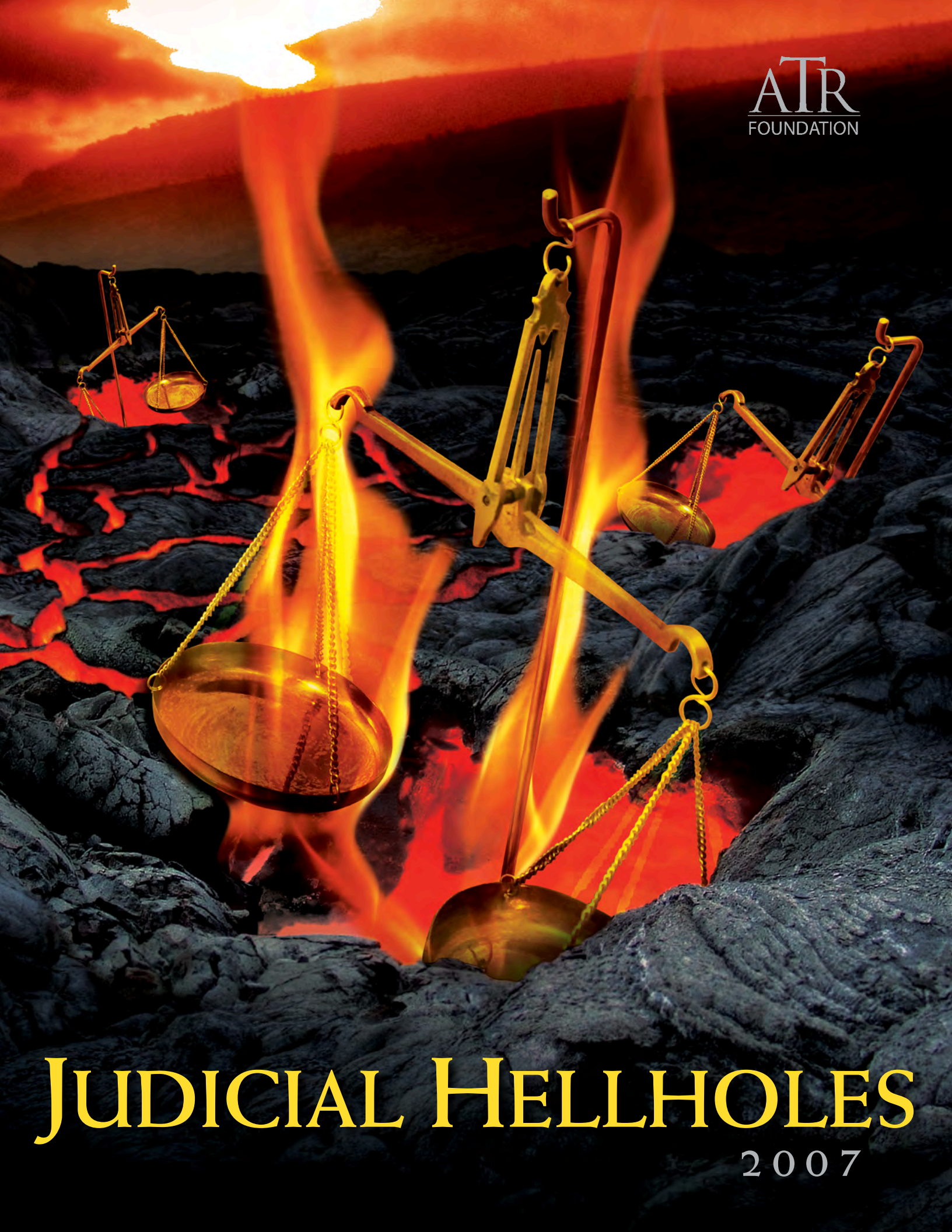
ATR
FOUNDATION
JUDICIAL HELLHOLES
2007

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

—**Richard "Dickie" Scruggs**, Mississippi trial lawyer, whose firm will collect $1.4 billion in legal fees from the tobacco settlements and has now shifted its focus to lawsuits against property insurers in the aftermath of Hurricane Katrina.

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

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

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

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

"You may not like it... but we'll find a judge. And then we'll find a jury" that will find restaurants liable for their customers' overeating. [4]

—**John Banzhaf,** George Washington University Law School professor and personal injury lawyer

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"West Virginia was a 'field of dreams' for plaintiffs' lawyers. We built it and they came." [5]

—**West Virginia Judge Arthur Recht**

"There's some merit to the accusations of bias in Madison County. I don't know if it's a judicial hellhole, but just figure it out. When people come from hither and thither to file these cases, there's gotta be an inducement, doesn't there? They're not coming to see beautiful Madison County." [6]

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

Table of Contents

Preface

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

Most state and federal judges do a diligent and fair job for modest pay. Their good reputation and goal of balanced justice in America are undermined by the very few jurists who do not dispense justice in a fair and impartial way.

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

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

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

To the extent possible, ATRF has tried to be specific in explaining why defendants are unable to achieve fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members are justifiably concerned about reprisals if their names and cases were identified in this report – a sad commentary about the Hellholes in and of itself. Defense lawyers are "loathe" to get on the bad side of the local trial bar and "almost always ask to remain anonymous in newspaper stories."[7]

ATRF interviewed individuals familiar with litigation in the Judicial Hellholes and verified their observations through independent research of press accounts, studies, court dockets, judicial branch statistics and other publicly available information. Citations for these sources can be found in the 480 endnotes following this report.

The focus of this report is squarely on the conduct of judges who do not apply the law evenhandedly to all litigants, and do not conduct trials in a fair and balanced manner. ATRF's Judicial Hellholes project is not an effort to obtain a special advantage for defendants or to criticize the service of those who sit on juries.

ATRF welcomes information from readers with additional facts about the Judicial Hellholes in this report, as well as on questionable judicial practices occurring in other jurisdictions. Information can be sent to:

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

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

About the American Tort Reform Foundation

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

Executive Summary

THE 2007 JUDICIAL HELLHOLES

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

1 SOUTH FLORIDA

South Florida has a reputation for high awards and plaintiff-friendly rulings that make it a launching point for class actions, dubious claims and novel theories of recovery. This year, defendants felt the Miami heat with a $521 million award against an accounting firm. In addition, an appellate court overturned a $60 million award against an automobile manufacturer in a case in which the driver fell asleep at the wheel. Meanwhile, South Florida's "King of Torts," a lawyer whose lifestyle included a Key Biscayne waterfront mansion, leased apartments in New York and Los Angeles, a $1.2 million condo in Colorado and a staff of servants, went to prison for stealing $13.5 million from roughly 4,500 of his clients. And the liability climate has driven many doctors from the area, though this situation has steadily improved since the Legislature enacted reforms in 2003.

2 RIO GRANDE VALLEY AND GULF COAST, TEXAS

The **Rio Grande Valley** and **Gulf Coast of Texas** have made their way into each and every Judicial Hellholes report since the project's inception. It is recognized as one of the toughest places in America for corporate defendants to receive a fair trial. This year, there was a surge in personal injury lawsuits related to dredging, a judge's "pocket veto" of an appeal of a $32 million award against a pharmaceutical company in a case where a juror knew and had taken loans from the plaintiff, and several particularly ridiculous lawsuits filings. Despite strong statewide legislative reforms enacted in 2004, this area stubbornly refuses to shed its Judicial Hellholes reputation.

3 COOK COUNTY, ILLINOIS

Cook County, the last standing Judicial Hellhole in Illinois (after the departure of Madison and St. Clair counties), hosts a disproportionate number of the state's large civil cases. Personal injury lawyers know that Cook County is the place to be, and this year they blew into the windy city to file massive class actions involving pet food and peanut butter, as well as many asbestos cases. It was a Cook County judge who threw out a state law aimed at improving access to health care with limits on payouts for immeasurable damages for pain and suffering damages in medical malpractice cases.

4 WEST VIRGINIA

West Virginia courts have earned a reputation for anti-business rulings, massive lawsuits and close relationships between the personal injury bar, state attorney general and the judiciary. It is almost unique among the states in providing civil defendants with no assurance that they will receive appellate review, and, as one of the cases highlighted in this year's report shows, this can leave a business hit with

a multimillion-dollar verdict with nowhere to turn. The West Virginia Supreme Court of Appeals, when it does act, has cast a shadow on the reputation of the state's judicial system. This year, it rejected a rule that places responsibility of warning patients of the risks of most drugs solely with their doctors, not pharmaceutical companies who do not know the patient's medical history. In addition, this year, the U.S. Supreme Court denied review of the West Virginia high court's invalidation of a law designed to stop forum shopping by plaintiffs who came from around the country to sue in Wild, Wonderful West Virginia courts. Despite its Hellholes reputation, however, it is important to note that there are many judges that adhere to the law in West Virginia, as the judiciary's handling of litigation stemming from a 2001 flood that was blamed on everyone but nature shows.

5 CLARK COUNTY, NEVADA

Home to the country's hottest gambling spot, Las Vegas, **Clark County** has joined the Judicial Hellholes list for the first time. The decks appear to be stacked in favor of local lawyers who reportedly "pay to play" in the county's courts. Judges have been criticized for issuing favorable rulings in cases that benefit friends, campaign contributors or their own financial interests.

6 ATLANTIC COUNTY, NEW JERSEY

Personal injury lawyers seem to have gained a monopoly in **Atlantic County**, a new addition to the Judicial Hellholes report. New Jersey is known for particularly plaintiff-friendly laws, admitting junk science in court and hosting lawsuits from all over the country against their state's own economic driver, the pharmaceutical industry. All these elements were on display in the Vioxx litigation in Atlantic County. There is also evidence that litigation fairness is deteriorating throughout the Garden State, leading to the formation of the New Jersey Lawsuit Reform Alliance in October 2007.

High profile issues such as class action abuse, pharmaceutical liability, asbestos lawsuits and extraordinary awards often dominate headlines. But being cited as a Judicial Hellhole is nothing to celebrate. Litigation abuse ultimately hurts the people living in these jurisdictions the most – by limiting economic growth and access to health care, among other things.

WATCH LIST

In addition to naming Judicial Hellholes, this report calls attention to several other jurisdictions for suspicious or negative developments in the litigation environment or histories of abuse. These transitional jurisdictions could either fall into the abyss of Judicial Hellholes or dig themselves out.

1 **Madison County, Illinois.** The #1 Judicial Hellhole from 2002 to 2004 dropped to the #4 position in 2005, and then into "purgatory" at #6 last year. Continued progress in restoring judicial fairness led by Chief Judge Ann Callis and Judge Daniel Stack, combined with substantial drops in the filing of class action, asbestos and large claims, has led ATRF to move Madison County onto the Watch List.

2 **St. Clair County, Illinois.** Madison's neighboring county has long been plagued with many of the same afflictions. If to a lesser extent, St. Clair has followed Madison County's example and lawsuits have fallen significantly since 2004.

3 **Hillsborough County, Florida.** Tampa hosted what is reportedly the third largest medical malpractice verdict in history, $217 million, this year. In another case, a plaintiff turned down what his lawyers suggested could be millions in punitive damages after he lost his wife in an accident, declaring that there had already been enough pain and suffering.

4 **Northern New Mexico.** Evidence is mounting that several counties in Northern New Mexico may be developing into a Judicial Hellhole. An Albuquerque court rendered the state's highest personal injury verdict this year and, in another case, a family traveled 200 miles from their home to sue in San Miguel County over a car accident that had no connection to the area.

5 **Delaware.** Delaware courts are generally known to be fair, but reforms by judges in Madison County, Illinois that limit forum shopping there have prompted personal injury lawyers to file asbestos cases in Delaware. Benzene and pharmaceutical cases followed. This year, the first of the asbestos cases to reach trial ended in a $2 million verdict.

6 **California.** ATRF continues to watch Los Angeles County, formerly known as "the Bank" and San Francisco, which are repeatedly noted as places of concern by ATRA members. Small business owners are under fire by plaintiffs' attorneys looking for a quick buck with lawsuits alleging technical violations of accessibility requirements for the disabled.

7 **Other areas to watch** include **Philadelphia, Pennsylvania** and **Tucson, Arizona** for their lawsuits against doctors; **Mississippi** where a prominent plaintiffs' attorney bribed two judges for favorable rulings; **Cuyahoga County (Cleveland), Ohio** where lawyers reportedly motivated by profit, not disability rights, use "professional plaintiffs" to sue small businesses for alleged violations of the Americans with Disabilities Act; **Baltimore, Maryland** for its asbestos litigation; and **Providence, Rhode Island** for a 2006 ruling approving of broad public nuisance lawsuits and, this year, the largest medical malpractice verdict in the state's history.

DISHONORABLE MENTIONS

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

1 **District of Columbia.** In a case that made international headlines, an administrative law judge sued his dry cleaners for $54 million for misplacing his pants, using the District's consumer protection law. The case went on for two years and took a two-day trial before it was finally dismissed.

2 **Missouri Supreme Court.** Missouri will become known as the "Show Me the Money" state if its high court continues to issue outlier, pro-plaintiff rulings. This year, the court permitted individuals that had experienced no injury to sue for medical monitoring, an approach rejected by most other states that have recently considered the issue.

3 **Michigan Legislature.** Michigan is generally known as a fair jurisdiction, but a recent full scale assault on the civil justice system by personal injury lawyers in the state legislature is cause for concern. The plaintiffs' bar is seeking to turn back the clock on past reforms while creating new ways to sue.

4 **Georgia Supreme Court.** This year, the Georgia Supreme Court invalidated two legislative reforms intended to improve the fairness of asbestos and medical malpractice litigation.

5 **Oklahoma.** The Oklahoma Supreme Court invalidated a law requiring a plaintiff to provide an affidavit from a physician when bringing a medical malpractice case. The Legislature reacted by rewriting the law to address the concerns of the court and including that provision in a comprehensive tort reform package. Governor Brad Henry, who had long expressed support for such a proposal, surprised the legislators by vetoing the bill, saying he had problems with two of its 49 provisions.

POINTS OF LIGHT

There is good news in some of the Judicial Hellholes and beyond. "Points of Light" provide examples of judges adhering to the law and reaching fair decisions as well as legislative action that has yielded positive change. This year's points of light include:

1. Legislative reforms implemented by the **West Virginia Legislature** in 2003 have dramatically reduced medical malpractice premiums and brought new doctors to the state.

2. **Ohio Judge Harry A. Hanna** barred the law firm Brayton Purcell from practicing before his court after he caught its lawyers involved in a double-dipping scheme in which the firm blamed its client's death on asbestos exposure as a shipyard worker to collect from asbestos trusts and then blamed his death on smoking cigarettes with an asbestos-containing filter to try to collect again from Lorillard.

3. **Florida appellate courts** overturned excessive verdicts, including a breathtaking $145 billion award against cigarette manufacturers and a $1.58 billion verdict against Morgan Stanley.

4. The **Mississippi Supreme Court** rejected recognition of a claim for medical monitoring where a plaintiff has no identifiable injury, placing it in stark contrast with a ruling by the Missouri Supreme Court that earned it a dishonorable mention.

5. The **Ohio Supreme Court** upheld one of the most basic principles of "How a Bill Becomes a Law," telling the governor that he cannot veto a bill after it becomes law. That is precisely what Governor Ted Strickland attempted to do to a tort reform law enacted in the final days of the previous legislative session.

6. **Several courts around the country have held the line on runaway public nuisance lawsuits,** resisting pressure from personal injury lawyers to create a "super tort" that circumvents traditional products liability requirements.

SOLUTIONS

Finally, the report briefly highlights several reforms that can restore balance to Judicial Hellholes, including stopping "litigation tourism," enforcing consequences for bringing frivolous lawsuits, stemming abuse of consumer laws, providing safeguards to ensure that pain and suffering awards serve a compensatory purpose, strengthening rules to promote sound science, addressing medical liability issues to protect access to health care and prioritizing the claims of those who are actually sick in asbestos and silica cases.

Experience shows that one of the most effective ways to improve the litigation environments in Hellholes is to bring the abuses to light so everyone can see them. By issuing its Judicial Hellholes report, ATRF hopes that the public and the media can persuade the courts in Hellholes to provide "Equal Justice Under Law" for all.

The Making of a Judicial Hellhole:

QUESTION: WHAT MAKES A JURISDICTION A JUDICIAL HELLHOLE?

ANSWER: THE JUDGES.

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

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

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, judges in Judicial Hellholes do not. These few judges may simply favor local plaintiffs' lawyers and their clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases.[8] More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense.

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

Weaknesses in evidence are routinely overcome by pre-trial and procedural rulings. Product identification and causation become "irrelevant because [they know] the jury will return a verdict in favor of the plaintiff."[9] Judges approve novel legal theories so that plaintiffs do not even have to be injured to receive "damages." Class actions are certified regardless of the commonality of claims. Defendants are named, not because they may be culpable, but because they have deep pockets or will be forced to settle at the threat of being subject to the jurisdiction. 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 often, judges allow cases to proceed even if the plaintiff, defendant and witnesses have no connection to the Hellhole jurisdiction and events in question.

Not surprisingly, personal injury lawyers have a different name for these courts. They call them "magic jurisdictions."[10] Personal injury lawyers are naturally drawn to these jurisdictions and look for any excuse to file lawsuits in them. Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.

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

PRE-TRIAL RULINGS

- **Forum Shopping.** Judicial Hellholes are known for being plaintiff-friendly, so many personal injury lawyers file cases in them even if little or no connections to the jurisdictions exist. Judges in these jurisdictions often do not prevent this forum shopping.

- **Novel Legal Theories.** Judges allow suits not supported by existing law to go forward. Instead of dismissing these suits, Hellhole 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 that deny defendants their fundamental right to learn about the plaintiff's case.

- **Consolidation & Joinder.** Judges join claims together into mass actions that do not have common facts and

circumstances. In one notorious example in 2002, the West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.

- **Improper Class Certification.** Judges certify classes that do not have sufficiently common facts or law, which may confuse a jury and make the case difficult to defend. In states where class certification cannot be appealed until after a trial, improper class certification can force a company defendant into a large, unfair settlement.

- **Unfair Case Scheduling.** Judges schedule cases in ways that are unfair or overly burdensome. In Madison County, Illinois, for example, some judges were known for scheduling numerous cases against a defendant to start on the same day or by giving defendants a week of notice before a trial begins.

DECISIONS DURING TRIAL

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

- **Junk Science.** Judges do not act as gatekeepers to ensure that the science admitted in a courtroom is credible. Rather, they allow a plaintiff's lawyer to introduce "expert" testimony that has no credibility in the scientific community, yet purports to link the defendant(s) to alleged injuries.

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

- **Excessive Damages.** Judges facilitate and allow to stand extraordinary punitive or pain and suffering awards that are not supported by the evidence, are tainted by passion or prejudice, or are influenced by improper evidentiary rulings.

UNREASONABLE EXPANSIONS OF LIABILITY

- **Private Lawsuits under Consumer Protection Statutes.** The vague wording of state consumer protection laws has led some judges to allow individuals to sue even when they cannot show an actual financial loss resulting from reliance on the conduct they claim is deceptive.

- **Public Nuisance Claims.** Similarly, the vague concept of a public "nuisance" has led to a concerted effort to broaden public nuisance theory into an amorphous tort in order to pin liability for societal issues on manufacturers of lawful products. Public nuisance theory has always targeted how properties or products are used, not manufactured, which is the province of products liability law. As one court observed, if this effort succeeds, personal injury lawyers would be able to "convert almost every products liability action into a [public] nuisance claim."[11]

- **Expansion of Damages.** There also has been a concerted effort to expand the scope of damages, which may hurt society as a whole, such as hedonic damages in personal injury claims or "loss of companionship" damages in animal injury cases.

JUDICIAL INTEGRITY

- **Trial Lawyer Contributions.** Trial lawyer contributions make up a disproportionate amount of donations to locally elected judges. A poll found that 46 percent of judges said donations influenced their judicial decisions.[12]

- **Cozy Relations.** There is a revolving door among jurists, personal injury lawyers and government officials.

Growth Strategies:

THE PERSONAL INJURY BAR'S ONGOING EFFORT TO EXPAND THE LIABILITY MARKETPLACE

During the six years of publication of the Judicial Hellholes report, the civil justice community achieved many successes in the tug-o-war over civil justice reform. As last year's report detailed, a number of state legislatures have enacted reforms to rein in trial lawyer abuses and clamp down on judges that create Judicial Hellholes. Courts also have been issuing fairer rulings and have done a better job scrutinizing trial lawyer tactics. In fact, several publications such as *Business Week* ("How Business Trounced the Trial Lawyers," Jan. 8, 2007) and the *National Law Journal* ("A Different Sort of Trial for Plaintiffs," Oct. 17, 2006) have gotten ahead of themselves by declaring victory for civil justice.

ATRA has always heeded the advice of one Wall Street analyst to "not underestimate the persistence and creativity of plaintiff lawyers."[13] As the pages of this Judicial Hellholes report exemplify, the personal injury bar has the money, the power and the know-how to continually reinvent new ways and places to sue. In the past year, the personal injury bar has been helped by having their friends, with significant trial lawyer backing, take control of the Congress, many state legislative chambers and state attorney general offices. Through alliances with these officeholders, the personal injury bar has tried to roll back important civil justice reforms and are looking for new, innovative ways to expand the liability marketplace.

EARMARKS FOR TRIAL LAWYERS

A major element of the litigation industry's new growth strategy is to seek what American Tort Reform Association general counsel Victor Schwartz has dubbed "trial lawyer earmarks" in federal legislation.

The House Foreign Intelligence Surveillance Act included one of the more telling trial lawyer earmarks. Plaintiffs' lawyers insisted on excluding a provision that would keep them from continuing some 40 lawsuits — seeking billions of dollars — against several telecommunications companies that cooperated with government counterterrorism investigations after the 9/11 attacks. As the *Washington Post* recognized, these companies were "acting as patriotic corporate citizens in a difficult and uncharted environment."[14] One Senate committee agreed with the *Post* and voted to include retroactive immunity from litigation for the telecoms; another agreed with the House and voted to exclude the immunity provision. As this report went to press, the full Senate had yet to vote and the White House had pledged to veto the bill if it does not include immunity.

Meanwhile, trial lawyers routinely attempt to weave into many pieces of federal legislation two basic types of earmarks: those prohibiting companies from engaging in pre-dispute arbitration agreements and those limiting the preemption of state tort lawsuits that conflict with federal agency policymaking.

Businesses have long included arbitration agreements in their contracts with other businesses and customers because they provide a quicker and less costly means of resolving business disputes. Arbitration works well for everyone except the trial lawyers because arbitration does not generate large litigation payouts. As the Wall Street Journal has reported, trial lawyers have been trying "to attach an anti-arbitration provision to nearly every new law in order to limit non-lawsuit dispute settlement. Thus a House lending bill … bans pre-dispute arbitration agreements related to mortgages, another House bill bans them in cases involving whistleblowers, and the Senate farm bill bans them even in meatpacking contracts. The mother of them all is a bill that lunges to fulfill the trial bar's long-cherished dream: prohibiting all Americans from voluntarily agreeing at the start of any business relationship to settle disputes without litigation."[15]

Additionally, federal preemption laws prohibit lawsuits involving conduct that was approved or prescribed by federal authorities or that would conflict with federal policy. These laws allow federal agencies to promulgate rules and regulations, and interpret laws they are charged with enforcing. The Food & Drug Administration (FDA) has relied on federal preemption, for example, to assure that the warnings they approve for prescription medications are not altered by lawsuits. When the Prescription Drug User Fee Act was up for reauthorization, one of the "hot button" issues was an amendment by the trial bar to prohibit the preemption of FDA-approved warnings.[16]

The coup de gras of "trial lawyer earmarks" is the federal response to the recall of millions of toys imported from China found to contain dangerous lead paint.[17] The personal injury

bar got the lid off the cookie jar with the insertion into the bill reauthorizing the Consumer Product Safety Commission (CPSC) a provision that delegates enforcement authority to state attorneys general through civil lawsuits. Some state attorneys general have a history of contracting out their work to the trial bar using contingency fee agreements, a practice that often includes the award of no-bid contracts to political supporters and little or no public oversight. The bill also effectively eliminates the potential for CPSC regulations to preempt state tort lawsuits and offers multimillion-dollar bounties to whistleblowers, an amount that may lead some disgruntled employees to hire a contingency fee lawyer to file a false claim.

STATE LEGISLATIVE FARE

The trial bar's efforts to expand liability markets at the state level have varied widely. For example, in Illinois this year the trial bar successfully convinced lawmakers to enact legislation to significantly increase damage awards in wrongful death lawsuits by adding grief, sorrow and mental suffering to noneconomic damages. These new measures are entirely subjective and leave jurors with no rational upper limit on awards.

In Michigan, trial lawyers sought unsuccessfully to retroactively repeal an 11-year-old law that declared FDA-approved label designs and warnings for prescription medicines to be legally sufficient. Personal injury lawyers would prefer to bring cases in which they would only have to prove that a person experienced a negative side effect, not that a pharmaceutical company actually engaged in any wrongdoing. The bill was killed by last-minute maneuvering in the state Senate but may be reintroduced next year.

In Ohio, on his first day in office Governor Ted Strickland tried to veto a bill already passed by the legislature in a previous session. The bill maintained rational limits on public nuisance law so such law could not be used as a super tort against makers of lawful products.[18] The Ohio Supreme Court ruled Strickland's veto unconstitutional. (*See* Points of Light, page 30).

Also, never missing an opportunity, the trial bar responded to the Menu Foods recall of pet food by seeking legislation in New Jersey and other states allowing owners to collect pain and suffering damages for injuries to their pets. In some states, parents cannot even collect these damages for injuries to their own children. A person cannot get such damages if his or her best friend is injured or killed. If the legislation passed, pet litigation would be pervasive. Lawsuits could be filed every time a dog is hit by a car, is not cured by a veterinarian or gets hurt straying onto a plant, farm or other property. Also, as the *Denver Post* editorialized, the corresponding increase in costs for pet products and services would "work against getting the medical care our dogs and cats need."[19] Much to the trial bar's chagrin, people love their pets more than the litigation lottery; a clear majority of Americans, including pet owners, told Gallup pollsters that owners should not be entitled to pain and suffering damages in animal injury and death cases.[20]

STATE ATTORNEYS GENERAL

Trial lawyers are increasingly teaming with friendly attorneys general in search of the holy grail – another tobacco-settlement-type billion-dollar payout to fund the next generation of mega lawsuits. The scheme works like this: trial lawyers help a friend become an attorney general, the attorney general then "hires" his or her trial lawyer friends by deputizing them with the awesome power of the state and unleashing them to sue entire industries for the promise of billions of dollars in contingency fees.

These contingency fee arrangements are too often made behind closed doors without any public oversight, leading to potential abuse for personal gain, political patronage and litigation based on profit, not the public interest. This year alone, ATRA has filed *amicus* (friend of the court) briefs in three appeals against these unholy alliances. Most notably in *Santa Clara County v. Superior Court*, ATRA supports the trial court's ruling finding it unconstitutional for the state to hire private lawyers on a contingency fee basis to pursue a public nuisance action.[21] In *State of Oklahoma v. Tyson Food*, ATRA is arguing that the Oklahoma attorney general's contingency fee agreement improperly delegates the state's environmental enforcement power to private law firms that lack neutrality.[22] ATRA also has filed an *amicus* brief in a Rhode Island lead paint case, which was motivated by private lawyers, not the state, and where the state ceded almost complete control over the litigation to the contingency fee attorneys.[23]

WAR ON LAWSUIT ABUSE CONTINUES

Nothing would make tort reformers happier than an eventual victory in the war against lawsuit abuse. But as this Judicial Hellholes report shows, that war is far from over. Personal injury lawyers will continue chasing the allure of big-dollar litigation by exerting influence in ways that can grow their liability industry and expand opportunities for litigation. This report provides vivid examples of where judges have repeatedly given into or even facilitated the trial bar's abusive tactics.

Judicial Hellholes 2007

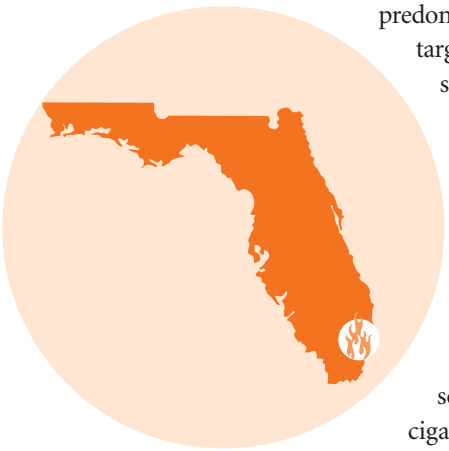
HELLHOLE # 1
SOUTH FLORIDA

Another year has passed and South Florida remains prominent among the nation's Judicial Hellholes. Their collective reputation for high awards and plaintiff-friendly rulings make Miami-Dade, Palm Beach and Broward counties a launching pad for class actions, dubious claims and novel legal theories of recovery. Unfortunately, the last year shows that little has changed. South Florida is one of the jurisdictions of choice for pushing the envelope of the legal system. The state's high court is viewed as unpredictable, leaving no confidence that improper rulings by trial courts will be corrected.

Standard Operating Procedure: Excessive Verdicts and Dubious Claims

The backbone of South Florida's reputation is still in its propensity for excessive damage awards.

In August 2007, a Miami jury handed down a $521 million award in a negligence case against accounting firm BDO Seidman.[24] This verdict included $351 million in punitive damages.[25] BDO Seidman, the nation's No. 5 accounting firm, was found negligent for failing in its audits to uncover the fraud of a financial services company backed by a Portuguese Bank.[26] The judgment has the potential to destroy the company as its total revenue in the previous fiscal year was $589 million.[27] BDO Seidman also stated that the damages award could trigger massive layoffs of the company's 2,800 employees in 34 offices nationwide.[28]



In another case, the Miami-Dade Circuit Court hit Ford with $60 million in compensatory damages stemming from the rollover of a Ford Explorer after the driver fell asleep at the wheel. In November 2007, an appellate court reversed, requiring a new trial because the Miami-Dade judge improperly allowed testimony on hundreds of other accidents without a hearing to show whether the circumstances under which they occurred were substantially similar to the case before the court.[29]

Verdicts like these lead others to try their luck in South Florida courts. The trial courts encourage a gamble that the case will be settled or not reversed on appeal. For example, a Miami woman sued wine and spirit maker Bacardi after she allegedly suffered serious burns as a result of being burned by the flaming rum of a Bacardi drink.[30] The lawsuit, filed in Miami-Dade County Circuit Court, alleges that the Bacardi 151 is defective and dangerous.[31] Yet, the product is clearly labeled with warnings against setting fire to it.[32] Of course, this is South Florida, so the case could still result in a huge award for damages.

Another notable claim in Miami-Dade County was filed against the major tobacco companies for targeting African-Americans in the sale of cigarettes.[33] The lawsuit seeks $1 billion in damages.[34] It alleges that, from the 1950s through the 1990s, the tobacco companies made disparaging generalizations about African Americans and suggested working through black churches and youth events to recruit smokers. According to the plaintiffs' attorney who filed the lawsuit, "If I could, I'd try to have [the tobacco companies] charged with genocide."[35] The lawsuit further cites studies and internal tobacco company documents that support increasing the number of billboards in predominately black neighborhoods and efforts to target the demographic through adds in magazines such as *Ebony*, *Jet* and *Essence*.[36] Creating liability for legally marketing a legal product to a specific consumer group would put practically every business in the world in the crosshairs of the trial bar.

Class Actions Business Is Booming

Class action litigation has always been big business for South Florida. Whether it is the seemingly endless string of lawsuits against cigarette makers originating in the state or new litigation frontiers proposed by its trial lawyers, the area has gained notoriety. Not surprisingly, of all the places in the country where a nationwide class action against pet food companies for contaminated products and highly publicized recalls might be filed, Miami was a location of choice.[37]

At roughly the same time, a class action filed in Miami-Dade Circuit Court against software giant Microsoft was finally resolved. As part of a settlement agreement with the state of Florida over alleged antitrust violations, Microsoft agreed to pay $202 million in rebates to Florida consumers.[38] Ninety-three million dollars in vouchers were provided to Florida area school systems with Miami-Dade and Broward countries receiving the lion's share, or $28 million of that sum.[39] Meanwhile, consumers who allegedly paid inflated prices were eligible for a rebate between $5 and $12, but few took advantage.[40] Thus the practical effect resembled the type of "coupon settlement" wherein the attorneys bringing the class action benefit more than anyone else. That vouchers went to schools for future purchases (presumably of Microsoft products) appears laudable, but those who were actually "injured" received little to nothing.

In Broward County, class actions also continue unabated. For example, another class action against Microsoft claiming damages in excess of $5 million alleges that the company's popular Xbox 360 video game system can scratch game discs.[41] The U.S. Humane Society also filed a class action against a nationwide online pet seller under consumer protection law for allegedly selling sick puppies.[42] The lawsuit claims that the selling of unhealthy puppies is both systematic and an unfair and deceptive trade practice.[43]

The attraction of South Florida as *the* place to file major class actions against large companies and even entire industries is undeniable. Enterprising plaintiffs' lawyers seeking jackpot justice have a storied tradition here, and there is little to suggest that South Florida is moving away from its Hellholes status.

Hellholes Icon Finally Put Away

One prominent plaintiffs' lawyer who came to embody the worst elements of South Florida's civil justice system was recently put behind bars. Louis Robles, once hailed as the "King of Torts" for his successful mass tort litigation practice in Miami, has graced the pages of previous Hellholes reports for stealing $13.5 million from roughly 4,500 clients to fund his opulent lifestyle.[44] This lifestyle included a $15 million Key Biscayne waterfront mansion, leased apartments in New York and Los Angeles, thirty-three acres of land in Telluride, Colorado, a $1.2 million condominium in Colorado and a staff of servants.[45] Robles also reportedly used some of his stolen client funds to produce a series of "B" movies.[46] At the same time Robles gallivanted around in limousines and private jets, many of his clients suffering from cancer or other diseases died before getting the damages to which they were entitled.[47]

"Lawyers hold a special position of trust, responsibility, and loyalty toward their clients. Lawyers are defenders of the law; they are not above the law. Louis Robles abused the trust of his clients, stole their money, and spent it on himself and his various business ventures. This case offers a sobering reminder of the potential consequences when a lawyer breaches his duty of honesty by placing his own interests ahead of those of his clients."[48]

—United States Attorney R. Alexander Acosta

This year, the Robles saga may have finally come to a close. After being indicted on federal charges,[49] Robles pled guilty to three counts of mail fraud carrying a maximum fifteen-year prison sentence.[50] These charges came after Robles saw his legal empire collapse in 2002 and his law license revoked in 2003.[51] With the fifteen-year plea agreement on the table, it appears justice will finally be served. Of course, a lengthy prison sentence for Robles will not help his clients fully recover the millions he stole from them. The lingering question for many of Robles' former clients is, "What restitution will actually be paid?" Thus far the U.S. Attorney's Office and court-appointed receiver have only been able to track down $1.1 million of the misappropriated funds.[52] The Florida Bar also pays victims of attorney misconduct out of its Client Compensation Fund, but the fund contains only about $3 million – far short of $13.5 million that Robles embezzled.[53] To date, none of his former clients have received any money from the Bar fund.[54] So, for now, the thought of Robles behind bars and the prospect of payment of about eight cents on every dollar owed[55] may just have to be enough.

Nice Work If You Can Get It, at $11,000 an Hour

In another example of the excesses seen in South Florida's civil justice system, an attorney sought a Broward County judge's approval of $93 million in attorneys' fees for a misappropriation of trade secrets action against electronics company Motorola.[56] More specifically, prominent plaintiffs' attorney Willie Gary requested a $24.5 million fee for 2,200 hours of his billable time, which translates to $11,000 per hour.[57] It is also reported that he bragged about this fee in a statement.[58] Equally surprising, he did not even win the case at issue; the trial ended in a hung jury.[59] The judge ultimately trimmed the rate to an undisclosed amount, but a more basic question remains: How far gone is South Florida's civil justice system that any attorney could think such an exorbitant hourly rate would be appropriate?

"Fabre Fix" Seeks to Undermine Fair Allocation of Liability

On the legislative front, Florida's civil justice system faced significant challenges from trial lawyers attempting to circumvent the state's historic 2006 repeal of joint and several liability.[60] The trial bar sought to abolish a law that allows courts to make a complete apportionment of fault in a civil case. The so-called "Fabre Doctrine" is the product of a 1993 Florida Supreme Court decision which was codified in 1999 to allow jurors to consider all

parties whose actions may have contributed to an injury, whether or not they are named as defendants by the plaintiff's lawyer.[61] This law helps prevent plaintiffs' attorneys from targeting "deep pocket" businesses with litigation while ignoring smaller, yet more culpable defendants. In other words, the rule permits a jury to look at the whole picture of who caused a particular harm. Therefore, trial lawyers have pushed for legislation that would invalidate the Fabre doctrine, inflate damage awards and undercut the effects of the state's law that holds a defendant liable only for damages proportionate to his or her share of fault. Thus far, the efforts have not been successful, but with the potential to drastically increase the amounts of damage awards, it's a safe bet that the plaintiffs bar will continue to lobby lawmakers in Tallahassee.

Medical Malpractice Woes Lessen, But Persist

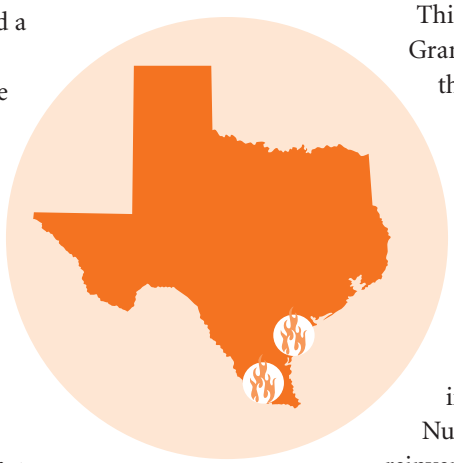
One of the few bright spots in South Florida and the state in general in 2007 came with regard to the availability of health care. Historically, Florida is one of the worst states in the country when it comes to the medical malpractice insurance system. In 2003, with the state facing a crisis of skyrocketing insurance premiums and an exodus of physicians, the Legislature held three special sessions and enacted reforms, including a limit on otherwise potentially infinite damages for pain and suffering.[62] Four years later, it is clear that those reforms are making a difference. Malpractice premiums have declined for the second straight year; in some cases as much as 20%.[63] The most recent annual report of the Florida Office of Insurance Regulation also stated that seven new medical-malpractice carriers entered the Florida market in 2006.[64] This represents a fairly significant gain considering that there were only four malpractice insurance carriers in the state in 2003.[65]

Despite these improvements, however, Florida's medical liability climate is ripe with challenges. The state's physicians and surgeons continue to pay the highest liability rates in the nation.[66] South Florida is particularly problematic. Doctors in Palm Beach, Miami-Dade and Broward counties pay, on average, between 40 to 60% more in annual premiums than doctors in Tampa Bay, Orlando or Jacksonville.[67] It has also been reported that Palm Beach County lost 300 physicians in the past year because of high insurance costs.[68] Doctors elsewhere in Florida have resorted to making patients sign a two-page waiver before seeing them wherein the patient agrees to seek arbitration if a dispute arises.[69] Several legislators have further initiated proposals to cut medical malpractice insurance rates by 25% to improve conditions.[70]

Such weighty challenges illustrate that when positive change does occur in South Florida, it happens slowly. Other elements of South Florida's civil justice environment show less positive change. As a result, it may be some time before South Florida is able to shed its Hellholes image.

HELLHOLE # 2

RIO GRANDE VALLEY AND GULF COAST, TEXAS



This is the sixth consecutive year that the Rio Grande Valley and Gulf Coast of Texas have made their way into the annual Judicial Hellholes report. They collectively continue to be "viewed as one of the toughest jurisdictions for corporate defendants in the country."[71] The state enacted important tort reforms in 2003 and 2004, which have improved the litigation environment in other parts of the Lone Star State,[72] and the state's high court is viewed as fair. But personal injury lawyers in Jefferson, Brazoria, Cameron, Hidalgo, Nueces, Starr and Zapata counties continue to reinvent themselves.

"Starr County has always been a difficult jurisdiction for corporate defendants. The people here are good people; they just tend to favor individuals in cases where there are corporate defendants involved. It's just a fact of life."[73]

—Merck Attorney Richard Josephson

Dredging Up Lawsuits

Last year we noted the *New York Times* report that many Texas lawyers "made the trip from P.I. to I.P. [Personal Injury to Intellectual Property]"[74] because, as one local attorney said in paraphrasing 1930s bank robber Willie Sutton, "You know lawyers: they go where the money is."[75] This year, the personal injury bar looked to dredge up new litigation over … dredging. Lawsuits related to personal injuries while dredging Texas ports are governed by the federal Jones Act, which has looser venue laws than Texas state law would allow. The personal injury lawyers, not surprisingly, are using the loophole to bring more cases in this Judicial Hellhole, which local personal injury lawyer Tony Buzbee reportedly said adds 60 to 70% more to the value of a case.[76]

According to one report, "98 of the 170 personal injury lawsuits filed against dredgers in the entire nation were filed" in this area of Texas.[77] With the inherent threat of massive liability, this spike of lawsuits reportedly has "already shut down or stalled two dredging projects at Texas ports."[78] It also has caused a near tripling of liability insurance. One local company reported that "this lawsuit explosion resulted in a 288% increase in liability insurance costs, from $7,000 an employee to nearly $23,000 per employee per year."[79] Without any deep water ports, Texas relies on dredging to enable the $178 billion in annual business sales that come through their ports.

"[W]hen you're in Starr County, traditionally, you need to just show that the guy was working, and he was hurt. And that's the hurdle: Just prove that he wasn't hurt at Wal-Mart buying something on his off time, and traditionally, you win those cases."[80]

—Personal injury lawyer Tony Buzbee in a speech to Maritime lawyers

Need More Proof?

- **Judge Pocket Vetoes a Critical Defense Motion.** Last year's Judicial Hellholes report provided details of a $32 million verdict in Starr County for a widowed plaintiff who blamed the fatal heart attack of her 71-year-old husband on the fact that he had taken Vioxx for no more than seventeen days. Never mind that he had a 28-year history of heart disease, had undergone quadruple bypass surgery, smoked and had high blood pressure long before taking Vioxx.[81] It was learned after the trial that one of the jurors not only knew the plaintiff, but had accepted interest-free loans from her and made several phone calls to her after receiving his jury summons. Vioxx maker Merck requested a new trial with a fair jury, but instead of ruling on the motion, District Judge Alex Gabert sat on it.[82] When the 75-day time limit for a new trial order ran out, the motion was effectively denied.

- **Local Newspaper Pleads with Newly Elected Judges to Address County's 'Odious Reputation.'** In Cameron County, the *Valley Morning Star* kicked off the new year with a plea to newly elected judges Janet Leal and Arturo Cisneros Nelson to end Cameron County's long reign as a Judicial Hellhole, "a place where judges, who generally are plaintiffs' lawyers themselves, give preferential treatment to tort cases in general or to cases filed by attorneys who are personal or political friends."[83] As the paper wrote, "Justice is presumed to be blind …. That isn't the case in Cameron County."

- **Imitating Trial Lawyers Does Not Flatter, It Gets You Sued.** Ten years ago, personal injury lawyer Wayne Reaud started a weekly newspaper called *The Examiner*, which featured stories about asbestos lawsuits as he and others repeatedly brought such high-dollar cases. The impact of these stories was so influential on potential jurors that, in at least one case, defense lawyers had a trial postponed. But when business interests started up the *Southeast Texas Record* earlier this year to cover the local litigation scene from a different perspective, the trial lawyers weren't flattered as they should have been. Instead, they hypocritically greeted the competition for readership with subpoenas, calling the effort "shameless propaganda."[84] Courts recently quashed the subpoenas, reminding the plaintiffs' bar that harassing newspapers in such a way violates the First Amendment.

- **Plaintiffs' Lawyers Cannibalize Each Other.** Thomas Henry, a Corpus Christi lawyer, must have run out of corporate defendants to sue on September 28 of this year because that was the day he decided to take on fellow personal injury "lawyer" Mauricio Celis.[85] Apparently, Mr. Celis is what trial lawyers call a "gatherer" – or what the rest of the country calls an "ambulance chaser." He recruits plaintiffs, and farms them out to "real" law firms to litigate their cases. Mr. Henry, looking to open a new liability market, invited Mr. Celis's clients to sue Mr. Celis. Mr. Henry's TV ad stated, Mauricio Celis "does not have a law license in the state of Texas nor does he have a license to practice law anywhere in the world. If you have hired this law firm, you may be entitled to a refund of all the attorneys fees paid. Contact me immediately!" What do you call someone who chases the ambulance chaser?

- **Plaintiffs Sue Over Vacuums that Suck, Steps that Go Down and Coffee that's Hot.** So much for personal responsibility! In a perusal of Southeast Texas lawsuits, three jump out. First is the lawsuit filed by a curious worker who decided to stick his hand inside an industrial vacuum.[86] He is suing the vacuum operator for injuries he sustained when his arm got "sucked up into the vacuum tube" and temporarily stuck.[87] Second is the $723,000 damages award that a Jefferson County case yielded for a woman who "missed a step" by over-stepping a stairwell's landing area.[88] She argued that the last step should have been marked; the defense suggested she should have watched where she was walking.[89] In a case of déjà vu all over again, a woman is suing McDonald's in Jefferson County because she spilled her coffee on her own lap after ordering coffee with her breakfast at a McDonald's drive through.[90] It is also worth noting that since 2004, Texas has received 28% of all U.S. motor vehicle products liability cases.[91]

"Some attorneys have been so certain of prejudice on the bench [in Cameron County] that they have been known to simply ask for a fast ruling so they can move ahead with the appeal that already has been prepared for higher courts."[92]

—Valley Morning Star

The Good News

Tort reform works! In June, the *San Antonio Express-News* reported that 30 insurance companies are offering medical malpractice insurance, a whopping 650% increase from only four such insurers prior to the 2003 medical liability reforms were enacted

by the state legislature.[93] "The lower cost of being a doctor in Texas has helped trigger a stampede of applications for physician licenses, with the waiting line now up to 12 months."[94]

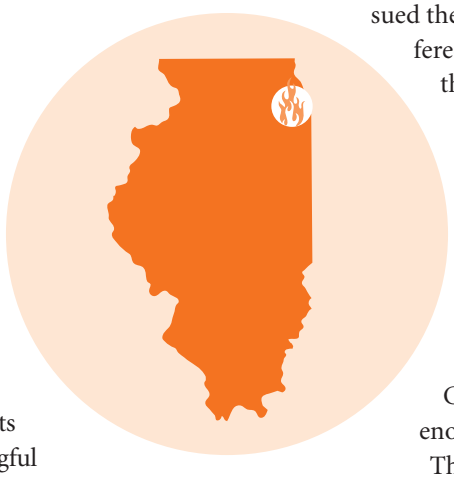
Consider the example of the Texas Medical Liability Trust, the largest writer of medical malpractice insurance in Texas, which has cumulatively reduced its rates by 31%.[95] The Trust also is paying out a dividend equal to 22% of expiring premiums.[96] Overall, policyholders have saved about $275 million since enactment of the reforms.[97]

Tort reform has worked so well, that "[c]oming up with creative new lines of litigation – and doing it on the cheap – is imperative for plaintiffs' lawyers in Texas these days. No other state's trial bar has suffered a greater reversal of fortune."[98] Here is another idea: stop looking at the civil justice system as though it were a business model in need of new markets for liability. Tort litigation should be about representing truly injured people and seeking fair compensation for them in the courts.

In a closing note on Texas, Judicial Hellholes authors appreciate the close attention that the *Fort Worth Star Telegram* gave to last year's report and, even though the paper's editorial board disagreed with us on some points, their ultimate conclusion was that the "annual report helps shed light on a system that requires continuing public exposure to make sure it operates justly."[99]

HELLHOLE #3

COOK COUNTY, ILLINOIS



With Madison County ending its hall-of-fame run on the Hellholes list and St. Clair County landing just above the Hades cut this year, too, Cook County remains Illinois' sole Hellholes jurisdiction in 2007. Long regarded as a hostile environment for corporate defendants and a popular venue for class actions, Cook County has now expanded its repertoire with noneconomic damages in wrongful death actions. In addition, a Cook County court has invalidated a state legislative limit on potentially infinite pain and suffering awards in medical malpractice cases.

Because Cook County is Illinois' major population and business center, the anti-competitive faults within its civil justice system invariably generate aftershocks that reverberate around the state. As the charts on the next page show, from 2001 through 2006, the Land of Lincoln's economy performed poorly relative to that of the nation as a whole. While U.S. GDP expanded 15%, Illinois' grew just 9% or nearly 40% more slowly. The country added 4.3 million new jobs, but Illinois actually managed to lose more than 60,000 jobs during the period as companies large and small hesitate to locate or expand in high-litigation jurisdictions.

Civil Litigation Factory Still Running Strong

Home to roughly 43% of Illinois' population, Cook County handles about 64% of its major civil litigation.[100] This disproportionate level is in contrast to a decade ago when the jurisdiction maintained a flow of litigation commensurate with its population.[101] The gradual increase in the number of claims can, in part, be attributed to the jurisdiction's reputation for plaintiff-friendly rulings and as an alternative venue to the courts of Madison and St. Clair counties, which have historically drawn more scrutiny and negative media attention. Consequently, when plaintiffs attorneys look to file a major lawsuit, they now often look no further than the Circuit Court of Cook County.

In 2007, for example, Cook County provided the preferred forum for lawsuits arising out of the peanut butter recalls that received considerable national media attention.[102] As a result, at least five lawsuits were filed nationwide alleging injuries from salmonella contamination.[103] Two of these five lawsuits are filed in Cook County.[104] Such lawsuits over tainted food in the wake of national media attention appear to have influenced Cook County residents in particular. The complaintant in a nationwide class action over highly publicized accounts of contaminated pet food products was brought by a Cook County pet owner.[105]

Elsewhere on the litigation front, Cook County has started to attract more suspect claims than in previous years. In a seemingly unprecedented class action lawsuit, two consumers sued their utility company for power outages suffered as a result of storms.[106] The lawsuit alleges that the power company failed to maintain its facilities when it knew or should have known that outages posed a risk to consumers and their property.[107] Of those who lost power during the storm-caused outage, 90% had electricity restored within 48 hours.[108] The particular storm was also reported to be the most destructive storm in the area in the previous decade.[109] Nevertheless, in Cook County, even nature's inconveniences are enough to give rise to a class action.

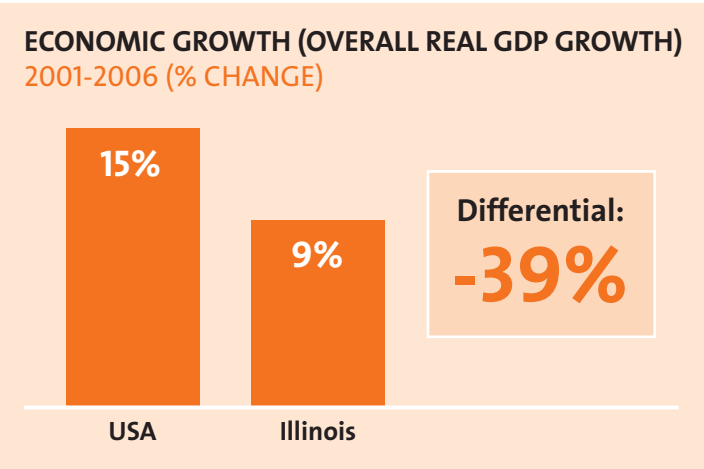
The pro-plaintiff environment in Cook County has also helped spawn other highly dubious claims. A student's grandparents filed a lawsuit against the Chicago Board of Education after a substitute teacher showed the Oscar-winning film *Brokeback Mountain* in class.[110] They sought a half million dollars for their grandson, allegedly due to the severe psychological distress that resulted from watching the film.[111] The lawsuit also alleges that the school system falsely imprisoned the students who watched the film during school hours.[112]

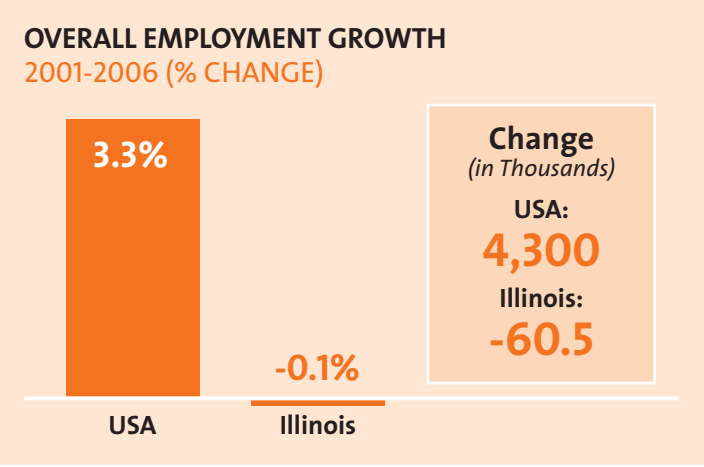
The real bread and butter of Cook County's civil justice system in recent years, however, comes from asbestos litigation. The jurisdiction is home to roughly 716 active asbestos cases,[113] with many more temporarily transferred to the multi-district litigation in Cuyahoga County, Ohio (*See* Points of Light, page 30). With so many active cases, justices often maintain

a strict and inflexible schedule which does not always enable certain defendants, inundated with hundreds or thousands of claims, to adequately prepare for each case. For example, Judge William Maddux provides parties one year to prepare and will deny requests for continuances to adhere to his ambitious trial schedule.[114] While beneficial to expediting the dissolution of claims, this case management practice can act to force settlements upon corporate defendants while perhaps depriving them of their due process rights.

Trial Lawyers Cash in on Grief

To keep Cook County's litigation machine well-oiled, the trial bar backed a change in Illinois law to now allow compensation for "grief and sorrow" to be paid to beneficiaries of decedents in wrongful death actions.[115] The bill, sponsored by Cook County representatives,[116] creates a new class of damages in wrongful death actions which lack the boundaries and safeguards that exist with respect to compensation for actual loss. Damages for grief and sorrow are amorphous concepts not easily calculated. This can lead, as was no-doubt intended by the trial bar's backing, to higher cumulative damage awards for any wrongful death. The potential for inflated awards is troubling and has caused serious problems in Illinois' past. Nevertheless, Governor Rob Blagojevich signed the bill into law, allowing plaintiffs' attorneys a sizable cut of that grief and sorrow.[117]





Source: U.S. Government

In a related, yet thwarted legislative attempt, the trial bar pushed a bill aimed at "deep pocket" defendants on the periphery who do not bear primary responsibility for a plaintiffs' injuries.[118] The proposed legislation would have apportioned fault based only on the parties involved at the time of the trier of fact's final ruling, thereby allowing plaintiffs' attorneys to manipulate which defendants would be left at the end of a lawsuit to pick up the tab.[119] Naturally, the party with the "deepest pockets" and the most resources would be left by plaintiffs to fit the bill regardless of who was most at fault. Fortunately, this effort to unfairly expand recoveries was curtailed during the latest legislative session, but may well return in the upcoming session.

Cook County Judge Throws Out Illinois Medical Liability Reform

In November 2007, Cook County Circuit Court Judge Diane Joan Larsen struck down a major tort reform law designed to control runaway awards for pain and suffering in medical malpractice cases.[120] This law operated to limit noneconomic damages to $500,000 against doctors and $1 million against hospitals, but placed no limit on recovery for actual and anticipated medical costs. The state legislature had enacted the law in 2005 in response to soaring malpractice insurance rates and an exodus of physicians, which jeopardized medical care in the state.[121] Deficiencies were particularly apparent among specialists in areas such as obstetrics and neurology, forcing patients to travel farther and wait longer for medical care.[122] The law had received bipartisan support and its passage was hailed by many in the medical community as an urgently needed and commonsense reform.[123] The new law was credited with helping to reduce medical malpractice insurance rates in Illinois and increasing the number of practicing physicians.[124]

Nevertheless, the Circuit Court struck down the law, stating it interfered with the jury's power to award damages. An appeal and final decision by the Illinois Supreme Court on whether the law will remain off the books is expected.[125] Meanwhile, the lower court's decision will reach far beyond the jurisdiction of Cook County. The holding will likely lead to an increase in the state's medical malpractice insurance premiums, which could lead physicians to once again exit the market.

Mixed Bag of Excessive Verdicts

Despite obstacles and setbacks in virtually every area of Cook County's civil justice system, the jurisdiction did make an effort to rein in excessive awards in several cases. For example, Cook County Circuit Court judge Cheryl Starks appropriately vacated a $120 million judgment in a class action lawsuit against an oil refiner, which included $40 million in punitive damages.[126] Judge Starks decertified the class action, thereby vacating this substantial award.[127] In another headline-grabbing case, an appellate review panel ordered a considerable reduction of a $27 million Cook County verdict against automobile manufacturer Ford for alleged defects in the Escort.[128] The initial verdict included $2 million in compensatory damages, yet $25 million in damages for loss of society.[129] The appellate court con-

cluded that the award was excessive and the product more of "heart than the mind."[130] It remanded the case, suggesting that an acceptable amount would be under $10 million, but leaving the determination with the Cook County Circuit Court judge.[131]

At about the same time, however, a Cook County jury handed down another record verdict in the case of a pharmacist providing the wrong prescription. This award was to the tune of $31.3 million, which included $25 million in punitive damages.[132] The award is reportedly the highest in Illinois history for an errantly filled prescription.[133] Hence, it seems that the unfortunate pattern of Cook County verdicts for 2007 is that for every reasoned decision limiting excessive awards, there is another extraordinary verdict waiting in the wings.

HELLHOLE # 4

WEST VIRGINIA

West Virginia has again earned the dubious distinction as a statewide Judicial Hellhole. As ATRF has fully detailed in past years, the state has gained this reputation by permitting lawsuits from out-of-state plaintiffs, with extraordinarily low standards for massive actions that combine many plaintiffs and defendants in a single lawsuit, and by adopting theories of liability that are out of the mainstream and particularly favorable to plaintiffs.[134] Companies face "jaw dropping" punitive damages in West Virginia, such as this year's $271 million punitive damages award – on top of $134.3 million in compensatory damages – in a class action over natural gas royalties.[135] A couple from Arizona can waltz right in and file a lawsuit in West Virginia courts naming a mere 77 companies as defendants.[136] It also is a place where a fictitious doctor purportedly signed medical documents supporting fraudulent asbestos claims.[137] West Virginia Circuit Court Judge Arthur M. Recht deserves recognition for permitting an investigation and dismissing the claims.[138] But despite the occasional faint sign of hope such as this, West Virginia remains a Judicial Hellhole this year as businesses large and small continue to fear the unfair litigation climate in the state.[139]

"Gov. Joe Manchin has adopted an 'open for business' attitude to attract investment to West Virginia. Unfortunately, the anti-business climate in the state's civil courts closes the door."[140]

—Charleston Daily Mail

That fear on the part of business leaders is reflected in the charts on page 13, which show that, from 2001 through 2006, West Virginia's economy lagged considerably behind the overall national economy in both overall growth and job creation.

Lack of Summary Judgment and Appellate Review

One of the underlying reasons why individuals and businesses fear getting sued in West Virginia is that it is almost unique among the states in its appellate review system. One would think that in the American civil justice system, if a trial court completely abandons the law, the defendant could appeal to a higher court and have the lower court's actions reviewed. Not so in West Virginia. West Virginia is one of only eight jurisdictions that do not have an intermediate appellate court, making the state's Supreme Court of Appeals the only venue for an appeal. Moreover, the state's only appellate court has full discretionary jurisdiction in civil cases, meaning it can choose whether or not to consider a case. The practical reality of that almost unique combination is that a defendant has no assurance of judicial review of a completely lawless decision.

That occurred this year in *Daniel Measurement Services, Inc. v. Eagle Research Corp.*, where a trial judge hearing a breach of confidentiality agreement and trade secrets claim recognized the lack of evidence in the case, but let the case go to trial anyway.

Despite the lack of any supporting evidence of damages, the case went to trial and ended with a $10.5 million verdict against the defendant. Although the trial court judge noted that he was "most troubled" by and "struggling with" the measure of damages

in the case, he concluded, "I'm not going to reduce it, though I am concerned with it."[141] This case cried out for appellate review, yet the West Virginia Supreme Court of Appeals decided not to hear the case. ATRA filed an *amicus curiae* (friend of the court) brief with the Supreme Court of the United States, urging the high court to find that due process requires some minimum level of pre- and post-trial review to ensure that defendants do not suffer an arbitrary deprivation of property.[142] Unfortunately, the court declined to review the case.

Another Bad Decision from the State's High Court

Businesses have come to fear West Virginia's highest court, which has a reputation for going its own plaintiff-friendly way. The seminal example is the court's recognition of massive claims for medical monitoring on behalf of anyone exposed to a potentially harmful substance, even if they have not developed an injury, and allowing recovery of a cash award that can be spent on anything – a car or a stereo – rather than medical expenses.[143]

In June of this year the court handed down what may become another infamous decision in *Johnson & Johnson v. Karl*.[144] In a 3-2 decision, the court made West Virginia the first state to reject entirely the "learned intermediary" exception to pharmaceutical products liability.[145]

In plain English, that means that, unlike courts in most every other state, plaintiffs in West Virginia courts can hold a manufacturer of prescription drugs directly liable for failing to warn a patient of risks, even if the company warned the patient's physician, who was in a much better position to assess and discuss the risks to the individual plaintiff based on his or her unique medical and family history.

Mandating direct warnings to consumers could have the unintended effect of discouraging the use of beneficial drugs based on risks that may not be applicable to certain plaintiffs or where the benefits clearly exceed any risks. Such complicated assessments are ordinarily for doctors to discuss with their patients.

"There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury. And I'm going to allow all of these to go to a jury. Plain and simple. All of your's, all of the plaintiff's. . . . I don't know how you are going to argue all of this and present it to a jury. That will be your problem."[146]

—Putnam County Circuit Court
Judge O.C. "Hobby" Spaulding

Litigation Tourism

Shortly after publication of the Judicial Hellholes 2006 report, the Supreme Court of the United States unfortunately decided not to consider yet another outlier decision by the West Virginia Supreme Court of Appeals, *Morris v. Crown Equipment Corp*.[147] In that case, West Virginia's high court invalidated a state law designed to prevent out-of-state residents from flooding West Virginia's plaintiff-friendly courts with claims. The law, which was enacted in 2003, permitted nonresidents to file claims in West Virginia courts so long as a "substantial part" of the events leading to the claim occurred in West Virginia or the plaintiff could show that he or she could not sue in another state.[148] In addition, the state legislature required that every plaintiff satisfy the new venue requirements so as to prevent nonresident plaintiffs from riding on the coattails of resident West Virginians or those whose claims actually arose in the state. This was a sound reform aimed at stemming litigation tourism to the Wild, Wonderful Lawsuit State, spurred by thousands of asbestos lawsuits that flooded in from around the country. Nevertheless, in a decision contrary to U.S. Supreme Court precedent[149] and other state court rulings,[150] the West Virginia Supreme Court of Appeals threw out the law's modest requirement that lawsuits filed in the state indeed have some connection to the state.

With the U.S. Supreme Court's denial of *certiorari* on December 11, 2006, the doors to West Virginia courts reopened to plaintiffs' lawyers from around the country looking for a favorable place to sue. In March, the state legislature enacted a modest reform that gives judges more discretion to dismiss claims by nonresidents based on a balancing of factors.[151] Such a measure only slightly closes the gap because it leaves such decisions to each individual judge's wide discretion. It remains to be seen whether West Virginia judges will appropriately use that authority.

Will Medical Malpractice Reforms Survive?

Given the West Virginia Supreme Court of Appeals' nullification of the state legislature's venue reform, doctors remain understandably uneasy as to whether laws enacted in 2001 and 2003 to stem rising medical malpractice insurance rates will stick. The 2001 law limited damages for pain and suffering in medical liability cases to $1 million.[152] Then the Medical and Professional Liability Act of 2003 included a sliding scale of between $250,000 and $500,000 and required plaintiffs to file certificates signed by independent doctors attesting to their claims' merits before proceeding.[153] The idea is to protect doctors from lawyers who file bogus suits first and hope questions can be postponed until later – after quick settlements have been reached. The legislation has created a healthier working environment that has thus far allowed West Virginia to attract and retain more doctors.[154] (*See* Points of Light, p. 29.)

This year, the state's high court granted review of two cases impacting the continued effectiveness of these medical liability reforms. The first, *Riggs v. West Virginia University Hospitals*, considered the applicability of the limit on damages in the 2001 law to a $10 million award for pain and suffering.[155] The plaintiff, who was diagnosed with a bacterial infection after a knee

surgery, claimed that the limit did not apply because the case did not involve direct patient care provided by a doctor, but rather an outbreak in the hospital. Fortunately, West Virginia's high court did not permit this lawsuit to circumvent the $1 million limit, making a commendable decision to uphold the law.[156] The second case, *Westmoreland v. Vaidya*, will consider the constitutionality of the 2003 law's requirement that plaintiffs submit certificates of merit to support their medical malpractice claims.[157]

Hope in the Hellhole

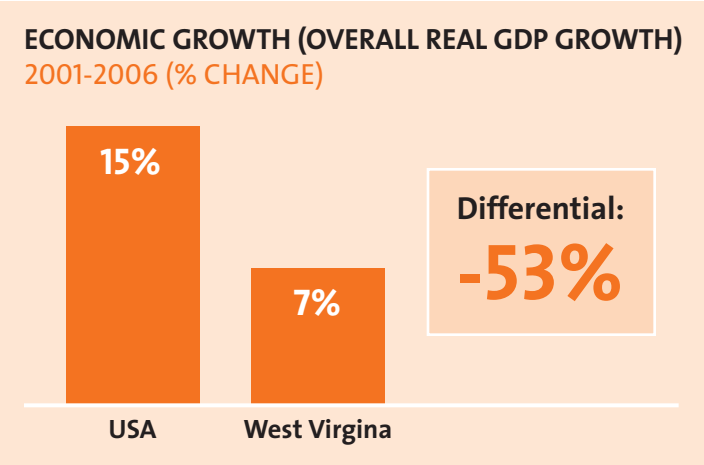
Stemming the Flood of Litigation. On July 8, 2001, a flood destroyed about 3,500 buildings in six counties south of Charleston. In some places, such devastation is called an "act of God." In West Virginia, personal injury lawyers consider it an "act of corporation." Local lawyers responded by suing dozens of businesses, coal companies, timber companies, railroads, oil and gas companies, and land owners on behalf of numerous plaintiffs, claiming that the businesses had altered the land in a manner that led to the destruction. The plaintiffs' lawyers asserted vague claims, effectively seeking to hold the businesses strictly liable for all damage that occurred. The West Virginia Supreme Court of Appeals tossed that theory in 2004,[158] yet the litigation continued as plaintiffs sought to show how the companies were at fault for the damage.

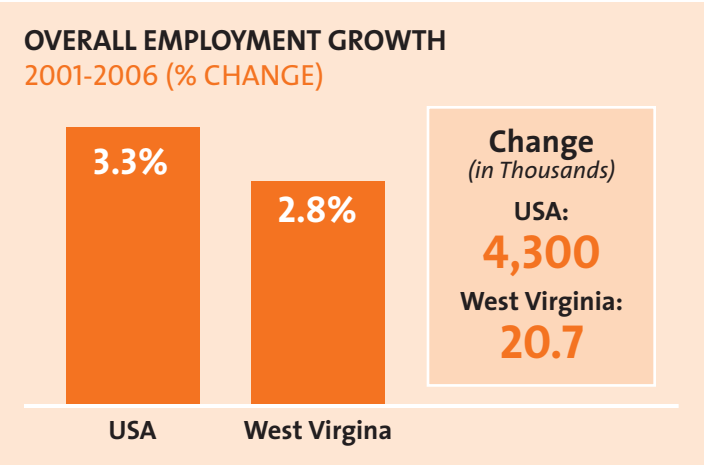
This year, two judges handling the litigation demonstrated that there is still hope for justice in West Virginia. Hats off to Circuit Court Judge Arthur M. Recht who, after giving the plaintiffs numerous chances to amend their complaint, dismissed such a lawsuit after finding that the lawyers provided no specific information as to how any particular defendant caused an injury to any particular property.[159] Judge Recht also found that the plaintiffs' attorneys had filed the lawsuit without evidence and had tried to game the system by engaging in a "fishing expedition" through the discovery process. In other words, they filed a baseless suit first, then looked for evidence – at great cost to the defendants – to support a claim, any claim, later.

> ***"Complaints may not be filed where plaintiffs intend to find out in discovery whether or not, and against whom, they may have a cause of action."***[160]
>
> —West Virginia Circuit Court Judge Arthur M. Recht

Judge Recht's decision makes clear that now, in West Virginia, plaintiffs may not lump numerous plaintiffs and defendants together in a single lawsuit to sidestep the ordinary requirement that the complaint provide "basic, core information" for each claim. Without such information, a defendant does not know who is suing, on what basis and for what damages, and thus cannot fairly defend itself. In reaching his ruling, Judge Recht cited a Mississippi Supreme Court decision that was one of the turning points in stemming mass litigation in that state and moving several of Mississippi's counties off the Judicial Hellholes list.[161] The plaintiffs have appealed the ruling but, in what is characteristic of the close-knit legal community of West Virginia, Chief Justice Robin Davis disqualified herself because her husband works on the plaintiff team, Justice Brent Benjamin recused himself because a defense attorney was his former partner and, since Justice Larry Starcher was absent, the court lacked a quorum to consider the case.[162] ATRA hopes that the Supreme Court of Appeals will ultimately uphold the Circuit Court's January 18, 2007 decision and mark a positive milestone for West Virginia.

Judge John A. Hutchison also showed a commendable commitment to the law when he granted a new trial against two timber companies that had not been dismissed from the flooding case or otherwise settled.[163] The plaintiffs' case relied primarily on expert testimony, whose theories the court found were untested, never subjected to peer review and not shown to be generally accepted in the scientific community. Rather, Judge Hutchison found that the experts, who had formulated their positions specifically for the purpose of the litigation, provided "nothing more than subjective belief and unsupported speculation" and their testimony did not fit

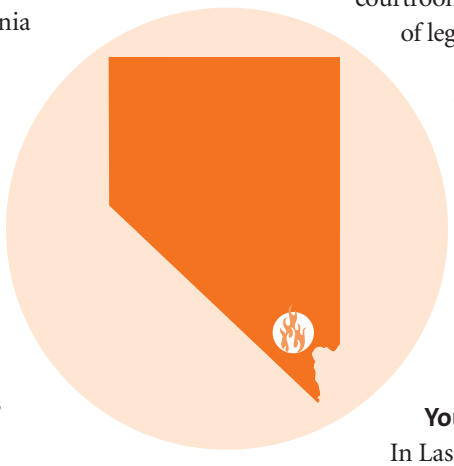




Source: U.S. Government

the facts of the case. Finally, Judge Hutchison concluded that "the Plaintiffs' entire case was designed to inflame the jury" and there was no reliable evidence presented in support of the claim that the defendants' use of their property contributed to the flooding. He dismissed the case and provided that, should he be reversed, then the defendants would be entitled to a new trial.

Preserving the Capacity for Appeals. In addition to adopting modest venue reform, the West Virginia Legislature this year limited the amount of the bond that a civil defendant may be required to post in order to stay collection of a judgment while the case is on appeal. Ordinarily, the bond must equal the amount of the judgment. But when a defendant is unfairly hit with a gigantic verdict, that bond requirement may jeopardize its ability to seek an appeal. For that reason, the Legislature limited the bond to $50 million.[164] This is a small, but helpful measure in bringing fairness to West Virginia courts.



Lose an Election? Sue! Finally, regular Judicial Hellholes report readers will remember last year's reference to former West Virginia Supreme Court of Appeals Justice Warren McGraw's lawsuit against a truck driver who rear-ended him on the way to a campaign event during his failed reelection bid in 2004.[165] Four months later, he claimed that the back pain from the injury caused him to grimace during a debate, the video tape of which was used to produce negative campaign ads.[166] McGraw, the brother of West Virginia Attorney General Darrell McGraw, sued for the money he would have made if he had won reelection to a 12-year term – more than $1.45 million.[167] That lawsuit appears to be on hold.[168]

But there was a lawsuit that we overlooked last year. Former Justice McGraw also sued a television station, its owner and a lawyer who worked for an organization that paid for airing two campaign ads. The ads criticized McGraw for joining in an opinion that resulted in the release of a child rapist from prison and allowed him to work as a janitor in a public school. West Virginia Circuit Judge Alan D. Moats closely reviewed every word of the advertisements and found that the factual statements made were indeed true and dismissed the case.[169]

McGraw's lawyer in that case was none other than former West Virginia Supreme Court of Appeals Justice Richard Neely, whose admirably candid quote has graced the inside cover of this report in past years: "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so."[170] When the state's former highest judges engage in this type of litigation, it is no wonder why the state has developed a reputation as a Judicial Hellhole. Perhaps with judges like Arthur Recht, John Hutchison and Alan Moats on the bench, West Virginia will pull itself out of the fire. It is largely due to their good work that West Virginia relinquishes its spot atop the Judicial Hellholes list.

HELLHOLE # 5

CLARK COUNTY, NEVADA

The *Los Angeles Times* conducted an in-depth report on the Clark County judiciary entitled, "They're Playing With a Stacked Judicial Deck." As the paper reported: "A common perception among a dozen out-of-state lawyers interviewed about their experiences in Nevada courtrooms is that justice in Las Vegas is just another form of legalized gambling."[171]

Lawsuit shenanigans have increasingly tarnished the reputation of Clark County's civil justice system. Clark County "courts are clogged with frivolous litigation and the rolls of the state bar are spotted with unethical and incompetent attorneys."[172] "Indeed, frivolous class action lawsuits know no boundaries in a city that sings to lawyers in siren song fashion."[173]

You Gotta Be in It to Win It

In Las Vegas courts, the deck is stacked for certain local lawyers. Judges routinely approve fees or rule on cases that benefit friends, business associates and campaign contributors without reporting the potential conflict.

According to the *L.A. Times*' investigative report,[174] one Clark County judge had a fundraiser hosted by lawyers with cases before him just four days before a crucial hearing.[175] The personal injury lawyer who brought that case, along with others in his firm, were the largest contributors to the event. The corporate defense lawyer, on the other hand, "hadn't chipped in a dime."[176] After the judge declined the defense motion to withdraw from the case, the defendant was ordered by the judge to pay $1.5 million in damages to the plaintiffs.[177]

Another judge held a fundraiser where 51 of the 54 attorneys donating $500 or more had cases pending before her or were assigned to her courtroom,[178] while a former state judge "approved more than $4.8 million in judgments and fees during more than a dozen cases in which a recent search of court records found no statement that he disclosed his relationship with those who benefited from his decisions."[179]

One judge adjudicated six cases involving an attorney from whom he had "borrowed" money.[180] A senior judge "presided over at least 16 cases involving participants in his real estate deals," and another senior judge "ruled for a casino corporation in which he held stock."[181]

In another episode, former *Las Vegas Tribune* columnist Steve Miller asked the question, "How often is a judge 'randomly' assigned to five simultaneous, unrelated civil trials that include the same litigation?" His answer? "Never – until recently." It seems that a certain local judge kept coming up whenever "one of the four biggest contributors to [her] last political campaign" was involved in several civil lawsuits at the same time.[182]

As the *L.A. Times* concluded, "[t]hese state judges often dispense a style of wide-open frontier justice that veers out of control across ethical, if not legal boundaries."[183]

Lawyers Gone Wild

The questionable conduct is not limited to those in robes. Ethics complaints against Nevada attorneys, according to an American Bar Association study from 2002 through 2005, is twice the national average.[184] An average of one complaint each year was filed for every five licensed attorneys in the state – the second highest ratio in the country!

Perhaps not surprisingly, suggested the *L.A. Times*, "only a small percentage of these allegedly wayward attorneys are taken to task."[185]

One high-profile case that Clark County judges declined to hear has been moved to a federal court in Spokane, Washington. The case involves allegations that a medical malpractice lawyer engaged in a conspiracy to defraud clients and insurance companies of millions of dollars by paying doctors and others to "obtain clients or client referrals, inflate his clients' personal injury claims artificially and fraudulently, and obtain false and misleading testimony from doctors in support of personal injury lawsuits."[186] As of this writing, a grand jury is investigating the case, and a local television station reports that at least seven local attorneys and seventeen local doctors are suspected of participating in the scheme.[187]

On the other hand, Nevada courts are quick to take action when a lawyer takes a stand against frivolous litigation. Earlier this year, the state's supreme court recommended that the Nevada Bar Association heavily fine and discipline a defense lawyer for identifying bogus claims during closing arguments, even though none of the plaintiffs' lawyers had objected.[188] The high court stated: "Essentially, [he] asked the jury to 'send a message about frivolous lawsuits."[189] The *Las Vegas Review*, in editorializing on this episode, had it right: it is eagerly awaiting a similar state supreme court response when plaintiffs' lawyers urge juries to "send corporate America a message" or "reach into the 'deep pockets'" of corporate America with a high verdict.[190]

> ***"I am from the State of Nevada where we have these megabucks jackpots – what this system has become is the megabucks jackpots for the trial lawyers. It is not about the little guys anymore."[191]***
>
> —U.S. Senator John Ensign

> ***"If you have juice, you get different treatment... . This is a juice town."[192]***
>
> —Las Vegas attorney with more than 15 years of local practice

The Cottage Industry of Construction Litigation

The growing size of the construction litigation industry in Clark County is less akin to a cottage than to the giant casinos along the strip. "Despite a notice and opportunity to repair (NOR) law and recent state Supreme Court rulings in Nevada that seek to curtail class action lawsuits, such lawsuits are still popular among plaintiffs' lawyers in Las Vegas."[193] In the years since the law has been enacted, "nothing has changed."[194] In fact, just the "threat of construction defects litigation has burned through the residential contractors liability insurance market."[195]

Consider the pinheaded litigation that has grown out of pinhole leaks. In recent years, a chemical imbalance in Clark County's water system has apparently caused brass fittings to leak due to a problem called "dezincification." While there have been fewer than a hundred actual leaks, the trial lawyers have filed purported class actions for up to 50,000 homeowners. In addition, the lawyers have named proverbial "deep pocket" defendants to increase their take, regardless of whether the companies were connected to any alleged wrongdoing. Take, for example, the out-of-state company that made the brass fittings. This company is defending against this litigation even though the fittings were pre-approved by the City of Las Vegas planning department. The litigation also has taken a toll on the local community, destroying a local plumbing business, which has laid off its employees and now just defends lawsuits.[196]

The more sensible approach would be to address this systemic issue through the county water supply or require builders to use only those fittings suitable for Las Vegas water. But why let logic get in the way when there are deep pockets to sue?

Dealer's Blackjack

When the dealer has blackjack, everyone loses, even if they have a great hand. The same thing happened in a tire blow-out case against Goodyear Tire when a discovery disagreement led to automatic liability. Goodyear was prepared to defend itself because it believed the tire was not defective and had sustained road hazard damage before it blew out.

When the parties engaged in a dispute over discovery issues, the local judge did not just penalize Goodyear, she "took the unusual step of striking the defendants' answer to the complaint,"[197] and ruled that it would not be permitted to present any evidence in its defense.[198] Since the court did not permit the jury to even consider Goodyear's case, it had no alternative but to find for the plaintiffs.[199] The company stated, "Not only was Goodyear

unable to present any defense, but based on a procedural ruling having nothing to do with the tire, the judge instructed the jury the tire was defective."[200]

Potential for Improvement

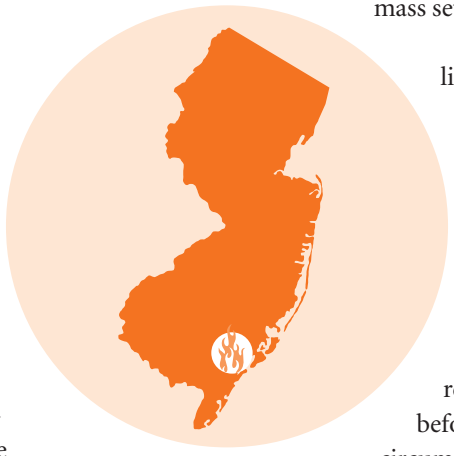
The good news is that the citizens of Nevada have proven their ability to turn around a liability crisis.

In 2003, amid an exodus of doctors, particularly OB-GYNs, the state enacted a $350,000 cap on pain and suffering damages with exceptions for gross malpractice and where a judge finds "exceptional circumstances."[201] At the time, nearly 30 obstetricians had left Las Vegas, leaving only about 80 doctors to deliver babies in one of the nation's fastest growing counties. A local citizen group called "Keep Our Doctors in Nevada" also led a successful ballot initiative to limit attorney contingency fees. Now, instead of doctors fleeing town, "[v]eteran plaintiffs' attorneys are leaving the field or dramatically limiting the cases they take."[202] Said one local OB-GYN, "It's given doctors hope that they can come back and rebuild their practices."[203]

In addition, the Nevada Supreme Court issued new rules governing lawyer advertising that took effect on September 1, 2007, prohibiting lawyers from making claims in advertisements that might give a client unjustified optimism about a case. All lawyers will have to submit their advertising to the State Bar for review. Now, local personal injury lawyers, like Glen "The Heavy Hitter" Lerner may have to stop spinning "like a tornado, blowing cash towards his clients" and writing "checks while a soccer announcer screams, 'GOAL!'"[204]

HELLHOLE # 6

ATLANTIC COUNTY, NEW JERSEY



The legendary New Jersey tourism slogan from the 1980s was "New Jersey and You, Perfect Together." It may have taken 20 years, but litigation tourism has finally descended on the Jersey Shore – Atlantic County to be specific. Ironically, the Atlantic County litigation story is the inverse of the one found elsewhere. Instead of taking from out-of-state corporate defendants and giving to in-state plaintiffs, these New Jersey courts are inviting out-of-state plaintiffs to sue New Jersey companies.[205] For a state with notorious identity problems, giving others home-field advantage in their state is not surprising. (After all, the New York Giants and the New York Jets play their home games in New Jersey.)

Raiding the 'Nation's Medicine Chest'

Historically, New Jersey has been a leader when it comes to the pharmaceutical industry, the reason it is known as the "Nation's Medicine Chest." New Jersey pharmaceutical and medical technology companies were responsible for more than a third of all drugs and biologics approved by the FDA in a recent year and contributed $20 billion to the state's economy in another. The industry employs 60,000 workers in the state, making it the state's largest manufacturing employer, with an average salary of more than $80,000 per worker.[206]

Instead of protecting this important sector of New Jersey's economy and quality of life, Atlantic County courts have allowed the nation to raid the medicine chest. Part of the problem is due to state supreme court decisions that have made New Jersey one of only two states in the nation – the other being fellow Judicial Hellhole West Virginia – to divert from the widely accepted law that the legal obligation for prescription drug manufacturers is to make sure that prescribing doctors are adequately warned of a drug's side effects, not individual patients.[207] New Jersey also has a plaintiff-friendly Consumer Fraud Act that allows plaintiffs to collect "threefold" damages, attorneys fees and costs, which has led to massive class actions.[208] New Jersey judges have developed a reputation among leading law professors and defense lawyers for admitting questionable "expert" testimony in court.[209] And New Jersey allows its plaintiff-friendly laws to supersede those of a plaintiff's home-state, which may be more fair, when the product at issue was manufactured in New Jersey.[210]

In addition, under New Jersey practice, there are only five judges who preside over mass tort cases. One judge is typically assigned to a set of related claims, which often involves multiple, complex claims, and may take weeks to try. One of the greatest problems with this system is that personal injury lawyers can bury their weaker cases in a pot of claims in hopes of generating a mass settlement.

In Atlantic County, local courts have taken litigation against in-state pharmaceutical firms to the Judicial Hellholes level. Consider the assignment of Vioxx-related cases filed against Merck to Atlantic County Judge Carol Higbee. By October of this year, nearly 16,000 Vioxx-related claims were awaiting trial in the Atlantic County courthouse.[211] As the director of court operations for Atlantic and Cape May counties remarked, Judge Higbee would likely be retired before they would all be complete.[212] Under these circumstances, judges may quicken the pace of the cases, even if doing so encroaches on the rights of defendants to fair trials.[213] Indeed, Judge Higbee facilitated "aggressive discovery" in as many as 1,000 cases,[214] and consolidated claims for trial even when each plaintiff's medical allegations were unique.[215] In November 2007, Merck and the plaintiffs' lawyers announced their intention to engage in a $4.85 billion settlement of these and other such cases.[216]

Turning Vioxx into Monopoly Money

Maybe it is understandable that a judge from the birthplace of the Monopoly board game had allowed the personal injury bar to turn Vioxx litigation into their own personal Monopoly Money. Consider the following examples:

- **Get-Out-of-Jail-Free Card Leads to $47.5 Million Haul.** When a sixty-one year old Idaho postal worker filed a lawsuit in Atlantic County against Merck blaming his heart attack on two months of Vioxx use, the jury originally returned a defense verdict. But have no fear when Judge Higbee is near. She gave the plaintiff a get-out-of-jail-free card by vacating the verdict due to post-trial developments and ordered a re-trial. The new verdict? Forty-seven-and-a-half million dollars, which included $27.5 million in punitive damages.[217]

- **'No Injury' Lawsuits Pass Go with Higbee.** A Vioxx "consumer fraud" lawsuit that Judge Higbee approved[218] headlined *Forbes*' "No Injury? No problem" article on creative ways that personal injury lawyers sue big companies.[219] The case was filed by lawyers on behalf of private health plans, hardly the average consumer the law was meant to protect, alleging that they would not have paid for Vioxx had they known of its side effects. Unlike individual personal injury claimants, however, such third-party payers do not have to prove that anyone suffered any injury.[220] Judge Higbee certified the case as a nationwide class action, disregarding the fact that many state laws are not nearly as generous as New Jersey's Consumer Fraud Act, and that the health plans involved had markedly different policies with respect to Vioxx.[221] As *Forbes* observed, the $20 billion lawsuit was "the latest and maybe biggest manifestation of what defense lawyers dub the 'harm-less' tort."[222] This year, the New Jersey Supreme Court reversed Judge Higbee's outrageous class certification in this case.[223]

- **Trial Lawyers in Line for Park Place Hotels; Plaintiffs Get Ride on the Reading.** Only in Monopoly land would a judge give lawyers 1,000 times more than their clients received. In a consolidated hearing of two cases, the jury awarded the plaintiffs $4,013 and $45 respectively for their consumer protection act claims, which was the cost of their Vioxx prescriptions. The attorneys' fee approved by Judge Higbee? A fat $4.4 million! Judge Higbee reportedly said that she "found no case law holding that a fee award should be reduced based on the size of the damages recovered."[224]

Red Rover, Red Rover, Let Alabama Come Over!

An Alabama man also used an Atlantic County court to sue Hoffmann-LaRoche, a New Jersey pharmaceutical company, over allegations that the company's medicine Accutane caused his inflammatory bowel disease. His $2.6 million verdict ($2.5 million for pain and suffering and future medical bills) was the first time a plaintiff successfully blamed Accutane for an inflammatory bowel disorder.[225] The case was decided on a warning defect theory, even though on the label, a "plain-type warning states Accutane has been associated with inflammatory bowel disease."[226] According to a report in the *L.A. Times*, three more such lawsuits are now scheduled for trial over the next year in Florida and Illinois.

Slip & Fall Down the Hellhole

The largest slip and fall verdict in South Jersey history was handed down by a jury in Atlantic County this year. A man who slipped on a patch of oil and fell in a mechanic's garage while installing a car alarm starter was awarded $5.7 million, including $3 million for pain and suffering. The oil drippings were from the car being serviced nearby.[227] Imagine that, oil on the floor in a mechanic's garage. . . .

Other Jersey Litigation Madness

This is the first year that a New Jersey jurisdiction has been classified as a full-blown Judicial Hellhole, so we would be remiss if we did not mention the following:

- **Hot Coffee Suit Gets Upscale Makeover.** In Northern Jersey, a man is suing Starbucks for not securely affixing the lid of his Chai tea. He claims the tea spilled and caused burns to his hand. The suit seeks compensation for ongoing medical treatment, mental anguish and a claim by his wife "for the loss of certain services from her husband."[228] So we can presume he's not ambidextrous.

- **Med Mal Self Help.** In response to the "ever escalating" cost of medical malpractice insurance, several gynecologists in New Jersey are requiring patients to sign liability agreements as a condition of treatment.[229] The agreements limit pain and suffering awards and punitive damages. OB-GYNs practicing in New Jersey pay $87,081 to $171,199 for regular malpractice coverage, which is double the base rates from four years ago. Under the new agreements, one doctor who had quit delivering babies reports that her malpractice insurance has been cut in half, allowing her to practice gynecology part-time.

- **2007 Brings the Largest Pain and Suffering Award in New Jersey History.** This year, a jury in Essex County awarded $70 million in compensatory damages, including $50 million in pain and suffering, to newborn who was severely injured due to allegedly negligent medical care. While the case was already a heart wrenching one, the trial court judge allowed the plaintiff's lawyer to make extraordinarily prejudicial arguments throughout the trial and in summation, which effectively spurred the jury to punish the defendant, rather than arrive at fair compensation. ATRA has filed an *amicus* brief in the case, which is pending a petition for review before the New Jersey Supreme Court.[230]

- **Lawyers Can Knowingly Bring a Baseless Claim.** According to a new ruling by a New Jersey appellate court, lawyers can

now file claims on behalf of clients who they know have baseless claims and are suing only for malicious reasons.[231] As one of the attorneys involved in the case said, "They have created a situation where a client goes to a lawyer and says, 'I want to file a defamation action even though there was nothing [said] about me that was untrue and I have an improper motive." The lawyer can then file the lawsuit and, according to the attorney, neither of them is liable.

- **Birth of a New Lawsuit Abuse Group.** The New Jersey Lawsuit Reform Alliance announced its formation this year. Marcus Rayner, the group's executive director, has observed that "[l]awsuit abuse is a growing problem in New Jersey, where an increasing number of out-of-state lawsuits are being heard that would not make it to trial in other states."[232]

Signs of Hope?

The New Jersey Supreme Court has issued several rulings this year that have corrected decisions in local and mid-level appellate courts that would have improperly expanded liability. First, the court held that cities cannot sue the former manufacturers of lead paint and pigment under public nuisance theories in hopes of getting the companies to remediate properties with aging lead paint.[233] (*See* Points of Light, page. 32.)

In addition, the state Supreme Court reversed a lower court ruling that would have given Michigan residents their own EZ-Pass lane to New Jersey courts.[234] In *Rowe v. Hoffman-La Roche, Inc.*, the issue was whether a Michigan resident barred from bringing product warning or defect claims under Michigan law could nonetheless file such claims in New Jersey. The state's high court wisely decided that Michigan law should apply to Michigan residents. Score one for the home team!

Watch List

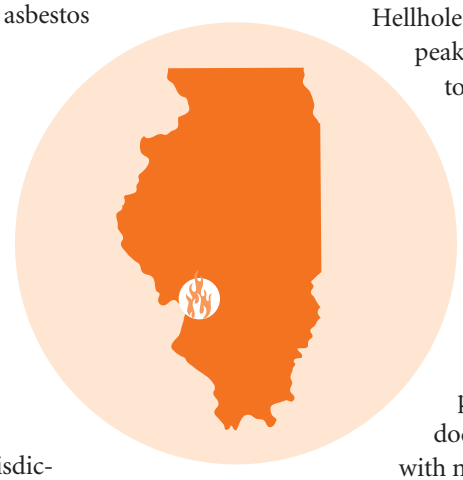
This report calls attention to several additional jurisdictions that bear watching, whether or not they have been cited previously as Judicial Hellholes. These are jurisdictions that may be moving closer to or further away from a full-blown Hellholes designation as their respective litigation climates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

MADISON COUNTY, ILLINOIS

HARDLY PARADISE, BUT NO LONGER A HELLHOLE

In a 2006 Christmas Eve editorial, the *Belleville News Democrat* included in its list to Santa the wish that the coming year would find Madison County, Illinois no longer deserving of its long-running designation as a Judicial Hellhole.[235] Though Santa may not necessarily deserve the credit, the wish has been granted.

After ranking as the #1 Judicial Hellhole in 2002, 2003 *and* 2004, Madison County dropped to #4 in 2005 and then inched its way into "Purgatory" at #6 in 2006. Thanks to the comprehensive reform efforts of Chief Judge Ann Callis, Judge Daniel Stack's continued diligence in dismissing out-of-state asbestos claims and other positive trends, the county avoided designation as a Hellhole this year. With a duly earned reputation as a hotbed for dubious litigation, however, the jurisdiction still warrants close attention.[236]



Early in the decade, Madison County became known for a bias against out-of-state defendants in civil suits, inequitable application of the law and wildly excessive awards. The small rural county in Southwestern Illinois became a haven for asbestos claims and, between 2003 and 2004, certified more class actions than any other jurisdiction – large or small – in the nation.[237] On any given day, the court docket included defendants comprising a veritable Who's Who of American employers. In 2005, President Bush traveled to the Madison County courthouse to explain the problems with onerous tort litigation and to tout his civil justice reform agenda.[238] Shortly thereafter, Congress enacted the Class Action Fairness Act,[239] which helped move out-of-state class actions from local trial courts into more neutral federal forums.

Gradual, Ongoing Progress

During the past four years, Madison County has seen declining numbers of lawsuits, fewer class actions, dismissals of out-of-state asbestos cases and positive changes in the handling of medical liability cases. These changes can largely be attributed to Chief Judge Callis who, while running for the position, told voters she believed she could make a difference and promised to improve the court's image.[240] In less than two years since winning the job as top judge, Callis's drive for equal justice is steadily gaining ground.[241]

Forum Shopping

As noted above, the number of major lawsuits filed in Madison County has steadily declined in recent years, demonstrating that plaintiffs' lawyers are less inclined to see the jurisdiction as a forum for jackpot justice. In 1999, the number of large suits filed in Madison County, those seeking more than $50,000, was just 1,246.[242] Then began the county's quick descent into a Judicial Hellhole. By 2003, the number of new large filings had peaked at 2,102.[243] They then began dropping, to 1,439 and 1,297 in 2004 and 2005, respectively.[244] By 2006, that number fell further to 1,145, dipping about 10% below the county's 1999 level.[245]

Until replaced by Judge Stack in 2004, the notoriously plaintiff-friendly Judge Nicholas Byron allowed asbestos claims from all across the country to be filed in Madison County.[246] When Chief Judge Callis placed Judge Stack in charge of the asbestos docket, he immediately began dismissing cases with no connection to the jurisdiction.[247]

On top of dismissing out-of-state asbestos claims, Judge Stack has dismissed numerous Vioxx claims where the plaintiff did not reside in the county.[248] For example, in July 2007 Stack transferred two Vioxx claims from Madison County to other jurisdictions in Illinois with closer connections to the cases. He has also put a stop to procedures that placed defendants at a distinct disadvantage. In February 2007, Stack rejected an attempt by a plaintiffs' lawyer to join 10 claims in a single trial as a cost-effective

alternative to holding individual trials.[249] The consolidated claim was divided into 10 individual lawsuits with two transferred to other counties and a third dismissed. The same attorney has filed roughly 125 Vioxx claims in Madison County, many of which have multiple plaintiffs.[250]

Madison County also has taken steps to fairly address smaller claims without protracted litigation. The Alternative Dispute Resolution Center for the Third Judicial Circuit opened September 6, 2007.[251] The center's opening follows the Illinois Supreme Court's approval of new arbitration rules which require cases filed in the county with claims between $10,000 and $50,000 to go through arbitration first.[252]

Class Actions Continue to Decrease

Formerly referred to as "the class action capital of the United States,"[253] the number of class actions filed in Madison County is drastically lower than in its Hellholes heyday. Rising from only two class action filings in 1998 to the peak of 106 in 2003, the filings slowly started to subside with 87 in 2004, 56 in 2005 and only three in 2006.[254] As the print deadline neared for this year's Judicial Hellholes report, plaintiffs' lawyers had filed only seven class actions in the county in 2007, according to court records.

Although the sharp decline in class action filings can be credited in large part to enactment of the Class Action Fairness Act, Judge Callis's reforms have played a part, too.[255] She and other circuit judges adopted a rule limiting the substitution of judges in a class action.[256] Under a state statute, attorneys were previously allowed to swap a judge once for every named party in a lawsuit. In what Judge Callis described as "blatant forum shopping," plaintiff attorneys would simply add another named party until they could get the judge they wanted.[257] Callis's rule, which has been challenged by members of the trial bar, treats the entire class as a single party allowing only one judge substitution.[258]

But Asbestos Claims Rise

While Madison County judges are not concerned, the number of asbestos cases being filed in Madison County rose in 2007 following three years of decline.[259] Specifically, personal injury lawyers filed 325 asbestos cases in Madison County in all of 2006 while lawyers had filed 227 just halfway through 2007.[260] Judge Stack, who has successfully managed the asbestos docket by transferring or dismissing claims of plaintiffs from outside of the county, is not worried about the increase. He attributes it to a rise in secondary exposure claims, in which lawyers widen the asbestos litigation by suing on behalf of family members claiming to have been exposed to asbestos at home through contact with a family member who worked with the substance.[261]

Fairness in the Courts?

Rather than face unfair odds by going to trial, many Madison County defendants for years chose to cut their losses by settling cases out of court. But today, at least some defendants believe they can get a fair trial. For example, in March 2007, the stage appeared set for yet another multimillion-dollar plaintiff verdict. The case revolved around a woman who died of a heart attack at age 52 after taking Vioxx, the once widely prescribed pain reliever, for 20 months. But in the first of such trials in the county, the jury surprised many observers by returning a defense verdict for Merck, the drug's manufacturer. Jurors were not distracted by emotional appeals from plaintiff's counsel and instead stuck to the facts in determining that Merck had adequately warned physicians of the drug's side affects. As one juror later described, the Vioxx labels "had everything written [o] n them. They warned them fine."[262] Another said the jury unanimously concluded that the deceased's pre-existing health problems caused her heart attack and death.[263]

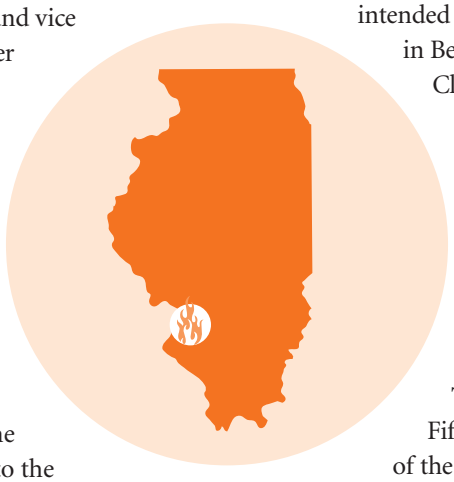
The defense verdict suggests that times may truly be changing in Madison County.

Reform for Medical Liability Claims

Runaway medical liability litigation in the county had spurred skyrocketing malpractice insurance premiums which, in turn, had caused many physicians to flee to neighboring jurisdictions. Court dockets were crowded by cases without merit that invariably delayed justice for worthy claimants. So Judge Callis created the Medical Legal Committee to address the problem. On June 18, 2007, Madison County judges adopted rules recommended by the committee "to alleviate the burden to the parties of protracted litigation in medical malpractice actions, to further the administration of justice, and to prevent unnecessary delay." [264] The new rules provide for mandatory mediation in malpractice cases and require that a circuit review panel examine the cases to ensure proper disposition.

ST. CLAIR COUNTY, ILLINOIS

The *Belleville News Democrat* observed that, "St. Clair and Madison counties are in separate circuits, but as a practical matter, they're virtually the same. The attorneys who practice in St. Clair County also are routinely in Madison County, and vice versa. Everybody knows everybody."[265] The paper made the comparison when complaining that a Madison County judge was picked to hear the drunk-driving case of a St. Clair County judge.[266] Because these two jurisdictions tend to be joined at the hip, St. Clair County is downgraded to "Watch List" status along with its more infamous neighbor.



Like Madison County, St. Clair County has seen drop-offs in case counts. In 2002 and 2003, respectively, lawyers filed 909 and 842 large cases, claiming $50,000 or more in the county.[267] Since 2004, those filings have fallen to the mid-700s and stayed there.[268] Previously seen as an overflow for Madison County cases, St. Clair was home to 21 asbestos cases in 2004, 36 in 2005, and 29 in 2006.[269] Class actions also have been decreasing in the county, from 36 in 2005 to 11 in 2006. [270] As of press time, class action filings remained stable in St. Clair, with 11 filed this year.

Judge-Issued Blank Check Denied

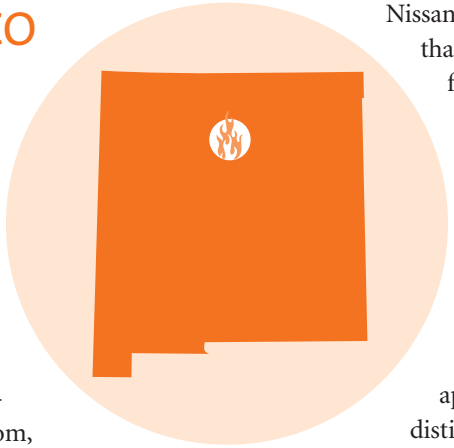
In August 2007, federal appellate judges made a final correction on the past mistakes of St. Clair County and appellate judges which had facilitated the defrauding of accident victims to the tune of $160 million in settlement funds.[271] James Gibson, who owned a financing and structured settlement business, had used the county courts' favorable rulings to transfer funds, paid by defendants and intended for accident vicitims, into a personal account in Belize.[272] The Fifth District Court covering St. Clair County had delivered an opinion that all settlement monies from accident victims could be transferred to Gibson and not deposited in trust accounts for the individual victims. With the funds under his complete control, Gibson distributed them as he saw fit. After stopping payments to victims and spending millions on himself, Gibson was eventually indicted on federal charges and convicted. The federal court cited the impropriety of the Fifth District ruling and actions in the description of the crime.[273]

By denying Gibson's appeal of his 40-year prison sentence, the federal court has now managed to apply some ice to another black eye for St. Clair courts.

But the county is still a place to watch, as evidenced by the November 15, 2007 filing of a lawsuit against drugmaker Sanofi-Aventis. According to media reports, only four of the case's 47 plaintiffs reside in Illinois; the rest hail from 21 other states. And the suit includes an allegation relating to New Jersey law, which begs the question: Why should St. Clair jurors and taxpayers expend time and resources deciding issues of New Jersey law for plaintiffs from across the country?

NORTHERN NEW MEXICO

Several areas of New Mexico, including its northern counties and Chaves County, may be developing reputations as Judicial Hellholes. For example, in June an Albuquerque court awarded the state's highest personal injury verdict ever – $54 million, including $50 million in punitive damages – against a nursing home in connection to the death of a 78-year-old patient.[274]



Less than a month later, after a patient suffered a heart attack in a hospital emergency room, plaintiffs in Roswell landed an out-of-this world $21.9 million medical malpractice award, which included $20 million in punitive damages.[275] (In comparison, the statewide average for a wrongful death case is about $1.2 million.[276])

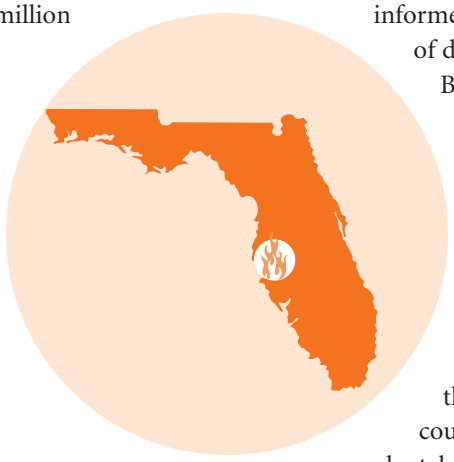
And in a classic case of forum shopping this year, a family from Socorro County traveled 200 miles to bring a wrongful death action against Nissan in plaintiff-friendly San Miguel County. The family did not live there, the car accident did not occur there and Nissan did not have a registered agent there. None of that stopped Judge Tim Garcia from finding the forum selection to be "proper" and suggested "if the Supreme Court wants to tell us it's not or the Court of Appeals, we would all love to know, because they all come to us, either in [Tierra Amarilla], San Miguel, Santa Fe, Taos. I would like some guidance, we all would, as to this issue."[277] Neither court would consider the appeal before trial, thus another indication of why New Mexico appellate court's have also earned the dubious distinction of dishonorable mentions by this report in years past.

> ***"[T]hey all come to us, either in [Tierra Amarilla], San Miguel, Santa Fe, Taos."[278]***
>
> —San Miguel County Judge Tim Garcia

HILLSBOROUGH COUNTY, FLORIDA

Several substantial verdicts in Hillsborough County (surrounding Tampa) raise questions as to whether personal injury lawyers are expanding their lucrative practices from South Florida westward toward the Gulf Coast.

In 2007, Tampa hosted a staggering $217 million medical malpractice verdict believed to be the third largest ever.[279] The case involved a single patient who was misdiagnosed at a hospital during a five-hour stay, sent home with prescription painkillers and later suffered a stroke.[280] At the time, the plaintiff was employed as a machine operator and earned just over minimum wage.[281] Nevertheless, a jury in Tampa handed down a $117.6 million *compensatory* damages award to the 50-year-old plaintiff.[282] The jury also saw fit to tack on over $100 million more in punitive damages.[283] This verdict proved a far cry from the claim valuations reached by attorneys on both sides. The plaintiff was reportedly willing to settle the case for $1 million and $3 million before verdict, but the defendants thought the jury would never go that high.[284] Ultimately, the parties came to a post-verdict settlement to avoid further delay in payment during a certain appeal.[285]

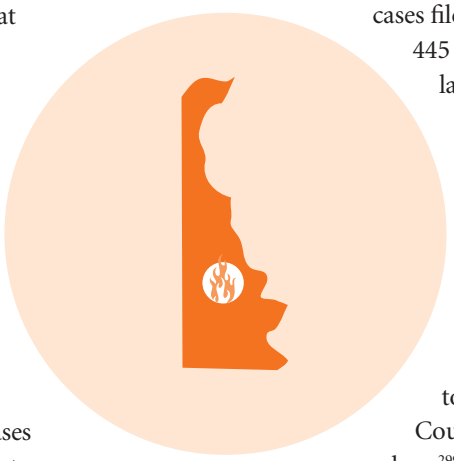


Interestingly, at a time some Florida courts were issuing landmark punitive damage awards, one Floridian plaintiff demonstrated a sense of reasonableness and restraint sorely lacking in the Sunshine State. Following the death of his wife who was struck by a car when a car wash employee accidentally bumped the gear shift, panicked and then hit the gas instead of the brake, Mac Brown received $7.5 million in compensatory damages from a Hillsborough County jury.[286] His attorneys informed him he might also receive tens of millions of dollars in punitive damages in the lawsuit. Brown, however, stunned the jury by declining punitive damages. Brown's attorney, acting on his direction, announced to the jurors, "The jury has spoken and justice has been done… [Mr. Brown] believes enough pain and suffering has been inflicted."[287] While by no means making a statement concerning the tort system, Brown's actions do demonstrate constraint and much of the public's desire for measured responses by courts when faced with tragic injuries and accidental death.

Unfortunately, some Florida plaintiffs and their lawyers take the opposite approach to the administration of justice and seek substantial money damages where the basis of the action is more tenuous. For example, in another Hillsborough County case the court awarded $4 million to a 16-year old and his parents for a broken arm suffered in a schoolyard football game.[288] The verdict went against the plaintiff's school[289] for its failure to appropriately supervise the pick-up game even though a school bully was blamed for the injurious tackle.[290]

DELAWARE

Delaware's civil justice system is generally considered to be among the most fair and reasonable in the country.[291] Nevertheless a troubling trend continues: Delaware is becoming an increasingly popular destination for asbestos claims that used to be filed in Madison County, Illinois. In March of this year, the first trial from the initial wave of asbestos filings resulted in a $2 million verdict.[292] The next asbestos trial was a consolidated action of 20 plaintiffs with four more groups of plaintiffs waiting their turn.[293] *The Record*, which has followed many of these lawsuits because they were filed by the Madison County-based SimmonsCooper law firm, reports that SimmonsCooper and Baron & Budd of Houston also have filed hundreds of benzene cases in Delaware through the local law firm of Bifferato, Gentilotti and Biden. The Biden is Joseph Biden III, now serving as Delaware's attorney general. He's also the son of U.S. Senator and presidential candidate Joseph Biden Jr.[294]



Since May 2005, when the first out-of-state asbestos claims were filed, there have reportedly been 576 additional asbestos cases filed through September 2007.[295] Approximately 445 of these cases were filed by out-of-state law firms.[296] Few, if any, of these out-of-state cases involve alleged exposures occurring in Delaware or have any other connection to the state.[297] Nevertheless, many of these cases are scheduled for trial in 2008.[298]

In response to this influx of out-of-state asbestos litigation, the President Judge of the Supreme Court of Delaware formed a committee to consider the issue in relation to all toxic-tort litigation in Delaware Superior Courts, and to examine the current procedures in place.[299] This committee, comprised of five members of the Delaware Bar, will make recommendations to the Court on how to best address the litigation overflow.[300]

One reason Delaware attracts lawsuits from out-of-state plaintiffs and law firms – other than the fact that many U.S. companies are headquartered there – is that its courts are allowed to fast-track a set of cases for trial and discovery. Earlier this year, more than 350 products liability cases were filed against AstraZeneca in Delaware in a single month, bringing the total to 648 such cases on the state's dockets.[301] This surge in filings over the anti-psychotic drug Seroquel exceeded the total number of such cases filed there in the last two years.[302] In this instance, it is believed that the personal injury lawyers filing these lawsuits in Delaware are trying to avoid being folded in to the federal multidistrict litigation in Tampa so that plaintiffs may have "as many different pressure points on AstraZeneca as [they] can obtain."[303]

CALIFORNIA

ATRF continues to receive feedback from surveys pointing to Los Angeles, formerly known as "the bank," and San Francisco as jurisdictions that should be carefully watched for litigation abuse. In addition, the *Sacramento Bee* studied the "uniquely generous payouts" that California law generally allows for those filing lawsuits against private businesses and public agencies under the federal Americans With Disabilities Act (ADA).[304] Under the ADA, private plaintiffs can seek injunctive relief and attorneys fees, but under California laws, such plaintiffs also can collect up to $4,000 in damages per violation in some instances and three times actual damages in others.[305]

While some suits target big companies and state parks, others go after "mom-and-pop businesses – many of them owned by immigrants with limited knowledge of English – who tend to settle quickly, sometimes without being told what needs to be fixed."[306] In rejecting one case where it was questionable whether the plaintiff even visited the defendant's restaurant, the judge wrote, "Despite the important mission of the ADA, there are those individuals who would abuse (it)."[307]

At least one small business owner is fighting back. Huy Dinh, who was sued because "a work station at his business was too high for disabled persons," filed a lawsuit against David Gunther and Morse Mehrban for filing frivolous lawsuits "to extort money from small businesses."[308] The suit alleges malicious prosecution, fraud and abuse of process.

California continues to be the host of speculative lawsuits, such as those trying to find liability against certain companies for the global phenomenon of climate change. Earlier this year, EarthRights filed a lawsuit against Occidental Petroleum related to allegations by 25 indigenous Anchuar plaintiffs regarding events in their hometown in Peru. The villagers' claims reportedly were rejected in Peru, but so far, the case in Los Angeles continues.[309]

On a positive note, a California appeals court sent packing a litigation tourist in Los Angeles because his claim had no legitimate connection to that jurisdiction. The case involved allegations relating to asbestos exposure by an Illinois man who worked in Illinois for the Illinois Central Railroad.[310]

"Out-of-state lawyers have been lured to California by its laws, setting up shop to sue businesses, using local disabled people as clients."[311]

—Sacramento Bee

OTHER AREAS TO WATCH

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

- **Philadelphia, Pennsylvania.** Medical malpractice continues to be the Philadelphia story. "[H]orror stories . . . about frivolous cases, 'shotgun' lawsuits and [the] poor medical malpractice environment" abound.[312] Said one doctor who practiced in South Philly from 1983 until 2001, when he left for the lower malpractice premiums in South Carolina: "The malpractice climate in Philadelphia is atrocious."[313]

  The head of Doctor's Advocate, a local group, who had been a trial lawyer himself agreed, saying that people should not be fooled by the decrease in the number of lawsuits filed: "The number of case filings is irrelevant because the number of doctors sued continues to rise. This is why physicians continue to leave the state, retire early, and close their practices – and why younger doctors aren't opening practices in Pennsylvania."[314] The numbers bear this out. Only four percent of Pennsylvania's physicians are under 35 years old, and only eight percent of medical residents graduating from the state's medical schools in 2005 stayed to practice.[315] The Politically Active Physicians Association has been following the medical fallout from the lack of available care in Pennsylvania and has attributed several deaths to unavailable services.

  Additionally, a Pennsylvania Superior Court ruled that a Philadelphia trial judge must explain why he awarded $4.1 million in attorneys fees when plaintiff class members received only $600 each for new brake jobs.[316] The total plaintiff award would max out at $5.6 million if everyone collected. In another case, a Philadelphia judge upheld a verdict in part because, in her opinion, the defendant, McNeil-PPC, raised too many appealable issues.[317] Maybe she should not have made so many alleged mistakes?

- **Tucson, Arizona.** Seems like the Philadelphia story is playing out in Tucson as well, as "[m]any Arizona physicians assert that increasing malpractice insurance premiums – coupled with perennially low reimbursement rates from health care providers – are threatening to knock them out of business."[318] The city has only one trauma center, with no other hospitals having specialists on call 24 hours a day, "making it necessary to send patients for treatment in places like Phoenix, San Diego and Albuquerque."[319]

- **Mississippi.** Justice may be for sale in some parts of the Magnolia State. Two former Mississippi judges were convicted for taking part in a bribery scheme orchestrated by a prominent plaintiffs' attorney to receive favorable rulings in major asbestos, medical malpractice, and car safety cases.[320] The combined amount the judges received was in excess of $150,000, which reportedly led to millions of dollars in plaintiff settlements.[321] At sentencing, the presiding judge remarked, "Lady Justice is sobbing."[322] And as reported in the November 30, 2007 edition of the *Wall Street Journal*, famed Mississippi plaintiff's atorney Richard "Dickie" Scruggs and others were indicted by a federal grand jury for conspiring to bribe a judge.

- **Cuyahoga County, Ohio.** "Professional plaintiffs" alleging violations of the Americans with Disabilities Act are at it in Cleveland. The actions, often brought by out-of-state activist groups, have angered some local advocates for the disabled. Said Cleveland attorney Bruce Hearey: "The end result may make some sense, but their tactics are flat-out wrong. [The] tactics are more about remunerating the lawyers than fixing anything."[323] In another case, the Ohio Supreme Court threw out a $30 million verdict that a Cleveland judge had allowed to stand, saying that the plaintiff's lawyer improperly inflamed the jury. Even the dissenting justice acknowledged that the trial judge should have restrained the plaintiff's lawyer.[324]

- **Baltimore, Maryland.** In a jurisdiction with a reputation for asbestos litigation abuse, the city's circuit court "open[ed] the door for a slew of future asbestos lawsuits."[325] It was the first time that liability was associated with certain brake pads that were used in cranes at the Bethlehem Steel plant.

- **Providence, Rhode Island.** Last year the notorious public nuisance trial in the state's lead paint case put Providence on the Watch List for the first time. It remains a place to watch, as this year, the jurisdiction played host to the "largest medical-malpractice verdict" in the state's history.[326]

Dishonorable Mentions

Dishonorable Mentions recognize a particularly abusive practice, unsound court decision or other action that damages the fairness of a state's civil justice system. This year, events in the District of Columbia, Georgia and Oklahoma have earned this distinction.

DISTRICT OF COLUMBIA

CONSUMER PROTECTION LAW TAKES SMALL BUSINESSES TO THE CLEANERS

An astounding lawsuit in the District of Columbia highlights the need for reform of consumer protection laws there and around the nation. This year, national and international media reported the public outcry after Roy Pearson, Jr. sued his family-owned neighborhood dry cleaners over an allegedly misplaced pair of pants. He first sought a mind-boggling $65 million in damages. After sober reconsideration, Pearson reduced his claim to just $54 million.[327] His "pantsuit," as it became infamously known, did not simply seek the cost of replacing the pants. Rather, Pearson claimed that the dry cleaner violated the District of Columbia's consumer protection law by posting a "Satisfaction Guaranteed" sign and not living up to this goal.[328]

The facts underlying this lawsuit are extraordinary to the extent that they are completely ordinary and relate to everyday trifles of life. In 2005, Pearson took five suits to his neighborhood dry cleaner for alterations. When he returned, one of the suits was allegedly missing its pants.[329] After bringing this issue to the attention of the Custom Cleaners' owners, the Chung family, Pearson explained that the pants he received were not the correct ones and asked to be compensated for the entire suit, valued at $1,150.[330] When the Chungs did not acquiesce, noting that the returned pants matched Pearson's inseam measurements and the ticket on the pants matched his receipt, Pearson initiated the lawsuit under the District's Consumer Protection Procedures Act (CPPA).[331]

The CPPA allows any member of the public to collect damages in the amount of $1,500 "per violation" for conduct that might mislead consumers, even if that particular individual was not deceived and did not experience a financial loss as a result. The District's consumer protection law is somewhat unique in allowing any member of the public to sue, reminiscent of a similar law in California that led to such widespread abuse against small businesses that voters had to directly intervene through a ballot initiative to change it. The District law is not alone, however, in providing for recovery of damages that are out-of-line with any economic loss allegedly experienced by the plaintiff and in not specifically requiring that a consumer actually be misled by a business's representation before suing for a cash award.

Pearson had worked for roughly 25 years as a plaintiffs' lawyer and, until being fired late this year, had served more recently as an administrative law judge with the D.C. government's Office of Administrative Hearings. So he knew very well how to take advantage of a law that is ripe for abuse.[332] He needed no more than a basic calculator to turn a pair of pants into a multimillion-dollar suit by multiplying the number of days over four years in which the signs hung in the store, by the number of purported consumer violations, and by the number of family members who worked in the store. Pearson also oddly claimed the owners should pay him $15,000 to rent a car every weekend so that he could drive to another dry cleaning establishment.[333] He apparently believed he had a right to a dry cleaner within four blocks of his residence.[334]

While this lawsuit may appear frivolous to the average person, the broad wording of the CPPA kept Pearson's lawsuit alive for more than two years and required a two-day trial at taxpayers' expense. In fact, the threat to the small business was so serious that the Chung's made three settlement offers to Mr. Pearson. Those offers began at $3,000 (more than double the price of a replacement suit), increased to $4,600 and finally topped out at $12,000.[335] He rejected each one, preferring to go for the multimillion-dollar jackpot.[336]

Ultimately, after a bench trial, D.C. Superior Court Judge Judith Bartnoff rejected Pearson's claim in a 23-page ruling, finding that he was "not entitled to any relief whatsoever."[337] To the court's credit, Judge Bartnoff ordered Pearson to pay the Chungs' court costs.[338] The Chungs, to their credit, did not ask the court to hold Pearson additionally responsible for their attorney's fees. Instead, they held out an olive branch after their bittersweet victory and hoped to dissuade Pearson from appealing the case. But Pearson was unwilling to cease and desist and, according to the Chung's attorney, his appeal to the D.C. Court of Appeals will likely be heard sometime in February 2008. In the meantime, the Chungs have been forced to sell Customs Cleaners and face continuing legal costs as Pearson's seemingly vindictive appeal runs its course.

With simple legislative measures, the D.C. Council can limit such outrageous manipulation of the District's well-intentioned consumer protection law in the future and make it easier for honest, hardworking small business owners to thrive. By requiring plaintiffs to prove that they actually relied on a supposedly fraudulent or deceptive advertisement or representation, lawmakers could drastically reduce this kind of lawsuit abuse. The D.C. Council also would do well to set the measure of damages at the plaintiffs' out-of-pocket costs, rather than "$1,500 per violation." If Pearson had simply limited his claim against the Chungs to the cost of a new suit, alterations and any reasonable legal expenses, then this case would not have become an international embarrassment and added to D.C.'s reputation for being hostile to small business. (D.C. finished dead last in the Small Business and Entrepreneurship Council's 2007 *Small Business Survival Index*, which ranked the 50 states and the District for their policies affecting entrepreneurs.)

MISSOURI SUPREME COURT

NO INJURY, NO PROBLEM

Few principles are as sacred and fundamental within our tort system as the notion that a plaintiff looking to sue someone must first demonstrate some kind of injury or loss. Yet in Missouri, the mere potential for developing a future injury is now good enough.

The Missouri Supreme Court arrived at a maverick decision earlier this year in a case involving class certification for children allegedly exposed to lead but lacking any present physical injuries.[339] The class comprised all children under age five living near a lead smelter operated by the defendants and left no distinction for the degree of exposure or onset of symptoms other than living in the area for at least one year.[340] In reversing a lower court and granting class certification, the Missouri Supreme Court recognized a claim for the future costs of diagnostic monitoring and treatment of any lead-based injuries that may or may not develop.[341]

Though this lead-smelting case marked the first time Missouri's high court had addressed whether state law permitted a no-injury recovery, the court nonetheless claimed its decision was based on "well-accepted" principles of Missouri law.[342] The court's decision relied on precedent that supports medical monitoring in cases of clear underlying injuries and rulings from courts in other states that have taken a minority approach.[343] But there was not the slightest effort to address the substantial case law or obvious public policy concerns about allowing lawsuits from perfectly healthy individuals who merely allege exposure to any toxic or hazardous condition or substance. It also certified the case as a class action without accounting for the individual issues related to alleged exposure that would predominate each person's medical monitoring claim.

Show Me the Lawsuits

Carrying the court's strained logic to its illogical end, virtually every Missourian might someday bring or join in a lawsuit if, for example, an everyday activity such as talking on a cell phone or drinking coffee is linked, however tenuously, to a malady or illness of some kind. Surely the minds of Show Me State personal injury lawyers are percolating with possibilities.

Making the Missouri Supreme Court's "no injury, no problem" decision that much tougher to swallow is the fact that America's tort system already enables those injured by a latent illness to sue for past medical expenses. Thus the other five state high courts to address similar no-injury claims for medical monitoring since 2001 have rejected them.[344]

Court Resists Becoming a Nuisance, this Time

A second, narrowly decided Missouri Supreme Court ruling this year also deserves attention. The case similarly involved alleged exposure to lead, but this time revolved around the City of St. Louis's claim that the sale of lead paint and pigments decades ago created a present day "public nuisance." The city sued former makers of lead paint and pigments for the costs of paint removal and abatement, rather than require that respective property owners be held responsible.[345] In a 4-3 decision, the state supreme court appropriately rejected the city's attempt to recover abatement costs without proof that any specific defendant's product caused an injury.[346] St. Louis had tried to rely on "market-share evidence" as a substitute for actual causation.[347] In other words, rather than show that a particular defendant's paint was used on a particular property, the city asked the court to take a shortcut and simply hold them all responsible based on how much of the market they controlled when lead-based products were being sold.

Though Missouri's high court this time resisted temptation to relax the burden of proof ordinarily required in all civil claims, the close split and the majority's wholly unnecessary inference that the court might have allowed a claim lacking causation evidence if only the city had sought to recover health costs instead of abatement costs has made many observers rather uneasy about the court's direction.

MICHIGAN LEGISLATURE

AN ASSAULT ON THE CIVIL JUSTICE SYSTEM

Michigan's historically reasonable and balanced legal environment may be on the verge of some serious backsliding. In 2007, the Michigan Legislature debated a trio of bills that, if enacted, would leave personal injury lawyers with as much or more to say than government experts when deciding which prescription drugs are to be available.[348] This legislative trifecta sought not only to eliminate a reasonable liability defense that limits the ability of plaintiffs' lawyers to challenge the federal Food & Drug Administration's judgment on a drug's safety and effectiveness in state courts, it also sought to revive retroactively claims not permitted under existing law.[349] Additionally, separate legislation would specifically subject pharmaceutical companies to consumer protection lawsuits, a change that would allow entrepreneurial trial lawyers to sue even if they could not find a client who suffered an adverse effect from a drug.[350]

Michigan is credited with establishing the country's first compliance defense in 1996 for drugs approved by the FDA.[351] This law provides that plaintiffs' attorneys cannot sue drug manufacturers who comply in all respects with the rigorous FDA approval process unless that manufacturer had misled the FDA or bribed an agency official to gain approval for the drug, or sold the product after a recall.[352] Hence, the existing law provides a practical defense in light of an FDA approval process that, according to Michigan Representative Fulton Sheen, "is by leaps and bounds the most stringent, costly and time-consuming drug approval process in the world."[353] By permitting claims where it is alleged that a drug company misled the FDA, Michigan law does not provide an absolute immunity from liability as some of its opponents argue.[354] Consequently, this balanced reform, which has been the model for statutes and adopted by courts in other states,[355] ensures that decisions about the safety and effectiveness of prescription drugs and the adequacy of accompanying warnings are made by experts at the FDA acting in the public interest, not by personal injury lawyers motivated at least in part by their own self-interest.

As one Michigan doctor explained in an editorial, "Ethical companies are not intentionally pushing dangerous drugs and risky treatments 'just to make a dollar.' They must not be held responsible for every adverse reaction that comes about through the use (including the consumer-driven misuse and overuse, which is clearly the consumer's responsibility) of FDA-approved products to the tune of millions and millions of dollars."[356]

Legislators have expressed concern regarding the effect that the proposals, if enacted, could have on employment in the state. As Representative Tonya Shuitmaker warned, "The legislation is the nail in the coffin for Michigan jobs."[357] The pharmaceutical industry, in particular, is critical to the state's employment environment and its burgeoning life-sciences industry.[358] But shortly after Governor Jennifer Granholm indicated her support for the anti-drugmaker bills in January,[359] Pfizer announced plans to close two plants in the state which, University of Michigan economists said, supported roughly 6,000 jobs.[360]

In past years, the Michigan legislators had wisely refused to consider such legislation.[361] But this year, the House actually approved these bills by significant margins. And though the Senate ultimately stopped them,[362] observers in Lansing believe similar legislation will likely be reintroduced in 2008. Thus Michigan emerges as a state to watch with the potential to become a new haven for pharmaceutical litigation.

GEORGIA SUPREME COURT

JUDICIAL NULLIFICATION OF TORT REFORM

Over the past year, the Georgia Supreme Court has twice invalidated portions of laws enacted to improve the fairness of the state's litigation environment. These 2005 reforms were designed to end historic abuses with respect to asbestos and medical malpractice litigation in particular. As a result of the court's repudiation, personal injury lawyers are continuing to file lawsuits with questionable merit.

The most recent ruling, handed down in May 2007, involved a law requiring plaintiffs in medical malpractice cases to file an authorization form to facilitate the investigation and evaluation of such claims.[363] The law required plaintiffs to provide the defendant's attorney with access to medical records and authorize the defendant's attorney to discuss the plaintiff's treatment with his or her physician.[364] This safeguard was put in place so that a doctor could rightly assess the merits of a claim at the onset of litigation. The Georgia Supreme Court invalidated this requirement because the authorization guidelines did not expressly state that a plaintiff had the right to revoke the authorization; a provision required by a federal health privacy law.[365] The court could have interpreted the state law consistently with the federal law, requiring such notification, but instead opted to invalidate the provision completely. The effect of the ruling in the absence of corrective legislative action is that doctors are again at a disadvantage in responding to and evaluating medical malpractice claims.

In late 2006, another Georgia Supreme Court decision invalidated the state's procedures for filing asbestos lawsuits, which have proliferated in recent years. That law required claimants to show that asbestos was a "substantial contributing factor" to their medical condition.[366] This was intended to assure that only meritorious claims would proceed in the legal process and as a deterrent for attorneys flooding the courthouse with specious claims in the hopes of cashing in on a quick settlement. This reform amended the previous statutory language which stated that asbestos must be a "contributing factor."[367] The court held that the application of this provision to pending claims violated the substantive rights of those parties, and it struck down the provision in its entirety.[368] Georgia courts are already feeling repercussions from this decision. The ruling allowed approximately 860 asbestos lawsuits to proceed. The majority of these cases name the same defendant[369] – a common problem in asbestos litigation whereby a defendant is inundated with claims and lacks the resources to fully investigate all of them. Dubious or unsupported claims can then infiltrate the system and eat away at settlement funds that would otherwise go to truly ill claimants; precisely what the legislature sought to avoid.[370]

The Georgia Supreme Court's recent decisions illustrate a backsliding from the state's comprehensive reform package. The procedures for the filing of asbestos and medical malpractice claims were major parts of legislation enacted in 2005. And they are not the only parts to have been invalidated. Early in 2006, the Georgia Supreme Court struck down a portion of the law designed to level the playing field for defendants in cases of medical malpractice by allowing them to move a lawsuit to their home county if the alleged offense occurred there.[371] With three portions of the law struck down since its enactment only two years ago, the state's high court has dramatically chipped away at litigation fairness in Georgia, removing reasonable safeguards and moving justice in the wrong direction.

OKLAHOMA DOUBLE PLAY

FAIRNESS SUFFERS SETBACK AT HANDS OF STATE SUPREME COURT AND GOVERNOR BRAD HENRY

Oklahoma went through a roller coaster year that included the state's supreme court striking down litigation reforms enacted in 2003, the legislature eagerly passing new reforms, and a governor long-supportive of such measures ultimately vetoing the legislation. As a result, Oklahomans have squandered some of the progress made in recent years and additional reforms have lost momentum.

In December 2006, the Oklahoma Supreme Court invalidated a basic requirement that plaintiffs support their medical malpractice claims by including a physician's affidavit.[372] This provision, part of the Affordable Access to Health Care Act enacted in 2003, was intended to discourage the filing of unsupportable medical malpractice claims.[373] In fact, the law was highly effective, credited with cutting malpractice lawsuits by as much as 60%.[374] The Oklahoma State Medical Association found that "this [certification] requirement has done more to eliminate the filing of frivolous lawsuits in Oklahoma and every state where it has been passed than any other lawsuit reform issue."[375] Yet, the Oklahoma Supreme Court invalidated the reform on the basis that it did not treat medical malpractice claims like other negligence claims, and that it created a barrier to court access with the modest cost associated with obtaining the affidavit.[376]

In the first full month after the ruling, more lawsuits were filed against Oklahoma physicians than in any month since the requirement took effect.[377] In response, the legislature proposed an amendment to the law to address the constitutional issues raised by the court.[378] At the same time, the Oklahoma legislature was actively considering a set of additional, long awaited civil justice reforms.[379] Eventually, the various measures were joined in a comprehensive bill that built on the successful reforms of neighboring Texas.[380]

Oklahoma Governor Brad Henry had long called upon the legislature to outdo Texas's successful tort reform package[381] and pass the Affordable Access to Health Care Act.[382] In April 2007, the legislature responded by passing a comprehensive reform that addressed the majority of Governor Henry's goals.[383] Governor Henry stunned many legislators, however, when he vetoed the bill he had called for for years. The man who had described himself as a "leading proponent of lawsuit reform"[384] apparently vetoed the legislation he helped to design because he supported only 47 of its 49 provisions.[385]

Had Governor Henry signed the legislation, it would have closed a number of traditional avenues for lawsuit abuse. First, the legislation would have addressed the constitutional issue leading to the Oklahoma Supreme Court's invalidation of the medical malpractice law, expanding its application to all types of professional liability and providing plaintiffs with more time to produce the affidavit.[386] In addition, the legislation included: a limit on noneconomic damages to prevent excessive verdicts, elimination of joint and several liability to make defendants pay only their fair share of responsibility, limits on prejudgment interest and standards for ensuring reliability of expert testimony.[387] The package also required potential members of a class action to opt into a lawsuit, providing individuals with more control over who may represent them in court. According to state treasurer Scott Meacham, who is also Governor Henry's lead negotiator on lawsuit reform, the negotiations stalled over the "opt-in" class action provision and on limiting noneconomic damages.[388]

The Oklahoma Supreme Court ruling and Governor Henry's veto has set back reasonable civil justice reform in Oklahoma. For years the state has attempted to catch up to other states in enacting laws that help attract more jobs and make health care more affordable and accessible. As even Meacham, the Governor's lead negotiator, concluded, "A golden opportunity to pass the most meaningful tort reform in state history was missed."[389]

Points of Light

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

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

In its "Points of Light" section, this report highlights jurisdictions where judges, legislators, the electorate and the media intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the desultory depths of a Hellhole, or keep itself from sinking to those depths in the first place. This year court rulings in Ohio, Florida and Mississippi, and the positive impact of legislation in West Virginia, provide reason for optimism.

WEST VIRGINIA:

MEDICAL MALPRACTICE REFORMS YIELD RESULTS

In 2003 the West Virginia Legislature responded to a medical malpractice liability crisis.[390] A history of inflated jury awards in the state led to skyrocketing insurance premiums and an exodus of state physicians. Quality of care was severely compromised, prompting legislative action through the imposition of caps on noneconomic damages such as pain and suffering. As a result of these efforts, the medical liability climate in West Virginia is entirely different today.

A report released by the West Virginia Insurance Commissioner at the conclusion of 2006 found that the medical malpractice environment in the state "showed dramatic improvement" in the years following the reforms.[391] Specifically, the number of malpractice claims dropped by nearly half from 379 in 2001 to 193 in 2005.[392] The average paid settlement also decreased from $374,908 in 2003 to $241,006 in 2005 – more than a 35% reduction.[393] Other insurance industry ratios actually show West Virginia outperforming the national average in some categories.[394]

Insurance premiums for doctors have steadily dropped, too, as the state's major medical malpractice underwriters continue to slash rates.[395] For example, in 2006 West Virginia's largest medical insurer, the Physician's Mutual Fund, decreased its premium rates 5%,[396] and then reduced them again by 15% in 2007.[397] To put this reduction in greater perspective, the state-created mutual fund insures approximately 70% of the doctors in West Virginia.[398] The Physician's Mutual Fund also provided the lowest rates among the major malpractice insurance underwriters prior to the 15% premium reduction.[399] As both an orthopedic surgeon and chairman of the Physicians' Mutual Board, Dr. Robert Ghiz summed up the situation with, "We're sort of thrilled."[400]

The trickle-down effect of these reforms is credited with a surge in the number of doctors coming to West Virginia. For instance, the chief operating officer of Charleston Area Medical Center Dr. Glenn Crotty Jr. observed, "We were almost at zero [new physician recruits] before tort reform. And we had several doctors leaving."[401] Since the reforms, the hospital has recruited 30 doctors annually for a total of almost 100 new hires.[402]

Tangible results like these shows the tremendous impact liability reform can have in a state. West Virginia now enjoys an influx of doctors, thanks to lower insurance premiums, and a drastically reduced volume of litigation. Excessive malpractice

awards are now controlled through reasonable reforms, the combined effect of which led the insurance commissioner to conclude that the state's medical liability "crisis" has finally ended.[403]

OHIO JUDGE DENIES FABRICATED CLAIMS

THE ASBESTOS BUCK STOPS HERE

Against the backdrop of an asbestos litigation environment historically fraught with abuses, Judge Harry A. Hanna of the Court of Common Pleas for Cuyahoga County, Ohio emerged as a legal star in 2007 by finally saying enough is enough.[404] Judge Hanna, who runs Ohio's multidistrict litigation (MDL) asbestos docket, barred the prominent California personal injury law firm Brayton Purcell from practicing before his court after he discovered that the firm misrepresented its client's asbestos exposure history in order to facilitate recovery under multiple asbestos bankruptcy trusts.[405]

The case that revealed this fraud and drew even greater attention to asbestos litigation nationwide was brought on behalf of Harry Kananian, who died in 2000 from the asbestos-related cancer mesothelioma. Brayton Purcell and a collaborating law firm, Early Ludwick & Sweeney, recovered as much as $700,000 for Kananian through claims made against several asbestos bankruptcy trusts and dozens of solvent defendants.[406] These claims essentially blamed Kananian's death on shipyard and factory exposure to asbestos over several decades.[407] In an attempt to recover yet again in a scheme often referred to as "double-dipping,"[408] Brayton Purcell then shifted its focus to Lorillard Tobacco Co., which had made a cigarette with an asbestos-containing filter in the 1950s. The firm tried to blame Lorillard for Kananian's mesothelioma, arguing that it was four years of smoking cigarettes with trace amounts of asbestos in the filters, rather than decades of factory and shipyard exposure, that produced Kananian's disease.[409]

As Judge Hanna explained, "It was lies upon lies upon lies."[410] The asbestos claims previously filed with other bankruptcy trusts, on which Judge Hanna permitted discovery, detailed a different exposure history and helped unravel this deception. Judge Hanna and Lorillard's defense attorneys also navigated through several attempted cover-ups in this pursuit of the truth, which Judge Hanna documented in a scathing opinion that highlighted more than a dozen specific instances of untruths, misconduct and obstructionist tactics.[411] This "nine month saga of frustration," as Judge Hanna called it, ultimately resulted in Brayton Purcell withdrawing from its representation of Kananian and Judge Hanna revoking the firm's privilege to appear before his court.[412]

Judge Hanna's actions emphasize that fraud in mass tort litigation remains a major problem. This is particularly true regarding bankruptcy trust claims which are handled predominately by a small coterie of plaintiffs' attorneys. Perhaps the exposure and national attention garnered by Judge Hanna's ruling hopefully will send a message around the country that such abuses will no longer be tolerated or go uninvestigated.

FLORIDA COURTS OVERTURN EXCESSIVE VERDICTS

SUNSHINE STATE RAINS ON PUNITIVE DAMAGES

Recent decisions by the Florida Supreme Court and a state appellate court to overturn two multibillion-dollar verdicts collectively provide a much needed ray of hope for a state clouded by unpredictable and disproportionate awards. The first of these high-profile rulings reversed a whopping $145 billion punitive damages hit on the tobacco industry;[413] the second vacated a $1.58 billion verdict against Morgan Stanley for defrauding billionaire financier Ronald Perelman.[414]

In *Engle v. Liggett Tobacco Group*, the Florida Supreme Court delivered a strong dose of reality by unanimously finding that the punitive damage award, which could potentially sink the entire tobacco industry, was "excessive as a matter of law."[415] While it may appear obvious that a $145 billion punitive award is excessive, a Miami-Dade Circuit Court felt otherwise in 2000.[416] That trial was the longest civil trial in U.S. history.[417] The punitive damages award was a result of an unprecedented, highly prejudicial and unconstitutional trial plan adopted by the Florida trial court that had a jury punish the defendants with punitive damages before even considering whether they had caused the plaintiffs' injuries and if so, what amount of compensatory damages would be appropriate. The intermediate appellate court also found that the plaintiff's counsel made remarks that were extraordinarily inflammatory, including racial pandering, pleas to disregard the law, references to evidence not before the court and derogatory remarks about opposing counsel.[418] The result was an out-of-control verdict that helped earn South Florida its reputation as a Judicial Hellhole.

Attempting to set things right, the Florida Supreme Court did not stop at merely reversing the punitive jury award. It went a step further and ruled to decertify the class action, which was brought on behalf of approximately 700,000 Florida smokers.[419] The court went on to state that the "highly individualized" injuries related to smoking did not warrant class action treatment, and that each of the claimants would have to prove injury under traditional elements of causation.[420] Nevertheless, the state's high court did not express the same indignation as the mid-level appellate court and established a highly unorthodox and unfair procedure. Despite the highly tainted trial, it retained some of the factual findings of the trial, effectively allowing plaintiffs to skip over certain types of medical evidence in litigating their own individual claims against tobacco companies so long as they file within one year of the ruling.[421] This could result in a flood of individual claims. It also creates a very serious conundrum for the application of Florida's comparative fault law. A new jury will be asked to compare the negligence of the plaintiff before the court with a finding made by a prior jury that the defendant's product is defective. In other words, the new jury will only be looking at half of the picture.

In March 2007, a Florida court of appeals handed down a separate ruling finding excessive a $1.58 billion verdict against the financial services firm Morgan Stanley.[422] The decision upheld a Palm Beach Circuit Court jury's finding that Morgan Stanley defrauded financier Ronald Perelman by conspiring to mislead him in the sale of his camping supplies company Coleman, but vacated the verdict.[423] With pretrial interest, the verdict was believed to be the largest in Palm Beach County history;[424] a considerable achievement for a county within the South Florida Hellholes jurisdiction.

The reversal of both the $145 billion and $1.58 billion punitive awards marks a significant development in reining in juries and sending the message that outlandish awards will not ultimately hold up in Florida.

MISSISSIPPI SUPREME COURT

NO INJURY, NO MONEY

Occasionally, sound and forward-looking decisions by state supreme courts slip through the cracks and receive very little media attention despite significant legal ramifications. This can occur when a decision's impact is not fully appreciated or easily digested into a news headline or sound bite. The Mississippi Supreme Court's medical monitoring ruling in January 2007 presents such an example wherein a seemingly innocuous pronouncement of state law to deny a medical monitoring claim effectively ended what could have developed into a critical state issue. It stands in stark contract to a ruling by the Missouri Supreme Court that came to the opposite conclusion (*see* Dishonorable Mentions, Missouri Supreme Court, p. 26).

In *Paz v. Brush Engineered Materials, Inc.*, the Mississippi Supreme Court rejected a claim for costs associated with monitoring potential injuries due to exposure to beryllium.[425] These claims were brought on behalf of private-sector workers who may have been exposed to beryllium but suffered no actual physical injury as a result.[426] Nevertheless, they sought the establishment of a medical monitoring fund to stay abreast of any possible development of Chronic Beryllium Disease, which impairs the lungs and often causes death.[427]

In answering a certified question from the United States Court of Appeals for the Fifth Circuit,[428] the court made clear that allowing a cause of action for medical monitoring without establishing an identifiable injury "would require an unprecedented and unfounded departure from the long-standing traditional elements of a tort action."[429] The impact of this decision reaches far more than those individuals exposed to beryllium. A contrary decision could have triggered an avalanche of lawsuits by individuals exposed to any of numerous potentially harmful substances, including lead paint, asbestos, silica dust or others. The Mississippi Supreme Court's ruling aligns with the majority of states which have rejected such a claim.[430] Several perennial Hellholes jurisdictions make up the minority of states which have permitted such an action.[431] This well-reasoned decision exemplifies the progress Mississippi has made since its past years on the Judicial Hellholes list.[432]

HOW A BILL BECOMES A LAW 101

OHIO SUPREME COURT REJECTS ATTEMPT TO VETO LEGISLATION AFTER IT BECOMES LAW

In 1903 Ohio's governor received the veto power by a state constitutional amendment.[433] In 2007, more than a hundred years later, there was an unprecedented constitutional face-off between all three branches of state government.[434] The controversy arose when newly elected Governor Ted Strickland "vetoed" a bill passed by the legislature in a previous session and already sent by his predecessor to the Secretary of State to be recorded as law.[435] Governor Strickland's late veto proved to be too late when the Ohio Supreme Court ruled it unconstitutional.

At issue is whether an incoming governor, within his first fifteen hours in office, can veto legislation enacted by the previous legislature.[436] More precisely, the question can be stated as "When does a bill become law?" – something the campy 1970s educational cartoon does not effectively cover. In this instance, the Ohio General Assembly passed legislation limiting damages for pain and suffering in consumer protection lawsuits, damages that are not ordinarily available at all in most other states. [437] The legislation also required that a claimant in a products liability action show that an injury was actually caused by a product of the named defendant,[438] a commonsense measure that promotes fairness for civil litigants. Business groups predicted courts would be flooded with lead paint lawsuits if Strickland's veto was allowed to stand.[439]

Once the legislature passed the bill it was sent to then-Governor Bob Taft. Ohio's Constitution spells out three options for the governor to act on legislation: he can sign the bill, veto all or parts of it, or take no action and allow the bill to become law in 10 days.[440] Outgoing Governor Taft took the "no action" route.[441] When he was presented the legislation on December 27, 2006, he did not sign it, but he filed it with then-Secretary of State Ken Blackwell who certified it to become law.

On January 8, 2007, however, Governor Strickland took office and asked his new Secretary of State, Jennifer Brunner, for the legislation back. She complied and Governor Strickland quickly vetoed the tort reform law that day. Legislators challenged Brunner's authority to return the certified legislation because, they argued, it had already become law by then.[442] The timing of the veto also raised a point of heated contention over whether it even came within the 10-day window.[443] Nevertheless, Governor Strickland stood by his veto, which suppressed the legislation.

Governor Strickland's motivations behind this potential usurpation of authority appear highly politicized. The legislation was passed by a Republican-controlled legislature and presented to a Republican governor. As a newly elected Democrat, Governor Strickland tried to veto the law, which understandably outraged many legislators and prompted their challenge of his action. As the constitutional chal-

lenge was pending, Attorney General Marc Dann, who had tried unsuccessfully to persuade former Governor Taft to veto the bill,[444] wasted no time in filing a lawsuit against the lead paint industry, hoping to avoid the evidentiary need to link particular manufacturers to paint at the particular properties at issue.[445]

On August 1 the Ohio Supreme Court reached a reasonable, nonpartisan decision that preserves the balance of power between the legislative and executive branches in the state. The court found Governor Strickland's veto invalid, finding that it came after expiration of the 10-day period for such an action.[446] The result is that the reasonable reforms passed by the legislature, and permitted to become law by Governor Strickland's predecessor, remain in effect.

COURTS HOLD THE LINE ON PUBLIC NUISANCE CLAIMS

Several rulings and verdicts around the country that have held the line on runaway public nuisance lawsuits collectively earn a point of light. As noted in last year's Judicial Hellholes report, personal injury lawyers and some state attorneys general have engaged in a concerted effort to move public nuisance theory far outside its traditional boundaries to get around the well-defined structure of products liability law. They seek to transform public nuisance theory into a super tort by "convert[ing] almost every products liability action into a [public] nuisance claim."[447] The result, as one court explained, would be a public nuisance "monster that would devour in one gulp the entire law of tort."[448]

The poster child of public nuisance theory abuse remains the Rhode Island attorney general's lawsuit against the former manufacturers of lead pigment and paint. In that case the court stripped or redefined the traditional elements and restrictions from public nuisance law that have kept the tort in check throughout the entire history of American jurisprudence; namely, that there must be an unreasonable interference to a common right caused by a party who had control over the nuisance. (*See* Judicial Hellholes 2006 report.) The trial court is going ahead with the abatement part of the proceedings while the liability aspect is being appealed to the state supreme court. The Rhode Island high court reportedly will review the case in 2008.

If the Supreme Court of Rhode Island affirms the trial court's abuse of public nuisance theory, it will be acting against a clear trend of state high courts and juries that have rejected these highly speculative lawsuits. Consider the events from June of 2007:

- First up was the Supreme Court of Missouri, which ruled in *City of St. Louis v. Benjamin Moore & Co.* to hold the line on traditional rules of causation.[449]

"Without product identification, the City can do no more than show that the defendants' lead paint may have been present in the properties where the City claims to have incurred abatement costs. That risks exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability entirely.... Absent product identification evidence, the City simply cannot prove actual causation."[450]

—Supreme Court of Missouri in *City of St. Louis v. Benjamin Moore & Co.*

- Less than a week later the Supreme Court of New Jersey, in *In re Lead Paint Litigation*,[451] also rejected the use of public nuisance theory in the product realm, stating that public nuisance law is inappropriate for assigning liability against those who manufactured a lawful product. The court held that if it were to "permit these complaints to proceed, [the court] would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance."[452] Selling a product is not the type of conduct that "creates" a public nuisance.

- Ten days after the New Jersey ruling a jury in Milwaukee held that the makers of lead pigment and paint did not cause the public nuisance that may have resulted from the misuse of their products.[453]

- In addition to these events, the Supreme Court of Ohio upheld a law enacted by the state legislature that limits damages in public nuisance claims,[454] and a California trial court held that public nuisance action brought by counties against the former lead pigment and paint makers could not be hired out under a contingency fee arrangement because of the prosecutorial-like judgment and deference needed to wage these cases.[455] These all come on the heels of a 2004 Supreme Court of Illinois decision rejecting a similar public nuisance action.[456]

Though each of these rulings and decisions may have surprised the trial bar, the courts' collective adherence to the rule of law is heartening and earns them a point of light.

Addressing Problems In Hellholes

The Judicial Hellholes project seeks not only to identify the problematic jurisdictions, but also to suggest ways in which to change the litigation environment so that these jurisdictions can shed the Hellholes label and restore fundamental fairness. As this report shows, judges often have it within their power to reach fair decisions applying the law equally to both plaintiffs and defendants, or they can tilt the scales of justice in a manner that places defendants at a distinct disadvantage. The purpose of this report is to shine light on such practices and encourage judges to live up to the guiding principle engraved atop the entrance to the Supreme Court, "Equal Justice Under Law."

But when a jurisdiction continually shows a bias against civil defendants, allows blatant forum shopping, consistently construes the law to expand liability, refuses to reduce awards that are not based on the evidence and permits junk science in the courtroom, legislative intervention may be needed. Below are a few areas in which legislators, as well as judges, can act to restore balance to the civil justice system.

Stop "Litigation Tourism." As the Judicial Hellholes report demonstrates, certain areas in a state may be perceived by plaintiffs' attorneys as an advantageous place to have a trial. As a result, plaintiffs' attorneys become the "travel agents" for the "litigation tourist" industry, filing claims in jurisdictions with little or no connection to their clients' claims. Fair venue reform would require plaintiffs' lawyers to file cases in the county in a state in which the plaintiff lives, was injured, or where the defendant's principal place of business is located. *Forum non conveniens*, a related concept, allows a court to refuse to hear a case if it is more closely connected to another state, rather than in a different area of the same state.[457] *Forum non conveniens* reform would oust a case brought in one jurisdiction when the plaintiff lives elsewhere, the injury arose elsewhere and the facts of the case and witnesses are located elsewhere. By strengthening the rules governing venue and *forum non conveniens*, both legislatures and courts can ensure that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff. In addition to state reform, the federal Lawsuit Abuse Reduction Act (LARA), which had been introduced in the last two Congresses, would provide a nationwide solution to unjust and unreasonable forum shopping. LARA passed the House of Representatives by a vote of 228-184 in October 2005,[458] which marked the second time the House passed the bill, having approved it by a similar margin in the closing days of Congress's 2004 session.

Restore Consequences for Bringing Frivolous Lawsuits. Frivolous lawsuits often leave small businesses (including mom and pop stores), restaurants, schools, dry cleaners and hotels with thousands of dollars in legal costs. The tools to discourage frivolous lawsuits were dulled considerably when Federal Rule of Civil Procedure 11 was modified in 1993 and many state's followed the federal judiciary's lead. These changes gave bottom-feeding members of the personal injury bar license to commit legal extortion. Plaintiffs' lawyers found they could bring frivolous claims, knowing that they would not be penalized, because a "safe harbor" provision now allowed them to simply withdraw their claim within 21-days and thus escape any sanction. Even if sanctioned, Rule 11 no longer requires the offending party to pay the litigation costs of the party burdened by frivolous litigation. Now, with impunity, plaintiffs' lawyers can bully defendants into settlements for amounts just under defense costs.

As officers of the court, personal injury lawyers should be accountable to higher standards of basic fairness, and they should be sanctioned if they abuse the legal system with frivolous claims. Accordingly, LARA would eliminate the "safe harbor" for those who bring frivolous lawsuits and restore mandatory federal sanctions.

Consumer Protection for Actual Consumers. As the internationally infamous "pantsuit" in the District of Columbia illustrates, private lawsuits under state consumer protection acts (CPAs) have strayed far from their originally intended purpose of providing a means of reimbursement for ordinary consumers who purchase a product based on the misrepresentation of a shady business. Instead, such claims are now routinely generated by personal

injury lawyers as a means to easy profits, or by interest groups as a means to achieve regulatory goals they could not otherwise achieve through democratic legislative processes. Such claims are often brought on behalf of individuals who have never seen, heard or relied upon the representation at issue. Judges should apply commonsense interpretations to CPAs that recognize the fundamental requirements of private claims while discouraging forum shopping and extraterritorial application. If courts find that statutory language impedes sound public policy or fails to distinguish between public law and private claims, state legislators should intervene. As Ted Frank, a fellow at the American Enterprise Institute, wrote in the *Washington Post*, "Consumer-fraud laws need to be rewritten so that they are helping consumers rather than attorneys."[459]

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

Pain and Suffering Awards Should Compensate Plaintiffs, Not Punitively Strip Defendants of Constitutional Protections. In recent years, there has been an explosion in the size of pain and suffering awards, and there is concern that they are being sought as a means to evade statutory and constitutional limits on excessive punitive damage awards.[460] Given the lack of standards in determining fair compensation for something as amorphous as pain and suffering, it is imperative that judges properly instruct juries that these awards serve a compensatory purpose and may not be used to punish a defendant or deter future bad conduct. When a jury reaches an extraordinary compensatory damages award, both trial and appellate level judges should closely review the decision to ensure that it was not inflated due to the consideration of inappropriate evidence. This would include evidence based on a defendant's "fault" as contrasted with a plaintiff's harm, and also prejudicial evidence. ALEC has developed a model "Full and Fair Noneconomic Damages Act" that would preclude the improper use of "guilt" evidence and enhance meaningful judicial review of pain and suffering awards. Ohio became the first state to adopt such legislation in 2005.[461]

Strengthen Rules to Preserve Sound Science. Junk science pushed by pseudo "experts" has tainted tort litigation for decades. For example, only this year did the Food and Drug Administration lift its fourteen year ban on silicone breast implants. The FDA put the ban in place as a result of allegations contained in class action lawsuits that had no basis in science, yet the lawsuits bankrupted companies and took away an option for breast cancer patients.[462] The more complex the science becomes, the more juries tend to be influenced by their personal likes and dislikes of expert witnesses, as opposed to the soundness of the testimony.

Ten years ago, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom.[463] The *Daubert* standard provides that, in determining reliability, the court must engage in a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts at issue."[464] There is evidence that following adoption of *Daubert*, judges more closely scrutinize the reliability of expert testimony and are more likely to hold pretrial hearings regarding admissibility of expert testimony.[465] Nevertheless, at least 20 states have not adopted anything close to the *Daubert* principles.[466] Even in courts where *Daubert* governs, some judges are not effectively fulfilling their gatekeeper role.[467] By adopting *Daubert*, taking their gatekeeper roles seriously and seeking competent, independent scientific experts, judges can better control their courts and properly return to plaintiffs in tort cases the fundamental burden of proving causation.

Ensure Access to Health Care with Reasonable Medical Liability Reforms. The inequities and inefficiencies of the medical liability system have negatively affected the cost and quality of health care, as well as access to adequate health care for many Americans. Increasing medical liability claims have forced doctors to retire early, stop performing high-risk procedures or move out of states with unfair laws. Consequently, in some areas of the country, certain medical specialists simply are not available. According to the American Medical Association, there are only seven states nationwide that are not experiencing an access-to-health-care crisis or at least dealing with some related problems.[468] Things are likely to worsen with the costly practice of "defensive medicine" becoming ever more pervasive. Commonsense medical liability reforms can help stabilize the system. These include: (1) a reasonable limit on noneconomic damages; (2) a sliding scale for attorneys' contingency fees; (3) periodic payment of future costs; and (4) abolition of the collateral source rule, so that juries may

consider compensation that a plaintiff receives from sources other than the defendant for his or her injury in determining damages. Medical liability reform can be achieved state by state, though Congressional action certainly would be the most sweeping and effective vehicle for reform.

Prioritize the Claims of Those Who Are Truly Sick in Asbestos and Silica Cases. Forum shopping, mass consolidations, expedited trials, multiple punitive damages awards against defendants for the same conduct, and the overall lack of due process afforded to defendants were issues repeatedly raised relative to asbestos litigation by survey respondents in preparation of this report. The heart of the problem is that, according to recent studies, as much as 90% of new asbestos-related claims are filed by plaintiffs who have no impairment.[469] To date, Congress has been unable to reach the consensus needed to enact a comprehensive solution. Increasingly, state courts are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Meanwhile, state legislatures are providing medical criteria that protect the ability of those who are injured to receive compensation, while preserving the rights of those who have been exposed but are not sick now to bring lawsuits later should they become sick. Therefore, state judicial and legislative actions can and have helped significantly reduce litigation abuse.

Progress at Risk: The Multistate Assault on Fairness in the Courts

Several states this year enacted important reforms to improve the fairness of the civil justice system. The legislative session, however, was largely characterized by the personal injury bar's attempts to protect and expand of their lawsuit industry. While most of their lawsuit-promoting initiatives failed in 2007, it will be important to be on guard for them in 2008.

THE LEGISLATIVE YEAR IN REVIEW: MODEST PROGRESS

Six states enacted significant civil justice reforms in 2007. Georgia reenacted and modified a 2005 law that was held unconstitutional by the Supreme Court of Georgia because of its application to pending claims.[470] The law prioritizes the claims of those who suffer from an asbestos- or silica-related condition, while preserving the claims of the unimpaired should they later develop a disease. The Georgia law also addresses liability placed on innocent corporations that never produced or sold asbestos but faced potentially bankrupting liability because they merged with another company that did – decades ago.[471] Inevitably, plaintiffs' lawyers, feeling their income streams threatened, will challenge such well-balanced asbestos litigation reforms in the courts. Perhaps the Georgia Supreme Court will be noted in the Points of Light section, rather than as a Dishonorable Mention, in next year's Judicial Hellholes report if it demonstrates respect for the legislative branch and upholds the reforms.

Over the past year Kentucky, West Virginia and Wyoming join about two-thirds of their sister states in protecting the right of a civil defendant to appeal an extraordinary verdict. Now nearly 40 states limit the amount of a bond needed to stay collection of a judgment during an appeal. Harsh appeal bond requirements can force a company to settle a case even if it is highly likely that an unfavorable judgment would be reversed on appeal.

As noted earlier in the Dishonorable Mentions section of the report, the Oklahoma legislature also passed a significant civil justice reform package that included an appeal bond provision, but it was unexpectedly vetoed by Governor Brad Henry. (*See* Oklahoma Double Play, page 28.) It remains to be seen whether the legislature can develop a bill that Governor Henry will sign and that will significantly benefit to the state's civil justice system.

THREATS IN 2007 AND BEYOND

The plaintiffs' bar has placed their focus on repealing tort reform gains, enacting new ways to sue, and increasing the size of awards. Here is a sampling of potential threats from around the nation.

Florida. A proposal that would have undermined joint and several liability reform was temporarily defeated and is likely to return in 2008. H.B. 733 would have blindfolded a jury from considering all those responsible for the plaintiff's injury when allocating fault. The trial bar's goal: rather than naming the party that holds the greatest responsibility for the injury in a lawsuit, a plaintiffs' attorney could manipulate the system by naming only a "deep pocket" defendant, even if that defendant was only slightly at fault. Under the legislation, if the jury found the named defendant liable, the defendant could be required to pay the entire judgment, regardless of whether more responsible parties had settled, were immune from suit or were located beyond the jurisdiction of the court. This legislation, however, has not gone away. The Florida legislature has formed a study group to explore the issue during recess. If enacted, the legislation is likely to bolster South Florida's attraction as a Judicial Hellhole and damage the overall fairness of the civil justice system in the state.

Illinois. Trial lawyers were successful in significantly increasing the amount of damages available under the state's wrongful death act.[472] The new law adds grief, sorrow, and mental suffering as additional measures of damages under the law, measures that can drastically increase awards because they are completely subjective with no rational bounds. Another bill, similar to that considered in Florida, would have prohibited the jury from considering any party not remaining in the litigation when determining fault, even if that party was highly responsible and was no longer before the court because it settled. That proposal passed the Senate, but did not reach a floor vote in the House before adjournment.[473]

Louisiana. Two initiatives supported by the trial bar would have greatly hurt the business climate in the state, which includes New Orleans, cited as a Judicial Hellhole in the past and still of considerable concern. The first would have authorized the state's attorney general to hire lawyers on a contingency fee basis.[474] When lawyers have a profit interest in prosecuting defendants for the government, there are serious constitutional concerns. Moreover, history has shown that private lawyers hired by states often are selected on the basis of their ties with elected officials, and it is the taxpayers who lose when these well-connected lawyers get a large chunk of the state's recovery. The second initiative would have introduced punitive damages into Louisiana law.[475] Fortunately, neither initiative became law.

Michigan. After a bill that would have repealed Michigan's FDA-compliance defense roared through the House, the proposal bogged down and did not reach a vote in the Senate. (*See* Dishonorable Mentions, Michigan Legislature, p. 26.) A significant number of state senators realized that with Michigan's struggling economy, it was a bad idea to send a message that the state was a place with expanding liability. Nevertheless, the proposal is likely to return in the future.

Missouri. A whole cadre of civil justice reforms failed to gain momentum, including needed improvements to the Missouri Merchandizing Practices Act,[476] prioritization of asbestos and silica claims above those who are unimpaired,[477] and boosting the responsibility of judges as guardians over junk science testimony.[478] The failure of the General Assembly to act and the growing pro-plaintiff attitude of the Missouri Supreme Court is turning once-neutral Missouri into a lawsuit haven.

New Jersey. Trial lawyer supported legislation in New Jersey's legislature this year would have resulted in an unprecedented expansion of damages available in wrongful death lawsuits.[479] These proposals breach reasonable boundaries that have evolved to ensure that damages are related to a plaintiff's true financial loss, not the unquantifiable and potentially unlimited emotional loss that accompanies the death of a family member. These large awards would be available to a much broader group of extended family members, as opposed to close family members who are properly permitted to recover their actual damages under current New Jersey law. Such a drastic and unnecessary expansion of liability will boost insurance costs for New Jersey automobile and home owners, doctors, small businesses and others, while providing significant shares of jackpot awards to personal injury lawyers. While these initiatives did not pass the legislature in 2007, they may be considered next year.

Texas. In recent years Texas has been among the most innovative states when it comes to civil justice reform. This year, however, an important bill did not cross the goal line. The legislation would have amended the state's Deceptive Trade Practices-Consumer Protection Act to reduce the potential for abusive lawsuits from individuals who have suffered no real harm. It would require those who sue to show that the alleged deceptive practice caused their loss and permit them to recover only their actual financial loss.[480]

Conclusion

The United States comprises more than 3,000 counties and 30,000 incorporated cites. In the vast majority of these jurisdictions diligent and impartial judges apply the law fairly. The Judicial Hellholes 2007 report shines its harshest spotlight on six of those jurisdictions. In these jurisdictions judges systematically make decisions that unfairly skew personal injury litigation against out-of-state companies and in favor of local plaintiffs. This year's report also lists several jurisdictions on its "Watch List" and awards "Dishonorable Mentions" – decisions by courts or legislatures that have unreasonably expanded liability.

In issuing its annual Judicial Hellholes report, ATRF works to restore the scales of justice to a balanced, neutral position. In that spirit the report includes a guide to reasonable measures that, if applied or enacted, might help restore even-handed justice in some parts of the country. Judges have significant autonomy when it comes to administering cases before them and thus can create mischief under any system. Judicial reforms in Madison County, Illinois demonstrate that individual judges can do a lot to clean up a Judicial Hellhole, with or without changes in the law. Judges must simply apply existing laws in a fair and unbiased manner, apply procedures that are not prejudicial to any party and conduct trials impartially. Ultimately it is the responsibility of judges to ensure that all civil litigants, not just the ones they may personally favor, receive "Equal Justice Under Law."

Endnotes

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[22] *State of Oklahoma v. Tyson Food*, Case No. 4:05-cv-00329-GKF-SAJ (N.D. Okla., filed June 1, 2007).

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[132] Michael Higgins, *Walgreens to Appeal $31 Million Error Award: Wrong Prescription Killed Man, Jury Finds*, Chic. Trib. Sept. 30, 2006.

[133] Stephanie Potter, *$25 Million Punitive Damages Award Sparks Battle*, 152 Chi. Daily L. Bull. 192, Oct. 2, 2006.

[134] One local trial lawyer, Scott Segal, who is also the husband of West Virginia Supreme Court of Appeals Chief Justice Robin Davis, has challenged West Virginia's placement as a Judicial Hellhole, defending trial court judges as working hard "dealing with criminal law, family law, child abuse and neglect" and helping the state have the lowest crime rate in the country. Cheryl Caswell, *State Bar Blasted for Silence on Criticism of Legal Climate*, May 24, 2007. ATRA does not doubt the hard work of West Virginia's trial court judges. Its distinction as a Judicial Hellhole has nothing to do with family or criminal law, but is solely related to unbalanced decisions in civil, primarily tort, cases against defendants at both the trial and appellate level.

[135] Editorial, *The Judiciary Affects the State; An Anti-Business Climate Undercuts 'Open for Business,'* Charleston Daily Mail, Feb. 2, 2007, at 4A; *see also* George Hohmann, *More Sue Over Gas Royalties*, Charleston Daily Mail, Feb. 27, 2007, at 1A.

[136] Cara Bailey, *Arizona Couple Names 77 Companies in Asbestos Suit*, W. Va. Record, May 10, 2007.

[137] 2006 Judicial Hellhole Report at 12.

[138] Chris Dickerson, *CSX Uncovers Fraud in Asbestos Case*, The Record (W. Va.), Apr. 27, 2007.

[139] Chris Dickerson, *West Virginia Small Business Owners Fear 'Unfair' Lawsuits, Study Finds*, The Record (W. Va.), May 27, 2007 (reporting that a survey of the state's small business owners found that 85% were concerned and 60% were "very" or "somewhat concerned" about the impact of frivolous lawsuits and that many altered business decisions as a result).

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[142] Brief of Amici Curiae National Association of Manufacturers, Chamber of Commerce of the United States of America, American Tort Reform Association, and American Chemistry Council in Support of Petitioner, *Daniel Measurement Services, Inc. v. Eagle Research Corp.*, No. 07-384 (filed Oct. 22, 2007).

[143] *See Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999).

[144] *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 914 (W. Va. 2007).

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also MacDonald v. Othro Pharm. Corp., 475 N.E.2d 65, 68 (Mass. 1985) (recognizing an exception to the general application of the learned intermediary doctrine for oral contraceptives).

[146] App. at 47a.

[147] *Morris v. Crown Equipment Corp.* 633 S.E.2d 292 (W. Va.), *cert. denied*, 127 S. Ct. 833 (2006). ATRA filed a brief with the court as *amicus curiae* urging it to grant certiorari and overturn the West Virginia decision. Brief of Amici Curiae American Tort Reform Association, The Chamber of Commerce of the United States of America, The National Federation of Independent Business, and the West Virginia Chamber of Commerce in Support of Petitioner, *Morris v. Crown Equipment Corp.*, No. 06-503 (filed Nov. 20, 2006), but the Court declined to review the case, 127 S. Ct. 835 (2006).

[148] W. Va. Code 56-1-1(c).

[149] *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1, 4 (1950) (quoting *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387 (1929) ("[I]f a State chooses to '[prefer] residents in access to overcrowded Courts' and to deny such access to all nonresidents, whether its own citizens or those of other States, it is a choice within its own control."); *Canadian N. Ry. v. Eggen*, 252 U.S. 553 (1920) (upholding a state statute of limitations that barred suits by nonresidents if the suit was time-barred in the jurisdiction where the tort occurred, but allowed suits under the same facts if brought by a resident).

[150] *See, e.g., Owens-Corning v. Carter*, 997 S.W.2d 560 (Tex.), *cert. denied*, 528 U.S. 1005 (1999) (upholding 1997 reform authorizing dismissal of nonresident plaintiffs on grounds of forum non conveniens).

[151] H.R. 2956 (W. Va. 2007) (signed by Governor on Apr. 4, 2007) (to be codified at W. Va. Code § 56-1-1a) ("Provided, That the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state.").

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[153] W. Va. Code § 55-7B-8.

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