact, Atlantic County has attracted litigants from as far away as England and Wales seeking such favorable outcomes.¹⁰⁵

“Atlantic County has made pharmaceutical litigation into a cottage industry.”¹⁰⁶

—Forbes Magazine

As discussed in last year's Judicial Hellholes report, several elements of New Jersey law make Atlantic County and the entire state ripe for lawsuits against drug companies. New Jersey is one of only two states in the nation – the other being fellow Judicial Hellhole West Virginia – to deviate from widely accepted law that obligates prescription drug manufacturers to adequately warn only prescribing doctors of a drug's known side effects. New Jersey (and West Virginia) law requires drug makers somehow to warn individual patients. New Jersey also has a plaintiff-biased Consumer Fraud Act that allows plaintiffs to collect “threefold” damages, attorneys fees and costs, and thus it encourages huge class actions. To boot, New Jersey judges have developed a reputation among leading law professors and defense lawyers for admitting questionable “expert” testimony in court. And New Jersey allows its plaintiff-biased laws to supersede those of a plaintiff's home-state, which may be more balanced, when the product at issue was manufactured in New Jersey.

This year an appellate court voided \$9 million of a \$15.7 million award out of Atlantic County against Merck & Co. in which it was alleged that the company failed to warn of Vioxx's cardiac risks. The appellate court struck the entire punitive damages portion of the award, finding that New Jersey law did not permit courts to punish defendants for pharmaceutical products pre-approved by the Food & Drug Administration.¹⁰⁷

The appellate court also found that the Atlantic County trial court impermissibly allowed the plaintiffs to double dip by collecting a product liability award while also recovering for essentially the same conduct under the state's consumer law.¹⁰⁸ The personal injury lawyers could not, as they have attempted to do in many such cases, tack on a consumer claim in order to qualify for an additional award of attorneys' fees. As the court recognized, permitting a consumer claim would make attorneys fees available in most product liability actions without legislative authorization.¹⁰⁹ Although the plaintiffs' recovery

under the consumer law was nominal compared with the compensatory damages received through the product liability claim, the ruling is significant because it recognizes that the generous treble damages and attorneys' fees provided by the Consumer Fraud Act were not intended to apply to failure to warn cases, but only to ordinary consumer transactions.¹¹⁰ This ruling may help stem the surge of class actions against pharmaceutical companies in New Jersey, many of which product liability claims wherein no one has been injured or shameless double-recovery efforts masquerading as consumer protection lawsuits.

In fact, that's the type of case that came before the New Jersey Supreme Court just one week later, and this time the Atlantic County trial court got it right. Entrepreneurial plaintiffs' lawyers brought a class action lawsuit on behalf of everyone who used Vioxx—not just in New Jersey, but in the entire United States. The class included even those who had not experienced a medical problem attributed to the drug. And the case was brought in Atlantic County.¹¹¹ The lawyers asked the court to require Merck to pay for medical monitoring, that is, routine doctor visits to check the health of those who took the drug – the type of recovery authorized by West Virginia courts and widely criticized. The trial court, to its credit, found that New Jersey law did not permit recovery for medical monitoring by those who could not demonstrate a present physical injury.¹¹² Although an intermediate appellate court disagreed with the trial court, the New Jersey Supreme Court upheld the trial court's decision. It affirmed the longstanding fundamental legal principle that only one who has experienced harm can sue.¹¹³ The court also knocked down the plaintiffs' attempt to circumvent the injury and proof requirements of New Jersey's product liability law by alleging consumer fraud, finding the class action to be “obviously a product liability claim.”¹¹⁴



OTHER NOTABLE CASES FROM AROUND THE STATE

- Double or nothing? In September 2008 an Atlantic City court awarded \$750,000 to a patron who slipped and fell on a wet floor at the Borgata Hotel Casino & Spa just after cashing in his chips.¹¹⁵
- Typically, state “dram shop” laws subject bars and restaurants to liability if they sell alcohol to a visibly intoxicated patron who is then involved in an accident. But a New Jersey appellate court this year raised the stakes, ruling that even though a restaurant did not sell a 19-year-old driver any alcohol, it was still liable for an eventual accident because that driver had arrived drunk, may have had his Coke spiked under the table by his 21-year-old friend (who died in the car accident and wasn't driving himself that night because his license had been suspended for drunk driving), and his friends were drinking



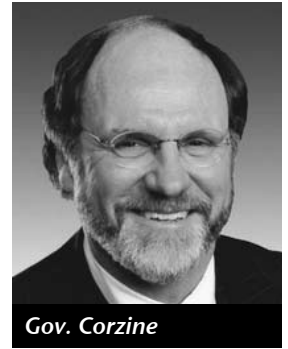
heavily at the restaurant. Testimony at trial indicated that the driver, Frederick Nesbitt III, did not appear intoxicated when he left a boisterous “wings night” at the C View Inn in Cape May, but his friend, James A. Hamby, clearly did. That’s enough, the appellate court said, finding that the restaurant had a duty to call a cab or ensure that drunken patrons have a sober ride home, whether or not they drank at the establishment. Summing up: Patron drank before going to the restaurant, likely driving drunk to get there; the restaurant did not sell alcohol to the driver. So, why is the restaurant subject to liability for the drunk driving accident? What does this say for the notion of personal responsibility in some areas of New Jersey?¹¹⁶

- Three of the 10 largest personal injury awards in New Jersey in the past year came in Monmouth County.¹¹⁷ A court there also awarded a mail carrier \$2.4 million after she fell when an unleashed dog leapt on her. The award included \$1.4 million for pain and suffering and \$240,000 to her husband.¹¹⁸
- Awards seem a tad excessive up north in Bergen County, too, where the court reportedly returned the highest asbestos verdict ever in New Jersey – \$30.3 million.¹¹⁹ Bergen County is also home to all pending litigation of the drug Zelnorm, following assignment by the New Jersey Supreme Court. Zelnorm is a drug for treatment of irritable bowel syndrome and constipation that was taken off the market in 2007 due to alleged adverse cardiovascular effects. All of the cases against the drug’s manufacturer have been filed by out of state plaintiffs with 14 suits filed in Hudson County, two each from Atlantic and Middlesex County, and one from Essex County.¹²⁰

FIGHTING FOR EVER LARGER AWARDS

Last year the trial bar pushed hard to include, for the first time ever, emotional harm-related damages in wrongful death suits. Damages in these suits have always been limited to measurable losses, in recognition that emotional loss comes with every death and could

lead to unpredictably excessive awards. Fortunately, Governor Jon Corzine pocket vetoed a bill in January 2008 that would have drastically expanded damages to allow recovery for mental anguish, pain and suffering, loss of society, and loss of companionship, citing the potential impact of higher awards on state and local budgets as well as the state’s business climate.¹²¹



SPLIT IT 50/50 WITH YOUR LAWYER?

New Jersey law provides a sliding scale for the share lawyers can take from their clients’ recovery in personal injury cases, ranging from one-third to 20% based on the amount recovered.¹²² This rule, designed to protect consumers of legal services, ironically does not apply to consumer protection claims, as well as other non-torts such as employment claims and commercial matters. This year, an ambitious attorney asked the New Jersey Supreme Court’s Advisory Committee on Professional Ethics if he could take a higher percentage, namely 50%, in consumer cases not falling under the existing rule. In a somewhat convoluted opinion, the committee found that lawyers may, in some instances, appropriately take half of any money awarded to their clients. While the committee found that such an agreement might “appear to be questionable,” it did not rule it out completely.¹²³

THE ECONOMIC IMPACT ON NEW JERSEY

Research conducted by Rutgers Eagleton Institute of Politics found that 89% of New Jersey businessmen and women surveyed claim that lawsuits are “driving up the cost of doing business” in the state, and that a full “25% have considered relocating out of state.”¹²⁴ Here are some of other findings from those surveyed:

- 93% said the state’s liability laws favor plaintiffs
- 80% ranked the business climate in New Jersey only as fair or poor
- 76% feel that New Jersey is on the wrong track
- 62% are concerned that they will be sued within the next five years
- 55% have been forced to change operations, products or services to limit exposure to lawsuits, and
- 75% said that commonsense liability reforms would make it easier to keep businesses from leaving the state.

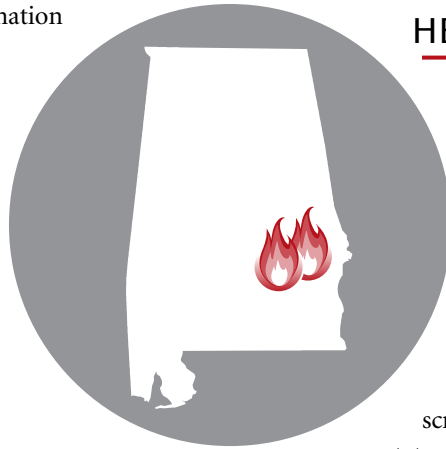
“There’s a storm brewing in New Jersey’s civil justice system... Unlike traditional tourism in Atlantic City, litigation tourism burdens our state’s economy and strains our judicial system.”¹²⁵

—Marcus Rayner, Executive Director
New Jersey Tort Reform Alliance

In fact, New Jersey is second-worst in the nation when it comes to how much of the state's economic activity is spent on tort litigation, and it has the fourth riskiest tort litigation system in the country.¹²⁶

According to James Hughes, Dean of the Bloustein School of Policy and Planning at Rutgers University, New Jersey had 20 percent of the pharmaceutical jobs in the United States in 1990. Today, that amount has fallen to about 13.7 percent, and the trend is worsening.¹²⁷

During the past year various reports have shown that pharmaceutical companies are slowly exiting New Jersey. According to the Healthcare Institute of New Jersey, the state's pharmaceutical industry cut about 600 jobs in 2007.¹²⁸ And even though that seemingly small decline may not seem dramatic, one industry publication observed, "it has raised concerns that the state is failing to capture growth within the industry."¹²⁹ Other states are taking those jobs. For example, in 2007 Johnson & Johnson moved 260 New Jersey jobs to Pennsylvania.¹³⁰ Another, more devastating blow came in July 2008 when Hoffmann-La Roche announced that, after 80 years in New Jersey, it will move its U.S. headquarters to California in a planned merger with Genentech, leaving the future of its 3,240 New Jersey employees in doubt.¹³¹ While there are many reasons for this decline, including expiring patents and regulatory hurdles,¹³² the poor litigation climate has certainly contributed to this decline and encourages firms to set up shop elsewhere.



HELLHOLE # 5

MONTGOMERY & MACON COUNTIES, ALABAMA

In recent years the Judicial Hellholes report has cited Alabama counties merely as "places to watch." But this year the counties of Montgomery and Macon warranted still greater scrutiny and have collectively earned their new status as a full-blown hellhole. The two nearby counties share several bad habits, such as unusually excessive verdicts, controversial alliances between government officials and trial lawyers, and suspect judicial rulings.

A RICH HISTORY OF EXCESSIVE VERDICTS

Their reputation for excessive awards has made both Montgomery and Macon counties infamous in the past. For example, of the more than 3,100 counties in the United States, these two had the dubious distinction of hosting the nation's largest verdicts in both 2003 and 2004, respectively. In 2003 a Montgomery trial court awarded the state \$11.9 billion in a case involving a royalty dispute with ExxonMobil Corporation over drilling operations in Mobile Bay, a verdict larger than the rest of the top 100 verdicts in the nation combined.¹³³ In 2004 a Macon County jury, after a three-day trial and just one hour of deliberation, awarded a mind-boggling \$1.6 billion to an individual plaintiff who had lost \$3,000 when an insurance agent continued to pocket her monthly payments on a lapsed life insurance policy.¹³⁴

"So far the verdicts have been very good to Alabama."¹³⁵

—Montgomery personal injury lawyer Jere Beasley, who tried a case on behalf of Alabama's Attorney General.

In 2008 the courts in each of these counties managed to keep verdicts under a billion dollars, but Montgomery County still produced several of the nation's highest awards. The first in a series of excessive verdicts against pharmaceutical industry leaders over Medicaid prescription drug pricing resulted in a \$215 million verdict awarded to the state.¹³⁶ In February a Montgomery County Circuit Court jury returned the multi-million dollar verdict, comprising \$40 million in compensatory damages and \$175 million in punitive damages, against AstraZeneca PLC, after deliberating for just 45 minutes.¹³⁷ In June the trial court trimmed the punitive damages side of the award to \$120 million.¹³⁸

In another Montgomery County Circuit Court trial before the same judge, Charles Price, a jury returned a \$114 million verdict



Source: U.S. Government

against two other pharmaceutical companies, GlaxoSmithKline PLC and Novartis AG, for allegedly overcharging the state's Medicaid program for prescription drugs.¹³⁹

All told, the state is primed to collect more than a quarter-billion dollars from these two cases alone, both of which are being appealed to the Alabama Supreme Court.¹⁴⁰ The effect of these terrifying and wholly unpredictable verdicts extends well beyond the instant cases as numerous other drug companies have settled similar lawsuits against them.¹⁴¹ It is estimated that the state may still collect as much as another \$1 billion in damages from remaining cases, and this figure excludes any additional punitive damages.¹⁴²

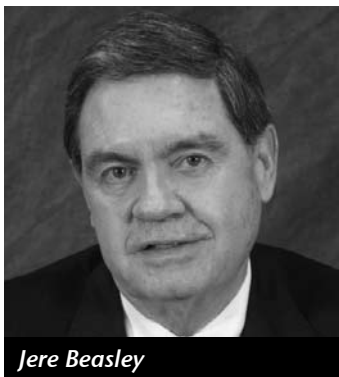
CONTROVERSIAL ALLIANCE AMONG TRIAL LAWYERS AND THE STATE AG

In suing pharmaceutical companies on behalf of the state to achieve large verdicts, Alabama Attorney General Troy King has, like some other state attorneys general (see *Dangerous Liasons*, p. 33), formed an alliance with private personal injury attorneys.



AG King

Despite assurances that these contracts would be subject to transparency and public accountability, King has been slow to move toward these measures.¹⁴³ While contracts are subject to review by a legislative committee, the committee can only temporarily delay contracts, not stop them. As a result, the tax-paying public remains largely in the dark as to how fees are determined and how many of their hard-earned dollars will go to trial lawyers.



Jere Beasley

Attorney General King's association with Montgomery trial lawyer Jere Beasley, in particular, has drawn considerable media attention. King has outsourced litigation against pharmaceutical companies to Beasley, who has sought large awards that some observers suggest have not been entirely in

the public interest. For example, Beasley has sought \$800 million in punitive damages in a case when the court found that no punitive recovery was warranted.¹⁴⁴

“There was a disturbing lack of accountability with respect to a once burgeoning relationship between the attorney general and the trial lawyers he contracted to sue on behalf of Alabama, but he has now pledged to move toward greater transparency. That’s very encouraging.”¹⁴⁵

—Skip Tucker, Alabama Voters Against Lawsuit Abuse Executive Director

REAL ‘JACKPOT JUSTICE’ IN MACON COUNTY

When an electronic bingo machine at a Macon County gaming park malfunctioned and erroneously paid out 40,000,000 credits for a patron's 25-cent play of the game, two Macon County judges saw a real opportunity to stand up for “jackpot justice.” They awarded the plaintiff \$10 million – even though the machine had a clear label stating that its maximum potential payoff was \$10,000.¹⁴⁶

The lawsuit was first heard by Macon County Judge Ray Martin, who issued a partial summary judgment ruling that was characterized as “nonfinal” [sic], yet it effectively changed what a jury would later consider. Martin's ruling stated that, “[Plaintiffs’] winnings could have totaled \$40 million or as little as \$10 million based on the scenarios expected to have been argued when the case went to trial.”¹⁴⁷ Disregarding defendant Macon County Greyhound Park's argument that “as little as” \$10 million was still 1,000 times greater than the machine's posted maximum payout and exponentially greater than what the machine would have paid had it not malfunctioned,¹⁴⁸ Judge Martin ruled for the plaintiff and handed off the case to Macon County Judge Steve Perryman for a jury trial.

But while selected jurors waited to hear the case, Judge Perryman decided instead to take the case away from them. He took it upon himself to award \$10 million to the plaintiff without the defendant being able to present exhibits or testimony.¹⁴⁹ This decision has prompted some to label the case a judicial “fix” and call for Alabama's Judicial Inquiry Commission to investigate whether judicial misconduct took place.¹⁵⁰ Regardless of the judge's specific intent, the decisions to disregard the machine's posted maximum payout, deny the defendant a chance to present evidence of a malfunction, and bump a convened jury out of the picture at the last minute all speak to the rough justice civil defendants can expect in Macon County.



ANYONE CAN BE AN EXPERT

In nearby Montgomery County, courts apparently err in the other extreme when it comes to admitting evidence. In October 2008 an expert witness who testified in a series of family law cases had reportedly fabricated his expert credentials.¹⁵¹ The faux-expert's qualifications supposedly included a doctorate in clinical psychology from the University of Southern California, among others.¹⁵² The court failed to perform a check or gate-keeping role of the individual's capacity as an expert, and allowed him to testify and make recommendations.

The phony expert currently faces perjury charges, and it remains uncertain what ramifications his conviction would have on the cases in which he testified or authored reports.¹⁵³ As Montgomery County Assistant District Attorney and master of the obvious John Gradel stated, "It really calls into question the course of action taken by the court based on his recommendations."¹⁵⁴

STATE HIGH COURT LOWERS BAR AND OPENS DOOR TO RECOVERY IN TOXIC EXPOSURE CASES

In a case that will have an impact in Montgomery and Macon counties and beyond, the Alabama Supreme Court rendered a decision this February that, in many instances, will significantly extend the period during which an individual may file an action for exposure to toxic substances.

Without so much as a sentence of analysis to clarify its ruling, a majority of the high court overruled its own 1979 decision that required claimants to file lawsuits within one year (later increased to two years by the state legislature) of their "last exposure."¹⁵⁵ Instead, the court applied an "accrual" test, which theoretically could allow the filing of lawsuits decades after alleged exposures. The court also allowed the new law to apply retroactively to the plaintiff, who, "as the prevailing party in bringing about a change in the law, should be rewarded for her efforts."¹⁵⁶

The state supreme court's reversal raises several important policy concerns. First, the decision undermines the fundamental public policy principle of finality within the civil justice system by extending the filing deadline (from the final or most recent exposure to within two years of whenever a claimant develops a sickness). Such indefinite extension can disadvantage defendants by making them more susceptible to false accusations and less able to mount a defense as the passage of time erodes evidence, witnesses and their memories.

Second, and at least as significant, the court's undermining of the state legislature comes with troublesome constitutional implications with respect to separation of powers. In effect, the court undercut the statute of limitations period that the state legislature had devised upon considering and balancing the interests of all parties. The court further permitted retroactive application of the law – a position which similarly ignores the legislative balancing

and is constitutionally infirm due to a lack of appropriate notice to defendants regarding their possible liability well after the statutory limitations period has expired.

HELLHOLE # 6

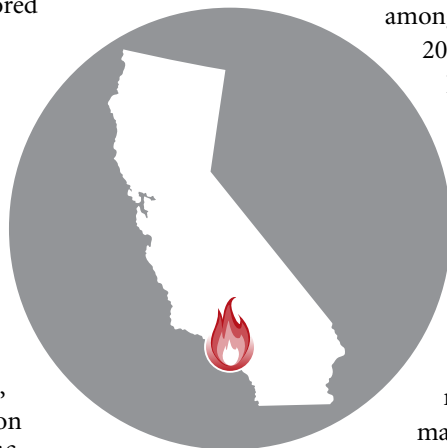
LOS ANGELES COUNTY, CALIFORNIA

Los Angeles County has earned inclusion in every Judicial Hellholes report to date. While the jurisdiction was named among full-blown Judicial Hellholes from 2002 to 2004, in recent years it has merely made the Watch List. But this year the county, formerly dubbed "the bank" by some prominent plaintiffs' attorneys for its high awards, reclaims its hellhole status. Making it to the Watch List is its neighbor to the south, Orange County (see p. 24). There are some who suggest that the tilting toward plaintiffs exists statewide, not just in Los Angeles County. Los Angeles Superior Court cases may be most frequently in the news because there are many major cases brought there given the county's large population compared with other counties in the state. Nevertheless, the inventive lawsuits, litigation "shakedowns" and excessive awards prevalent in the two jurisdictions are complementary and make Southern California an unmistakably inhospitable place for civil defendants.

ADA 'SHAKEDOWN LAWSUITS' CONTINUE

California, and especially Los Angeles County, has for years struggled with abusive lawsuits. Prior reports have detailed the immense problems under California's Unfair Competition Law, which allowed private lawyers to act as if they were attorneys general, bringing actions on behalf of the general public even when the party filing the complaint suffered no harm nor had any connection to a defendant. These lawsuits were often referred to as "shakedowns" due to the relative ease with which attorneys could extort settlements from businesses and organizations. In 2004 Golden State voters applied the brakes to this litigation gold rush by passing Proposition 64 and restoring some semblance of reasonableness to the state's civil justice system.

But in the past few years a new type of shakedown lawsuit has evolved, relying on the federal Americans with Disabilities Act (ADA). These lawsuits are designed to extract tidy settlements with claims that people with disabilities are being denied access to places such as restaurants and other small businesses. Often these actions are based on trivial technical violations such as a sink that is an inch too high or an existing handicap-accessible ramp with an elevation grade that is a degree too steep.¹⁵⁷ Also, rather than file lawsuits or litigate the cases, attorneys send demand letters and attempt to obtain



quick cash settlements. Although the federal ADA only allows private lawsuits to seek compliance with accessibility standards, California law also makes ADA violations subject to cash awards. No state has been harder hit by these lawsuits than California, and Los Angeles County has emerged as ground-zero for such claims.

“[ADA lawsuits] are low hanging fruit.”¹⁵⁸

—ADA consultant Kim Blackseth

Arguably the most visible personification of California’s ADA lawsuit abuse problem has been wheelchair-bound attorney Theodore Pinnock, who has moved his lawsuit filing business to Los Angeles County.¹⁵⁹ Since 1993 Pinnock has filed nearly 1,500 lawsuits in California to “enforce” the ADA.¹⁶⁰ Last year a federal judge in San Diego fined him \$15,000 for his actions, and since then he has begun filing claims in Los Angeles County courts.¹⁶¹ Pinnock has also set his sights elsewhere around Southern California, filing lawsuits against more than 60 businesses in National City, Chula Vista and several communities south of San Diego.¹⁶²

But Pinnock is not alone. Federal courts in California have barred Jarek Molski and his law firm from filing any more ADA lawsuits without a judge’s permission. Molski, also disabled, filed more than



Jarek Molski

400 nearly identical ADA suits, mostly against restaurants and wineries. Each complaint would allege that the plaintiff could not find accessible parking, that the service counter was too high, and that the doors were too difficult to open. Virtually every complaint would conclude with a claim that he suffered some injury in the restroom, usually in the process of transferring himself from his wheelchair to the toilet, and was thus humiliated from the experience.¹⁶³ In fact, on one particular day, Molski apparently visited a restaurant and two wineries – he filed lawsuits against all three claiming bathroom injuries.¹⁶⁴ Molski always asks for \$4,000 per day that the violations are not fixed, and he waits a year before filing suit.¹⁶⁵

In 2004 U.S. District Judge Edward Rafeedie found that the “allegations contained in [Molski]’s complaints are contrived and not credible. Although it is not obvious when looking at an individual complaint, examining [his] complaints in the aggregate reveals a clear intent to harass businesses.”¹⁶⁶ This November the U.S. Supreme Court declined to consider the U.S. Court of Appeals for the Ninth Circuit’s decision to shut down his extortion racket.¹⁶⁷ The willingness of the courts to take action against Molski’s ADA litigation operation is a welcomed development, but hundreds of businesses had already settled with him over bogus charges in the past, “earning” Molski hundreds of thousands of dollars in less than two years.¹⁶⁸ And while he may be out of busi-

ness in California, surely there are many would-be Molskis lining up to take his place – and the loot. In fact, recently published news reports in the Los Angeles area suggest that Jon Carpenter, an up-and-coming serial plaintiff who has now brought more than 100 shameless ADA lawsuits of his own, may be the guy to watch. Help may be on the way. In October of this year, the state legislature and governor enacted new legislation, S.B. 1608, in an effort to reduce unwarranted damages and attorney’s fees in ADA lawsuits.

‘THE BANK’ STILL PAYS EXCEPTIONALLY HIGH DIVIDENDS

Beyond ADA lawsuit abuse, Los Angeles County continues to struggle with excessive verdicts. The jurisdiction has a storied history of landmark billion-dollar verdicts, especially when unpopular defendants are targeted.¹⁶⁹ Such past verdicts include a multi-billion dollar award against General Motors.¹⁷⁰ And though the jurisdiction in 2008 managed to avoid the type of truly eye-popping “outlier” verdicts against which the U.S. Supreme Court has recently warned,¹⁷¹ it more than made up for it with consistently high average awards.

For example, this year the county was home to many of the nation’s largest asbestos verdicts. Included in this list is a Los Angeles County jury award of over \$20 million for a man’s alleged asbestos exposure while doing repairs and maintenance work on marine equipment;¹⁷² a \$14.9 million verdict in favor of a former engineer exposed to asbestos during a 44-year career, 31 years of which were spent working in Iran;¹⁷³ a \$9.9 million award to a former oil worker and his wife;¹⁷⁴ and a \$9.7 million award to a former machinist mate.¹⁷⁵ These examples come on the tail of a whopping 2007 asbestos award of \$35.1 million.¹⁷⁶

To put these vast sums in a nationwide context, it should be noted that from 1995 through 2005 the median verdict for a claim of mesothelioma (the lung cancer known to be caused by exposure to asbestos) was approximately \$1.5 million. The average such verdict, including California’s exceptionally high awards, was roughly \$4 million.¹⁷⁷ This year, Los Angeles County produced a startling number of awards that doubled, and in some cases exceeded by many multiples, more typical awards in other jurisdictions. For obvious reasons then, the county’s high awards make it a favorite jurisdiction of personal injury lawyers who make their livings litigating asbestos-related lawsuits on a contingency fee basis, and such awards may help restore the county’s formerly notorious reputation

as “the bank.” (ATRF understands that the state Judicial Council, along with some Los Angeles and San Francisco judges, are looking at ways to curb excesses in asbestos litigation. This is a positive and welcomed step in the right direction.)



EVERYONE'S A VICTIM OF DISCRIMINATION AS 'DOGGONE' CASE COSTS CITY \$4.5 MILLION+

Back in 2004 Los Angeles County Fire Department firefighter Tennie Pierce was on the receiving end of a prank wherein dog food was secretly mixed into his spaghetti by fellow firefighters.¹⁷⁸ When he complained the fire department responded by suspending two senior captains for one month. A younger firefighter who was involved received a three-day suspension. And the costly legal aftermath that ensued dragged on into 2008.

Pierce, an African American, sued the city for discrimination. A long legal battle that began in 2004 included Mayor Antonio Villaraigosa's veto of an initial \$2.7 million settlement offer approved by the city council. Ultimately, in September 2007, the city paid the "pranked" firefighter \$1.5 million rather than risk a huge award in court.¹⁷⁹ Not insignificantly, the city also paid \$1.3 million to defend itself prior to this settlement.

"What kind of investigation is it where everyone gets paid?"¹⁸⁰

—Steve Tufts, President, United Firefighters of Los Angeles

But there's more. The two white captains involved laughed all the way to the bank, too, when they sued the city and claimed that they had been made scapegoats and subjected to discriminatory discipline insofar as the younger, more lightly punished firefighter implicated in the dog food incident is Latino. In March 2008, a court

awarded the two fire department captains \$1.6 million, mostly for their pain and suffering.¹⁸¹

In the end, it seems, everyone is a victim of discrimination and everyone gets paid. Somewhere in Los Angeles County as this report goes to press, the fire department's Dalmatian mascot is almost certainly conferring with a team

of lawyers and drafting a complaint that will seek damages and attorneys' fees for an allegedly misappropriated can of dog food.

COUNTY'S JUDICIAL COMPENSATION VIOLATED STATE CONSTITUTION FOR PAST DECADE

Part of Los Angeles County's difficulties in curbing "shakedown" lawsuits, excessive awards and inventive litigation may be that the judiciary has enough trouble policing itself. In October 2008 a California appellate court ruled that the county's program of providing supplemental benefits to judges violated the state's

constitution.¹⁸² The additional compensation amounted to \$46,436, or 27% more than their state-provided salary. The state constitution clearly states that the state legislature is exclusively in charge of setting judicial compensation. The judges received the additional benefits for the past decade at a cost of at least \$120 million to taxpayers, including \$21 million in 2007 alone.¹⁸³ While this report applauds the county's initiative in seeking to recruit and retain the most qualified jurists, the state legislature must authorize such a policy.\

HELLHOLE # 7

CLARK COUNTY, NEVADA

"Hello, my name is Clark County and I am a Judicial Hellhole."

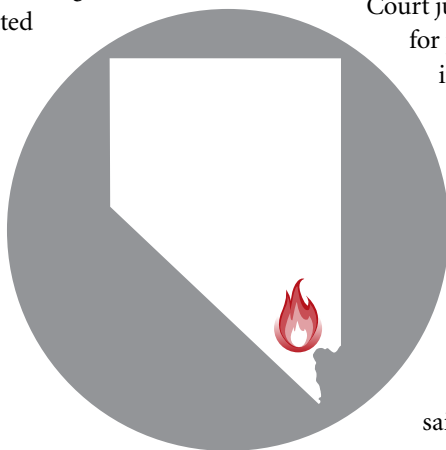
Bruce Beesley, President of the State Bar of Nevada, took the critical first step toward recovery in August 2008 when he acknowledged with a column appearing in *Nevada Lawyer* that Clark County has a Judicial Hellholes problem:

"The last few years, there have been articles in the *New York Times* and *Los Angeles Times* regarding the improper and corrupting influence of campaign contributions in Nevada. The American Tort Reform [Foundation], ranking America's most unfair jurisdictions in its Judicial Hellholes publication for 2007, listed Clark County for the first time, indicating that 'the decks appear to be stacked in favor of local lawyers who reportedly pay to play in the county's courts.'"¹⁸⁴

Beesley went on to write that if those courts are to fulfill their constitutional responsibilities properly, "the public must believe that the judiciary is fair and free from improper influence." And Beesley's fellow lawyers must believe the same thing, or Clark County's civil justice system could break down entirely.

In an anonymous online survey of 799 Clark County attorneys publicized in May 2008, many of them said certain judges "favor lawyers or litigants involved in cases they decide."¹⁸⁵ In fact, "every jurist was perceived, by at least a few lawyers, as biased in some fashion," with "personal bias regarding individuals [being] alleged much more often" than other biases.¹⁸⁶ Clark County District Court judges "captured three of the five worst ratings for perceived bias toward attorneys and litigants" in the entire survey.¹⁸⁷

Also, a survey in advance of an April 2008 Professionalism Summit held by the Clark County Bar Association, the Nevada Bar Association, and the Washoe County Bar Association revealed that a clear majority of lawyers believe that not just judges, but "[a]ttorneys are compromising professionalism as a result of business and economic pressures."¹⁸⁸ More than a third said that ethical standards of most lawyers were



not high, and nearly 60% agreed that lawyers' ethical standards and practices were declining.

Professor Kenneth Fernandez of the University of Nevada Las Vegas called these criticisms "very valid,"¹⁸⁹ though his explanations seemed more like excuses for an apparent collective lack of conscience in Clark County. "Of course judges will be affected by the pocketbook," he said. "It is very hard to suppress your financial interests. If a lawyer has contributed to your challenger, that will affect you more . . . Even without campaign contributors, there can be personal rivalries that can affect individuals . . . You will not stop individuals from holding a grudge on a personal matter."¹⁹⁰

News flash for Professor Fernandez: Upstanding judges in the vast majority of jurisdictions all across the country manage these issues and conflicts with integrity and fairness, recusing themselves from cases when it's appropriate.

TRIAL FOR REPORTED MED-MAL SCANDAL MAY NOT BE RESUSCITATED

Hope that federal courts could clean up the alleged abuses in Clark County are fading. The FBI spent four years investigating Las Vegas professionals, uncovering an alleged scheme where a personal injury attorney "raked in millions of dollars by conspiring with [an] alleged medical fixer, and others, in a complex web of deceit that took huge sums of money out of the settlements awarded to severely injured clients."¹⁹¹

At trial a Las Vegas neurosurgeon testified about the "sordid scheme" in which he and the personal injury lawyer were involved. He alleged that before depositions they would go "over questions" the lawyer planned to ask him "and answers that would be given." The surgeon also testified that the two "hid the kickbacks from the [settlements] by crafting bogus invoices."¹⁹²

The first case against the personal injury lawyer ended in a mistrial with several counts being dismissed. Before the case began, the lawyer ran "a series of T.V. ads, which introduced him to the jury pool as a champion of the little guy."¹⁹³ As of press time, all charges against the personal injury lawyer and the medical consultant, "once labeled the focus of a massive investigation," have been temporarily set aside or dismissed.¹⁹⁴

MONEY FOR NOTHING

Another scandal allegedly began this past election season when Nevada Supreme Court judicial candidate Kris Pickering blew the whistle on what she said was an offer by a Clark County lawyer to give her campaign \$200,000 in exchange for a written agreement that she recuse herself on cases brought by that lawyer.¹⁹⁵ The FBI has been investigating the matter since July.

The allegations are that the Clark County lawyer made the offer through the

candidate's political consultant. The candidate said she rejected the deal. Her opponent, Judge Deborah Schumacher, received but subsequently returned \$20,000 in combined donations from the lawyer in question and the lawyer's husband. Judge Schumacher has "emphasized that at no time was she approached to sign a letter regarding recusals," and law enforcement sources reportedly said they agree.¹⁹⁶ The lawyer has "emphatically denied any claim she was willing to donate to Pickering's campaign," saying that the two "have been bitter adversaries for 20 years."¹⁹⁷

CASE UPDATE: DEFENSE DOUBLE STANDARD

Corporate defense lawyers have long expressed frustration about plaintiffs' lawyers seemingly being allowed to say just about anything in court while judges make them feel all but gagged. Last year's Judicial Hellholes report noted defense lawyer Phillip Emerson's testing of this theory in Clark County's courts. In his closing arguments in personal injury cases, Emerson encouraged the jury to send a message about frivolous lawsuits, telling jurors that "Americans have become a society of blamers." He also suggested that such lawsuits had wasted taxpayer money and jurors' valuable time, and caused a decline in the reputation of the legal profession.¹⁹⁸ His statements were not wholly unlike those classically used by plaintiffs' lawyers who suggest that juries should "send a message" to corporate America.

*"[I]t's cases like this that make people skeptical and distrustful of lawyers and their clients who bring personal injury lawsuits . . ."*¹⁹⁹

—Defense attorney Phillip Emerson in closing arguments in a Clark County tort case

The Supreme Court of Nevada, apparently not amused, ordered a new trial in one case, ordered monetary sanctions, and referred Emerson to the State Bar for possible disciplinary action. The court complained that he was "perpetuating a misconception that most personal injury cases are unfounded and brought in bad faith by unscrupulous lawyers" and "impermissibly injected his personal opinion about the justness" of his clients' cause. That's one way of looking at it, certainly. But others agree with him wholeheartedly when he says "I have a real passion for cases like this because it's cases like this that make people skeptical and distrustful of lawyers and their clients who bring personal injury lawsuits" and lead to the public's negative perception of the legal system. Not surprisingly, the Nevada Trial Lawyers Association, which had submitted a friend-of-the-court brief in support of one of Emerson's adversaries, praised the high court's stifling decision.²⁰⁰ But if Emerson went too far in his closings, the question now is whether trial judges in Clark County and elsewhere in Nevada will apply the standard equally to statements made by plaintiffs' lawyers.

It didn't take ATRF researchers long to find a case on appeal,



Provenza v. Lemans Corp.,²⁰¹ in which the similarly opinionated assertions of plaintiffs' lawyers were challenged. Here, plaintiff's counsel called his client's case "the saddest thing in the world" and said that "[a] corporation who brings about injury to another is as much a concern to me as it is to the person who is injured." And he encouraged the jury to "speak for the victim" by sending a message: "Our only protection against this type of defective product is knowledge that we can find shelter within the law." The judge did not seem bothered by the remarks, and the jury responded with a \$42 million award, which is said to be the largest personal injury verdict in Nevada history.²⁰² Will the state's high court apply to the Provenza attorney the same standard it applied to Phillip Emerson?

This case, which involved a 13-year-old badly burned while "making an ill-advised jump in an off-road area" on an old motorcycle,²⁰³ also makes the Judicial Hellholes report for another reason. According to reports, the plaintiff's father had hotwired the motorcycle due to an ignition problem by placing a piece of wire under the fuel tank to bypass a malfunctioning spark plug wire and then attempted to conceal the unsafe modifications after the accident.²⁰⁴ When this came to light, the Las Vegas court dismissed the motorcycle manufacturer from the case, but the clothing company "was left holding the bag" while being barred by the court from introducing the mitigating hotwire evidence in its defense.²⁰⁵ Allegations against the clothing company were that the clothes were not fire retardant, even though, as the defendant's attorney explained, "the clothing was never advertised as being fire retardant."²⁰⁶ The Las Vegas court did not allow the clothing company to show evidence that the gasoline fire was likely sparked by the father's mechanical ingenuity, that off-road motorcycle crashes rarely result in fires, or that no similar manufacturer offers fire-proof clothing.²⁰⁷

UNSCREWING THE CAP

In 2004 Nevada voters passed a ballot measure placing a \$350,000 limit on damages for pain and suffering in medical malpractice cases. The public decided that such a limit was needed to keep good



doctors from leaving Nevada as unlimited liability was driving up their insurance premiums. The ballot measure did not affect recovery for medical expenses, lost wages and other out-of-pocket costs, which could still be considerable.

Instead of respecting the will of the people, Clark County personal injury lawyers are "looking for ways around the pain-and-suffering cap," according to the *Las Vegas Review-Journal*.²⁰⁸ Their latest

scheme? Go after doctors and other medical professionals personally under contrived civil conspiracy theories that are outside the scope of the 2004 law. Such claims also are not typically covered under a doctor's malpractice insurance, meaning that "[t]he only likely avenue for payouts based on [these claims] would be through seizing doctors' personal assets."²⁰⁹

James Marx, president of the malpractice insurer Nevada Docs Medical Risk Retention Group, explained that the ultimate losers will be regular Nevadans: "If we give an unlimited amount of damages to these patients, someone pays for that. It doesn't come from the insurance company. It's all taken from doctors. There's a substantial load passed on to doctors, and subsequently to patients, that society has to pay."²¹⁰ More to the point, such lawsuits would substantially undermine the purpose of the 2004 ballot measure and drive more doctors out of Nevada.

OTHER SITUATIONS OF NOTE

- In a case "once billed as the largest construction-defect lawsuit in Nevada's history," the Clark County District Court found that only seven percent of the homeowners seeking damages deserved them. The case was filed against Del Webb Communities in 2003 for \$70 million on behalf of 1,000 homeowners. After the court denied class action status to sue on behalf of all 7,800 homeowners in Sun City Summerlin, some of the homeowners sued individually, and the jury decided that only 70 of them merited compensation. Defendants explained that the verdict "confirms that there were few issues with the homes and illustrates the unfortunate risk homeowners sometimes take in responding to solicitations from trial lawyers instead of working with their home builder."²¹¹
- Judge Elizabeth Halverson of the Eighth Judicial District was charged with 11 counts of misconduct, including improperly communicating with jurors, falling asleep on the bench and mistreating employees.²¹² Additionally, a former court bailiff said Halverson forced him to massage her feet and put her shoes on for her. Judge Halverson was suspended in July 2007 by the court's chief judge, but has continued to collect her \$130,000 annual salary during her case before the Nevada Commission on Judicial Ethics. On August 12, Judge Halverson lost her bid for re-election. Three days later, the Commission concluded its disciplinary hearing, but, as of press time, it had not made a decision as to whether Judge Halverson might ever be permitted to return to the bench.



Fmr. Judge Halverson

WATCH LIST

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

RIO GRANDE VALLEY & GULF COAST, TEXAS

Since the inception of the Judicial Hellholes report, there has always been at least one Texas jurisdiction cited as a hellhole. In the very first report seven years ago, four jurisdictions in the state were so named, with three earning repeat honors the following year. More recently, the counties in and around the Rio Grande Valley and Gulf Coast have provided a steady reminder that “Everything’s Big in Texas,” including abuses in the civil justice system. But this year, thanks to statewide litigation climate improvements spurred by comprehensive legislative reforms and no-nonsense appellate courts, these stubbornly problematic counties are being removed – at least temporarily – from the list of full-blown hellholes. ATRF does so with extreme caution, recognizing that the historic unpredictability of decisions in the Rio Grande Valley and the Gulf Coast could easily result in backsliding.

Uncommonly large trial court verdicts in counties such as Jefferson, Brazoria, Cameron, Hidalgo, Nueces, Starr and Zapata have contributed to the state’s hellhole reputation. But the damage they cause is now being more readily mitigated by appeals courts, as happened twice this year when high profile awards in Vioxx cases were reviewed and found to have been built on shaky legal grounds.

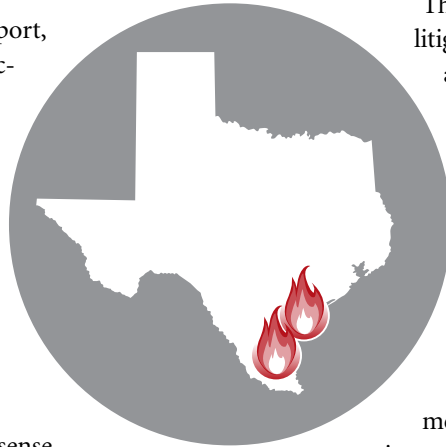
The Texas Court of Appeals, reviewing the first Vioxx case to go to trial, overturned a \$253 million verdict from a Brazoria County court.²¹³ The unanimous panel found the allegation that the plaintiff’s death was caused by ingestion of Vioxx to be “nothing more than conjecture” given that there was no evidence that the plaintiff died from a blood clot, a medical problem for which the drug allegedly increases risk.²¹⁴ The verdict had included \$24.45 million in compensatory damages and a simply unfathomable \$229 million in punitive damages.²¹⁵

In another rebuke to the Rio Grande Valley’s trial courts, a Texas mid-level appellate court ordered a new trial in a Vioxx case heard in Starr County where the plaintiff had won a \$32 million verdict.²¹⁶ The appellate court found that a juror had been receiving interest free loans from the plaintiff totaling \$12,700, and had made repeated phone calls to the plaintiff in the days following his jury summons and leading up to the trial.²¹⁷ Then, in spite of the fact that the deceased septogenerian husband of the plaintiff had been overweight, had smoked for 30 years and had high blood pressure, high cholesterol, diseased arteries, a previous quadruple bypass and already suffered one heart attack prior to taking Vioxx,²¹⁸ the trial court returned a verdict that included \$7 million in compensatory damages and \$26 million in punitive damages.²¹⁹ Go figure.

These reversals may signal that the “anything goes” litigation environment in the Rio Grande Valley and along the Gulf Coast will begin to stabilize for the better. But elsewhere in the Lone Star state this past year there were a number of disquieting developments that could well give rise to future Judicial Hellholes. First, while the state celebrated the fifth anniversary of its medical liability reform package and the resulting success (see Points of Light, p. 29), the Texas Supreme Court declined to hear a case to settle the constitutionality of the medical liability limits.²²⁰ This puts the reforms in a precarious and uncertain position, which could quickly reverse many of the hard-fought gains should a lower, plaintiff-biased court declare them unconstitutional.

Further, although Texas appellate courts have stepped up to rein in excessively high verdicts, such awards persist in the Rio Grande Valley, Gulf Coast and, to a lesser extent, throughout the state. For example, the largest-ever judgment and attorney fee award in U.S. securities-fraud history came this year in Houston federal court. The case, arising out of the Enron scandal, resulted in a recovery of more than \$7.2 billion from the failed energy trader’s lenders, auditors and directors, with a record \$688 million going to the attorneys.²²¹ The firm Coughlin Stoia Geller Rudman & Robbins is poised to collect about \$400 million from the single case. Incarcerated lead attorney and class action kingpin William Lerach (see Rogues’ Gallery, p. 36) is also estimated to pocket \$50 million for his early role.²²² Such astonishing figures suggest that it may be some time before Texas achieves the more reasonably balanced awards and fees prevalent in other states.

In one more sign that Texas’s litigation climate may yet face a long recovery period ahead, a former paralegal for prominent



MADISON COUNTY, ILLINOIS

Faithful readers of this report may recall that last year marked Madison County's first reprieve from the list of Judicial Hellholes. The jurisdiction that was the #1 Judicial Hellhole in 2002, 2003 and 2004 before dropping to #4 in 2005 and to #6 in 2006, has once again shown signs of gradual improvement within its once notoriously unfair civil justice system. While these improvements will keep Madison County off of the Judicial Hellholes list again this year, lingering concerns make this jurisdiction worthy of continued scrutiny.

ROAD TO REDEMPTION PAVED WITH REFORMS

A major reason for being optimistic that Madison County will not plunge back into the Judicial Hellholes abyss is the re-election of Chief Judge Ann E. Callis to a second two-year term. Judge Callis, who was southern Illinois' first female chief judge when elected in 2006, has led efforts to enact innovative reforms that have limited historic forum shopping and class action abuses. For example, Judge Callis banned multiple substitutions of judges by class action plaintiffs – a decision upheld in 2008 by the Fifth District Appellate Court.²²⁵ Illinois law provides plaintiffs with one substitution for cause as a matter of right if the judge has not made a significant ruling in the case. And prior to Judge Callis' action, judge-shopping local class action lawyers would simply file substitutions on behalf of different individual plaintiffs within the class until they were assigned the favorable judge they sought all along.²²⁶ Judge Callis eliminated this procedural loophole, giving shameless plaintiff's attorneys one less reason to select Madison County as a place to expect plaintiff-biased treatment.

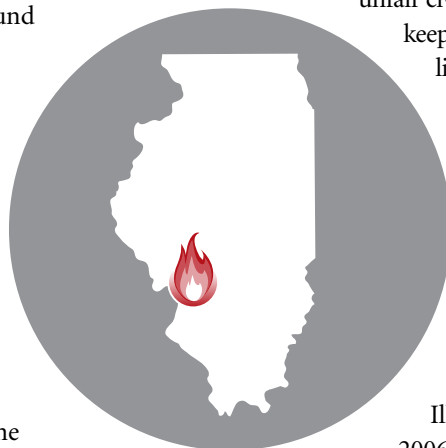


Similar reform efforts also appeared to bear fruit as judges applied tighter controls on class action filings than in the past. For instance, Associate Judge Richard Tognarelli decertified two class actions that were virtually national in scope – one including plaintiffs from 49 states and the other comprising claimants from 46 states – against Ford Motor Company that related to car paint delamination.²²⁷ Circuit Court Judge Phillip Kardis had certified the claims involving an estimated 27 million vehicles in 2003 before the Illinois Supreme Court ruled in two 2005 cases that it is improper to apply Illinois consumer law to conduct that may be legal in other states.²²⁸ Judge Kardis later retired and the case ultimately wound up before Judge Tognarelli, who found class certification inappropriate because of differing types of paint problems among the plaintiffs and laws that vary in each state.²²⁹

lawyer Richard Laminack accused him of being a “sexual predator” who, among other things, once suggested that she perform a sexual act on an expert witness to improve his “mood and testimony.”²²³

Apparently, Texas plaintiffs' lawyers will still go to any length to pursue jackpot justice. The woman, who worked on fen-phen litigation while employed at Mr. Laminack's firm, also alleged that clients were overcharged for phony medical records from health care providers that never treated them.²²⁴

Reason for optimism, however, may be found in a recent ruling of the Texas Supreme Court that should stop personal injury lawyers from importing claims from all over the country to friendly Texas courts. On December 5, 2008, the state's high court ruled in *In re General Electric Co.* that the plaintiff, who had lived and worked in Maine all of his life, could not sue for his asbestos exposure in Harris County, which handles Texas's asbestos litigation. This decision may finally end a 15-year battle between the state legislature and judiciary that began when the state supreme court eliminated the traditional doctrine of *forum non conveniens*, which allows a court to dismiss cases that are more appropriately conducted in other jurisdictions. The U.S. Supreme Court labeled Texas “the world's forum of final resort.” A Texas appellate court justice took it a step further, predicting that Texas courts would become “not only the courthouse for the world but the laughingstock of the legal world as well” if its judges did not throw out cases having nothing to do with the state. What followed was a situation wherein the state's elected representatives would repeatedly enact laws to limit forum shopping to counter rulings by Texas courts that resisted applying the law. In this year's ruling, the Texas Supreme Court recognized that the 2003 and 2005 reforms closed the loopholes and required Texas's trial courts to dismiss cases with no connection to the state.



Outside the courtroom Madison County has further improved its litigation environment by initiating a mediation program in which a judge who is not assigned to the case or an outside mediator can help bring the parties to a settlement in civil cases wherein \$50,000 or more is at stake.²³⁰ This voluntary program saves litigants' time and money, and finite tax dollars and court resources. The new program joins an existing mandatory program for medical liability cases, which now covers nursing home litigation, too, as the first of their kind in the state.²³¹ Moreover, the Madison County Circuit Court has instituted a successful mandatory arbitration program for all lawsuits seeking between \$10,000 and \$50,000. Either side can reject the arbitrator's decision and take the case to trial, but only 26% percent of arbitration awards in the county were rejected in the program's first year and less than 2% went to trial.²³²

ASBESTOS LITIGATION RESURGENCE

In spite of the important efforts to improve the county's litigation climate and poor reputation, significant hurdles remain. One of the most troubling statistics is the county's recent increase in asbestos filings, which suggest the jurisdiction's infamous asbestos racket has yet to be entirely shut down. Personal injury lawyers continue to file asbestos claims in the county on behalf of residents of other states. Some of these suits also allege that as many as 250 defendants are responsible for a single plaintiff's injury.

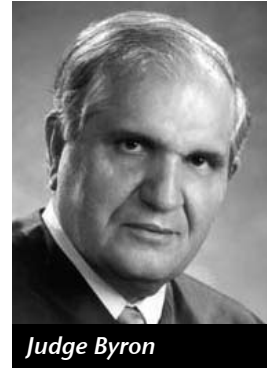
"Despite the best efforts at sensible reform by Judge Dan Stack, the specter of past asbestos verdicts is still proving magnetic to asbestos lawyers from near and far. Something about this place, we can only surmise, must drive corporate defendants to pay up to get out."²³³

—Editorial, Madison County Record

During the past two years, an average of six to eight asbestos cases were filed each week in Madison County. Although what once was a raging flood of asbestos cases has been reduced to a steady stream, there is fear among some observers that dangerous waters could rise again. In one week in March 2008, 20 new asbestos cases were filed in Madison County, the most in a five day period in more than two years. Sixteen of the 20 cases involved plaintiffs from outside Illinois. Overall, the number of asbestos cases filed in the county rose significantly in 2007 and again in 2008,²³⁴ with about 9 out of 10 claims filed on behalf of out-of-state plaintiffs.²³⁵

Of course, such asbestos cases can bring big money. The filing fees alone amount to about

\$130,000 in revenue for the court.²³⁶ Nonetheless, this increased caseload is rather disconcerting in light of the general decrease in asbestos claims nationwide.²³⁷ While still far from the record rates for new filings that Madison County experienced earlier this decade, this worrisome new surge warrants watching, as a hellholes relapse cannot, unfortunately, be ruled out.



On an encouraging final note that actually bodes well for the future of civil justice in Madison County, the Honorable Nicholas Byron, whose plaintiff-biased rulings invited a cross-continent parade of asbestos plaintiffs and established the county as the very worst of Judicial Hellholes for years, was finally forced to retire by a state law that effectively limits the age of judges. Best of luck in retirement, Judge Byron!

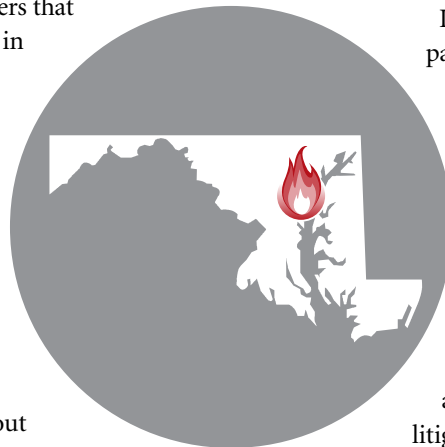
BALTIMORE, MARYLAND

Perennially cited by respondents to the Judicial Hellholes survey and listed as a jurisdiction to watch, Baltimore, Maryland (the city, not the county), has been a welcoming host to a disproportionate share of East Coast asbestos litigation. Perhaps, coincidentally, an all-star plaintiffs' attorney with a specialty in asbestos cases, Peter Angelos, happens to be the owner of the Baltimore Orioles baseball team. Regardless, Baltimore is plagued by more than just out-of-control asbestos litigation, as several lead paint cases resulted in questionable multimillion-dollar verdicts and the state's non-economic damages cap came under assault by plaintiffs' lawyers this year.

For example, in one Baltimore case alleging exposure to lead paint, the jury came back with a plaintiff's verdict that called for an award of \$6 million (later reduced to \$605,000 due to Maryland's inflation-adjusted limit on non-economic damages). It then became known that one of the jurors was also a client of the law firm representing the plaintiff but had failed to disclose that inconvenient truth before trial.²³⁸ Amazingly, the judge refused to set aside the verdict, finding the failure to disclose inadvertent.²³⁹

In another truly astounding Baltimore lead paint case, a jury awarded \$5.7 million, including \$5.1 million in past and future non-economic damages and \$600,000 in economic damages, to a 24-year-old man who had allegedly been exposed to lead paint in his home more than 20 years ago.²⁴⁰ The court then ruled that Maryland's non-economic damages limit did not apply since the plaintiff's injuries predated its enactment.²⁴¹

The state's limit on non-economic damages, which has helped moderate Baltimore's litigation climate, is also coming under more direct





assault. In yet another lead paint case, the Maryland Court of Special Appeals rejected a challenge to the cap, finding that it does apply to the Maryland Consumer Protection Act (CPA).²⁴² Plaintiffs' lawyers tried to circumvent the cap by bringing a lead paint claim as a CPA action, arguing the cap only applied in tort suits.²⁴³ The Court of Special Appeals rejected their premise and upheld a Baltimore City Circuit Court decision reducing damages from \$2.3 million to \$515,000 pursuant to the cap.²⁴⁴

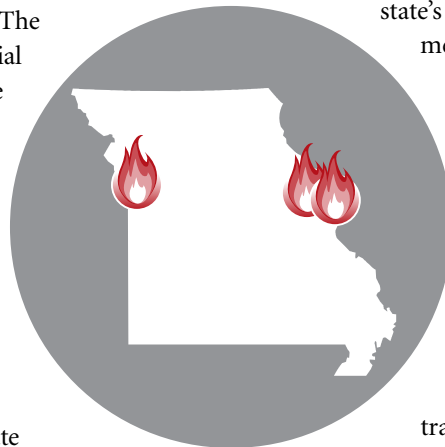
A Baltimore City Circuit judge similarly rejected a constitutional challenge to the state's non-economic damages limit in a medical liability case.²⁴⁵ However, this decision, which reduced damages from \$10.2 million to \$632,500, is expected to be appealed by none other than The Law Offices of Peter G. Angelos PC, which have a major stake in seeing the cap fall.²⁴⁶ Finally, beyond Baltimore, additional challenges to the constitutionality of the damages cap are before the Court of Special Appeals in cases brought in nearby Anne Arundel and Montgomery counties.²⁴⁷

While Maryland courts have thus far held the line in rejecting these multiple challenges, civil defendants, particularly those in Baltimore, are justifiably fearful that the caps could fall at any time and expose them to vastly expanded liability. For example, in an asbestos lawsuit typical of Charm City this year, it took just 32 minutes for a jury to render a \$15.3 million verdict against John Crane-Houdaille Inc., finding that asbestos-containing rope it supplied caused a claimant's mesothelioma.²⁴⁸ Thus, Baltimore appears to be teetering along the edge of a hellhole and bears watching in the year ahead.

ST. LOUIS (THE CITY), AND ST. LOUIS AND JACKSON COUNTIES, MISSOURI

Three Missouri jurisdictions called attention to themselves this year with devilish deviations from traditionally sound and predictable outcomes in their civil courts. The City of St. Louis, previously cited among Judicial Hellholes before major legislative reforms were enacted in 2005, joined surrounding St. Louis County and cross-state soul mate Jackson County in cultivating an increasingly negative reputation for excessive awards while hosting a disproportionate share of Show Me State litigation.

For example, roughly two thirds of the largest 25 verdicts in Missouri in 2007 came from just these three jurisdictions.²⁴⁹ They also hosted nine of the top 10 settlements in the state



last year.²⁵⁰ St. Louis County, in particular, has twice this past year broken its own previous records for the highest personal injury verdict.²⁵¹ The current record verdict (at press time) came in a car accident case in May 2008 when the jury awarded \$21 million in damages (this figure was adjusted upward to \$25 million after accounting for prejudgment interest).²⁵² The case was filed just days before the 2005 tort reform law took and thus didn't have to be filed in another county.²⁵³

Class action plaintiffs also are finding the St. Louis area and Jackson County to be hospitable forums. For instance, when Missouri lawyers filed class actions questioning the cholesterol pill Vytorin's effectiveness and arguing that their clients paid more for it than they should have, they filed four lawsuits: three in St. Louis area courts and one in Jackson County.²⁵⁴ Additionally, Jackson County provided the forum of choice for a dubious class action lawsuit against Coca Cola, alleging the company misled consumers into believing that fountain Diet Coke is the same product as bottled Diet Coke when, in fact, the fountain drink uses an additional sweetener.²⁵⁵ The plaintiff contended that she and other consumers would not have purchased fountain Diet Coke if they had known it contained the additional sweetener. The lawsuit was filed on behalf of anyone who purchased Diet Coke from a fountain after March 1999.²⁵⁶ A Jackson County Circuit Court readily granted class certification, but the Missouri Supreme Court unanimously reversed the circuit court, finding that it had abused its discretion by certifying an overly broad class.²⁵⁷



In addition to appealing to in-state litigants, these three jurisdictions are at the forefront of attracting out of state litigation. A St. Louis County court, in particular, ignored the doctrine of *forum non conveniens* and welcomed litigation tourism by failing to dismiss cases of out-of-state claimants; a decision recently affirmed by the Missouri Supreme Court (see Dishonorable Mentions, p. 26).

The one significant factor that kept these jurisdictions off the Judicial Hellholes list this year was Missouri's comprehensive 2005 legal reforms, which have improved several aspects of the state's overall litigation environment. These improvements are most prominent in the City of St. Louis, where the number of medical malpractice cases in the jurisdiction has reportedly dropped 72% (from 207 in 2004 to 58 in 2007) since the recent reforms took effect.²⁵⁸ Similarly, wrongful death claims have dropped from 142 to 72 over the same span.²⁵⁹ While such statistics suggest there has been some laudable progress, excessively high verdicts and settlements, and ongoing forum selection problems warrant a caution flag and close tracking in the year ahead.

OTHER AREAS TO WATCH

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

ORANGE COUNTY, CALIFORNIA

Just south of Judicial Hellholes pick Los Angeles County, trial lawyers have decided that Orange County is a good place to try out a fresh new mass tort. The first-of-its-kind lawsuit claims that the popular wrinkle-reducing treatment Botox is unsafe.²⁶⁰ Filed by more than a dozen Botox users and their relatives, the suit challenges a treatment approved by the FDA nearly 20 years ago.²⁶¹ Experts contend that the treatment has a remarkable safety record with 18 million vials sold and more than 15 million treatments preformed worldwide.²⁶² Despite this widespread use and the rarity of reported serious adverse events associated with treatment, Orange County is serving as experimental jurisdiction into which this new mass tort has been injected.

Orange County also had some problems on the bench this year. Judge Kelly MacEachern was ousted from the judiciary for falsifying travel records to obtain reimbursement and then lying about it under oath.²⁶³ The judge allegedly fibbed about attending two courses, one of which was ironically titled "Excellence in Judging," and proceeded to claim hotel reimbursement for a stay in San Diego. The Commission on Judicial Performance determined that the judge engaged in an attempt to cover up her wrongdoing that was "calculated, not careless" and suspended her from the bench indefinitely.²⁶⁴

ST. CLAIR COUNTY, ILLINOIS

This former Judicial Hellholes jurisdiction continues to attract lawsuits from out-of-state plaintiffs while producing questionable legal rulings and relationships between the judiciary and plaintiffs' attorneys. For example, in a recent lawsuit filed against Eli Lilly & Company claiming that the anti-psychotic drug Zyprexa led to diabetes or mental illness, only one of the thirty-six plaintiffs was a St. Clair County resident.²⁶⁵ The same attorneys, Lloyd M. Cueto and Christopher Cueto of Belleville, filed a similar suit in November 2007 on behalf of 30 plaintiffs from several other states.²⁶⁶ Why would presumably infirm patients bring their claims across the country to St. Clair County? Maybe because the county still has a lingering hellhole reputation, and maybe because the attorneys Lloyd and Christopher Cueto happen to be, respectively, the son and brother of St. Clair County Circuit Judge Lloyd A. Cueto?

MADISON, WISCONSIN

Creation of the nation's newest "rocket docket" in the Western District of Wisconsin has led to an influx of patent litigation to the Madison area.²⁶⁷ Statistics in a recent report on patent litigation by PricewaterhouseCoopers illustrate that trial success rates are much higher in the district, with patent holders winning 66.7% of the time between 1995 and 2007. The report ranked Wisconsin's

- Orange County, California
- St. Clair County, Illinois
- Madison, Wisconsin
- Seattle, Washington
- New Orleans, Louisiana
- Minnesota
- Santa Fe, New Mexico
- Oklahoma



Western District fifth nationally for plaintiffs' overall success rates. Not coincidentally, "patent trolls," or companies whose primary source of income is derived through patent litigation, have become a high-growth sector in the Madison region.²⁶⁸

SEATTLE, WASHINGTON

A thriving tech sector and a wave of construction in Seattle have recently lured at least a half-dozen law firms to the Emerald City.²⁶⁹ These recent market entrants only add to the steady rise of litigation in recent years, positioning Seattle as a major staging ground on the West Coast for new lawsuits.

NEW ORLEANS, LOUISIANA

Three years after the flood waters of Hurricane Katrina receded, a menacing tide of new lawsuits threatens to further erode civil justice in this historically problematic jurisdiction. Thus far courts have carefully handled numerous class actions and other mass claims, but it remains to be seen whether they will continue to do so fairly. A recent study found that 89% of Louisiana's small business owners thought frivolous lawsuits hampered the state's business climate. New Orleans/Orleans Parish was also ranked among the 10 least fair and reasonable court systems in the country.²⁷⁰



MINNESOTA

The state has become a forum of choice for claimants who fail to meet statutory deadlines in other states because it offers one of the nation's longest statute of limitations: six years for any negligence action and four years for strict products liability claims. Add to the mix one of the nation's broadest "choice of law" provisions, which basically allows any out-of-state claimant to sue under Minnesota law, and it's no wonder that litigation tourists are plotting a course to the North Star State.²⁷¹

SANTA FE, NEW MEXICO

Not unlike New Orleans, Santa Fe has been flooded by class-action lawsuits targeting national insurance companies.²⁷² And these lawsuits are not without controversy. In an investigative report, an Albuquerque Journal reporter found that in one of the settlements, only two policyholders received any money – each collecting \$30,000 – while the plaintiffs' lawyers walked away with \$7.5 million in fees and costs.²⁷³ In another settlement, policyholders received \$100 in coupons or \$30 in cash, and their lawyers took home \$10.5 million.²⁷⁴ At press time, a settlement on appeal to the New Mexico Supreme Court called for the plaintiffs' lawyers to receive \$6.5 million in fees even though they reported litigation costs "of less than \$55,000 from the time they filed the lawsuit until the settlement hearing."²⁷⁵ In condemning the trial court judge, the mid-level appellate court stated that "the District Court may have abdicated its duty to carefully evaluate the settlement."²⁷⁶ You think?

OKLAHOMA

The Oklahoma Supreme Court is no fan of tort reform, and neither, apparently, is Governor Brad Henry. The state's high court has hacked away at the state's Affordable Access to Health Care Act of 2003. In 2006 the court struck down a requirement that claimants file an affidavit of merit from a physician supporting their claims.²⁷⁷ The court found the provision was a "special law" because it treated those bringing claims for medical malpractice differently than those claiming injuries for other reasons. After the legislature responded to the court's decision by expanding the affidavit requirement to apply to any case of professional malpractice,²⁷⁸ including lawyers and accountants, Governor Henry vetoed the bill, forsaking the support for tort reform that he had espoused during his gubernatorial campaign.²⁷⁹

This November, the Oklahoma Supreme Court struck again, throwing out the 180-day period within which a plaintiff had been required by law to serve a medical negligence complaint on a defendant.²⁸⁰ Observers there suggest it may be only a matter of time before the court also strikes down the \$300,000 limit on noneconomic damages that has proved vital to stabilizing affordable insurance premiums for emergency care physicians and obstetricians.

Moreover, the Sooner State is reportedly experiencing increased class action activity as some judges there develop a reputation for certifying classes that shouldn't be certified and state appellate courts seem reluctant to reverse such determinations.

If there's a bright side to developments in Oklahoma, it may be found in the November 2008 election results, which bolstered the number of tort reform supporters in the state legislature. Hoping to finally hold Governor Henry to his campaign promise to sign comprehensive tort reform into law, eager lawmakers are already counting votes for an override that may be required if the governor brandishes his veto pen once more.



DISHONORABLE MENTIONS

Dishonorable Mentions recognize particularly abusive practices, unsound court decisions or other actions that erode the fairness of a state's civil justice system. This year, high court rulings in Massachusetts and Missouri have earned this dubious distinction.

MASSACHUSETTS SUPREME JUDICIAL COURT:

WARN EVERYONE OR GET SUED!

In a case that stretches the bounds of liability to an unprecedented and, arguably, untenable level, the Supreme Judicial Court of Massachusetts ruled in December 2007 (after the previous edition of this report had gone to press) that a physician not only has a duty to warn his or her patients about the harmful side effects associated with a prescription drug, but also to warn unknown and unrelated third parties who may someday cross paths with and be injured by that patient.²⁸¹ This extraordinary departure from well-settled law imposes a duty to warn any person who might come into contact with a patient and be injured should the patient have an adverse reaction to a drug. Thus in Massachusetts, physicians now owe a unique duty to the world, and for this the state's high court earns well-deserved recognition as a Dishonorable Mention.

***"This is one more straw on the backs of practicing physicians who feel the liability challenges out there are being broadened. Now they're being held responsible for things that happen beyond the physician-patient relationship."*²⁸²**

—Dr. Dale Magee, president of the Massachusetts Medical Society

The case, *Coombes v. Florio*, arose out of a fatal automobile accident in 2002 caused by a then-75-year-old patient of the defendant, Dr. Roland Florio.²⁸³ The patient had been diagnosed with a number of serious medical conditions including asbestosis, chronic bronchitis, emphysema, high blood pressure, and metastatic lung cancer that had spread to his lymph nodes, and lost consciousness while driving after allegedly suffering an adverse reaction to his prescribed medications.²⁸⁴

Following the accident, the estate of a third-party decedent sued Dr. Florio, claiming he'd owed a duty to warn all those who might possibly be injured as a result of his patient's drug reaction.²⁸⁵

The trial court judge dismissed the case against the physician because there was no special relationship, or *any* relationship for that matter, between Dr. Florio and the deceased motorist.²⁸⁶ But in a stunning reversal, the state's highest court held in a split decision that a physician's duty to warn extended to everyone who might reasonably be foreseen coming into contact with such a patient.²⁸⁷

The public policy implications of the court's ruling, explained in detail by the dissenting justices, suggest this decision "vastly enlarges the field of physician liability"²⁸⁸ and is likely to result in significant negative consequences. First, doctors faced with broad liability to third-parties are likely to engage in overly defensive medicine and over-warn patients by, for example, telling all of their patients not to drive. Further, as patients are inundated with warnings, they are more likely to ignore their physician's advice because they will not be able to distinguish legitimate warnings from defensive warnings. So more patient accidents might actually result as patients question, "doesn't the doctor just say that to everyone?"

SUPREME COURT REMAKES

MISSOURI AS THE 'SHOW ME (YOUR LAWSUITS) STATE'

For the second straight year a decision by the Missouri Supreme Court earns a Dishonorable Mention. Last year the court issued a poorly reasoned medical monitoring opinion that allows damages in the absence of physical injury.²⁸⁹ This year the court challenged the equally fundamental principle of law encompassed by the doctrine of *forum non conveniens*.

In nearly every state the doctrine of *forum non conveniens* is applied by courts to dismiss cases with tenuous connections, or no connections at all, to the jurisdictions in which they have been filed. This basic legal principle prevents plaintiffs' lawyers from forum shopping for the most favorable jurisdictions and thus keeps defendants and witnesses from being inconveniently forced to travel considerable distances. It also protects local residents from serving on juries and paying taxes to support litigation in which their state has no interest. This year the Missouri Supreme Court effectively gutted this fundamental principle, potentially opening the door to lawsuits filed by anyone from anywhere.²⁹⁰

Plaintiffs in *Wyeth v. Grady* alleged injuries from prescription hormone therapy drugs and filed action against several pharmaceutical companies in the Circuit Court of the City of St. Louis.²⁹¹

The case initially involved 186 plaintiffs, only 21 of which were Missouri residents.²⁹² Most of the cases were moved to federal court, with 11 plaintiffs remaining in St. Louis circuit court. These remaining plaintiffs had no connection to the state beyond filing a lawsuit there. Yet in this seemingly garden-variety application of the doctrine of *forum non conveniens*, the state high court applied an extraordinarily low threshold to keep the case in Missouri.

Similar to other states the Missouri Supreme Court began its analysis of the doctrine of *forum non conveniens* with an inquiry into the claimant's connections to the forum state.²⁹³ It found that none of the facts giving rise to any of the claims occurred in Missouri. All of the women were prescribed hormone therapy, purchased and ingested the drugs, and suffered alleged injuries in northeastern states.²⁹⁴ None of the potential witnesses were located in Missouri, leaving them outside the circuit court's subpoena power.²⁹⁵ No other parties to the lawsuit were Missouri residents either: the plaintiffs lived in Delaware, New Jersey, New York, and Pennsylvania;²⁹⁶ and none of the defendant pharmaceutical companies was incorporated or headquartered in Missouri. Finally, the court concluded that "there is no apparent nexus between these particular cases and Missouri."²⁹⁷

But despite the obviously absent connection to St. Louis, the Missouri Supreme Court ruled that the cases could still be heard in Missouri courts because there was no showing that the filing of the suits was for the purpose of "vexing, oppressing or harassing" the defendant companies.²⁹⁸ In effect the court turned a blind eye to other burdens and inconveniences inappropriately imposed on defendants as a result of being forced to try a case in an unrelated forum. For example, it is much more burdensome for a defendant

to present important evidence or call key witnesses if they must be flown or transported halfway across the country to do so. Indeed, the majority in *Grady* conceded that hearing the case in the unrelated forum of Missouri resulted in "some inconvenience."²⁹⁹

The fact that defendants tried so hard to keep the unconnected case out of Missouri courts, several of which have been cited in past Judicial Hellholes reports, suggests perhaps that the "forum" is inherently "vexing."

Nonetheless, the Missouri Supreme Court's decision to downplay these considerations and allow the case to proceed in St. Louis establishes a troubling precedent that severely undermines the doctrine of *forum non conveniens* in the state. As a result plaintiffs' lawyers now have an open invitation to import out-of-state litigation to the Show Me (Your Lawsuits) State.



POINTS OF LIGHT

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

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

In its Points of Light section, this report highlights interventions by judges, legislators, the electorate and the media that reduce lawsuit abuse. These are examples of how a courthouse, city, county or state can emerge from the desultory depths of a Hellhole or otherwise avoid sinking to those depths in the first place. This year court rulings in Maryland and Rhode Island, and the positive impact of statutory reforms adopted in Pennsylvania and Texas, provide reasons for optimism.

MARYLAND COURT OF APPEALS REAFFIRMS THAT THERE IS NO 'DUTY TO THE WORLD'

While some state high courts succeeded in extending liability (see Dishonorable Mentions, p. 26), Maryland's Court of Appeals held the line, recognizing that pharmaceutical manufacturers may owe a responsibility for adverse reactions to those who take their medications but owe no such a responsibility to those who haven't taken those medications.³⁰⁰ The court's decision provides an example for other courts addressing the outer limits of products liability.

The facts underlying *Gourdine v. Crews* resemble those of the Massachusetts Supreme Judicial Court case of *Coombes v. Florio*,³⁰¹ in which the court reached the opposite conclusion with regard to a physician's liability. In *Gourdine*, a patient taking a combination of insulin medications suffered a debilitating episode while driving that resulted in a fatal accident with another motorist.³⁰² The family of the deceased third-party then sued the pharmaceutical manufacturer, claiming the company owed a duty to anyone who could possibly have been injured by a patient's adverse drug reaction.³⁰³

Maryland's highest court slammed the door on this reckless attempt to expand liability. As the court explained, a duty of care to third parties under these circumstances "would create an indeterminate class of potential plaintiffs"³⁰⁴ and "expand traditional tort concepts beyond manageable bounds . . . Essentially, [the product manufacturer] would owe a duty to the world."³⁰⁵

The Court of Appeals affirmed that lower courts had appropriately dismissed the case against the manufacturer, and its decision effectively forecloses future attempts in Maryland to wildly expand manufacturers' liability for the injuries of those who never used their products.

RHODE ISLAND SUPREME COURT REJECTS PRODUCT-BASED PUBLIC NUISANCE CLAIMS

In one of the most widely anticipated and closely monitored state supreme court cases of 2008, the Supreme Court of Rhode Island issued a landmark decision that rejected an effort to convert public nuisance law into a Super Tort that could leap the more stringent requirements of products liability law in a single bound.³⁰⁶ The ramifications of the court's ruling extend far beyond the nation's smallest state and represent a significant step toward quashing a concerted effort by the personal injury bar to salvage failed products liability cases aimed at a variety of manufacturers and industries.

The case was brought by Rhode Island's attorney general (see *Dangerous Liasons*, p. 34), who, working in coordination with private contingency fee lawyers, sued former manufacturers of lead pigment under public nuisance law for present-day hazards associated with deteriorated lead paint in homes.³⁰⁷ The trial court permitted the novel theory, and an eventual trial resulted in a verdict for the state.³⁰⁸ The Rhode Island Supreme Court's critical review of the case drew national attention from courts, attorneys



general and other legal observers curious to see whether this new legal theory would gain traction. It did not.

Public nuisance claims arise when the conduct of an individual or business unreasonably interferes with a right of the general public, and the individual or business has the ability to stop the resulting harm.³⁰⁹ In this case, the Rhode Island Supreme Court recognized that those who made and

sold lead paint long ago have since had no ability to control the use, maintenance or removal of their products from homes.³¹⁰ Only property owners, the high court reasoned, have the ability to address the problems.

The court's commonsense decision, which ended a nine-year litigation saga, joins a string of recent decisions by high courts in Illinois, Missouri and New Jersey that rejected similar product-based public nuisance claims.³¹¹ Taken together, these decisions stand as a powerful deterrent to personal injury lawyers and activist attorneys general seeking to turn the law of nuisance into an unlimited universal tort. For example, only days after the Rhode Island Supreme Court's decision, the city attorney of Columbus, Ohio, dismissed a similar lead paint public nuisance action.

In addition to providing clarity in the law of public nuisance, the court also earns recognition as a Point of Light for issuing a warning to state attorneys general regarding the use of private contingency fee attorneys to pursue public litigation. Specifically, the court stated that the attorney general must "retain complete control over the course and conduct of the case," must "retain a veto power over any decision made by outside counsel," and have a senior member of his or her staff "personally involved with all stages of the litigation."³¹² Thus the decision provides valuable insight on not one, but two major issues of litigation abuse.

PENNSYLVANIA & TEXAS EMERGE FROM DEPTHS OF MEDICAL LIABILITY CRISIS

Only a few short years ago increasing litigation and inflated awards for damages had combined to create medical liability crises that were driving physicians, particularly specialists, out of Pennsylvania and Texas. As doctors' malpractice insurance premiums skyrocketed, many general care physicians and specialists looked to set up shop in other states. As a result the availability of

medical care was compromised, and citizens began looking to their legislatures and courts for answers.³¹³ Fast forward to 2008 when reforms adopted by the respective legislatures and judiciaries in these two states have had time to succeed.

In Pennsylvania medical malpractice filings fell nearly 40 percent statewide, from 2,632 in 2000 to 1,617 in 2007.³¹⁴ Philadelphia, in particular, witnessed a drop in filings from 1,085 to 586 during that period.³¹⁵ According to the Pennsylvania Medical Society's 2007 report, physician insurance premiums also dropped between 2002 and 2007, as the liability climate improved.³¹⁶ Former Pennsylvania Supreme Court Justice William H. Lamb served as chairman of the state's Medical Malpractice Task Force and credits much of the improvement to initiatives undertaken by the high court.³¹⁷ Court rules now require a plaintiff's lawyer to file a medical malpractice lawsuit in the county where the cause of action arose, along with a certificate of merit from a licensed physician stating that there is a reasonable probability that the defendant(s) deviated from the accepted standard of care.³¹⁸ This has the effect of curbing meritless claims designed simply to extort settlements from malpractice insurers.

The turnaround of Texas's medical liability crisis is even more profound. The state faced in 2003 a situation in which 1 in every 4 doctors faced at least one malpractice claim each year.³¹⁹ That number has since decreased by half in light of reforms enacted by the state through Proposition 12, which was a constitutional amendment ratifying the limit on noneconomic damages in medical malpractice cases.³²⁰ This law limited a plaintiff's noneconomic damages award to \$250,000 from doctors, and an additional \$250,000 from each of up to two medical care institutions.

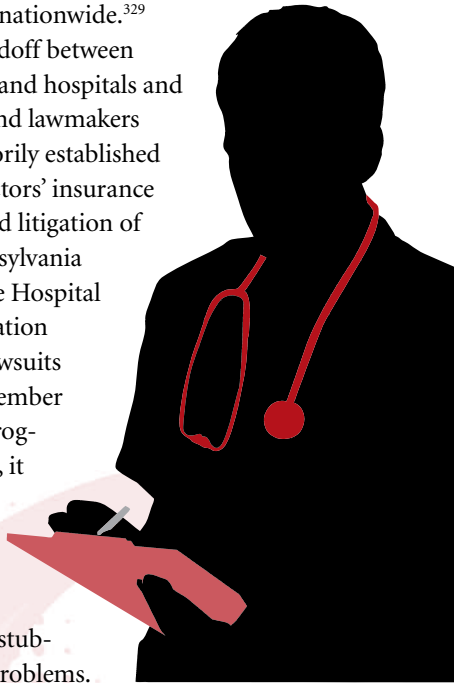
In the five years following the state's passage of Proposition 12 the medical liability climate has improved demonstrably.

As a result of reductions in the number of claims being filed, the Lone Star State's largest malpractice insurer, the Texas Medical Liability Trust, has repeatedly dropped its rates and returned dividends to renewing policy holders, equating to a rate cut of more than 50%.³²¹ It is estimated that insurers statewide have cut rates by more than 25%.³²² There are also more than 30 new insurers in the state, up from just four in 2003.³²³ During this same period Texas has licensed approximately 8,836 new doctors, with each year setting a new record for license applications.³²⁴ Areas formerly in acute crisis, such as South Texas, Victoria and Beaumont, have shown proportionately impressive gains with the addition of desperately needed specialists.³²⁵ One survey reported that nearly 90% of Texas doctors said they felt more comfortable practicing medicine now than before the state's medical liability laws changed in 2003.³²⁶



A study by The Perryman Group states that approximately 8.5% of Texas's economic growth since 1995 is the result of lawsuit reforms.³²⁷ The study further reports that the total impact of tort reforms implemented since 1995 includes the creation of almost a half-million jobs in the state. Reforms specifically limiting non-economic damages in medical malpractice lawsuits are credited with creating more than 223,000 of those jobs.³²⁸ As good health care becomes more accessible, it's plainly easier for employers to maintain and expand healthier and more productive workforces.

These results powerfully illustrate the beneficial effects of medical liability reform. But while the liability environments in Pennsylvania and Texas continue to show signs of improvement, there remain steep hills to climb. For instance, Pennsylvania's average physician-liability payout is still 60% higher than those nationwide.³²⁹ Meanwhile, a testy standoff between Keystone State doctors and hospitals and Governor Ed Rendell and lawmakers over the use of a statutorily established fund that helps pay doctors' insurance premiums has generated litigation of its own. Both the Pennsylvania Medical Society and the Hospital & Healthsystem Association of Pennsylvania filed lawsuits against the state in December 2008. Thus if further progress is to be made there, it is incumbent upon the governor and other policymakers to continue exploring additional solutions to stubborn medical liability problems.



SUPREME COURTS IN NEW JERSEY, OREGON REQUIRE INJURIES FOR MEDICAL MONITORING

The supreme courts of New Jersey and Oregon earn joint honors this year for sound rulings in the area of medical monitoring liability. Both high courts affirmed a basic tenet of law that requires an injury as a prerequisite for recovery. In doing so, they joined a growing list of state courts to reject medical monitoring claims absent signs of present physical injury. These decisions also come on the heels of an outlier 2007 Missouri Supreme Court decision cited as a Dishonorable Mention in last year's Judicial Hellholes

report, which reached the opposite conclusion and permitted medical monitoring claims to proceed when claimants lacked physical injury.³³⁰

In June 2008 the New Jersey Supreme Court required that a physical manifestation of injury be shown in a products liability action which sought medical monitoring damages associated with the drug Vioxx.³³¹ Plaintiffs' lawyers had brought the action on behalf of a proposed national class of individuals who ingested Vioxx prior to the drug being removed from the market, alleging damages for monitoring any increased risk of serious cardiovascular events, including heart attacks and strokes.³³² None of the claimants, however, suffered from any known adverse effect from having taken the drug.³³³ The court rejected extension of liability for medical monitoring in the absence of physical injury, reasoning that such a claim is not recognized within the state Product Liability Act's definition of "harm."³³⁴ Rather, the court explained, "Plaintiffs' effort to expand the definition of harm to include medical monitoring is best directed to the Legislature."³³⁵

A month earlier the Oregon Supreme Court had reached the same conclusion in a negligence case alleging medical monitoring damages for the increased risk of lung cancer from smoking.³³⁶ Here, the plaintiffs asked the trial court to certify a class of all Oregon smokers having smoked the equivalent of five "pack years" of cigarettes.³³⁷ According to the complaint, this class included approximately 400,000 members and sought approximately \$29.6 billion in damages in monitoring expenses for individuals presently experiencing no signs of impairment.³³⁸ The court refused to "modify existing negligence law to require defendants to bear the cost of medical monitoring" and dismissed plaintiffs' medical monitoring claims because the lack of present injury resulted in the failure to state a claim.³³⁹

As detailed elsewhere in this report, high courts in Missouri and West Virginia have in similar medical monitoring cases ruled against the commonsensical requirement of present injuries upheld in New Jersey and Oregon. But the clear trend is for courts to require a physically manifested injury. In fact, since 1999, seven of the eight state high courts addressing the issue have expressly rejected medical monitoring absent physical injury.³⁴⁰ The supreme courts of New Jersey and Oregon helped to maintain and solidify this rational boundary line by insisting that every claimant must truly experience harm before collecting damages.



TORT DEFORM:

PLAINTIFFS' BAR LOBBIES LEGISLATURES TO UNDO REFORM AND EXPAND LIABILITY, BUT JUDGES CAN CURB ABUSE

The Judicial Hellholes report has always focused on state court judges who fail to apply the law or court procedures in a fair and even-handed manner. But the report has increasingly recognized that the rule of law ultimately requires judges to play the cards they are dealt. If state statutes are drafted in ways that expand liability, provide for damage awards that are out of proportion to the plaintiffs' actual injuries, or otherwise impose burdensome procedures, then judges are nevertheless compelled to follow them. Likewise, state legislatures may also pass laws that "supersede" well-reasoned court decisions.³⁴¹

The personal injury bar and its allies are strongly lobbying for litigation-friendly laws, sometimes referred to as "trial lawyer earmarks." The organized personal injury bar formerly known as the Association of Trial Lawyers of America and more recently euphemistically renamed the American Association for Justice (AAJ), along with its affiliated state trial lawyer associations, have not-so-secretly initiated a campaign to boost their business. At the federal level, trial lawyer lobbying efforts have tripled on average over the past decade.³⁴² For instance, this past year AAJ actively pushed for inclusion of lawsuit enhancing provisions in the Consumer Product Safety Improvement Act that went well beyond the funding and staffing needs of the federal Consumer Product Safety Commission (CPSC). Instead, the trial bar successfully increased the likelihood that state attorneys general will consider hiring private sector lawyers ostensibly to enforce federal law, created new whistleblower lawsuits, limited the CPSC's ability to stop state tort lawsuits that conflict with its ability to protect consumer safety, and established an online database to report supposedly dangerous products without adequately ensuring that such information is accurate.

A concerted companion effort is underway in state legislatures across the country, where lawmakers in 2008 considered legislation to create new consumer litigation,³⁴³ allow more class actions,³⁴⁴ permit higher damage awards in wrongful death cases,³⁴⁵ authorize larger awards in cases involving injuries to pets,³⁴⁶ and permit punitive damages where not otherwise available.³⁴⁷ They also considered legislation designed to create new types of lawsuits against prescription drug manufacturers³⁴⁸ and insurers.³⁴⁹ While most of these efforts failed this time around, the pressure to enact litigation-expanding state laws is only expected to increase during upcoming legislative sessions in 2009. A recent edition of *Trial* magazine, the AAJ's principal monthly publication, made clear that the association is "poised to roll out a new initiative aimed

at assisting states in filing, advocating for, and enacting pro-consumer legislation," such as limits on arbitration and attacks on insurance companies.³⁵⁰ This legislative push for expanded liability is representative of a more activist strategy in state legislatures. Such legislation can quickly reverse years of progress or destabilize a state's civil justice system, damage a state's economy, and provide new opportunities for abusive litigation. In short, these laws may drive more jurisdictions into Judicial Hellholes.

WHAT CAN JUDGES DO?

While judges must faithfully apply the laws enacted by legislatures, even when laws represent an expansion of liability, they nonetheless retain the ability to curb potential abuse in some areas.

In this liability- and litigation-expanding environment, it is particularly important that courts interpret laws in a common-sense manner that will not give rise to infinite and unpredictable liability, particularly when statutory language is either ambiguous or the interpretation urged by the plaintiffs' bar would lead to peculiar results.

For instance, some state legislatures are considering expanding their consumer protection laws to permit claims against new defendants, such as insurers or pharmaceutical companies, which are already closely regulated.³⁵¹ These laws often permit high damages for any conduct that might be considered "unfair" or "deceptive," along with an award of attorneys' fees to prevailing plaintiffs.³⁵² State courts should interpret consumer laws as per the laws' intended purpose: to compensate fairly consumers for losses stemming from a business's bad conduct. Courts should not allow misuse of such laws to unfairly destroy small businesses that committed good faith mistakes or minor, technical violations, nor to provide lucrative windfalls to personal injury lawyers.

One example is the D.C. Court of Appeals' current consideration of whether the broad language of the District of Columbia's consumer protection act should be read to authorize a multimillion-dollar damages award against a family-owned



dry cleaner that allegedly lost a customer's pants.³⁵³ In another case, Maryland's highest court is considering whether lawyers can allege consumer protection claims to recover for personal injuries, rather than financial losses, and get around the state's limits on noneconomic damages.³⁵⁴

Courts should also ensure that private lawyers do not place consumers in jeopardy by bringing lawsuits based on theories that conflict with decisions of those experts and policymakers at government regulatory agencies who are properly charged with protecting the public. Courts should look to the actions of federal and state regulatory authorities for guidance when determining whether an act is unfair or deceptive, and avoid sending mixed signals that create confusion as to the safety of products and the legality of business practices.

One of the more subtle attempts by the personal injury bar to expand liability occurs with implied rights of action. These are private causes of action that are not expressly stated in the law, yet can be interpreted by a court to exist given the nature of and intent behind a particular piece of legislation. When adopted by a court, a private cause of action creates a new avenue for recovery. Such court interpretations may not have been anticipated by legislators when they voted on the legislation, and defendants can be similarly surprised and forced to defend actions where there had been no prior indication of liability exposure. Thus courts can and should adhere closely to the language of the law and only recognize creation of new claims when unambiguously authorized in a statute.

DANGEROUS LIAISONS:

SOME STATE ATTORNEYS GENERAL OFFER CONTINGENCY FEE CONTRACTS TO POLITICALLY SUPPORTIVE OUTSIDE COUNSEL

As reiterated throughout, this report primarily focuses on judicial decision making and court practices that unfairly tip the scales of justice against civil defendants. But the actions of a handful of state attorneys general also contribute to growing concerns in the business community about the ability of defendants to receive fair trials. This happens when what are essentially private lawsuits are filed, often in a plaintiff-biased local court, with the backing of the state government and a strong incentive to obtain the highest monetary award possible. It's a system of legal kickbacks known as "pay to play," wherein lawyers who contribute to the campaigns of the state's highest ranking attorney can then get a contract for a piece of the action and, in some cases, develop the action themselves and get a go-ahead to pursue it in the state's name.

The practice began in May 1994 in the Chancery Court in Jackson, Mississippi, when then-Mississippi Attorney General Mike Moore filed a revolutionary lawsuit that would change the relationship between the offices of attorneys general and the plaintiffs' bar in virtually every state.³⁵⁵ The lawsuit was brought against the manufacturers and other entities comprising the tobacco industry and sought to recover monies allegedly spent by the state of Mississippi providing health care to residents injured by tobacco use.

But that's not what was unique about this lawsuit. The lawsuit was filed in Chancery Court. According to the state of Mississippi's Web site, "Chancery Courts have jurisdiction over disputes in matters involving equity; domestic matters including adoptions, custody disputes and divorces; guardianships; sanity hearings; wills; and challenges to constitutionality of state laws. Land records are filed in Chancery Court."³⁵⁶ Chancery courts are not typically the courts where lawsuits potentially worth several hundred million dollars are filed.³⁵⁷

The State of Mississippi also pioneered an important new litigation model for legal representation with this lawsuit; Moore's office hired outside counsel to represent the state, including his close friend and campaign contributor, Richard "Dickie" Scruggs (who has since been disbarred and is serving a federal prison sentence for an unrelated conspiracy to bribe a Mississippi judge). Scruggs and others agreed to take the case on a contingency fee basis. In the event that Mississippi settled or won its case, Scruggs would take a percentage. If the state got nothing, he would get nothing.³⁵⁸

Today, the history of that litigation, parallel actions filed in other states, the ensuing Master Settlement Agreement (MSA) and additional state settlements is well known. Less well-known

is the application of the model that it pioneered; a model that has created a corrupt and corrosive cronyism between some state attorneys general and outside counsel.

Hired on a contingency fee basis, outside counsel have won many billions of dollars in fees for their litigation work against a variety of industries.³⁵⁹ They also have been generous supporters of their chief clients' reelection campaigns; thereby ensuring that the model provides financial benefits to both the elected official doing the hiring and the personal injury lawyers performing the work.

Today several attorneys general are involved in relationships with outside counsel in high-profile litigation that exemplifies the need for comprehensive reform. Here are four examples.

MISSISSIPPI

If former Mississippi Attorney General Mike Moore pioneered the model wherein personal injury lawyers are hired by the AG and, in turn, reward his or her campaign with cash, then credit goes to his successor Jim Hood for perfecting it.

In a five-year span Hood's office retained 27 law firms to represent Mississippi in 20 separate lawsuits. Partners in the firms selected by Hood contributed \$534,900 to his reelection campaigns over a two-cycle period.³⁶⁰ The list of Hood contributors included Moore's old friend Richard "Dickie" Scruggs to the tune of \$30,000 (see Rogues' Gallery, p.36), and fellow plaintiffs' counsel Joey Langston, who, like his former associate Scruggs, has also recently pled guilty of conspiring to bribe a judge. Langston's firm gave Hood \$130,000. And that investment in Hood's campaign seems to have paid off. In 2005 as part of the state's \$100 million settlement with MCI/WorldCom, Langston's firm split \$14 million in fees.³⁶¹

Considering his propensity for hiring future felons to perform legal work on behalf of Mississippi citizens, Jim Hood understandably remains a steadfast opponent of laws that would provide for competitive bidding and public scrutiny of the contracts into which his office enters.³⁶²

OHIO

Former Ohio Attorney General Marc Dann was forced to resign in disgrace in May 2008 in the face of an impeachment vote, after an investigation into the management of his office made numerous

findings of “inappropriate staff-subordinate relationships, heavy drinking and harassing and threatening behavior by a supervisor.”³⁶³ While these sad events ultimately drove Dann from office, they were hardly the only instances in which his office was singled out for criticism and scrutiny.

Ohio enacted a strong law designed to end a “pay to play” culture there by prohibiting the attorney general from hiring outside counsel that had contributed more than \$1,000 to his or her campaign. It was a law Mark Dann seemed determined to circumvent.³⁶⁴

In October 2007 the Wall Street Journal reported that Dann replaced the outside counsel in a lawsuit his office was pursuing against Fannie Mae with new counsel, William Titelman, who had no experience with the underlying litigation. Titelman made no contributions to Dann’s campaign himself, but his apparently civic-minded son wrote Dann’s campaign a \$10,000 check.³⁶⁵

Additional reports suggest that Dann rewarded contributors to the Democratic Attorneys General Association, which he reportedly hoped to lead one day, with lucrative state contracts to represent Ohio in pharmaceutical litigation. The Columbus Dispatch reported that these types of arrangements seemed specifically designed to circumvent strong “pay to play” laws, which are silent with respect to payments made to state parties.³⁶⁶

RHODE ISLAND

In 1999 then-Rhode Island Attorney General Sheldon Whitehouse (now a United States Senator representing the Ocean State) brought litigation against a handful of paint and pigment manufacturers alleging that the defendants violated Rhode Island’s public nuisance statute by contributing to lead contamination in Rhode Island homes. To represent Rhode Island, Whitehouse hired outside counsel from the storied personal injury law firm of Ness Motley (now known as Motley Rice LLC), which had earned millions in fees and presumably invaluable experience in the Master Settlement Agreement with the tobacco industry.

In the first attempt to try the defendants under the novel application of public nuisance law, the trial ended with a hung jury. A second attempt yielded a \$2.4 billion verdict, which was later set aside in a July 2008 decision from the Supreme Court of Rhode Island (see Points of Light, p. 28). That decision earned the high court a startlingly impolitic public rebuke by Motley Rice lawyers in an opinion-editorial in the Providence Journal originally titled, “R.I. High Court Dumps on Your Kids.”³⁶⁷

While the defendants in the case were estimated to have spent upwards of \$100 million fighting the lawsuit,³⁶⁸ Rhode Island itself fared little better and ultimately lost the case on final appeal back before the state’s high court. More effective and less speculative mechanisms for addressing the effects of lead paint exposure in children have arguably been delayed nearly a decade, and thus another generation of Rhode Island children have experienced higher risk.

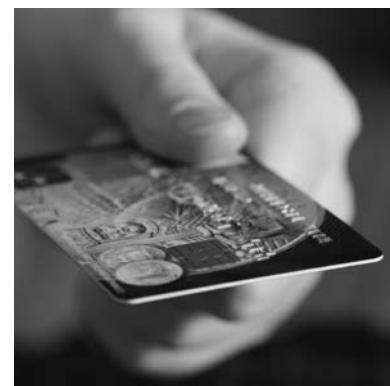
WEST VIRGINIA

In West Virginia, longtime Attorney General Darrell McGraw uses the powers of his office and its relationships with outside counsel to serve as both the state’s chief law enforcement officer and an adjunct to its legislature. It’s a factor that’s contributed to the state’s continuing stature as a Judicial Hellhole (see Judicial Hellholes, West Virginia, p. 4).

In a 2004 settlement with Purdue Pharma for \$10 million, a third of the money went to outside counsel who worked on the case. While some funds went to state agencies, McGraw distributed the balance “to his own favorite institutions and projects, however unrelated to the case.” The University of Charleston, for example, received \$500,000 for a new pharmacy school.³⁶⁹

In another case, McGraw’s office settled with MasterCard and Visa for \$11.6 million. As part of the settlement, West Virginia residents were to receive a sales tax “holiday” on large appliances in, not coincidentally, an election year. Two West Virginia attorneys who contributed to McGraw’s election campaign will share in \$3.9 million in fees from the settlement with counsel from Seattle and Washington, D.C. That fee request is pending, in part because outraged citizens, such as Steve Cohen of West Virginia Citizens Against Lawsuit Abuse, petitioned Judge Ronald Wilson to carefully review the fee arrangement.

While many public officials might welcome judicial review of a settlement ostensibly in the public interest, Cohen’s petition instead drew a pointed threat from Deputy Attorney General Fran Hughes, who verbally assailed Cohen after the hearing concerning the settlement and fees.³⁷⁰



“In total, between just the two settlements... McGraw’s office pulled in \$22 million – and decided how to use it. Legislators could have used that money for any number of worthy causes. For example, that’s nearly the amount lawmakers had to put up to offer help to 19,100 teachers many of whom are worried about their retirement pensions. Wouldn’t an additional \$22 million have allowed the legislature to offer them an even better deal?”³⁷¹

—The Intelligencer: Wheeling News Register

Editorial boards aren't the only ones taking notice. In 2007, the federal government's Center for Medicare and Medicaid Services stated its intent to withhold federal Medicare funds from West Virginia, arguing that the settlement satisfied litigation brought on behalf of the West Virginia Department of Health and Human Resources for expenditures allegedly incurred in treating the victims of OxyContin abuse – expenditures partially offset by West Virginia's Federal Medicaid Assistance Payment.³⁷² In a July 2008 decision, the U.S. Department of Health and Human Resources Departmental Appeals Board affirmed CMS's right to recoup the federal government's share of the OxyContin settlement proceeds.

Thus McGraw's litigation enabled his office to enrich its pet projects, earned millions from the settlement for the personal injury lawyers who supported his campaign and, get this, arguably lost budget money for the state agency on whose behalf the claim was brought.

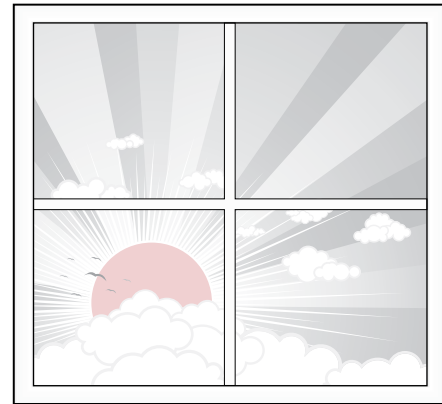
ATRA PROPOSES TRANSPARENCY IN STATE ATTORNEY GENERAL-PRIVATE LAWYER PARTNERSHIPS

In light of these shameless abuses and misconduct, there is strong public support for reform. Some 75 percent of citizens in a recent ATRA survey supported a code of ethics for attorneys general.³⁷³ And though several states have enacted related reform laws, and despite a federal executive order banning the retention of outside counsel on a contingent fee basis by federal agencies,³⁷⁴ the National Association of Attorneys General (NAAG) has yet to establish a uniform code of conduct or other principles governing the relationship between state attorneys general and outside counsel.

For that reason, the American Tort Reform Association has developed and proposed for discussion among policymakers a "transparency code" of its own. ATRA's code requires:

- **DISCLOSURE:** All contracts with vendors, including outside counsel, who provide services to the state or perform legal work in the name of the state, should be posted on the Internet for public inspection.
- **VALUE:** In every instance, the attorney general should seek to provide the highest quality services at the best value to state citizens when contracting with outside counsel. Unless an extraordinary situation requires assistance from a specific legal expert with technical or scientific experience not generally available, every effort should be made to competitively bid contracts for outside counsel.
- **OVERSIGHT:** Given that contingency fee-based contracts are often used when attorneys general are pursuing litigation that has a potentially significant public policy or regulatory impact, such contracts should be subject to review by the Legislature.

- **REPORTING:** Outside counsel providing services to the attorney general on a contingency fee basis shall be required to disclose detailed information on the hours worked, services performed and fees received from the state, as long as this reporting does not undermine the attorney-client privilege.
- **ACCOUNTABILITY:** All monies recovered by the attorney general in excess of \$250,000 as a result of lawsuits won or settled by the state should be deposited in the state treasury for appropriation by the legislature unless a settlement with the attorney general's office stipulates that the funds shall be allocated to a specific entity. At no time shall an attorney general enter into a settlement that allows the office of the attorney general to disseminate funds at its discretion.



COURTS MUST PROTECT THE RIGHT TO A FAIR TRIAL

If state attorneys general do not police themselves, courts must act. Deputizing private lawyers to represent the state on a contingency fee basis raises significant constitutional issues as to whether a private sector lawyer motivated largely by a profit-seeking self-interest can impartially seek justice, as would government attorneys sworn to protect the public's interest.

A federal trial court in Oklahoma recently permitted use of these dangerous agreements,³⁷⁵ and Rhode Island's highest court has said the state "is not precluded from engaging private counsel pursuant to a contingent fee agreement in order to assist in certain civil litigation, so long as the Office of Attorney General retains absolute and total control over all critical decision-making in any case in which such agreements have been entered into."³⁷⁶

Meanwhile, the California Supreme Court is currently considering whether to continue applying a well-reasoned ruling that found contingency agreements which delegate the state's police power to private contingency fee lawyers impermissible.³⁷⁷ But regardless of which way California's high goes in this instance, courts everywhere must increasingly be aware of the apparent willingness of some state attorneys general to put their own political interests and the private interests of their plaintiffs' lawyer supporters ahead of the public interest.

THE ROGUES' GALLERY (WILL CONGRESS INVESTIGATE?)

Not only do the practices of some state attorneys general contribute to Judicial Hellholes environments, but behind every Judicial Hellholes judge is a supporting cast of personal injury and mass tort lawyers who are constantly pushing courts to expand liability. And just as their scheming and shenanigans evolve, so too must this report. Accordingly, this new Rogues' Gallery section premieres this year as a means by which to remind policymakers – particularly those in an often seemingly indifferent Congress – that, just like professional athletes who use performance-enhancing drugs and corporate accountants who take ill-advised shortcuts, there are influential plaintiffs' lawyers who unscrupulously and sometimes illegally work to corrupt the nation's civil justice system, and they, too, warrant aggressive oversight.



During the past few years it has become increasingly clear that many of these personal injury and mass tort lawyers have stretched ethics rules and criminal laws beyond their intended bounds. Several high-profile

plaintiffs' lawyers have recently gone to prison for illegally manufacturing lawsuits, conspiring to bribe judges, disregarding court orders and even stealing their clients' recoveries.

Stuart Taylor, a moderate observer of the legal system, wrote in his *National Journal* column that “[n]ow and then events converge to remind us of how often plaintiffs' lawyers pervert our lawsuit industry for personal and political gain, under the indulgent eyes of judges, without rectifying any injustices, at the expense of the rest of us. We have recently witnessed the spectacle of three of the nation's richest and most famous plaintiffs' lawyers heading to federal prison for various criminal frauds. . . . This industry is rotten.”³⁷⁸

Taylor's column referred, of course, to the litigation industry's former Big Three: securities class-action kingpin William Lerach, his former law partner in crime Melvyn Weiss, and longtime Mississippi legend Richard “Dickie” Scruggs, all of whom will be discussed in further detail below. But the Judicial Hellholes' new Rogues' Gallery intends to shine its spotlight even more broadly on two separate, yet equally important groups: the shadiest of lawyers comprising (and compromising) the personal injury and mass tort bars, and the judges who ferret out the offenders. These are their stories . . .

FABRICATING LAWSUITS



Judge Jack

In June 2005 U.S. District Judge Janis Graham Jack exposed the widespread practice of mass screenings that personal injury lawyers have been using in recent years to recruit non-sick individuals as plaintiffs for claims alleging exposure to asbestos, silica and other potentially toxic substances. Specifically, Judge Jack found that all but one of the 10,000 silica claims consolidated before

her court for pre-trial purposes were fraudulently misdiagnosed.³⁷⁹ “[T]hese diagnoses were driven by neither health nor justice,” she wrote, “they were manufactured for money.”³⁸⁰ In a separate case it was uncovered that West Virginia personal injury firm Robert Peirce & Associates filed a claim for a plaintiff based on a medical report by a “Dr. Oscar Frye,” even though Dr. Frye simply does not exist.³⁸¹ Allegations related to fraudulent screenings continue to mount, including most recently in Michigan.³⁸²

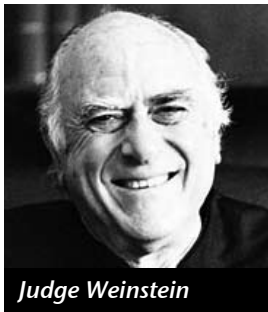
Milberg Weiss Bershad & Schulman, the nation's leading firm in class action securities litigation, was exposed in 2007 for reportedly paying millions of dollars over the span of decades to people who agreed to be plaintiffs in their manufactured class actions.³⁸³ One repeat plaintiff allegedly was paid \$161 million from 1983 to 2005; another allegedly got \$67 million between 1991 and 2005.³⁸⁴ By spring of this year, founding partner Melvyn Weiss, one-time partner William Lerach, and two others had pled guilty to conspiracy charges and are serving prison time.³⁸⁵ Judge John Walter, who sentenced Weiss, set the record straight: “This whole conspiracy corrupted the law firm and corrupted it in the most evil way.”³⁸⁶

Cleveland Judge Harry Hanna last year caught well-known California personal injury law firm Brayton Purcell telling asbestos bankruptcy trusts one story and his court a completely different story as to how its client contracted an asbestos-related disease in what was apparently a blatant attempt to game the legal system.³⁸⁷ In order to collect from bankruptcy trusts, the lawyers blamed their client's asbestos-related illness on shipyard and factory exposures, but when suing Lorillard Tobacco Company before Judge Hanna, the lawyers blamed the illness on cigarettes. In a subsequent interview, Judge Hanna said, “In my 45 years of practicing law, I never expected to see lawyers lie like this. . . . It was lies upon lies upon lies.”³⁸⁸ Judge Hanna has banished the firm's lawyers from practicing in his courtroom.

DISREGARDING THE JUDICIAL SYSTEM

Mississippi's King of Torts, Dickie Scruggs was sent to federal prison this year to serve a five-year sentence for "attempting to bribe a Mississippi judge."³⁸⁹ The famed anti-tobacco and personal injury lawyer was indicted in 2007 along with another attorney for conspiring to bribe Lafayette County Circuit Judge Henry Lackey, who reported the bribe overture. "Prosecutors said [that] Scruggs wanted a favorable ruling in a dispute over \$26.5 million in legal fees from a mass settlement of Hurricane Katrina insurance cases."³⁹⁰ It was reported that U.S. District Judge Neal Biggers Jr. indicated "Scruggs had entered into the scheme so easily that the judge wondered whether Scruggs had done such a thing before and, indeed, evidence indicates that he may have."³⁹¹

U.S. District Judge Jack Weinstein exposed an apparent "document laundering" scheme by plaintiffs' lawyer Jim Gottstein, expert witness Dr. David Egilman, and *New York Times* reporter



Alex Berenson.³⁹² Judge Weinstein had sealed the documents because they contained highly sensitive trade secrets. "Even if one believes, as apparently did the conspirators, that their ends justified their means, courts may not ignore such illegal conduct without dangerously attenuating their power to conduct necessary litigation effectively on behalf of all people," said Judge

Weinstein. "Such unprincipled revelation of sealed documents seriously compromises the ability of litigants to speak and reveal information candidly to each other; these illegalities impede private and peaceful resolution of disputes."³⁹³

In King County, Washington, a court clerk witnessed personal injury lawyer Scott Frost of Waters & Kraus sitting just outside the room in which a jury was deliberating one of his firm's cases when he sprung to his feet and moved quickly to prod his firm toward a settlement. Based on that eyewitness account, Superior Court Judge Sharon Armstrong concluded: "It appears that Mr. Frost may have been eavesdropping on the jury deliberations, that he may have overheard the jury's agreement to a defense verdict, immediately advised [his partner] of the jury's decision, and [the partner] then settled the case."³⁹⁴ Judge Armstrong has barred Frost from practicing before her court.

Personal injury firm Gilbert Heintz & Randolph was outed by U.S. Bankruptcy Judge Kathryn Ferguson for allegedly representing both parties in an asbestos bankruptcy matter. The firm first filed claims on behalf of 10,000 plaintiffs against Congoleum Corp., and then it represented Congoleum in an action to fund the bankruptcy trust through insurance proceeds.³⁹⁵ As if that weren't bad enough, Gilbert Heintz & Randolph had a 70% interest in a claims-processing firm it urged Congoleum to hire for handling the plaintiffs' claims. Judge Ferguson fined the firm \$13 million, stating that the conflicts of interest "permeated every aspect of [the firm's] decision making."³⁹⁶

STEALING CLIENTS' MONEY

In Florida, the Sunshine State's own "King of Torts," Louis Robles, was caught stealing \$13.5 million of his clients' money.³⁹⁷ In 2003, he was indicted on related federal charges and is now serving fifteen years in prison. He defrauded roughly 4,500 clients, used new settlements to pay old ones, over-billed them, and collected for highly questionable legal costs. Jonathan Soloman, the special agent in charge of the FBI's Miami office explained that "[h]e used his clients' misfortune to fund his luxurious lifestyle . . . Robles told unconscionable lies to his clients."³⁹⁸

Not to be outdone, three Kentucky personal injury lawyers – William Gallion, Shirley Cunningham Jr. and Melbourne Mills Jr. – reportedly tried to divvy up two-thirds of a \$200 million settlement in fen-phen litigation, rather than accept the already exorbitant \$60 million share to which they were entitled.³⁹⁹ Early in 2008 year, Mills was acquitted at trial after his lawyer claimed that Mills was "a bad alcoholic" and was too drunk to have the requisite intent to conspire with the others to defraud their clients.⁴⁰⁰ The others are awaiting a new trial and have been disbarred.⁴⁰¹ Kentucky Bar Association Chief Counsel Linda Gosnell has called the matter "a case of absolute, unbridled greed."⁴⁰²

Apparently, such cases are not uncommon. For example, Virginia personal injury lawyer Stephen Conrad pleaded guilty in August 2008 to "embezzling millions of dollars from clients who had suffered serious injuries to fund a lavish lifestyle."⁴⁰³ One client uncovered the wrongdoing when he found out that Conrad "had settled [the] case without his permission and kept the money."⁴⁰⁴ In Massachusetts, personal injury lawyer Bruce Namenson was indicted in July 2008 for allegations of "mortgage fraud and . . . stealing \$100,000 from a minor he represented in a personal injury settlement."⁴⁰⁵ Also, New York Attorney Campbell Holder pleaded guilty to "stealing more than \$1.6 million in client funds that were held in escrow and trust accounts."⁴⁰⁶

WHERE'S THE OUTRAGE?

Richard Skilling, Bernie Ebberts, Roger Clemens: Call your office. Despite seemingly widespread problems of fraud, deceit and dishonesty within the personal injury and mass tort industries, there has been scant mention of these scandals in state capitals and on Capitol Hill, leaving ATRA President Sherman "Tiger" Joyce to ask: "So why has Congress yet to acknowledge, much less schedule a hearing, now that, within the past several months, three of the nation's most powerful, widely known plaintiffs' lawyers have all pled guilty to federal felonies in connection with their corruption of our civil justice system?"⁴⁰⁷



U.S. House of Representatives Minority Leader John Boehner and House Judiciary Committee Ranking Member Lamar Smith have been the exceptions. Their May 2008 letter to House Speaker Nancy Pelosi and Judiciary Committee Chairman John Conyers urged congressional hearings to investigate how pervasive such misconduct and crimes may be within the legal profession:

The costs of the crimes involved in the Milberg Weiss scandal are ultimately borne by innocent American taxpayers, workers and employees – the very Americans being tossed about in the current economic storm. If in fact Mr. Lerach’s crimes are an ‘industry practice,’ then the Milberg Weiss scandal has revealed a clear and present threat to our nation’s prosperity. The United States Congress has an obligation to take action – by holding hearings to determine the extent of the trial lawyer scandal and the threat to our economy, identifying appropriate legislative remedies, and sending them to the President without delay.

The Washington Post got it right with an editorial, saying “What is needed now is a sober discussion about how best to achieve a fairer,



Minority Leader Boehner



Speaker Pelosi

more balanced legal system through comprehensive tort reform. Such a system would not be lopsided but would shield businesses from legal blackmail, just as it would protect the rights of legitimate plaintiffs to win just compensation from negligent businesses that caused them real harm. Smart and ethical businesspeople and lawyers – and, yes, there are many who fit the bill – would be wise to start working together to craft such a fix.”⁴⁰⁸

Alas, with a few exceptions, congressional leadership has yet to indicate any willingness to broker such a fix. Stay tuned.

ADDRESSING PROBLEMS IN HELLHOLES

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

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

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

Stop “Litigation Tourism.” As the Judicial Hellholes report demonstrates, certain areas in a state may be perceived by plaintiffs’ attorneys as an advantageous place to file lawsuits. As a result, plaintiffs’ attorneys become the “travel agents” for the “litigation tourism” industry, filing claims in jurisdictions with little or no connection to their clients’ claims. Reasonable venue reform would require a plaintiff’s lawyer to file a case in the jurisdiction where the plaintiff lives, was injured, or where a defendant maintains a principal place of business. *Forum non conveniens*, a related concept, allows a court to refuse to hear a case if the case is more closely connected to another state, rather than in a different area of the same state.⁴⁰⁹ *Forum non conveniens* reform would oust a case brought in one jurisdiction when the plaintiff lives elsewhere, the injury arose elsewhere and the facts of the case and witnesses are located elsewhere. By strengthening the rules governing venue and *forum non conveniens*, both legislatures and courts can ensure that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff. In addition to state reform, the federal Lawsuit Abuse Reduction Act (LARA) would provide a nationwide solution to unjust and unreasonable forum shopping. LARA passed the House of Representatives by a vote of 228-184 in October 2005,⁴¹⁰ which marked the second time the House passed the bill, having approved it by a similar margin in the closing days of its 2004 session.

Restore Consequences for Bringing Frivolous Lawsuits.

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



Consumer Protection for Actual Consumers.

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

fraud laws need to be rewritten so that they are helping consumers rather than attorneys.⁴¹¹

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

Pain and Suffering Awards Should Compensate Plaintiffs, Not Punitively Strip Defendants of Constitutional Protections. In recent years, there has been an explosion in the size of pain and suffering awards, and there is concern that such awards are being sought as a means to evade statutory and constitutional limits on excessive punitive damage awards.⁴¹² Given the lack of standards in determining fair compensation for something as amorphous as pain and suffering, it is imperative that judges properly instruct juries about the compensatory purpose these awards are meant to serve, making clear that they may not be used to punish a defendant or deter future bad conduct. When a jury reaches an extraordinary compensatory damages award, both trial and appellate level judges should closely review the decision to ensure that it was not inflated due to the consideration of inappropriate evidence. This would include evidence based on a defendant's "fault" as contrasted with plaintiff's harm, and also prejudicial evidence. ALEC has developed a model "Full and Fair Noneconomic Damages Act" that would preclude the improper use of "guilt" evidence and enhance meaningful judicial review of pain and suffering awards. Ohio became the first state to adopt such legislation in 2005.⁴¹³

Strengthen Rules to Preserve Sound Science. Junk science pushed by pseudo "experts" has tainted tort litigation for decades. The more complex the science becomes, the more juries tend to be influenced by their personal likes and dislikes of expert witnesses, as opposed to the soundness of the testimony. Ten years ago, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom.⁴¹⁴ The *Daubert* standard provides that, in determining reliability, the court must engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue."⁴¹⁵ There is evidence that following adoption of *Daubert*, judges more closely scrutinize the reliability of expert testimony and are more likely to hold pretrial hearings regarding admissibility of expert testimony.⁴¹⁶ But at least

twenty states have not adopted anything close to the *Daubert* principles.⁴¹⁷ Even in courts in which *Daubert* governs, some judges are not effectively fulfilling their gatekeeper role.⁴¹⁸ By adopting *Daubert*, taking their gatekeeper roles seriously and seeking competent, independent scientific experts, judges can better control their courts and properly return to plaintiffs in tort cases the fundamental burden of proving causation.

Ensure Access to Health Care with Reasonable Medical Liability Reforms. The inequities and inefficiencies of the medical liability system have negatively affected the cost and quality of health care, as well as access to adequate health care for many Americans. Increasing medical liability claims have forced doctors to retire early, stop performing high-risk procedures or move out of states with unfair laws. Consequently, in some areas of the country, certain medical specialists simply are not available. According to the American Medical Association, there are a limited number of states nationwide that are not experiencing an access-to-health care crisis or related problems.⁴¹⁹ Things are likely to worsen with the costly practice of "defensive medicine" becoming ever more pervasive. As reported by *The National Law Journal* online November 20, 2008, a new survey of more than 800 doctors by the "Massachusetts Medical Society . . . concluded that so-called defensive medicine, or doctors' use of tests, procedures and referrals to avoid lawsuits, costs the state at least \$1.4 billion" a year.⁴²⁰

Commonsense medical liability reforms can help stabilize health care systems. These include: 1) a reasonable limit on non-economic damages; 2) a sliding scale for attorneys' contingency



fees; 3) periodic payment of future costs; and (4) abolition of the collateral source rule, so that juries may consider compensation that a plaintiff receives from sources other than the defendant for his or her injury in determining damages. Medical liability reform can be achieved state-by-state, though Congressional action certainly would be the most sweeping and effective vehicle for comprehensive reform.

Prioritize the Claims of Those Who Are Truly Sick in Asbestos and Silica Cases. Forum shopping, mass consolidations, expedited trials, multiple punitive damages awards against defendants for the same conduct, and the overall lack of due process afforded to defendants were issues repeatedly raised relative to asbestos litigation by survey respondents in preparation of this report. The heart of the problem is that, according to recent studies, as much

as 90 percent of new asbestos-related claims are filed by plaintiffs who have no impairment.⁴²¹ To date, Congress has been unable to reach the consensus needed to enact a comprehensive solution. Increasingly, state courts are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Meanwhile, state legislatures are requiring that plaintiffs meet medical criteria to proceed with their claims so the truly sick can be compensated first, and so the right to bring a lawsuit later is preserved for those who have been exposed but are not sick now.

Conclusion. The United States includes more than 3,000 counties and 30,000 incorporated cities. In the vast majority of these jurisdictions, diligent and impartial judges apply the law fairly. The Judicial Hellholes 2008/2009 report shines its harshest spotlight on seven areas that too often fall short of this standard. In these jurisdictions judges systematically make decisions that unfairly skew personal injury litigation, often to the detriment of out-of-state companies and in favor of local plaintiffs.

In issuing its annual Judicial Hellholes report, ATRF works to rebalance the scales of justice to their properly neutral position. In that spirit, the report exposes suspect legal rulings and inappropriate relationships of judges or other public officials. This year's report takes an additional step of highlighting the abuses and excesses of some influential members of the trial bar in the new Rogues' Gallery, and anticipates future efforts by coordinated personal injury attorneys to expand liability in a section on Tort Deform. However, the focus of this report, as in years past, remains primarily on the judges who possess significant autonomy when it comes to administering cases before them and thus can create mischief under any system. Ultimately, it is the responsibility of judges to ensure that all civil litigants receive Equal Justice Under Law.

ENDNOTES

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³ Petition for Writ of Certiorari, *Daniel Measurement Servs., Inc. v. Engle Research Corp.*, No. 07-384, at 15 (filed Sept. 19, 2007) (quoting trial court transcript).

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¹⁴ *Id.*

¹⁵ W. Va. Code § 56-1-1(c).

¹⁶ See *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006), cert. denied, 127 S. Ct. 835 (2006) (No. 06-503).

¹⁷ W. Va. Code § 23-4-2(c)(2).

¹⁸ *Ryan v. Clonch Indus., Inc.*, 639 S.E.2d 756, 766 (W. Va. 2006).

¹⁹ Brian Peterson's West Virginia Weblog, *Deliberate Intent - The Narrow Exception You Can Drive a Truck Through*, Dec. 27, 2006, at <http://legalweblog.blogspot.com/2006/12/deliberate-intent-narrow-exception-you.html> (commenting on *Ryan v. Clonch Indus., Inc.*, 639 S.E.2d 756 (W. Va. 2006)) (author is a partner in the law firm of Bowles Rice McDavid Graff & Love LLP in the Martinsburg, West Virginia office whose practice includes employment law).

²⁰ See Kristen M Leddy, Russell S. Sobel & Matthew T. Yanni, The Federalist Society for Law and Public Policy Studies, *Should We Keep This Court?: An Economic Examination of Recent Decisions Made by the West Virginia Supreme Court of Appeals*, at http://www.fed-soc.org/publications/pubid.1160/pub_detail.asp.

²¹ *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 914 (W. Va. 2007). Some states recognize but have limited the exception. New Jersey does not apply the learned intermediary doctrine where the prescription drug manufacturer attempts to advertise directly to consumers and the consumer relies on that advertisement. See *Perez v. Wyeth Lab., Inc.*, 734 A.2d 1245, 1257-58 (N.J. 1999); see also *MacDonald v. Othbro Pharm. Corp.*, 475 N.E.2d 65, 68 (Mass. 1985) (recognizing an exception to the general application of the learned intermediary doctrine for oral contraceptives).

²² *Chemtall Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), cert. denied sub nom., *Chemtall Inc. v. Stern*, 128 S. Ct. 1748 (2008) (No. 07-1033).

²³ See *Supreme Court Won't Block Trial Plan in Coal Miners' Case*, 23 No. 17 Andrews Tobacco Indus. Litig. Rep. 6, Apr. 25, 2008.

²⁴ *Daniel Measurement Servs., Inc. v. Eagle Research Corp.*, App. at 10a, 12a. ATRA filed an amicus curiae (friend of the court) brief with the Supreme Court of the United States urging the high court to find that due process requires some minimum level of pre- and post-trial review to ensure that defendants do not suffer an arbitrary deprivation of property. Brief of Amici Curiae National Association of Manufacturers, Chamber of Commerce of the United States of America, American Tort Reform Association, and American Chemistry Council in Support of Petitioner, *Daniel Measurement Servs., Inc. v. Eagle Research Corp.*, No. 07-384 (filed Oct. 22, 2007). The U.S. Supreme Court denied certiorari, leaving no appellate review of this decision. 128 S. Ct. 655 (2007).

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²⁶ See Ken Ward, *Gov. Defends Aid for DuPont*, Charleston Gaz. & Daily Mail, Aug. 23, 2008, at 1A, at 2008 WLNR 16058950.

²⁷ See Petition for Writ of Certiorari, *NiSource, Inc. v. Estate of Garrison G. Tawney*, Nos. 08-219, 08-229 (U.S. filed Aug. 20, 2008).

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³⁷ See Justin Anderson, *Reports Show Reforms Working*, Charleston Gaz. & Daily Mail, Oct. 1, 2008, at 1A, at 2008 WLNR 18673941.

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³⁴¹ For example, the Minnesota Legislature recently considered legislation to supersede the Minnesota Supreme Court's decision in *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000), which ruled that a private plaintiff could recover his or her attorneys fees in consumer litigation only if he or she demonstrates that the action benefits the state, not just the individual bringing the lawsuit. See H.F. 2787 and S.F. 2726 (Minn. 2008).

³⁴² According to lobbying disclosure reports filed with Congress, AAJ spent \$2,140,000 on federal lobbying activities in 1998 and peaked its spending at \$8,315,738 in 2006. This year, AAJ is on pace with its 2007 lobbying expenses of \$5,740,000 as it has disclosed \$4,190,000 in lobbying expenses during the first three quarters of 2008.

³⁴³ See, e.g., H.B. 4046, 94th Leg., Reg. Sess. (Mich. 2008), 82nd Gen. Assem., 1st Sess., H.F. 2142 (Iowa 2008), H.B. 7155, 2008 Sess. (R.I. 2008).

³⁴⁴ See, e.g., H.B. 568, 2008 Reg. Sess. (La. 2008).

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³⁴⁹ See, e.g., H.B. 1407, 66th Gen. Assem., 2nd Reg. Sess. (Colo. 2008) (enacting increase in penalties against insurers for violations of claims practices act and expanded liability), S.B. 2860 (Fla. 2008) (enacting law increasing penalties for violations of insurance code).

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³⁵⁵ See Complaint, Mike Moore ex rel., *Mississippi v. American Tobacco Co.* (filed May 23, 1994).

³⁵⁶ See State of Mississippi Judiciary, Administrative Office of the Courts, Chancery Court, at http://www.mssc.state.ms.us/aboutcourts/chancerycourt_about.html.

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³⁶³ Assoc. Press, *Ohio Official Balks at Quitting*, N.Y. Times, May 6, 2008.

³⁶⁴ James Nash, *'Pay to Play' Limits Have a Weakness: Middlemen*, Columbus Dispatch, Oct. 28, 2007.

³⁶⁵ Nathan Koppel, *Lead Counsel in Fannie Suit is Switched Out*, Wall St. J., Oct. 8, 2007.

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³⁷¹ Mike Meyer, *McGraw Problem Dumped on Voters*, Intelligencer: Wheeling News Register, Mar. 22, 2008.

³⁷² Correspondence from Ted Gallagher, Associate Regional Administrator, Division of Medicaid and Children's Health Operations/Region III to Ms. Marsha Morris, Commissioner, Bureau for Medical Services.

³⁷³ See Survey Shows Americans Expect Transparency, Accountability, From Attorneys General, at <http://www.atra.org/show/8107>.

³⁷⁴ Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007.

³⁷⁵ See Order, *State of Oklahoma v. Tyson Food* (N.D. Okla. Jan. 1, 2008) (declining certification of issue of validity of contingency fee agreement to Oklahoma Supreme Court).

³⁷⁶ Order, *Rhode Island v. Lead Indus. Inc.*, No. 2004-63-M.P. (R.I. July 1, 2008).

³⁷⁷ See *County of Santa Clara v. Atlantic Richfield Co.*, No. S163681 (Cal.). ATRA filed a brief as *amicus curiae* (friend of the court) at the intermediate appellate level and to urge the California Supreme Court to grant review. ATRA will file an amicus brief on the merits in February 2009. A decision is expected in late 2009.

³⁷⁸ Stuart Taylor, *Lawsuits that Benefit Only Lawyers*, Nat'l L.J., May 17, 2008.

³⁷⁹ See *In re Silica Prods. Liab. Litig.* (No. MDL 1553), 398 F. Supp. 2d 563, 642 (S.D. Tex. 2005); see also Editorial, *Screening for Corruption*, Wall St. J., Dec. 2, 2005, at A10, abstract at 2005 WLNR 19447615; Editorial, *Silicosis, Inc.*, Wall St. J., Oct. 27, 2005, at A20, abstract at 2005 WLNR 17413061.

³⁸⁰ *In re Silica Prods. Liab. Litig.*, 398 F. Supp.2d at 635; see also John S. Stadler, Commentary, *Judge's Silica Opinion Exposes Manufactured Tort Claims to Antiseptic Sunshine*, 23:15 Andrews Toxic Torts Litig. Rptr. 10 (Sept. 2, 2005).

³⁸¹ See Editorial, *It's Time to Take a Detailed Look*, Charleston Gazette & Daily Mail, July 31, 2006, at 4A, at 2006 WLNR 13288592; see also Chris Dickerson, *CSX Uncovers Fraud in Asbestosis Case*, W. Va. Record, July 27, 2006, at <http://www.wvrecord.com/news/newsview.asp?c=182252>.

³⁸² Editorial, *Michigan Malpractice*, Wall St. J., Nov. 10, 2008, at A18.

³⁸³ See Editorial, *Class-Action Backlash*, L.A. Times, June 16, 2006, at 12, at 2006 WLNR 10405736; *Melvyn Weiss is Free on Bail in Class-Action Kickback Case*, Wall St. J., Oct. 15, 2007, at B11.

³⁸⁴ See Grand Jury Indictment, *supra*, at 1-2.

³⁸⁵ See Anthony Lin, *Melvyn Weiss Agrees to Plead Guilty to Role in Kickback Scheme*, N.Y.L.J., Mar. 21, 2008.

³⁸⁶ *Id.*

³⁸⁷ See Order & Opinion, *Kananian v. Lorillard Tobacco Co.*, No. CV 442750 (Ct. Com. Pl. Cuyahoga County, Ohio, Jan. 18, 2007), at http://el.shb.com/nl_images/SHBWebsite/Attorneys/Thorne/Order.pdf.

³⁸⁸ See James F. McCarty, *Judge Becomes National Legal Star; Bars Firm From Court Over Deceit*, Cleveland Plain Dealer, Jan. 25, 2007, at B1 (quoting Judge Harry Hanna).

³⁸⁹ Associated Press, *Court Orders Dickie Scruggs to Ky. Federal Prison*, Law.com, July 24, 2008, at <http://www.law.com/jsp/article.jsp?id=1202423213935>.

³⁹⁰ *Id.*

³⁹¹ Anita Lee, *Scruggs Buckles at Sentencing; Receives 5 Years*, Sun Herald, June 27, 2008, at 2008 WLNR 12122845.

³⁹² See *Zyprexa Litig., In re Injunction*, No. 07-CV-0504, slip op. at 5 (Related to MDL No. 1596) (E.D.N.Y. Feb. 13, 2007); see also Tom Perrotta, *N.Y. Federal Judge Faults Leak of Sealed Zyprexa Documents*, N.Y.L.J., Feb. 14, 2007, at <http://www.law.com/jsp/article.jsp?id=1171360977884>; Landon Thomas, Jr., *Judge Rules Drug Documents Must be Returned to Eli Lilly*, N.Y. Times, Feb. 14, 2007, at C7.

³⁹³ *Id.* at 13.

³⁹⁴ Letter from Sharon Armstrong, Superior Court Judge, King County, Wash., to Peter Kraus, Managing Partner, Waters & Kraus, L.L.P., Dec. 18, 2006 [hereinafter Armstrong Letter]; Peter Geier, *Dallas Law Firm Is Accused of Eavesdropping; Seattle Judge Bars Firm From Asbestos Matters in Her Court; Probe Started*, Nat'l L.J., Jan. 8, 2007, at 10; Mary Alice Robbins, *Seattle Judge Seeks Inquiry Into Dallas Lawyers' Alleged Conduct*, Tex. Law., Jan. 15, 2007, at http://www.accessmylibrary.com/coms2/summary_0286-29238967_ITM.

³⁹⁵ See Nathan Koppel, *Asbestos Ruling, \$13 Million Fine Buffet Law Firm*, Wall St. J., Apr. 24, 2006, at B1, at 2006 WLNR 6865172.

³⁹⁶ *Id.*

³⁹⁷ Jim Wyss, *'King of Torts' Receives 15-year Sentence*, Miami Herald, Dec. 5, 2007, at <http://www.miamiherald.com/business/story/332410.html>.

³⁹⁸ See Jay Weaver, *Ex-lawyer Denies He Stole More Than \$13 million of Clients' Money*, Miami Herald, May 24, 2006, at B3, at 2006 WLNR 8876113.

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⁴⁰⁰ See Brett Barrouquere, *Lawyer Cleared in Diet-Drug Trial*, Charleston Gazette & Daily Mail, July 2, 2008, at 9A, at 2008 WLNR 12420618.

⁴⁰¹ See Jim Warren & Beth Musgrave, *Fen-Phen Lawyers Permanently Disbarred*, Lexington Herald-Leader, Oct. 24, 2008, at 2008 WLNR 20281482.

⁴⁰² Andrew Wolfson, *Court Urged to Suspend 3 Lawyers*, Courier J. (Louisville, Ky.), Aug. 18, 2006; see also Brandon Ortiz, *Fen-Phen Lawyers' Licenses Sought*, Lexington Herald-Leader, July 29, 2006, at B1, at 2006 WLNR 13099486; Paul A. Long, *Bar Wants Lawyers Suspended*, Cin. Post, Aug. 18, 2006, at A2, at 2006 WLNR 14466758; Jim Warren, *The Fen-Phen Case: 'Unbridled Greed' Cited in Lawyers' Trial*, Lexington Herald-Leader, May 14, 2008, at A1, at 2008 WLNR 9047167.

⁴⁰³ Scott McCabe, *Personal Injury Attorney Admits Embezzling Millions from Clients*, The Examiner (D.C.), Aug. 20, 2008, at 4.

⁴⁰⁴ *Id.*

⁴⁰⁵ Sheri Qualters, *Attorney Indicted for Alleged Theft of Mortgage Payments*, Nat'l L.J., Aug. 5, 2008.

⁴⁰⁶ Mark Hamblett, *Jailed Attorney Ordered to Pay Malpractice Award*, N.Y.L.J., Aug. 8, 2008.

⁴⁰⁷ Sherman Joyce, Editorial, *Congress Overlooks Plaintiff-Lawyer Abuses*, The Hill, Apr. 23, 2008.

⁴⁰⁸ Editorial, *A Fall and a Lesson*, Wash. Post, Apr. 9, 2008, at A18.

⁴⁰⁹ See *Black's Law Dictionary* 680 (8th ed. 2004).

⁴¹⁰ See Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (1st Sess. 2005).

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⁴¹² See Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment"*, 54 S.C. L. Rev. 47 (2002), also printed in 52 Def. L.J. 737 (2003); Janssen

Pharmaceutica, Inc. v. Bailey, 878 So. 2d 31, 62 (Miss. 2004); Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Center Piece of Our Tort System*, 93 U. Va. L. Rev. 1401 (2004).

⁴¹³ See Ohio Rev. Code Ann. § 2315.19.

⁴¹⁴ See *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).

⁴¹⁵ *Id.* at 600.

⁴¹⁶ See Molly T. Johnson et al., *Expert Testimony in Federal Civil Trials: A Preliminary Analysis* 1 (Fed. Jud. Ctr. 2000), at [http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/\\$file/ExpTesti.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf).

⁴¹⁷ See Defense Research Inst., *Frye/Daubert: A State Reference Guide* 3-4 (2006). Some of these states, such as California, Florida, and Illinois, continue to apply the less rigorous *Frye* "general acceptance" test, which the federal courts abandoned with the adoption of the *Daubert* standard in 1993. *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Donaldson v. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002). Other states apply their own standard to determine the admissibility of expert testimony. See, e.g., *In re Robert R.*, 531 S.E.2d 301, 303 (S.C. 2000).

⁴¹⁸ See generally Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217 (2007).

⁴¹⁹ See American Medical Ass'n, Medical Liability Crisis Map, at <http://www.ama-assn.org/ama/noindex/category/11871.html>.

⁴²⁰ Sheri Qualters, *Survey: 'Defensive Medicine' Costs Massachusetts \$1.4 Billion*, Nat'l L.J., Nov. 20, 2008, at <http://www.law.com/jsp/nlj/PubArticlePrinterFriendlyNLJ.jspx?id=1202426160155>.

⁴²¹ See Behrens & Cruz-Alvarez, *supra*.





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