

# JUDICIAL HELLHOLES

2017-2018

ATR  
FOUNDATION

***“It is the Legislature, not this Court, that is entitled to make laws as a matter of policy based on the facts it finds. ...[It is] the Legislature’s task to decide whether a medical malpractice crisis exists, whether a medical malpractice crisis has abated, and whether the Florida Statutes should be amended accordingly.”***

—Florida Supreme Court Justices Ricky Polston, Charles Canady and Alan Lawson dissenting in [North Broward Hospital District v. Kalitan](#) (June 8, 2017), wherein the usual liability-expanding majority again saw fit to disregard the will of Sunshine State voters as expressed through their duly elected representatives in the legislature and governor’s office.

***“Nor does the absence of a regulation or statute declaring interior residential lead paint to be unlawful bar a court from declaring it to be a public nuisance. ...As this court pointed out in Santa Clara I, a defendant’s control of the nuisance is not necessary to establish liability in a representative public nuisance action in California.”***

—A unanimous three-judge panel of California’s Sixth District Court of Appeal upholding a trial court’s de facto imposition of a sweeping new regulation, even as it remanded for reduction an initial \$1.2 billion judgment against former makers of lead-based paint in [People v. ConAgra Grocery Products Company](#) (November 14, 2017).

***“[T]he majority’s holding is legally inaccurate ... [and] will have a far-reaching, negative impact on the manner in which physicians serve their patients. For fear of legal liability, physicians now must be involved with every aspect of informing their patients’ consent, thus delaying seriously ill patients’ access to physicians and the critical services that they provide. Courts should not impose such unnecessary burdens upon an already strained and overwhelmed occupation when the law does not clearly warrant this judicial interference.”***

—Pennsylvania Supreme Court Justice Max Baer dissenting in [Shinal v. Toms](#) (June 20, 2017), a 4-3 medical liability decision that a brain surgeon, not his highly trained staff, should have directly sought a patient’s informed consent.

***“We apply our evidence rules and our court rules and that attracts plaintiffs here. They like our evidence rules, they like our expert witness rules ....”***

—New Jersey Supreme Court Justice Barry T. Albin, during [oral argument](#), [McCarrell v. Hoffmann-La Roche Inc.](#) (Oct. 13, 2016).

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

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# PREFACE

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

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

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

## ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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# EXECUTIVE SUMMARY

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The **2017-2018 Judicial Hellholes** report shines its brightest spotlight on eight jurisdictions or courts that have earned reputations as Judicial Hellholes. Some are known for welcoming litigation tourism or as hotbeds for asbestos litigation, and in all of them too many judges seem more eager to expand civil liability than to respect precedent and the policy-making authority of duly elected lawmakers.

## JUDICIAL HELLHOLES

**#1 FLORIDA** The Florida Supreme Court's liability-expanding decisions and barely contained contempt for the lawmaking authority of legislators and the governor has repeatedly led to its inclusion in this report. And though the high court's plaintiff-friendly majority this year shrunk from 5-2 to 4-3, a hushed discussion between two majority justices recently caught by an open microphone suggests that this majority is as partisan as ever and brazenly determined to influence the judicial selection process as three like-minded colleagues face mandatory retirement in early 2019.

Meanwhile, an aggressive personal injury bar's fraudulent and abusive practices in South Florida and elsewhere have also tarnished the state's reputation. Encouragingly, at least some plaintiffs' lawyers who've crossed the line are being held accountable, either with stiff court sanctions or criminal prosecutions. But with the help of some lawmakers, too many are still getting away with too much, and for the first time in this report's 16-year history, enough shade has been cast on the Sunshine State to rank it as the nation's worst Judicial Hellhole.

**#2 CALIFORNIA** If most lawmakers in Sacramento and the reliably generous plaintiffs' lawyers who write campaign checks to keep them there can be likened to the Symbionese Liberation Army of the Berkeley-radical 1970s, then most California voters can be likened to the Stockholm syndrome-suffering heiress Patty Hearst, coming to love their captors even as hundreds of new laws – many of them designed specifically to expand civil liability on business and property owners – are enacted each year.

A lengthy, stand-alone book could be written every year about California's inexorable expansions of civil liability. But because this report's constructive criticisms seem to fall largely on deaf ears in Sacramento and in many courthouses around the state, this year's look at the West Coast's perennial Judicial Hellhole will pragmatically limit its focus to an armful of the state's civil injustices, including precedent-defying state supreme court decisions, the Private Attorneys General Act, Prop 65, food and beverage litigation, innovator liability, the California Environmental Quality Act's impact on affordable housing, courts' expansions of public nuisance law and natural disaster-chasing personal injury lawyers, among others.



# JUDICIAL HELLHOLES

2017-2018

- 1 FLORIDA**
- 2 CALIFORNIA**
- 3 ST. LOUIS, MISSOURI**
- 4 NEW YORK CITY  
ASBESTOS LITIGATION**
- 5 PHILADELPHIA, PENNSYLVANIA**
- 6 NEW JERSEY**
- 7 MADISON AND COOK  
COUNTIES, ILLINOIS**
- 8 LOUISIANA**

**#3 ST. LOUIS, MISSOURI** As *Bloomberg* has reported, St. Louis civil courts are known for “fast trials, favorable rulings, and big awards.” But by virtue of a change in gubernatorial leadership, a good start by state lawmakers on an agenda of much needed statutory reforms and a powerful U.S. Supreme Court decision curbing forum shopping in 2017, the City of St. Louis Circuit Court can no longer be fairly ranked as the nation’s worst Judicial Hellhole, as it was a year ago. But much more work must be done to improve further the civil justice climate in St. Louis and the rest of the “Show Me Your Lawsuits State.”

**#4 NYCAL** Since 2013 the Judicial Hellholes report has faithfully if discouragingly reported in great detail on the continually corrupt and brazenly plaintiff-favoring ways of New York City’s Asbestos Litigation court known as NYCAL. But rather than provide another historically comprehensive analysis of all the unseemly self-dealing that has long sullied NYCAL’s reputation and otherwise results in extraordinarily good outcomes for asbestos plaintiffs and their lawyers relative to outcomes in other jurisdictions nationwide, this year’s report focuses largely on a much anticipated and ultimately disappointing new Case Management Order (CMO), which will govern the handling of cases going forward, pending an appeal.

**#5 PHILADELPHIA, PENNSYLVANIA** The Philadelphia Court of Common Pleas has long been known nationally center for products liability litigation. The court’s Complex Litigation Center (CLC) hosts a mass torts program that attracts drug, medical device and asbestos cases from across the county. The CLC had undertaken reforms and, in recent years, seemed to become less welcoming to out-of-state plaintiffs. But a surge of new lawsuits and a string of multimillion dollar verdicts have sadly returned “[The City of Unbrotherly Torts](#)” to the ranks of Judicial Hellholes.

**#6 NEW JERSEY** As New Jersey Supreme Court Justice Barry T. Albin explained to defense counsel during 2016 oral arguments in an appeal of a case based wholly on junk science, out-of-state plaintiffs “like our evidence rules, they like our expert witness rules . . . .” That was an understatement. Plaintiffs and their lawyers also like the Garden State’s continuing hostility to arbitration agreements, which effectively ignores clear guidance from the U.S. Supreme Court. And plaintiffs from across the country love the state high court’s willingness to apply New Jersey’s longer-running statute of limitations to product liability claims. But the state’s justices did tap the brakes on run-away, if preposterous consumer class actions this year, and they’ll soon have the chance to revisit (and strengthen) New Jersey’s lax standard for the admission of expert testimony.

**#7 MADISON AND COOK COUNTIES, ILLINOIS** Madison and Cook counties have become perennial Judicial Hellholes known for disproportionate volumes of litigation and large verdicts. Plaintiff-friendly judges seem to dominate both jurisdictions in which defendants face uphill battles from their very first motions. And with the most relevant local and state politicians comfortably in cahoots with the powerful plaintiffs’ bar, prospects for positive reforms remain remote, even as these jurisdictions’ hyper-litigiousness works against economic growth and job creation, and makes it harder for both government and businesses to find affordable insurance.

**#8 LOUISIANA** The Pelican State’s legal climate has suffered for decades at the hands of powerful trial attorneys and the politicians they control. Plaintiff-friendly courts, excessive jury verdicts, problematic venue laws, widespread judicial misconduct, a lack of transparency in asbestos litigation and trust claims, disability-access lawsuits targeting small businesses, broad misuse of consumer protection laws, and the highest jury-trial threshold in the nation are all problems that contribute to the state’s longstanding reputation as one of the worst places in the country to be sued.

## WATCH LIST

Beyond the Judicial Hellholes, this report calls attention to seven 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.

**BALTIMORE, MARYLAND** Prompted by overtures from the politically powerful personal injury law firm of Peter Angelos, Maryland lawmakers in 2018 are expected to consider what would effectively be a change to Maryland's longstanding statute of repose, reviving questionable, if not outright fraudulent asbestos claims if the state's high court does not do so first. Plaintiffs' lawyers also want lawmakers' help in building a "litigation superhighway" for these stale old cases by hiring more judges in Baltimore at taxpayers' expense.

**GEORGIA** Georgia's Supreme Court in recent years issued decisions that significantly expanded civil liability, and that troubling trend continued in 2017. Making matters worse, trial courts in the Peach State are understandably following the high court's lead as a growing list of outrageous verdicts has begun to worry many business leaders there.

**NEWPORT NEWS, VIRGINIA** Joining Baltimore as another hotbed of asbestos litigation along the Mid-Atlantic coast, Newport News is known for evidentiary double standards, incorrect legal rulings and lack of transparency that help give asbestos plaintiffs there the highest trial-winning percentage in the country. But new judges and some related federal court decisions may lead the way toward greater fairness for defendants.

**OREGON SUPREME COURT** Oregon's high court makes its first appearance in this report, primarily because of two decisions that should trouble consumers, doctors, hospitals and health insurers alike. Though this court made some enlightened decisions during the past year, its two alarming decisions suggest it may take the Beaver State down a darker trail toward a future Judicial Hellholes designation.

**PENNSYLVANIA SUPREME COURT** Pennsylvania's Supreme Court has been regarded as generally balanced in the past, but that balance has shifted since 2016 after several newly elected justices supported by the plaintiffs' bar joined the bench. Now it seems the high court is more easily persuaded to expand liability, as it has done with decisions affecting asbestos litigation, medical liability, workers' compensation and "bad faith" claims against insurers. On the bright side, the court upheld a longstanding statutory remedy for victims of lawsuit abuse.

**U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT** No rational observer would suggest for a moment that citing the U.S. Court of Appeals for the Ninth Circuit on the Watch List will in any way prompt it to moderate its oft-overturned ways. But two very disappointing decisions this year, involving the admissibility of expert testimony and abuse of the False Claims Act, demand this report's attention.

**WEST VIRGINIA** Once a perennial Judicial Hellhole, West Virginia's legal climate has vastly improved during the past three years thanks to numerous statutory reforms enacted after Mountain State voters decided they'd had enough of trial lawyer-controlled lawmakers – and jobs-killing legislative expansions of civil liability – and threw many of the bums out on Election Day 2014. In 2017 the legislature passed two more important reform bills, but the state's still plaintiff-friendly high court remains a problem as unanswered questions about one justice's alleged conflicts of interest and campaign connections to wealthy trial lawyers won't go away.

**BALTIMORE, MARYLAND**  
**GEORGIA**  
**NEWPORT NEWS, VIRGINIA**  
**OREGON SUPREME COURT**  
**PENNSYLVANIA SUPREME COURT**  
**U.S. NINTH CIRCUIT**  
**COURT OF APPEALS**  
**WEST VIRGINIA**

## DISHONORABLE MENTIONS

### **CONNECTICUT SUPREME COURT BLESSES \$42 MILLION FOR TICK BITE**

Responding to inquiries from a federal appeals court, the Connecticut Supreme Court in August 2017 declared that state law supports a \$41.7 million jury award in a negligence case against a private school after a teenaged student was bitten by a tick while hiking in a mountainous area during a study program in China.

### **MINNESOTA GOVERNOR'S 'VETO TRIPLE-PLAY'**

Though voters last year sent new, reform-minded majorities to both bodies of the state legislature, Gov. Mark Dayton, a loyal servant of the plaintiffs' bar, vetoed bills that would have limited property owners' liability for trespassers' injuries, lowered the prejudgment interest rate and allowed defendants in auto-accident cases to adduce evidence as to whether plaintiffs were wearing their seatbelts.

### **WISCONSIN APPEALS COURT STRIKES DOWN MEDICAL LIABILITY LIMIT**

In July 2017 a Wisconsin appellate court struck down the state's statutory limit on noneconomic damages in medical liability cases, holding that lawmakers' \$750,000 limit was arbitrary and unfairly burdensome to catastrophically injured plaintiffs.

## **POINTS OF LIGHT**

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

One very encouraging development this year is action taken by state attorneys general in Arizona, New Mexico and Nevada against scheming attorneys hectoring small businesses with often fraudulent lawsuits that allege violations of the Americans with Disabilities Act.

Featured among this year's notable court decisions are the U.S. Court of Appeals for the Fifth Circuit's reversal of a record-setting if wholly meritless False Claims Act verdict and two sound decisions from the Seventh Circuit, including one of the final decisions written by the retiring but forever-quotable Judge Richard Posner, decertifying a preposterous class action that claimed no compensable injuries.

Meanwhile, legislatures in 13 states enacted 17 significant, positive civil justice reforms in 2017, including asbestos transparency statutes in Iowa, Mississippi, North Dakota and South Dakota; disability-access litigation reforms in Minnesota and Texas; and, also in Texas, a much needed crackdown on fraudulent storm-litigation detailed in this report last year.

## **CLOSER LOOKS**

### **THREE SUPREME COURT DECISIONS SHOULD SLOW LITIGATION TOURISM**

Assuming lower courts abide by them, three U.S. Supreme Court decisions in 2017 should limit the ability of plaintiffs' lawyers to forum-shop their cases in Judicial Hellholes. The high court's decisions provide welcome relief for business defendants that had grown weary of being hauled into plaintiff-friendly jurisdictions across the country to which neither they nor the plaintiffs suing them had any connection.

### **OPIOID LITIGATION**

As too many Americans suffer serious drug abuse problems, our leaders should seek guidance from caring and knowledgeable experts in a cooperative search for solutions in the public interest. Instead, many state and local officials have been convinced by self-interested personal injury lawyers to take an adversarial approach, inviting additional problems that neither officials nor their constituents need.

### **TRIAL LAWYERS' INFLUENCE GROWS AT THE AMERICAN LAW INSTITUTE**

As the mission of this long respected legal institution shifts troublingly from describing the law to changing the law, its leaders should take steps to keep it from being wholly captured by plaintiffs' lawyers and reflexively anti-business academics.



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# JUDICIAL HELLHOLES

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## #1 FLORIDA

The Florida Supreme Court's liability-expanding decisions and barely contained contempt for the lawmaking authority of legislators and the governor have repeatedly led to its inclusion in this report. And though the high court's plaintiff-friendly majority this year shrunk from 5-2 to 4-3, a hushed discussion between two majority justices recently caught by an open microphone suggests that this majority is as partisan as ever and brazenly determined to influence the judicial selection process when three colleagues face mandatory retirement in early 2019.

Meanwhile, an aggressive personal injury bar's fraudulent and abusive practices in South Florida and elsewhere have also tarnished the state. Encouragingly, at least some plaintiffs' lawyers who've crossed the line are being held accountable, either with stiff court sanctions or criminal prosecutions. But too many are still getting away with too much, and for the first time in this report's 16-year history, enough shade has been cast on the Sunshine State to rank it as the nation's worst Judicial Hellhole.



## FLORIDA SUPREME COURT

Not much has changed in the plaintiff-friendly Florida Supreme Court. Yes, liability-loving **Justice James E.C. Perry** retired upon reaching mandatory retirement age and was replaced by new **Justice C. Alan Lawson**. And yes, Justice Lawson has joined **Justices Ricky Polston** and **Charles Canady** in resisting with principled dissents the remaining majority's expansions of liability and disregard for the policymaking role of the legislature.

But remarkably, even after being replaced, Justice Perry was allowed by **Chief Justice Jorge Labarga** to continue deciding cases he had heard before his retirement date – a practice that was [challenged](#) as contrary to the Florida Constitution. **Edward Whelan**, president of the Ethics and Public Policy Center, wrote the following for the *National Review's* Bench Memos blog:

*[I]t's one thing to decide already-argued cases without the new member. It's quite another thing to allow the retired justice to displace the new member in those cases. This elementary distinction seems to have escaped the Florida Supreme Court.*

*...To be sure, there may be a small number of cases that would have to be re-argued because Lawson's participation would break a tie among the six remaining justices who heard oral argument. But those are precisely the cases in which having Perry displace Lawson is most objectionable. And any supposed efficiency gains would be offset by the uncertainty resulting from a ruling in which the decisive vote is cast by someone who has taken part illegally.*

The practice was curtailed after Florida **House Speaker Richard Corcoran** [threatened](#) to file a petition challenging the court's "eighth justice," but the remaining 4-3 majority continues to wield power with still rather predictable results.

In 2017 the high court issued a series of rulings in medical liability cases that are detrimental to patients and healthcare providers, while also making it more difficult both to resolve disputes without litigation and identify fraudulent or inflated medical expense claims. Additionally, Florida attorneys are bracing for the court's anticipated rejection of a more exacting standard for expert testimony used in all federal and most state courts.

### PATIENT SAFETY DOWN, ATTORNEYS' FEES & DAMAGES UP

In four medical liability cases, the Florida Supreme Court has undercut patient safety, protected lawyers' fees, allowed higher damage awards, and invalidated a law intended to reduce litigation.

In January Florida's high court [ruled](#) that information about adverse medical events that healthcare providers voluntarily share with patient safety organizations can be obtained by plaintiffs' lawyers and used in litigation. The court's 5-2 decision in *Charles v. Southern Baptist Hospital of Florida* found that a 2004 amendment to the Florida Constitution that provides patients with a right to access adverse incident reports effectively supersedes a federal law providing that these reports are confidential.

This ruling should concern doctors and patients alike. It discourages doctors from sharing information the broader medical community can use to limit mistakes and increase the quality of care. In its May [petition](#) to the U.S. Supreme Court, Southern Baptist Hospital emphatically noted its concern that health-care providers in Florida face "the dilemma of eschewing valuable patient-safety activities altogether or creating work product that

may be used against them in litigation.” Groups such as the [American Medical Association and Florida Medical Association](#), [American Hospital Association](#) and the [Patient Safety Organization of Florida](#) also urged review by the high court but, quite disappointingly, the defendant’s petition for certiorari was denied in October 2017.

On the same day it undercut patient safety, the Florida Supreme Court sided with plaintiffs’ lawyers over their medical liability clients when it comes to getting paid. In [Searcy, Denney, Scarola, Barnhart & Shipley v. Florida](#), the court found that the legislature could not maximize recoveries for injured patients by limiting attorney fees in malpractice claims against public hospitals. In its 4-3 decision the court ruled that a law firm was constitutionally entitled to take 25% of a client’s \$15 million recovery. It did so even though the legislature waived the state’s sovereign immunity and approved the large recovery, but with the condition that no more than \$100,000 of the award go toward attorneys’ fees. A mid-level appellate court, which Florida’s Supreme Court reversed, [found](#) that to allow otherwise would violate the separation of powers, rewrite legislative enactments, and be contrary to earlier decisions of the state high court. Yet the usual 4-3 majority allowed the lawyers to take their hefty cut of funds that the legislature specifically approved for a child’s future medical care.

Then, this past summer, Florida’s high court invalidated the state’s reasonable limit on noneconomic damage awards in medical liability cases. In another 4-3 decision in [North Broward Hospital District v. Kalitan](#), the court found that the legislature lacked a legitimate state objective to constrain such awards, which are often the largest part of damages. The decision was not a surprise. Three years earlier the court invalidated the cap when applied in wrongful death cases involving multiple claimants in [Estate of McCall v. United States](#). As [predicted](#) in last year’s Judicial Hellholes report, the court extended this reasoning in *Kalitan*, allowing unlimited awards in all cases for unquantifiable losses, such as pain and suffering, inconvenience or lost enjoyment of life.

In *Kalitan* and *McCall* the court hubristically substituted its own policy judgment for that of the state legislature and governor, finding the medical malpractice insurance crisis that originally drove the reform statute never existed and, even if it did, it was over. In so doing, the court rejected the findings 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 access to quality healthcare in Florida. By way of contrast, the U.S. Court of Appeals for the Eleventh Circuit [upheld](#) the same law under the U.S. Constitution.

[Dissenting](#) in *Kalitan*, Justice Polston, joined by Justices Canady and Lawson, expressed concern about the majority’s eagerness to legislate from the bench. “It is the Legislature, not this Court, that is entitled to make laws as a matter of policy based on the facts it finds,” he wrote. His dissent properly recognized that it is “the Legislature’s task to decide whether a medical malpractice crisis exists, whether a medical malpractice crisis has abated, and whether the Florida Statutes should be amended accordingly.”



A Florida civil justice advocate said the court “crowned itself fact-finder and policymaker, [rejecting all of the Legislature’s work](#) and its role under [Florida’s] system of government.”

Finally, in a November encore, the Florida Supreme Court invalidated a state law enacted to place plaintiffs and defendants on level ground when initially evaluating the merits of medical malpractice allegations and thus encourage settlement of valid claims without the need for litigation.

The law, enacted in 2011, allowed a healthcare provider’s attorney to informally speak with a plaintiff’s treating physicians about the medical condition at issue in the lawsuit before a lawsuit is filed. Since bringing a medical malpractice lawsuit waives privacy rights with respect to the medical information at issue in the claim, a mid-level appellate court [upheld](#) the law, rejecting plaintiff counsel’s seemingly ridiculous contention that the law intruded on a patient’s privacy.

But you guessed it, in [Weaver v. Myers](#) Florida’s high court majority reversed the lower court on wholly speculative grounds, suggesting that defense counsel might ask doctors to share medical information beyond the scope of the specific malpractice allegations – even though the statute does not authorize them to do so. This decision was not supported by Florida’s Constitution or prior court decisions. Rather, as the three dissenting justices recognized, it was yet another instance of the majority’s “unwarranted interference with the Legislature’s authority.”

## INVALIDATING ARBITRATION AGREEMENTS

In addition to undermining amicable settlements prior to litigation, Florida's Supreme Court also has significantly curtailed the ability of patients and doctors to avoid litigation by way of relatively inexpensive and quick resolutions through arbitration.

The court twice ruled, in [December 2016](#) and then again in [May 2017](#), that an agreement to arbitrate any dispute arising out of medical care entered between a doctor and patient is void and violates public policy unless the agreement mirrors provisions included in Florida's Medical Malpractice Act. One such [provision](#) requires healthcare providers to concede liability and arbitrate only on damages. A hospital has asked the U.S. Supreme Court to review the most recent decision, [arguing](#) that these rulings violate the Federal Arbitration Act, which promotes arbitration by generally requiring states to honor and enforce such agreements. The hospital notes that state law compelling it to surrender its defenses in order to arbitrate a dispute is incompatible with the federal law. The hospital's petition for certiorari is [pending](#).



Those two decisions came on the heels of another 2016 ruling noted in [last year's Judicial Hellholes report](#), in which the Florida Supreme Court [ruled](#) nursing home residents cannot be bound by an arbitration agreement when it is signed by a family member – even when that same family member subsequently files a lawsuit on behalf of the estate. Such anti-arbitration rulings carelessly enrich Florida's litigation industry at the expense of those seeking medical and nursing home care in this [steadily aging](#) state.

## ENABLING FRAUDULENT AND INFLATED CLAIMS

In years past the Judicial Hellholes report has [documented](#) the shady referral relationships between some Florida personal injury lawyers and the medical clinics to which the lawyers refer their clients. The system leads to inflated medical bills and, as a result, inflated judgments and settlements. This year a Florida Supreme Court decision may make the situation worse, allowing attorneys to hide such arrangements during litigation.

In [Worley v. Central Florida Young Men's Christian Association, Inc.](#) the plaintiff fell in a YMCA parking lot, went to the hospital to be checked out, and had a follow up appointment a week later. She then hired an attorney and was sent to an orthopedic center, which referred her to another doctor who performed a routine procedure that should have cost around \$6,000. Yet her lawsuit [claimed over \\$66,000](#) in damages after the debt was sold multiple times, with the cost inflated after each additional transaction. When lawyers for the YMCA attempted to investigate the legitimacy of the charges, Worley's lawyers instructed her not to answer any questions about whether they referred her to a particular doctor.

By way of background, some plaintiffs' lawyers refer clients to certain doctors willing to sign "[letters of protection](#)." A letter of protection promises the doctor will not charge the patient after providing care and instead wait for payment from the anticipated settlement of a lawsuit. Because payment does not come through the patient's insurance, there is no applicable schedule of fees and the clinics can charge rates that no one would ordinarily pay. The clinic can then sell the account receivable and letter of protection to another entity that can also sell the debt, and so on.

In April 2017 the high court's usual 4-3 majority effectively protected this letters-of-protection racket, allowing assertions of attorney-client privilege to hide referral relationships in personal injury cases. The dissent logically argued that the number and frequency of referrals between a lawyer and a medical provider are not privileged because the referrals are for the purpose of receiving medical care, not legal services.

## EXPERT TESTIMONY STANDARDS ON THE LINE

While federal courts and an overwhelming majority of other states have adopted the more exacting [Daubert standard](#) for expert testimony, Florida's high court is not raising the bar without a fight. In action many saw as long overdue, the Florida Legislature finally passed a reform law in 2013, effectively deputizing judges as gatekeepers to ensure ahead of time that expert testimony presented to jurors is indeed reliable.

In February 2017, however, the court handed trial lawyers a major victory by refusing to adopt *Daubert* procedur-

ally, expressing “grave” but unspecified “constitutional concerns.” Despite its fair and just application in most of the nation’s courts, Florida’s plaintiff-friendly justices [posited](#) that having trial judges carefully review proposed expert testimony is somehow impermissible in Florida. While refusing to adopt the *Daubert* approach, the court also declined to adopt as a rule of procedure another statute that would have required an expert testifying on the applicable [standard of care](#) in a medical liability lawsuit to be in the same specialty as the doctor named as a defendant.

Now, having declined to adopt the new standard as a rule of procedure, the Florida Supreme Court is poised to end what is left of *Daubert*. In *Delisle v. Crane Co.*, it will decide whether *Daubert* applies in a case in which the plaintiff’s experts testified that he developed mesothelioma due to a combination of low-dose exposures to asbestos fibers in sheet gaskets (while working at a paper company) and the filters of Kent cigarettes (while smoking), among other sources. A Broward County jury returned an \$8 million verdict. A mid-level appellate court, however, [overturned](#) the verdict, finding two of the plaintiff’s expert witnesses failed to meet the *Daubert* standard. It ordered a new trial for the cigarette maker and entered a verdict in favor of the gasket maker. The Florida Supreme Court, which has already darkened Sunshine State skies for [tobacco defendants](#) with various plaintiff-friendly [rulings](#), will now use this asbestos-cigarette case to make a substantive determination on whether trial courts may apply the *Daubert* approach in Florida.



## SOUTH FLORIDA

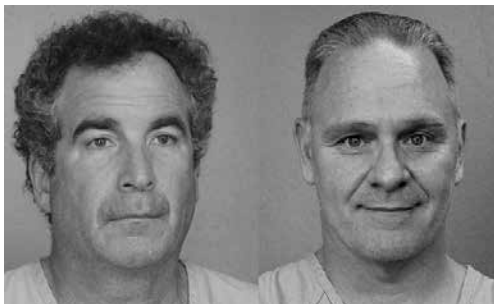
South Florida has developed a well-deserved reputation for its aggressive personal injury bar and fraudulent and abusive litigation practices.

### LAWYERS ARRESTED FOR PIP FRAUD

In addition to court sanctions, criminal prosecutions – underused in Florida – are a means by which to check litigation fraud. And fraud in Florida’s [personal injury protection](#) (PIP) system demanded its own spotlight this year. Under the PIP system, insurers pay up to \$10,000 for medical expenses stemming from auto accidents no matter who is at fault. Florida lawyers and their associates have been scamming the system for years, contributing to why Floridians have some of the [highest car insurance rates](#) in the country.

In late-September 2017, the Broward County Sheriff’s Office led a fraud sting that resulted in the [arrest](#) of six Florida personal injury lawyers from Fort Lauderdale and Boca Raton. Prosecutors allege that the attorneys paid tow-truck drivers, auto-repair employees and others to solicit “unsuspecting vehicle accident victims” for them, paying \$500 to \$1,500 per referred client. Then the lawyers allegedly sent the clients to medical clinics, which billed insurers for treatment covered by PIP benefits and gave the lawyers [kickbacks](#) of \$1,500 to \$2,500 per patient. One of the attorneys is further accused of taking half of his clients’ settlement checks.

Following the lawyers’ arrests, Broward County authorities [rounded up](#) accomplices, individuals the lawyers allegedly paid to solicit car crash victims to make insurance claims. Authorities say they cumulatively received more \$1.5 million dollars in kickbacks from fraudulent PIP claims in 2015 and 2016. The FBI is now on the case and [more arrests](#) may be forthcoming.



Slootsky and Pravato

Meanwhile, at least two of the conniving personal injury lawyers have already [entered guilty pleas](#). **Steven Slootsky** of Boca Raton was first, pleading guilty to 15 felonies and agreeing to spend up to five years in prison and pay more than \$170,200 in restitution to defrauded insurance companies, according to the agreement.

The deal between prosecutors and Fort Lauderdale’s **Vincent Pravato** address three felony charges with a sentence of five years’ probation, 250 hours of community service and \$16,408 in restitution to insurers.

A separate indictment of a chiropractor and two clinic operators unsealed in October detailed yet another scheme in which “[corrupt lawyers](#)” milked the PIP system in a multimillion-dollar fraud. The indictment reportedly indicates that attorneys duped clients into believing they had lucrative lawsuits, encouraged them to visit a network of chiropractic clinics, and enticed them to have expensive treatments, even when uninjured. Accident victims were pushed to make dozens of unnecessary visits to the clinics until their bills reached the maximum \$10,000 PIP benefit.

### **A GATHERING STORM OF ‘AOB’ ABUSE**

Florida also is experiencing a major uptick in assignment of benefits (AOB) abuse in recent years. An [AOB allows](#) a policyholder to sign over insurance claim rights to a third-party, such as a contractor, so the third-party can quickly make repairs and get paid directly by the insurer later. While policyholders may sign over their rights innocently enough, some attorneys and contractors then use these agreements to inflate pricing, perform unnecessary repairs to homes following a storm, for example, and then sue insurers when the exorbitant charges are questioned. Such AOB claims have [skyrocketed](#) over the past decade, from 405 filed in 2007 to more than 28,000 in 2016. These lawsuits are [overwhelmingly concentrated](#) in Palm Beach, Broward and Miami-Dade counties.

A *Wall Street Journal* editorial in March 2017, “[Florida’s Trial Bar Hurricane](#),” noted that “[s]tate courts have turned a blind eye to this abuse, and insurance costs are predictably soaring,” by as much as [10% to 15%](#), even as “legislative fixes have been thwarted in recent years by the state’s powerful plaintiffs-lawyer lobby.” A follow-up [letter to the editor](#) by ATRA director of legislation **Matthew Fullenbaum** called out two lawmakers in particular: “Sunshine State voters should be reminded that two key state Republicans, **Speaker of the House Richard Corcoran** and **Senate President Joe Negron**, are currently running obedient interference for the powerful plaintiffs’ bar.” They and others helped kill reform this year, but another effort is expected in 2018.

### **AUTO-REPAIR AOB**

A comparable AOB scheme occurs in auto repairs in Florida, particularly with respect to claims for cracked windshields. According to the Florida Department of Financial Services, lawsuits brought by [auto-glass](#) companies against insurers rose from 1,389 in 2012 to 19,695 in 2016. Three-quarters of this litigation is filed in just five counties. About half of the cases are filed in the Tampa area, Hillsborough and Pinellas counties, but Broward and Miami-Dade counties, joined by Orange County, round out the top five, according to a [study](#) by the Florida Justice Reform Institute. About a quarter of these cases are filed by less than a [dozen lawyers](#) who appear to work with a relatively small number of auto glass shops. ATRA hopes to report arrests and plea bargains in connection with this racket next year.

### **HURRICANE IRMA AND CORAL GABLES**

Leave it to South Florida law firms to turn a natural disaster into a [class-action lawsuit](#). After Hurricane Irma hit in September 2017, two law firms sued Florida Power & Light Company (FPL) on behalf of all of its customers, blaming the power company for outages after the storm. The [complaint](#) alleges that FPL failed to adequately



prepare for the storm and otherwise mismanaged funds it received through a rate increase for preventive tree-trimming, which supposedly delayed power restoration. Never mind that FPL has been replacing about [16,000](#) old utility poles each year with more hurricane-resistant ones.

An attorney at a law firm that filed that class action, **Frank Quesada**, also moonlights as a Coral Gables City Commissioner. So no one was surprised on October 24 when the commission [voted unanimously](#), with Quesada abstaining, to file its own lawsuit against FPL over power outages and slow response times. A power company spokesperson said such litigation is [frivolous](#) in that it effectively seeks future preferential treatment for Coral Gables residents when the utility will be working to restore power for all customers. FPL also noted that some of Coral Gables problems are of its own making, such as its resistance to past tree-trimming efforts.

Speaking of the past, Coral Gables has recently developed its own little reputation for litigiousness. In May 2017 the city [sued FlipKey](#), a TripAdvisor-owned short-term home rental company, for listing properties in the city. Coral Gables [filed another lawsuit](#) against Facebook and Instagram in August 2017, demanding the social media networks remove posts that criticize the city's reliance on private security guards (instead of sworn police officers) and reveal the identities of the users behind that criticism. This is also the same city that spent [eight years](#) defending its [ban on parking pickup trucks](#) within city limits overnight, which, while upheld by the courts, was [relaxed](#) by voters in 2012.

### ADA LAWSUITS ON A ROLL

For years Florida has been plagued with unscrupulous lawsuits filed under the Americans with Disabilities Act (ADA). One quarter of the ADA access lawsuits filed in federal courts nationwide in 2016 (1,663 out of 6,601) were filed in Florida, according to a [Seyfarth Shaw analysis](#). In these “[drive-by lawsuits](#)” a group of lawyers and serial plaintiffs sue businesses for minor technical violations of accessibility regulations, such as fading paint on a handicap parking space or a fractionally imprecise angle of a wheelchair ramp. *Forbes* [explained](#) these lawsuits as “an extortion scheme [that] is now a perfected business plan executed by unethical attorneys.”

“Lawsuit mills” churn out complaints in Broward, Palm Beach and Miami-Dade counties at a rate of up to 20 a day. Pro se professional plaintiffs also are behind many of the lawsuits. For example, though apparently no relation to early-20th century musical theater legend [George M. Cohan](#), South Florida's **Howard Cohan** is himself a real trouper, filing more than [1,100 ADA claims](#) against local businesses between 2012 and 2016, incredibly accounting for about 20% of the state's ADA litigation during that period. One such lawsuit took aim at an art supply shop in West Palm Beach, alleging a toilet paper dispenser was not at the exactly correct height.



This year the Florida Legislature passed a [law](#) allowing businesses to hire a qualified expert to [inspect and certify](#) that their facility is ADA compliant. The expert provides the business with a compliance certification or remediation plan that can be filed with the state and must be considered by courts in litigation. The new law does not stop lawsuits, even when a business is certified to be in compliance. But theoretically it may discourage frivolous lawsuits, even as some [question](#) its lack of clarity and effectiveness.

### TRYING TO MAKE ASBESTOS PAY AGAIN

As if tobacco cases, accident and storm claims, and disability-access lawsuits weren't enough to keep South Florida's aggressive personal injury lawyers in Porsches and flashy boats when they're not in jail, the [Defense Litigation Insider](#) reported in late-October 2017 that plaintiffs' lawyers in *Robert G. Clark v. Borg Warner Corporation*, filed in Miami-Dade County, are trying to reopen an additional line of lucrative litigation. They have filed three motions that signal their ultimate desire to have the state's 12-year-old asbestos litigation reform statute struck down – largely on equal protection grounds – so questionable asbestos claims might again pay big money.

Enacted in 2005, Florida's [Asbestos and Silica Fairness and Compensation Act](#) has reasonably required asbestos plaintiffs to submit evidence meeting accepted medical standards to support claims for nonmalignant injuries while abolishing punitive damages. This reform, which is in place in many states, stopped lawyers from using unreliable mass screenings to flood courts with bogus lawsuits filed on behalf of people who were exposed to asbestos but had no physical impairment. It has preserved resources for those who are truly sick and those who might develop an asbestos-related injury in the future.

Early bets are this South Florida case will eventually make its way to the state's high court, giving the justices there yet another opportunity to forsake the judgment and authority of the legislative and executive branches.

## FRAUDULENT TOBACCO CLAIMS DRAW NEARLY \$9.2 MILLION IN SANCTIONS

Plaintiff lawyers' self-dealing is not limited to South Florida. A panel of four federal judges in October 2017 imposed nearly \$9.2 million in sanctions on two Jacksonville-based plaintiffs' firms for their shameless pursuit of more than 1,200 "frivolous and factually baseless lawsuits" against tobacco defendants. The 148-page [order](#) in the U.S. District Court for the Middle District of Florida detailed how lawyers at the [Wilner Firm](#) and [Farah & Farah PA](#) had committed "unprofessional conduct [on] ... a grand scale," showing "reckless disregard for their profession's ethical duties" and "disdain for the Court."

As reported by the [Florida Times-Union](#), the Wilner and Farah firms "filed claims in 2008 on behalf of hundreds of people who had not authorized them to do so and people who had never smoked. More than 500 of the people were dead." Problems with these claims were discovered in 2012 when, over the lawyers' strenuous objections, the court sent questionnaires directly to plaintiffs.

The lawyers had filed the phony claims pursuant to a Florida Supreme Court decision known as *Engle*, which had made Florida "ground zero" for tobacco litigation. As discussed in previous Judicial Hellholes reports, the 2006 *Engle* decision preserved findings in a class action lawsuit that place two strikes against defendants. Individuals who were members of the class would not have to establish that the companies were negligent, sold a defective product, or that cigarettes cause certain diseases. They would only need to show that they were a member of the class who smoked during a certain period, addiction caused their injuries, and the amount of damages suffered.

The only catch? To take advantage of the *Engle* ruling, plaintiffs' lawyers had one year to file their individual claims. And take advantage they did.

Since the two law firms couldn't get in touch with many of the people they heard from as the *Engle* litigation proceeded through Florida's courts between 1994 and 2006, the lawyers filed complaints for them anyway. The firms filed about 3,700 lawsuits on behalf of more than 4,400 "clients" that made their way to federal court as the deadline approached in 2008. Over the next several years the court repeatedly asked the lawyers to confirm that they had viable cases on behalf of clients who wished to proceed with litigation. In response, the lawyers represented to the court that they had authorization to file the suits and had recently been in touch with their clients.

But an extensive investigation through appointment of a special master, building on an [earlier ruling](#) of the U.S. Court of Appeals for the Eleventh Circuit, found otherwise. It indicated that the lawyers filed 588 personal injury complaints on behalf of dead people who could not bring such claims. Another 572 cases involved plaintiffs who did not respond to a court-ordered questionnaire and likely did not authorize the firms to file or maintain lawsuits.

In all, the court found that about one third of the cases filed by the Wilner and Farah firms were frivolous, representing an "immense waste of judicial resources and contempt shown for the judicial process." Estimating the cost of wasted resources, the judges ordered the firms to pay \$6,983.42 for each of 1,250 frivolous suits, and cover the \$435,129.12 cost of the special master's seven-month investigation. They additionally referred the matter to the Florida Bar, which ATRA urges to take harsh disciplinary action.



Rep. Burgess

For example, state **Rep. Danny Burgess** (R) and **Sen. Greg Steube** (R) earlier this year tried but failed to pass legislation that would have repealed the state's appeals bond cap for tobacco defendants. And [Florida Politics.com](#) reports that a renewed effort is expected in 2018.

**Judges William G. Young, Timothy J. Corrigan, Marcia Morales Howard and Roy B. Dalton Jr.** are to be applauded for facing Florida's rampant lawsuit abuse head on.

While they recognized that "it would have been easier ... to let this matter go," they did the right thing by showing such egregious conduct will not be tolerated. Other judges presiding over mass tort litigation in Florida and elsewhere should follow their example.

Meanwhile, some Florida lawmakers — functioning as political puppets of the powerful plaintiffs' bar — keep pulling strings in the opposite direction, trying to make it easier for the state's shyster class to coerce settlements from civil defendants. For



Sen. Steube



## OUTLOOK DIM FOR THE SUNSHINE STATE

Florida shows little inclination to make a much needed course correction. Bipartisan legislative majorities this past year catered to the trial bar in defeating bills that would have addressed contingency fees in workers compensation claims and curtailed both AOB and PIP fraud. Medical malpractice and collateral source reforms were both killed in committee.

So significant reforms face a steep climb in the state legislature. But if the politically powerful personal injury lawyers get their way, they may soon have a friend in the governor's mansion, too. Speaker Corcoran has formed a new political action committee as he considers a gubernatorial run, and plaintiffs' lawyers specializing in [medical malpractice](#) and [product liability](#) claims were among those contributing [large sums](#) to the \$820,900 the PAC initially raised in July 2017.

And as if ruling the roost in both the legislative and executive branches weren't enough to look forward to, cock-sure plaintiffs' lawyers also look to extend their grip on Florida's Supreme Court – perhaps with help from some sitting justices.

The story is long and a little complicated, but here's a table-setting from the [Orlando Sentinel](#):

*A quirk in the state constitution means Florida could be headed to a bruising legal brawl over the ideological balance of the Florida Supreme Court that would decide the future of the court for decades to come.*

*Three justices – **Barbara Pariente**, **Fred Lewis** and **Peggy Quince** – will be forced under the state constitution's age limits to retire on Jan. 8, 2019, **Gov. Rick Scott's** last day in office. The justices are reliable members of the liberal voting bloc that holds a 4-3 majority on the bench.*

After hearing November 1 [arguments](#) in a case challenging Gov. Scott's authority to appoint three new and presumably less plaintiff-friendly justices to the high court two Januarys from now, Chief Justice Labarga and Justice Pariente were caught by a still open microphone in a [hushed discussion](#) that sounded like it may have been about influencing members of the [Judicial Nominating Commission](#) (JNC), which vets and recommends to the governor candidates for Supreme Court appointments.

While looking at a [document](#) offered by Justice Pariente, Chief Justice Labarga is heard to say, "Izzy Reyes is on there, he'll listen to me," referring to JNC member Israel U. Reyes, a former circuit judge who now runs a private practice out of Coral Gables.

Ironically, just before the justices were caught on the hot mic, the lawyer for plaintiffs hoping to keep Gov. Scott from appointing new justices urged the high court to stave off a possible political crisis by ruling for his clients now, "in a nice calm, dispassionate way in which nobody can make any accusations that anybody is worried about who is picking their colleagues or their successors ... ?"

Many observers, including Gov. Scott it seems, would argue that it's already too late for the justices to avoid such accusations. The governor's attorney filed a November 20 motion with the high court [urging](#) Justice Pariente to recuse herself from participating in the decision over his nominating authority. The motion cites both the open-mic incident and the justice's past campaign remarks in arguing she cannot be impartial. The court [denied](#) the motion November 29, so stay tuned.





## #2 CALIFORNIA

If most lawmakers in Sacramento and the reliably generous plaintiffs’ lawyers who write campaign checks to keep them there can be likened to the [Symbionese Liberation Army](#) of the Berkeley-radical 1970s, then most California voters can be likened to the Stockholm syndrome-suffering heiress Patty Hearst, coming to love their captors even as hundreds of new laws – many of them designed specifically to expand civil liability on business and property owners – are enacted each year.



With another [859](#) new statutes added to the books in 2017, the annual average for new enactments since 2010 ticked

up to more than 830, making it virtually impossible for even the most conscientiously law-abiding Californians to keep up and protect themselves from costly lawsuits. Which helps explain why data available from the [Court Statistics Project](#) of the [National Center for State Courts](#) show that more than 820,000 new lawsuits were filed in state courts in 2016. And with [tens of thousands more](#) filed in federal courts throughout the state, it’s no mystery why housing and business costs continue to soar, driving a continuing outmigration of [people](#) and job-providing [companies](#) whose executives consistently rate California the [nation’s worst](#) state in which to do business.

### NEW LAWS SINCE 2010

Year	#of New Laws
2010:	733
2011:	745
2012:	876
2013:	800
2014:	931
2015:	808
2016:	893
2017:	859
Total	6,645
<b>Annual Average</b>	<b>~830</b>

Which is why neither Los Angeles, Sacramento, Pomona or Chula Vista has so much as a snowball’s chance in a hellhole of [convincing](#) online mega-retailer Amazon to locate its second headquarters anywhere within California’s borders. Amazon CEO and [America’s richest man](#) Jeff Bezos would have to be crazy to even think about giving the state’s ravenous plaintiffs’ bar an even greater opportunity to [rifle his deep pockets](#).

In any case, as this report notes regularly, a lengthy, stand-alone book could be written every year about California’s inexorable expansions of civil liability. But because these constructive criticisms seem to fall largely on deaf ears in Sacramento and in many courthouses around the state, and because leaders and citizens in more reform-minded states actually appreciate and often act on the report’s insights and critiques, this year’s look at the West Coast’s perennial Judicial Hellhole will pragmatically limit its focus to a limited armful of the state’s civil injustices.

### U.S. SUPREME COURT CHECKS CALIFORNIA’S HIGH COURT

Last year’s [report](#) was very critical of the California Supreme Court’s 2016 split decision in [Bristol-Myers Squibb Co. v. Superior Court of](#)

[California, San Francisco County](#). The decision showed the court’s willingness to “throw open [further] the doors to the state’s already overburdened courthouses to out-of-state plaintiffs with products liability (and other) claims against national defendants, discarding due process and effectively ignoring several U.S. Supreme Court opinions.”

The 4-3 majority had ruled that state courts could decide cases against businesses that are not headquartered or incorporated in California – even when the plaintiffs live and were allegedly injured out of state – if a defendant company merely has significant sales of a product in California (as any national business does, given the state’s size).

In her prescient dissent, retiring **Justice Kathryn Werdegar** wrote: “By weakening the relatedness requirement, the majority’s decision threatens to subject companies to the



jurisdiction of California courts to an extent unpredictable from their business activities in California, extending jurisdiction over claims of liability well beyond our state's legitimate regulatory interest. ... Such an aggressive assertion of personal jurisdiction is inconsistent with the limits set by due process."

Thank goodness the U.S. Supreme Court agreed with Justice Werdegar. Soundly rejecting the jurisdictional analysis of California's high court, an 8-1 U.S. Supreme Court majority in June 2017 reiterated that unless the alleged injury arose in a state, an out-of-state corporation is only subject to a lawsuit if it is incorporated or can be considered "at home" in the state by maintaining a principal place of business there. Applying this standard, the high court reversed the California decision as "difficult to square with our precedents." To establish what is known as "specific jurisdiction," there must be "a connection between the forum and the specific claims at issue." Bristol-Myers' contract with a California-based drug distributor, the court found, was insufficient to establish jurisdiction. (See more on this and two more 2017 U.S. Supreme Courts jurisdictional decisions in Closer Looks, p. 64.)

Incidentally, the California Supreme Court continued its well established propensity for expanding civil liability



and disregarding U.S. Supreme Court precedent with its unanimous April 2017 decision in [McGill v. Citibank, N.A.](#) The court held that an arbitration agreement that "waives the right to public injunctive relief is contrary to California public policy and is therefore unenforceable under California law." Cue more class actions and shameless contingency fees.

The state high court reversed a lower appellate court ruling that had relied on the 2011 U.S. Supreme Court decision in [AT&T](#)

[Mobility LLC v. Concepcion](#). Thus California's high court again defied the highest court in the land by refusing to accept its interpretation of the Federal Arbitration Act as a statute that generally preempts state laws that inhibit mandatory arbitration clauses in pre-dispute contracts. Citibank has [petitioned](#) the U.S. Supreme Court to hear its appeal.

### EXPORTING 'PAGA' TO HOBBLE COMPETING STATES

Rather than advocate reforms from within to help make their state more competitive and persuade residents and businesses not to flee to other states, some Californians have cynically taken to exporting their litigious ways so as to hobble other states' economies and make those states less attractive to would-be out-migrants. And if some advocates have their way, California's [Private Attorneys General Act](#) (PAGA) will become the [kudzu](#) of civil liability-expanding state laws, choking off business investment, job creation and wage growth in states far and wide.

Taking effect in 2004 as a means around arbitration clauses in employment contracts that limit costly, plaintiffs' lawyer-enriching class actions, PAGA authorizes "aggrieved" employees to file lawsuits seeking civil penalties on behalf of themselves, other employees and the State of California for labor code violations. But as [Bloomberg reports](#), California-based activists aren't content to stifle businesses in the once Golden State. They held a July 2017 conference to pitch PAGA to municipal lawmakers from around the country and plan to campaign for comparable new laws in at least four states in 2018.

Meanwhile, based on the pretense that employees are bringing these claims on behalf of the state, 75% of the penalties wrung from non-compliant employers go to the state's Labor and Workforce Development Agency while only 25% goes to the "aggrieved employees" and their lawyers who take a third or so of that. So this very blue state's policymakers have found a way to expand government spending without per se raising taxes. Never mind that many PAGA lawsuits revolve around technical nitpicks, such as an employer's failure to print its address on employees' pay stubs, even though the address was printed on the paychecks themselves.

To say that California workers must be some of the most easily aggrieved in the world would be an understatement. But to be fair, it's the lawyers who gin up PAGA complaints who are most to blame. According to [Jeffrey D. Polsky](#) of [Fox Rothschild](#),



such lawyers and their employee clients are [eager to settle cases](#) with employers because “the parties can decide what part of the settlement to designate as PAGA penalties and what part goes directly to the employees. Invariably, plaintiffs want more to go to them directly because they and their attorneys get all of that.” Employers will go along if they’re to be let off the hook a little more easily.

But expansive [PAGA amendments](#) were signed into law by **Gov. Jerry Brown** in June 2016, empowering the state to guard jealously its interest in settlements and keep more cash for itself. Polsky says: “More money going to PAGA penalties, means less going to plaintiffs directly. Since employees see just a fraction of those penalties, it will be more expensive for employers to settle lawsuits that include PAGA claims.”

Meanwhile, two state court decisions in 2017 will affect the PAGA saga. In the first, [Williams v. Marshalls of Ca.](#), **Jennifer Rubin** of [Mintz Levin writes](#), “the California Supreme Court rejected an employer’s attempt to severely curb discovery in PAGA actions” despite “certain employee privacy interests.” But the “Court did not rule out stricter limitations on discovery if information sought was more personal in nature . . . .”

In the second case, [Esparza v. Ks Industries, LP](#), the California Court of Appeals actually confirmed a marginal win for employers by finding that employees-turned PAGA plaintiffs can’t have it both ways. Citing the state high court’s 2014 [Iskanian](#) decision, the appellate court found that an employee subject to an arbitration provision must make a choice: arbitrate for wage claims and keep all of the resulting award, or sue for PAGA penalties and take the measly 25% the law allows.

Legislators sensitive to employers’ plight under PAGA keep trying to amend the onerous law, but trial lawyers, some of whom have carved out a nice little PAGA niche for themselves, keep killing such bills. Nonetheless, Assembly members **Vince Fong** and **Rudy Salas** deserve kudos for trying. Also worthy of encouragement are efforts by business groups and activists to take the issue of much needed PAGA reform directly to the people in the form of ballot measures. Defense counsel **Carmen J. Cole** updated those efforts in an [October 2017 blogpost](#).



### PROP 65

As the Judicial Hellholes report has documented for years, California’s [private-attorney-enforced](#) and thus easily exploited Prop 65 became law as a well-intentioned voter referendum in 1986. It requires the placement of ominous warning signs in [various businesses](#) and other public accommodations where even the slightest, non-threatening trace amounts of now [more than 1,000](#) listed chemicals that state environmental regulators deem carcinogenic or otherwise toxic may be present.

In large enough doses these chemicals are “known to the state of California to cause cancer, birth defects or reproductive harm,” insist the regulators. But the now ubiquitous and generally ignored signs do nothing to protect public health, while the absence of signs serves principally as an invitation for personal injury lawyers and their favorite lead plaintiffs to bring more lawsuits. Prop 65 litigation produces hundreds of [settlements](#) and [judgments](#) each year.

Surely no one sides with businesses that truly endanger public health. But to give a sense of how absurdly divorced from public health concerns California courts have let Prop 65 litigation get, in September 2017 a lawsuit [stayed in 2015](#) was [resurrected](#) as the so-called **Council for Education and Research on Toxics** (CERT) has sued Starbucks and other coffee sellers over their failure to warn consumers about barely measurable levels of [acrylamide](#) in their delicious brews. For better context, understand that [CERT](#) is [merely a front](#) for and shares an address with Long Beach-based plaintiffs’ lawyer [Raphael Metzger](#). Enough said.

When California Gov. Brown served as the state’s attorney general, he took a very dim view of parasites like Mr. Metzger. In a [2007 letter](#) warning a Connecticut-based law firm to give up its lucrative-at-the-expense-of-California-businesses Prop 65 racket, AG Brown and his deputy wrote, “your manner of pursuing [these claims] does not appear to be in the public interest. . . . Our primary concern at this point is the manner in which your clients

have collected significant sums of money from businesses that have little or no liability for past violations, and an amount of attorney fees that appears to exceed a *reasonable* amount” (emphasis added).

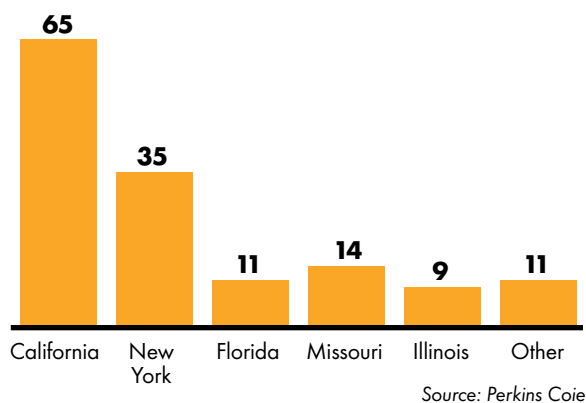
So it’s not surprising that in October 2017, Gov. Brown [signed](#) into law compromise [legislation](#) that amends Prop 65, with some observers optimistically hoping it may reduce annual Prop 65 claims by 25%. But considering that environmental regulators keep [adding](#) new chemicals to their list of supposedly “known” carcinogens and toxics, even when peer reviewed science says [they’re safe](#) (e.g., the effective and widely used herbicide glyphosate), the proof will be in the allegedly toxic pudding.

## FOOD & BEVERAGE LITIGATION

Speaking of pudding, California law also encourages specious, often no-injury consumer protection and false advertising lawsuits that target makers and sellers of foods and beverages. As [Food Navigator-USA.com](#) reported in late November 2016, “There have been hundreds of class action lawsuits directed at food and beverage companies in recent years” over everything from whether the phrase “[evaporated cane juice](#)” on a product’s label fraudulently misleads consumers about sugar content to allegations that products marketed as “natural” may contain [genetically modified ingredients](#).

Many of these class actions are filed in California [state courts](#) or federal courts located there. The federal Northern District of California has been derisively referred to as the “Food Court” as these cases have piled up there.

### FOOD INDUSTRY CLASS ACTIONS BY JURISDICTION IN 2016



“As to what happens to most [of these] false advertising cases once they are filed,” Food Navigator observed, “it depends on a multitude of technical factors, many of which seem to the casual observer to have little to do with the actual merits (e.g., is this label actually deceptive?). Few are thrown out completely after a motion to dismiss, and many drag on for years as plaintiffs are given the opportunity to amend their complaints and tweak their arguments.”

A [defense attorney](#) explained to Food Navigator that since many of these food and beverage lawsuits eventually show up in court records as “voluntarily dismissed,” it’s likely that parties often come to a private settlement. So “we don’t know how much money is changing hands, but

the fact that so many of these cases are still being filed suggests that the plaintiffs’ attorneys think it’s worth it.”

It’s too soon to know empirically, but anecdotal observation of 2017 headlines indicates that California judges’ patience for these often [preposterous](#) lawsuits – like the patience of the general public long ago – may be [running out](#). But for every dismissal of a food-labeling suit brought on behalf of someone purporting to be an imbecile incapable of understanding simple, federally mandated nutrition labels, at least another is [allowed to proceed](#).

## INNOVATOR LIABILITY

Crafted primarily by personal injury lawyers desperate to get around longstanding federal law that shields generic drugmakers from lawsuits over the substance of their medications’ warning labels, the novel theory of “innovator liability” effectively seeks to turn products liability law on its head. Fortunately, the argument that original brand-name drugmakers should be held liable for injuries allegedly arising from generic drugs manufactured, marketed and sold by third-party drugmakers has been widely [rejected](#) by courts across the country.

In fact, **San Diego County Superior Court Judge Joan M. Lewis** had reasonably dismissed *T.H. v. Novartis Pharmaceuticals Corporation*, a case in which plaintiffs sought to hold the pharmaceutical company liable for injuries they suffered in utero after their mother was prescribed a generic asthma medication six years after Novartis had ceased manufacture of its brand-name version and [sold its interest](#) in the drug.

But Judge Lewis was [unanimously reversed](#) in March 2016 by a three judge panel of the Fourth Appellate

District, which ordered the case remanded and invited plaintiffs to amend their complaint. In doing so, the panel relied on a since discredited California appellate decision in 2008, *Conte v. Wyeth*, the first to recognize innovator liability. The defendant appealed to the California Supreme Court, which heard oral argument in the case in October 2017.

Drug and device law expert [Steven Boranian](#) was present and later [blogged](#):

*“Perhaps the Court already knows what it wants to do with innovator liability, because nearly all the questioning was on perpetual liability,” indicating the justices were plainly “troubled by the prospect of liability in perpetuity for a manufacturer that no longer sells a product. The plaintiff tried to minimize the issue, arguing more than once that the prospect of perpetual liability was overblown and that perpetual liability cases would be rare,” but at least “a couple of justices not[ed] that the situation would not necessarily be rare.”*

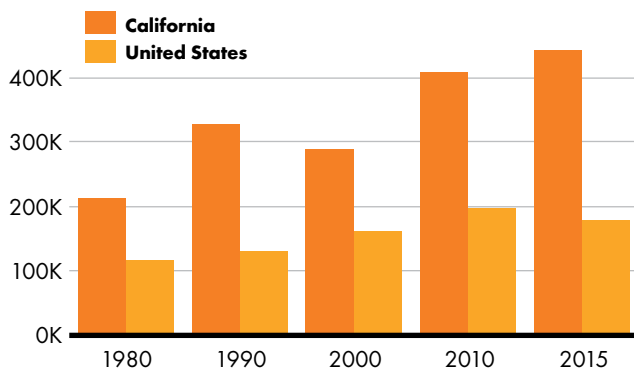
Nonetheless, Mr. Boranian says it’s “anyone’s guess” what California’s high court will do with innovator liability. Of course, the best and obvious solution is to adopt the bright-line rule urged by the defense, that manufacturers owe no duty at all to users of subsequent manufacturers’ products. Manufacturers everywhere are keeping their fingers crossed.

### CEQA’S UNINTENDED CONSEQUENCE: UNAFFORDABLE HOUSING

As this report has noted previously, the [California Environmental Quality Act](#), known as CEQA, “is California’s broadest environmental law,” according to the California Department of Fish and Wildlife, which administers it.

#### CALIFORNIA HOME PRICES HAVE GROWN MUCH FASTER THAN U.S. PRICES

Inflation-Adjusted Median Home Prices in 2015 Dollars



The law helps “guide [the department] during issuance of permits and approval of projects. Courts have interpreted CEQA to afford the fullest protection of the environment within the reasonable scope of the statutes. CEQA applies to all discretionary projects proposed to be conducted or approved by a California public agency, including private projects requiring discretionary government approval.”

But there’s been a long-growing bipartisan consensus (see [here](#), [here](#), [here](#), [here](#) and [here](#) for starters) that an unintended but disastrous consequence of the well-intentioned statute has been a rise in “Not In My Back Yard” litigation that delays or prevents construction projects across the state. Protection of the

environment is barely a consideration as wealthy plaintiffs, concerned more about the protection of their property values, level lawsuits which invariably add to the state’s chronic shortage of affordable housing.

A perusal of the [Miller Starr Regalia](#) blog at [CEQADevelopments.com](#) suggests that California courts have their hands full with this complicated and costly litigation, leaving interested observers sometimes confused and often disappointed. To his credit, Gov. Brown, who has often spoken of the need for meaningful, comprehensive CEQA reform, [vetoed](#) in October 2017 a CEQA amendment, saying, “the current CEQA process already is very detailed, and requires an incredible amount of notice. For that reason, I am reluctant to add the additional requirements mandated by this bill.”

### COURTS EXPAND ‘PUBLIC NUISANCE’ LAW

Regular readers know this report has consistently kept an eye on state attorneys general and, more recently, counties and cities that hire private-sector plaintiffs’ lawyers to pursue deep-pocket corporate defendants with lawsuits that seek to substitute public nuisance law, with its lower standard of proof, for products liability law and its more exacting standard. And though public nuisance lawsuits against companies that stopped making lead paint decades ago had failed in [seven](#) other jurisdictions, the scheme to force those defendants to pay for the abatement of peeling

and chipping paint won a key [2013 victory](#) with help from **Santa Clara Superior Court Judge James Kleinberg**.

After hearing post-trial motions Judge Kleinberg in January 2014 ordered three defendant 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. And though it took three years, that decision was largely [upheld](#) by California's Sixth District Appellate Court in November 2017, albeit with an order for the trial court to reduce the size of the verdict.

But even before the lead paint was dry on that unprecedented case, climate activists and their lawyers had already seized California law's now seemingly all-purpose public nuisance cudgel to go after oil companies, [filing suits](#) in July 2017 that seek compensation for cities anticipating calamitous sea-level rise as a result of fossil-fuel burning.

Quoted by the [Los Angeles Times](#), a lawyer representing the city of Imperial Beach and San Mateo and Marin counties in sea-level cases said, "Like the lead paint case, we have an industry that knew its products could inflict serious damage and continued to promote those products anyway." Likely salivating, he estimated his cases, since moved to federal court, could ultimately be worth "billions and billions." And UCLA law professor [Sean B. Hecht](#) told the Times, "As of yesterday's [lead-paint] ruling, those sea-level rise cases are far more likely to advance past the first litigation hurdle."

For the record, the lead-paint defendants intend to appeal their case to the California Supreme Court. It ain't over till it's over.



## **ASBESTOS AND TALC**

A [December 2016 decision](#) by the California Supreme Court resolved an appellate court split and found "the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers" where it is "reasonably foreseeable" that workers "will act as vectors carrying asbestos from the premises to household members."

As if that weren't a big enough blow to asbestos defendants, the state Senate passed [legislation](#) in 2017 that would undercut those defendants' right to due process by limiting the time for depositions of key witnesses in asbestos cases. As [Freddy Fonseca](#) of [Manion Gaynor & Manning LLP](#) explained in an August 2017 [blogpost](#):

*A shortened period for cross-examinations is inherently prejudicial because all defendants maintain an interest in properly and fairly preparing their defense and no party should be required to jeopardize that right. Imposing a seven hour limit on a key witness' deposition will ensure that defendants' due process rights will be violated by not allowing adequate time to defend the case at a deposition. As a hotbed for asbestos litigation, plaintiffs in California typically name dozens of defendants for a wide variety of alleged exposures in a myriad of industries and locations that generally consist of work histories spanning thirty to forty years. In addition, such time constraints will pin codefendants against each other as each attempts to jockey for more time to properly cross-examine a plaintiff in an effort to build their defense. The number of parties in a typical asbestos case coupled with the varying alleged exposures stretched over decades will make it impossible for a defendant to conduct an effective cross-examination under the time constraints proposed by SB 632.*

In 2016, for example, the typical asbestos lawsuit filed in Los Angeles named [69 companies](#) as defendants. Trial lawyers will try to get this bill through the Assembly and onto Gov. Brown's desk in 2018.

Meanwhile, on brighter notes for products liability defendants, a California jury deliberated for two days in November 2017 before [clearing Johnson & Johnson](#) and its talc supplier of any liability for a woman's terminal mesothelioma, an asbestos-related cancer, holding that there was no evidence that the companies' talcum powder was unsafe.

And a month earlier, Los Angeles County Superior Court Judge Maren Nelson [reversed](#) a wholly untethered \$417 million jury verdict for a woman who alleged her ovarian cancer had been caused by talcum powder use. Judge Nelson said the plaintiff failed to prove that talc caused her cancer, finding that at most the case proved there’s “an ongoing debate in the scientific and medical community about whether talc more probably than not causes ovarian cancer and thus (gives) rise to a duty to warn.”



### DISASTER-CHASING PERSONAL INJURY LAWYERS

Unable to sue God or Mother Nature, personal injury lawyers hurried in the wake of devastating October 2017 wild fires in Northern California to craft class actions against a major public utility whose power lines, the lawyers speculatively assert, must have somehow sparked the blazes.

Even as embers still smoldered in the Golden State, plaintiffs’ lawyers from California and across the country began [soliciting potential clients](#) for lawsuits targeting the deep-pockets of Pacific Gas & Electric, the company they’re already blaming for the deadly fires that ravaged public and private property to the tune of [billions of dollars](#) in the Santa Rosa and Cloverdale areas north of San Francisco.



Never mind that police arrested an [arson suspect](#) and the state’s investigation into the fires’ origins is otherwise ongoing.

Noteworthy in this rush to the courthouse is a California rule known as “[inverse condemnation](#),” which effectively allows for a utility defendant – even one that has complied with safety rules and regulations and has otherwise done nothing wrong – to be held liable for property damage and attorneys’ fees associated with an event like a wildfire. California is [one of the only states](#) in the country where courts have applied inverse condemnation liability to events involving utility equipment.

As sometimes sarcastic *Press Democrat* columnist **Chris Smith** [put it in late-October](#), “It appears that news of the fires that ravaged the North Bay and beyond has touched the heart of the [Lalezary Law Firm](#) of Beverly Hills.

“As Reserve Deputy Sheriffs and Personal Injury Lawyers,” reads one of the firm’s new, targeted promotions, ‘we feel it is our duty to launch a full investigation and bring swift justice for the families who were affected all across of (sic) California.’

“That is so sweet,” Smith’s wry mocking of the lawyers continued. “After the limitless demonstrations of valor, selflessness and generosity, we now witness a flood of offers from lawyers from down the block and across the nation to advocate for victims of our greatest disaster – and for an ample share of any judgments or settlements,” he observed, noting that piranha from Orlando-based [Morgan and Morgan](#), Dallas-based [Baron & Budd](#) and others are already circling, hoping to tear open the presumably deep pockets of the principal provider of electric power to much of Northern California.

It’s a safe bet rate payers are less eager to see a costly litigation feeding frenzy ensue, but the lawyers aren’t really worried about them.

### DISABILITY-ACCESS LITIGATION

Despite its enactments of so-called [reform statutes](#) in recent years and significant growth of disability-access litigation in other states, California remains the nation’s ground-zero for these often fraudulent lawsuits that typically target [small business owners](#) – particularly [minorities and recent immigrants](#) who are unable or unwilling to fight back – with alleged violations of the Americans with Disabilities Act. More recently this still wheelchair-centric racket has worked to expand its turf, [targeting retailers’ websites](#), for example, with allegations that they’re not accessible to the visually impaired.





So, understanding the death grip the plaintiffs' bar exerts on Sacramento, California business owners and their advocates are now looking to Washington for real relief. There, the [ADA Education and Reform Act](#), introduced by **Rep. Ted Poe** of Texas, would mandate that notifications be given to premises owners, giving them a grace period to make repairs or renovations, before a lawsuit can be filed. No one's crystal ball is perfect, but it's reasonable to think this bill may pass the U.S. House of Representatives sometime in early 2018. Of course, the row will be tougher to hoe in the Senate where 60 votes are needed to end debate. But small business owners are counting on **Sen. Dianne Feinstein**, the ranking Democrat on the Judiciary Committee. They hope she still believes in the need for meaningful ADA reform as strongly as she did in 2012 when she [wrote a letter](#) to California's **Senate President pro Tempore Darrell Steinberg**, warning him against further delay of a state reform bill pending at the time.

## END NOTES

**The Governor.** As noted above, California enacts more than 800 new laws a year, many of them specifically designed to expand civil liability at the behest of politically influential personal injury lawyers. But some measure of reasonableness is occasionally imposed by Gov. Brown, and those impositions are appreciated by business leaders and entrepreneurs.

The latest example came with the governor's [October 2017 veto](#) of a bill that would have required larger businesses – those with deeper pockets – to begin keeping gender-sensitive salary and wage data and submitting it to the Secretary of State. His veto statement read, in part:

*“While transparency is often the first step to addressing an identified problem, it is unclear that the bill as written, given its ambiguous wording, will provide data that will meaningfully contribute to efforts to close the gender wage gap. Indeed, I am worried that this ambiguity could be exploited to encourage more litigation than pay equity.”*

**The Attorney General.** Unlike his predecessor who was elected to the U.S. Senate in November 2016, California's rookie **Attorney General Xavier Becerra** has thus far shown limited interest in hectoring businesses and driving them to Arizona, Nevada or Texas.

In fact, say relieved business leaders in hushed tones, they're thrilled that the AG seems currently preoccupied with burnishing his reputation as a genuine [leader of the Trump Resistance](#), joining or launching his own lawsuits against the federal government every chance he gets. Presumably he believes his rebel-with-a-cause routine will play well with California's deep blue electorate when he runs in 2018 to keep the AG post to which he was appointed. Meanwhile, regardless of their politics, the state's business folks are just happy Mr. Becerra's not picking on them.



**Arbitration.** In a state known for its courts' relentless resistance to the 92-year-old Federal Arbitration Act and decades of U.S. Supreme Court precedent upholding that statute's general protection of arbitration agreements against state efforts to curtail them, a California appellate panel in late-July 2017 refreshingly [reversed](#) a trial court's decision denying arbitration in a suit accusing a nursing home of causing a patient's death, ruling that the arbitration agreement was enforceable despite the patient's death prior to expiration of the so-called "cooling-off period" required by state law.

**Bar scores.** And finally, a grudging three cheers to California's Supreme Court for [refusing](#) in October 2018 to buckle under multifaceted pressure to lower the so-called "cut" score for passing the state's bar exam. As [reported](#) by *The Recorder*, the state's leading legal journal, "Law school deans, students and Democratic state lawmakers ha[d] been pressing the court to lower the cut score. A California State Bar committee stocked with law school deans [recommended in August](#) that the Supreme Court reduce the ... score by up to 6.25 percent. The Law School Council endorsed setting the ... score at a lower range than a prior state bar committee pitched as appropriate. A survey of 4,188 July 2017 exam-takers found that more than 90 percent said the score should be reduced."

In case some folks haven't noticed, California's civil courts are already teeming with bottom-third-of-their-class opportunists ready to sue anyone with the audacity to earn a profit. The hard fact is the state needs more middling, integrity-challenged lawyers like it needs a major earthquake.



### #3 ST. LOUIS, MISSOURI

As *Bloomberg* has [reported](#), City of St. Louis courts are known for “fast trials, favorable rulings, and big awards.” But by virtue of a change in gubernatorial leadership, a good start by state lawmakers on an agenda of much needed statutory reforms and a powerful U.S. Supreme Court decision curbing forum shopping in 2017, the City of St. Louis can no longer fairly be ranked as the nation's worst Judicial Hellhole, as it was [a year ago](#).

In November 2016 Missouri voters elected a new reform-minded governor, **Eric Greitens**. When he delivered his first [State of the State Address](#) to a joint session of the legislature in Jefferson City the following January, he was just minutes into his speech when he [cited](#) this report's sharp criticism of St.

Louis, particularly its hosting of “junk science” mass torts. The governor committed to enacting critical civil justice reforms as a means to improving both the state's civil justice system and its economic prospects. Lawmakers have followed his lead, and a timely decision from the highest court in the land, limiting state courts' jurisdiction over out-of-state defendants, should boost their efforts to curb litigation tourism and otherwise reduce lawsuit abuse in the “Show Me Your Lawsuits State.”

#### DAUBERT REFORM

Among several reform measures on the first-year governor's legislative to-do list was the urgent need for Missouri to adopt the more exacting [Daubert](#) standard for the admission of expert evidence — the standard used by all federal courts and an overwhelming majority of other state court systems — in order to stem the flood of “[junk](#)



[science](#)” lawsuits that are scaring job-creating businesses away from the state. And as reported by [KMOV-TV](#), the new Speaker of the Missouri House, **Todd Richardson**, also listed *Daubert* reform among his “[top](#) legislative” priorities.

Promptly then, led by **Rep. Kevin Corlew** and **Sen. Doug Libla**, Missouri lawmakers went to work and in fairly short order produced a bill Gov. Greitens [signed into law](#) in late-

March 2017 at a small business site. “When crooked trial lawyers bring in shady witnesses who act as experts while peddling junk science, it makes it harder for justice to be done. That scares away businesses,” the governor said at the ceremony.

So the next time a mouthpiece for multimillionaire plaintiffs' lawyers, such as American Association for Justice CEO [Linda Lipsen](#), badmouths the Judicial Hellholes report as a meaningless “[publicity stunt](#),” you'll know she really means that it's a well-respected driver of reforms aimed at some of her profession's particularly parasitic shenanigans, including the [scientifically groundless](#) mass tort that has invaded St. Louis, blaming talcum powder use for ovarian cancer.



#### TALC TRIALS

Speaking of which, as St. Louis television viewers know, personal injury lawyers from across the country have spent [many millions of dollars](#) during the past few years, saturating the market with misleading ads about talcum powder use. Those lawyers knew Missouri was among a dwindling minority of holdout states with an outdated standard

for expert testimony that allowed juries to hear speculative testimony that is disallowed [elsewhere](#). So they brought more than a thousand junk-science claims by out-of-state plaintiffs against out-of-state talc makers in St. Louis courts. And they enjoyed early success, presumably beyond their wildest dreams.

Four of the first five talc trials conducted in the City of St. Louis Circuit Court resulted in multimillion-dollar plaintiffs' verdicts to the cumulative tune of [more than \\$300 million](#). The largest single verdict was \$110.5 million. The respective plaintiffs had lived, purchased and used talc products not in Missouri but in Alabama, California, South Dakota, Tennessee and Virginia. And thanks to a January 2017 decision by the Missouri Supreme Court, [doubling down](#) on a similarly bad [2016 decision](#), the out-of-state talc defendants could not have some [1,350 claims](#) by out-of-state plaintiffs sent back to courts in the plaintiffs' home states or a federal MDL in New Jersey.

### U.S. SUPREME COURT TO THE RESCUE

In addition to Missouri's new expert testimony statute noted above, civil justice reformers hope a June 2017 decision by the U.S. Supreme Court in [Bristol-Myers Squibb Co. v. Superior Court of California for San Francisco County](#) will be far-reaching and finally make clear to state courts, including those in Missouri, that they generally cannot exercise jurisdiction over out-of-state defendants being sued by out-of-state plaintiffs over alleged out-of-state injuries without violating defendants' Fourteenth Amendment right to due process. (See more about the U.S. Supreme Court's jurisdictional decision in *Closer Looks*, p. 64.)



Responding to a defense [motion](#) that cited the Supreme Court's 8-1 decision announced earlier that day, St. Louis **Circuit Court Judge Rex Burlison** declared a mistrial in *Swann v. Johnson & Johnson*, the sixth talcum powder trial to begin there. He signaled the end of most of the talc claims pending in St. Louis, saying, "the mere fact that nonresident plaintiffs have joined their claims with those of a handful of Missouri residents does not suffice to give" Missouri courts jurisdiction over the defendants.

Missouri's Eastern District appeals court gave further hope that the end of St. Louis's talc lawsuit surge had arrived in October 2017 when it reversed and vacated the \$72 million talc verdict that was the first of four such controversial, multimillion-dollar verdicts rendered in the City of St. Louis Circuit Court, also on the basis of the *Bristol-Myers* decision.

But optimism resulting from those rulings was dashed as this report went to press. Only six months after his earlier ruling, plaintiffs' lawyers convinced Judge Burlison to preserve the largest of St. Louis's talc verdicts—the \$110 million award to a Virginia resident who bought and used talc products there. Rather than throw out the out-of-state claim, Judge Burlison gave the plaintiffs' lawyers an opportunity to "make a record" connecting the case to Missouri. So months after the trial, the plaintiffs' lawyers came back claiming Johnson & Johnson had done business with an in-state company that made its talc products. That was enough for Judge Burlison, who [found](#) *Bristol-Myers* "stringent standard" for personal jurisdiction had been met. Plaintiffs' lawyer Ted Meadows is thrilled, [declaring](#) that this "limited evidence" connecting the cases to Missouri will help keep the St. Louis talc cases going, including those with verdicts now on appeal.

### STATE HIGH COURT GETS ONE RIGHT

To be fair to Missouri's high court, it did render a sound jurisdictional decision in February 2017, two months before the U.S. Supreme Court ruled in a [similar case](#) on appeal from [Montana's Supreme Court](#) (see more on the Montana appeal in *Closer Looks*, p.64). In the Missouri case, brought under the [Federal Employers Liability Act](#) (FELA), which governs compensation for injured railroad workers, the state high court unanimously hewed closer to longstanding tradition and appropriately ruled that out-of-state plaintiffs alleging out-of-state injuries against out-of-state defendants doing little business there should bring their cases elsewhere.

Virginia-based Norfolk Southern Railway Company had been sued in Missouri by an Indiana plaintiff over injuries that allegedly occurred in Indiana, even though the railroad only does about 2% of its business in Missouri. Based on these facts, the Missouri Supreme



Court [concluded](#) that the trial court lacked personal jurisdiction over the railroad, leaving the plaintiff to bring his claim in Indiana or Virginia.

While this decision is encouraging and certainly brings clarity to FELA case filings in Missouri, lawmakers are not off the hook. Venue and joinder reform legislation is still very much needed to keep plaintiffs' lawyers from forum-shopping within the state and otherwise arguing that defendants' "nationwide marketing" campaigns make them "at home" in Missouri.

## ST. LOUIS ASBESTOS DOCKET STILL GROWING



Just a Huck Finn stone skip across the river from Madison County, Illinois – a perennial Judicial Hellhole and the nation's epicenter for asbestos litigation – St. Louis has been building its own reputation as a jurisdiction hospitable to asbestos claims. Plaintiffs' lawyers filed just 67 asbestos-related lawsuits there in 2010. That annual number has since nearly quintupled.

In 2016 St. Louis nudged past Philadelphia (yet another Judicial Hellhole) into [fourth place](#) among jurisdictions drawing the most new asbestos lawsuit filings, according to consulting firm [KCIC](#)'s yearly asbestos litigation trends report. And St. Louis was second only to Madison County in both new mesothelioma claims and non-meso lung cancer claims.

KCIC attributes St. Louis's rising number of asbestos filings to two plaintiffs' law firms that also have been big players in Madison County: [Napoli Shkolnik](#) and [Gori Julian & Associates](#).

In particular, the "significant increase in [non-meso] lung cancer filings in St. Louis is due to the filings by Gori," KCIC explains. "In 2014, Gori only filed 29 of the 168 cases [there]." Such filings by Gori increased to 77 filings in 2015 and, in 2016, "accounted for 60% of all St. Louis lung cancer filings — 111 of the jurisdiction's 185 lung cancer cases."

Though it no longer offers a lax expert testimony standard, St. Louis is increasingly [attractive](#) to asbestos claimants for many of the same reasons it attracts other products liability litigation – plaintiff-friendly venue and joinder rules, relatively inexpensive television advertising, and the potential for excessive awards, thanks in part to a 2014 [state high court decision](#) striking down a reform statute that reasonably limited punitive damages. So not surprisingly, St. Louis has hosted several multimillion-dollar asbestos verdicts and thus will likely attract still more cases.

## PREPOSTEROUS CONSUMER CLASS ACTIONS

As [Joanna Shepherd](#) of Emory University Law School has [reported](#), the Missouri Merchandising Practices Act (MMPA), the state's consumer protection law, actively "invites potential abuses through socially valueless lawsuits and unnecessary consumer litigation."

Prof. Shepherd finds that local lawyers repeatedly use the MMPA to file meritless class actions in state court, typically in St. Louis, hoping to avoid potentially less sympathetic federal courts by seeking less than \$5 million in damages – the amount triggering federal jurisdiction under the [Class Action Fairness Act](#). These are not serious cases, she says. They are a money-making enterprise for plaintiffs' lawyers like those at the [Armstrong Law Firm LLC](#). It has filed class action lawsuits in St. Louis alleging various products, including [peppermint candies](#), [donuts](#), "Toastees," and [bread](#), [biscuit](#), [cupcake](#) and [coffee cake](#) mixes are misleadingly labeled. As though reasonable consumers buy candy, donuts or cupcake mix thinking such sweet treats are wholesome additions to their diets.

And even though, as Prof. Shepherd and others note, state courts are generally much less likely than federal courts to dismiss these often preposterous consumer claims, two recent rulings in the federal Western District of Missouri may signal more trouble, particularly when it comes to a rising tide of so-called [slack-fill](#) law suits, wherein plaintiffs allege that over-sized packaging misled them to believe they were getting more for their money than they actually got.

Writing in late-August 2017 [Martha Charepoo](#) of [Baker Sterchi Cowden & Rice](#) in St. Louis detailed the two consecutive, nearly identical opinions by the Western District in slack-fill claims brought under the MMPA. In both [Bratton v. The Hershey Company](#) and [White v. Just Born, Inc.](#), the federal court "refused to dismiss claims against candy manufacturers for selling [purportedly] under filled boxes of Reese's Pieces and Whoppers (Hershey) and Hot

Tamales and Mike and Ike's (Just Born), thereby allowing both class actions to proceed to the discovery stage.”

In both cases defendants argued that the plaintiffs failed to show an “ascertainable loss,” as required by the MMPA. Among other things, the candy-makers also argued that consumers are not misled because information about the net weight of the contents, the number of pieces of candy per serving, and the number of servings in the box are all clearly listed on the box.

But these arguments did not persuade **District Judge Nanette K. Laughrey**. Citing a Missouri appellate court's late-2016 decision in [Murphy v. Stonewall Kitchen, LLC](#), an “all-natural” labeling case, the judge said that whether reasonable consumer would be misled by a large box is a question of fact that cannot be resolved before there has been fact discovery. In other words, both state and federal courts now seem to believe the MMPA limits their decisions about what constitutes reasonableness rather than allow commonsense objectivity at the start. This means plaintiffs' lawyers seeking quick, easy-money settlements will have more leverage over defendants wishing to avoid the expense of lengthy litigation.



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### **LAWMAKERS MUST KEEP UP REFORM MOMENTUM IN 2018**

In addition to expert-testimony reform aimed at limiting junk science, Missouri lawmakers in 2017 enacted another solid [statute](#) allowing defendants at trial to introduce evidence of both the actual costs of plaintiffs' medical care and payments already made by defendants or their insurers as a means to keep plaintiffs' lawyers from unduly inflating demands for damages. So this was a good start.

But as analysis of the slack-fill cases above suggests, one of the top priorities for Missouri legislators and Gov. Greitens in 2018 ought to be overdue amendments to the MMPA which, as currently written and interpreted by the courts, does far more to enrich class-action lawyers than it does to protect consumers. In fact, as litigation costs are invariably passed on to consumers in the form of higher prices, Missourians should be demanding action on this from their elected representatives in Jefferson City.



And while lawmakers are at it, they should heed the governor's call for legislation reforming the state's lenient and easily gamed venue and joinder rules so as to limit personal injury lawyers' brazen efforts to shop their cases to the state's more plaintiff-friendly courts in St. Louis.

Furthermore, legislators should follow through in passing a law that would allow jurors in auto accident cases to hear evidence about whether plaintiffs were wearing seat belts so liability for damages can be more fairly apportioned.

Some lawmakers also are reportedly fine-tuning language in a proposal that would bring transparency and accountability to the hiring of private-sector personal injury lawyers by the state's attorney general or other officials to run lawsuits on behalf of the government. If such contracts are to be entered into, both lawmakers and taxpayers should have ready access to contract details. And strict accountings of and limits on lawyers' fees, including a ban on contingency-fees, would better serve the public's interest in evenhanded civil justice.

Sooner than later Missouri's litigation climate would also benefit from judgment interest reform and restoring reasonable limits on punitive damages. But urging these future reforms is by no means to suggest that 2017 wasn't quite positive. Because it was. That's why St. Louis has dropped from the #1 Judicial Hellhole to the #3 spot. And with a governor and legislative majorities further determined to improve their state's economy by making their state decidedly less hospitable to out-of-state plaintiffs and meritless lawsuits, reform momentum can be maintained and more progress can be made.

## #4 NEW YORK CITY ASBESTOS LITIGATION

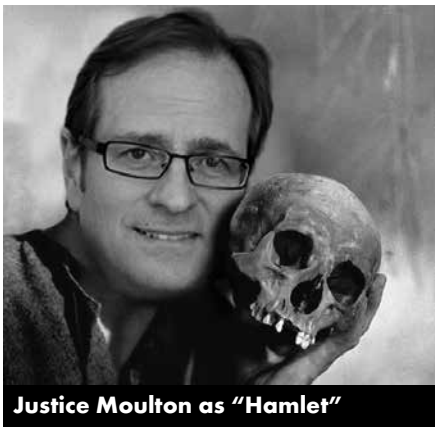
Since [2013](#) the Judicial Hellholes report has faithfully if discouragingly reported on the brazenly plaintiff-favoring ways of New York City's Asbestos Litigation court known as NYCAL.

Last year's [report](#) reminded readers that NYCAL trial judges who aspire "to appellate court appointments dare not displease certain members of the plaintiffs' bar ... who exercise significant influence over judicial appointments through their involvement in judicial screening and departmental disciplinary committees. In fact, New York Gov. **Andrew Cuomo** himself has sheepishly conceded that "[t]he trial lawyers are the single most powerful political force" in the state.

And the governor ought to know. Presumably feeling some of that political force, he actually appointed to chair New York's [Commission on Judicial Conduct](#) one of NYCAL's most notorious plaintiffs' lawyers, **Joseph Belluck**, whose firm **Belluck & Fox** is a once and potentially future [defendant](#) in asbestos fraud litigation brought under the federal Racketeer Influenced and Corrupt Practices statute known as [RICO](#). The governor also appointed former NYCAL [Justice Paul Feinman](#) to New York's highest court.

But rather than provide another comprehensive analysis of all the unseemly self-dealing that has long sullied NYCAL's reputation and otherwise results in [extraordinarily good outcomes](#) for asbestos plaintiffs and their lawyers relative to outcomes in other jurisdictions nationwide, this year's report – due to space limitations – will focus largely on a much anticipated and ultimately disappointing new [Case Management Order](#) (CMO) issued in June 2017 by then outgoing administrative judge, **Justice Peter Moulton**.

For those seeking a refresher on the historical context of NYCAL, they may consult both the Judicial Hellholes [archives](#) or a thorough [report](#) published earlier this year by the American Tort Reform Association's allies at the U.S. Chamber Institute for Legal Reform (ILR).



Justice Moulton as "Hamlet"

### JUSTICE MOULTON'S TURN AS 'HAMLET'

To be fair to asbestos defendants, or not to be fair?

That was the question Justice Moulton appeared to agonize over for nearly two years as he contemplated a new CMO that would govern NYCAL's procedural rules, including pretrial discovery, the selecting and scheduling of cases for trial, disclosure of claims made on bankruptcy trusts and limits, if any, on available damages.

It should be noted that Justice Moulton was put in charge of NYCAL in early-2015, just as the state's political establishment in Albany had been shaken to its core with the [conviction](#) on federal corruption charges of former New York State **Assembly Speaker Sheldon Silver**. In addition to obstructing every reasonably crafted tort reform bill

in the legislature for more than 20 years, Mr. Silver moonlighted for **Weitz & Luxenberg**, the plaintiffs' firm with the most pending cases at NYCAL. Federal prosecutors charged that he earned millions of dollars in referral fees after using taxpayer money to provide research grants for a doctor who [steered asbestos cases](#) to the powerful firm.

The Silver scandal effectively pushed out Justice Moulton's predecessor, **Justice Sherry Klein Heitler**, amidst assertions that she had given "[red-carpet treatment](#)" to Mr. Silver's associates at Weitz & Luxenberg. For example, she granted the firm's request to lift NYCAL's longstanding ban on [punitive damages](#) in asbestos cases, giving plaintiffs greater leverage over asbestos defendants in pretrial settlement negotiations. So initially there was hope among those defendants that Justice Moulton would end, or at least reduce the one-sidedness of NYCAL's procedures.

But even as he conducted open "[town hall](#)" meetings at which both plaintiff and defense counsel were heard

from on proposed changes to the CMO, and even as he [spoke publicly](#) of a desire to broker an evenhanded conciliation between the two sides, Justice Moulton's [rulings from the bench](#) were much like those of Justice Heitler before him, and this began to erode hope among asbestos defendants that his promised new CMO would really make NYCAL proceedings any more fair.

Justice Moulton ultimately imposed a new CMO on the parties when he wasn't able to achieve agreement from both sides. The new CMO was issued just before Justice Moulton was appointed to the Appellate Division by Gov. Cuomo, where, it's worth noting, he failed to recuse himself from an appeal of a NYCAL case he'd presided over at trial. Nonetheless, defendants quickly united in their opposition to several key provisions of the CMO, including the availability of punitive damages and a lack of meaningful requirements for plaintiffs to file and disclose all available asbestos trust claims before trial. Appeals have been filed by defendants with strong [amicus brief](#) support challenging the new CMO. Defendants have asked the Appellate Division to vacate the CMO or, at a minimum, modify it to address their concerns.

### THE RETURN OF PUNITIVE DAMAGES

Of all the new CMO's provisions – an [extensive analysis](#) of which by attorneys at Hawkins Parnell Thackston & Young is recommended – it is the return of punitive damages to NYCAL litigation that defense counsel oppose most fervently. Why? For nearly two decades beginning in 1996, plaintiffs were not permitted to pursue punitive damages because judges had wisely recognized that depleting resources through jackpot awards hurts those afflicted with slow-to-develop asbestos-related diseases in the future and that repeatedly punishing companies for the same conduct serves no purpose.

Furthermore, many of today's asbestos defendants are far removed from any putative wrongdoing. In fact, in many NYCAL cases the asbestos related activities were committed by a predecessor company, not the company now facing litigation. So the availability of punitive damages in the new CMO puts a fat judicial thumb on the scales of justice, empowering plaintiffs' lawyers to exert more pressure on defendants in settlement negotiations or otherwise win even bigger verdicts and get [richer still](#).



As noted above, however, in April 2014 Justice Heitler [lifted](#) a long-standing ban on punitive damages and an appellate court upheld her authority to do so. But the appellate court left to her successor, Justice Moulton, to determine whether punitive damages *should* be allowed. His new [CMO](#) does allow them and, naively or otherwise, it trusts plaintiffs' lawyers to pursue punitive damages only on a "good faith basis." That's a bit like asking a pack of hyenas to attack a wildebeest calf only if they're hungry.

And talk about deep-pocket justice, according to the Hawkins Parnell analysis, "In quantifying an award of punitive damages," the new CMO would allow NYCAL juries to "consider the ability of a defendant to pay" such damages. "Thus 'immediately prior' to jury selection in a trial where plaintiff asserts punitive damages, defendant must provide plaintiff with reliable financial disclosures, such as SEC disclosures, an audited profit and loss statement or a corporate representative affidavit attesting to the defendant's net worth with supporting documentation."

Though the new CMO would prevent any case in which punitive damages are being sought from being consolidated with other asbestos cases, that's a rather small consolation for today's defendants and seems to have less to do with providing just compensation for the injured than it does with favoring politically powerful plaintiffs' lawyers.

In any case, an October 2017 [amicus brief](#) filed in support of the asbestos defendants' appeal of the CMO points out that other jurisdictions across the country have deferred punitive damages for several reasons:

- Punitive damages windfalls deplete resources for people who develop asbestos-related diseases in the future;
- Repeatedly punishing companies for the same conduct serves no purpose;
- Punitive damages in asbestos litigation do not deter misconduct because the exposures at issue occurred decades ago, before federal health and safety regulations were established, by companies that are largely

bankrupt, leaving as solvent defendant companies today mainly peripheral defendants who have generally not engaged in conscious, flagrant wrongdoing; and

- Putting punitive damages back in the mix gives plaintiffs’ lawyers more leverage over risk-averse defendants and will lead to inflated settlements.

### TRUST CLAIMS LOOPHOLE

As noted above, many former asbestos defendants have gone bankrupt and have established trust funds through which those with injuries can administratively seek compensation, apart from the filing of lawsuits.

Needless to say, plaintiffs’ lawyers pursue both avenues. But some hide evidence of the true sources of their clients’ exposure to asbestos by waiting to file trust claims until *after* their lawsuits conclude, keeping useful information from defendants and manipulating the value of the civil court cases by only allowing a small portion of a plaintiffs’ total asbestos exposure to be shared with a jury. [Recent data](#), including NYCAL data, make clear that greater transparency is needed to address this costly gamesmanship and suppression of evidence.

As noted in past Judicial Hellholes reports, 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 bankruptcy judge noted a NYCAL case Garlock had settled for \$250,000. The plaintiff in that case had denied any exposure to insulation products, implying that the bankrupted major producers thereof were not a source of his alleged exposure. But once the case settled, the plaintiff’s lawyers filed 23 claims with trusts set up to pay people exposed to those companies’ products, including eight trust claims filed within 24 hours of completing the settlement with Garlock.

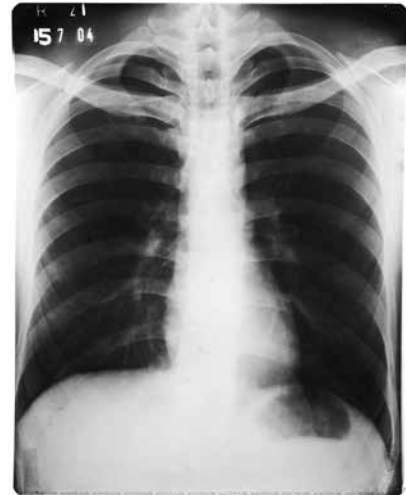
A more [recent analysis](#) of the discovery data from Garlock’s bankruptcy case in relation to asbestos defendant Crane Co. showed “a similar pattern of systemic suppression of trust disclosures.” The study discussed a NYCAL case – the Gerald Moors case – as an example. Mr. Moors testified at his deposition that he never worked with asbestos containing products from 11 now-bankrupt companies including Owens Corning. Just before opening statements Mr. Moors’ attorneys successfully moved to prevent defense counsel from mentioning Owens Corning’s asbestos insulation product during the trial, arguing that their client never said he was exposed to the product. But Garlock discovery data showed that the asbestos specialists at Belluck & Fox – the same Belluck & Fox whose top partner now chairs New York’s Commission on Judicial Conduct – filed 26 trust claims on Mr. Moors’ behalf, including a claim against Owens Corning, “despite Moors’ sworn testimony that he did not work with the products from those (now bankrupt) companies.”

The trust claims filed in the Moors case also reveal site exposure inconsistencies. In his lawsuit, Moors denied being exposed to asbestos at the Ravenswood Powerhouse. In [trust filings](#), however, Belluck & Fox listed Ravenswood Powerhouse as a site where Moors was exposed to asbestos.

Such “double-dipping” duplicity in NYCAL was made possible by a “loophole” inserted into the old CMO by Justice Heitler. And the loophole survives in Justice Moulton’s new CMO, which again naively assumes that plaintiffs’ lawyers will act in good faith in declaring before an asbestos trial begins whether they “intend” to file additional claims with asbestos trusts after trial. If they do, they’re required to declare those intentions with specificity before a trial begins.

But as Joseph Belluck coyly explained during a June 2014 [hearing](#) before the American Bar Association’s Asbestos Litigation Task Force:

*[Judge Heitler] put in what is in effect an intent standard into the ... filing requirement ... So ... even though claims against bankruptcy trusts may be probable, ... 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.*

The reason was plain enough, Mr. Belluck: she wanted to curry favor with plaintiffs' lawyers by letting them cheat the system. Because short of performing a [Vulcan mind meld](#), it's impossible to know what someone *intends* to do tomorrow, the next day or next month. And that Justice Heitler's aiding and abetting of the bilking of both civil defendants and asbestos bankruptcy trusts was not stopped in the new CMO is unfathomable. Which is why the previously mentioned [amicus brief](#) supporting NYCAL defendants' pending appeal argues if the appellate court does not vacate the new CMO altogether, it "should, at a minimum, modify the CMO to require plaintiffs to file all eligible asbestos trust claims early in the discovery process and specify that trust claims materials are admissible."



Of course, if the appeals court won't step in to demand that NYCAL and other state trial courts deal transparently with all asbestos claims, state lawmakers may finally be ready to step up themselves. In fact, state **Sen. John Bonacic**, chair of the Senate Judiciary Committee and a former trial lawyer himself, has [introduced a bill](#) to address this [glaring need](#). And **Assemblymember Aravella Simotas**, [a rising political star](#) from Queens, is sponsoring an identical bill on her side of the Capitol building. So there may be hope yet.

#### **LIMITED CONSOLIDATIONS CONTINUE**

Consolidation of asbestos cases for trial, even on a small scale, "[significantly improve\[s\] outcomes for plaintiffs.](#)" But New York's highest court, the Court of Appeals, let slip an opportunity in 2016 to make NYCAL conform to the national trend of ending consolidation in asbestos litigation, technically [finding](#) that the question of consolidation had not been preserved on appeal from a lower court [decision](#).

Not surprisingly then, Justice Moulton's new CMO allows NYCAL consolidations to continue, albeit with limits. Despite a 2015 [empirical study](#) showing, among other things, that NYCAL's "consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts," the new CMO would [allow](#) for consolidation of two to three cases in certain circumstances.

And quite disappointingly, the new CMO would forever forsake the eight so-called *Malcolm* factors or criteria that previously established rules and case law had required be met in determining whether asbestos cases are sufficiently similar to be consolidated. Rather than require that all eight criteria be met, Justice Moulton's new CMO creates a three-is-enough rule.

#### **SUMMARY JUDGMENT**

Again, space here precludes a comprehensive analysis of every element of the new NYCAL CMO now being appealed by asbestos defendants. But this report would be remiss were it not to remind readers of the court's reflexive denials for several years of defendants' motions for [summary judgment](#). NYCAL defendants face an upside-down, virtually impossible-to-bear burden of proving a negative – namely that their products were *not* present at a claimants' worksite when alleged exposure to asbestos occurred – if their motions for summary judgment are to be granted. This standard leaves NYCAL defendants facing an uphill fight, bearing the significant costs and risks of a trial, even when plaintiffs can't specifically recall being exposed to their products.

#### **ENDNOTES**

New York State taxpayers have also faced a costly uphill fight against corruption during the long and sordid political career and subsequent criminal prosecution of the aforementioned former New York State Assembly Speaker Sheldon Silver.

Since last year's report, Mr. Silver appealed his 2015 conviction on federal fraud charges. But his attorneys only managed to convince the appellate court that misleading jury instructions in his first trial warranted a retrial,



which is now expected to get underway in [April 2018](#). Likely inadmissible at that second trial will be a federal prosecutor's July 28 [statement](#) calling the aging ex-pol's efforts to delay his second trial "little more than a delay tactic ... motivated by his recognition that, as time passes, necessary witnesses and other evidence may be lost."

In fact, as the *New York Post* [reported](#), the prosecutor noted that the principal witness against Mr. Silver is 81-year-old Dr. Robert Taub, "who told the [original] jury he referred patients suffering from asbestos-related health problems to Silver's law firm in exchange for favors, including state-funded research grants."

This ghoulish sidebar speaks to the spirit of self-interest that Mr. Silver personifies and which has long animated New York politics. This spirit also has permeated NYCAL courtrooms. And powerful plaintiffs' lawyers there will continue to exert their influence and have their way unless the appellate court now considering asbestos defendants' appeal of Justice Moulton's lopsided CMO push back. It's also possible that Justice Moulton's successor, [Justice Lucy Billings](#), won't let her past as a plaintiffs' lawyer, crusading in part for "environmental justice," unduly influence her treatment of NYCAL defendants.

But should the courts fail to reclaim balance in the name of justice, perhaps lawmakers and the voters who send them to Albany may yet rise to the task. Of course, knowing what we know of NYCAL and the political milieu in which it exists, it is difficult to be optimistic.

That said, New York voters on Election Day 2017 overwhelmingly supported [Proposal 2](#), a ballot measure adopting an amendment to New York's constitution that will now allow judges to strip generous state pensions from politicians and other government officials convicted of felonies in connection to their public duties. Let's call it "Shelly's Law" and hope that it's a sign of less corrupt things to come.

## #5 PHILADELPHIA, PENNSYLVANIA

The Philadelphia Court of Common Pleas has long been a national center for product liability litigation. The court's Complex Litigation Center (CLC) hosts a mass torts program that attracts drug, medical device and asbestos cases from across the country. The CLC undertook reforms and, in recent years, seemed to become less welcoming to out-of-state plaintiffs. But a surge of new lawsuits and a string of multimillion dollar verdicts have sadly returned "[The City of Unbrotherly Torts](#)" to the list of Judicial Hellholes.



### RISPERDAL LAWSUITS TRIPLE AFTER RECORD BREAKING VERDICT

The number of lawsuits targeting Risperdal now pending in the Philadelphia Court of Common Pleas [tripled](#) from the start of 2017 through November, from approximately 2,000 to [6,400](#). The claims against Johnson & Johnson unit Janssen allege it failed to adequately warn doctors that the antipsychotic drug, which is used to help people with conditions such as autism, can cause children to develop gynecomastia, a condition characterized by the abnormal growth of female breast tissue in young men. Bellwether trials began in January 2015.

Some Risperdal cases have resulted in [summary judgment](#) for Janssen. Over the past year, two judges, [Judge Kenneth Powell](#) and [Judge Sean Kennedy](#) threw out Risperdal lawsuits mid-trial, finding the plaintiffs had presented insufficient evidence linking the plaintiffs' conditions and the drug. **Judge Arnold New** also deserves recognition for finding back in 2014 and [reaffirming](#) in 2015 that punitive damages are not available in the Risperdal suits because applicable New Jersey law, where the company is incorporated and headquartered, does not impose such punishment when the safety and labeling of the product at issue are approved by the FDA.

But four of the Risperdal cases tried in Philadelphia have resulted in [\\$75 million](#) in damages against Janssen, including a [\\$70 million verdict](#) to a Tennessee plaintiff in July 2016. Plaintiffs' lawyers called that result a "game-changer," which has sparked a flood of new claims since prior verdicts had only ranged from \$500,000 to \$2.2 million. Unsurprisingly, Janssen is now [settling](#) some of these cases rather than risk catastrophic trial verdicts.

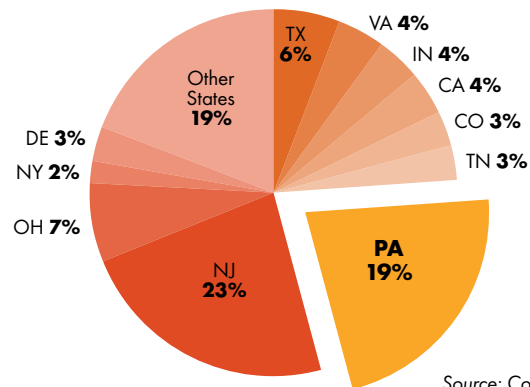
### XARELTO LAWSUITS: 1,500 CASES AND COUNTING

Philadelphia's Court of Common Pleas also [created](#) a mass tort program for Xarelto in January 2015 and it has quickly grown to [over 1,500 cases](#). Plaintiffs' lawyers have filed nearly 400 new Xarelto lawsuits in 2017 through November. These lawsuits allege that Johnson & Johnson and Bayer did not adequately warn of the risk that the blood thinner could result in bleeding complications.

Before trials begin, the defendant companies asked the court in an April 2017 motion to require the plaintiffs to disclose whether [third parties](#) are [financing the litigation](#), which may be [illegal](#) under Pennsylvania law.

Meanwhile, [doctors](#) have expressed [concern](#) that their patients may refuse to take or stop using anticoagulation drugs such as Xarelto as a result of fearmongering television commercials run by plaintiffs' lawyers seeking still more clients and hoping to influence future jurors. Never mind that the bleeding risk is miniscule relative to the much more significant risk of devastating (even fatal) strokes, which the drug works to reduce.

### PLAINTIFFS' RESIDENCY IN PHILLY MESH LITIGATION



Source: Court records

### PELVIC MESH CASE STUDY: 4 OF 5 PLAINTIFFS FROM OUT-OF-STATE

The Philadelphia Court of Common Pleas has a smaller docket of cases targeting manufacturers of pelvic mesh devices, which are used to treat or control bladder incontinence, a common condition in women after childbirth and as they age. Plaintiffs allege that the devices deteriorate and can cause harm. Johnson & Johnson subsidiary Ethicon has [lost](#) five mesh-related cases in Philadelphia since December 2015, with cumulative damages exceeding \$105 million.

In April 2017 J&J was hit with a [\\$20 million](#) verdict for an out-of-state plaintiff, including \$17.5 million in punitive damages. That award was soon eclipsed by another Philadelphia case that resulted in an astounding [\\$57.1 million](#) award – \$7 million in compensatory damages plus \$50 million in punitive damages. That was a rare case brought in Philadelphia on behalf of a Pennsylvania resident.

Then, just when it seemed Ethicon had actually won its [first Philly mesh case](#) brought by an Ohio plaintiff this past summer, the trial judge intervened to [overturn](#) the verdict and order a new trial to award the plaintiff damages.

By the onset of fall 2017 there were about [130 cases](#) on Philadelphia's mesh docket, a review of which reveals that roughly 4 of every 5 plaintiffs (101 of the 130) do not live in Pennsylvania. They come to Philadelphia from 26 states and from as far away as Anchorage, Alaska. More plaintiffs live in neighboring New Jersey, which in recent years has become less welcoming to mass torts, than Pennsylvania.

The Philadelphia docket includes quite a few plaintiffs from Texas, but none from nearby Connecticut, Maryland, or West Virginia, and few from Delaware or New York. The overall percentage of out-of-state mass tort claims in Philadelphia may be even higher. An analysis of 3,643 prescription drug lawsuits filed in the CLC from January through May 2017 found that [94%](#) were filed for plaintiffs outside Pennsylvania—a 20% increase from 2016. Clearly, some plaintiffs' lawyers believe their clients will get better results in Philadelphia, while others remain in their home states.

Judge New issued a late-summer 2017 order in the Philly mesh litigation, indicating that he is [considering](#) dismissal of mesh cases brought by out-of-state plaintiffs in light of recent U.S. Supreme Court jurisdictional decisions limiting the ability of state courts to exercise jurisdiction over out-of-state defendants when a claim is not connected to the state (see related Closer Look, p. 64). Following those U.S. Supreme Court rulings, three out-of-state plaintiffs suing Boston Scientific in the Philadelphia Court of Common Pleas [withdrew](#) their mesh lawsuits with

the intention of refileing them in Delaware, where Boston Scientific is incorporated.

But **Shanin Specter**, of [Kline & Specter](#), which has brought most of the mesh lawsuits in Philadelphia, has indicated that he has no intention of voluntarily withdrawing any of the cases his firm is pursuing on behalf of out-of-state plaintiffs. Mesh defendants, meanwhile, have urged the Philadelphia court to dismiss the out-of-state claims, [observing](#) that, “Plaintiffs’ sole connection to the commonwealth is their lawyers’ choice to file suit in this court.”



### **ASBESTOS LITIGATION: DOWN ELSEWHERE, UP IN PHILADELPHIA**

Philadelphia is also a popular place for plaintiffs’ lawyers to file asbestos claims, placing [fifth](#) in the nation for such filings in 2016. Only Madison County (Ill.), Baltimore, New York City and St. Louis hosted more new asbestos claims overall, but Philly placed a strong third in new mesothelioma claims.

While asbestos lawsuit filings in most of the top-10 jurisdictions for asbestos claims stayed the same or decreased between 2014 and 2016, Philadelphia’s filings experienced an [“uptick”](#) in both total asbestos lawsuits (230 to 245) and mesothelioma claims (89 to 96) during this period. It appears that lawyers are filing more asbestos claims on behalf of plaintiffs from [other states](#) in Philadelphia but, unlike pharmaceutical and medical device litigation, more than half of the asbestos plaintiffs there are Pennsylvania residents.

The Court of Common Pleas docket shows more than 200 new asbestos lawsuits filed in the first 11 months of 2017, putting it on pace this year to again place fairly high among those jurisdictions attracting the most. Meanwhile, there are more than [550 asbestos cases](#) pending in Philly overall.



Companies are fighting back against fraud in asbestos litigation. In May 2017 John Crane Inc. (JCI) [filed a RICO claim](#) against the [Shein Law](#) firm and attorney **Benjamin P. Shein** in the U.S. District Court for the Eastern District of Pennsylvania. [Shein Law](#) markets itself as the “Philadelphia asbestos lawyers.” The lawsuit alleges that the lawyers “devised and implemented a scheme to defraud [asbestos defendants], and to obstruct justice” by “fabricating false asbestos ‘exposure histories’ for their clients ... and systematically conceal[ing] evidence of their clients’ exposure to other sources of asbestos.”

The lawsuit alleges that the lawyers explicitly denied their clients were exposed to other sources of asbestos during litigation but, when the lawsuits ended, then filed claims for additional compensation from asbestos bankruptcy trusts, telling different stories. The Pennsylvania RICO suit is on hold as the parties await a ruling by the U.S. Court of Appeals for the Seventh Circuit as to whether an identical action JCI filed previously in an Illinois federal court was improperly dismissed and can proceed there.

Meanwhile, some judges are trying to hold the line. In one recent case a plaintiff attempted to blame talcum powder for her development of mesothelioma. But in September 2017 Court of Common Pleas **Judge Idee C. Fox** [excluded](#) the testimony of two expert witnesses who intended to support the claim. She [characterized](#) the approach of one of the experts claiming to have detected asbestos in Colgate-Palmolive’s product as a “mishmash of scientifically acceptable methodologies” and the other expert’s method as “inherently unscientific.”

### **FEWER MEDICAL LIABILITY LAWSUITS, BUT THAT COULD CHANGE**

Due to legislative reforms that reduced the ability of plaintiffs’ lawyers to pick-and-choose a friendly court in which to file medical malpractice claims, Philadelphia no longer has the huge medical liability docket that it once had. From 2000 through 2002 plaintiffs’ lawyers annually filed an average of 1,204 medical malpractice lawsuits in Philadelphia County. After venue reform, that number immediately dropped to 577 in 2003 and the number of such lawsuits concentrated in Philadelphia has [steadily declined](#) to 378 in 2016—a nearly 69% drop. Though Philly continues to host by far the greatest number of medical liability cases in the state, such lawsuits have been more fairly distributed among the counties where the patient received medical care.

But a recent Pennsylvania appellate court decision may spark a reversal of the downward trend in medical liability cases in Philadelphia. Under the state's venue law, medical professional liability actions can only be brought in the county in which a patient is treated. Nevertheless, in [Wentzel v. Cammarano](#), the mother of a newborn who received neonatal intensive care at Reading Hospital in Berks County brought a lawsuit alleging malpractice in Philadelphia County. During treatment, the Berks County doctors had sought advice from a cardiologist in Philadelphia's St. Christopher's Hospital.

The lawsuit did not dispute that the Philadelphia doctor had made an appropriate diagnosis and devised a suitable treatment plan. Instead the suit claimed the diagnosis and treatment plan were not provided quickly enough. The trial court, following the venue statute, appropriately transferred the case to Berks County, but an appellate court reversed. It found that the allegations concerning the Philadelphia doctor involved "treatment" sufficient to keep the case there. The Pennsylvania Medical Society [cautions](#) that this decision may invite the forum-shopping of medical claims in the state, allowing plaintiffs to file suits where advising physicians were located rather than where treatment was actually rendered.

Plaintiffs' lawyers are drawn to file medical claims in Philly because they know there is a good chance of a large award. In 2016, [16 such cases](#) went to trial – more than in any other Pennsylvania county. Five resulted in plaintiffs' verdicts, the largest of which was [\\$10.1 million](#) against a Philadelphia hospital in a case alleging doctors' diagnosis of infant meningitis didn't come quickly enough. Three-quarters of the award, \$7.5 million, was for pain and suffering. The Philadelphia award was the largest medical liability verdict in the state that year.

Unlike many other states, Pennsylvania does not place any limit on noneconomic damages in medical malpractice claims, which not only constrains court judgments, it facilitates reasonable settlements. This may have contributed to why WalletHub's 2017 ranking of the Best & Worst States for Doctors placed Pennsylvania's [medical environment](#) 44th in the country. The state's medical malpractice payouts per capita are exceeded by only two other states, New Jersey and New York.



### **FIERCE COMPETITION FOR LAWSUITS IN PHILLY**

A few years back this report [documented](#) how one Philadelphia personal injury law firm had sued a rival Philly firm for allegedly buying up all the ad space on city buses. Now two other firms are at it. This time Philadelphia lawyer [Jeff Rosenbaum](#) has [sued Morgan & Morgan](#), an aggressive Orlando-based firm that is heavily advertising on billboards and television on Rosenbaum's turf.

According to the complaint, Morgan & Morgan has spent more money on personal injury lawsuit ads in the Philadelphia market than any other personal injury firm, even though it has just a single lawyer licensed in Pennsylvania who has practiced for just one year. Rosenbaum claims his carpet-bagging competitors' advertising campaign misleads consumers by suggesting "they actively litigate claims in Pennsylvania when in fact their representation of personal injury claims is nonexistent or minimal." Rather, the Florida firm refers the lawsuits it generates from its advertising to other attorneys and firms, even as some of its ads say, "not a referral service."

Rosenbaum even [aired a TV commercial](#) directly attacking Morgan & Morgan. "Until recently, I've never even heard of Morgan & Morgan," he says, pointing out that John Morgan is a Florida lawyer. "Don't be fooled," Rosenbaum says, as he touts his local roots and encourages viewers to hire a "real Pennsylvania lawyer." In November Rosenbaum urged a federal court to immediately [pull the plug](#) on the Morgan & Morgan ads, requesting an injunction. A court hearing on the motion is scheduled for January 4.

John Morgan's [response](#): "It is utter nonsense. This guy doesn't like competition. Sorry, it's the American way. We look forward to delving into his financials and deposing his staff and clients."

Actually, Mr. Morgan, heavy lawsuit advertising and lawyers suing lawyers over a piece of the action is the *Philadelphia way*, and you should fit right in.

## PLAINTIFFS' LAWYERS ON OFFENSE IN THE LEGISLATURE

Pennsylvania has not enacted any significant civil justice reforms since 2011 when the legislature passed the Fair Share Act, ensuring that parties in a lawsuit pay only the percentage of a verdict for which they are actually held liable. This year the [Pennsylvania Coalition for Civil Justice Reform](#) was formed with an [ambitious agenda](#) for improving the state's legal climate. Legislators have introduced several civil justice reforms, but they have [stalled](#).

Meanwhile, plaintiffs' lawyers are attempting to expand liability. They have introduced bills to [increase](#) the minimum recovery in private actions brought under the Unfair Trade Practices and Consumer Protection Act from \$100 to \$500, which would make the state even more attractive for consumer class actions. The trial lawyers also want to [chip away](#) at the Fair Share Act and [create](#) a state False Claims Act that would be a [bonanza](#) for them.



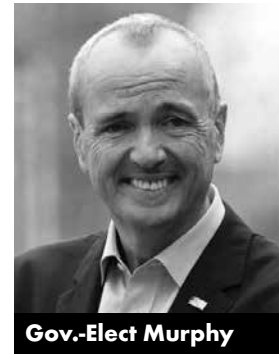
## #6 NEW JERSEY

In Roman mythology, [Janus](#) was a two-faced god that controlled transitions and time, at once looking forward while also reflecting on the past. In more modern times Janus's two faces came to symbolize a duplicitous nature, and the past year in New Jersey's courts might fairly be described as a Janus moment, including transitions and mixed messages.

The 2016-2017 term of the New Jersey Supreme Court marked the first time in six years that the state's high court had a full complement of judges.

Now **Gov. Chris Christie** is on his way out, and it is unclear what the incoming administration's attitude toward the court will be.

Four slots on the New Jersey high court will open up over the next few years. And **Phil Murphy**, the governor-elect, has not indicated whether he will stick with tradition and reappoint justices who have served their initial seven-year term, or follow the outgoing governor's lead and replace some justices while keeping others.



## A LAX APPROACH TO EXPERT TESTIMONY

By way of context, a case that was decided by the Appellate Division this summer and that's currently on appeal to the New Jersey Supreme Court, highlights just how much of an outlier New Jersey is in evaluating whether expert testimony is based on real science and not merely fanciful theories offered by plaintiffs' experts to mislead jurors into big verdicts.

Two years ago this report applauded **Atlantic County Judge Nelson Johnson**, who [excluded](#) the testimony of two expert witnesses who planned to support claims that Accutane, an acne medication, could cause Crohn's disease. Judge Johnson found the plaintiffs' experts were "[cherry picking evidence](#)" and had presented theories in a court room that would not withstand scrutiny in the scientific community. "It is one thing to stand alone in the world of science, advancing a hypothesis that others do not accept," Judge Johnson [wrote](#). "It is quite another thing to advance a hypothesis that can only be supported by disregarding valid scientific research." His ruling blocked plaintiffs' "hired-guns" from testifying and led to the [dismissal](#) of over 2,000 Accutane cases.

But virtually all of the dismissed cases were revived this summer when the Appellate Division [overturned](#) Judge Johnson's decision. On appeal, a three-judge panel found that Johnson went "beyond [the court's] gate-keeping function," taking "too narrow a view in determining whether the experts were using accepted scientific methodologies to analyze the evidence, and improperly determined the weight and credibility of the experts' testimony." (Noteworthy is the fact that also on appeal is Judge Johnson's similarly no-nonsense September 2016 [exclusion](#) of testimony claiming that talcum powder use caused ovarian cancer.)

The Appellate Division applied a "relaxed" standard for evaluating the reliability of expert testimony in cases involving medications or other substances. Its reasoning allows any credentialed experts to testify, so long as they are able to convince the court their methodology is sufficiently scientific. This is simply a bad idea. Expert wit-

nesses should not be permitted to sway jurors with opinions that ignore objective, established science.

Meanwhile, the Accutane litigation has been pending for 14 years. Scientific studies have [repeatedly](#) found [no tie](#) between Accutane and Crohn's disease. Judge Johnson this year [continued to exclude](#) so-called experts who use "a methodology which is slanted away from objective science and in the direction of advocacy."

The New Jersey Supreme Court will soon decide the appeal of Judge Johnson's 2015 ruling. The Court should [get rid of the state's relaxed standard](#) for expert testimony. Instead, it should adopt the same rigorous review applied in the federal courts and the vast majority of other state court systems. That approach, known as the [Daubert](#) standard, requires the judge to determine not only that the testimony is the product of reliable principles and methods, but also that the purported expert has applied the principles and methods reliably to the facts of the case.

Advocates for a more evenhanded civil justice system certainly hope New Jersey's high court will move the state's expert evidence law into the mainstream. But considering the court's January 2017 reinstatement of a [\\$25 million Accutane verdict](#), one of the largest in recent years, for an Alabama plaintiff, it's difficult to be optimistic.

### IT'S NEVER TOO LATE IN THE GARDEN STATE

During [oral argument](#) in the Accutane case that ultimately reinstated the \$25 million verdict noted above, **Justice Barry T. Albin** was quite candid with defense counsel, saying, "We apply our evidence rules and our court rules and that attracts plaintiffs here. They like our evidence rules, they like our expert witness rules . . ." In later writing the [opinion](#) in *McCarrell v. Hoffmann-La Roche*, Justice Albin also made it clear that the loose application of statutes of limitations can now be added to the list of pot-sweeteners that draw plaintiffs from all across the country to New Jersey courts.

*McCarrell* established that, by suing in the Garden State, a plaintiff who lived and took Accutane in Alabama could nonetheless benefit from New Jersey's longer statute of limitation on filing products liability lawsuits, rather than be subject to his home state's shorter time limit.

A unanimous court abandoned the "governmental-interest" standard it had previously used to decide whether a lawsuit was timely when the answer would be different under the law of the state where the claim arose and New Jersey law. Under the new approach, rather than look to which state has a substantial relationship to the events in the lawsuit, in which there is a presumption favoring the law of the state where the injury occurred, the court looked to whether the forum state (New Jersey) has a "substantial interest" in the litigation. Under this approach, New Jersey's statute of limitation is presumed to apply unless "exceptional circumstances" exist.

It is impossible to say at this point what sort of fact pattern New Jersey courts might find "exceptional," but the high court's opinion suggests that the state has a "substantial interest" in just about any product liability action. And observers say this welcoming attitude means plaintiffs who are time-barred from bringing claims in their home states will be drawn to New Jersey. "New Jersey is now a [more attractive forum than ever](#) to out-of-state tort plaintiffs," they say.

### ACTIVELY ANTI-ARBITRATION

Last year's Judicial Hellholes report [detailed](#) the history of the New Jersey court system's hostility to arbitration agreements, even as it claims to follow federal law that has long prohibited states from impeding alternatives to lengthy and costly litigation. The state's predisposition against arbitration continues, despite a very [clear message](#) warning state courts to stop such interference sent by the U.S. Supreme Court in May 2017.

In *Kindred Nursing Centers Ltd. v. Clark*, a 7-1 U.S. Supreme Court instructed state courts that they cannot impose special requirements as a condition of enforcing arbitration agreements. In a decision written by **Justice Elena Kagan**, the Supreme Court reaffirmed that federal law requires courts to place arbitration agreements "on equal footing with all other contracts."

New Jersey courts continue to insist that no "magic words" are necessary to make an arbitration agreement valid, but the experience of businesses says otherwise. Companies continue to have their agreements voided for not including specific terms. This is an expensive game of cat and mouse that benefits no one.



But even having an arbitration agreement that a court okays is no guarantee it will be upheld. In *Dugan v. Best Buy*, for example, **Appellate Judges Scott Moynihan and Francis Vernoia** in August 2017 [voided](#) an arbitration agreement over the process by which the defendant rolled out a new employment policy. Best Buy had employees go through an online training session informing them of the various progressive steps they could take to resolve a concern, the final option being a “claim in arbitration, rather than in court.” The final screen specifically focused on “Why is Best Buy Implementing an Arbitration Policy?” and contained a link to review the policy and for answers to frequently asked questions. At the conclusion, employees were asked to acknowledge the new policy. Nevertheless, an assistant manager ran straight to the courthouse with allegations that he was wrongfully terminated.



Even as the court found that the policy adequately informed employees that conflicts would be resolved through arbitration rather than in court, it found that the check-the-box process, without the employee “mechanically sign[ing] any document,” was insufficient to establish an enforceable agreement. “A handwritten signature is the customary and perhaps surest indication of assent,” the court said.

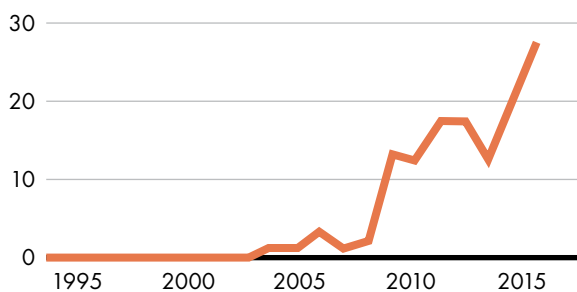
Really? In an age when we use smart phones to do our banking and pay our bills while shopping online for everything from holiday gifts to diapers for the baby, it seems this ruling-that-time-forgot shows an implacable anti-arbitration bias, plain and simple. No other contracts are subjected to a similar level of scrutiny. If they were, New Jersey would have a contract-formation crisis on its hands.

### IS THE TCCWNA TIDE TURNING?

Last year this report observed, “Whenever there has been an opportunity for [New Jersey’s] courts to crack down on victimless consumer lawsuits they have declined to do so.” So it’s quite nice to report that such an opportunity has finally been seized by the state’s high court.

As documented at length in previous reports, a once obscure state law known as the **Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA)** has rapidly become a choice weapon for plaintiffs’ lawyers to attack businesses that sell products or services in New Jersey. Known as a “[gotcha](#)” statute,” the TCCWNA allows

### TCCWNA DECISIONS



Source: NJCJL

plaintiffs’ lawyers to bring class action lawsuits seeking \$100 per violation—an amount that often greatly exceeds actual damages, if any—based on trivial technicalities, such as statements made on a business’s website that are inconsistent with a New Jersey regulation. Statements like, “[void where prohibited](#),” for example, are a no-no. It doesn’t matter whether a consumer even read the terms or conditions, relied on them in making a purchase, or experienced a loss – it’s still grounds for a class action and a chance at big money for the plaintiffs’ lawyers running this racket.

But in 2017 the New Jersey Supreme Court appropriately tapped the brakes on these out-of-control and often preposterous lawsuits. The court ruled that the failure of restaurants to list prices for every drink a customer might order on its menu should not subject it to a billion-dollar class action. Yes, that’s *billion* with a “b.”

During oral arguments the plaintiffs’ lawyer confirmed that under his interpretation of TCCWNA, the class action was potentially a billion dollar case. But the court was not persuaded. Its [5-1 decision](#) in *Dugan v. TGI Fridays* and *Ernest Bozzi v. OSI Restaurant Partners* finally put some meaningful and much-needed limits on TCCWNA litigation.

The court began to bring some clarity to a critical element of the statute that requires consumers to have been “aggrieved.” It is not enough, the court found, for a business to have engaged in some trifling violation on paper. At the very least, the consumer must have seen that document, in the instant case, a menu. The court also held that the



failure to provide prices on a menu does not violate a “clearly established legal right of a consumer or responsibility of a seller” as required under the TCCWNA because never before had someone made such a claim.

“Nothing in the legislative history of the TCCWNA ... suggests that when the Legislature enacted the statute, it intended to impose billion-dollar penalties on restaurants that serve unpriced food and beverages to customers,” the court concluded as it denied class certification.

The ruling sets the stage for two more TCCWNA cases that are [on their way](#) to the high court: *Spade v. Select Comfort Corp.* and *Wenger v. Bob’s Discount Furniture*. Both cases involve claims that furniture sellers failed to include required language about timely delivery of furniture printed in 10-point type on contracts or sales documents, even as the consumers who sued received timely deliveries. New Jersey’s high court has [agreed](#) to answer two questions posed by the U.S. Court of Appeals for the Third Circuit. The first is whether a consumer who receives a contract that violates a state regulation is an “aggrieved consumer” even if he or she “has not suffered any adverse consequences from the noncompliance.” The second is whether a mere violation of the furniture delivery regulations, absent conduct that would otherwise violate New Jersey’s consumer protection law, violates a “clearly established right” under the TCCWNA.

Answering these questions should discourage the more outrageous, no-injury TCCWNA complaints that have clogged New Jersey court dockets in recent years.



### **A TIME FOR NEW BEGINNINGS**

Rather than inventing new ways to enrich plaintiffs’ lawyers at the expense of business defendants and their customers (who pay higher prices when litigation costs are passed on to them), New Jersey courts should embrace their Janus moment.

The courts have the power and an opportunity to choose a new path toward a fairer, more evenhanded civil justice system. Many hope the new governor understands this moment of opportunity, as well, and will firmly resist political pressure from the plaintiffs’ bar, which will surely lobby him to nominate, especially to the high court, more plaintiff-friendly, liability-expanding jurists like Justice Albin.

## **#7 MADISON COUNTY AND COOK COUNTY, ILLINOIS**

Madison and Cook counties have become perennial Judicial Hellholes known for disproportionate volumes of litigation and large verdicts. Plaintiff-friendly judges seem to dominate both jurisdictions in which defendants face uphill battles from their very first motions. And with the most relevant local and state politicians comfortably in cahoots with the powerful plaintiffs’ bar, prospects for positive reforms remain remote, even as these jurisdictions’ hyper-litigiousness works against economic growth and job creation, and makes it harder for both government and businesses to [find affordable insurance](#).



### **MADISON COUNTY**

#### **ASBESTOS FILINGS CONTINUE TO RISE**

Madison County continues its reign as the national epicenter for asbestos litigation, attracting plaintiffs and their attorneys from all across the country, with the overwhelming majority of cases having absolutely no connection to the county or the state of Illinois. After inching downward for a few years earlier this decade, new asbestos claim filings are again robust in this small, largely rural county in Southwestern Illinois. According to consulting firm [KCIC’s annual asbestos litigation report](#) released in early-2017, nearly 1,300 new asbestos-related cases were filed in



Madison County in 2016. Second place went to Baltimore, Maryland, with only 414 (see Watch List, p. 46).

With more than three times the filings of the next most popular asbestos jurisdiction, Madison County accounted for 28% of all new cases filed in the United States in 2016. It also had far more new mesothelioma claims than any other jurisdiction in the country. Of the 1,299 asbestos filings overall, [1,078 cases were mesothelioma claims](#), accounting for 47% of all such claims filed

nationwide. St. Louis was second in this category with just 119, or 5% of the total.

It is certainly understandable why KCIC's report named the county the "[preeminent mature jurisdiction for asbestos filings](#)," and why the jurisdiction again ranks prominently among the nation's Judicial Hellholes. For example, in the past three years it has attracted more than [10 times the number](#) of claims than the nearby city of [St. Louis](#), which also has been noted for its own growing asbestos docket.

When trying to figure out why these types of claims are so popular, one has to look no further than the money involved. Mesothelioma claims in Madison County are worth up to \$3 million each, with plaintiffs' attorneys [collecting 30% in fees](#), or roughly \$1 million per claim.

Two locally-based law firms tend to dominate the landscape in Madison County – [Gori Julian](#) of Edwardsville, and the [Simmons](#) firm in Alton. These two firms accounted for 58% of all new claims filed in Madison County in 2016. As KCIC says, "That is a [notable consolidation of filing power](#) between just two firms in the nation's most popular jurisdiction."

While these firms do not limit their focus to Madison County alone, it certainly remains their primary target due to the plaintiff-friendly courts and the lack of legislative reforms. According to Illinois **Lawsuit Abuse Watch Executive Director Travis Akin**, "This is where plaintiffs believe they're going to have the [most favorable outcome](#). No [defendant] wants to get dragged into that courtroom."

Small businesses and taxpayers are footing the bill for this lucrative litigation. By opening their doors to cases with little connection to the area, or even the state, courts are increasing the liability insurance premiums on Illinois businesses and those costs are trickling down to consumers and undermining job creation. According to the Illinois Civil Justice League, the Madison County asbestos litigation industry could be worth more than [\\$1.74 billion annually](#).

### **ASBESTOS TRUST TRANSPARENCY REFORM NEEDED**

As the standoff between Illinois **House Speaker Mike Madigan**, one of the state's staunchest trial-lawyer allies, and reform-minded **Gov. Bruce Rauner** continues to bog down all legislative activity in Springfield, local Madison County officials are considering taking action themselves. The Madison County Board's Judiciary Committee is examining possible ways to reform Madison County's asbestos docket, particularly with respect to transparency.

According to a study by the Illinois Civil Justice League, there is great need for transparency because plaintiffs' lawyers have learned to exploit the [informational disconnect](#) that exists between administrators of asbestos bankruptcy trust funds and civil courts. The problem arises because trust administrators are not obligated to share claims information with attorneys defending asbestos lawsuits and, by intentionally delaying the filing of asbestos trust claims until lawsuits conclude, plaintiffs' lawyers can hide critical evidence about products their clients were allegedly exposed to and thus increase the likelihood that juries will hold still-solvent defendant companies solely liable for their clients' alleged injuries.

Madison County, of course, is not the only jurisdiction in the country where plaintiffs' lawyers engage in often fraudulent "double-dipping." The practice involves telling one story of a claimant's alleged exposures to asbestos fibers in court and a wholly different story or multiple stories to trust administrators in pursuit of multiple payouts for the same injury.

Why should anyone care? Because double-dipping does at least two terrible things: it drives still more [companies into bankruptcy](#) at significant cost to employees, pensioners and shareholders; and by compensating claimants

who've already won verdicts or settlements in court, bankruptcy trusts prematurely deplete their funds and risk leaving future claimants uncompensated. Without transparency it is difficult to police and punish the costly fraud that is rampant among asbestos claims, in Illinois and across the country.

### **ASBESTOS LITIGATION FORUM-SHOPPING ON APPEAL**

As has long been established, Madison County is a magnet for asbestos claims from across the country because of plaintiff-friendly procedures and the Illinois' loose venue rules. But change may be coming. The Fifth District Appellate Court is currently considering a very important venue case involving Ford Motor Company, having been [ordered](#) to do so by the state's high court.

[Maune Raichle](#), another law firm sharing significantly in the proceeds from Madison County asbestos litigation, originally brought the case there in November 2015. Ford argued that the Madison County Circuit Court did not have jurisdiction to hear the case because the company was not "[at home](#)" in Illinois, as the U.S. Supreme Court requires. The case involves [plaintiffs living in Florida](#), Ford is headquartered in Michigan, and the alleged asbestos exposure also occurred in Michigan.

Ford filed a motion to dismiss for lack of jurisdiction which, [not surprisingly](#), was denied by [Associate Judge Stephen Stobbs](#). This is certainly not the first time Judge Stobbs has [ignored jurisdiction rules](#) to brazenly favor asbestos plaintiffs, and it probably won't be the last time he tries. But Ford appealed his ruling to the Fifth District. And though the Fifth District initially denied the appeal, the Illinois Supreme Court granted Ford's motion for a [supervisory order](#) and ordered the mid-level appellate court to hear the appeal.



### **GUIDANCE FROM ILLINOIS SUPREME COURT**

The Illinois Supreme Court's own recent balanced decision in [Aspen Am. Ins. Co. v. Interstate Warehousing Inc.](#) should provide guidance to the Fifth District on how to address the issues presented.

In *Aspen* the high court overturned lower courts and granted an Indiana-based defendant's motion to dismiss for lack of personal jurisdiction. The plaintiff, incorporated in Texas and doing business principally out of Connecticut, had insured against the financial losses sustained by a New Jersey-based policyholder when one of the defendant's warehouses collapsed in Michigan. So if the plaintiff were not expecting a plaintiff-favoring jurisdictional ruling, one can reasonably ask why else it originally filed its case in Cook County (see more on Cook County below), especially since the defendant's only connection to Illinois was a warehouse located in Joliet.

Citing U.S. Supreme Court precedent in *Daimler*, Illinois' high court [agreed](#) with the defendant's argument that its Joliet warehouse was insufficient to subject it to jurisdiction in the state. If the mere operation of a warehouse were sufficient, the court said, then the defendant would also be at home in all other states where it maintains warehouses, which sets entirely too low a threshold.

If Illinois' lower courts hue to this high court decision and properly dismiss cases involving parties with insufficient ties to the state, plaintiffs' lawyers may find it more difficult to continue exploiting Madison County's plaintiff-friendly courts and be forced to file their cases where they belong.

### **DEFENDANTS FIGHT BACK**

Instead of waiting for legislative relief, some defendants have decided to fight back against the rampant lawsuit abuse in Madison County. In August of this year, Avocet Enterprises appealed to the Fifth District to sanction the Gori Julian law firm, [alleging](#) "a conscious and repeated effort to hold Avocet hostage to the byzantine world of asbestos litigation and to then seek its settlement ransom."

Like many Illinois plaintiffs' firms, Gori Julian tends to [target the same group of defendants](#) in each case, regardless of whether there is any factual connection. Gori Julian's primary concern is whether or not the company has "deep pockets." As Avocet's lawyer, David Chizewere [pointed out](#), "Plaintiff completely failed to provide any

facts whatsoever from which one could infer that Avocet was responsible for plaintiff's asbestos exposure. This failure was not an innocent oversight."

The law firm has filed over [400 similar cases](#) against Avocet, and all but four of them resulted in a dismissal and no settlement payments. As observers [expected](#), Judge Hobbs denied Avocet's motion for sanctions because the Gori Julian plaintiff involved in this particular case dismissed her claims. Unable to provide particular dates, job sites or products tying to Avocet to any liability after Avocet's repeated requests for such information, the plaintiff dismissed the complaint. Avocet appealed because it does not believe the dismissal should have any bearing on whether sanctions should be awarded given the history of the law firm.

On principle, Avocet has [spent \\$720,000 defending](#) the lawsuits, which they claim have no factual basis and are intended only to harass the company and force settlements. But principles don't get asbestos defendants very far in Madison County.



### **MADISON COUNTY JUMPING ON OPIOID LITIGATION BANDWAGON**

Madison County State's Attorney Tom Gibbons has joined the growing list of other state and local prosecutors who have or are considering [lawsuits against pharmaceutical companies](#) over their production, marketing and distribution of federally regulated opioid-based pain-relievers. The entire state faces severe budgetary problems, and officials see this litigation as a means to solving some of those problems. Gibbons points to the "extraordinary expenses" the county has incurred in order to deal with opioid overdose and addiction, "money our taxpayers have had to shell out because we've had an epidemic dumped on us."

But rather than cooperatively bringing together healthcare professionals, drug companies, regulators, law enforcement officials and social service providers, like a joint task force of the National Association of Counties and the National League of Cities [report](#) is happening in many communities determined "to break the cycles of addiction, overdose, and death," Madison County seems as determined to pursue adversarial litigation as it is to hire politically influential personal injury lawyers on a contingency-fee basis to run that litigation.

While State's Attorney Gibbons has gone out of his way to assure the media he'll work publicly with the Madison County Board to consider all aspects of possible opioid litigation carefully, he's also [made it clear](#) that he can act independently of the board. And in a telling signal that he's already made up his mind to hire contingency-fee lawyers to run such a lawsuit, Gibbons [responded](#) rather petulantly to an October letter from the Illinois Civil Justice League which cited [Manhattan Institute research](#) showing the potential for conflicts of interest and corruption flowing from contingency-fee arrangements. (See more on opioid litigation in Closer Looks, p. 66.)

### **'HELLHOLES' REPUTATION HURTS CONSUMERS AND TAXPAYERS**

On the off chance that anyone's inclined to believe that Madison County's hyper-litigiousness hurts no one other than the deep-pocket corporations often targeted there, the *Madison-St. Clair Record* [reported in July 2017](#) that two insurers which had previously provided coverage for the county declined to submit new bids this year, citing the unacceptable risk of litigation.

A county official said various insurers over the years have decline to write policies in Madison County "because of the litigation factor." And when fewer insurers are willing to offer policies, county residents and businesses – both as taxpayers and private consumers alike – pay bigger bills, as wealthy area trial lawyers laugh all the way to the bank.

## **COOK COUNTY**

Cook County continues to host a disproportionate amount of the state's litigation and is known for large verdicts. Recent studies have shown a "[litigation explosion](#)" in the county, accounting for roughly two-thirds of Illinois' major civil litigation, even though a significantly smaller fraction of the state's population lives there.

Judges consistently display a pro-plaintiff bias and a disregard for truth and fairness. The Cook County court has been plagued by unqualified and unethical judges, yet somehow most continue to be reelected. In 2017, however, at least two Cook County judges were removed from the bench for misconduct.

In April Judge Jessica O'Brien was [indicted](#) on federal mortgage fraud charges. She had been elected in 2012 and presided over the small-claims docket. It is alleged that she [lied to lenders](#) in order to obtain more than \$1.4 million in mortgages on two properties that she purchased and sold between 2004 and 2007. And a committee of Cook County judges [removed](#) her from the bench the day she pled not-guilty to the charges. Presumably the panel did not include her husband, another Cook County judge elected in 2016.

Also in April, Judge Richard Cooke was forced to step down when the very same committee of Cook County judges voted to refer his "[non-compliance](#)" with a judicial assignment to the state agency that investigates potential judicial misconduct. He had refused to work in traffic court and defied orders for months to do so. Though Cooke had run unopposed in a [Northwest Side sub-circuit](#), he somehow managed to spend an "[unprecedented \\$660,000](#)" he had lent to his campaign. Because he had contributed nearly \$70,000 to the campaigns of other judges, perhaps Judge Cooke thought he would draw a [more desirable](#) civil court assignment.

In any case, even for those unfamiliar with Cook County, such behavior by its judges on and off the bench should raise questions about the quality of its court. As a John Marshall Law School professor [observed](#), "Judges have a code of professional conduct they are obligated to uphold, and one essential tenet of the code is do not engage in any conduct that compromises the prestige and integrity of the judicial office. They cannot engage in conduct to compromise impartiality or give the public the appearance they are biased."

Cook County has a [history](#) of electing compromised judges, and its voters need to take these elections more seriously. As *Chicago Law Bulletin* editor [Marc Karlinsky puts it](#), "The whole system works [only] when judges are good." Cook County judges are not good, and that helps explain why the court is often cited among Judicial Hellholes.

## COOK COUNTY JUSTICE, BOUGHT AND PAID FOR



In addition to its reputation for corruptible judges, Cook County is notorious for the number of meritless lawsuits filed there each year as personal injury lawyers scramble for the next "golden ticket." These lawyers spend [millions of dollars](#) on advertising that encourages Illinoisans to sue over anything and everything, clogging the county courthouse with litigation that invariably delays justice for those with legitimate claims. These very same lawyers then contribute millions to Cook County judges' election campaigns, hoping to cultivate a plaintiff-friendly bench.

A [2016 study](#) showed campaign contributions by trial lawyers to judges and other Illinois office seekers topped \$35.25 million during the previous 15 years. In addition to the \$6 million contributed through the Illinois Trial Lawyers Association's legislative political action committee, the top 25 plaintiffs' firms and their lawyers and family members collectively invested another \$29 million. These campaign contributions have gone to legislators, constitutional officers, judges, state's attorneys, county board chairmen, circuit clerks, county party chairmen, mayors, union leaders and politically allied special interests.

## LAWSUIT LOTTERY

In light of this influence, the most recent preposterous class actions targeting the deep pockets of Walgreens, 7-Eleven and McDonald's come as no surprise. Walgreens and 7-Eleven were [targeted](#) for erroneously applying the county's [new soda tax](#) to unsweetened beverages. It was a simple mistake that both stores promptly corrected, and plaintiffs lost mere pennies. But now defendants will spend dearly to fight these suits.

The allegations against McDonald's were slightly different. The company was sued for allegedly [taxing the tax](#). The plaintiffs accuse the company of adding the new tax to orders *before* calculating other sales taxes. The lead plaintiff was overcharged by 2 cents and his lawyers are now seeking both compensatory and punitive damages equal to at least 1% of the annual revenue of all McDonald's stores in Cook County. Like Walgreens and 7-Eleven, McDonald's faces large legal costs that will eventually be passed on to consumers in the form of higher prices.

The county's soda tax, which has [since been repealed](#) incidentally, went into effect on [August 2, 2017](#). As should be expected any time a new tax is added, it created some confusion for merchants and customers alike. But rather than allow a reasonable grace period for glitches to be fixed, trial lawyers struck quickly. In less than two months, three significant class actions were filed. And even if the plaintiffs ultimately prevail in these tedious claims and the defendants pay [refunds](#) and other damages, the average customer will at best receive pennies while, once again, the scheming lawyers who engineered the litigation hope to make millions.

### **SUBWAY'S 'FOOTLONG' PROBLEM SOLVED**

One can only hope the soda-tax suits eventually end like the infamous Subway "Footlong" litigation ended. Readers of this report will remember a slew of class actions being filed a few years ago after someone posted a photo of a sandwich that appeared to measure marginally less than a full 12 inches in length. Two of these seven class actions were filed by Cook County residents in the federal Northern District of Illinois.

But sanity prevailed in August 2017 when the U.S. Court of Appeals for the Seventh Circuit finally [put the bite](#) on these cases, throwing out a proposed settlement [approved](#) by a Wisconsin federal court under which Subway agreed to be more careful and pay the plaintiffs' attorneys more than half-million dollars.

Under the settlement agreement, the [nine Subway customers](#) who brought the case walked away with \$500, but the settlement was "utterly worthless" to the average Subway customer, according to the court. The [court's opinion](#) stated it was a "hollow" deal and that reasonable consumers should understand the "natural variability in the baking process," inevitably leaving some rolls shorter and longer than the advertised foot-long.



### **CLASS-ACTION LAWYERS BET ON 'BIPA'**

Like the helpful roulette croupier at Rick's Café Americain, Illinois lawmakers in 2008 enacted the [Biometric Information Privacy Act \(BIPA\)](#) that is now helping class-action lawyers cash in at the Cook County Casino, er, Courthouse.

Unlike the sympathetically [desperate Bulgarian newlyweds](#) fleeing Nazi repression in "[Casablanca](#)" (Warner Bros., 1942), however, today's gamblers have more in common with the opportunistically self-serving Capt. Renault. They target private-sector defendants with often unfounded allegations of negligent, even reckless handling of employees' and customers' biometric information, such as iris scans, fingerprints and facial recognition data used increasingly to keep physical workplaces and sophisticated communications and cyber systems safe.

Providing a private right of action for those whose biometric information is improperly collected, used, sold, disseminated or stored – even when no actual injuries result – BIPA allows for liquidated damages of \$1,000 per negligent violation and \$5,000 per reckless violation, along with attorneys' fees and costs for prevailing plaintiffs.

Illinois plaintiffs have already [sued Facebook, Shutterfly, Google, Snapchat and L.A. Tan](#) in various federal and state courts. These lawsuits include the approval by the Cook County Circuit Court of a [\\$1.5 million class action settlement](#) against L.A. Tan in late-2016. More recently, the pace of high stakes BIPA class actions has quickened. In November 2017, two separate class actions with the same lead plaintiff were filed by the same law firm on the same day against [Aramark](#) and [Sweetgreen](#). Also on the same day, a former baggage handler was named as the lead plaintiff in a class action against [United Airlines](#).

It is unlikely that any of these recently filed cases will ever make it to trial. And it is even more unlikely that, if any did, evidence of real harm to any class members would be adduced. Because, with a big assist from the Illinois lawmakers whose reelection campaigns they generously support, the class-action lawyers driving these suits are much more interested in pre-trial settlements. In the previously mentioned L.A. Tan settlement, for example, the plaintiffs' attorney got the lion's share while [class members collected only \\$125](#).

In 2016 Illinois State Sen. [Terry Link](#) (D-Waukegan) summoned the courage to offer an [amendment](#) that would have tamped down BIPA claims somewhat by excluding some photo-related images from the law's scope.

But lawsuit industry lobbyists must have gotten to him because his proposal was quickly withdrawn, and private employers [can bet their sweet BIPA](#) that they'll face many more such parasitic class actions in Cook County.

## #8 LOUISIANA



The Pelican State's legal climate has suffered at the hands of powerful trial attorneys and the politicians they have controlled for decades. Plaintiff-friendly courts, excessive jury verdicts, problematic venue laws, widespread judicial misconduct, a lack of transparency in asbestos litigation and trust claims, disability-access lawsuits targeting small businesses, broad misuse of consumer protection laws, and the highest jury trial threshold in the nation are just a few of the more pressing issues that contribute to the state's longstanding reputation as one of the worst places in the country to be sued. Indeed, a report much longer than this one could be written about the proliferation of meritless litigation in Louisiana.

The 2015 election of **Gov. John Bel Edwards**, a trial lawyer, has helped further stack the deck against defendants down on the bayou, and Louisiana is unlikely to escape this litigiously fevered swamp anytime soon.



### DEEP POCKET JUSTICE

Litigation is a growing industry in Louisiana, and meritless lawsuits are on the rise. Of particular concern is the seemingly endless array of lawsuits targeting energy companies with allegations of environmental harms. Current litigation concerns include thousands of [legacy oilfield claims](#) and "public nuisance" claims alleging groundwater contamination with [methyl tertiary butyl ether](#) or MTBE, a gasoline additive once mandated by federal law.

Troublingly, Gov. Edwards has answered the call of politically powerful plaintiffs' lawyers and environmentalists to lead an aggressive, high-profile legal attack targeting Louisiana's energy industry over production activities conducted decades ago.

Under his leadership, the state has joined forces with six local parishes to file more than 40 lawsuits targeting major providers of oil and gas jobs in Louisiana. This summer, the governor added even more fuel to the hellholes fire when he [hired](#) one of his top political fundraisers to represent his office and the Louisiana Department of Natural Resources in an anticipated wave of new lawsuits, [promising](#), "We're going to be active litigants going forward."



The Edwards administration has argued the suits are necessary to force energy companies to restore wetlands they allegedly damaged with exploration and production operations dating back to the 1930s. But the governor's ongoing [effort](#) to enlist wealthy political supporters to run and possibly reap enormous legal fees from the litigation suggests other powerful motives may be at play. As noted in previous [reports](#), the lawsuits assert a smorgasbord of legal theories apparently intended to keep the cases in friendlier state courts where defendants' pesky demands for evidence that they are actually liable will more likely be ignored or silenced.

By contrast, a similar [lawsuit](#) filed by trial lawyers on behalf of the [Southeast Louisiana Flood Protection Authority-East](#) in 2013 has been repeatedly [rejected](#) and blatantly described by a federal court as "a collateral attack on an entire regulatory scheme." This should have sent a strong message to Louisiana's politicians that deep pocket justice doesn't pay. But they seem to be hoping for better luck in state courts.

These actions will only continue to move Louisiana in the wrong direction and further weaken the state's struggling economy, which has lost thousands of [jobs](#) and major manufacturing [projects](#) in recent years.

## RUNAWAY 'ADA' LAWSUITS

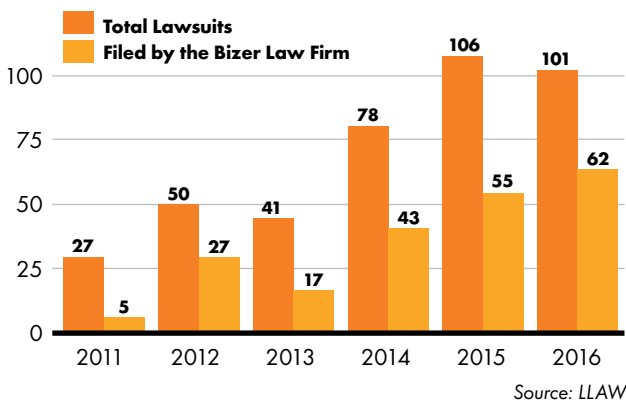
This report routinely documents California's ongoing run as the [nation's epicenter](#) for disability access lawsuits. But if some personal injury lawyers in the Pelican State have their way, Louisiana may soon contend for that ignominious title as the number of claims targeting small businesses for minor violations of the Americans with Disabilities Act (ADA) continues to rise.

According to court data compiled by the nonprofit watchdog group [Louisiana Lawsuit Abuse Watch](#), the filing of disability-access complaints in Louisiana has [increased](#) more than 360 percent in the past six years. Noteworthy is the fact that more than half of the plaintiffs in these suits are represented by personal injury lawyer **Andrew Bizer** with the [Bizer & DeReus](#) law firm.



The lawsuits, which frequently target local and state governments, landowners, shopping centers and other small businesses, often involve serial plaintiffs and are often filed without giving notice to the business owners, who are forced to spend scarce resources on settlements or preparing a defense rather than addressing and repairing the violation and removing the barrier. For example, one plaintiff in Shreveport, Louisiana has filed 17 [lawsuits](#) over the last year and a half, six of which have already been settled for undisclosed amounts.

### ADA LAWSUITS FILED IN LOUISIANA



attorney general or local prosecutors. The [driving force](#) behind the litigation is none other than the state's trial lawyer-turned governor himself.

Gov. Edwards' involvement in the opioids case certainly will not help his already tendentious relationship with state **Attorney General Jeff Landry**, who has moved to [wrestle control](#) of the opioid litigation away from the governor. And many expect Landry to challenge Edwards' reelection in 2019.

Meanwhile, other critics of the governor point to his [expansion of Medicaid](#) under the federal Affordable Care Act, known colloquially as "Obamacare," as a significant factor in the state's opioid problem. But as any successful personal injury lawyer learns early on: Never take responsibility if you can blame someone else. (See more on "Opioid Litigation" in Closer Looks, p.66.)

## WIDESPREAD JUDICIAL CORRUPTION

Corruption in Louisiana courts is a cancer eating away at the heart of the state's justice system. There has been evidence of inefficiency, incompetence and unethical conduct by members of the bar, court staff and judges for decades.

For proof we need look no further than news headlines. In the early 2000s the FBI's sprawling investigation dubbed "[Operation Wrinkled Robe](#)" ensnared four state judges and dozens of well-known attorneys and bail bondsmen, all of whom took part in an illegal kickback scheme at the parish courthouse.

In 2010, the Louisiana judiciary suffered another national embarrassment when Congress impeached former New Orleans federal [Judge Thomas Porteous](#) for a litany of charges, including accepting cash and gifts from lawyers with cases pending in his court.

This shameful approach violates the spirit in which this important statute was written.

'Jumping on an increasingly crowded bandwagon of state and local government entities nationwide that have done the same, Louisiana's Department of Health in September 2017 [filed a lawsuit](#) against the pharmaceutical industry alleging that, "Drug manufacturers undertook an orchestrated campaign to flood Louisiana with highly addictive and dangerous opioids... in an effort to maximize profits above the health and well-being of their customers...."

Leaving aside the merits of such claims, Louisiana's suit is notable because it was not initiated by the



Another glaring, long-running saga of judicial misconduct finally climaxed in 2017 as former Louisiana 18th Judicial District [Judge J. Robin Free](#), who developed a [national reputation](#) as a repeat offender with numerous ethical lapses over two decades, was forced to resign.

In 2001 Judge Free was [admonished](#) twice by the [Louisiana Judiciary Commission](#) after he failed to recuse himself in two separate cases in which he knew the defendants. After being censured by the judiciary commission, he assured its members that he had learned from his mistakes. But apparently not.

In [2009](#), Judge Free again refused to recuse himself from an environmental class-action lawsuit alleging groundwater contamination, even though his mother lived within the allegedly contaminated area and was therefore part of the affected class. He eventually received a 30-day slap-on-the-wrist [suspension](#) from the Louisiana Supreme Court for his third ethical transgression, but his inappropriate conduct continued.

In 2015 Judge Free was [suspended](#) again for 30 days without pay and forced to pay a \$7,000 fine after the state's high court [concluded](#) he had "harmed the integrity of and respect for the judiciary" by accepting lavish gifts from trial lawyers involved in a case before his court.

In 2016 he was [suspended](#) yet again—this time for one year without pay and fined \$11,000—for abusing his contempt authority in formal proceedings and making inappropriate comments toward women during domestic abuse hearings. More recently, the judge came under investigation after several [bizarre confrontations](#) with local law enforcement officers and, thankfully, Judge Free announced his [retirement](#) in June 2017.

But that he was allowed to resign, rather than being forcefully removed from the bench by his peers much earlier in his disgraceful judicial career suggests many Louisiana judges and justices may be more concerned with protecting each other than the public interest.

These and many other instances of influence peddling, cronyism and corruption contribute to Louisiana's stubborn reputation as a Judicial Hellhole. Since 2000, at least 10 Louisiana judges have been removed or resigned their seat on the bench due to judicial misconduct, while many others have been sanctioned. And a [review of state Supreme Court judicial misconduct opinions](#) shows more than 40 Louisiana judges have been publicly disciplined by the high court over the last decade for violating their oaths and abusing the authority.

Such conduct has eroded the public's trust in the state's judiciary. It also discourages business large and small from investing in and creating new jobs for Louisiana's [struggling economy](#). So if the judiciary is unwilling or unable to hold themselves to a much higher standard of ethical conduct, then the state lawmakers should take action to implement standard-raising reforms. Improving transparency and accountability throughout the judiciary are a must.



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# WATCH LIST

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

## BALTIMORE, MARYLAND



Prompted by overtures from the politically powerful personal injury law firm of **Peter Angelos**, Maryland’s Senate Judicial Proceedings Committee conducted an October 2017 [hearing](#) for lawmakers on what plaintiffs’ lawyers claim is a “backlog of civil asbestos cases” in the Circuit Court for Baltimore City.

Those lawyers testified that there are roughly 30,000 pending non-mesothelioma asbestos cases in Baltimore that haven’t been scheduled for trials because the court lacks enough judges and other resources. And without trial dates, their argument went, defendants can’t be compelled to engage in serious settlement negotiations.

So the hearing served as political theater, with representatives of the Angelos firm bemoaning an underfunded and long-stalled status quo. But it was really just a dress rehearsal for next year’s legislative session when a more concerted effort to increase the court’s budget and requisite taxes is expected, along with a push to preserve old questionable claims.

Maryland’s 20-year [statute of repose](#) for improvements to real property was first enacted in 1970. It required any claim relating to an improvement to real property to accrue within 20 years after the improvement was made. The statute was amended in 1991 to include an exemption allowing claims against manufacturers in asbestos-related litigation, but the Maryland intermediate appellate court recently ruled that any prior asbestos-related claim pertaining to an improvement to real property would have to accrue by July 1990 – 20 years after the enactment of the original statute. The court ruled that the 1991 amendment could not revive older claims barred as of its effective date.

The case, [Duffy v. CBS Corp.](#), is currently [on appeal](#) to the state’s high court. But before the state’s high court can affirm a ruling that would result in dismissal of thousands of old claims, the Angelos firm may attempt to “clarify” the law by having plaintiff-friendly legislators declare that asbestos is not an improvement to real property. Should the legislature do the plaintiff bar’s bidding and enact such an amendment over a possible veto by Gov. Larry Hogan, the Angelos firm would be in for a nice payday and likely put still more pressure on the legislature to increase the court’s budget and requisite taxes.

But Annapolis lawmakers already face a projected [\\$250 million budget deficit](#) for the coming fiscal year, and before they decide to raise taxes to provide more court funding for what defense counsel fear would become a “super highway” for bogus asbestos claims, they ought to reread a report they requested from Maryland’s Administrative Office of the Courts in 2014.

Skeptical of “merely increasing the number of judges” in Baltimore City without also giving judges better tools to weed out “non-meritorious cases,” the report indicates that roughly two-thirds of the asbestos claims pending in Baltimore City are represented by the Angelos firm. And fewer than 600 of all pending claims – less than 2% – allege an actual diagnosis of mesothelioma, the



rare and fatal cancer often caused by significant exposure to asbestos.

Of the remaining claims, only 1 in 5 allege any kind of cancer at all, and defense counsel note that many non-mesothelioma plaintiffs have long histories of cigarette smoking. Thus it seems entirely fair to question the fundamental reliability of medical diagnoses underlying the overwhelming majority of non-malignant asbestos claims now clogging the docket.

Speaking of questionable diagnoses, the *Baltimore Sun* [reported in 2013](#) when the Angelos firm last “[sought] to revive thousands of dormant asbestos cases,” that an investigation showed more than 1,500 claims to be duplicates. Of the remaining 11,383 claims scrutinized, nearly 70% involved diagnoses by one or more of the same five doctors, one of whom signed off on nearly 50% of those diagnoses, including an astounding 77 in just one day.

Even more remarkable was the identity of this super doctor, **William Goldiner**. He was and remains the team doctor for the Baltimore Orioles, which Peter Angelos purchased with the contingency-fee riches he won as Charm City’s most successful asbestos lawyer in the early 1990s.

Stunned by the Sun’s reporting, a [Wall Street Journal editorial](#) then urged Baltimore judges to “dig into the claims and see how many are bogus suits manufactured with the help of friendly doctors. ... [S]uch discovery is the best way for the judiciary to stop the avalanche of fraudulent claims so legitimate victims can get their day in court.” And in fact, Baltimore City Circuit Court **Administrative Judge W. Michel Pierson** testified at the October hearing that such a process is now underway.

Beyond questionable diagnoses, another [well-documented](#) element of fraud that harms legitimate asbestos claimants is known as “double-dipping.” That’s when plaintiffs’ lawyers coach their clients to tell one story of alleged asbestos exposure for lawsuits against still-solvent defendants, and then entirely different stories when they also seek administrative payouts from trust funds established by previously bankrupted defendants. Such questionable claims deplete finite funds faster than they otherwise would be and therefore reduce future claimants’ chances of receiving just compensation.

This lack of transparency plaguing asbestos litigation and trust claims nationwide came up only tangentially in the October hearing. But if lawmakers intend to conduct additional briefings or more thorough hearings next year, plaintiffs’ lawyers should be obliged to answer some pointed questions.



Meanwhile, before anyone even thinks about raising taxes to alleviate a court “backlog” comprising largely meritless claims, just so asbestos lawyers’ can expand their business model, state authorities with subpoena power should commit to investigating that business model.

Perhaps Maryland **Attorney General Brian Frosh**, whose [website](#) stresses his commitment to “safeguarding vulnerable populations,” will bravely step to the plate on behalf of legitimately diagnosed asbestos claimants. Their day in court shouldn’t be delayed by bogus cases, nor should trust funds be manipulatively depleted before the truly deserving can seek compensation.

## GEORGIA

The [Georgia Supreme Court](#) appeared on the Watch List in this report last year for the first time after issuing decisions over three years that significantly expanded civil liability. Unfortunately, the Peach State’s high court continued this troubling trend in 2017. Making matters worse, the state’s trial courts have been plagued by a spate of outrageous verdicts. The lower courts appear to be following the lead of the high court, expanding liability and increasing awards any chance they get.



## PREMISES LIABILITY

One area of Georgia law that courts there are changing fast is premises liability. The high court and lower courts alike have aggressively expanded liability for property owners. At the end of 2016 the Georgia Court of Appeals [reversed](#) a trial court decision in *Miller v. Turner Broadcasting Systems, Inc.*, creating new Georgia law by allowing a skilled electrical worker, who was injured after working on wires that his coworker told him were live, to proceed to trial against the property owner. It had long been the rule in Georgia that a person cannot recover from a property owner for injuries suffered as a result of a hazard on the premises when the plaintiff had equal or superior knowledge of the hazard. Incredibly, however, the Georgia Supreme Court in May 2017 [refused](#) to hear the defendant's appeal and thereby let precedent be ignored.



Georgia's high court also increased landowners' liability with a 2017 decision in [Martin v. Six Flags Over Georgia](#). Here the court unanimously held that defendants can be held liable for harm to a customer occurring off the premises if criminal activity was allegedly "foreseeable." The plaintiff was brutally attacked by assailants with no connection to the park at a bus stop outside of a Six Flags Over Georgia amusement park. To the high court's credit, it marginally reined in an even more expansive opinion of the lower court, which would have held landowners liable for injuries outside of their premises 100% of the time.

In bad news for all Georgia property owners, other trial courts appear to be following the high court's expansive lead on premises liability. A recent [Chatham County jury](#) found CSX Transportation liable for \$3.9 million in damages for the wrongful death of a trespasser who was killed by a train while she filmed a movie. Never mind that CSX had twice denied her permission to film on the tracks. CSX plans to appeal the decision.

## EXPANSION OF MEDICAL LIABILITY

In August 2017 the Georgia Court of Appeals for the Fourth Division, overturned a [trial court's decision](#) and reinstated a [vicarious liability](#) claim in a medical liability case. The lower court had found that the claim was barred by the statute of limitations and relevant Georgia law.

But the appellate court [allowed](#) the vicarious liability claims to proceed against a medical practice, despite the fact that they were added after the two-year statute of limitations had expired. After making a vague allegation of negligence by the "treating physicians," the plaintiff later sought to add a specific group of doctors to the complaint more than two years after the alleged injury occurred. To support its decision, the court reasoned that it was not a new claim, it simply clarified the earlier filing; however, as the defense argued, allowing a plaintiff to add a different group of doctors to a case after the statute of limitations has run seems to ignore the purposes of the statute all together.

The case was [appealed](#) to the Georgia Supreme Court and it is up to the justices to protect the integrity of the statute of limitations.

## RUNAWAY JURY VERDICTS AND THE 'WALDEN' DECISION

After a series of outrageous verdicts in [Bryan County](#), [Douglas County](#), and [DeKalb County](#), where the awards drastically outweighed the medical expenses and reasonable compensation for the injuries claimed in the cases, all eyes are now on the Georgia Supreme Court as it considers arguably the most important case on its docket heading into 2018. The high court has an opportunity to rein in the runaway verdicts and restore balance to the system. The court granted review in [Chrysler Group v. Walden](#) in June 2017 and heard arguments in October.

The case originated in a trial court in Decatur County in 2016 and ended in the largest wrongful death and pain-and-suffering verdict in Georgia history, totaling a whopping \$150 million.

The award in [this case](#) stemmed from a tragic accident in which a reckless driver rear-ended a family in their Jeep Grand Cherokee as they sat at a stoplight. The impact exploded the gas tank, causing a fire which took the life of a child. At trial the judge allowed the plaintiffs' attorney to concentrate his fire on the income of Chrysler's CEO

and otherwise suggest that company executives should go to prison instead of the driver who caused the accident. A predictably enflamed jury found the driver to be 1% at fault and Chrysler to be 99% at fault.

Incredibly, an intermediate appellate panel in November 2016 [upheld](#) the verdict, which had earlier been substantially lowered by the trial judge. But the appellate judges said they'd have upheld the initial award. So now it's up to the Georgia Supreme Court to restore sanity. If it doesn't, Georgia will likely find itself ranked among Judicial Hellholes before long.

## NEWPORT NEWS, VIRGINIA

Joining Baltimore as another hotbed of asbestos litigation along the Mid-Atlantic coast, Newport News, Virginia, as [past editions](#) of this report have [documented](#), is known for its evidentiary double standards, unsound legal rulings and lack of transparency. This is why asbestos plaintiffs have historically enjoyed a higher winning percentage in Newport News than in any other place in the country.

In fairness, the last asbestos case to go to trial in Newport News was [Parker v. John Crane, Inc.](#) in early 2016, as noted in last year's report. And because there have been no trials since, it's hard to know whether the problems and inequities that have manifested themselves in the past will persist.

But worth noting is one potential bright spot in the form of a new slate of judges that have taken the bench in Newport News Circuit Court. This past December in *Ferrell v. 3M Co.*, tried under maritime law as many asbestos cases in the jurisdiction are, **Judge Gary Mills** ruled that application of Virginia law's "[single disease](#)" rule was consistent with maritime principles. In *Ferrell* the claimant had been previously diagnosed with asbestosis and pursued a lawsuit. Approximately 15 years later the claimant filed a second suit after being diagnosed with mesothelioma.

The defendants in the second lawsuit filed a motion for dismissal of the case, arguing under the "single disease" rule that the filing of the first lawsuit for asbestosis triggered the statute of limitations and started the clock on all future claims. After reviewing the various arguments, Judge Mills agreed and dismissed the suit as time-barred under the statute of limitations. Is *Ferrell* a harbinger of more evenhanded treatment of asbestos defendants in Newport News?

If a bright new day fails to dawn broadly in Newport News, asbestos defendants may at least, finally, be able to avail themselves of a federal forum in so-called "failure to warn" cases. While the federal courts outlet has long been available in other jurisdictions, asbestos defendants in Virginia for nearly 30 years were unable to escape state courts. The rule that had developed over this time held that a "[government contractor defense](#)" did not apply in failure-to-warn cases.

But in three cases over the past year, the federal Fourth Circuit Court of Appeals set those Virginia rulings aside. In [Ripley v. Foster Wheeler](#), [Brinkman v. General Dynamics Corp.](#) and [Sawyer v. Foster Wheeler](#) the Fourth Circuit encouragingly made clear that defendants confronted with claims for failure to warn of asbestos hazards have the right to defend those suits in federal court when they were under contract to the federal government. Although plaintiffs will vigorously resist any effort to take these cases out of Newport News, it is fully expected that companies sued in the litigation will turn to these decisions first should they seek removal.

Nonetheless, Newport News remains a jurisdiction to watch. Newfound fairness may be trending there at the moment, but it's far too soon for asbestos defendants to relax.





## OREGON

Oregon makes its first-ever appearance on the Watch List, primarily because of two high court decisions that should trouble consumers, doctors, hospitals and insurance companies alike. Though the Oregon Supreme Court has made some admirable [decisions](#) over the past year (see Points of Light, p. 62), those were not enough to outweigh its most alarming decisions. And if Oregon's judiciary continues down this darker path, it may find itself more prominently featured in a future edition of this annual report.

The first troubling decision came in [Smith v. Providence Health](#), creating an entirely new kind of claim against medical providers. After suffering permanent brain damage from a stroke, plaintiff Joseph Smith brought this medical negligence action, alleging that, because doctors had not taken proper steps to follow up on his complaints of stroke symptoms, he lost a chance for treatment that, in only one-third of cases, provides a patient with no or reduced complications following the stroke. Reviewing the complaint on its face, the trial court agreed with defendants that plaintiff had failed to state a claim under Oregon law. The court entered a judgment dismissing the complaint with prejudice, which the Court of Appeals affirmed.

But in May 2017 Oregon's high court reversed. Now plaintiffs who suffer adverse medical outcomes can advance speculative claims that their chances for recovery may have been reduced. This new standard for medical negligence in the Beaver State further lowers already low standards and will create added burdens for doctors and hospitals, which will ultimately be passed along to patients in the form of higher prices for care.

In addition to doctors, hospitals and patients, insurance companies are also facing new difficulties in the state. Oregon statutory law requires an insurer to pay a policyholder's attorney fees when a recovery is obtained from the insurer. After considering the definition of "recovery" in the context of this law, the Oregon Supreme Court concluded that a plaintiff in an insurance claim should be awarded attorney fees, even in the absence of a money judgment.

The high court's decision in [Long v. Farmers Ins. Co.](#) came after the plaintiff's insurer had already made five payments totaling more than \$16,000 from January 2012 to February 2014 for repairs necessitated by a leak under the plaintiff's kitchen sink. The trial court awarded the plaintiff nothing more than the insurer had already paid for repairs, thus attorney fees were not awarded. An intermediate appellate court upheld that decision.

But Oregon's high court reversed, even as it conceded that text of the applicable statute left the meaning of "recovery" ambiguous. As a result, it's not unreasonable to think that a certain class of plaintiffs' lawyers will be encouraged to engage clients willing to engage in lengthy legal battles over embarrassingly weak claims with little likelihood for genuine recoveries, simply for the chance to collect some hefty fees. In addition to burdening taxpayers who provide precious court resources, the costs of such litigation will invariably be paid by insurers and their less litigious policyholders.

## PENNSYLVANIA SUPREME COURT

Businesses are carefully watching the Pennsylvania Supreme Court. While it has been generally balanced in the past, its membership [shifted](#) in 2016 after the earlier election of several candidates supported by the plaintiffs' bar. Plaintiff-friendly justices now have a dominant majority. During the past year the court has certainly done so, rendering decisions affecting asbestos litigation, medical liability and workers' compensation claims. It also issued a highly anticipated ruling on requirements for "bad faith" lawsuits against insurers, which may not invite a huge new wave of litigation but failed to limit such claims to those involving actual misconduct. On the positive side, the Keystone



State's high court deserves praise for upholding a longstanding statute providing a remedy to victims of lawsuit abuse.

### **BACKTRACKING ON FLAWED EXPERT TESTIMONY IN ASBESTOS LITIGATION**

In the past Pennsylvania's Supreme Court [repeatedly rejected testimony](#) by plaintiffs' experts claiming that exposure to a single fiber of asbestos from a defendant's product makes that defendant responsible for the plaintiff's development of an asbestos-related disease, even if the plaintiff had much greater exposure to asbestos from other sources. The court called this "any exposure" theory a "fiction" and properly required experts to show that a plaintiff was exposed to a sufficient level of asbestos from a defendant's product to have caused his injury. In November 2016, however, the court's new majority upheld a verdict that embraced a "cumulative exposure" theory, which was really the "any exposure" theory by a different name.

That case, [Rost v. Ford Motor Co.](#), involved a plaintiff who did not work directly with asbestos but claimed he was exposed to dust from Ford products containing asbestos while laboring as a "gofer" in an auto repair garage for just three-months. The plaintiff's expert did not account for the plaintiff's other occupational exposure to asbestos at high levels elsewhere over at least a 10-year period. And while the high court did not expressly overrule its precedents, it paid scant attention to additional causation factors in this case, such as dose, scientific studies or literature, and a comparative assessment of plaintiff's exposures.

As a result of the decision, observers [note](#), "[a]sbestos defendants, particularly low-dose asbestos defendants, are in a precarious situation in Pennsylvania." The court's 4-2 decision also held appropriately that the trial court's practice of consolidating unrelated asbestos cases violated the state's civil procedure rules, but it found Ford suffered no prejudice from the error.

### **MAKING IT MORE DIFFICULT TO TREAT PATIENTS**

Doctors have a duty to provide their patients with information about the alternatives, risks and benefits of medical procedures in order to obtain informed consent. In June 2017 a divided Pennsylvania Supreme Court ruled that surgeons must personally fulfill this obligation. They cannot rely on their professionally trained medical staffs to convey information to patients and answer their questions and concerns.

In [Shinal v. Toms](#), a 4-3 Court revived a medical liability case after ruling that a jury, which sided with the defense, was improperly allowed to consider evidence that qualified members of a brain surgeon's staff had provided information to a patient about the risks of a procedure she opted to undergo. Instead, the court ruled, a physician's duty to obtain informed consent was "nondelegable."

In dissent, **Justice Max Baer** expressed concern with the "far-reaching, negative impact" of the decision on how physicians serve their patients," Baer wrote. "For fear of legal liability, physicians now must be involved with every aspect of informing their patients' consent, thus delaying seriously ill patients' access to physicians and the critical services that they provide. Courts should not impose such unnecessary burdens upon an already strained and overwhelmed occupation when the law does not clearly warrant this judicial interference."

The Pennsylvania Medical Society concurred with Justice Baer, saying the ruling "could have significant ramifications for Pennsylvania physicians" who seemingly can "no longer rely on the aid of their qualified staff in the informed consent process." Others [observe](#) that the decision "ignores the realities of modern team medicine and will drive up the cost of medical care."



**Justice Baer**

### **CREATING TURMOIL IN THE WORKERS' COMP SYSTEM**

On the same day as the informed consent decision, the Pennsylvania Supreme Court struck down a significant element of the state's Workers' Compensation Act (WCA) that directed physicians to determine a worker's degree of impairment based on methodology provided by the American Medical Association (AMA). Now, as a result of this decision, employers face uncertainty, more litigation and higher workers' comp insurance premiums.

Under Pennsylvania’s workers’ compensation law, once an employer has paid 104 weeks of total disability benefits, it can have a doctor conduct an [impairment rating evaluation](#) (IRE) to determine a worker’s degree of disability. If the level of impairment is below 50%, the employer can then file to change the employee’s disability from “permanent total” to “permanent partial status,” which confines benefit payments to no more than 500 weeks. The level of impairment is determined based on the “most recent edition” of an AMA guide. This provides certainty for claim outcomes and an incentive to return to work or settle the claim.

In [Protz v. Workers’ Compensation Appeal Board](#) the court ruled that the statute’s reference to the AMA guidelines, which are regularly updated, represented an unconstitutional delegation of legislative authority, and that the offending language was not severable from the WCA. The ruling [shocked](#) employers, who can no longer rely on IRE evaluations. Without the ability to follow the AMA’s guidelines for evaluating a workers’ level of impairment, employers face greater exposure to long term workers’ compensation claims.

Workers’ comp lawyers call *Protz* “the most significant workers’ compensation ruling in Pennsylvania in the past 30 years” and [predict](#) it will lead to thousands of workers seeking more benefits. Immediately after the decision, law firms specializing in workers’ comp claims [advised](#) workers whose benefits had expired to contact an attorney to seek reinstated benefits.

Already the Pennsylvania Compensation Rating Bureau has [filed](#) a 6% loss cost increase as a direct result of



the *Protz* decision. Insurers [expect](#) the decision to “increase costs for employers and add a level of uncertainty to the workers compensation claims process going forward.”

Adding to the mounting concerns of Pennsylvania employers’ and their insurers, the *Philadelphia Inquirer* published in September 2017 results of a lengthy [investigation](#) into questionable conduct and potential conflicts of interest on the part of partners at the area’s dominant workers’ comp claims law firm, [Pond Lehocky](#). The story reports:

*Three partners at the firm and its chief financial officer are majority owners of a mail-order pharmacy in the Philadelphia suburbs that has teamed up with a secretive network of doctors that prescribes unproven and exorbitantly priced pain creams to injured workers — some creams costing more than \$4,000 per tube.*

*Pond Lehocky sends clients to preferred doctors and asks them to send those new patients to the law firm’s pharmacy, Workers First. The pharmacy then charges employers or their insurance companies for the workers’ pain medicine, sometimes at sky-high prices, records show.*

### **COULD BE WORSE: CLARIFYING ‘BAD FAITH’ LAWSUITS**

Last year this [report](#) expressed concern that a case before the Pennsylvania Supreme Court presented it with an opportunity to dilute the standard for bringing “bad faith” lawsuits, which allege that an insurer did not properly or promptly pay an insurance claim. Overall, the court’s unanimous ruling in [Rancosky v. Washington National Insurance Co.](#), could have been worse. The court took a middle-of-the-road approach that [observers](#) view as either maintaining the status quo or increasing liability in some cases.

Although the legislature created bad faith actions 27 years ago, this was the first time the Pennsylvania high court had considered the standard for such claims. The court’s decision requires plaintiffs to show an insurer knowingly or recklessly refused coverage without a reasonable basis. The court also, to its credit, found that plaintiffs must present “clear and convincing evidence” supporting their claim, rejecting the lower “preponderance of the evidence” standard sought by plaintiffs’ lawyers. And the decision continues to recognize that a merely incorrect decision by an insurer does not automatically demonstrate bad faith.

But the high court predictably failed to go as far as insurers had hoped. It refused to find that actual “bad faith” is always required in a bad faith claim. Rather, the court found that a plaintiff does not need to show an insurer denied a claim as a result of a “dishonest purpose” or “motive of self-interest or ill will.” Such conduct is merely a



factor to consider, not required, the court ruled.

Of greatest concern, however, is the court's determination that the bad faith statute does not require proof of an improper motive for the imposition of punitive damages on top of actual damages, interest and attorneys' fees. **Chief Justice Thomas Saylor's [concurring opinion](#)** does remind trial courts that punitive damages must reflect the reprehensibility of the specific conduct at issue and cautions against awarding punitive damages that violate constitutional standards. But leaving such judgments to lower courts, particularly in plaintiff-friendly jurisdictions such as Philadelphia, may prove to be an act of misplaced good faith.



### **GOOD NEWS: UPHOLDING A REMEDY FOR VICTIMS OF LAWSUIT ABUSE**

While the high court expanded liability in several areas this year, it preserved a Pennsylvania statute that has long protected litigants from lawsuit abuse.

The [Dragonetti Act](#), passed by the General Assembly and signed into law in 1980, gives civil defendants who prevail at trial a statutory cause of action for “wrongful use of civil proceedings.” Under the law those who bring lawsuits in a “grossly negligent manner or without probable cause” and act primarily for an improper purpose may be required to compensate victimized defendants. Such compensation may include any financial loss or emotional distress that resulted from the proceedings. Punitive damages may be imposed when appropriate. In *Villani v. Seibert*, the law was challenged as violating the judiciary's exclusive power to regulate the practice of law under the Pennsylvania Constitution.

The court's 5-1 [ruling](#) in April 2017 recognized that the statute's purpose is to “compensate victims of frivolous and abusive litigation and, therefore, has a strong substantive, remedial thrust.” It declined “to recognize generalized attorney immunity from the substantive principles of tort law” established by the legislature. In other words, the court found that when an attorney injures someone through wrongful conduct, he or she should be subject to liability just like anyone else. In a [concurring opinion](#), Justice Baer emphasized the difference between the judiciary's exclusive authority to discipline attorneys and the legislature's role in providing a remedy for victims of lawsuit abuse.

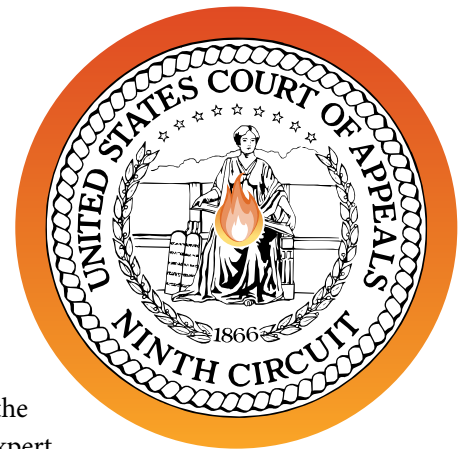
The ruling is not only a victory in preserving the Dragonetti Act, it also solidifies the Pennsylvania legislature's authority to respond to other troubling attorney practices in the future. Observers note, however, that the court left open the door to [future challenges](#) to the statute and the possibility that the court could yet find it unconstitutional if applied to cases in which plaintiffs' are attempting to expand the law or seek punitive damages.

### **THE UNKNOWN: PRODUCT LIABILITY LAW REMAINS UNCERTAIN**

Product liability law in Pennsylvania remains [uncertain](#) in the wake of the state high court's November 2014 ruling in *Tincher v. Omega Flex Inc.* The lengthy decision swept away decades of Pennsylvania precedent. Three years on [many questions remain unanswered](#). Some judges have adhered to earlier rulings that disadvantage defendants, such as a state appellate court [ruling](#) in April 2017 that a products liability defendant still cannot introduce evidence showing its product to be in compliance with federal regulatory and industry standards. That court affirmed a [\\$55 million](#) Philadelphia verdict against Honda in a crashworthiness case. Pennsylvania defense attorneys also anticipate that plaintiffs' lawyers will use *Tincher* to make broader and more costly [discovery requests](#) of their clients.

## U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

No rational observer would suggest for a moment that citing the U.S. Appeals Court for the Ninth Circuit on this report's Watch List will in way prompt it to moderate its off-overturned ways. ([Hawthorne effect](#) be damned.) But two very disappointing decisions this year expanding liability for innovative companies demand attention.



### EXPERT TESTIMONY

In [Wendell v. GlaxoSmithKline](#) the Ninth Circuit in June of 2017 overturned the U.S. District Court for the Northern District of California's exclusion of an expert witness under [Daubert](#). The lower court found several issues with the expert's testimony, including that it seemed litigation driven, was not based on independent research, and did not satisfy standards for peer-reviewed journals. The expert's testimony also lacked any animal or epidemiological studies showing a causal link between the combination of drugs and the injury at issue. Finally, the expert failed to present any scientific evidence excluding the plaintiff's disease itself as a risk factor for the injury.

The plaintiff alleged that the defendants' drug used to treat his inflammatory bowel disease caused him to develop lymphoma. On review of the lower court's decision, the Ninth Circuit ruled that each [Daubert](#) consideration had been examined too narrowly. The court also found that the lower court failed to take into account the broader picture of the overall methodology used by the expert and held that each of the deficiencies noted by the lower court could not exclude the expert testimony by itself. Since the Ninth Circuit found that the lower court improperly excluded the expert's opinions, it also reversed the summary judgment granted to the defendants on the duty to warn claim. Though disappointing, the result is not surprising coming from an appellate court that consistently maintains loose standards for expert testimony.

### FALSE CLAIMS ACT

By its nature the False Claims Act (FCA) invites questionable claims by individuals supposedly acting on behalf of the government. In light of recent decisions it has become clear that the Ninth Circuit does not have a strong interest in limiting such FCA abuse. When relators **Jeff and Sherilyn Campie** brought an FCA claim against **Gilead Sciences**, the U.S. District Court for the Northern District of California dismissed the claims with prejudice, holding that the plaintiffs had failed to state a claim. On appeal, the Ninth Circuit in July 2017 [reversed](#), holding that the relators had stated a "plausible" claim that Gilead sought payment for noncompliant drugs.



More specifically, the claims brought by the relators alleged that Gilead made false statements about its compliance with FDA regulations regarding HIV drugs, resulting in the receipt of billions of dollars from the government. A successful FCA claim must show that a false statement (or fraudulent course of conduct) made knowingly was a material cause for the government to pay out money or forfeit moneys due. The Ninth Circuit found the drugs had been intentionally misbranded over an extended period of time and that Gilead had submitted a direct request for payment from government agencies.

But in addition to the four elements required for an FCA claim, the U.S. Supreme Court's 2016 [Escobar](#) opinion stated that the misrepresentation must be "material to the Government's payment decision" and that "the materiality standard is demanding." In Gilead's case, the government continued to pay for the medications after it knew of the misbranding. Surely this fact indicates that any misrepresentations by Gilead were not deemed material to the government's payment decision. Defense counsel is appealing the case, giving the U.S. Supreme Court yet another opportunity to overturn the Ninth Circuit.

## ROBBINS GELLER SLAP-DOWN

Of course, not every decision rendered by the Ninth Circuit expands civil liability. And once in a blue moon such a decision actually limits liability. That was the case in November 2017 when the appellate court upheld a lower court and thereby slapped down the relentless parasites at [Robbins Geller Rudman & Dowd](#), known for orchestrating so-called “shareholder” lawsuits that often bootstrap allegations of fraud and misconduct against corporate management when stock prices dip.

Two years earlier U.S. District Judge Jon Tigar of the Northern District of California dismissed a Robbins Geller suit against Yelp that alleged the online review site had propped up its earnings by coercing businesses to buy ads if they wanted to have bad, purportedly fake reviews removed from the site. The suit further alleged that media reports of some 2,000 customer complaints about such coercion prompted the company’s stock price to plummet in April 2014. But Judge Tigar [found](#) that Yelp never represented that every review on its site was authentic and reliable. He also found the plaintiffs’ allegation of “fraud on the market” deficient because it was based on claims of potential fraud, not fraud itself.

Refreshingly, a unanimous panel of the Ninth Circuit sided with Judge Tigar, [holding](#) “that in the circumstances of this case ... customer complaints that refer to allegations of fraud, without more, are insufficient to allege loss causation.” Neither, the appellate panel found, was there any evidence that Yelp executives “had specific information regarding employee use of review manipulation when trying to sell advertising.” The dismissal was affirmed, and plaintiffs won’t be allowed to amend their complaint and try again.

## WEST VIRGINIA

Once a [perennial Hellhole](#), West Virginia’s legal climate has [vastly improved](#) over the past three years thanks to numerous statutory reforms undertaken after Mountain State voters decided they’d had enough of trial lawyer-controlled lawmakers – and jobs-killing expansions of civil liability – and threw many of the bums out on Election Day 2014. In 2017 the legislature passed two more important reform bills: one that lowered the [prejudgment interest rate](#), and another that limits products liability for [innocent sellers](#). If not eventually struck down by the state’s still plaintiff-friendly high court, these and previously enacted reform statutes should continue to improve fairness and predictability in West Virginia’s civil courts.

While great progress has been made in the state, there is still work to be done. Several important legislative issues should be tackled as part of 2018’s legislative agenda, including:

- Allowing at trial the admission of evidence showing personal injury plaintiffs did not use their seatbelts in car accident cases,
- Limiting “[phantom damages](#)” so awards in personal injury cases reflect a plaintiff’s actual medical costs incurred, not those initially billed but never paid, and
- Venue reforms that require plaintiffs to file claims in the appropriate court while cracking down on forum-shopping.

Concern also persists in West Virginia about the fact that litigants do not have the same right to [appellate review](#) that is available in other states. And perhaps most importantly, lawmakers should seek to end the state’s uniquely troublesome practice of allowing medical monitoring claims. The West Virginia Supreme Court is the only court in the country that still permits [cash awards to uninjured people](#) who bring speculative medical monitoring claims.



Even as West Virginia legislators and governors make progress, however, the state's Supreme Court of Appeals remains a concern and requires a watchful eye.

The high court is currently presented with the question of whether to adopt a novel plaintiffs' bar theory, [innovator liability](#). This case is a true litmus test for the court. Under innovator liability a brand name manufacturer can be held liable for injuries caused by a generic company's product.

Subjecting companies engaged in innovation to liability that bears no relation to their products or revenues can discourage future investments in, for example, medicines or technologies that can improve and even save lives. Innovator liability also undermines the predictability and fairness that civil courts should provide all parties to litigation. And no notion of basic fairness can tolerate a product manufacturer being forced to serve as an insurer for injuries caused by a generic competitor, which is why the [vast majority](#) of state courts that have ruled on innovator liability have rejected it. West Virginia should, too.

Meanwhile, fairness also requires this report to note good news out of the Supreme Court of Appeals in 2017, including its decision in [Martinez v. Asplundh Tree Expert](#). In this case, the court ruled that West Virginia's statutory limit on punitive damages applies in cases tried after the law's effective date, regardless of when the alleged conduct occurred or when the complaint was filed. The court correctly interpreted the legislature's intent and resisted the urge to legislate from the bench.

But picking up where a 2014 [ABC News investigation](#) entitled "**Lear Jet Justice in West Virginia? A 'Circus Masquerading as a Court'**" left off, new and disturbing questions are being raised about one justice's alleged conflicts of interest and campaign connections to wealthy trial lawyers.

Regular readers of this report will remember that a wealthy Mississippi plaintiffs' lawyer named **Michael Fuller** bought a private jet from the husband of the Supreme Court of Appeals then-**Chief Justice Robin Davis** as a monstrous [\\$91 million](#) trial verdict against a West Virginia nursing home that Fuller had won was headed to the high court on appeal.



Fuller also orchestrated [tens of thousands of dollars](#) in [questionable](#) contributions for the chief justice's ensuing reelection campaign, and she wrote the nursing home appeals decision that ultimately awarded him some \$17 million in fees.

Davis's husband, who sold the jet to Fuller, has insisted that [nothing unethical or illegal](#) took place. But court-watching activists in the state never bought that line and have more recently declared a subsequent state ethics investigation a [whitewash](#). Where the sordid tale goes from here remains to be seen, but the activists used Freedom of Information Act requests to secure from state authorities thousands of documents and recordings and are reportedly combing through them for evidence that may yet prompt a more thorough inquiry.



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# DISHONORABLE MENTIONS

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

## CONNECTICUT SUPREME COURT BLESSES \$42 MILLION AWARD FOR TICK BITE

Responding to inquiries from a federal appeals court, the Connecticut Supreme Court in August 2017 [declared](#) that state law supports a \$41.7 million jury award in a negligence case against a private school after a teenaged student was bitten by a tick while hiking in a mountainous area during a study program in China. She later developed a debilitating condition expected to worsen with age.

The U.S. Second Circuit Court of Appeals, where the case is now pending, referred two questions to Connecticut's high court, asking: Are schools obligated by Connecticut policy and law to warn of the danger of contracting an insect-borne illness on field trips? And was a \$41.7 million verdict excessive?

The original 2013 jury verdict awarded the student and her family \$10.25 million in economic damages and \$31.5 million for pain and suffering. Lawyers for the school continue to argue that there was no duty to warn against contracting a catastrophic tick-borne disease because such an event could not have been foreseen.

While observers can understand a jury's inclination to see that a tragically injured young person's continuing needs for care are met, one can only wonder if Connecticut's Supreme Court would have been so magnanimously quick to bless such a giant award had the defendant been a public school funded by Constitution State taxpayers.



## MINNESOTA GOVERNOR'S 'VETO TRIPLE-PLAY'

In 2016 Minnesota voters indicated they were tired of politics as usual in the state legislature and elected a reform-minded pro-business majority for only the second time since the early 1970s.

It was an opportunity for lawsuit reform advocates in the state to get serious consideration for many common sense legislative initiatives long stalled in the state. But there was a problem: **Gov. Mark Dayton**, a loyal servant of the reliably generous plaintiffs' bar.



**Trespasser Liability.** In 2017 Minnesota lawmakers passed a bill on a bi-partisan basis that would have simply codified in statutory law Minnesota's common law protection for landowners against trespassers' liability claims, with certain long recognized exceptions. The so-called Trespasser Liability Act had already been passed by all four of Minnesota's surrounding states in response to the [recently activist](#) American Law Institute's Third Restatement of Torts, which effectively urged courts to impose new liability on property owners for injuries incurred by unwanted trespassers.

The Minnesota bill carried bipartisan authors and had the strong support of leading property rights and agriculture groups. But despite the rare legislative bipartisanship behind the bill's easy passage, Gov. Dayton vetoed the bill, becoming the only governor in America to veto such a bill since the ALI's restatement. More than half the states have now enacted such laws.

**Prejudgment Interest.** Gov. Dayton in 2017 also vetoed an omnibus budget bill that included a lowering of Minnesota's excessively high prejudgment interest rate that helps trial lawyers bully defendants into lucrative pre-trial settlements.

**Seat Belt Rule.** The same omnibus bill vetoed by the governor also contained a provision repealing the state's Seat Belt Gag Rule. Since 1963 juries in Minnesota have been kept from knowing whether a person injured in a car accident may have contributed to their own injuries by not wearing a seat belt. The gag rule was initially passed when seat belts were relatively new and their capacity to protect drivers and passengers was not yet known.

In any case, tort reform efforts in the "Land of 10,000 Lawsuits" may soon enough get a boost as Gov. Dayton has announced he'll not seek re-election in 2018. Amen.

### **WISCONSIN APPEALS COURT STRIKES DOWN MEDICAL LIABILITY LIMIT**

In July 2017 the Wisconsin Court of Appeals, District 1 struck down the state's statutory limit on noneconomic damages in medical liability cases, holding that lawmakers' \$750,000 limit was arbitrary and unfairly burdensome to catastrophically injured plaintiffs.

The appellate court's decision in [\*Mayo v. Wisconsin Injured Patients and Families Comp. Fund\*](#) cited the Wisconsin Supreme Court decision in [\*Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund\*](#), which struck down other statutory liability limits largely on equal protection grounds. Both cases also reached the conclusion that the amount of the cap was arbitrarily selected because it was not rationally related to the legislative objective of lowering medical malpractice insurance premiums. Wisconsin's high court has granted cert and is expected to hear *Mayo* arguments in early 2018.

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# POINTS OF LIGHT

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

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

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

This report’s **Points of Light** typically comprise noteworthy actions taken by judges, lawmakers or other government officials to stem abuses of the civil justice system not detailed elsewhere in the report.

## ATTORNEYS GENERAL

While some state attorneys general let themselves be egged on by private-sector personal injury lawyers to hector businesses in their states with sometimes speculative and meritless litigation, the likes of which this report has detailed for many years, others, such as **Arizona Attorney General Mark Brnovich**, actually work to protect businesses from litigious parasites, such as those driving the growing disability-access lawsuits racket.

When AG Brnovich got word from small businesses in and around Maricopa County that two near-do-well, barely-managed-to-get-through-law school schemers – with the audacity to call their litigation mill “Advocates



**AG Brnovich**

for Individuals with Disabilities” – had filed [approximately 1,700](#) cookie-cutter lawsuits alleging violations under the federal Americans with Disabilities Act (ADA), he took action. He [intervened](#) in the cases in August 2016 and managed to get them consolidated before one judge. Most of the cases were then dismissed because plaintiffs couldn’t even show they had ever visited the defendants’ businesses, much less suffered any injury.



Then in November 2017 AG Brnovich’s office [announced a settlement](#) with the two plaintiffs’ lawyers that, among other things, ends their appeal of the matter, requires them to pay attorneys’ fees for those they sued and another \$25,000 to the AG’s office for educating small businesses and remediating ADA-required signage. Most wonderfully, the settlement also bans these two bottom-feeders from filing any more ADA claims in Arizona forever. Bam!

Following Arizona’s lead, both [New Mexico Attorney General Hector Balderas](#) and [Nevada Attorney General Adam Laxalt](#) have taken comparable actions in 2017 to crack down on these often fraudulent disability-access lawsuits. Let all three AGs’ actions serve as a model for their counterparts in other states.

## IN THE COURTS

### U.S. FIFTH CIRCUIT REVERSES RECORD-SETTING BUT TOTALLY BOGUS FCA VERDICT

A unanimous three-judge panel of the U.S. Court of Appeals for the Fifth Circuit in September of 2017 reversed a [record-setting](#) federal [False Claims Act](#) verdict of [\\$663 million](#) in a case so willfully mishandled by the trial judge that it sunk the [Eastern District of Texas](#) into the ignominious rankings of Judicial Hellholes two years ago.

The case, [United States ex rel. Harman v. Trinity Industries](#), arose in 2012 when “relator” (plaintiff) **Joshua Harman** purported to “blow the whistle” on his once and future competitors at **Trinity Industries Inc.**, alleging that Trinity had knowingly and fraudulently sold to the federal and state governments elements of a highway guardrail system that had been modified in 2005 but not subsequently tested and approved by the Federal Highway Administration (FHWA).



Trinity defended the claim by showing that the design modification was recommended by the system’s engineers at the Texas A&M Transportation Institute (TTI) to “improve the product,” that the modification was “insignificant,” and that it did not need to be disclosed. Trinity also pointed out that the FHWA had already investigated for a potential FCA violation and promptly affirmed that the modified product was [compliant](#) with the agency’s standards. Accordingly, the federal government declined to join the plaintiff’s FCA lawsuit.

Citing the U.S. Supreme Court’s 2016 decision in [Escobar](#), **Circuit Judge Patrick E. Higginbotham** wrote that for a FCA claim to succeed, it must show that a defendant’s knowingly false and fraudulent conduct materially could have caused the government a loss. And since relevant FHWA regulations allowed TTI “engineers [to] use their judgment to determine that additional testing [was] not needed” to assure the safety of the modified product, Trinity sold the government only the sound, lifesaving guardrail system it had contracted to sell. “Disagreement over the quality of that [engineering] judgment is not the stuff of fraud,” the court said.

More damningly, the opinion found that Harman had signaled to potential investors his “[intention] to use the proceeds [from the lawsuit] to recapitalize his business and begin manufacturing competing” guardrail elements. It also detailed why the \$663 million verdict was both unjustified and without any basis in fact.

So the reputation of an upstanding company that provides a reliable and affordable product protecting Americans all along our nation’s roads and highways has appropriately been restored.

But as the number of new FCA claims by private individuals and their lawyers grew [nearly 300%](#) from 1994 through 2015, and as the percentage of government initiated claims shrinks, this long-awaited Fifth Circuit decision more broadly and importantly reiterates that:

*“Congress enacted the FCA to vindicate fraud on the federal government, not second guess decisions made by those empowered through the democratic process to shape public policy. ... As the interests of government and relator diverge, this congressionally created enlistment of private enforcement is increasingly ill-served,” especially “[w]hen the government ... repeatedly concludes that it has not been defrauded ... .”*

As ATRA’s [amicus brief](#) to the Fifth Circuit pointed out, 80% of FCA claims now proceed without the government joining private relators in their allegations against defendants. And even when defendants prevail, they are



forced to incur considerable legal expenses.

By way of historical context, the FCA was first enacted to punish and discourage Civil War profiteering and was sometimes known as “Lincoln’s Law.” But when the government concludes it has not been defrauded, false claims cases should end and there should be no awards for damages made to relators and their attorneys. They are the profiteers of today. Trinity should never have had to appeal such a verdict, much less endure roughly five years of very costly but meritless litigation. All judges must ensure that such costly FCA travesties are never repeated.



### U.S. SEVENTH CIRCUIT’S ‘EMPTY SUIT’ EYE DROP DECISION

Writing the majority opinion for a U.S. Court of Appeals for the Seventh Circuit panel in [Eike v. Allergan, Inc.](#), retiring Judge Richard Posner vacated class certification and remanded for dismissal a suit against six pharmaceutical companies that preposterously claimed eye drops manufactured by the defendants were “unnecessarily large” and thus in violation of state consumer fraud statutes. Plaintiffs shamelessly sought damages calculated as the difference between the price of purchased drops and the presumably lower price had the drops been appropriately less voluminous.



Learn more at [atra.org](http://atra.org)

As he often has, Judge Posner used a humorous analogy to note that the plaintiffs did not allege collusion or misrepresentation, only that the price of the drops may have been excessive because of their size. Comparing the eye-drops plaintiffs to ultimately dissatisfied individuals who purchased cats from a breeder who truthfully disclosed upfront all the costs of raising the cats, he called their complaint merely one of regret, not one in which an actionable injury occurred. He added that plaintiffs did not even have standing to bring the claim since they failed to allege “an invasion of a legally protected interest.” And since nothing in the complaint even suggested an injury caused by the defendant, class certification was vacated and the case was remanded with directions to dismiss the suit with prejudice.

Parasitic class-action lawyers are tough to deter, but perhaps this Seventh Circuit decision will help limit what American Tort Reform Association general counsel Victor Schwartz calls “empty-suit litigation,” in which no real injuries to plaintiffs can be discerned. ATRA filed an [amicus brief](#) arguing for the outcome ultimately reached by the Seventh Circuit.

### ANOTHER SOUND DECISION FROM THE SEVENTH CIRCUIT (ASBESTOS)

In a workplace asbestos lawsuit the Seventh Circuit affirmed a district court decision that, joining the [Sixth](#) and [Ninth](#) Circuits, excludes scientifically unsound expert testimony about medical causation.

Before trial in [Krik v. Exxon Mobil Corp.](#), defense motions urged Judge John Z. Lee of the Northern District of Illinois to exclude [Dr. Arthur Frank](#)’s “any exposure” or “each and every exposure” theory of causation. This theory effectively purports that *any* exposure to asbestos, regardless of how minuscule or brief, should be considered a cause of injury. Judge Lee sided with defendants in finding under [Daubert](#) that the plaintiff’s exposure theory was insufficiently reliable to warrant admission since it was “not tied to the specific quantum of exposure attributable to the defendants” and ignored fundamental toxicology with respect to dose dependency.

Subsequently writing for a unanimous appellate panel, Judge Ilana D. Rovner explained, “the principle behind the ‘each and every exposure’ theory and the cumulative exposure theory is the same – that it is impossible to determine which particular exposure to carcinogens, if any, caused an illness.” However, since the ultimate burden of

proof on causation remains with the plaintiff, “[R]equiring a defendant to exclude a potential cause of the illness ... improperly shifts the burden of proof to the defendants ... ”

### OREGON SUPREME COURT REINS IN PERSONAL JURISDICTION

Justice Rives Kistler’s opinion in *Barrett v. Union Pacific Railroad Co.* for the Oregon Supreme Court reversed a trial court’s decision granting general jurisdiction over a case brought by an out-of-state plaintiff alleging an out-of-state injury caused by an out-of-state defendant. The plaintiff was injured while working for Union Pacific in Idaho, but brought his complaint in Oregon. Moreover, Union Pacific is a Delaware corporation and does less than 4% of its business in Oregon. The Oregon Supreme Court held that a corporation doing business within a state is not on its own sufficient to give that state general jurisdiction over the corporation.



Despite this positive decision coming out of Oregon, many other states have shown confusion and uncertainty in interpreting questions involving jurisdictional issues. Last year’s Judicial Hellholes report criticized faulty 2016 jurisdictional decisions by state high courts in California and Montana. Fortunately, the U.S. Supreme Court has since clarified jurisdictional standards, and this Oregon decision hews to high court precedent (see more on the U.S. Supreme Court’s 2017 jurisdictional decisions in *Closer Looks*, p. 64).



### THREE JURIES ISSUE DEFENSE VERDICTS IN XARELTO BELLWETHER TRIALS

A Louisiana federal jury in May 2017 took just over two hours to find that Johnson & Johnson and Bayer [had not failed](#), as alleged, to provide adequate instructions to doctors who prescribed Xarelto. This verdict came from the U.S. District Court, Eastern District of Louisiana in the first bellwether trial of *In re Xarelto Products Liability Litigation*. This was the first decision of over 19,000 lawsuits in federal courts involving Xarelto generated by nonstop TV ads suggesting that viewers “Call Now!” to get compensation.

Both defendants’ and plaintiff’s motions for judgment as a matter of law were denied prior to closing arguments. Xarelto was prescribed to plaintiff Joseph Boudreaux to reduce the risk of stroke. At trial, the plaintiff alleged that he developed gastrointestinal bleeding within a month after starting the drug and needed several blood transfusions. Further, plaintiff said that he was not warned that there was no agent to reverse uncontrolled bleeding. The defendants denied that they had failed to warn doctors of the relevant risks, and the jury agreed.

Since that initial win, federal juries have [twice more](#) returned defense verdicts in Xarelto bellwether cases. The outcome of these trials is a positive sign for pharmaceutical companies that properly warn doctors of the risks associated with their products.

## IN THE LEGISLATURES

Thirteen states enacted 17 civil justice reform statutes in 2017. An alphabetized list of those welcomed accomplishments follows below:

**Arizona** extended the state’s lengthy-trial fund for another 10 years, assuring better compensation for jurors ([H.B. 2246](#)).

**Arkansas** adopted consumer protection act reforms, including the requirement that plaintiffs prove they actually relied on a merchant’s allegedly deceptive conduct when entering into a transaction that resulted in a loss ([H.B. 1742](#)).

**Iowa** passed two reforms: one that protects landowners from certain



trespassers' liability claims ([S.F. 260](#)); and another that requires asbestos plaintiffs to transparently provide documentation on any and all of their bankruptcy trust claims while also establishing threshold medical criteria so asbestos exposure claims by asymptomatic plaintiffs can be set aside ([S.F. 376](#)).

**Kentucky** lowered the state's prejudgment interest rate from 12% to 6% ([H.B. 223](#)).

**Minnesota** passed disability-access litigation reform requiring that a business be given notice and 90 days to correct an alleged violation of the American with Disabilities Act before a lawsuit can be filed ([H.F. 1542](#)).

**Mississippi** ([H.B. 1426](#)), **North Dakota** ([H.B. 1197](#)) and **South Dakota** ([S.B. 138](#)) created a right for asbestos defendants to obtain plaintiffs' bankruptcy trust claims information.

**Missouri** passed two reforms: one adopting the more exacting *Daubert* standard for expert evidence to keep "junk science" out of courtrooms ([H.B. 153](#)), and another allowing defendants at trial to introduce evidence of both the actual costs of plaintiffs' medical care and payments already made by defendants or their insurers ([S.B. 31](#)).

**Montana** lowered its judgment interest rate from 10% to the prime rate + 3% ([S.B. 293](#)).

**Oklahoma** amended its e-discovery rules to mirror the changes made to the Federal Rules of Civil Procedure ([H.B. 1570](#)).

**Texas** passed two reforms: one reining in rampant [litigation fraud](#) that has targeted property insurers in the wake of major storms ([H.B. 1774](#)), and another requiring that businesses be given notice and 60 days to correct alleged violations of the Americans with Disabilities Act before a lawsuit can be filed ([H.B. 1463](#)).

**West Virginia** passed two reforms: one lowering the states judgment interest rate ([H.B. 2678](#)), and another limiting products liability for innocent sellers ([H.B. 2850](#)).

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# CLOSER LOOKS

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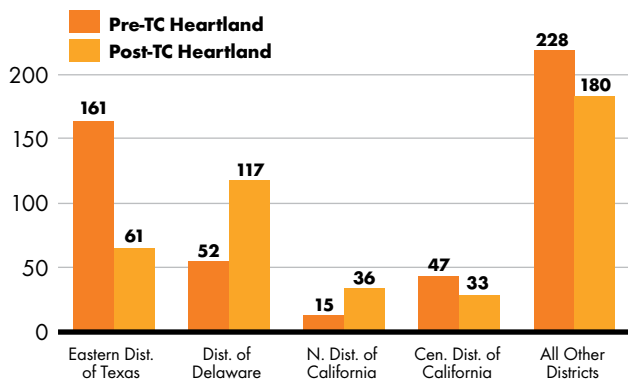
## THREE SUPREME COURT DECISIONS SHOULD SLOW LITIGATION TOURISM

Assuming lower courts abide by them, three U.S. Supreme Court decisions in 2017 limit the ability of plaintiffs' lawyers to forum-shop their cases in jurisdictions the American Tort Reform Association calls Judicial Hellholes. The high court's decisions provide welcome relief for business defendants that had grown weary of being hauled into plaintiff-friendly jurisdictions across the country to which neither they nor the plaintiffs suing them had any connection.

### GOODBYE TO THE NATION'S PATENT COURT

In a rare move two years ago, [this report named](#) the federal Eastern District of Texas (ED Texas) among the nation's worst Judicial Hellholes. The court there had become America's hotspot for patent litigation, drawing plaintiffs from all across the country because of its "rocket docket" of expedited trials, general unwillingness to dismiss cases, a high plaintiff-win rate and larger-than-average awards for damages.

### TC HEARTLAND SHIFTING THE PATENT LANDSCAPE



Source: Lex Machina

In May 2017, however, the Supreme Court unanimously ended the ED Texas's reign as the nation's busiest patent infringement court. The high court's ruling in *TC Heartland LLC v. Kraft Foods Group Brands LLC* generally requires patent-holding plaintiffs to bring lawsuits only where an allegedly infringing defendant is incorporated, or where there has been an act of infringement and the defendant has a regular and established place of business.

Already the ruling is having an impact. Patent cases formerly concentrated in the ED Texas are shifting to Delaware, where many businesses are incorporated, and other states that have real connections to claims. In 2016, for example, 1,647 patent infringement

cases were [filed](#) in the Eastern District of Texas while Delaware's federal court hosted just 455. In the weeks immediately following *TC Heartland*, these two courts experienced a "complete flip" in the volume of cases. Attorneys [expect](#) cases to be treated more evenhandedly in Delaware, where federal judges are described as "no-nonsense."

### NO MORE FORUM SHOPPING IN FELA CASES

Last year the Montana Supreme Court earned a place on this report's [Watch List](#) due in part to its [May 2016 decision](#) granting state trial courts jurisdiction over cases filed by out-of-state railroad workers, regardless of where their alleged injuries occurred. The Montana high court majority reasoned that if a railroad company merely has tracks running through the state it is subject to jurisdiction there.

But in *BNSF Railway Company v. Tyrell* an 8-1 U.S. Supreme Court majority in May 2017 firmly reversed the Montana high court, requiring state courts henceforth to apply the same constitutional safeguards that apply in all other cases when they hear cases arising under the Federal Employers Liability Act (FELA).

Two years earlier, in *Daimler AG v. Bauman*, the U.S. Supreme Court ruled that the Fourteenth Amendment's Due Process Clause does not permit a state to drag an out-of-state corporation into its courts when the corporation is not "at home" in the state and the plaintiff's injury or the events that resulted in the alleged harm occurred

elsewhere. The court defined a business “at home” in a state as one with sufficiently “continuous and substantial contacts” that make it akin to a local business. Montana’s justices, however, engaged in a strained reading of *Daimler* and bizarrely limited its application to disputes arising abroad while exempting railroad workers’ cases.

Justice Ruth Bader Ginsburg wrote that “FELA does not authorize state courts to exercise personal jurisdiction over a railroad solely on the ground that the railroad does some business in their States.” She then applied *Daimler* to the BNSF case. Since the FELA claims were unrelated to the railroad’s operation in Montana, and the railroad did not do such exceptional business in Montana that is could be considered “at home” there, the Supreme Court held that state courts had no jurisdiction over the claims.



### THE END OF MASS TORT HOTSPOTS?

Over the years many state courts have earned reputations as Judicial Hellholes, with plaintiff-friendly rules, procedures and judges making them popular destinations for litigation tourism. Such courts draw products liability lawsuits from all across the country, targeting the makers of pharmaceuticals, medical devices, consumer products or asbestos. Examples include mass-tort Meccas in California, the City of St. Louis Circuit Court, Philadelphia’s Court of Common Pleas, and Madison County, Illinois. But in a case that may have the most significant implications for such jurisdictions, the U.S. Supreme Court also ruled that state courts may not exercise jurisdiction over nonresidents’ claims when mixed with residents’ claims that rely on a manufacturer’s general connections to that state.

In August 2016 California’s Supreme Court had [allowed](#) 592 individuals from 33 states to join 86 California residents in a lawsuit against a pharmaceutical company. That company, Bristol-Myers Squibb, is incorporated in Delaware, headquartered in New York, and maintains substantial operations in both New York and New Jersey. The nonresident plaintiffs did not purchase, were not prescribed, did not ingest and were not injured by the drug in California. Yet the state high court found that because [other plaintiffs](#) were prescribed, obtained and ingested Plavix in California and allegedly sustained the same injuries as did the nonresidents, California courts could exercise jurisdiction over the nonresidents’ claims.

California’s high court also considered Bristol-Myers’ sales revenue in California, research facilities located in the state, its California salespeople and its small legislative affairs office in Sacramento. The court labeled this the “sliding scale” approach, whereby even minimal “contacts” between the business and the state can be added to tip the scale in favor of justifying personal jurisdiction. The ruling effectively subjected any business with significant sales in California to jurisdiction in state courts there, and it was a big reason the once Golden State again ranked prominently in last year’s Judicial Hellholes report.



Thankfully, the U.S. Supreme Court’s June 2017 decision in [Bristol-Myers Squibb Co. v. Superior Court of California](#) soundly rejected the sliding-scale approach. Another 8-1 majority reiterated that unless the alleged injury arose in a state, an out-of-state corporation is only subject to a lawsuit

if it is incorporated or can be considered “at home” in the state by maintaining a principal place of business there. Applying this standard, the high court reversed the California decision as “difficult to square with our precedents.” To establish what is known as “specific jurisdiction,” there must be “a connection between the forum and the specific claims at issue.” Bristol-Myers’ decision to contract with a California company to distribute the drug nationwide, the court found, was insufficient to establish jurisdiction.

The *Bristol-Myers* decision has altered the landscape for mass tort litigation. The impact is already being felt in St. Louis, last year’s [top-ranked Judicial Hellhole](#) and home to more than [1,100](#) scientifically [groundless](#) claims by out-of-state plaintiffs alleging that talcum powder use causes ovarian cancer. Hours after the high court’s announcement of the *Bristol-Myers* decision, a St. Louis trial judge [declared a mistrial](#) in a talc case that combined the claims of a Missouri resident with the claims of two out-of-state plaintiffs with no connection to Missouri.

Two months later a federal judge for the U.S. District Court for the Eastern District of Missouri [dismissed the claims](#) of almost 80 out-of-state plaintiffs involved in another talc action, which included just four plaintiffs who either lived or claimed to have used the product in Missouri. Citing *Bristol-Myers* [the judge stated](#), “There are simply no facts connecting nonresident Plaintiffs to the State of Missouri.”

And two months after that, in October 2017, a [Missouri appellate court reversed and vacated](#) a \$72 million verdict that had been the first of four such controversial, multimillion-dollar talc verdicts rendered in St. Louis. But, after plaintiffs’ lawyers [dug up](#) a connection between Johnson & Johnson and a Missouri company that made talc products, the same trial court judge who declared an immediate mistrial earlier in the year [sustained](#) St. Louis’s largest talc verdict, \$110 million, as this report went to press. Appeals will certainly follow.

Defendants in other state courts known as mass-tort hubs also are relying on the *Bristol-Myers* decision to seek dismissals of various claims. As noted on p. 31 of this report, for example, a Philadelphia Court of Common Pleas judge is [considering](#) whether to dismiss two-thirds of the court’s [pelvic mesh docket](#). And the *Chicago Tribune* [reports](#) that the decision may also jeopardize Madison County, Illinois’ status as the nation’s epicenter for asbestos litigation.



Contrary to **Justice Sonia Sotomayor’s** seemingly misinformed *Bristol-Myers* [dis-sent](#), injured plaintiffs will not be forced “to bear the burden of bringing suit in what will often be far flung jurisdictions,” because, as always, they can still file lawsuits in their local courthouses, regardless of where defendants may be incorporated or maintain principal places of business, and regardless of where their injuries may have occurred.

The decision will, however, reduce personal injury lawyers’ ability to gather hundreds or thousands of claims from around the country and file them in plaintiff-friendly courts. Instead, plaintiffs’ lawyers will have the [choice](#) of filing nationwide mass actions in the defendant’s home state, where their clients live, or where the injuries allegedly occurred. As cases proceed individually or in smaller groups, businesses targeted in mass tort litigation will have, as the Due Process Clause demands, a fair chance to defend themselves and feel less pressure to settle meritless claims.

### **WILL THE DECISION IMPACT CLASS ACTIONS?**

There is an [open question](#) as to whether the *Bristol-Myers* decision will apply beyond mass actions to class actions. Mass actions are individual lawsuits targeting a particular product that are grouped together. Class actions involve one or more class representatives who sue on behalf of similarly situated people with claims involving common questions of law and facts. It remains to be seen how *Bristol-Myers* impacts lawsuits where a class representative alleges an injury that occurred in the forum state, but many members of the class have no connection to that state. Developments in this area are to be closely watched.

## **OPIOID LITIGATION**

President Trump has now declared the nation’s opioid crisis a “public health emergency.” This important step follows the recommendation by a White House commission, led by New Jersey Governor Chris Christie, to “[act boldly](#),” to stem the crisis.

As this epidemic of drug abuse becomes a growing problem for many states across the country, details of a White House strategy remain unclear. But as a recent *Wall Street Journal* [editorial](#) noted, the “horrors of opioid addiction come from many dysfunctions, including too many prescriptions, a decline in work, heroin and fentanyl, easy access from Medicaid, and others.”

Understandably then, as [reported](#) by a joint task force of the National Association of Counties and the National League of Cities, many communities are already cooperatively bringing together health care professionals, drug makers and distributors, regulators, law enforcement officials and social service providers “to break the cycles of addiction, overdose, and death” as they work through “partnerships across ... local, state and federal levels.”

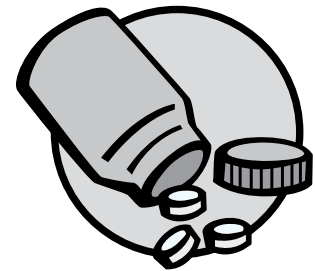
But having let themselves be convinced that communities can somehow sue their way out of complex opioid abuse problems, some state and local prosecutors have taken a more adversarial approach. Not coincidentally,

those doing the convincing are [many of the same](#) private-sector personal injury lawyers [who got rich](#) beyond their wildest dreams with contingency fees two decades ago when they convinced state attorneys general to let them run lawsuits against cigarette makers.

So no one should be surprised that the personal injury lawyers' national trade group here in Washington hosted in September a "[Rapid Response: Opioid Litigation Seminar](#)" to teach attendees how they too might cash in on such litigation. One of the breakout sessions was even titled, "Opioids: The Next Tobacco?"

Never mind that prescription opioid pain-relievers are not like cigarettes. They were developed to address a legitimate medical need. They require Food and Drug Administration approval and stark warning labels about the potential for addiction, and their lawful distribution is closely regulated by the Drug Enforcement Administration. Of course, as we've all learned in recent years, what may begin with doctors' thoughtful prescriptions of lawful medicines for patients' terrible pain can in some cases end in the streets with overdoses on illegal and deadly drugs such as heroin and fentanyl.

Not to be deterred by facts or nuance, much less the public interest, self-interested personal injury lawyers have talked a coalition of 41 state attorneys general into issuing [subpoenas for five drug manufacturers](#) that seek information about how prescription opioids were marketed and sold. Several state AGs have already gone further, filing multi-count lawsuits against drug makers and distributors, with dozens of county and city prosecutors following suit. And most of these prosecutors have hired private-sector lawyers to consult or run their lawsuits.



The prosecutors assert that hiring outside counsel on a contingency-fee basis saves taxpayers money since counsel only gets paid if litigation is successful. This simple rationale, however, overlooks the conflicts of interest and corruption to which such arrangements have often led. A litany of these types of abuses has been chronicled for more than a decade by the Wall Street Journal's [editorial board](#) and a Pulitzer Prize-winning [New York Times series](#).

This reporting has revealed that politically influential plaintiffs' lawyers frequently shop their ideas for potentially lucrative lawsuits against corporate defendants to friendly state prosecutors who then hire the lawyers, expecting generous pay-to-play campaign contributions later.

Thus the American Tort Reform Association (ATRA) urges all policymakers to insist that the public interest in health and safety is never compromised by private interests. This principle has animated ATRA's efforts for more than a decade to push commonsense reform statutes — successfully in 18 states so far — that promote accountability and transparency when public authorities choose to hire outside counsel on a contingency-fee basis.

Too many Americans are suffering serious drug abuse problems, and our leaders must work together to find good-faith solutions. They ought to be relying for guidance on caring and knowledgeable experts inside and outside of government. Because to rely on trial lawyers instead is to invite other problems that neither policymakers nor their constituents need.

## TRIAL LAWYERS' INFLUENCE GROWS AT THE AMERICAN LAW INSTITUTE



As first noted in this report [two years ago](#), the Philadelphia-based American Law Institute for nearly a century has exercised more influence on judge-made common law than any other private institution in the nation. But like a black hole that remains invisible except for the observable oscillations or "[wobbles](#)" its overwhelming gravity incites in nearby objects, ALI's great influence over our courts also has remained invisible to most Americans.

But an [April 2010 magazine article](#) published by the plaintiff bar's leading national trade group served as an observable wobble in the legal universe, signaling dramatic changes at the ALI that should now trouble every business, consumer and taxpayer in America. Of course, to fully appreciate these changes some historical context is necessary.

The ALI's website explains that it was founded [in 1923](#) by a group of judges, lawyers and professors who were generally "dissatisf[ied] with the administration of justice" and the "uncertainty stemm[ing] in part from a lack of agreement on fundamental principles of the common law" among the various states. So it sought "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."

This was certainly a worthy mission, and over ensuing decades the ALI's most influential work came in the form of periodic publications known as Restatements of the Law. As the name suggests, restatements surveyed and described existing law, and quickly came to be relied on and trusted by judges, lawyers, legal scholars and law students for their thoughtfully objective analysis. As the utility of and respect for its restatements grew, so did the ALI's reputation for being above the partisan fray.

Fast forward to 2010. That's when the magazine article eagerly brought to trial lawyers' attention ALI's then soon to be finalized "[Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm](#)." For the first time in the venerated ALI's history, this restatement went beyond merely reviewing the law and actually recommended fundamental change: an unprecedented expansion of landowners' duty of care to all visitors, including unwanted trespassers.

Tellingly, one of the article's co-authors also drafted the ALI restatement and thus was expertly able to cite promising cases in Arizona and Iowa, and otherwise provide detailed guidance for plaintiffs' lawyers looking to forge a lucrative new line of trespassers' lawsuits against property and business owners. This new coziness with the trial bar also marked a decided turn away from the ALI's largely objective past and toward a future of openly subjective advocacy.

Such advocacy was palpable at the ALI's annual spring meeting in 2017. Up for discussion were two draft restatements concerning the law of [liability insurance](#) and [consumer contracts](#) which, respectively, could reshape fundamental aspects of the law and further clog civil court dockets with litigation at significant expense to businesses, their customers and just about everyone else.

Only an 11th-hour letter to ALI leadership from many corporate general counsel, expressing "strong concern about the recent direction" of the organization, managed to postpone the anticipated final adoption of the liability insurance restatement at the annual meeting. The letter gravely noted the draft text's potential to undermine the "plain meaning" of contract terms, disproportionately increase penalties for alleged breaches of duty, and subject insurers to broad, extra-contractual damages for alleged "bad faith."

Perhaps more troubling is the pending restatement on consumer contracts law. Leaving aside the fact that there has never before been a recognized body of *consumer* contracts law (there is only contracts law), the three law professors (from Harvard, the University of Chicago and New York University, respectively) charged with drafting this restatement are effectively ignoring the Supremacy Clause of the Constitution, much U.S. Supreme Court precedent and the 92-year-old Federal Arbitration Act in their zeal to convince state courts that virtually all arbitration clauses in consumer contracts are "unconscionable" and therefore unenforceable, clearing the way for still more trial lawyer-enriching class actions.

Meanwhile, the American Tort Reform Association and its state-based allies are working to moot the unaccountable ALI's radical flights of legal fancy. Since 2011 they have driven enactment of bipartisan legislation in 23 states that preempts any additional liability for trespassers' injuries that ALI-influenced judges may have contemplated. These advocates for reasonable limits on civil liability also stand ready to launch comparable campaigns to contain future threats, too, because even though ALI has as much right as other interest groups to advocate for changes in the law, it is no longer due special deference from judges.

The late **Justice Antonin Scalia** said as much in a 2015 [decision](#), writing that authors of ALI restatements have, "[o]ver time ... abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."

Now the aspirations of American business leaders must include stopping the ALI's liability-expanding agenda and returning the organization to the laudable scholarship



Justice Scalia



and evenhandedness of its past. Business-friendly members of ALI must become more active and recruit more members like themselves. And unless ALI leaders wish to risk the black hole of irrelevance if their organization were to be *wholly* captured by plaintiffs' lawyers and reflexively anti-business academics, they would be wise to invite and welcome broader participation in their underreported proceedings.

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# THE MAKING OF A JUDICIAL HELLHOLE:

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**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.







1101 Connecticut Avenue, NW, Suite 400  
Washington, DC 20036  
(202) 682.1163

[www.ATRA.org](http://www.ATRA.org)