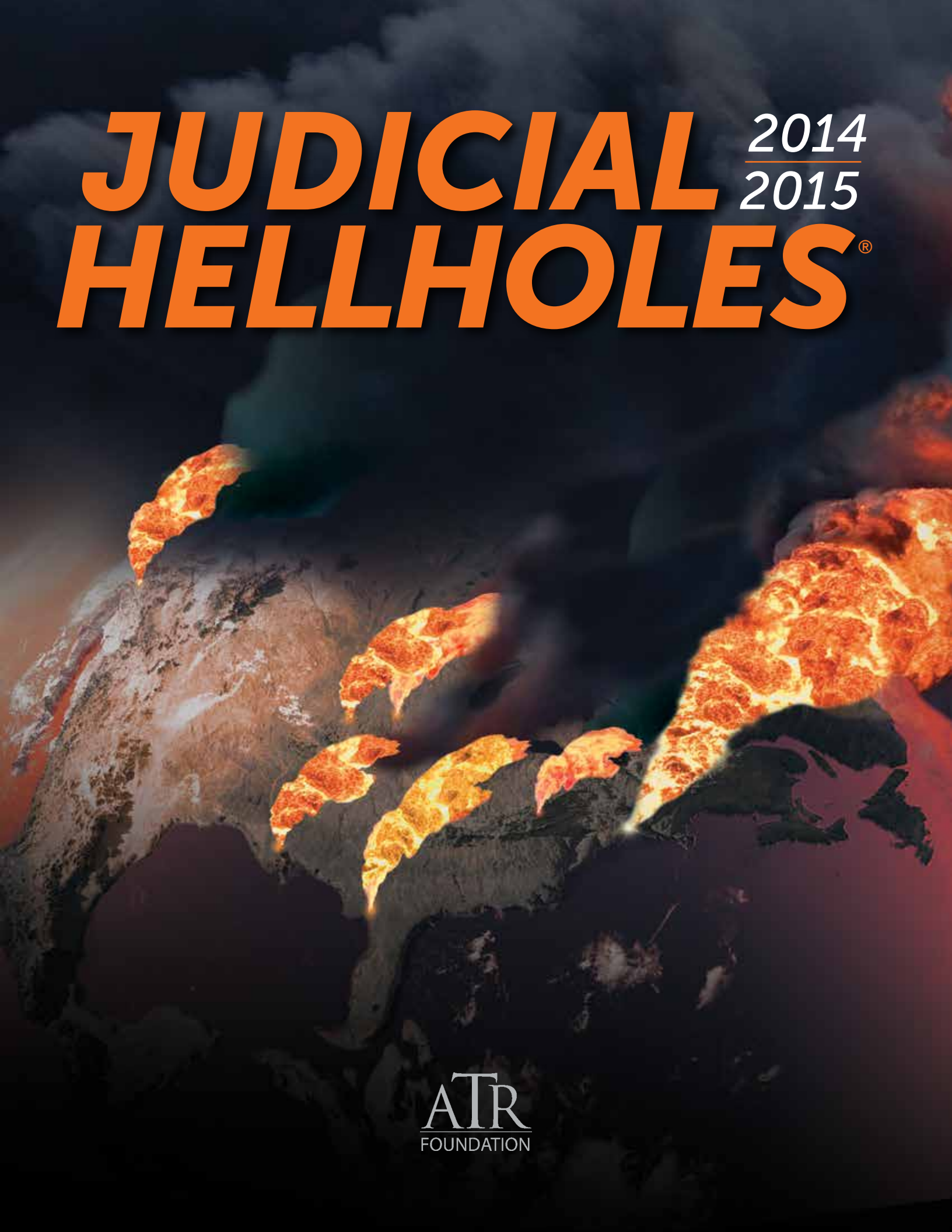
JUDICIAL HELLHOLES®

2014
2015



ATR
FOUNDATION

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

—New York Governor Andrew Cuomo, explaining why efforts to enact a much needed tort reform again ended in failure (April 23, 2014)

"It is difficult to conceive how allowing the plaintiff to present to the jury fictitious evidence of amounts paid for medical services, while preventing the tortfeasor from challenging that evidence, serves the interests of justice. ..."

—West Virginia Justice Allen H. Loughry II, dissenting in Kenney v. Liston (W. Va. 2014), which allowed juries to consider only the billed price of medical services and found inadmissible the lower amount actually paid and accepted for such services.

"This case is a typical example of a frivolous class-action lawsuit."

—West Virginia Justice Menis Ketchum II, dissenting in Tabata v. Charleston Area Medical Center (W. Va. 2014), where the majority ruled that a data privacy class action should be certified even though no one had accessed the health records at issue.

"Justice Lewis' plurality opinion reweighs the evidence and disbelieves the Governor's Task Force as well as the legislative testimony, claiming that its own independent review has revealed that the other two branches were incorrect...."

—Florida Chief Justice Ricky Polston, joined by Justice Charles Canady, dissenting in *McCall v. United States* (Fla. 2014), in which the court invalidated a limit on noneconomic damages in medical malpractice cases as lacking a rational basis.

"Left intact, our holdings funnel BP's cash into the pockets of undeserving non-victims. These are certainly absurd results. And despite our colleagues' continued efforts to shift the blame for these absurdities to BP's lawyers, it remains the fact that we are party to this fraud...."

—Fifth Circuit Judge Edith Brown Clement, dissenting *In re: Deepwater Horizon* (5th Cir. 2014), where the full court refused to review a panel's interpretation of a class action settlement that allowed payment of claims from uninjured plaintiffs

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PREFACE

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

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

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

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 public and private sectors.

EXECUTIVE SUMMARY

The **2014-2015 Judicial Hellholes** report shines its brightest spotlight on seven courts or areas of the country that have developed reputations as Judicial Hellholes. Several have become or continue to be hotbeds of asbestos litigation, even though the U.S. has passed its epidemiological peak for mesothelioma, and even as civil courts and lawmakers in much of the rest of the country grow increasingly skeptical of a lawsuit industry that relentlessly generates new claims in Judicial Hellholes and elsewhere. This skepticism is being fueled by mounting evidence of manipulation and even outright fraud.

But asbestos litigation and the jurisdictions that attract a lot of it comprise only a fraction of this year's report. Permissive courts willing to entertain sometimes preposterous consumer class actions, rogue judges willing to disregard the authority of the other two branches of government, steadily spreading disability-access lawsuits that cynically target small businesses that can't afford to defend themselves in court, state attorneys general contracting with private-sector personal injury lawyers to pursue their self-interest instead of the public interest, the trial lawyers' major advertising investment aimed at what they hope will be the next product-liability bonanza, and many other issues all receive attention.

JUDICIAL HELLHOLES® 2014 2015

1. NEW YORK CITY ASBESTOS LITIGATION
2. CALIFORNIA
3. WEST VIRGINIA SUPREME COURT OF APPEALS
4. FLORIDA SUPREME COURT
5. MADISON COUNTY, ILLINOIS
6. MISSOURI SUPREME COURT
7. LOUISIANA

JUDICIAL HELLHOLES

#1 NEW YORK CITY ASBESTOS LITIGATION (NYCAL) has gone from bad to worse over the past year for the many companies that are defendants in asbestos litigation centered there. The manager of the asbestos docket, Justice Sherry Klein Heitler, and other NYCAL trial judges, often with appellate court blessing, have adopted a series of plaintiff-friendly procedures. Justice Heitler has reintroduced punitive damages in asbestos cases after a near 20-year hiatus and allowed plaintiffs' lawyers to circumvent a requirement that they file their asbestos bankruptcy trust claims before trial. NYCAL judges also allow plaintiffs' lawyers to try multiple, dissimilar cases together (consolidation), impose liability on one company for the products of another, and routinely hold defendant's jointly liable for a plaintiff's entire damages award despite a New York law that provides for allocation of liability in proportion to fault. As a result of such practices, multimillion-dollar awards in asbestos cases tried in New York City have become commonplace. Statutory reform is not on the horizon, as the Speaker of the New York State Assembly is also on the payroll of one of the law firms profiting from NYCAL imbalance. But the state's high court has a chance to tug the reins with asbestos appeals pending before it.

#2 CALIFORNIA would have easily three-peated as the #1 Judicial Hellhole had it not been for the acutely shameless bias of New York City's asbestos court. In fact, it's impossible in limited space to touch on, much less

detail, all that is wrong about the once Golden State's civil justice system. But this year's report briefly endeavors to sample several issues, including the troubling use of "public nuisance" law and private-sector contingency-fee lawyers by district attorneys seeking to rifle the deep pockets of corporate defendants, the continuing expansion of asbestos liability and the still relentless targeting of small business owners by so-called disability-access lawsuits. It also examines personal injury lawyers' exploitation of the health-warning law known as Prop 65 and consumer protection laws, the wholly absurd individual lawsuits encouraged by a permissive judiciary, and even some faintly promising good news from the courts and voters.

#3 The **WEST VIRGINIA SUPREME COURT OF APPEALS** rarely misses an opportunity to abandon traditional tort law and adopt expansive theories of liability. In the past year alone, it has imposed a duty on home and business owners to protect visitors from open and obvious conditions, required certification of a class action of individuals united by the fact they suffered no injury, and permitted recovery of inflated damages for fictional medical costs. The state's only appellate court also allowed scientifically unsound expert testimony and rendered a transparently results-oriented decision, written by a plainly conflicted chief justice, which sustained a significant portion of a flawed punitive damages award. Even one of the concurring judges viewed the court's reasoning in that case as "positively silly." And one case the high court remanded, due to a trial court's inadequate analysis, resulted in an even larger award. Meanwhile, the plaintiffs' lawyer-dominated state legislature in 2014 sought to expand civil liability further, but things could change as voters saw fit on Election Day to install new majorities in the statehouse for 2015.

#4 The **FLORIDA SUPREME COURT** has played a key role in generating the Sunshine State's reputation for an unfair civil justice system, which manifests itself most plainly in South Florida. Over the years, the high court has issued a torrent of liability-expanding decisions, many over vigorous dissents. The legislature has overturned several of these decisions, restoring balance, but the high court often has the last word on such reforms. In what may be the most blatant act of judicial nullification in history, the Florida Supreme Court invalidated a law intended to ensure access to healthcare in the state by limiting subjective damages for pain and suffering in medical liability lawsuits. Justices of the high court ignored the wisdom of the legislature and governor, and imposed their own views on the need for and effectiveness of such a damages limit. In the year ahead, the state's high court is expected to consider whether it will follow or ignore the legislature's decision to replace Florida's anything-goes standard for admissibility of expert testimony with the more rigorous standard applied by federal and most state courts.

#5 MADISON COUNTY, ILLINOIS, a jurisdiction that helped inaugurate the Judicial Hellholes report in 2002, is going back to the future. Plaintiffs' lawyers are fighting to revive a $10.1 billion tobacco verdict reached in 2003 that was thrown out by the state's supreme court in 2005. They pushed, unsuccessfully, to remove from the high court one of the justices who invalidated that gargantuan verdict, investing over a million dollars to oppose his retention. Meanwhile, Madison County remains the epicenter for asbestos litigation with 9 out of 10 cases filed on behalf of plaintiffs who live and work outside Illinois. The number of asbestos lawsuits filed in the county seemingly leveled off in 2014 after an influx of questionable lung cancer cases in 2013, but filings are still double their 20-year average. Local judges set 50, sometimes over 100, cases for trial on a single day, making it extraordinarily difficult for defense lawyers to prepare.

#6 The **MISSOURI SUPREME COURT** has developed a reputation for outlier, liability-expanding rulings and for invalidating reasonable civil justice reforms. In 2014 the court found that a law requiring proportionality between a plaintiff's injury and the punishment imposed on a defendant infringed on the constitutional right to a jury trial. It did so even though federal and state courts have consistently found limits on punitive damages permissible and the U.S. Supreme Court considers proportionality a requirement for due process. Missouri's high court also altered the standard for a retaliatory discharge claim, exposing state employers to greater liability if they replace an employee who is no longer able to carry out his or her duties after an injury, even after reasonable accommodation. The court's decisions have sparked a "court reform" movement looking to address the judicial appointments process.

#7 LOUISIANA The shameless feeding frenzy initiated by personal injury lawyers and enabled by a plaintiff-friendly federal judge that began in the wake of 2010's Deepwater Horizon oil spill continues, seemingly unabated,

and other long-standing problems in civil courts there combine to qualify Louisiana as a Judicial Hellhole for another year. But its drop in the rankings from #2 last year to #7 shows that progress is being made – if not so much by the courts themselves than by lawmakers determined to improve the Pelican State's reputation for civil justice.

WATCH LIST

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

ATLANTIC COUNTY, NEW JERSEY
MISSISSIPPI DELTA
MONTANA
NEVADA
NEWPORT NEWS, VIRGINIA
PHILADELPHIA, PENNSYLVANIA

ATLANTIC COUNTY, NEW JERSEY, known as a center for mass tort litigation, has significantly changed. The state's Chief Justice promoted to the appellate bench the judge previously at the heart of many of the concerns about the court's handling of litigation. The New Jersey Supreme Court then spread the bulk of Atlantic County's mass tort cases, 13,000 pharmaceutical and medical device lawsuits, to other counties. The state is still a center for mass tort litigation, though it is now more dispersed, and a hotbed for consumer class actions.

MISSISSIPPI DELTA Mississippi's litigation environment has significantly improved since the early 2000s. Legislative reforms, gubernatorial support, and judicial action led to a remarkable turnaround. But the 18-county Delta region has resisted the spirit of reform and retains a reputation for favoring plaintiffs. Trial courts in the state's northwest are routinely overturned by the Mississippi Supreme Court – and for good reason.

MONTANA warrants close monitoring as plaintiffs' lawyers have mounted an assault on the state's statutory limit on punitive damages, which limits punishment to the lesser of $10 million or 3% of a defendant's net worth. Recent Montana lawsuits resulted in a $10.5 million punitive damages award in a contract suit and a $248 million punitive damages award against an automaker. Although the trial court judge reduced the $248 million award to $73 million, judges in both cases refused to apply the statutory limit. The contract case is pending before the Montana Supreme Court. Additionally, some counties are developing plaintiff-friendly reputations and the state's governor is blocking reasonable liability reforms.

NEVADA is hosting a $1 billion lawsuit that is trying to shift to a presumably deep-pocketed health insurer the responsibility for a hepatitis C outbreak that was caused by an endoscopy clinic's criminally unsanitary practices. That billion-dollar verdict follows on the heels of a $524 million Vegas jackpot, for three patients, stemming from the same incident. Meanwhile, the state's outgoing attorney general, known for hiring private contingency fee lawyers to attack businesses, faced sanctions by a state court judge. Voters chose a new AG who has pledged greater transparency in the hiring of outside counsel and stronger safeguards in how such litigation will be handled. But continuing "construction defect" litigation further hinders the state's troubled housing sector.

NEWPORT NEWS, VIRGINIA While much of Virginia continues to enjoy a reputation as generally hospitable to business, the same can hardly be said of Newport News, where companies defending asbestos claims brought by local personal injury lawyers can't get an even break.

PHILADELPHIA, PENNSYLVANIA experienced a substantial decline in mass tort lawsuit filings after the judge supervising the Complex Litigation Center adopted needed procedural reforms and rescinded the court's invitation for out-of-state claims back in 2012. But plaintiffs' lawyers still view Philadelphia as a friendly jurisdiction and fight to keep the court from transferring their cases to federal court. Philadelphia continues to host a substantial mass

tort docket comprising pharmaceutical, medical device and asbestos cases. Pending retirements of both the judge that instituted the reforms and the state supreme court chief justice who appointed him create uncertainty as to the direction the city's courts will take in the future.

DISHONORABLE MENTIONS

Dishonorable Mentions, which highlight singularly unsound court decisions, go this year to the Supreme Courts of Alabama and Pennsylvania for recognizing novel product liability theories that most other courts have rejected.

POINTS OF LIGHT

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

- **U.S. Bankruptcy Court for North Carolina Judge George Hodges** exposed rampant manipulation in asbestos litigation as plaintiffs' lawyers hide trust claims showing their clients were exposed to asbestos by bankrupt companies while suing claims against solvent defendants.
- The **Alaska Supreme Court** ruled that plaintiffs' lawyers cannot use the state's consumer protection law to circumvent requirements for personal injury actions.
- The **Iowa Supreme Court**, in contrast to the Alabama Supreme Court, rejected "innovator liability," which allows plaintiffs to sue companies that developed a brand-name drug when they took the generic version.
- The **Minnesota Supreme Court** maintained rational constraints on the state's consumer fraud and joint and several liability statutes.
- The **New York Court of Appeals** did not recognize a cause of action for medical monitoring when a plaintiff has no present physical injury, following the majority approach.
- The **Washington Supreme Court** resisted an attempt by plaintiffs' lawyers to circumvent the state's worker's compensation law that would have allowed them to expand the pool of asbestos defendants.
- **Mississippi voters** retired a Jones County judge known for imbalanced rulings.

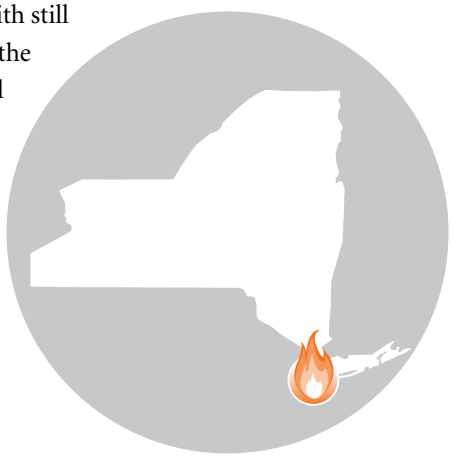
In addition to these significant court rulings, **legislatures** in a dozen states enacted significant, positive civil justice reforms. Louisiana had a particularly productive session, enacting five laws aimed at improving the state's polluted litigation environment.

SPECIAL FEATURE

This year's report also draws attention to a surge in product liability lawsuits against manufacturers of mesh used mostly to treat pelvic floor disorders in older women. Through aggressive advertising, plaintiffs' lawyers have generated more than 100,000 lawsuits, making mesh the nation's largest mass tort aside from asbestos. This explosive growth in pelvic mesh litigation not only has public health implications, it is already overwhelming courts and tempting judges to place efficiency over fairness in deciding claims. Since the devices continue to have FDA clearance and some are viewed as the "gold standard" for treatment, the litigation is likely to continue for the foreseeable future.

JUDICIAL HELLHOLES

#1 NEW YORK CITY ASBESTOS LITIGATION (NYCAL)

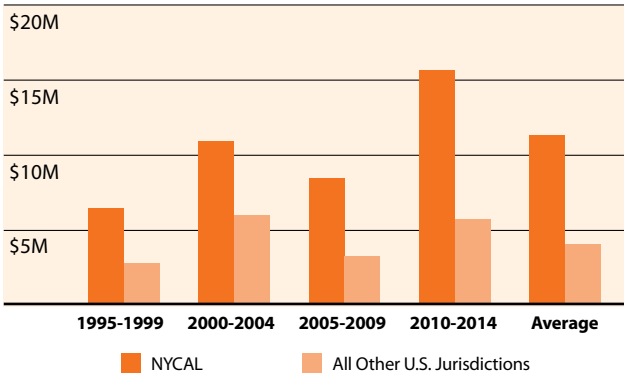


With the epidemiological peak of mesothelioma cases behind us in the U.S., and with still additional revelations of manipulated evidence and perhaps outright fraud within the asbestos lawsuit industry expected in recently unsealed documents from the federal bankruptcy case in North Carolina known as *Garlock*, the handful of civil court jurisdictions with still very active asbestos litigation dockets naturally draw the Judicial Hellholes spotlight. Several will be exposed in the balance of this report, but in none of them is the plaintiffs' bar more brazenly favored by the judges presiding over such litigation than it is in New York City.

The New York City asbestos litigation (NYCAL) docket has been transformed from a challenging jurisdiction for defendants to a patently unfair one. As a result, headline grabbing verdicts in 2014 have become commonplace:

- $7.3 million to a truck driver in April;
- $11 million to an auto mechanic in May;
- $25 million in June in a joint trial of two electricians' claims; and
- $7 million to a contractor in September, reportedly the largest award ever returned against a power company in New York State.

AVERAGE ASBESTOS VERDICTS 1995-2014



Verdict data compiled from publically available sources and services including Mealey's, Westlaw and VerdictSearch.

Recent decisions by the court may cause these verdict levels to climb even higher in 2015. Some of the more significant ways that NYCAL has become an outlier with a tarnished reputation are summarized below.

PUNITIVE DAMAGES BAN LIFTED

For nearly two decades, punitive damages were not an issue in NYCAL cases. Since 1996, the NYCAL court deferred (did not decide) punitive damage claims. The former manager of the docket, **Justice Helen Freedman**, adopted this position and wrote it into the NYCAL Case Management Order (CMO) because, like "[m]any courts," she "long ago decided that punitive damages had little or no place in the asbestos litigation." She later explained that deferring "all punitive claims indefinitely…seemed like the fair thing to do for a number of reasons." Justice Freedman, now on the New York appellate bench, summarized those reasons:

> "First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong."

The sound reasons that led Justice Freedman and other leading courts to defer punitive damages still apply today. In fact, Philadelphia Court of Common Pleas **Judge John Herron** issued a protocol in 2013 that continues that jurisdiction's longstanding practice of deferring punitive damage claims in asbestos cases.


Justice Heitler

But in April 2014, the current manager of the NYCAL docket, **Justice Sherry Klein Heitler**, granted a request by New York City-based Weitz & Luxenberg, P.C., a politically powerful plaintiffs' firm, to lift the court's longstanding ban on punitive damages in asbestos cases. In Justice Heitler's opinion, "the decision to deny plaintiffs the opportunity to seek punitive damages lies with the legislature" – even though the NYCAL court already decided the issue long ago. And as further explained below, punting the issue to the legislature in Albany is a nonstarter because, as Justice Heitler well knows, a well-paid member of the Weitz firm also serves conveniently as the Speaker of the New York State Assembly where virtually every reasonable civil justice reform proposal goes to die.

Unconvincingly, Justice Heitler has tried to downplay the impact of her punitive damages decision on defendants and future claimants, explaining that "even without punitive damages, resources available to persons injured by asbestos are naturally being depleted and that bankruptcy filings by asbestos defendants continue." She also said that "the Defendants' fear of large, repetitious punitive verdicts in NYCAL may be exaggerated."

Defendants raised a concern that the reintroduction of punitive damages would be highly prejudicial because the presentation of evidence as to one defendant's wrongful acts would improperly influence a jury to punish all defendants involved in the trial. The objection fell on deaf ears. Justice Heitler wrote: "While this court appreciates the Defendants' concerns, at the end of the day the decision and the circumstances under which to consolidate lies within the discretion of the NYCAL trial Judges in accordance with the facts of the cases before them." Translation: Forget about a fair trial, defendants. Settle your cases.

Predictably, plaintiffs' lawyers told the court it was not their intention to abuse the opportunity to seek punitive damages. Justice Heitler also "caution[e]d the plaintiffs' bar not to overstep this permission by attempting to seek punitive damages indiscriminately." So far, the restraint promised by plaintiffs' lawyers is not in evidence. Without consequence – surprise, surprise – the Weitz firm is routinely asking for punitive damages in their NYCAL cases. Other plaintiffs' firms are jumping on the bandwagon.


Weitz

Justice Heitler's decision to reintroduce punitive damages has significant consequences for defendants and insurers in NYCAL cases. Defendants that choose to exercise their right to a jury trial will face greater risks. Indeed, plaintiffs' attorney **Perry Weitz** argued during a motions hearing that he wanted to be able to use the threat of punitive damages to force settlements out of what he described as "recalcitrant defendants and insurers." So trials in consolidated cases will be especially risky for defendants because of the possibility for guilt by association.

Of course, the potential for punitive damages to artificially inflate settlements is not limited to those defendants that are more aggressive in taking cases to trial or that are part of a cluster of cases being tried together. All defendants and their insurers are likely to experience higher settlement demands in NYCAL cases as a result of Justice Heitler's decision to reverse the nearly two-decade ban on punitive damages.

Further, the availability of insurance for compensatory damages, but not for punitive damages, raises the specter of so-called "bad faith" claims against insurers who refuse to settle on plaintiffs' terms. As Weitz explained to the court:

> "Th[e] [settlement] dynamic changes completely if punitive damages [are] allowed to go forward, and this is why: There's no insurance for punitive damages. And if that insured, if that company says to their insurer, I want you to settle this case for $500,000, and then there's a $20 million verdict … against that defendant because the insurer didn't settle for $500,000 … , then whatever that insured would be responsible for – let's call it $5 million after all the settlements – the insured has a bad faith

claim against that insurer to cover that five million dollars, because the insurance company did not negotiate in good faith on behalf of its insured."

PREJUDICIAL CONSOLIDATIONS

The problem of reintroducing punitive damages in trials is magnified by a recent First Department appellate court decision approving the consolidation of dissimilar NYCAL cases for trial. NYCAL trial courts are now permitted to consolidate cases in a manner that is so permissive and deferential to judges' whims that it arguably imposes no standard at all.

The First Department ruled that NYCAL **Justice Joan Madden** did not abuse her discretion in joining cases that involved different worksites, different occupations, different exposure periods, different diseases, different plaintiff health statuses and even different legal theories. In order to give deference to the trial court's decision to consolidate these two very different cases, the appellate court concluded that commonality existed because both plaintiffs were occupationally exposed to asbestos until the same year (though for different time periods) and both defendants allegedly failed to act reasonably in permitting the exposures. This is akin to saying apples are the same as oranges because both are fruits.


Justice Madden

Consolidating trials is highly unfair to defendants. One commentator has said, "Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." A "maelstrom of facts, figures, and witnesses" is created that juries cannot keep straight. "[T]here is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs."

Plaintiffs' lawyers also know that smaller consolidations such as those in NYCAL cases make settlements more likely. One study found that "plaintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials…." Other commentators have observed that small scale consolidations, such as in New York City, "significantly improve outcomes for plaintiffs."

The highly permissive approach to consolidation in NYCAL cases is an extreme outlier. Elsewhere, courts "have ended or substantially curbed the use of trial consolidations in asbestos cases." For example, protocol recently adopted and followed by the Philadelphia Court of Common Pleas prohibits consolidated trials of asbestos cases unless all parties agree or the cases involve the *same* law, *same* disease and *same* plaintiffs' law firm. The possible good news in New York is that the First Department chose on December 9, 2014, to certify the case to the state's highest court, the New York Court of Appeals, for clarification as to whether New York law permits such unfair procedures to be applied against defendants.

LIABILITY FOR PRODUCTS SOLD BY THIRD-PARTIES

The clear majority rule nationwide is that manufacturers of products are not legally responsible for asbestos-containing materials made and sold by third-parties simply because it may have been foreseeable that such materials would be used near or in conjunction with the manufacturers' equipment post-sale. For example, the California Supreme Court has held that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products."

Federal courts have found that New York law is in harmony with this clear majority rule, and have refused to impose legal responsibility upon a manufacturer for an allegedly injurious product that the manufacturer did not make, sell or otherwise place in the stream or commerce. Further, New York's highest court has ruled in a non-asbestos case that, in a combined use scenario, a manufacturer can only be held liable for a harm caused by an injurious defective product made or sold by a third-party when the manufacturer: 1) controlled the production of

the injury-producing product, 2) derived a benefit from the sale of the injury-producing product, or 3) placed the injury-producing product in the stream of commerce. New York's Fourth Department appellate court has applied this rule and followed the majority approach in an asbestos case.

Yet various New York state judges – primarily in NYCAL cases – rely on "a one-paragraph [memorandum] opinion with no clear holding," to provide a rule that an equipment manufacturer has a legal duty to warn for every asbestos-containing product that could have a foreseeable (in hindsight) use with that equipment, even though the opinion stands for no such proposition.

As with consolidation, the New York Court of Appeals also has an opportunity in two cases under review to confirm that New York law is in harmony with the clear majority rule nationwide. In both cases, plaintiffs received significant awards against a valve manufacturer – including $32 million to a single NYCAL plaintiff that was later reduced to approximately $4.4 million after remittitur and certain set-offs – even though the valve manufacturer did not make, supply or place into the stream of commerce any of the asbestos-containing products to which exposure was alleged.

OTHER NYCAL PROBLEMS

DEEP POCKET LIABILITY

Another manner in which the law is applied in an unfair manner in NYCAL cases involves joint and several liability. New York law generally provides for fair-share liability for noneconomic damages among defendants that are determined to be 50% or less at fault for the plaintiff's harm. This reform was enacted to eliminate the unfairness of holding a defendant liable for damages far out of proportion to its share of fault for an injury. An exception allows full "deep pocket" liability to be imposed on a minimally at-fault defendant that is found to have "acted with reckless disregard for the safety of others."

This narrow statutory exception, applicable only to truly "reckless" defendants, has been exploited by NYCAL judges and effectively allowed to subvert the general rule of limited liability altogether. Plaintiffs' lawyers now routinely seek jury instructions (and NYCAL judges routinely comply) to find recklessness in situations that fall far below the high bar set by the New York Court of Appeals. As a result, juries find the exception applicable in virtually every NYCAL case, even though that was clearly not the legislature's intent.

TRUST CLAIM GAMES

A case that gained nationwide attention early in 2014 makes clear the need for transparent, comprehensive monitoring of asbestos claims both administered by asbestos bankruptcy trusts and adjudicated by the tort system. As discussed among other Points of Light on p. 46, a North Carolina federal bankruptcy judge, in *In re Garlock Sealing Technologies, LLC*, found that a gasket and packing manufacturer's settlements of mesothelioma claims in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." The judge explained:

"Beginning in early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock."

The NYCAL case management order noted above has language that should address this problem. A 2003 amendment to the CMO, when the NYCAL docket was managed by Justice Freeman, provides that "[a]ny plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial."

As with its more recent success in ending NYCAL's deferral of punitive damages, Weitz & Luxenberg in 2012 filed a motion to vacate the proof-of-claim element of the CMO. In this instance, however, Justice Heitler appeared to reject the request, explaining that to strike "this particular clause … would diminish the effectiveness of the CMO as a whole."

But don't be fooled by Justice Heitler's head-fake. Plaintiffs' lawyers have recently emphasized a curious sentence in her opinion: "The CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within

certain time limitations, not claims they may not *anticipate* filing…." Plaintiffs' lawyers contend that the sentence was purposefully included in the decision to allow them to delay the filing of asbestos bankruptcy trust claims, contrary to the spirit of the CMO. One leading New York plaintiffs' attorney, Joseph Belluck, offered his perspective at a June 2014 hearing before an American Bar Association Asbestos Litigation Task Force:

> "[Justice Heitler] put in what is in effect an intent standard into the disclosure – into the filing requirement … . So in New York, even though claims against bankruptcy trusts may be probable, [and] I can predict that they are going to be filed, I am not under any requirement to file them. I only have to file the claims that my client intends to file before the trial. It is incredibly nuanced, and she did it for a reason. I am not going to get into all of the reasons behind it, but she did it for a reason."

Yes, of course she did, Mr. Belluck. Justice Heitler's reason, as usual, was to curry favor with influential elements of the personal injury bar, and what is now allowed to go on in New York City merely buttresses the *Garlock* opinion with more evidence that such manipulative delays are likely the rule, not the exception.

BURDEN OF PROOF FLIPPED

The First Department very recently affirmed another incredible order by Justice Heitler that requires defendants in NYCAL cases to unequivocally establish their non-liability in cases where plaintiffs do not know for certain whether they worked with a defendant's asbestos-containing product. This Kafkaesque ruling lifts the plaintiff's traditional burden to prove the case, including whether an alleged injury was caused by exposure to the defendant's product, and seeks to crush the defendant by forcing it to prove otherwise.

NY SPEAKER SHELDON SILVER


Speaker Silver

Despite the considerably negative toll that well-documented bias in the NYCAL and other civil courts takes on economic growth and job creation in the crumbling Former Empire State, reform efforts in Albany will always face tough odds as long as **Assembly Speaker Sheldon Silver** wields the gavel in the state legislature's lower house. Why? It may have something to do with the fact that he also happens to be a personal injury lawyer on the payroll of the aforementioned Weitz & Luxenberg firm.

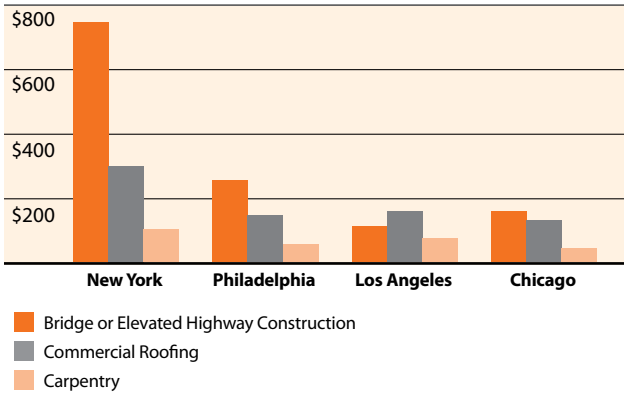
The *New York Post* reports that "[o]ver the years…Shelly has killed any attempt at tort reform, which could cut into his firm's earnings." And in giving up in April of 2014 on a push to finally reform the state's century-old "scaffold law," which impedes redevelopment projects by making construction insurance prohibitively expensive, **Governor Andrew Cuomo** admitted his political impotence to *Crain's New York Business*: "The trial lawyers are the single most powerful political force in Albany. That's the short answer. It's also the long answer" as to why excessive liability has yet to be curbed legislatively.

For years, Speaker Silver refused to disclose his Weitz firm earnings, but the information has begun to come to light as a result of recent disclosure requirements. Interestingly, the Speaker's "still-shrouded work" for the Weitz firm "became far more lucrative for the powerful Manhattan Democrat in 2013," just as he managed to thwart both scaffold law and medical liability reform in the Assembly that year. According to the *Daily News*, Silver reported earning between $650,000 and $750,000 from the law firm in 2013 – up significantly from 2012's mere $350,000 to $450,000.

GENERAL LIABILITY LOSS COSTS

(DOLLARS PER $1,000 OF PAYROLL)

Source: Insurance Services Office



As the *New York Post* has pointed out, "It's all perfectly legal… We don't begrudge a man getting rich. But it does make one wonder about loyalties."

A December 8, 2014 *New York Times* article reports that as part of an ongoing federal investigation, "prosecutors and F.B.I. agents have … been able to determine that for some time, Mr. Silver had failed to disclose income from another law firm besides Weitz & Luxenberg." The article reported that "[i]t is not known what Mr. Silver did to earn this income."

Speaker Silver's position in Albany also allows him to appoint individuals to the powerful Judicial Screening Committee, which, as previously reported by the *New York Times*, "reviews candidates for the State Supreme Court and its Appellate Division, and makes recommendations to the governor." In 2008, Silver appointed to the committee **Arthur Luxenberg**, a name partner at the firm that now pays him three-quarters of a million dollars a year. So might a NYCAL trial judge who aspires to a future appellate court appointment tip the scales of justice to favor the clients of a firm with so much political influence over which judges will receive such appointments? Defense attorneys certainly think so, and outlier results from NYCAL back them up.

#2 CALIFORNIA

Were it not for the brazen bias pervading of New York City's asbestos court and its judges' and lawyers' cozy ties to state lawmakers, California, ranked #1 among all Judicial Hellholes the past two years, would have easily pulled off an unprecedented Hellholes three-peat. After all, with consistently more than a million new lawsuits filed there every year, there are so many things wrong with the administration of civil justice in the once Golden State that a third consecutive #1 ranking would have been perfectly justifiable. Furthermore, the state is so large that its civil justice machinations invariably affect people all across the country who are trying to business there in one form or another.

"California is a big state with a big economy, and as a result there is a tremendous amount of big litigation here," said David Levine, a professor at the University of California's Hastings College of Law when speaking to *Law360.com* earlier in 2014. "Because of the sheer amount of money being generated here, it can be tempting to bring litigation to see if you can get a piece of the pie."

It's impossible in the limited space of this report to even touch on, much less detail all the efforts to divvy up Professor Levine's proverbial pie. A book-length treatment would better serve that task. Nevertheless, this year's report briefly endeavors to sample several issues, including the troubling use of "public nuisance" law and private-sector contingency-fee lawyers by district attorneys who seek to rifle the deep pockets of corporate defendants, the continuing expansion of asbestos liability, personal injury lawyers' exploitation of both the health-warning law known as Prop 65 and consumer protection laws, the still relentless targeting of small business owners by so-called disability-access lawsuits, the absurd but costly lawsuits that California's permissive judiciary encourages and, in the interest of fairness, even a few pieces of good news.

Judge Kleinberg

LEAD PAINT AND PAINKILLERS

On the same day last year's Judicial Hellholes report was published, Santa Clara Superior Court **Judge James Kleinberg** issued his decision in a much watched lead paint-as-public nuisance case. The public nuisance theory of liability as applied to lead paint had been tried by personal injury lawyers and their allies among various state prosecutors for years as a means of trying to slip under the higher burden of proof required by products liability law. Their scheme to rifle the pockets of defendant corporations that haven't produced lead paint in decades – as opposed to going after the slumlords whose failure

to properly maintain painted surfaces in rental housing poses the only real health risk to children – had ultimately failed everywhere. But not with Judge Kleinberg.

After entertaining post-verdict motions, the judge's final decision issued in January 2014 ordered three companies to pay $1.15 billion, to be shared among Alameda, Los Angeles, Monterey, San Mateo, Santa Clara, Solano and Ventura counties, and the cities of Oakland, San Diego and San Francisco.

During the bench trial, which concluded in September 2013, the defense adduced plenty of evidence that showed the paint companies had stopped selling lead paint once science demonstrated its threats to health and child development, and before the federal government ordered a halt to such sales in 1978. They also showed that California suffers no appreciable lead exposure problems, at least not relative to the national average for such exposure. Still, trial observers reported that Judge Kleinberg's very California-like antipathy toward all things corporate was repeatedly on display, such as when he questioned the industry's strict reliance on certain American doctors and experts about lead-paint risks when international researchers had noted such risks much earlier. "I'm quite troubled by the idea that because American doctors say 'X, Y and Z' that that is the end of the inquiry," the judge snapped. (Yeah, what do those darn American doctors and scientists know, anyway? They're not the boss of me.)

Defendants have appealed Judge Kleinberg's lead paint decision to the California Court of Appeals, Sixth Appellate District. But careful Judicial Hellholes report readers may remember that the high court in 2010 had blessed city and county officials' use of private-sector personal injury lawyers on a contingency-fee basis to pursue their public-nuisance scheme, so no one should necessarily assume the verdict will be overturned.

In the interim, the lead-paint-as-public-nuisance success before Judge Kleinberg has inspired the second horror film of this double feature – call it "Son of Lead Paint" or the "Attack of the Nuisance Opioids." In May 2014, Santa Clara County teamed this time with Orange County and a host of private-sector contingency-fee lawyers to sue narcotics makers, alleging they have caused a deadly epidemic of addiction to potent painkillers such as OxyContin with a "campaign of deception" designed to promote sales and boost profits.


Chou

But again, rather than pursue the litigation under strict products liability law, the county prosecutors and their hired guns are relying on California's sprawling and always easily exploited false advertising and unfair competition law, as well as the more adaptable law of public nuisance. Santa Clara **Assistant County Counsel Danny Chou** told the press upon filing the lawsuit that, "In looking at the issue, you realize that doctors and patients weren't getting complete and accurate information" from the drugmakers. "They were being deceived about the risks and benefits of these drugs, and they were being deceived by the companies that were producing them."

Leaving aside the pesky facts that the painkillers have been approved by the Food and Drug Administration and require a prescription from a licensed and not readily deceived physician to obtain them, Chou went on to explain that making sure people understand the risks and benefits of drugs like OxyContin and Percocet before taking them is the lawsuit's "primary goal." That must mean that extracting hundreds of millions of dollars from drugmakers to be poured into county coffers and the personal bank accounts of multimillionaire personal injury lawyers who'll likely support the prosecutors' future political campaigns is only a *secondary* goal.

ASBESTOS HOT-ZONES

While California's Los Angeles and Alameda counties don't quite stack up with Madison County, Illinois, in terms of sheer volume of asbestos lawsuits, and their courts aren't necessarily as brazenly imbalanced as New York City's asbestos litigation court known as NYCAL, they continue to be known nationwide as hot-zones for such litigation, replete with sometimes unscrupulous plaintiffs' lawyers, biased judges and often mind-blowingly generous verdicts.

Such "large verdicts show the dangers of going to trial," observed one veteran attorney. "If the defense isn't put on in the right way and the jury gets mad at you in California, you can get hit with an adverse verdict with a big number."

One such "big number" – $18 million in punitive damages – out of Los Angeles County was affirmed in October 2014 by a divided panel of the California Second District Court of Appeal. The *National Law Journal* reported that the original award of $48 million included $30 million in compensatory damages for a homebuilder (and his wife) who had contracted mesothelioma after allegedly inhaling asbestos dust from construction materials in Southern California from 1964 to 1994. Though Los Angeles County Superior Court **Judge Steven Kleifield** granted materials supplier Union Carbide Corp.'s motion for a new trial on compensatory damages, both sides in *Izell v. Union Carbide Corporation* later stipulated to a reduced amount of $6 million, all in noneconomic damages.


Justice Kitching

The appeals court majority disagreed with defendant Union Carbide's argument that the 2012 award was based on insufficient evidence and that the $18 million in punitive damages was "unconstitutionally excessive." In upholding the original punitive damages award, the court found that Union Carbide "acted with a reprehensible indifference to the health and safety of others." **Justice Patti Kitching** dissented, saying, "the significant reduction of the jury's compensatory damage award requires a new trial on the amount of punitive damages."

A spokesperson for Union Carbide's parent company, Dow Chemical Co., issued this statement:

> "The California Court of Appeal for the [Second] District's decision in *Izell* once again makes clear defendants in asbestos litigation cannot expect proper application of California law in California's trial or appellate courts. While UCC feels sympathy for Mr. Izell and his family, UCC is extremely disappointed in the decision and believes … [it] was based on a fundamentally flawed interpretation of California law on the issues of causation, comparative fault and punitive damages… . UCC intends to vigorously pursue its appellate options, including petitioning the California Supreme Court for review, as the time is now for the California Supreme Court to level the playing field and abandon the relaxed rules governing asbestos litigation…."

Just eight days after the Los Angeles County jury's $18 million dollar award for punitive damages was upheld on appeal, an Alameda County jury took less than a day, following a six-week trial, to render … wait for it … a nearly $71 million verdict for another single asbestos plaintiff and his wife against gasket manufacturer John Crane Inc. (*Whalen v. John Crane Inc.*, No. RG14711964).

While only finding Crane 3% liable for the mesothelioma diagnosed in the former U.S. Navy Machinist's Mate in 2013, the jury nonetheless said Crane's negligence, defectively designed products and failure to warn would cost it $40 million for the plaintiff's pain and suffering, another $30 million dollars for his wife's loss of consortium, and $861,113 in economic damages.


Justice Kolakowski

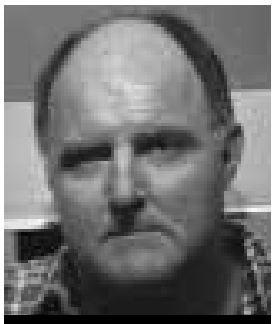
During the trial, Superior Court **Judge Victoria Kolakowski** excluded mitigating evidence the defense wished to present – not that this is an unusual phenomenon faced by defendants in Alameda County asbestos litigation. Crane is expected to appeal this monstrous verdict, one of the largest single-plaintiff asbestos verdicts in recent memory.

Still, if there's any hope that reason may yet assert itself in California asbestos litigation, it may be found in the Second District's late-November 2014 decision upholding a lower court that found Shell Oil was not responsible for protecting a woman from asbestos exposure that allegedly arose from laundering her husband's work clothing. The panel cited *Campbell v. Motor Company* (Cal. Ct. App. 2012) in finding that to hold the defendants responsible for off-premises exposure would unfairly saddle them with "limitless" liability. Other California appeals courts have ruled similarly in such secondary exposure cases, and now the high court is poised to take up the issue of take-home exposure in early 2015, having granted cert in two cases, *Kesner v. Superior Court* and *Haver v. BNSF*.

ROLLING FOR DOLLARS

Watered down compromise legislation out of Sacramento in recent years has done nothing to slow the rolling threat posed to California's small business owners, particularly those who speak English as a second language, by a finite group of "frequent filers" specializing in so-called "disability-access" lawsuits. These opportunistic suits exploit both the federal Americans with Disabilities Act (ADA) and the state's civil rights law to stake their claims.

In August 2014 the *Modesto Bee* profiled one of those frequent filers, **Robert McCarthy**, "a 59-year-old pedophile who stole his dead brother's identity to illegally obtain food stamps and disability payouts … ." Each year since 2001, except when incarcerated for sex crimes and fraud, reported the Bee, McCarthy "has left his Arizona home for short trips to California. That's where the money is when you want to sue for disability discrimination."


McCarthy

"As he has done in numerous other California communities before and since, McCarthy rolled through Modesto, Ceres and Turlock on a four-day trip in May 2013, spending $500 on hotel rooms, alcohol, an ashtray and other items. Six months later, he sued 13 of the places he'd visited, saying they did not accommodate him and his wheelchair."

McCarthy's modus operandi is similar to others practicing his craft. He asks judges to order the businesses he's targeted to award him "$4,000 for each of the multiple problems he detects, and to triple the amounts," as allowed under California's civil rights law, "to teach the companies a lesson." It should be noted that far more often than not the "problems" McCarthy and his ilk "detect" are minor and technical, ranging from bathroom soap dispensers and grab-rails being a fraction of an inch too high to fading blue paint on a handicapped parking-spot.

Of course, not all of California's wheelchair racketeers are as unsavory as McCarthy, and some plaintiffs may actually have been hindered in their good-faith efforts to access public places. But a lengthier Bee exposé published later in August illustrated the cumulative scope of this lawsuit abuse problem. More than 40% percent of all ADA lawsuits in the U.S. occur in California, according to the Bee, and they are "likely raising prices to other consumers," since "millions of dollars have changed hands." And while these "drive-by lawsuits" were "once mostly confined to Southern California and the Bay Area," they are now becoming more prevalent in Northern California counties as the four most active plaintiffs (including McCarthy), who have filed 820 separate ADA lawsuits throughout the state, are now moving to expand their territory and beat other, less prolific litigants to the punch.

Together, this merry band of litigants has sued an estimated 35,000 shops and restaurants up and down the state, according to the California Justice Alliance, putting many family-owned mom & pop operations out of business. As San Jose Councilman Sam Liccardo told the *Mercury News*, "This is a shameful abuse of a well-intended law. We know there are plenty of small businesses out there hanging by a thread right now, and these lawsuits don't make things any easier."

"Something needs to be done," said Tom Scott, executive director of California Citizens Against Lawsuit Abuse. "We have 3.6 million small businesses out there (in California) trying to comply with a variety of laws, and there are bad actors taking advantage with bad intent. This shakedown of small businesses is not stopping because people are seeing it as a way to make quick money."

Scott and others are hopeful that California lawmakers will finally get around to enacting practical, meaningful reform in 2015. Elements of such reform might give business owners the option of paying state-sanctioned engineers to inspect, recommend needed improvements to and/or certify their premises as "accessible" under the ADA. Such certification would serve to ward off unreasonable claims. Some would also like to see the state institute a safe-harbor period of several weeks to a few months, during which a business could consult with certified engineers and affect necessary renovations after receiving official notice of a plaintiff's intent to sue. Lawmakers should find a way to improve access for the disabled without allowing hardworking Californians to be victimized by lawsuit blackmail.

ALL-NATURAL LITIGIOUSNESS MEETS PROP 65

Regular readers of this report know that, in recent years, California has been home to a growing wave of often ridiculous consumer class actions that target the labeling and marketing of various food and beverage products. This report has also been critical of the abuse of private-attorney-enforced Prop 65, the voter-passed referendum that has since 1986 required ominous warning signs in businesses and other public accommodations where even the slightest, non-threatening trace amounts of some 800 different chemicals may be present. In large enough doses, these chemicals are "known to the state of California to cause cancer, birth defects or reproductive harm," but the now ubiquitous and thus generally ignored signs serve only as an invitation for more lawsuits.

In January of 2014, an innovative personal injury lawyer, Jack Fitzgerald, invented hybrid litigation that combines phony consumer confusion with labels and a Prop 65 twist. Fitzgerald's meritless class actions, *Cortina v. PepsiCo, Inc.* and *Cortina v. Goya Foods, Inc.*, were filed in the U.S. District Court for the Southern District of California and allege that a byproduct of caramel coloring in soft drinks and other products is harmful, even though the Food and Drug Administration says it's not.

Both multimillion-dollar suits claim the defendants are in violation of California's Unfair Competition Law, False Advertising Law and Consumers Legal Remedies Act by allegedly failing to tell consumers that their products contain "dangerous levels" of 4-methylimidazole, or 4-MeI. The chemical is considered a carcinogen but, as reported by *Food Navigator-USA.com*, government authorities in the U.S., Canada and Europe say it poses no risk for humans in the concentrations allowed in food products.

"Under California's Proposition 65, products with more than 29 micrograms of the potentially carcinogenic chemical must carry a health warning label," according to *Law360.com*, and Fitzgerald's lawsuits purport that "independent testing" shows significantly higher levels in the defendants' products. But it's unclear where (in which state or states) those products were purchased for testing. And where the tested beverages were purchased may be important since, as Law360.com's coverage continued, PepsiCo says it immediately moved to meet the latest regulatory requirements under Prop 65 and that all of its products in California are below the state's threshold. It also said it intended to make the same changes in all its products sold across the U.S. before the end of February 2014.

But lawsuits without injury are routine in California, and if personal injury lawyer-written laws and regulations open loopholes for lawsuits – like setting thresholds for potential harm to absurdly low levels – rest assured those loopholes will be shamelessly exploited. Meanwhile, soft drink consumers in California should prepare to pay a little more for their favorite beverages. After all, money for lawyers' fees has to come from somewhere.


Judge Koh

If there's any good news to report from California's food courts, it may be on the "all natural" front. ATRA ally Glenn Lammi of the Washington Legal Foundation explained in a late-2013 piece for *Forbes* how plaintiffs' lawyers for several years have been serving California courts "a steady diet of all-natural … class actions[,] alleging that the use of 'natural' or 'all natural' on a food product label is false or misleading under state law…." But a dismissal with prejudice in the case of *Kane v. Chobani, Inc.* in February 2014 could invite a trend toward reasonableness. In firmly rejecting the plaintiffs' claims, Northern District of California Judge **Lucy K. Koh** wrote that, "Plaintiffs do not provide … any basis to support their claim that the color additives which Defendant uses in its yogurts are in fact 'highly processed unnatural substances.' Plaintiffs also provide no basis whatsoever to support their allegation that fruit and vegetable juice is somehow unnatural, nor explain with any specificity what they contend is 'unnatural' about these particular ingredients."

No one believes for a moment that Judge Koh's commonsense dismissal of this particular waste of court

resources will end all efforts by shameless class-action lawyers to get rich beyond their wildest dreams at everyone else's expense. But perhaps it will discourage future food-labeling suits from incredibly claiming that concentrated or dehydrated fruit juices are somehow "unnatural."

CRAZY LAWSUITS ENCOURAGED BY PERMISSIVE COURTS

Speaking of court resources, California court budgets have been drastically cut and tightened in recent years as the spend-thrift state barely stays in the black, thanks only to the smoke-and-mirrors gimmicks of wiley **Governor Jerry Brown**.


Chief Justice Cantil-Sakauye

"The court system has been cut by more than $1 billion in the last several years," according to the *Los Angeles Times*, "forcing the closure of 51 courthouses and more than 200 courtrooms. The cuts have created long, snaking lines at clerk windows, delays in resolution of cases and trial dates, and sent court fees skyrocketing." And though 2014's budget brought a modest funding boost for the courts, California Supreme Court **Chief Justice Tani Cantil-Sakauye** said in June that it still falls short of relieving all the problems.

Perhaps the chief justice might consider adding to her future remarks and speeches about budget shortfalls a polite message to her lower court colleagues, whose collective reputation for being too often receptive to even the most laughable of lawsuits irrefutably adds to California's fiscal woes. When crackpots, charlatans and parasites believe judges will let them use meritless claims to extort settlements from defendants, they come out of the woodwork to crowd dockets and otherwise chase taxable commerce from the state. California's courts can't routinely host a clown-show without the state suffering serious repercussions. Imposing stiff sanctions on panderers of frivolous lawsuits every now and again could go a long way in changing the way some self-centered plaintiffs and their attorneys think.

For example, a dressing down in open court would have been perfectly reasonable treatment for the filers of these nonsense suits:

- Helmet-haired bit actor Frank Sivero, who played gangsters in films like "The Godfather Part II" and "Goodfellas," filed a $250 million lawsuit in October 2014 against FOX Television and the producers of its long-running megahit cartoon series "The Simpsons," alleging they unlawfully appropriated his likeness with use of their recurring mafia man character "Louie." It sounds like somebody may have gotten ahead of his residual checks while playing the ponies out at Santa Anita, and is now hoping Simpsons millionaires will offer him a fresh stake in order to make this pathetic lawsuit go away. Only in Hollywood.

- Home improvement retailer Lowe's in August 2014 reached a $1.5 million settlement in a class action brought by several California county district attorneys who had alleged false-advertising of 2x4 pieces of lumber. What every contractor and every do-it-yourselfer in America has known forever, namely that measurements for tight, new pieces of lumber are always marginally smaller than the advertised measurements so as to accommodate for later expansion and the easier joining of components during construction, was news to these DAs and the "investigators" they sent out at taxpayers' expense to get the dirt on Lowe's. Rather than take on the expense of fighting this typically Californian, anti-business lawsuit all the way to trial, Lowe's took the less expensive way out by settling. Who can blame them?

- And though this list of resource-wasting lawsuits could go on nearly forever, let's end it with good news for litigious lovers of alfalfa sprouts and bad news for restaurants with an occasionally forgetful employee or two. Heather Starks was the lead plaintiff in a Los Angeles County class action that settled in 2014. The suit had accused the popular sandwich shop chain Jimmy John's LLC of fraud and false advertising after she'd ordered a sandwich she believed would include sprouts but allegedly did not. Rather than simply tell restaurant staff that her

sandwich needed sprouts, she instead found a lawyer (or her lawyer found her) and sued. Like Lowe's, Jimmy John's caved and future customers will have the pleasure of picking up the tab for a $725,000 settlement.

GOOD NEWS

Unlike many California judges, the Judicial Hellholes report annually strives for fairness and balance. Accordingly, it is only fair to report that there were some welcome bright spots in California in 2014 that are worthy of note.

- **Wage & Hour Litigation** In late May 2014, the California Supreme Court issued a decision in *Duran v. U.S. Bank National Association*, that reversed a $15 million plaintiffs' verdict in the class action that had been tried in Alameda County Superior Court. The high court couldn't abide by the trial judge's uncritical reliance on the plaintiffs' statistical "evidence," saying "we cannot have confidence in such findings because the trial court did not use a valid representative witness group or consider individualized evidence that might have presented a more complete picture of the class. On remand, the trial court must start anew by assessing whether there is a trial plan that can properly address both common and individual issues if the case were to proceed as a class action."

- **Limiting Liability for Commercial Property Owners** California's high court also stepped up for commercial property owners in June 2014, with its answer to a certified question from the U.S. Court of Appeals for the Ninth Circuit in *Verdugo v. Target Corporation*. In holding that a business does not owe a duty to its customers to obtain and make available an automated external defibrillator (AED) for use in a medical emergency, the court explained that such policymaking authority should be left to the legislative branch by way of statutory law and not the courts' judgment in making common law.

- **Still Hungry for GMO Lawsuits, Trial Lawyers Stumble Again** Exercising their rightful policymaking authority, California lawmakers in 2014 nobly resisted Sacramento's powerful lawsuit lobby and instead listened to traditional farmers, food producers and restaurants in rejecting a S.B. 1351, a bill designed by and for the lawsuit industry to accomplish what a ballot proposition in 2012 could not – since it was soundly rejected by voters.

In an effort to grow more robust and bountiful crops, humans have experimented with genetically modified organisms, or GMOs, for thousands of years, long before Augustinian friar Gregor Mendel made a true science out of it in the 1800s. Such work has since developed to produce drought resistant corn and soybeans, rice with more vital nutrients, and various other crops that thrive even when the soil around them is treated with herbicides. Yet the struggling organic food industry and its trial lawyer allies keep up their efforts to impose GMO labeling mandates, hoping to scare consumers away from perfectly safe and more affordable food products while ensnaring some unlucky food sellers in class actions. (Voters in Colorado and Oregon also rejected related ballot initiatives in 2014.)

- Propositions 45 & 46 Kudos to California voters in 2014, too, for seeing through two new trial lawyer-crafted ballot measures that, respectively, would have worked to boost insurance premiums and make medical care more expensive and less available by creating additional civil liabilities for insurers and healthcare providers.

#3 WEST VIRGINIA SUPREME COURT

West Virginia's Supreme Court of Appeals is the main contributor to the state civil justice system's poor reputation. The state's only appellate court rarely misses an opportunity to abandon traditional tort law constraints and embrace novel theories of liability. The court issued several more lawsuit-encouraging rulings in late 2013 and 2014. And while biased decisions by trial courts usually spur a jurisdiction's reputation as a Judicial Hellhole, it's interesting to note that in three of the five West Virginia cases profiled in this year's report, lower courts applied sound principles but were reversed by the high court. West Virginia's trial lawyer-dominated legislature for years had also contributed to the state's pro-liability, anti-business atmosphere, but voter's in 2014 appear to have endorsed a climate change.

OPENLY AND OBVIOUSLY ABANDONING PERSONAL RESPONSIBILITY

As the Judicial Hellholes report went to press in November 2013, the high court ruled 3-2 that a parking lot owner who removed for repair stairway handrails damaged by skateboarders is subject to liability when a person with significant mobility issues attempts to navigate them. The decision reversed Berkeley County Circuit Court **Judge Gina M. Groh**, who had found that, as a fundamental principle of West Virginia premises liability law, "a property owner is not liable for injuries sustained as a result of dangers that are 'obvious, reasonably apparent, or as well known to the person injured as they are to the owner'" and dismissed the case. The high court responded by abolishing the open and obvious danger doctrine in *Hersh v. E-T Enterprises*. In dissent, **Justice Allen H. Loughry II** found that "[i]t is decisions like these that have given the state the unfortunate reputation of being a 'judicial hellhole'" and place an "impossible burden" on property owners of making their premises "injury proof."

W. Va. Supreme Court of Appeals "To Do" List:

- ☑ Eliminate defense to liability
- ☑ Admit junk science
- ☑ Permit phantom damages
- ☑ Certify no-injury class action
- ☑ Sustain as much as possible of $91.5 million verdict
- ☐ Allow trial court to increase punitive damages due to defendant's appeal

Shortly after last year's Judicial Hellholes report was published, **Justice Brent Benjamin** filed his own dissenting opinion in *Hersh*, expressing concern with the ruling's "real world impact," which would require a full jury trial to decide premises liability cases where the law would not ordinarily recognize a duty of care. "With this decision, our traditional concept of personal responsibility now no longer exists in the realm of premises liability," he said. "Where the open and obvious doctrine once operated to prevent meritless suits from proceeding through the court system, I fear that the elimination of the doctrine will throw open the courthouse doors to frivolous claims."

WHO NEEDS SCIENTIFIC EVIDENCE WHEN YOU HAVE A PAID 'EXPERT'?

One day after the high court decided *Hersh*, it also reversed a decision of Marshall County Circuit Court **Judge David W. Hummel**. Judge Hummel had taken seriously his responsibility to keep junk science out of the courtroom. In *Harris v. CSX Transportation*, he granted summary judgment for the railroad because, he found, the plaintiffs' three expert witnesses failed to show scientific evidence supporting their theory that exposure to diesel fumes could cause railroad workers to develop multiple myeloma, a plasma cell cancer.

In support of Judge Hummel, Justice Loughry observed in dissent that the plaintiffs' experts relied on studies that did not even mention the disease and relied on animal studies that suggested only the "biological plausibility" of a tie to it. Only one of the three plaintiffs' experts even asserted a causal link, but did not rely on any published, peer reviewed study. "Daubert commands that in court, science must do the speaking, not merely the scientist," Justice Loughry continued. He concluded that the majority had "simplistically view[ed] the mere qualification as an expert as all that was necessary to get the opinions of these experts before the jury."

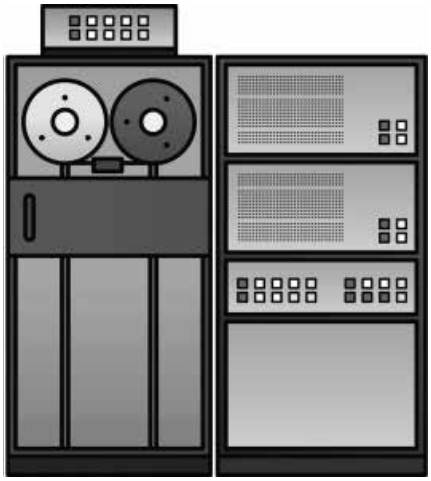
The *Harris* decision led a lawyer, who also holds chemistry and biology degrees, to lament that the court deleted verifiable testing from the scientific method and substituted human judgment for objective evidence of cause and effect. "So now, in West Virginia, it's enough for an expert to say in response to the question: Has your hypothesis been tested? 'Yes, I have weighed the data that gave rise to the hunch in my brain pan and I can now report that it convincingly passed that test and may reliably be considered 'scientific knowledge.'"

In other words: Scientific, shmientific.

WHAT THE CLASS HAS IN COMMON: NO INJURY

In order to certify a class action, which often pressures a defendant to settle out of fear of a potentially catastrophic verdict at trial, a judge must find that there are questions of law or fact common to the proposed class members. In 2014, West Virginia's Supreme Court of Appeals took an uncommon approach to commonality: it certified a class where the class members shared this fact: they experienced no injury.

In *Tabata v. Charleston Area Medical Center*, a hospital accidently allowed a patient database to become publicly accessible on the internet. There was no evidence that anyone had actually accessed the database, which could be found through advanced searching techniques. Kanawha County Circuit Court **Judge James C. Stucky** threw out the case, finding "Plaintiffs have not shown that the members of the class have suffered any injury, much less a similar injury …." Citing to numerous courts from across the nation, Judge Stucky found "the risk of future identity theft, especially when not accompanied by any present injury, is not an injury in fact."



The high court reversed Judge Stucky in a 4-1 decision in May 2014, relying on the class members' complete lack of injury to mind-bendingly justify class certification. The majority noted that the class members had "no evidence of unauthorized access of their personal and medical information, no evidence of actual identity theft, and no evidence of economic injury arising from the alleged wrongdoing," but nevertheless found their interest in privacy was sufficiently violated to bring a claim.

A dissenting **Justice Menis Ketchum II** called the case a "typical example of a frivolous class-action lawsuit." He noted that the plaintiffs' lawyer admitted that no unauthorized person accessed the medical records or personal information, which was quickly secured by the medical center when it learned of the mistake. "No harm, no foul," he would have ruled.

Paul Bond, a partner in Reed Smith's data privacy, security and management group in Princeton, New Jersey, calls the decision a "breakthrough for plaintiffs' counsel." Now, any accidental data breach allows for a massive lawsuit in West Virginia, even if lawyers cannot find a single person who actually suffered an injury of any kind as a result. "Plaintiffs attorneys who have a choice of any venue to litigate over a data security breach would naturally choose a West Virginia state court in light of this precedent."

RECOVERY OF INFLATED DAMAGES IN PERSONAL INJURY CASES

Everyone who has gone to a doctor or hospital knows that medical bills initially list prices that are double, triple, even six times the amount of what is ultimately accepted by the healthcare provider as full payment from a private insurer,

Medicare or Medicaid. Those who do not have health insurance (even though most people are now required to obtain health insurance under the Affordable Care Act) often receive significant write-offs or discounts from providers. Much like buying a new car, no one pays the full "sticker price." That reality is lost on West Virginia's high court, which ruled in June that jurors can *only* consider the prices listed on medical bills when calculating awards for damages. The ruling blindfolds jurors from learning the actual value of treatment and requires them to reach inflated verdicts in personal injury cases.

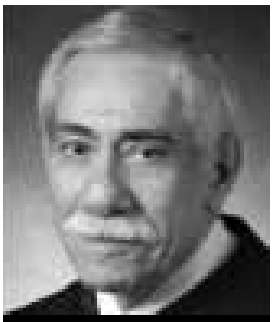
The high court's decision in *Kenney v. Liston* affirmed a ruling by Monongalia County Circuit Court **Judge Susan Tucker** that prevented a defendant from showing that the bills for the plaintiff's medical treatment after a car accident were either reduced by the provider or paid by the health insurer at a discounted rate. Another 4-1 majority found that the "collateral source rule" entitles a plaintiff to recover the billed rate for medical services because the discounted rate is a result of the insurance policy for which the plaintiff paid.

The fallacy of this argument, as judges in some states have observed, is that the amount of a health insurance premium is based on an insurer's payment of a negotiated rate. Policyholders do *not* pay premiums based on list prices. If they did, insurance rates would be much higher. At a more fundamental level, the law should not permit plaintiffs to recover amounts billed but never paid "for the simple reason that the injured plaintiff did not suffer any economic loss in that amount," as the California Supreme Court recognized.

"It is difficult to conceive how allowing the plaintiff to present to the jury fictitious evidence of amounts paid for medical services, while preventing the tortfeasor from challenging that evidence, serves the interests of justice," Justice Loughry wrote in dissent. "Are we to blindly accept the fiction that hospitals and other medical providers routinely and as a matter of freely-negotiated contracts accept less than the reasonable value of their services?" Apparently, the answer is "yes" – at least in Wild, Wonderful West Virginia.

WHERE THERE'S A WILL, THERE'S A WAY

The potential for excessive awards for punitive damages in the Mountain State is illustrated by a $91.5 million verdict in 2011. As discussed in past Judicial Hellholes reports, the preposterous, single-plaintiff verdict stemmed from the death of a very ill 87-year-old woman at a nursing home, which her son's lawsuit attributed to understaffing. It was the highest ever in the state against a nursing home and one of the largest verdicts in the country in a personal injury case. In June 2014, West Virginia's high court found that the trial court had committed significant errors. But instead of ordering a new trial, the majority instead used a strained reading of the law to shrink but ultimately sustain as much of the originally gigantic award as it possibly could.


Judge Zakaib

In *Manor Care, Inc. v. Douglas*, a divided high court found that now retired Kanawha Circuit Court **Judge Paul Zakaib** had improperly submitted erroneous claims to the jury and gave them a confusing and inadequate verdict form that may have resulted in duplicative damages and an unwarranted punitive damages award. But the majority only cut $5 million from the award as improper, struck $1.5 million that it could not understand, and reduced the punitive damages proportionally from $80 million to $32 million.

Justice Benjamin would not have permitted the punitive damages award, observing in his dissent that Judge Zakaib provided the jury with a confusing verdict form that was "woefully inadequate" to sustain the extraordinary award. The form did not even ask the jury to evaluate whether the nursing home had committed the level of misconduct necessary to permit a punitive damages award, for example. Justice Loughry also dissented, criticizing the decision as a "shockingly result-oriented analysis" in which the majority acted as a "super-jury" by adjusting an award that resulted from an "abominable" verdict form. He also found the court's evaluation of the punitive damages award failed to apply the due process safeguards mandated by the U.S. Supreme Court. Even Justice Margaret Workman, who agreed with the outcome, had harsh words for her colleagues' approach. The court could have reached the same result, she said, without "looking positively silly," by finding a portion of the verdict duplicated damages already awarded, rather than tossing it out "like so much garbage simply because [the court] claims to be confused by it."

The *Douglas* decision now smells that much more like plaintiff-friendly garbage in light of an ABC News Nightline investigation that aired December 2, 2014. It revealed that the author of the opinion, **Chief Justice Robin Jean Davis**, received more than $37,000 in 2012 campaign contributions from a number of out-of-state people of modest means with no apparent connection to West Virginia judicial politics, other than their associations with **Michael Fuller**, the multimillionaire plaintiff's attorney in *Douglas*. Chief Justice Davis received the contributions as the case was before her Court. Many of the checks came from people who lived in Fuller's home town in Plant City, Florida and from Mississippi, where his firm is based. And, Nightline reports, as the case headed to the high court, Fuller purchased a Lear jet from Chief Justice Davis's husband, himself a wealthy trial lawyer, for $1.3 million. With the trimmed but otherwise affirmed award, Fuller's law firm will receive more than $17 million in fees.

When Nightline pressed the chief justice about why she failed to disclose her husband's business relationship with an attorney who was appearing before her, she responded, "Why should I?" Well, because "[t]his does not look good for the rule of law," said James Sample, an expert on judicial ethics at Hofstra University Law School. "A million-dollar sale of an airplane while litigation involving the lawyer who purchases the airplane is pending before the court? Absolutely no question. It's proper to disclose, and it is improper to not disclose." "This is a circus masquerading as a court," Sample said. And as the *Charleston Daily Mail* concluded, "the report raises enough concern to reinforce the perception of West Virginia's court system as a judicial hellhole for those who play by the rules, yet heaven for plaintiffs' attorneys who can manage multiple campaign contributions and million-dollar deals."

JUDGES PLAY GAME-SHOW HOST

Another Mountain State defendant dreamed of relief from a crazy trial court and took its case to the Supreme Court of Appeals. And at first, the dream seemed to be coming true when the case was remanded for a new trial due to flaws in the punitive damages award. But the dream devolved into a nightmare when the second verdict was even larger than the first. Now, as West Virginia's wheel of misfortune for defendants continues to spin, the case has returned again to the high court.


Judge Recht

It all started with a bench trial five years ago when now retired Ohio County Circuit Court **Judge Arthur M. Recht** ruled that a mortgage lender had engaged in unconscionable practices in refinancing Lourie Brown's Wheeling home. She alleged the lender had charged her a high interest rate with an undisclosed balloon payment due in 30 years. The lender responded that the plaintiff received a lower monthly payment and more than $40,000 at closing, which she had used to buy a new car.

Perhaps feeling a bit like a magnanimous game-show host, Judge Recht not only awarded the plaintiff about $17,000 in restitution, he voided the remainder of the $144,800 loan obligation – effectively giving her the home "and a new car!"

"But that's not all, Johnny!" Judge Recht also awarded the plaintiff nearly $600,000 in attorneys' fees and legal costs under the state's consumer protection law. And he imposed punitive damages three times the plaintiff's compensatory damages. But instead of using the plaintiffs' actual loss ($17,000) to make that punitive damages calculation, he threw in as an added bonus both the loan obligation and attorneys' fees,

"bringing your grand total for punitive damages, Lourie Brown, to $2.2 million!" Ding, ding, ding, ding, ding!

When *Quicken Loans v. Brown* was first considered by the Supreme Court of Appeals in 2012, the court ruled that Judge Recht had failed to conduct a "meaningful and adequate" analysis of the punitive damages award, which requires written findings explaining his reasoning. But the high court nonetheless ruled that trial courts could include plaintiffs' attorneys' fees in compensatory-to-punitive-damages calculations when it sent the case back to the trial court for further consideration.

The case went to Judge Recht's successor, **Judge David Sims**. And not to be outdone, Judge Sims increased the multiplier from three to three-and-a-half and applied it to attorneys' fees that had grown to $875,233 during the appeal. So he ultimately entered a $3.5 million punitive damages award that largely punished the mortgage lender for having had the temerity to appeal its case, rather than for actual harm its business practices may have caused.

The high court heard oral argument again in April 2014, and would-be contestants, er, plaintiffs and their lawyers everywhere eagerly await the final decision. Will the Supreme Court of Appeals invite them all to "Come on down!"? Stay tuned.

A PREJUDICIAL PROCEDURE NEVERTHELESS RESULTS IN AN AFFIRMED DEFENSE VERDICT

Only in West Virginia would the judiciary consolidate over one thousand personal injury lawsuits, and then have a jury consider general issues of liability and whether to punish a defendant with punitive damages *before* individual plaintiffs prove their cases. That is how the West Virginia Supreme Court of Appeals allowed a trial court to use this "creative, innovative trial management plan" to consider cases alleging injuries from smoking against cigarette makers. The use of such mass consolidations and "reverse bifurcation" (deciding punitive damages before liability) in this and other cases was among the reasons why West Virginia earned the #1 Judicial Hellhole ranking in past years. The ultimate outcome of that case – a defense verdict on six of seven claims affirmed in a 3-2 ruling by the high court – suggests that there is hope for fairness in the Mountain State after all.

In November 2014, the state's high court found that Judge Recht, who'd presided over the case, properly dismissed the complaints of hundreds of plaintiffs who did not provide depositions or submit basic evidence supporting their claims. Those disclosure requirements, the court found, were part of a case management order to stay discovery that the plaintiffs' lawyers themselves had requested. The high court also affirmed Judge Recht's instructions to the jury on the standard for finding a product defective and found that the trial court's instruction on application of the higher "clear and convincing evidence" standard for punitive damages, rather than a lower "preponderance of the evidence" standard, *if* wrong, was harmless since the jury found the plaintiffs' case for liability unpersuasive. The high court affirmed Judge Recht's decision that federal cigarette labeling laws preempted certain claims. It also found that, contrary to the plaintiffs' lawyers' assertion, Judge Recht gave them wide latitude to question potential jurors on their feelings about personal responsibility.

While a portion of the case is ongoing, Judge Recht's handling of the case post-consolidation, the jury's careful consideration of the evidence, and the West Virginia Supreme Court of Appeals' narrow affirmance of the decision deserve recognition.

AG Morrissey

AG IMPROVEMENTS, LEGISLATIVE SHENANIGANS

The retirement voters imposed on long-serving West Virginia **Attorney General Darrell McGraw**, Jr. in 2012 has not set well with some members of the state's legislature. McGraw had been known for awarding no-bid contracts to contingency-fee lawyers and using settlement money for his own office's use and self-promotion. McGraw's successor, **Patrick Morrissey**, has since undertaken ethics reforms, including a policy that provides transparency in the hiring of outside counsel. According to AG Morrissey, that policy has

already saved the state taxpayers millions of dollars that would have been siphoned off by contingency-fee lawyers.

In a startling show of partisan politics, however, the House of Delegates narrowly passed its own so-called "Attorney General Ethics and Accountability Act." It would have required the AG to hire outside counsel anytime a company or individual involved in a case had made a campaign contribution to the AG. If enacted, it would likely have led to chaos and substantial cost to taxpayers, as the state's AG would frequently need to hire outside counsel, without government supervision, rather than follow a rational conflict-of-interest policy.

The bill was so extreme that it sparked a bipartisan group of 36 state attorneys general to send a letter to West Virginia lawmakers expressing concern with the "unprecedented nature of the proposed bill." The bill, which died in the Senate Judiciary Committee, was a waste of time that the legislature could have more productively used to improve the state's poor litigation climate. The legislature's formidable coalition of practicing personal injury lawyers also placed a higher priority on creating more lawsuits with an ultimately rejected false claims bill than on considering a proposal to create an intermediate appellate court.

Public backlash against such economy- and employment-undermining priorities likely contributed to West Virginia voters' recent decision to change party control of both houses of the state legislature beginning in 2015. The tectonic shift bodes well for legal reform efforts that can improve West Virginia's business climate.

AND FINALLY ...

In late 2012, a federal jury in the Northern District of West Virginia found two plaintiffs' lawyers and a radiologist liable for fraud in connection with their filing of bogus asbestos claims against CSX Transportation in West Virginia courts. Their appeal came to an abrupt halt in November 2014, when they agreed to pay the railroad $7.3 million dollars.

The Judicial Hellholes report has closely followed this litigation since the railroad took an unprecedented, encouragingly aggressive approach in responding to suspicious asbestos claims. A federal judge had found in an earlier, separate proceeding that the now deceased radiologist used by the lawyers to validate claims was among doctors who made diagnoses that "were driven by neither health nor justice – they were manufactured for money." Ray Harron's diagnoses, **Judge Janis Graham Jack** found, could "only be explained as a product of bias – that is, of Dr. Harron finding evidence of the disease he was currently being paid to find."

A Wheeling, West Virginia jury found the lawyers, Robert Peirce and Louis Raimond, along with Harron, had violated the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. It held them jointly liable for $429,240 in penalties. In September 2013, **Judge Frederick P. Stamp Jr.** tripled the damages, as required by RICO, to $1,287,721.41. A prevailing plaintiff is also entitled to attorneys' fees under the federal racketeering law, and CSX requested $10 million to cover the lengthy litigation. Judge Stamp, however, held off on the fee request until the lawyers and doctors had a chance to appeal.

The U.S. Court of Appeals for the Fourth Circuit considered the case on October 28. Oral argument went poorly for the asbestos fraudsters' lawyer. The appellate judges did not seem receptive to the view that RICO cannot apply to plaintiffs' lawyers and expert witnesses who conspire to make fraudulent claims. Given the likelihood of a loss, the defendants apparently decided to withdraw their appeal, pay the full judgment plus interest, and pay CSX a few million dollars less in attorneys' fees than they could have been required to pay under RICO.

ATRA hopes CSX's successful RICO suit will serve as a model for other corporate defendants plagued by litigation that is not only meritless, but fraudulent. Chevron succeeded in 2014 with a similar use of RICO to stop enforcement of a foreign judgment secured through "corrupt means." And gasket maker Garlock Sealing Technologies also invoked the statute after a federal bankruptcy judge found in 2014 that plaintiffs' law firms had engaged in a "startling pattern of misrepresentation" in asbestos litigation (see Points of Light, p. 46).

#4 FLORIDA SUPREME COURT

This report has typically shined its spotlight on South Florida's litigation machine, components of which include an aggressive personal injury bar, allied medical clinics, expansive tort liability and plaintiff-friendly judges. These elements combine to create a litigation climate that is among the worst in the country for civil defendants. But a significant driver of the Sunshine State's litigation problem comes straight from the top – the Florida Supreme Court.

A TORRENT OF LIABILITY-EXPANDING DECISIONS

The state's high court has repeatedly and consistently ruled in favor of expanding liability, provided plaintiffs with procedural advantages over defendants in litigation, and shown a lack of deference to the legislature's role in determining public policy. Virtually everyone in Florida – from neighborhood grocers and family physicians to local government service providers and parents trying to make decisions about their children's sporting activities – has felt the impact. Since 2000 the Florida Supreme Court has:

- Blindfolded juries to the fault of drunk drivers in accidents underlying lawsuits alleging carmakers could have better designed their vehicles to prevent injuries.
- Exposed supermarkets and retailers to liability for slip-and-falls even when they were not aware of hazards that allegedly caused falls and could not have reasonably found and addressed them.
- Placed broad new liability on streetlight maintenance companies when anyone is hurt in an accident while a streetlight is out.
- Allowed manipulative plaintiffs' lawyers to create "bad faith" lawsuits against insurers who, in good faith, attempt to pay a claim.
- Exposed local governments to greater tort liability by imposing duty to protect against natural hazards, such as rip currents on Florida beaches.
- Turned the state into the epicenter for smoking lawsuits by relieving individual plaintiffs of their typical burden of proof.
- Adopted a lax standard for expert testimony, allowing admission of junk science that would be rejected by federal courts and most state courts.
- Took away the ability of parents to sign a waiver of liability so that their child can participate in activities that have risks of injury.
- Disregarded a law that had successfully reduced insurance rates for Florida businesses by constraining attorneys' fees in workers' compensation cases.
- Expanded tort liability despite parties' entering a contract to govern remedies.
- Prohibited insurers from using a fee schedule to determine the reasonable value of medical services unless the schedule is specifically referenced in the policy.
- Voided a contract between doctor and patient that provided for arbitration of medical malpractice claims and limited noneconomic damages.

In many of these cases the court's pro-liability majority prevailed over vigorous dissents. In several instances – crashworthiness, parental waivers, slip-and-fall liability – the Florida Legislature eventually overturned the decision and restored balance. In other instances however, the Florida Legislature has not yet acted.

NO 'RATIONAL BASIS' FOR LIABILITY REFORM?

The most astonishing and troubling decision of all such decisions by the Florida Supreme Court came in March 2014 when it made plain its distaste for tort reform and some justices' utter disdain for the judgment of the

legislative and executive branches of government, as well as the voters who elect those policymakers. It did so by invalidating a law that had restored balance to the state's medical liability system, finding the legislature lacked a "rational basis" for enacting it.

The Florida Legislature enacted the law in 2003 as part of a package of reforms to address the state's horrid healthcare environment from which physicians had begun to flee. The law limited damages for pain and suffering in medical negligence actions to $500,000 and allowed up to $1 million in cases of catastrophic injury. Florida's limits are set at a level higher than many states that have enacted similar reforms.

Most courts have found that laws limiting noneconomic damages are constitutional. Some have struck them down. But what is most remarkable about the Florida Supreme Court's decision in *McCall v. United States* is its unique basis for doing so. In a fractured 5-2 decision, the court found that the legislature lacked a "rational basis" for enacting the law and keeping it in place. This standard is intended to respect the separation of powers, giving deference to elected officials by upholding laws if they serve any conceivable legitimate purpose. Also remarkable is that the Florida Supreme Court struck down the limit under the Florida Constitution on the same basis that the U.S. Court of Appeals for the Eleventh Circuit upheld the law under the U.S. Constitution.

Florida's medical liability reform was not hastily enacted by sleepy lawmakers in the waning wee hours of a legislative session. Nor was the limit on noneconomic damages tucked away on page 574 of a 1,500-page bill legislators voted for without reading. To its credit, Florida legislature enacted the limit upon the recommendation of a bipartisan governor's task force, numerous hearings, and an extensive legislative record documenting the impact of excessive liability on medical malpractice insurance rates and the availability of doctors in Florida. After the legislature enacted the 2003 reforms, a key part of which was the noneconomic damages limit, Florida's healthcare environment improved.


Judge Lewis

Fast forward to the *McCall* decision 11 years later. **Justice R. Fred Lewis**, joined by **Chief Justice Jorge Labarga**, revisited the legislative record, cherry-picked testimony and cited to websites to conclude that a medical malpractice crisis never existed in Florida in 2003 and that evidence did not prove limits on noneconomic damages reduce insurance premiums. In so doing, the justices substituted *their* policy views for the 119 legislators and a governor elected by at least 2.5 million individual Florida voters, to say nothing of numerous doctors and experienced citizens who had testified at hearings throughout the state.


Chief Justice Labarga

Justices Barbara Pariente, **Peggy Quince** and **James E.C. Perry** disagreed with the plurality's "independent evaluation and reweighing of reports and data, including information from legislative committee meetings and floor debate, as well as an article published in the Palm Beach Post newspaper, as part of its review of whether the Legislature's factual findings and policy decisions as to the alleged medical malpractice crisis were fully supported by available data." But, the concurring justices nevertheless found the law invalid for an equally-troubling reason. They concluded that no rational basis existed to justify *continued* application of the law.

In order to support this conclusion, Justice Pariente's concurring opinion relied on evidence showing increased retention of medical physicians, a significant drop in medical malpractice lawsuits, and lower noneconomic damages payouts. But as **Justice Ricky Polston's** refreshingly logical dissent observed, "[t]his information could just have easily (and perhaps more likely) supported the argument that the cap had its intended effect and that, if the cap was eliminated, the medical malpractice crisis would return with full force."

The Florida Supreme Court's *McCall* decision provides a law casebook example of the judiciary stepping outside its role as an arbiter of individual disputes and intruding into the policymaking role of the legislative and executive branches of government. While, technically, the court's decision only invalidated the law when applied in wrongful death cases involving multiple claimants, Florida courts will likely cite its reasoning to find the law inapplicable in any medical negligence case. As a result, Florida could see a resurgence of the problems that plagued its healthcare system more than a decade ago.

THE NEXT BIG TEST

The next issue likely to come before the Florida Supreme Court that will have a significant effect on the state's litigation environment is the legislature's adoption of a strengthened standard for expert testimony.

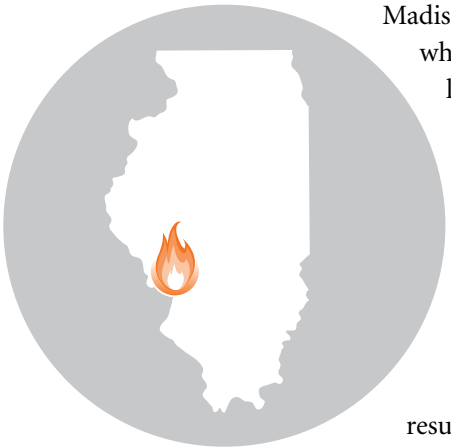
Florida's anything-goes standard for admission of purported expert testimony, known as the "*Frye/Marsh* test," contributed to the state's reputation for a poorly balanced civil justice system, as noted in past reports. Under this standard, most testimony offered by so-called experts is subject to little or no judicial scrutiny. Plaintiffs' lawyers could mislead jurors with junk science in product liability, medical malpractice and other complex cases.

In 2013, after a seven-year effort, Florida lawmakers adopted the more rigorous approach followed in federal and most state courts known as the Daubert standard. Now Sunshine State judges are taking a more active role in ensuring that the testimony offered by experts is based on sound science and actually enlightens jury deliberations. Although the plaintiffs' bar and its allies believe that Florida judges cannot handle the "gate-keeping" role in place elsewhere, the judges are routinely using the new standard. As the Third District Court of Appeal found in applying the Daubert approach, "The legislative purpose of the new law is clear: to tighten the rules for admissibility of expert testimony in the courts of this state."

In most states, controversy over the standard governing admissibility of expert testimony would have ended. But in Florida, whenever a law touches on the workings of the judiciary, the Florida Supreme Court has the final say on whether it will be followed. The court can decide to adopt the law "to the extent it is procedural" or opt not to follow it, essentially vetoing it. Historically, in most cases, the Florida Supreme Court has followed the legislature's lead on rules of evidence. After all, rules of evidence, particularly those governing expert testimony, are not technical filing requirements, but may determine the outcome of a case.

Soon after the legislature adopted the new standard, the Florida Bar's Code and Rules of Evidence Committee began to consider whether to recommend that the Florida Supreme Court adopt it as a rule. In October 2014, the 41-member committee (with 11 members absent) voted to recommend *against* the high court adopting the law as a rule of procedure by a two-vote margin. The high court should help restore some faith in Florida's civil justice system by respecting the policy judgment of lawmakers and warmly embracing the *Daubert* standard as a means to increasing fairness and predictability, and moving into the 21st-century mainstream on expert testimony.

#5 MADISON COUNTY, ILLINOIS



Madison County became synonymous with abusive litigation in the early 2000s when ATRA and groups such as the Manhattan Institute spotlighted how the largely rural county had become a magnet for nationwide class actions. The local court's civil docket bulged with the names of major corporations being hauled into seemingly sleepy Edwardsville, Illinois. Lawyers there made millions while the consumers they purportedly represented received coupon recoveries. That situation changed significantly after Congress enacted the Class Action Fairness Act (CAFA) in 2005, expanding federal court jurisdiction over multi-state class actions, and the Illinois Supreme Court stepped in to address local pro-plaintiff rulings.

But plaintiffs' lawyers have gone back to the future in their latest effort to resurrect a multi-*billion* dollar class-action verdict thrown out years ago by the state's high court. Meanwhile, Madison County continues to function as a nationwide claims-processing center for asbestos lawsuits, most of which have no connection to the county or anywhere else in Illinois. As the *Chicago Tribune* observed, "The 5th Judicial District, and Madison County in particular, is a magnet for personal injury and product liability cases because the courts are notoriously plaintiff-friendly."

'PRICE' IS WRONG

"The Price is Right," a still wildly popular television game-show implicitly referenced elsewhere in this report, first hit the airwaves in 1956. A class action lawsuit in Madison County that resulted in a jackpot verdict seems to have gone on nearly as long. That suit sought damages on behalf of all Illinois residents who had purchased "light" cigarettes since their introduction in 1971. After a three-month trial in 2003, now-retired Madison County Circuit Court **Judge Nicholas Byron**, sitting without a jury, reached a whopping $10.1 billion verdict in *Price v. Philip Morris*. He was no Bill Cullen, Bob Barker or Drew Carey, however, and the Illinois Supreme Court effectively canceled his show in 2005 when it overturned the verdict. But plaintiffs' lawyers have since updated the format and brought it back for a 2014 encore.

Here's the back-story: In 2005, the Illinois Supreme Court found that Philip Morris was not subject to liability under the state's Consumer Fraud Act because the Federal Trade Commission (FTC) allowed use of the terms "light" and "low tar" in marketing cigarettes. The U.S. Supreme Court declined to hear the case in 2006. Two years later in 2008, the plaintiffs' lawyers, still hoping to claim their grand-prize of about $1.8 billion in attorneys' fees, seized on a U.S. Supreme Court ruling in a different case, *Altria Group Inc. v. Good*, to petition the Madison County court to reopen *Price*. The plaintiffs argued that in *Good*, the U.S. Supreme Court, relying in part on the position of the FTC, found that federal law regulating cigarette advertising did not preempt Maine's consumer protection law – a distinctly different issue than application of a specific state consumer statute's regulatory compliance provision.

To his credit, Madison County Circuit Court **Judge Dennis R. Ruth** ruled that too much time had passed to revisit the *Price* verdict, but Illinois's Fifth District appellate court reversed Judge Ruth in 2011, instructing him to consider the merits of the plaintiffs' motion. On remand, Judge Ruth carefully evaluated whether the FTC's position, expressed in a brief filed in *Good*, would have led a divided Illinois Supreme Court to reach a different outcome. He found that the plaintiffs did not meet their burden of showing that the new evidence would make it "more probably true" that they would have prevailed.

In April 2014, the Fifth District again reversed the trial court. Astonishingly, it reinstated the decade-old $10.1 billion verdict. So Philip Morris has once again appealed to the Illinois Supreme Court.

This in turn has led the plaintiffs' lawyers to engage in desperate tactics aimed at the Illinois Supreme Court **Justice Lloyd Karmeier**. Why? In 2005, newly seated Justice Karmeier not only joined the majority that dismissed the state law-based claim on grounds that cigarette advertising is federally regulated, he also would have rejected it because, his concurrence reasoned, class members had not incurred any actual loss. Had they not purchased light cigarettes, they simply would have purchased other cigarettes at the same price.

So the plaintiffs' lawyers decided to try to prevent Justice Karmeier from hearing the pending appeal. First they tried desperately to force Justice Karmeier to recuse himself from the case. But the plaintiffs' lawyers have been unable to point to any campaign finance records supporting their accusation that Phillip Morris played an undue role in Justice Karmeier's initial election to the high court in 2004.

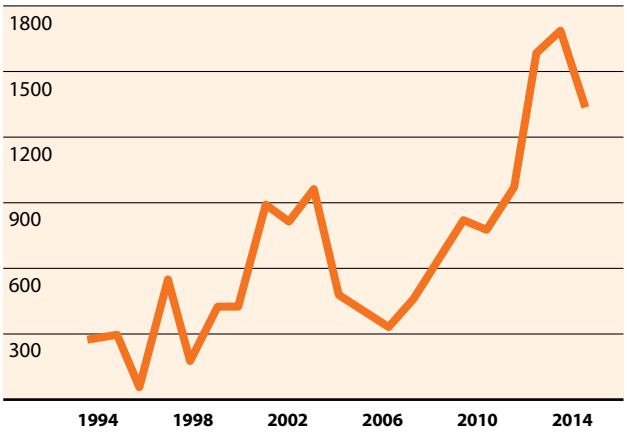
With failure of their recusal-forcing efforts, the plaintiffs' lawyers adopted a new strategy: removing Justice Karmeier from the court altogether. They launched an "October surprise," suddenly spending millions on negative advertising in an effort to defeat him in his 2014 retention election.

According to the *Bellville News-Democrat*, the anti-Karmeier campaign war chest included $1.2 million from lawyers affiliated with **Korein Tillery**, the firm that stands to profit most from reinstatement of the *Price* judgment. Other firms contributed thousands of dollars to the anti-Karmeier effort. But despite the plaintiffs' vast expenditures and smear tactics, including an effort to link Justice Karmeier to the accidental death of a state trooper in 2012, voters in Southern Illinois retained him in November.

Thus the stage is now set for a final episode of the *Price* litigation. At stake is not only one of the most excessive and extraordinary verdicts in history, originating in Madison County's heyday as a haven for consumer class actions, but also the finality of court rulings. If the resurrected verdict is sustained, Illinois trial courts will have a green light to second-guess decisions of higher courts based purely on speculation as to how later developments may have affected past evaluations of the law.

STILL THE EPICENTER FOR ASBESTOS LITIGATION

ASBESTOS CLAIMS FILED ANNUALLY IN MADISON COUNTY



Personal injury lawyers from across the country are still flocking to Madison County to file asbestos claims. In fact, roughly 90% of plaintiffs who file in Madison County come from outside Illinois. They drag with them scores of defendants they name in each lawsuit, hoping enough of those defendants will settle out of court and thus help sustain the lawsuit industry's asbestos business model.

Thanks primarily to Judge Byron's plaintiff-friendly ways, Madison County had developed early last decade a nationwide reputation as a welcoming venue for asbestos claimants. Asbestos filings skyrocketed from a low of just 65 in 1996 to 953 in 2003. Asbestos trials between 2000 and 2003 led to news-making verdicts of $16 million, $34 million and $250 million.

In July 2004, Judge Byron handed the asbestos docket off to also now retired **Judge Daniel Stack**, who showed an initial willingness to transfer or dismiss claims that reasonably should have been heard elsewhere. And when a new, reform-minded **Chief Judge Ann Callis** took the reins in 2006, many optimistically believed that Madison County's civil courts were poised to become more fair and less likely to produce outlier verdicts. Asbestos lawsuit filings dropped appreciably. These and other promising signs led ATRA to move Madison County from the rankings of Judicial Hellholes to this report's less onerous Watch List between 2007 and 2009, even as the court began to experience a resurgence of asbestos claims. Sadly, the nascent reform movement ultimately failed to launch, and the county regained its infamous standing as a Judicial Hellhole in 2011 when **Judge Barbara Crowder** inherited the largest asbestos docket of any state court in the nation.

Judge Crowder quickly faced controversy for accepting generous campaign contributions from three local asbestos law firms just days after she'd allocated to them valuable trial dates – valuable because possession of a trial date gives asbestos plaintiffs another big advantage in extracting settlements from the defendants corralled in their lawsuits. Judge Callis was forced to remove Judge Crowder from the asbestos docket, replacing her with **Judge Clarence Harrison**. In March 2012, he replaced the trial date-assignment system that had given preferential treatment to local asbestos firms.

But rather than stem the flow of new lawsuits, abandonment of the trial allocation system opened the door to new players from outside the county. The asbestos docket doubled from two years earlier. New York-based law firm, Napoli Bern Ripka & Shkolnik, opened an office in Madison County and quickly became the "new king" of asbestos lawsuits, surpassing the local firms that had long-dominated the litigation. The Napoli firm filed a surge of cases claiming that asbestos exposure resulted in lung cancer, rather than the conditions more closely linked to asbestos: mesothelioma and asbestosis. While the number of people with mesothelioma is shrinking and competition is fierce among law firms to represent such plaintiffs, lung cancer is more common and presents a big new business opportunity for plaintiffs' lawyers willing to allege their client's cancer was caused by exposure to asbestos and not other, more obvious possibilities.

These lung cancer lawsuits contributed to a record number of asbestos claims in Madison County in 2012 and

2013. In fact, in 2013, the Napoli firm filed one-third of the 1,678 asbestos lawsuits filed in the county, most of which were lung cancer cases. The firm's senior partner, Paul Napoli, views the increased litigation as benefiting the county's economy – more filing fees for the court, more taxes from and jobs at satellite law offices, and more out-of-town lawyers staying at hotels and eating at local restaurants.

Judge Stephen Stobbs, who took over the asbestos docket in late 2013, doesn't appear inclined to make his court any less attractive to the nation's asbestos plaintiffs. This year, only one-half of 1% of new Madison County asbestos lawsuits were filed on behalf of Madison County residents.

Judge Stobbs has also proved reluctant to transfer or dismiss cases in which the plaintiffs never lived or worked in Madison County (or anywhere else in Illinois). In June 2014 he denied several defendants' motions to dismiss claims filed by the Napoli firm on behalf of plaintiffs hailing from states such as Alaska, Colorado, Tennessee, Texas and Utah. As a result of his decision, which runs contrary to Illinois Supreme Court precedent, some defendants have reportedly developed a sort of Stockholm syndrome, like kidnapped heiress Patty Hearst did decades ago. They've given up efforts to escape their judicial captors in Madison County and no longer resist with motions to have their cases with no relation to the jurisdiction transferred or dismissed. One observer said of Judge Stobbs' ruling: "Madison County sent the message – loud and clear – that it is open for business and welcomes new filings from out of state." The more things change, the more they stay the same.

Unfair yet also typical, Madison County still sets numerous asbestos cases for trial each week, delighting plaintiffs' lawyers who know defense counsel can't possibly prepare for multiple trials simultaneously and thus will, again, be more inclined to offer a settlement upon concluding that resistance is futile. For example, in an October 21 Order, Judge Stobbs set 50 individual asbestos cases filed by Gori, Julian & Associates against John Crane, Inc. for a single day, December 8, 2014. And that number does not account for other cases filed by the same or other plaintiffs' firms that were already set for trial on the same day against the same defendant. There were 181 asbestos cases set for trial in a single Madison County courtroom on December 1. Only one of the plaintiffs involved is from Madison County. Just 15 are from Illinois.

As one local defense attorney opined, "Without a commitment to dramatically reduce the number of trial settings, and an equal commitment to making sure that we are spending the resources of the county and all the parties on cases that really belong in Madison County, I don't see that there's going to be a lot of change in the current situation." Indeed, Judge Stobbs had already set 1,074 asbestos cases for trial in 2015 by mid-October of 2014.

Despite these significant concerns, the only two cases that have gone to trial under Judge Stobbs, in November 2013 and February 2014, resulted in defense verdicts. This continues a trend of nine consecutive defense victories at trial there since 2005. Even if Madison County judges are willing to embrace plaintiff lawyers' overreach, it's encouraging to see that increasingly savvy jurors are having none of it. If only more defendants would fight back by going to trial. Who knows? Perhaps they could finally escape the courts and personal injury lawyers holding them hostage in Madison County.

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But back to reality. Although mid-year statistics indicated that Madison County's new asbestos filings in 2014 were on pace to dip a bit from 2013's record high, they're still likely to remain about double the 20-year average. Furthermore, plaintiffs' lawyers will now have more potential clients thanks to the lame-duck state legislature's parting gift, an amendment to the state's 10-year statute of repose for lawsuits related to building construction that exempts asbestos claims. And if all this isn't sufficiently discouraging, a new Madison County associate judge, appointed to fill a vacancy in September 2014, is **Martin Mengareli**, a personal injury lawyer who arrives from Simmons Hanly Conroy LLC, which happens to bill itself as the "Mesothelioma Law Firm."

#6 MISSOURI SUPREME COURT

The "Show-Me-Your-Lawsuits" state has quickly ascended the list of most troublesome jurisdictions in the country thanks to disappointing decisions by the high court on both punitive damages limits and workers' compensation laws. These are just the latest rulings that have resulted in increased liability exposure for businesses across the state and across the country. From endorsing a radical approach to medical monitoring claims in 2007 to reversing in 2014 a commonsense jury verdict that found the Kansas City Royals were not liable for injuries allegedly suffered by a spectator during the team mascot's traditional hotdog toss, Missouri's high court is proving itself an implacable force for ever expanding liability.

STRIKING DOWN ANOTHER LIMIT ON DAMAGES

In September 2014, the Missouri Supreme Court struck down the state's statutory limit on punitive damages when applied to common law claims in *Lewellen v. Chad Franklin National Auto Sales North*. The court ruled that the statute limiting punitive damages to the greater of $500,000 or five times the amount of the total judgment infringed on the right to a jury trial under the Missouri Constitution.

The decision is an outlier. Most states limit punitive damages, which punish a defendant rather than compensate a plaintiff for a loss. Some states allow them rarely or not at all. Federal and state courts have consistently found that lawmakers can take action to keep awards for punitive damages from running wild. In fact, the U.S. Supreme Court has recognized that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered," a principle reflected in the Missouri statute.

But Missouri's high court relied on a technical interpretation of the state constitution, finding that a statutory limit on punitive damages would restrict the right to a jury trial of common law claims as it existed in 1820. The court also found, incongruously, that while the legislature has the ability to specify remedies available in certain cases, it does not have the power to limit them.

This decision marks a stark change for the high court. In 2012, it reasonably upheld the limit on punitive damages in the context of the Missouri Merchandising Practices Act (the state's consumer protection law), finding that the legislature "had a right to set limits on the substantive remedies permitted under that statute, including the limit of punitive damages that could be recovered." However, then-**Chief Justice Richard Teitelman** issued a dissenting opinion that provided a roadmap for the 2014 ruling. In his dissent, Justice Teitelman focused on the word "inviolate" in the constitution when discussing the constitutional right to a trial by jury. According to Justice Teitelman, the word has a simple definition; it means "free from change or blemish, pure or unbroken."

Of course, the Missouri Supreme Court is no stranger to striking down statutory limits on damages. In 2012 the court nullified a $350,000 limit on noneconomic damages in medical liability lawsuits. In *Watts v. Cox Medical Centers* a 4-3 majority hung its hat on a similar theory, holding that the state constitution's right to a jury trial does not allow limiting damages in lawsuits arising under common law. *Watts* departed from a Missouri Supreme Court decision issued just months earlier that upheld the noneconomic damages limit in the context of a wrongful death case, a statutory action.

Returning to the recent case of *Lewellen*, not only did the high court strike down the limit on punitive damages, it permitted an excessive award. The court allowed punitive damages that were 40 times higher than the plaintiff's actual damages, ignoring U.S. Supreme Court precedent instructing that punitive damages awarded in

excess of a 9:1 ratio very rarely satisfy due process. The Missouri Supreme Court determined that the trial court erred in applying the $500,000 statutory cap, reinstating a $1 million award for punitive damages where the plaintiff's actual losses totaled just $25,000.

DECADES OF WORKERS' COMP LAW JETTISONED

In addition to striking down the state's limit on punitive damages, Missouri's high court in 2014 increased the liability exposure of employers by opening the door to more retaliatory discharge claims.

Under the Court's decision in *Templemire v. W & M Welding*, an employee can bring a retaliatory discharge action if he or she filed a workers' compensation claim and then asserts the claim played a part in motivating the employer's action. The ruling overturned three decades of precedent, altering the standard in place since 1984. This is a significant shift from the prior standard in Missouri, which permitted a retaliatory discharge claim when filing a workers' compensation claim was the "exclusive cause" of a termination decision. The decision is the latest in a series of Missouri Supreme Court cases that have fundamentally shifted the state's employment law to favor plaintiffs.

After all, *Templemire* now puts an employer that needs to replace an employee who can no longer carry out his or her duties because of an injury under threat of significant liability. To wit, John Templemire was injured at work when a large metal beam fell and crushed his foot. When he was finally allowed to return to work, it was only on a restricted basis. He could no longer perform his previous responsibilities and duties. His employer tried to accommodate him by offering "light duty," even though there really wasn't any light duty work to be done when Templemire returned. After Templemire was unable to perform even simple duties and then had an intense confrontation with his boss, he was fired and later filed his retaliatory discharge claim. Jurors returned a verdict in favor of his former employer, but the Missouri Supreme Court reversed them. The court remanded the case for a new trial in which the judge would instruct the jury with the more expansive standard.

Under this new standard, an employer's decision to replace an employee may have nothing to do with exercising workers' compensation rights and everything to do with job performance and meeting the employer's needs. But now, the employee only has to show that a workers' compensation claim possibly contributed to the discharge decision in order to bring a lawsuit.

THE 'MISSOURI PLAN' (TO ADVANTAGE PLAINTIFFS' LAWYERS)

Missouri's civil litigation climate is quickly deteriorating and the root of much of the problem lies with the way in which the state's judges, at every level, are appointed. The so-called Missouri Plan was adopted in 1940 and was effectively nonpartisan until about 30 years ago. But individuals plainly aligned with the plaintiffs' bar have since captured the appointment committee with predictable results.

Missouri's appellate judges are appointed by a seven-member panel. The Appellate Judicial Commission's membership is set by the Missouri Constitution. It includes three non-lawyers appointed by the governor, three lawyers elected by the Missouri Bar Association, and the chief justice of the Missouri Supreme Court. In practice, this purportedly "nonpartisan" court appointment plan is ensuring that the liability-expanding interests of plaintiffs' lawyers are disproportionately represented.

The three lawyers currently on the committee are two personal injury lawyers, **Thomas M. Burke** and **Donald E. Woody**, and a criminal defense lawyer, **J.R. Hobbs**. Two non-lawyers appointed by Governor Jay Nixon are **Edward "Nick" Robinson**, a union representative from St. Louis, and **Cheryl Darrough**, a campaign staffer for the Democratic Party, both of whom consistently seek to appoint liability-expanding judges. The only committee member favoring reasonable limits on liability is **John Gentry**, a businessman, appointed by the previous governor, Matt Blunt. Naturally, Gentry is routinely out-voted.

#7 LOUISIANA

The shameless feeding frenzy initiated by personal injury lawyers and enabled by a plaintiff-friendly federal judge that began in the wake of 2010's Deepwater Horizon oil spill continues, seemingly unabated, and other long-standing problems in civil courts there combine to qualify Louisiana as a Judicial Hellhole for another year. But its drop in the rankings from #2 last year to #7 shows that progress is being made – if not so much by the courts themselves than by lawmakers determined to improve the Pelican State's reputation for civil justice. In fact, several positive tort reform laws enacted by Louisiana in 2014 are outlined among other legislative Points of Light on p. 50. One of them, in particular, was designed to put an overdue end to the "Buddy System."

HIGH COURT STRIKES BLOW TO 'BUDDY SYSTEM'

AG Caldwell

Before the legislature got around to reining in **Attorney General James "Buddy" Caldwell**'s notorious "Buddy System," wherein the AG had long made a practice of hiring his friends among the personal injury bar to sue deep-pocket corporate defendants on behalf of the state so those friends in turn could win big fees and make generous contributions to his next campaign, Louisiana's Supreme Court in January 2014 struck a preliminary blow.

A 4-3 high court majority overturned a $258 million verdict in the state's lawsuit against a drug company that Caldwell and his hired guns alleged had downplayed, in a letter to doctors, the risk of diabetes associated with an anti-psychotic medicine, Risperdal. The decision also wiped out $70 million in fees and $3 million in costs and expenses that the court additionally awarded to the private-sector plaintiffs' lawyers who'd brought the idea for the lawsuit to the attorney general's office in the first place.

In fairness to Caldwell, this particular case, *Caldwell v. Janssen Pharmaceutical Inc.*, was initiated by his predecessor, **Charles Foti**. But Caldwell ultimately embraced it as his own and had since made it a model for his own tenure as attorney general.

"[W]e find the Attorney General failed to establish sufficient facts to prove a cause of action against the defendants under [the state's Medical Assistance Programs Integrity Law] because no evidence was presented that any defendant made or attempted to make a fraudulent claim for payment against any Louisiana medical assistance program within the scope of MAPIL," wrote **Justice Greg Guidry** for the majority. "Even if the defendants misrepresented the efficacy or safety of their product to Louisiana doctors, there is simply no evidence in this record, and moreover no allegation, that this misrepresentation in fact caused any health care provider or his billing agent to knowingly present a claim for payment that is false, fictitious, untrue or misleading in regard to any material information," Guidry added.

More coverage of this important Louisiana Supreme Court decision was offered by the *Associated Press* and *Bloomberg News*.

LOUISIANA'S CONTINUING CIVIL JUSTICE PROBLEMS

While the days of the pay-to-play "Buddy System" appear to be over, a number of less publicized but important problems with Louisiana law persist in encouraging lawsuits, often at the expense of consumers and jobseekers. And since a 2014 survey of Louisiana voters showed that strong majorities favor continuing civil justice reforms, here are a few issues that lawmakers might look to tackle next:

Jury Trial Threshold Many Louisianans are being denied their fundamental right to a trial by jury thanks to a unique law that sets the jury-trial threshold for damages sought by a plaintiff at $50,000. Lawsuits seeking less are heard only by a judge. And when personal injury lawyers develop a cozy relationship with particular judges, it's no surprise that they file plenty of smaller claims in the jurisdictions where those judges sit. This law effectively takes citizen jurors, who might actually return defense verdicts from time to time, out of the mix, and nearly 7 in 10 voters in the survey noted above don't like it.

Why? Because when plaintiffs' lawyers have good reason to believe they'll win cases tried only by friendly judges, they file more lawsuits. And the frequency of such lawsuits is reflected, for example, in Louisiana's auto insurance rates – some of the highest in the country. And it should be noted by way of comparison that 36 states have no threshold for civil jury trials. Of the 14 that do, Louisiana's is by far the highest. Legislative efforts to eliminate the $50,000 threshold failed in 2014 as trial-lawyer lobbyists vigorously opposed them. But lawmakers should try again.

Direct action Louisiana's direct action statute allows an injured person, or his survivors or heirs, to assert a claim against both the insured and its insurer. In some instances, the direct action statute also allows a lawsuit to be brought against the *insurer alone*. Again, this law, which encourages litigation, is unique to Louisiana. Common law in many other states prohibits a plaintiff from suing a tortfeasor's insurer directly.

Duplicative Damage Awards: Louisiana is one of only seven states in the nation that awards hedonic damages for the "loss of enjoyment of life." Until a 2006 Louisiana Supreme Court ruling, hedonic damages were considered to be duplicative to "pain and suffering." But in *McGee v. A C and S Inc.*, the high court's ruling allowed awards for hedonic damages as separate from other intangible losses, such as pain and suffering.

Shameless Judges There's only so much lawmakers can do about judges who shamelessly curry favor with wealthy litigants, but voters who elect such judges could take a stronger stand. If Louisianans wish someday to boost their state up out of the Judicial Hellhole it's currently mired in, they might start by paying more attention to judges like 18th Judicial District Court Judge J. Robin Free. He took an all-expenses-paid trip to a lavish hunting ranch owned by a Texas trial lawyer, who only days earlier had settled a lawsuit in Judge Free's court for $1.2 million. On December 9, 2014, the state's high court found the actions improper, but only slap-on-the-wrist sanctions will be applied to the judge, who's poised to begin another six-year term on the bench.


Judge Free

FEDERAL, STATE LITIGATION TARGETS ENERGY PRODUCERS

Of course, no discussion of what makes Louisiana a Judicial Hellhole is complete without pointed mention of the tort bar's steady, self-serving assault on the state's energy industry. That assault has received renewed attention since the Deepwater Horizon oil spill.

"Within weeks of the epic 2010 oil spill in the Gulf of Mexico, BP apologized, acknowledged partial blame, began paying claims and cleanup costs, and sought to settle lawsuits rather than fight in court," began a September 2014 update of this sorry saga written by *BloombergBusinessweek* correspondent Paul Barrett. "Yet after spending more than $28 billion so far to make amends and dilute the public-relations debacle, the London-based oil giant remains enmeshed in litigation."

Last year's Judicial Hellholes report and countless media accounts since have documented the blatant fraud perpetrated by plaintiffs' lawyers who, on behalf of businesses that suffered no harm remotely traceable to the Gulf oil spill, have nonetheless sought to squeeze free money out of the Court Supervised Settlement Program that BP voluntarily established. The fund has been too easily exploited under the administration of veteran Louisiana lawyer **Patrick Juneau**. He was appointed to administer the fund by federal **District Judge Carl Barbier**, a past president of the state's trial lawyers association and the judge presiding over all oil spill-related federal litigation ongoing in New Orleans.

But BP has tried to fight back. In September 2014 it filed a motion with Judge Barbier seeking to have Juneau

removed as administrator of the claims fund, citing what BP sees as a conflict of interest, since Juneau, prior to his appointment as administrator, had represented the state in claims against BP. "With billions of dollars at stake, the Court, the parties, and the public rightly expected that the Claims Administrator would be a neutral, not a partisan," the motion reads. "Because he is Court-appointed and functions as an arm of the Court, he must be a neutral, free of a disqualifying conflict of interest. Mr. Juneau, however, was not a neutral when the Court appointed him."

No surprise, Judge Barbier denied BP's motion in November. But BP is appealing that denial to the Fifth Circuit. Meanwhile, it had petitioned the U.S. Supreme Court to intervene in a separate class action filed against it by various bayou opportunists calling themselves the Plaintiffs' Steering Committee. BP wanted the high court to review certification of the class, arguing in its petition:

> "The Fifth Circuit improperly interpreted the certified class in a way that expanded it to include parties never injured…. The class yokes together many claimants that suffered spill-related losses with numerous others whose alleged losses are entirely unrelated to the spill, thereby awarding damages without any connection to the theory of liability."

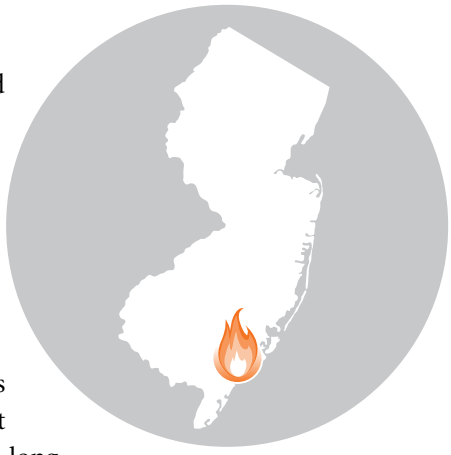
But BP's hopes that the high court would ride in to save the day were dashed on December 8 when the justices, without comment, declined to review lower court rulings.

Of course, in addition to federal litigation targeting BP, "legacy lawsuits" based on state law and similarly aimed at energy producers' deep-pockets continues apace, as well. To its credit, the Fifth Circuit in February 2014 cited preemption by federal law in upholding a lower court's dismissal of 11 Louisiana parishes' lawsuits against BP. But lawsuits by two parishes aimed at a broader swath of the energy industry effectively got a green-light to proceed with a home-field advantage in state court when a federal judge ordered them returned there after the defendants had sought to have them tried in federal court. And despite legislative efforts to end it, controversial "coastal erosion" litigation launched against scores of energy companies under the questionable authority of the South Louisiana Flood Protection Authority-East also continues. So when it comes to suing the energy industry in Louisiana, like the late, great **Jimmy Durante** might have said, "Everybody wants to get in on the act."

WATCH LIST

The Judicial Hellholes project calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from Hellholes status as their respective litigation climates degrade or improve. By correcting such imbalances, judges and policymakers can avoid having their jurisdiction's designated as a Judicial Hellhole. Unlike the Hellholes rankings, Watch List jurisdictions are now presented alphabetically and do not reflect their relative level of concern.

ATLANTIC COUNTY, NEW JERSEY



The odds of hitting a jackpot in Atlantic City lengthened significantly in 2014, and not simply because a number of casinos there closed their doors. The reputation for imbalance that Atlantic County courts had developed for many years suddenly has a chance to evolve for the better, as a particularly plaintiff-friendly trial judge has been kicked upstairs to the appellate bench and most of the court's mass tort litigation was moved elsewhere. So it may be time for the plaintiffs' bar to cash in its chips and move on. The high-rolling hey-day, when litigation tourists from across the country flocked here, may finally be over.

For several years, Atlantic County grabbed attention as one of the nation's worst jurisdictions in which to defend a lawsuit. It became known as a magnet for litigation targeting the pharmaceutical industry, long crucial to New Jersey's economy. Defendants blamed the plaintiff-embracing environment on **Judge Carol E. Higbee**, who led the mass tort docket. Judge Higbee had presided over the county's civil division since 2005.

Judge Higbee

But Judge Higbee became entangled in controversy when a drugmaker accused her of bias in favor of Accutane plaintiffs, as documented in last year's report. Judge Higbee refused to recuse herself from the cases in February 2013. Early in 2014, the New Jersey Supreme Court denied a request to remove her from hearing the litigation. Instead, **Chief Justice Stuart Rabner** essentially ordered all involved to "play nice." "As in all cases, we expect from counsel and the parties … their cooperation with one another and with the court whenever possible," he wrote in a January 14 order denying Roche's appeal. "We also expect that trial court judges will treat all parties with the utmost respect and evenhandedness while presiding over litigation," he concluded in returning the case to the trial court "for further proceedings consistent with these expectations."

In what now appears to have been a more subtle and diplomatic way of effectively removing Judge Higbee from Accutane litigation, Chief Justice Rabner, just two months after the high court denied Roche's appeal, "temporarily" reassigned Judge Higbee from the Atlantic County Superior Court to the Appellate Division. Initially she was to serve an appellate stint between April 14 and June 20, but the high court then ordered the assignment to continue indefinitely beginning August 1. Days later, Judge Higbee's colleagues on the appellate division reversed several of her Accutane rulings.

The cases overseen by Judge Higbee at first remained in Atlantic County when **Judge Nelson Johnson** took over as the multicounty litigation judge. (Judge Johnson, who has served in the court's civil division since 2006, also happens to be the author of "Boardwalk Empire: The Birth, High Times and Corruption of Atlantic City").

But things changed in September, when **Judge Julio L. Mendez** sent a letter to attorneys involved in mass tort litigation informing them that the New Jersey Supreme Court approved the transfer of most of Atlantic County's mass tort litigation to Bergen and Middlesex counties. The transfer includes over 13,000 pharmaceutical and medical device lawsuits. Only the Accutane cases will remain in Atlantic County, and Judge Nelson dismissed 600 more of them on December 9, finding that plaintiffs had failed to respond to discovery orders.

Make no mistake; New Jersey remains a hotbed for litigation. The state's mass tort litigation has not diminished, but it is more dispersed. The Garden State has one of the most pro-plaintiff consumer laws in the nation, making it a place where thousands of lawsuits bloom. And though **Governor Chris Christie** pins responsibility for the lack of needed tort reform on **Senate Judiciary Committee Chairman Nick Scutari**, he'll needs to utilize his gubernatorial bully pulpit more aggressively if he expects to persuade New Jersey residents to support him in rolling recalcitrant lawmakers.

MISSISSIPPI DELTA

Mississippi's litigation environment has significantly improved since the state became known as the "Lawsuit Capital of the World" in the early 2000s. Legislative reforms, gubernatorial support, and judicial action led to the remarkable turnaround. But the 18-county Delta region has resisted the spirit of reform and retains a reputation for favoring plaintiffs. Trial courts in the state's northwest are routinely overturned by the Mississippi Supreme Court – and for good reason.

This year, the state's high court has decided 23 civil cases, about a quarter of which came from the Delta region. In five of the six Delta cases, the high court reversed the trial court or found the trial court erred but affirmed the outcome on different grounds.

For example, in *Entergy Mississippi, Inc. v. Acey*, the Tunica County Circuit Court took it upon itself to expand liability for negligent infliction of emotional distress. Courts elsewhere apply strict requirements for "bystander liability" claims, in which one person claims emotional distress stemming from an injury to another. Without such rules, defendants would be subject to infinite liability by family members, friends and others. For that reason, most courts generally limit such claims to individuals who are nearby and contemporaneously observe an injury to a close family member. The Delta trial court judge disregarded this time-tested standard and allowed a mother who was not present when her child climbed a cotton picker and touched a power line to proceed with an emotional harm claim. The trial court judge said the case "cries out for expansion" of the law, but the high court pulled the reins. Defense lawyers tell ATRA that trial judges' willingness to rewrite the law willy-nilly is prevalent in the plaintiff-friendly Delta region.

Hospital MD, LLC v. Larry also illustrates the Delta's pro-plaintiff attitude. There, the Yazoo County Circuit Court allowed a medical malpractice claim to proceed even though the plaintiff had failed to provide soon enough a required pre-suit notice of the claim to an emergency room doctor's employer and filed the lawsuit after the two-year statute of limitations expired. The Mississippi Supreme Court found the trial court improperly excused the plaintiff from missing the filing deadline. A "discovery rule" did not toll the statute of limitations, the high court found, when the plaintiff was well aware of his injury and the doctor allegedly responsible at the time of treatment. That the plaintiff was unsure of the doctor's employer did not authorize the trial court to allow an untimely lawsuit.

The jury selection process is also a source of anxiety for defendants in the Mississippi Delta. ATRA has received reports that some trial court judges have systematically excused prospective jurors on the ground that they would need to miss work in order to serve. This is contrary to state

law, which says the jury must be "selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens have the opportunity … and an obligation to serve as jurors…." Mississippi law does allow courts to excuse prospective jurors for "undue or extreme … financial hardship," a high standard. This high standard is met only if a potential juror would "[i]ncur costs that would have a substantial adverse impact on the payment of the individual's necessary daily living expenses." Yet some trial judges are reportedly dismissing any prospective juror that has a job. The lack of their perspective may deprive civil defendants of a fair trial.

MONTANA

PUNITIVE DAMAGES LIMIT UNDER ATTACK

The plaintiffs' bar has launched an all-out offensive against Montana's statutory limit on punitive damages, and only the state's high court, poised to rule on the limit's constitutionality, can save the day.

In January 2014, a jury in Butte, Montana awarded a plaintiff $52 million – $41.5 million in compensatory damages and $10.5 million in punitive damage – in a contractual dispute between two businesses. The trial court judge entered judgment for that amount, refusing to trim the punitive damages award to $10 million, as required by Montana law. That law provides that a punitive damages award may not exceed the lesser of $10 million or 3% of a defendant's net worth. But District **Judge Kurt Krueger** found the limit on punitive damages violated the right to a trial by jury. The Montana Supreme Court is considering this case, *Masters Group International v. Comerica Bank*, and held oral arguments on September 26, 2014.

As discussed in the Missouri section of this report, most courts have upheld limits on punitive damages. The right to a jury trial preserves the role of the jury in deciding factual disputes; it does not affect the power of the legislature to establish the remedies available for a particular cause of action. The Montana Legislature understood that it is sound public policy for the state to constrain punitive damages within reason so as to avoid excessive punishments and windfall awards.

No case more clearly demonstrates the need for such reasonable constraints than one in which a $248 million punitive damages award was entered against an automaker. This gargantuan 2014 award stemmed from a car accident involving a Hyundai Tiburon in which two teenagers were sadly killed. But while the plaintiffs claimed the crash was caused by a defective steering knuckle, Hyundai presented evidence that the teenage boys had purchased fireworks prior to the accident and were playing with them at the time of the crash. The explosion, Hyundai claimed, distracted the driver and caused him to lose control of the vehicle. According to Hyundai, **Judge Deborah Kim Christopher** made a series of one-sided evidentiary rulings that kept the jury from hearing evidence critical to its defense while allowing misleading information from the plaintiffs' lawyers.

The Lake County award was reportedly the sixth largest in the entire country so far in 2014. In September, Judge Christopher reduced the award to $73 million. She did so by multiplying the plaintiffs' $8.1 million in compensatory damages by a factor of nine—the highest level arguably permissible under a broad reading of U.S. Supreme Court punitive damages jurisprudence. Hyundai requested that the judge further reduce the verdict to conform to the statutory limit, but she refused, finding the law unconstitutional.

Along with Comerica, Hyundai appealed its punitive damages case to the Montana Supreme Court. But while waiting to have its case heard and incurring a ridiculous 10% post-judgment interest rate on the trial verdict (more on this below), the carmaker cautiously decided to cut its losses by settling the case for an undisclosed sum. So the fight to save a perfectly reasonable statutory limit on punitive damages and keep the Treasure State from becoming a treasure chest for trial lawyers now comes down to the *Comerica* case. The court considered oral argument on September 26, and a decision is expected in 2015.

STACKED DECK?

Meanwhile plaintiffs' lawyers often choose to file their claims in two particularly plaintiff-friendly Montana counties: Cascade County and Great Falls County. Here, judges have developed a reputation for allowing plaintiffs' attorneys to select sympathetic jurors who they believe will vote in their favor. During jury selection, some judges permit plaintiffs' attorneys to strike jurors for cause if they concede an unfavorable view of excessive litigation or liability in general, but defense counsel are not afforded comparable license.

For example, in *Dannels v. BNSF Railway Co.*, the question was whether a railroad worker's back injury was caused by the cumulative stress from his work over 20 years or was unrelated to his job. Since plaintiffs' lawyers sued a railroad, Montana's venue law allows them to choose any county in the state to file their lawsuit. They chose Cascade County and, during *voir dire*, District Court **Judge Kenneth Neill** granted the plaintiff's motions to strike potential jurors who valued personal responsibility and expressed skepticism about claims made in lawsuits blaming employers for injuries. The case resulted in a $1.7 million verdict.

GOVERNOR POSES OBSTACLE TO LEGAL REFORM

The judiciary is not the only branch of government that is friendly to plaintiffs' lawyers in Montana. **Governor Steve Bullock** has served as a roadblock to sensible reforms that would help nurture business growth and economic development in the state.


Gov. Bullock

At the end of 2013, for example, Governor Steve Bullock vetoed bipartisan legislation setting a reasonable rate for interest following a judgment. H.B. 225 would have set post-judgment interest at the Federal Reserve System prime interest rate plus 2%. Instead, Governor Bullock's veto kept in place the state's long outdated and ultimately coercive rate of 10%, which is now far higher than market rates and among the highest post-judgment interest rates in the country. Over the past few years, several states have enacted interest rate reforms to allow litigants wishing to pursue appeals to do so without risking bankruptcy.

NEVADA

The reputation of the Silver State's civil courts remains tarnished in the eyes of many observers. A wholly absurd verdict imposed on a health insurer for the criminal conduct of a endoscopy clinic owner, and outgoing Nevada **Attorney General Catherine Cortez Masto's** use of private contingency-fee lawyers in suing deep-pocketed defendants has raised red flags.

PLAINTIFFS' LAWYERS SEEK JACKPOT, AGAIN

In last year's Judicial Hellholes report, we noted that the *Las Vegas Review-Journal* declared Sin City to be "the undisputed jackpot justice capital of the world" after a Clark County jury delivered a $524 million verdict against a health insurer. The massive award shifted responsibility for a hepatitis C outbreak due to criminally unsanitary practices at an endoscopy clinic from the physician who owned and operated the clinic (and who has since been convicted and sentenced to prison) to a health insurer viewed as a deep pocket. And don't forget the $270 million settlement drugmaker Teva Pharmaceuticals was forced into in 2012 after a first wave of lawsuits originally blamed the outbreak on the size of the vials in which the anesthetic propofol was sold to the clinic. Though labeled for single-use only, plaintiffs argued the vials were large enough to invite unsanitary multiple uses.

But the lawsuits continue. Health Plan of Nevada is continuing to defend against a separate breach-of-contract lawsuit stemming from its referral of patients to the clinic. The lawsuit seeks as much as $1 billion. Such costs will most assuredly burden Nevada's health care system with increased costs to patients, to line the pockets of a handful of plaintiffs' lawyers. And it's all likely to end up before the Nevada Supreme Court before it's over.

AG'S AGGRESSIVE USE OF CONTINGENCY FEE LAWYERS MAY END

Term-limited Attorney General Masto will leave office at the conclusion of 2014, a development that could restore faith in impartial and fair enforcement of state law.

Attorney General Masto relied on private plaintiffs' lawyers who stand to profit from pursuing expansive theories of liability and imposing the highest possible fines on companies doing business in the state. For example, Masto filed a lawsuit against Lender Processing Services (LPS), a Jacksonville, Florida-based mortgage document processing company (now Black Knight InfoServ LLC) and, six months after filing, turned the case over to a Washington, D.C.-based private-sector class-action law firm, Cohen Milstein. Nevada's high foreclosure rate meant the suit was likely to be politically popular. But AG Masto's decision to hire out-of-state counsel on a contingency-fee basis, no less, turned a lawsuit that should have pursued justice in the public interest into one that instead pursued profit in the self-interest of lawyers, from whom the attorney general may seek favors in the future.

It's also interesting to note that when all other states settled their litigation against LPS, Nevada opted out and pressed on alone. And the other states all pursued the case through government staff attorneys, not profit-seeking contingency-fee lawyers.

In any case, LPS fought back, asking the Nevada Supreme Court to invalidate the attorney general's agreements with the private lawyers. The company argued that Nevada law specifically does not allow AG Masto to hire outside lawyers and that the arrangement unconstitutionally gave the contingency fee lawyers veto power over the state's ability to fairly settle a case. ATRA filed an amicus brief in the case, which was argued in June 2013.

While the Supreme Court challenge was pending, Clark County District Court **Judge Elizabeth Gonzalez** took the rare action of sanctioning the AG's office for failing to produce evidence in discovery that backed up its incendiary allegations made against LPS in both court documents and the media. In January 2014, Judge Gonzalez ordered AG Masto to pay the reasonable attorney's fees incurred by LPS. But before the district court could affix a cost or the Nevada Supreme Court could rule, AG Masto decided to get out while the getting was good and settled the underlying lawsuit for $6 million, including $500,000 for her pals in Washington.

AG Masto's politically-motivated decision-making wasn't limited to the LPS case. She also hired two plaintiffs' firms to pursue claims against Pfizer related to its marketing of hormone therapy products. Again, she had the district court contemplating sanctions for failing to produce documents, this time allegedly as a result of state agencies discarding documents relevant to the litigation. In the summer of 2014, the Nevada Supreme Court was again asked to consider whether AG Masto violated state law by hiring contingency fee lawyers. ATRA again filed an amicus brief, and AG Masto again settled the case to avoid a definitive repudiation of her cozy relationships with outside counsel by the high court.


Laxalt

Under the settlement with Pfizer, the drugmaker will make a $6.5 million charitable donation for research at the University of Nevada School of Medicine and pay $1.5 million to "offset the State's investigatory costs," which will likely be used to compensate the private lawyers hired in that case.

Thankfully, AG Masto's self-serving reign of error is coming to an end. Nevada voters on Election Day selected something of a long-shot candidate, **Adam Laxalt**, to succeed her in 2015. Laxalt has pledged greater transparency in the hiring of outside counsel, including an open bidding process and limits on contingency fees when it's deemed necessary to hire private law firms to represent the public's interests.

'CONSTRUCTION DEFECT' LITIGATION

Finally, a loose definition of "construction defect" in Chapter 40 of the Nevada Revised Statutes, coupled with permissive litigation timeframes and an entitlement to attorneys fees are spurring litigation against homebuilders, driving up insurance costs that are passed on to homebuyers, and thus hindering the comeback of the state's housing sector.

For example, in a 2014 case that resulted in a jury award of nearly $600,000 to compensate homeowners for their losses, the judge granted nearly $6.7 million in attorneys' fees. After interest and expenses, the total award

of almost $10 million was roughly 17 times that of actual damages. Defendants appealed to the Nevada Supreme Court and the parties ultimately settled the case for an undisclosed sum. But plaintiffs' law firms specializing in construction defect lawsuits boast of recovering billions in judgments and settlements since 2000, while a University of Nevada study shows that resulting Nevada homebuilders' insurance costs are much higher than the national average, keep small builders out of the market, undermine competition and leave would-be homebuyers with fewer affordable choices.

NEWPORT NEWS, VIRGINIA

While much of Virginia continues to enjoy a reputation as generally hospitable to business, the same can hardly be said of Newport News, where companies defending asbestos claims brought by local personal injury lawyers can't get an even break.

DEFENDANTS LOSE

Asbestos defendants that take their cases to trial are more likely to lose in Newport News than in any other jurisdiction in the nation, according to verdict data compiled from publically available sources and services including Mealey's, Westlaw, and VerdictSearch.

As the nearby chart shows, 85% of Virginia asbestos lawsuits that go to trial, the bulk of which are filed in Newport News, result in plaintiffs' verdicts. This is in contrast to a 52% plaintiffs' verdict rate nationwide, and plaintiff win rates between 59% and 81% in states that include other magnet jurisdictions for asbestos litigation, such as New York City and Madison County, Illinois.

OUTCOME OF ASBESTOS CASES REACHING VERDICT (2004-2014)

State	Plaintiff Verdict	Defense Verdict
VA	85%	15%
NY	81%	19%
MD	76%	24%
PA	70%	30%
TX	64%	36%
CA	59%	41%
All other jurisdictions	52%	48%

Why, one might ask, is this the case? It appears to stem from a combination of a decidedly low bar for plaintiffs to show causation, the court's one-sided evidentiary rulings, and a general bias against asbestos defendants.

A LOWER CAUSATION STANDARD

Plaintiffs in Newport News pursue their claims under maritime law and its "substantial contributing factor" standard of causation. This is significant because the court has allowed local lawyers to define downward the requirements of this standard. Juries in Newport News are instructed that "any" exposure, as long as it is "real, not imaginary," qualifies as a substantial contributing factor. Coupled with plaintiffs' experts, who are permitted freely to offer the "every exposure contributes" opinion, the substantial contributing factor standard is effectively no standard at all. Indeed, product identification is virtually all that is required to get to a jury.

This plaintiff-friendly standard is in stark contrast to the standard set by the Virginia Supreme Court for non-maritime claims. The state's high court ruled in 2013 that a plaintiff who was exposed to asbestos from multiple sources must show that the exposure stemming from the defendant's product was sufficient to cause his condition in absence of other exposures.

When asbestos defendants lose in Newport News, as they almost inevitably do, they are often on the hook for not only paying their share of the plaintiff's damages, but also picking up the tab for companies that have gone bankrupt or are otherwise not named as defendants in the case. A defendant can only avoid joint and several

liability for what may be a seven- to eight-figure verdict if it can prove the plaintiff's disease was "solely caused" by exposures to other defendants' products. But this "alternative cause" defense is really no defense at all when circumstantial evidence (*e.g.*, Navy ship records and military specifications) is rarely permitted, and plaintiffs and their witnesses seldom recall the other numerous sources of exposure, particularly those resulting from now-bankrupt defendants' products. As with such convenient memory failures in other jurisdictions, they don't stop asbestos claimants in Newport News from separately recovering hundreds of thousands of dollars from bankruptcy trusts, for which defendants at trial there get no credit or set-off of any kind.

INADMISSABLE EVIDENCE

Another factor favoring asbestos plaintiffs in Newport News is the court's effective prohibition on defendants presenting scientific evidence demonstrating that low exposures to chrysotile asbestos, which was used in products such as automobile brake linings, pipe insulation, and gaskets and boiler seals, does not present as significant a health risk as amphibole asbestos, which was typically used in thermal insulation products. While such evidence refutes the "every-exposure-contributes" theory, the court excludes it as impermissible "dose reconstruction." So a defendant is not permitted to show jurors that the level of asbestos fibers released from its product is below the safety limit set by federal regulators, nor is a defendant's expert permitted to opine to a numerical threshold of exposure required to cause mesothelioma.

Moreover, despite the fact that such evidence is found in peer-reviewed medical and scientific literature and routinely accepted by other courts, Newport News judges ignore it and prohibit a defendant's experts from relying upon evidence based in any way upon "dose estimates." Ironically, as the "every exposure contributes" theory is increasingly coming under fire from courts across the country, it nevertheless remains the gold standard in Newport News against which defendants' experts are judged to be "junk scientists."

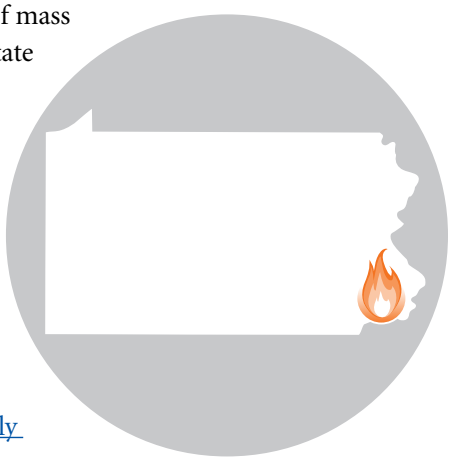
In response to a plaintiff expert's opinion that the products in question caused the plaintiff's mesothelioma, a defendant's expert can do little more than offer vague principles of physiology and asbestos medicine. And this assumes that defense experts are permitted to testify at all, given that the disclosure requirements for experts have become so onerous that the typical expert disclosure in Newport News totals nearly 100 single-spaced pages. Even with such lengthy disclosures, defendants are far from guaranteed that plaintiffs will not prevail in their efforts to strike the testimony of defense experts.

Defendants also are categorically prohibited from introducing evidence regarding the plaintiff's employer – in most cases, the Newport News Shipbuilding & Dry Dock Company or the U.S. Navy. This prohibition includes what an employer knew about the health hazards of asbestos and what the employer did or failed to do that may have caused or contributed to the alleged exposures.

BUILDING ON IMBALANCE

Defendants ensnared in Newport News asbestos litigation also contend with the fact that each plaintiff-favoring interpretation of law, evidentiary ruling, and practice carries forward from one case to the next among the Newport News Circuit Court's five judges. A defendant that risks going to trial is bound by rulings from prior trials – even if that defendant was not party to of any of those cases. Often a defendant's only hope is that it can survive the verdict and prevail upon the Virginia Supreme Court, the only appellate court in Virginia to which an asbestos defendant has resort, to accept its appeal. Interestingly, the Newport News Circuit Court has treated the high court's refusal of a petition for appeal in an asbestos case as an affirmation of the trial court's reasoning, even though Virginia law makes clear that denial of review typically has no precedential value. In this manner, the Newport News court has effectively become the "court of first and last resort."

PHILADELPHIA, PENNSYLVANIA



In early 2012, Administrative **Judge John Herron** acknowledged an explosion of mass tort cases in Philadelphia, withdrew the judiciary's open invitation for out-of-state claims, and instituted significant procedural reforms. As a result, new mass tort filings fell 70%, from 2,690 in 2011 to 813 in 2013, and Philly dropped from its #1 ranking among Judicial Hellholes to the less onerous Watch List, where it has remained. But through only June of 2014, according to ATRA sources, such filings had already reached 1,074. So there's still good cause to keep a close eye on the "City of Unbrotherly Torts."

Philadelphia has long been known for excessive verdicts. And a June 2014 "crashworthiness" lawsuit that revolved around the crippling injury a driver suffered after losing control of his Honda Integra and rolling his vehicle several times into a ditch resulted in a outlier verdict in excess of $55 million – reportedly the largest crashworthiness verdict in Pennsylvania for at least the past 20 years.

For good reason then, plaintiffs' lawyers from all around the country believe they'll receive more favorable treatment in Philadelphia than in their clients' home courts or federal court. Many cases filed in Philadelphia continue to be brought there by plaintiffs' lawyers whose clients have no connection to the Keystone State. The percentage of asbestos claims filed on behalf of out-of-state plaintiffs declined from 47% in 2011 to 21% in 2014, a positive sign. But litigation tourists are still drawn to the jurisdiction, particularly those with pharmaceutical claims, with 4 out of 5 such lawsuits in Philadelphia still being filed by out-of-state plaintiffs – a proportion that has not significantly changed in recent years.

The Court of Common Pleas Complex Litigation Center's (CLC) mass tort program currently includes over 4,500 pharmaceutical, medical device and asbestos cases. And the CLC created a mass tort program for pelvic mesh cases in February 2014. Within six months, plaintiffs' lawyers had filed about 900 cases there. And they are fighting hard to keep the lawsuits in Philadelphia, opposing their removal to federal multidistrict litigation in West Virginia. Leaders of the local plaintiffs' bar expect pelvic-mesh cases to become the largest mass tort program in Philadelphia in recent memory, surpassing the litigation surrounding the anti-inflammatory drug Vioxx.

Chief Justice Castille

Changes to judicial leadership also call into question whether recent progress in Philadelphia may be undone. Both Judge Herron, who was a key figure in improving the fairness of Philadelphia's mass tort program, and Pennsylvania Supreme Court **Chief Justice Ronald D. Castille**, who appointed Judge Herron, face mandatory retirement this year. In October, Justice Castille appointed **Judge Kevin M. Dougherty** to succeed Judge Herron in managing the Philadelphia court system's trial division effective December 1. Judge Dougherty currently manages the family law division of the court. The direction he'll take the civil division is unknown.

Meanwhile, a case currently before the Pennsylvania Supreme Court has the potential to stem or foster unfair trial practices and permit scientifically unsound evidence in Philadelphia. The high court is considering an appeal of an asbestos case that resulted in a $1 million Philadelphia verdict against a carmaker. The court will consider the fairness of Philadelphia's practice of consolidating unrelated asbestos cases for discovery and trial. The justices will also consider whether plaintiffs' lawyers can name a company as a defendant in asbestos litigation by merely alleging "any exposure" from asbestos stemming from that company's products, even if it was not a sufficient level to cause harm.

DISHONORABLE MENTIONS

"Dishonorable Mentions" generally comprise singularly unsound court decisions, abusive practices, legislation or other actions that erode the fairness of a state's civil justice system and aren't otherwise detailed in other sections of the report. This year's report highlights rulings by the high courts of Alabama and Pennsylvania, which endorsed theories of liability rejected by most other courts.

ALABAMA SUPREME COURT DOUBLES DOWN ON 'INNOVATOR LIABILITY'

In August of 2014, the Supreme Court of Alabama reaffirmed its earlier, first-and-only-in-the-nation state high court embrace of an expansive theory of civil liability known as "innovator liability."

In a 6-3 decision, the Court held that a brand-name drugmaker can be held liable for injuries allegedly caused by a plaintiff's use of a generic drug manufactured by a competitor.

More broadly conceived, the always creative personal injury bar's theory of innovator liability is a means to subject original product designers or manufacturers to liability not only for harm allegedly caused by the products they made or sold, but also for harm from similar products made or sold by their competitors. The theory turns centuries of settled tort law on its head.

The plaintiff, Danny Weeks, sustained injuries from the long-term use of the generic form of Reglan, but sued Wyeth LLC, Pfizer Inc., and Schwarz Pharma, the brand-name drugmakers. Weeks accused the brand-name manufacturers of misrepresentation and fraud, claiming his physician was not adequately warned about the potential consequences of long-term use when its drug was originally marketed and sold.

The Alabama Supreme Court held that it was "foreseeable" to the brand-name manufacturer that statements it made about its drug could later result in a patient being prescribed and injured by a generic formulation. For that reason, the court found that it is "not fundamentally unfair to hold the brand-name manufacturer liable for warnings on a product it did not produce." In doing so, the court seemed to willfully overlook a longstanding tenet of tort law, namely that a company is liable only for injuries caused by products that it makes or sells. Foreseeability alone does not create a duty. It is just one of many factors courts may consider when determining liability. The court took this approach even while recognizing that numerous jurisdictions have rejected innovator liability, joining instead "a few courts" that held otherwise.

If allowed to flourish, this theory could impose billions of dollars of unwarranted liability on companies that invest significant time and expense to develop new products that are later copied and sold by others. And it would effectively force innovating companies to act as insurers for their generic competitors' products by diverting vast sums from research and development and spending them instead on litigation.

The Alabama high court's irresponsible embrace of innovator liability is that much more disappointing in light of the fact that the court for many years has served as the sober, Ward Cleaver adult, often cleaning up messes left by childish lower courts that had been too easily cajoled into mischief by Eddie Haskell-like plaintiffs' lawyers.

PENNSYLVANIA SUPREME COURT SUBJECTS DRUGMAKERS TO 'NEGLIGENT DESIGN DEFECT' CLAIMS

A Pennsylvania Supreme Court ruling has given plaintiffs' lawyers a new basis to file product liability lawsuits in Philadelphia.

In *Lance v. Wyeth*, the state's high court forced a pharmaceutical manufacturer to face a plaintiff's late-in-the-game claim of "negligent design defect" – a theory of liability not traditionally recognized in pharmaceutical cases because a drug's design is approved by the FDA and cannot be changed without fundamentally altering the product. The law has long recognized that a medication's risks are properly addressed through warnings. It is the adequacy of these warnings that is typically the subject of litigation.

At trial, Lance argued that Redux, a "fen-phen" substitute, was so dangerous that Wyeth had been negligent both in marketing it initially and failing to withdraw it from the market later. The trial judge threw out the suit, concluding the drug's testing and labeling had been approved by the FDA. An intermediate appellate court, however, reinstated the lawsuit, creatively finding that Wyeth's marketing of the drug somehow subjected the pharmaceutical company to design-based liability claims.

In a 4-2 decision, the Pennsylvania Supreme Court reasoned that, "[u]nder Pennsylvania law, pharmaceutical companies violate their duty of care if they introduce a drug into the marketplace, or continue a previous tender, with actual or constructive knowledge that the drug is too harmful to be used by anyone."

The *Lance* decision contradicts years of established law in Pennsylvania. And the court went out of its way to recognize this new cause of action by, among other things, suddenly allowing the plaintiff, who'd made no such previous claim in the lower courts, to assert the "negligent design defect" theory. Wyeth argued that it lacked notice and thus was not allowed to prepare a defense. But the high court majority nonetheless found that the plaintiff had preserved the issue for appeal by asserting "negligent marketing" and "negligent failure to withdraw" theories of liability.

Unsurprisingly, the state's plaintiffs' bar cheered the ruling as a "big win." It will now allow Keystone State juries – particularly in Philadelphia, a hotspot for pharmaceutical litigation – to second-guess the FDA about medicines' benefits and risks.

POINTS OF LIGHT

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

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

In its "Points of Light" section, the Judicial Hellholes report commends actions taken by judges, lawmakers, voters and even the media to stem abuses of the civil justice system not detailed elsewhere in the report. This year the focus is on several court decisions, some Mississippi voters who'd finally had enough, and positive civil justice reform laws enacted by the states.

IN THE COURTS

NORTH CAROLINA BANKRUPTCY JUDGE'S 'GARLOCK' DECISION OUTS RAMPANT MANIPULATION OF ASBESTOS CLAIMS

In what some observers believe may be the single most important judicial decision in 2014, U.S. Bankruptcy **Judge George Hodges** in North Carolina reduced an asbestos trust defendant's liability by 90 percent, down to $125 million from the $1.4 billion sought by plaintiffs' lawyers, finding that the larger amount based on settlements inflated by undisclosed evidence. The opinion offered a scathing critique of the lawyers and their clients who tried to run a scam on the defendant Garlock Sealing Technologies, Inc.

The judge found that Garlock's settlement history should not be used as an accurate measure of its future trust liability because the last 10 years of its participation in the tort system was infected by the manipulation of exposure evidence by plaintiffs and their lawyers. According to *Bloomberg BusinessWeek's* Paul Barrett, "Hodges cited, for example, what he called widespread evidence that many plaintiffs' attorneys had for years concealed evidence that victims were exposed to potential carcinogens other than Garlock [Technologies'] asbestos-lined gaskets."

Tort cases against Garlock included several insulation manufacturers as co-defendants. But according to the opinion, as other defendants entered bankruptcy, "the evidence of exposure to those [defendants'] products also 'disappeared.'" This practice is widespread, as asbestos lawyers often withhold evidence of their clients' exposure to bankrupted defendants' products so they can first pursue lucrative tort settlements or verdicts against solvent defendants.

Asbestos lawyers don't want judges and juries to know that their clients' alleged exposures may have been to products made by parties not named as defendants in their lawsuits. Such mitigating information would naturally accrue to the defendants' advantage. So plaintiffs' manipulate and obfuscate until they win in court, then they look to "double-dip" by making additional claims against the bankruptcy trusts.

As reported by Daniel Fisher of *Forbes*, Judge Hodges allowed Garlock "to conduct discovery on 15 settled cases, and discovered plaintiff lawyers had failed to disclose evidence Garlock could [have used] in its defense in all 15. Garlock had negotiated settlements in 99% of some 20,000 asbestos lawsuits, the judge noted, but then as

remaining defendants went bankrupt plaintiff lawyers escalated their demands [on Garlock] at the same time as evidence of other exposures 'disappeared.' Lawyers control the bankruptcy trusts and refuse to allow those trusts to share claims information to cut down on double-dipping."

"For years lawyers have deluged courts with claims, confident that neither defendants nor courts will have the time or money to sort through the scams," wrote the Wall Street Journal. "Garlock, which is trying to emerge from bankruptcy, took a courageous risk in taking on the tort bar in court. It now plans to use the information it found in discovery as the basis for a racketeering, fraud and conspiracy suit against four national asbestos plaintiffs firms—Shein Law Center, Belluck & Fox, Simon Greenstone, and Waters & Kraus."

In September, Judge Hodges delivered another significant blow to conniving asbestos lawyers when he ordered all documents pertaining to the case to be unsealed and made available to the public. He rejected objections to the unsealing, citing the public's right to access court proceedings. And since these documents could well show a pervasive pattern of fraud and misrepresentation on the part of asbestos lawyers and their clients, access to them is expected to spur both new legislation – at the state and federal levels – to impose transparency on bankruptcy trust claims administration and a possible new wave of lawsuits against those who have manipulated and abused the legal system.

ALASKA SUPREME COURT REJECTS PERSONAL INJURY CLAIM WORKAROUND WITH CONSUMER PROTECTION LAW

On August 1, 2014, the Alaska Supreme Court refused to extend the state's Unfair Trade Practices Act (UTPA) to personal injury claims. This case involved a student who participated in a rock climbing class and broke her tibia when she landed awkwardly from a 3 to 4 foot fall. She had signed and understood a clear waiver that met all of Alaska's requirements for enforceability. Her attorney likely realized that the waiver would (and did) bar her negligence claim. As an alternative means to recover, her attorney alleged a violation of the UTPA, claiming that the student viewed three newspaper advertisements run by the gym that gave her the impression that the activity was safe.

The Alaska Supreme Court found that the UTPA's application to claims for "loss of money or property" did not extend to personal injury claims. If it did, the court recognized, then plaintiffs would be able to circumvent tort reform laws aimed at constraining liability in personal injury cases.

The UTPA would allow treble damages even where the outrageous conduct needed for punitive damages is not present, preclude a defendant from alleging comparative fault, and hold a single defendant fully responsible for an injury rather than apportion damages between multiple parties. "A UTPA cause of action for personal injury or wrongful death would sidestep all of these civil damages protections," the court found. Absent clear legislative direction, the court ruled it would not apply the UTPA to causes of action involving personal injury or wrongful death.

In reaching its decision, the Alaska Supreme Court noted appellate case law in Oregon, Hawaii, Tennessee and Washington holding that cases involving personal injury do not fall within the scope of their consumer protection acts.

IOWA SUPREME COURT SAYS NO TO 'INNOVATOR LIABILITY'

Unlike Alabama's high court, the Supreme Court of Iowa firmly rejected innovator liability in July of 2014.

In *Huck v. Wyeth,* the Court explicitly stated that brand name manufacturers are not liable for injuries to those individuals who exclusively use the competing generic formulation. The plaintiff alleged she had developed a neurological disorder from prolonged use of metoclopramide. The plaintiff admitted that she had only ingested the generic form of the drug, but she sued both the brand-name and generic manufacturers.

The Iowa high court found no "persuasive case that public health and safety would be advanced through imposing tort liability on brand defendants for injuries caused by generic products sold by competitors." Case closed.

MINNESOTA SUPREME COURT MAINTAINS CONSTRAINTS ON CONSUMER FRAUD LAWSUITS, PRESERVES JOINT & SEVERAL LIABILITY

Two Minnesota Supreme Court rulings in 2014 rejected personal injury lawyers' efforts to expand liability. Those decisions, which maintained rational constraints under the state's consumer fraud and joint and several liability statutes, have some forecasters calling for an improving litigation climate in the North Star State.

In July the high court held that plaintiffs' lawyers cannot use the state's consumer protection law to bring lawsuits under a separate law that empowers only government agencies, not private citizens, to enforce it.

The case arose after a union-sponsored health benefits fund claimed several pharmacies in Minnesota failed to pass on savings when they fill prescriptions with generic drugs, rather than brand name pharmaceuticals. Minnesota law requires pharmacies to use the less-expensive generic drugs with customer's consent, and to pass on the savings. The benefits fund filed its suit under the Minnesota Pharmacy Practice Act (PPA) and the Consumer Fraud Act (CFA) alleging that the pharmacies failed to pass on the cost-savings and omitted material facts about their brand name drug acquisition costs.

The Supreme Court agreed with the trial court (and the position taken by ATRA in its amicus brief) that the PPA does not create a private right of action. The court refused to infer such an action where the legislature provided for government enforcement. The court also stated that, in any CFA claim, the essential elements of a consumer fraud action must be met. The pharmacies had not made any misrepresentations regarding the drugs, so the plaintiffs alleged that the pharmacies had a duty to disclose the acquisition cost of the generic drug dispensed compared to the brand name drug prescribed. The court found that nothing in the state CFA created a duty to disclose this information, and dismissed the CFA claim. The decision suggests that the Minnesota Supreme Court, unlike courts in states that have reflexively expanded consumer protection liability, may understand the dangers in interpreting these laws too broadly.

In a separate case, Minnesota's high court issued a long-awaited decision that preserves the state legislature's intent to curtail joint liability. Minnesota law provides that a party that is less than 50% responsible for a plaintiff's injury is responsible only for its proportional share of the plaintiff's damages.

The case arose when the plaintiff's husband pushed her wheelchair over an unmarked five-inch drop on a church's property. A jury found the husband (who was not a defendant) and the church each 50% responsible for her resulting injury. The plaintiff's lawyers argued that because an award was not collectable from the plaintiffs' husband, the entire liability could be shifted (reallocated, under the statute) to the church. In September, the court interpreted the Minnesota statute to allow reallocation of damages to a defendant only when that particular defendant is subject to joint liability under one of the other narrow exceptions to proportionate fault provided by the law.

The court's decision generally assures that the liability of an individual or business named as a defendant is limited to that defendant's own fault unless that defendant bears more than half of the responsibility for an injury. Amen to that!

NEW YORK COURT OF APPEALS REJECTS NO-INJURY MEDICAL MONITORING CLAIMS

On January 10, 2014, in a 4-2 decision with one abstention, the New York Court of Appeals found no cause of action for medical monitoring. It held that without a physical injury, an increased risk of future harm does not suffice to support a separate tort claim. The court concluded that "the policy reasons set forth above militate against a judicially-created cause of action for medical monitoring. Allowance of such a claim, absent any evidence of present physical injury or damage to property, would constitute a significant deviation from our tort jurisprudence."

This case involved Phillip Morris' sale of tobacco products to plaintiffs who smoked the equivalent of 20 pack-years but have not developed lung cancer or been placed under physician surveillance for such an injury. The court expressed concern that allowing such a speculative cause of action could flood the already overburdened courts and inequitably divert money away from individuals with actual injuries. Finally, the court recognized that the state legislature is better situated to determine whether a new cause of action for medical monitoring should be established.

WASHINGTON SUPREME COURT UPHOLDS TRADITIONAL INTERPRETATION OF WORKER'S COMP LAW

In a 5-4 decision handed down in September, the Washington Supreme Court narrowly but laudably preserved the integrity of the state's workers' compensation system by resisting an asbestos plaintiff's attempt to alter long-standing interpretation of relevant state law.

In *Walston v. The Boeing Co.*, the plaintiff had cited a provision of the Evergreen State's Industrial Insurance Act (IIA), enacted more than a century ago, that allows employees to forsake the swift, no-fault compensation system in order to pursue a tort claim if they can show that their employer *deliberately* injured them.

In earlier cases, the Washington high court had interpreted the IIA's deliberate intent exception narrowly, holding that a deliberate intent to injure means the employer had *actual knowledge* that an injury was certain to occur and willfully disregarded that knowledge.

But Walston sought a new, radically expansive interpretation of the "deliberate intention" exception. Walston asked the court to find that any employer who is engaged in hazardous materials operations deliberately intends to injure its employees because of the possibility that such work could someday lead to disease.

Thankfully, the majority wasn't swayed and reaffirmed earlier precedent, holding that risk of disease is insufficient to meet the deliberate intention standard. The court said the risk of injury—even substantial risk—does not equal malice. Further, the court held that an asymptomatic cellular-level condition is not itself a compensable injury. An asymptomatic cellular-level condition simply creates a *risk* of compensable injury.

This interpretation of the IIA's deliberate intention standard is consistent with the legislature's intent and several generations of judicial interpretation. If the plaintiff's approach had been embraced, it would have effectively eviscerated the IIA's exclusive remedy construct in asbestos and other toxic tort cases, and subjected Washington employers to full-blown tort suits stemming from any number of hazardous, occupational exposures. In particular, Washington employers would have faced the mesothelioma lawsuits that are ginned up continuously by asbestos law firms' television and Internet ads.

MISSISSIPPI VOTERS RETIRE JONES COUNTY JUDGE

Jones County Circuit Court **Judge Billy Joe Landrum** was long known for his plaintiff-friendly rulings. After 28 years on the bench, however, voters decided to retire Judge Landrum late in 2014.


Judge Landrum

The question when defending a case before the notoriously anti-corporate judge was not whether you'd lose, but how much it was going to cost. Defendants either settled or focused on setting up grounds for appeal. While the fairness of Mississippi's litigation environment has generally improved since the early to mid-2000s, nothing much changed in Jones County – the land that time forgot. In fact, just last year, this report named Jones County a Watch List jurisdiction, citing Judge Landrum as the "the principal source of anxiety" for defendants that find themselves dragged into the jurisdiction.

Judge Landrum, who, until this year, was never challenged during his long judicial tenure, placed second in a four-candidate race on Election Day. And he was finally bested in the November 25 runoff by **Dal Williamson**, a Jones County native who has practiced law for 34 years.


Judge-elect Williamson

The race got nasty, with Judge Landrum taking out ads claiming his opponent had no circuit court trial experience and declaring that his opponent "never tried [a case] in my court since I've been on the bench, ever, period…. He's never been before a jury on a criminal case or a civil case in this court in the 28 years I've been here." Landrum also insinuated in ads that Williamson was in cahoots with state auditor Stacey Pickering, who alleged after an investigation that the incumbent judge engaged in financial mismanagement.

Meanwhile, Williamson displayed a stack of court papers on television, including Judge Landrum's signature. He had tried several cases before the longtime judge,

Williamson said, and Judge Landrum's ads indicated either a "problem with memory" or a "brazen disregard for the truth." His only link to Pickering was representing him eleven years earlier in an election qualification dispute when the now-auditor was running for state senate.

According to local news reports, preliminary runoff results showed Judge Landrum had been resoundingly rejected by voters, who favored Williamson with about 60% of the vote. Williamson will take his seat in January and serve as Jones County Circuit Court Judge for the next four years. Civil justice reformers offer hearty congratulations and urge him to remake Jones County into a jurisdiction that is fair to all.

IN THE LEGISLATURES

Several states adopted significant, positive civil justice reforms during the 2014 legislative sessions.

Louisiana legislators had a particularly productive session, enacting five laws that should help improve the litigation environment in a state with a historically problematic civil justice system. The new laws:

- Require judges to serve as gatekeepers over the reliability of expert testimony before it is admitted in court, codifying the current practice of Louisiana courts, which is consistent with federal courts and most other state courts.
- Prohibit the state from compensating attorneys on a contingency fee basis absent express statutory authority, codifying a Louisiana Supreme Court decision. Though not retroactive, this new law also provides a transparent process for the state to contract outside counsel.
- Prohibit any governmental entity, other than those with current authority under the Coastal Zone Management Act, from filing lawsuits based on any land uses within the coastal zone, including actions against oil and gas companies. The law stops the Southeast Louisiana Flood Protection Authority-East's lawsuit seeking to require oil, gas and pipeline companies to pay a portion of the cost of restoring marshland in five parishes around New Orleans. A local judge, however, has already effectively nullified the law.

- Require state agencies to submit an annual report to the legislature regarding litigation initiated by a state agency and requires the attorney general to publish an annual report containing a list of all civil actions initiated by the State of Louisiana.
- Clarify the types of damages available and the standards for recovery in "legacy lawsuits." This law also allows a party to recover attorneys' fees when a case is dismissed early in the litigation.

Below, in alphabetical order, is a state-by-state listing of some of the new laws enacted in other states, all of which should help improve the civil justice environment and restore balance to civil liability:

- **Alaska** enacted a law making an expression of apology, responsibility, liability, sympathy, commiseration, compassion or benevolence by a healthcare provider inadmissible in a medical liability case. It also requires a healthcare provider to advise a patient to seek legal advice before making an agreement with the patient to correct an unanticipated outcome of medical treatment or care.
- **Arizona** extended for another 10 years its "Lengthy Trial Fund," which helps ensure that all people can serve as jurors on long trials.
- **Colorado** extended liability protection previously provided for volunteer firefighters at the scene of an emergency to community volunteers and their organizations.

- **Florida** enacted a law limiting the liability of "passive investors" in nursing home businesses. It specifies that a cause of action for negligence or violation of nursing home residents' rights, alleging direct or vicarious liability for the injury or death of a resident, may be brought only against a licensee, its management or consulting company, its managing employees, and any direct caregiver employees. The law also authorizes the Agency for Health Care Administration to suspend the license of a nursing home facility that fails to pay a judgment or settlement agreement.

- **Georgia**, **Kansas**, and **Michigan** codified their common law regarding trespasser liability. Precluding judicial expansion of liability, these laws recognize that a possessor of land generally owes no duty of care to a trespasser except to refrain from willfully or wantonly causing and injury.
- **Kansas** enacted a law that adopts the *Daubert* standard for expert testimony. The law also will incrementally raise the limit on noneconomic damages by $50,000 every four years until 2022. The current limit is $250,000. This law responds to a 2012 Kansas Supreme Court decision, which called for the state legislature to reexamine the limit and make the necessary monetary increases due to inflation and cost of living increases.
- **Oklahoma** adopted a rebuttable presumption that a product is not defective when it complies with applicable federal safety standards or regulations. Legislators also adopted a law that requires the losing party in a derivative suit to pay the prevailing party's reasonable expenses, including attorneys' fees, taxable as costs, incurred as a result of such action. Another new law provides that a health care provider's lack of compliance with the federal Patient Protection and Affordable Care Act is inadmissible in a medical liability action.
- **Tennessee** adopted legislation regulating the lawsuit lending industry.
- **Utah** adopted a law requiring a plaintiff to have offered a settlement in order to qualify for prejudgment interest. The law also provides that prejudgment interest is only calculated from the date of a qualifying offer. The law establishes an interest rate of two percentage points above the prime rate, as published by the Federal Reserve, but it may not be lower than 5% or higher than 10%.
- **Wisconsin** adopted a law that reduces plaintiff-lawyer manipulation of the civil justice system and inflated recoveries in asbestos claims detailed near the top of this section. It will require plaintiffs' lawyers to disclose in tort claims they filed, or will file, with asbestos trusts established by bankrupt companies. The law also requires judges to admit trust claims into evidence. The law authorizes defendants to identify trust claims that the plaintiff could and should file. If a judge agrees, the case is stayed until that claim is filed and disclosed. Wisconsin also enacted a law, similar to Alaska, which provides that a health care provider's apology to a patient or patient's relative is not admissible in court.

SPECIAL FEATURE:

THE RISE OF MESH LITIGATION

For years, predatory trial attorneys have taken advantage of unfortunate accidents and injuries, spinning them into lucrative paydays for themselves and their firms. Always looking for their next big score, plaintiffs' lawyers have recently turned to litigation surrounding the use of mesh in treatment of feminine pelvic floor disorders. They're seizing on the unfortunate complications sometimes associated with these medical procedures.

To date, plaintiffs' lawyers have filed over 100,000 product liability claims against mesh manufacturers around the country. Over 60,000 of these claims are pending before **Judge Joseph R. Goodwin** of the U.S. District Court for the Southern District of West Virginia, where federal multidistrict litigation is centered. Mesh litigation is also concentrated in Philadelphia, Pennsylvania; Bergen County, New Jersey; and Middlesex County, Massachusetts, and is pending in states such as California, Delaware, Missouri and Texas. These lawsuits have quickly become the largest mass tort aside from asbestos claims.

BACKGROUND

Pelvic Floor Disorders (PFD) are painful and complex medical issues, and each disorder has its own potential complications and favored treatments. There are two main pelvic floor disorders, Stress Urinary Incontinence (SUI) and Pelvic Organ Prolapse (POP), which can be treated in different ways. One method involves a mesh device, which doctors use to provide additional support when repairing weakened or damaged tissue in a woman's pelvic floor. It can be made from an absorbable or non-absorbable synthetic material or absorbable biologic material. At present, there are over 100 different mesh devices on the market. Each specific type of mesh has its own benefits and risks, depending on which disorder it is used to treat.

One in nine women will undergo surgery for urinary incontinence or POP by the age of 80, and 30% of those women will undergo two or more surgeries to fix this medical problem. Unfortunately, the nature of the problem is one that lends itself to very painful and unpleasant complications that are often times unavoidable. Over 300,000 surgeries for POP disorder alone are performed each year in the United States. As a result, plaintiffs' lawyers have a large pool of potential plaintiffs.

EXTREME ADVERTISING

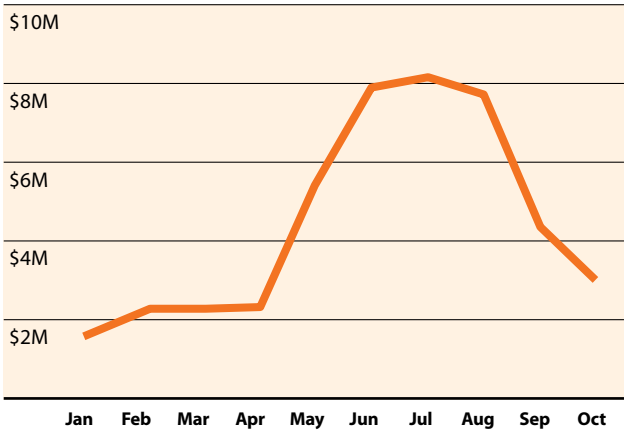
The best way to illustrate the personal injury bar's rabid interest in pelvic mesh litigation is to examine the amount its members spend each month in their effort to generate new lawsuits. In the first 10 months of 2014, lawyers spent an estimated $45 million on television advertising to gather potential plaintiffs. That's $5 million more than mobile videogame maker Machine Zone plans to spend worldwide promoting its new "Game of War: Fire Age."

Spending on advertising, which was already trending at an astounding $2 million per month for about a year, spiked after one mesh maker announced it was settling 20,000 lawsuits in late April 2014.

The trial bar spent more than $2.5 million on such advertising in April, $5.5 million in May, and nearly $7.9 million in June. In May alone, 8,000 television ads to recruit individuals for pelvic mesh lawsuits aired nationwide.

The trend continued in July with a whopping $8.2 million in additional television ad spending – the first time advertising for mesh implant lawsuits topped $8 million in a single month. While spending tapered off in September and October, no one should believe that mesh litigation does not remain a top mass tort focus for plaintiffs' lawyers.

ESTIMATED PLAINTIFFS' LAWYER AD SPENDING TO GENERATE PELVIC MESH LAWSUITS IN 2014



HEALTH POLICY IMPLICATIONS OF EXCESSIVE LITIGATION

Mesh litigation and the broader controversy it implies are reducing women's treatment options and may be leading some to avoid treatment altogether.

Some manufacturers are halting their sale of the products and affected women are losing viable treatment options due to increased litigation costs. For example, the Cook Group, a manufacturer of a biologic mesh graft for POP, wrote a letter to the FDA in October of 2013, stating that the company was withdrawing its product from the U.S. market for reasons "based solely on the current product liability environment and not on patient risk." The president of the company warned the FDA that the vital advances necessary to repair these challenging health problems are not going to occur if the current litigation problem is not resolved. The excessive litigation has chilled, if not frozen, medical advancements in this field. He warned that the lawsuits are forcing the medical community to take "giant steps backward – not only by discouraging development of new technologies, but by driving safe, proven technology out of the market and forcing surgeons to revert to the high-recurrence-rate suture repairs of yesterday." To put it bluntly: the tort bar's offensive has placed women's health and future quality of life at risk.

The American Urogynecologic Society (AUGS) and the Society of Urodynamic Female Pelvic Medicine & Urogenital Reconstruction (SUFU) have expressed concern that "one of the unintended consequences of this polypropylene mesh controversy has been to keep women from receiving any treatment for SUI." Similarly, a manuscript endorsed by more than 600 members of the Pelvic Surgeons Network, found that the fundamental flaw in targeting mesh products is that it would deprive doctors of "an important tool in our surgical armamentarium that may be the best option in some cases."

No group of medical experts has recommended removing a mesh product from the market or withholding them from surgeons' use. The AUGS and the American College of Ob/Gyn (ACOG) strongly oppose restrictions by state or medical organizations, healthcare systems, or insurance companies that ban currently available surgical options. Instead, they focus on ensuring that doctors appropriately inform their patients of all of the risks and benefits to the procedures.

The FDA is currently reevaluating the process it uses to assess pelvic mesh implants, and it may choose to reclassify them as "Class III devices," which would allow the FDA to require clinical trials that would compare procedures using mesh with those that do not use mesh. It's important to note that the FDA has not recommended taking these products off the market, but is instead requiring that manufacturers of these devices enroll patients into carefully monitored post-market research studies to help determine the efficacy and safety of these products and procedures.

A court-mandated ban on these products could prohibit women from having access to an FDA-accepted option that can significantly improve their quality of life.

IMBALANCED LITIGATION PRACTICES

So far, the few mesh cases to go to trial have resulted in inconsistent outcomes. A few cases have resulted in gigantic awards, while several others have resulted in full defense verdicts. The key to such results is whether the court conducted a fair trial. As the Judicial Hellholes report has long documented, prejudicial court procedures often underlie extraordinary verdicts. That is the case with pelvic mesh litigation.

In some cases judges have allowed plaintiffs' lawyers to introduce inflammatory evidence while precluding defendants from presenting pertinent information. For example, the largest pelvic mesh verdict to date occurred on September 9, 2014, when a Dallas County District Court jury reached a $73 million verdict against Boston Scientific. In that instance, the plaintiff's lawyers seized on a single internal e-mail questioning a scientific study that simply concluded that more long term testing was needed to compare the safety of one device to another. The jury awarded Martha Salazar, who claimed she was injured by a defective mesh sling used to treat her stress urinary incontinence, $23 million in compensatory damages – much more than the $14 million the plaintiff had sought – plus another $50 million in punitive damages. This ludicrous award was later reduced to $34.9 million in accordance with Texas's limit on punitive damages. But meanwhile, some judges have even prevented defendants from telling juries about the FDA's process for clearing the devices.

Another prejudicial practice that significantly increases the likelihood of an unwarranted or inflated verdict is the consolidation of multiple cases for trial. Just as they are in asbestos and pharmaceutical litigation, judges are tempted by plaintiffs' lawyers to go the consolidation route when there are thousands of cases on the court docket. But consolidation invariably puts court efficiency over defendants' due process. It confusingly mingles evidence by placing the experiences of more than one plaintiff in front of the same jury at the same time. Empirical studies show that multi-plaintiff trials more often result in more and larger plaintiffs' verdicts than when cases are tried on their individual merits.

For example, two multi-plaintiff trials against Boston Scientific resulted in extraordinary awards in November 2014. In a Southern District of Florida (Miami) trial presided over by Judge Goodwin, who oversees the pelvic mesh federal mass tort litigation in West Virginia, the jury awarded $26.7 million in compensatory damages to four plaintiffs. Although the plaintiffs' injuries varied significantly, they were each awarded roughly the same amount: $6.7 million, demonstrating the arbitrary results that occur in multi-plaintiff trials. Another mesh trial, this one before **Judge Irene C. Berger** in the Southern District of West Virginia (Charleston), resulted in an $18.5 million award to four plaintiffs later that month.


Judge Berger

These outcomes are a stark contrast from some of the trials that involved individual plaintiffs. Juries considering two separate cases in Massachusetts state courts in the summer of 2014 found that the slings were not defectively designed and that Boston Scientific had provided adequate warnings.

For these reasons, it comes as no surprise that plaintiffs' lawyers favor multi-plaintiff trials. Such requests are reaching a new level. As this report goes to press, plaintiffs' lawyers, in the name of "judicial economy," asked Judge Goodwin to consolidate the cases of not one, two, or four plaintiffs, but a "wave" of 185 individual cases against manufacturer C.R. Bard for a single trial in January 2015. The need to maintain fairness and protect defendants' right to due process should convince the judge to deny their motion.

COURT SHOPPING

As the trial bar looks to squeeze as much profit as possible from mesh litigation, plaintiffs' lawyers from all over the country are creatively seeking to avoid federal court jurisdiction, preferring to try their cases before home-state judges or even more plaintiff-friendly courts in other states.

One method plaintiffs' lawyers use to avoid federal court jurisdiction is to name as a tangential defendant an in-state company that makes a component of the device in question. This sidesteps the "complete diversity" of citizenship requirement for federal court involvement. Some judges have allowed this practice to flourish, even as


Judge New

others have recognized these tactics for what they are and dismissed claims against local defendants that are immune from suit under federal law.

For example, in late August, Philadelphia Court of Common Pleas **Judge Arnold New**, coordinating judge of the Complex Litigation Center, dismissed Secant Medical, the sole Pennsylvania-based defendant involved in Philadelphia's pelvic-mesh mass tort. Secant makes the mesh component material used in certain devices. Judge New ruled that the Biomedical Access Assurance Act (BAAA), which ensures the availability of medical devices by providing liability protection to manufacturers of raw materials and components, applied to the company. The BAAA specifically states that, "a biomaterials supplier shall not be liable for harm to a claimant caused by an implant." As a result of the dismissal, manufacturers will have strong grounds for removal of the lawsuits to federal court.

Another tactic to avoid federal court jurisdiction is to file lawsuits in batches of under 100 plaintiffs. This avoids triggering federal jurisdiction as a "mass action" under the Class Action Fairness Act (CAFA). For example, plaintiffs' lawyers filed 11 separate suits, each with fewer than 100 plaintiffs, in the District Court of Pottawatomie County, Oklahoma. The cases include 650 plaintiffs from 26 states and the Commonwealth of Puerto Rico against Ethicon, a subsidiary of Johnson & Johnson. A federal judge in Oklahoma remanded the cases to state courts. Johnson & Johnson has appealed to the Tenth Circuit, which heard oral arguments earlier this year but has yet to rule.

LOOKING AHEAD

The rapid rise of mesh litigation puts it on pace to become the nation's largest mass tort, and its implications for women's health and treatment choices is concerning. Mesh devices continue to have FDA clearance, and doctors continue to use them to treat their patients. Given the unavoidable risk of complications with any surgical implant and an aging population, plaintiffs' lawyers know that mesh implants can provide a growing pool of potential client. The flood of claims may tempt judges to take shortcuts in the name of efficiency, but it is imperative that they decide pelvic mesh cases, as with all cases, by protecting all parties' due process rights.

THE MAKING OF A JUDICIAL HELLHOLE:

QUESTION: What makes a jurisdiction a Judicial Hellhole?
ANSWER: The judges.

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

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

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

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

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

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

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

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

PRETRIAL RULINGS

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

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

DECISIONS DURING TRIAL

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

UNREASONABLE EXPANSIONS OF LIABILITY

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

JUDICIAL INTEGRITY

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

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