



JUDICIAL Hellholes[®] 2023/24

HELLHOLE HOSPITALITY

*How Certain Courts
Enable Litigation Tourism*



**PEACH STATE PERILS,
LIBERTY BELL BLUES**

*Georgia and Pennsylvania Share
Shameful Limelight, Make History
as Dual No. 1 Judicial Hellholes[®]*

FUELING LAWSUIT FRENZY

*The Invisible Hand
of Litigation Finance*

“If having to defend this suit in Pennsylvania seems unfair to Norfolk Southern, it is only because it is hard to see Mallory’s decision to sue in Philadelphia as anything other than the selection of a venue that is reputed to be especially favorable to tort plaintiffs.”

– Justice Samuel Alito, concurring in part and concurring in the judgment in *Mallory v. Norfolk Southern Railroad Co.*

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

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

“The average New Yorker feels the pain too. Nuclear verdicts (and routinely excessive verdicts) drive insurers from the market and increase premiums. The twin pressures of decreasing competition and increased insurance costs are ultimately passed through to the consumer. This is the same consumer and taxpayer who was leaving New York at a higher rate than any of the 50 states even before COVID-19.”

– The [New York Law Journal](#) op-ed discussing the economic impact of New York’s legal climate and the rise in excessive verdicts.

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

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

“The legislature never intended the Act to be a mechanism to impose extraordinary damages on businesses or a vehicle for litigants to leverage the exposure of exorbitant statutory damages to extract massive settlements.”

– The dissent in *Cothron v. White Castle* (Illinois Supreme Court), discussing the abuses of Illinois’ BIPA statute

Preface

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

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

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

ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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Executive Summary

The **2023-2024 Judicial Hellholes®** report shines its brightest spotlight on nine jurisdictions that have earned reputations as Judicial Hellholes®. Some are known for allowing innovative lawsuits to proceed or for welcoming litigation tourism, and in all of them state leadership seems eager to expand civil liability at every given opportunity.

JUDICIAL HELLHOLES®

#1 GEORGIA The “Peach State” maintained its position atop the list thanks to another year of high nuclear verdicts and liability-expanding decisions by the Georgia Supreme Court. Neither the judiciary nor the legislative branches are willing to take responsibility for the state’s poor civil justice system.

#1 THE SUPREME COURT OF PENNSYLVANIA & THE PHILADELPHIA COURT OF COMMON PLEAS

A late-breaking venue decision by the Pennsylvania Supreme Court that will increase litigation tourism and an almost \$1 billion verdict out of the Philadelphia Court of Common Pleas propelled these courts to the top of this year’s list. Additionally, there is a flood of medical liability litigation in Philadelphia courts thanks to the Pennsylvania Supreme Court’s decision to eliminate an important rule governing where lawyers may file these cases. The Philadelphia Court of Common Pleas continues to be a prolific producer of nuclear verdicts and liability-expanding decisions by the high court will only worsen the situation. Plaintiffs from across the country flock to the Court of Common Pleas because of its reputation for excessive verdicts and its “open door” policy to out-of-state plaintiffs.

#2 COOK COUNTY, ILLINOIS Lawsuits brought under the state’s Biometric Information Privacy Act bog down Illinois businesses and a new wave of no injury lawsuits is on the horizon. Food and beverage litigation floods the county’s dockets and liability-expanding legislation only worsens the problem. Additionally, an overwhelming percent of the state’s nuclear verdicts come out of the Cook County trial court.

#3 CALIFORNIA Endless Prop-65 litigation targets a variety of industries and no-injury Private Attorney General Act (PAGA) and Americans with Disabilities Act (ADA) accessibility lawsuits bog down business. The state’s unique Lemon Law is a gold mine for plaintiffs’ lawyers and arbitration is under attack in both the courts and the legislature. California also is at the forefront of the environmental litigation battle.

#4 NEW YORK CITY Expansive liability laws have led to lawsuit abuse in the Big Apple. No-injury consumer class action lawsuits and lawsuits brought under the ADA bog down businesses and third-party



**JUDICIAL
Hellholes®**
2023/24

- 1 GEORGIA
- 1 THE SUPREME COURT OF PENNSYLVANIA & THE PHILADELPHIA COURT OF COMMON PLEAS
- 2 COOK COUNTY, ILLINOIS
- 3 CALIFORNIA
- 4 NEW YORK CITY
- 5 SOUTH CAROLINA ASBESTOS LITIGATION
- 6 LANSING, MICHIGAN
- 7 LOUISIANA
- 8 ST. LOUIS

litigation finance feeds the litigation machine. Additionally, rather than address the problems, the legislature chooses to pursue the trial bar's liability-expanding agenda.

#5 SOUTH CAROLINA ASBESTOS LITIGATION South Carolina's consolidated docket for the state's asbestos litigation has cemented an unwelcome reputation for bias against corporate defendants, unwarranted sanctions, low evidentiary requirements, liability expanding rulings, unfair trials, severe verdicts, a willingness to overturn or modify jury verdicts to benefit plaintiffs, and frequent appointment of a receiver to maximize recoveries from insurers.

#6 LANSING, MICHIGAN A newcomer to the 2023 list, both the Michigan Supreme Court and Michigan Legislature bear responsibility for Lansing's deteriorating civil justice climate. The high court expanded premises and workplace liability and adopted an expansive approach to medical liability. A barrage of liability-expanding legislation was introduced and enacted, with more on the horizon in 2024.

#7 LOUISIANA Coastal litigation drags on with no end in sight and is a burden on the state's economy. Insurance schemes plague the system, and the outgoing governor vetoed much needed transparency legislation.

#8 ST. LOUIS Judges in St. Louis abandon their role as "gatekeepers" and allow junk science to be presented in their courtrooms. The courts are a prolific producer of nuclear verdicts and St. Louis has an international reputation as a plaintiff-friendly jurisdiction. Rather than address the lawsuit abuse, the legislature has failed to move reforms.

WATCH LIST

Beyond the Judicial Hellholes®, this report calls attention to three additional jurisdictions that bear watching due to their histories of abusive litigation or troubling developments. These jurisdictions may be moving closer to or further away from a designation as a Judicial Hellhole® and they are ranked accordingly.

KENTUCKY The "Bluegrass State" makes its first appearance on the Judicial Hellholes® report's Watch List due to a handful of percolating issues. State courts have exposed those who report suspected fraudulent claims to liability, eliminated a critical screening mechanism for medical liability claims, and are experiencing larger verdicts. Additionally, some lawyers have resorted to unethical measures to obtain wins.

TEXAS COURT OF APPEALS FOR THE FIFTH DISTRICT The Fifth Court repeatedly misapplies state precedents and procedures, requiring review and reversal by the state's high court. It has developed a reputation for being pro-plaintiff and pro-liability expansion.

NEW JERSEY The New Jersey trial bar has achieved the triple threat – they wield unprecedented power in the state legislature, the Governor has no real interest in civil justice reform, the political balance of the New Jersey Supreme Court has shifted and recent decisions by the state's intermediate appellate courts indicate a corresponding shift toward increased liability for businesses.

DISHONORABLE MENTIONS

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

Included among this year's list, the Delaware Supreme Court adopted an expansive view of public nui-

sance and trespass liability, Illinois counties remain the venue of choice for asbestos claims, and the Minnesota Legislature enacted a liability-expanding agenda. Lastly, the Wisconsin Supreme Court denied review in a controversial product liability judgment.

POINTS OF LIGHT

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

Among the positive developments, the New Hampshire and Delaware Supreme Courts rejected no-injury medical monitoring claims, the New Jersey Court of Appeals discarded improper expert testimony, the Texas Supreme Court rejected manipulation of juries by "anchoring," and the West Virginia Supreme Court placed reasonable limits on employer liability.

In addition to court actions, nine state legislatures enacted significant, positive civil justice reforms in 2023, including historic reforms in Florida, an Indiana bill that places reasonable limits on third-party litigation financing, comprehensive product liability legislation in Montana, and Kansas legislation that lowers the prejudgment interest rate.

CLOSER LOOKS

[PLAINTIFFS' LAWYERS PUSH TO DROP GUARDRAILS IN STATE WRONGFUL DEATH ACTS](#) Personal injury lawyers have mounted a nationwide campaign to expand liability under state wrongful death acts. Plaintiffs' lawyers know that tragic accidents present an opportunity for excessive awards that go far beyond providing reasonable compensation to those who have lost a loved one (and a substantial contingency fee).

[LITIGATION TOURISM: JUDICIAL HELLHOLES® ARE OPEN FOR BUSINESS](#) Judges in Judicial Hellholes® have made a habit of swinging open their courtroom doors to out-of-state plaintiffs. Plaintiffs' lawyers flock to plaintiff-friendly courts seeking to take advantage of low barriers of entry and reputations for nuclear verdicts and expansive rulings. Unfortunately, this year, the United States Supreme Court created significant ambiguity with respect to plaintiffs' ability to drag out-of-state defendants into Judicial Hellholes® that have little or no connection to the case at hand.



Judicial Hellholes®



TOP ISSUES

- Proliferation of Nuclear Verdicts
- Phantom Damages Provide Windfalls to Plaintiffs and Attorneys
- Expansion of Premises Liability
- Georgia Supreme Court Issues More Liability-Expanding Decisions
- Predatory Lawsuit Loans Complicate and Inflate Settlements

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Georgia residents pay a “tort tax” of **\$1,213.80** and **123,900** jobs are lost each year according to a recent study by [The Perryman Group](#). If Georgia enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **\$13.11 billion**. would increase its gross product by over **\$11.9 billion**.

TRIAL LAWYER ADVERTISING

Plaintiffs’ lawyers are well aware of the state courts’ propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent an eye-popping **\$84.29 million** on more than **1.26 million** local legal services television advertisements in Georgia.

Georgia vaulted to the top of the Judicial Hellholes® report in 2022 thanks in large part to a massive \$1.7 billion punitive damages award in a product liability case in **Gwinnett County** that was [riddled with](#) ethically questionable events and severely biased court orders. Unfortunately, 2023 brought about more of the same for the Peach State. Courts across the state continue to award nuclear verdicts and the **Georgia Supreme Court** issued a disappointing premises liability decision and other liability-expanding decisions that will only make a terrible environment worse.

In addition, Georgia continues to embrace an archaic seatbelt gag rule that precludes a jury from hearing evidence about whether an occupant wore a seatbelt at the time of a crash, and third-party litigation financing provides the resources to drive the litigation machine. Both lawyers and lenders



profit off the litigation, as unregulated cash-for-lawsuit companies offer plaintiffs loans at excessive rates, then take a substantial share of their awards.

In recent years, neither the judiciary nor the legislative branches have been willing to take responsibility for the state's poor civil justice system. The judicial branch blames the legislature for enacting bad laws while ignoring the damage it continues to do by permitting frivolous claims to be heard and expanding liability like it has done in a litany of premises cases. While the **Georgia General Assembly** has enacted moderate reforms in years past, several much-needed reforms have failed to move.

Governor Brian Kemp demonstrated important leadership by recently acknowledging the need for “[an even playing field](#)” in Georgia courts and has positioned civil justice reform as a top priority for his administration in 2024, which has not been done in nearly 20 years. All eyes will be on Georgia in 2024 to see if it's finally the year for much-needed change.

LITIGATION TOURISM



This year, the **United States Supreme Court** missed its opportunity to rein in litigation tourism and prevent plaintiffs' lawyers from filing lawsuits in plaintiff-friendly courts that have no direct tie to a claim. In [Mallory v. Norfolk Southern Railway](#), the **U.S. Supreme Court** ruled that it is constitutional to statutorily grant state courts jurisdiction over out-of-state companies that have registered to do business in that state regardless of where the parties are from and where the injury occurred.

While the case originated in Pennsylvania, the **Georgia Supreme Court** had reached a [similar decision](#) in 2021. Very few states grant courts this expansive jurisdiction over out-of-state defendants. There is real concern that this decision has opened the door to plaintiffs' lawyers flocking to Georgia to take advantage of the courts' reputation for nuclear verdicts, pro-plaintiff rulings, and liability-expanding decisions.

NUCLEAR VERDICTS

Georgia is one of the most prolific producers of nuclear verdicts (awards of \$10 million or more) nationwide. From January 1, 2018 through April 10, 2023, [39 nuclear verdicts](#) in personal injury and wrongful death cases were reported, with 12 awarded in 2022 alone. Included in the 2022 verdicts was the previously mentioned eye-popping \$1.7 billion punitive damages award out of **Gwinnett County, Fulton, DeKalb** and **Gwinnett Counties** produced [41%](#) of the state's nuclear verdicts during this time.



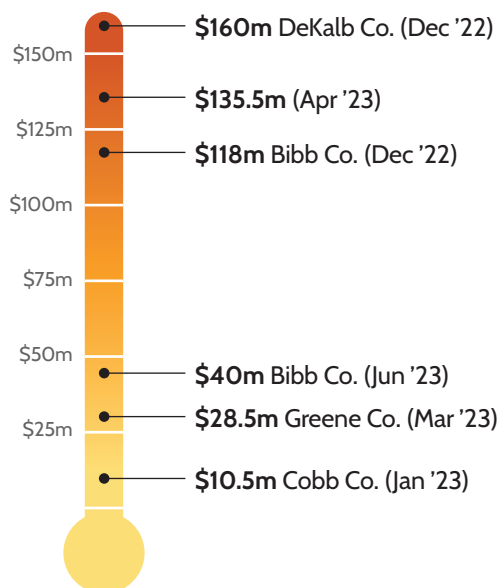
In June 2023, a **Fulton County** jury awarded \$32.5 million to the parents of a 21-year-old college student who was killed in a single-vehicle accident when he struck an ornamental planter off the side of the road, possibly to avoid either an animal that had entered the road or another vehicle. The **City of Milton** was found to have maintained a “dangerous public nuisance” by leaving the planter in place. The City requested a new trial, [arguing](#) that it had no liability because the planter was over 6 feet from the road – not in the right-of-way – and had been located there for decades without incident. The trial court [denied](#) the City's motion and upheld the nuclear verdict. Ultimately, it will be the taxpayers that foot this bill.

In another case out of **Cobb County**, plaintiffs' lawyers lamented that their near-record setting [\\$80 million](#) verdict in a tragic auto accident case was too low and that they were wrongly deprived of an additional \$30 million in attorneys' fees due to “stubborn litigiousness” by defendants. The jury disagreed; however, the lawyers plan to appeal.

Other recent nuclear verdicts in Georgia courts include:

- **December 2022:** [\\$118 million verdict](#) (including \$90 million in punitive damages) in a premises liability case in **Bibb County**
- **December 2022:** [\\$160 million verdict](#) in a premises liability case in **DeKalb County**
- **January 2023:** [\\$10.5 million verdict](#) in a medical liability case in **Cobb County**
- **March 2023:** [\\$28.5 million verdict](#) (including \$6.5 million in attorneys' fees and costs) in a premises liability case in **Greene County**
- **April 2023:** [\\$135.5 million verdict](#) (including \$125 million in punitive damages) in a lawsuit against the owners and developers of a solar farm brought by neighboring property owners in the federal district court in Columbus. (On October 23, the judge issued a remittitur order that decreased the award to [\\$5 million](#). The plaintiffs asked the judge to [reconsider](#) and filed an [appeal](#))
- **June 2023:** [\\$40 million verdict](#) in a medical liability case in **Bibb County**

NUCLEAR VERDICTS IN GEORGIA (2022-23)



The dramatic rise in nuclear verdicts can be attributed to several factors, including the courts allowing the use of “anchoring” by plaintiffs’ lawyers. Anchoring is a tactic that lawyers use to place an extremely high amount into jurors’ minds to start as a base dollar amount for a pain and suffering award. While some courts prevent or limit this tactic, Georgia is one of a few that has a [specific state statute](#) allowing the practice.

The trucking industry has been a primary target of runaway verdicts, as has been well chronicled by recent [Judicial Hellholes® reports](#). The nuclear verdicts against the trucking industry not only affect the companies named in those lawsuits, but the industry itself. According to a [study](#) by the **American Transportation Research Institute (ATRI)**, the average auto liability premium has increased significantly for fleets of all sizes. With the [average size](#) of verdicts in excess of \$1 million increasing from \$2,305,736 to \$22,288,000 nationwide between 2010 and 2018, insurance companies are charging more to cover these excessive litigation risks. These rising insurance premiums often hit small businesses the hardest and have driven many out of business.

Businesses are aware of Georgia courts’ propensity to award nuclear verdicts, and as a result, feel great pressure to settle prior to trial. In April, a defendant “accused of knowingly manufacturing a defective recreational vehicle” settled for [\\$105 million](#), the largest pre-trial settlement in Georgia history.

Automakers in Crosshairs Thanks to Archaic Law

Under what’s known as the “seatbelt gag rule,” lawyers defending a product liability claim in Georgia cannot inform the jury that someone hurt in an auto accident was not wearing – or was misusing – a seatbelt.

[Enacted](#) by the Georgia legislature in 1988, critics of the statute argue that the policy behind the seatbelt gag rule has [long ended](#). At the time of enactment, people questioned the effectiveness of seatbelts in preventing injuries. Some legislators believed that air bags were sufficient and seatbelt use was not widespread. Since then, forty-nine states have mandated the use of safety belts and numerous [studies](#) have proven the protection that modern seatbelts provide. With clear evidence that seatbelt usage is crucial to both a driver’s and a passenger’s safety, many states are discarding the seatbelt gag rule as an anachronistic law that “may have been appropriate in its time,” but has become outdated by further studies. Instead, these states allow

juries to consider seatbelt use when allocating fault or determining the cause of an injury. Further, Georgia is a primary enforcement state, which requires seat belt usage or one can be given a citation.

Unfortunately, in 2022, the **Georgia Supreme Court** passed on an opportunity to constrain the state's gag rule; however, the justices did leave the door open to a future change. The **Georgia Legislature** has had opportunities to eliminate the rule the past several years but has chosen not to move the legislation.

Update on Record \$1.7 Billion Verdict

As mentioned earlier, in August 2022, a Georgia jury returned a \$1.7 billion punitive damage verdict against Ford, finding that the company sold millions of "Super Duty" models with defectively weak roofs. This astronomical verdict helped propel Georgia atop last year's [Judicial Hellholes](#)® list. The case was riddled with ethically questionable events and severely biased court orders, all of which were outlined [last year](#). Additionally, Ford was prohibited from informing the jury that the plaintiffs were improperly wearing their seatbelts during a rollover crash.

Following the verdict, Ford promptly filed post-trial motions for a new damages trial and judgment notwithstanding the verdict. In September 2023, **Judge Joseph C. Iannazone** [rejected Ford's motions](#), finding that there was sufficient clear and convincing evidence for a jury to conclude that Ford was liable for punitive damages.

While Ford had argued that the excessive verdict was a product of "trial by sanctions" on account of a [biased sanctions order](#) that tainted the jury's damage calculations, **Judge Iannazone** decided that his order did nothing of the sort. He also outright rejected Ford's argument that the verdict was unconstitutionally excessive despite blowing past [guideposts](#) laid out by the **U.S. Supreme Court**. Even after acknowledging that the punitive damage award was "quite high," he merely pointed out that the state's cap on punitive damages does not apply to product liability cases. As a whole, **Judge Iannazone** decided that Ford had not proven that the jury verdict was "manifestly the result of prejudice, or bias, or corrupt motive," or that it contravened the "principles of justice and equity."

The court's refusal to reduce the astronomical punitive damages award is particularly troublesome because this verdict practically *tripled* the prior record in Georgia for largest punitive damages verdict. For reference, the same plaintiff's lawyer obtained a \$150 million verdict against Chrysler back in 2014 in a small county in South Georgia – the trial judge in that case [reduced the verdict](#) all the way down to \$40 million.

The saga will continue as Ford [expressed](#) that it will "seek a deserved new trial from the Georgia Court of Appeals."



Good News

On March 15, 2023, the **Georgia Supreme Court** upheld the constitutionality of the state's \$250,000 cap on punitive damages in non-product liability cases in *Taylor v. Devereux Foundation, Inc.*

PHANTOM DAMAGES AWARDED BY GEORGIA COURTS

Courts across Georgia [routinely award](#) phantom damages to plaintiffs, driving up awards and providing a wind-fall to plaintiffs and their attorneys. "Phantom damages" occur when courts calculate a plaintiff's medical expenses using the amount a patient was billed for a medical service (chargemaster rate) instead of the amount the patient, their insurer, Medicare, Medicaid, or workers' compensation actually paid, and the healthcare provided accepted, for treatment. For example, a hospital may



bill \$20,000 for an emergency room visit, while the amount the hospital actually receives after adjustments may be \$8,000. The \$12,000 difference is not owed or ever paid for the treatment – that is the amount of phantom damages.

Georgia courts have [misinterpreted the collateral source rule](#) by holding that it applies to the discounted price of the plaintiff’s medical treatment – so plaintiffs can recover expenses based on chargemaster rates that no party actually pays and juries cannot hear evidence of the amount accepted by a healthcare provider instead as full payment.

But – there is no actual discount since hospitals set the fee schedules for treatments offset by Medicaid/Medicare/insurance far in advance (patients are never actually responsible for paying the chargemaster rates).

A variety of civil justice abuses contribute to the growing litigation costs in Georgia, none more so than judges permitting “phantom damages.” The use of inflated billed amounts only increases the overall cost of the judicial system, spreading the financial burden on the backs of consumers through higher costs on goods and services. These amounts become a driving factor for settlements or jury awards in personal injury cases when juries are asked to assign a verdict amount of three to four times the actual value of the medical bills.

But juries are only told the “phantom” inflated dollar amount billed. They are not informed of the actual amount paid by a patient or his or her insurer. They’re not made aware of the financial interest of medical finance companies or their impact on health care costs. Consequently, we see higher and higher damage awards and settlement amounts based on exaggerated (phantom) numbers intended to produce a larger payout for trial lawyers.

GEORGIA SUPREME COURT DRAMATICALLY EXPANDS PREMISES LIABILITY



Premises liability cases [have generated](#) some of the most eye-popping nuclear verdicts in Georgia, particularly lawsuits blaming businesses for the criminal conduct of others on or near their property. Despite the abuses in this area, the **Georgia General Assembly** has failed to address the

problem. During the 2023 legislative session, **Senator Greg Dolezal** introduced a bill that would have protected landowners from civil liability in most instances when a crime occurred on their property without their knowledge and ability to address it.

The bill was proposed in response to a case in which a person who was shot in a CVS parking lot sued the pharmacy for his injuries. In that instance, the plaintiff had arranged to meet an acquaintance at the store parking lot to purchase an electronic device. After the transaction, an unknown assailant entered the plaintiff’s car, threatened to kill him, and ordered him to hand over his money. The plaintiff tried and failed to shoot the assailant with his own pistol, at which point the assailant shot the plaintiff several times and fled. The plaintiff survived but sustained severe injuries. The lower court awarded \$45 million to the plaintiff, assigning 95% of liability to CVS, 5% to the plaintiff, and zero liability to the shooter. Unfortunately, the **Georgia General Assembly** failed to act.

As a result, the Georgia high court’s decision during the appeal led to further deterioration of the state’s civil justice system. In June 2023, the **Georgia Supreme Court** upheld the lower courts’ verdict in [Georgia CVS Pharmacy LLC v. Carmichael](#), and embraced an overly broad test for “foreseeability,” significantly expanding the scope of liability for property owners.

The Court held that a premises owner is liable for injuries caused by a third party’s criminal acts if it was “reasonably foreseeable” the act would occur. The Court said the jury must consider the “totality of circumstances relevant to the premises” and it must be decided on a “case-by-case basis.” The decision seems to allow even crimes occurring [near a landowner’s premises](#) to be considered in the foreseeability test. The

Court rejected a bright-line approach that requires a plaintiff to identify a “substantially similar” crime occurring on the premises – a standard that the **Georgia Supreme Court** used in prior cases.

The Court said that prior crimes are still relevant to the reasonable foreseeability inquiry, but they are no longer controlling. This new totality-of-the-circumstances standard greatly expands the potential liability of landowners because it no longer requires criminal acts to have occurred on the property before a landowner can be held liable.

The impact of this decision is far-reaching and will specifically burden those that live in high-crime areas. Businesses will be forced to either close their stores or charge higher prices to offset the high costs of additional security measures, concerns **Justice Shawn Ellen LaGrua** raised in her concurring opinion.

Threat to Further Expand Premises Liability

As if the risk of facing a multimillion-dollar verdict for crimes that occur on or near a person’s property is not enough, a **Georgia Supreme Court Justice** recently [threatened](#) to further expand liability for Georgia homeowners, businesses, and other property owners. At issue is whether a person who comes onto the property of another can sue for an injury that resulted from the guest’s own carelessness.



In this instance, a guest at a vacation lodge sued the owner after she tripped on a piece of asphalt that was raised about one inch where a parking lot and walkway met. She stubbed her toe and fell. She admitted that had she looked down, she would have seen the bump and avoided it. An intermediate appellate court [found](#) that the trial court should have dismissed the suit because a guest is responsible for avoiding open and obvious hazards. It said plaintiffs are not entitled to an “absolutely smooth or level way of travel.”

If that were Georgia law, one can only imagine the number of trip-and-fall lawsuits that would burden its residents and businesses.

The plaintiff appealed that ruling to the **Georgia Supreme Court**, but the case settled before the Court issued an opinion. That didn’t stop **Justice Andrew Pinson** from weighing in, however, with a threat to expand liability. In a concurring opinion granting the withdrawal of the appeal following the settlement, **Justice Pinson** expressed interest in revisiting premises liability law in a future case to clarify that whether an object was in a person’s “plain view” and avoidable with reasonable care should be decided by a jury, not the court, regardless of whether the hazard is an uneven walkway or a spill in a supermarket aisle. As a practical matter, this means a lengthy and expensive jury trial will be required in cases involving obvious issues on a property when a person paying attention could easily avoid the hazard. As a result, there will be more lawsuits and property owners will feel compelled to settle them rather than spend the money to go through litigation even when they win.

OTHER OVER-BURDENSOME LIABILITY EXPANDING DECISIONS

Expansion of Wrongful Death Liability

In February 2023, the **Georgia Supreme Court** expanded who may bring wrongful death lawsuits to additional persons. In [Hamon v. Connell](#), the Court held that in cases where a decedent’s surviving spouse cannot be found or opts not to sue, the decedent’s adult children can file a wrongful death claim, which the statute does not permit. In a surprising twist for this Court, the justices openly ignored the plain language of the [Wrongful Death Act](#), which prescribes only a spouse or minor children to bring a claim, and the Court instead chose to rely on “equitable principles.”

This decision is part of the concerning trend of Judicial Hellholes® across the country expanding wrongful death liability, which is explored in a [“Closer Look”](#) section.

Expansion of Georgia's Statute of Repose

"Reckless" Conduct Independently Exempted from Statute of Repose

The Georgia Supreme Court recently narrowed the applicability of the state's [statute of repose](#) for product liability cases. Typically, this statute prevents lawsuits alleging that a product is defective when more than 10 years have passed since the product's initial sale. The statute includes an exception for negligence claims "arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property."

In a [negligent design case](#) brought against Ford 18 years after a vehicle's sale, the Court chose to read "reckless" as an [independent](#) exception from the statute of repose, one that requires a lower level of culpability than "willful or wanton" conduct. Consequently, manufacturers may now face an increased number of lawsuits brought long after their products are sold.

Case to Watch



In June 2023, the **Chatham County Court** issued a liability-expanding decision that, if not overturned, will drastically expand product liability for manufacturers. The plaintiff sued L'Oréal, alleging that its hair relaxer products caused her to develop uterine fibroids. As discussed earlier, [Georgia law](#) requires product liability claims to be brought within 10 years of when the product is first sold or used. In this instance, the plaintiff began using hair relaxer products in 1995, and began purchasing L'Oréal products in 2003, yet she did not sue until 2022. The trial court [denied dismissal](#) of the suit on June 15, 2023, finding the statute of repose did not begin to run until 2014 because the plaintiff was exposed to a "new product" every time she applied the hair relaxer.

In its [application for interlocutory appeal](#), defendant aptly pointed out, "If every application of a single-use product (like hair relaxer) involved a 'new product,' by definition there would be no such thing as a 'first' sale, because every sale would be the first (and last) sale of that particular 'product.'"

In July, the **Georgia Court of Appeals** [agreed to review](#) whether the 10-year statute of repose bars the plaintiff's claims.

Mirror-Image Rule

As noted above, plaintiffs' lawyers in Georgia engage in gamesmanship in which they make settlement demands full of tricky conditions, then claim that an insurer did not comply with one of their many trick requirements. The goal is to work around the insurance policy limits and claim the insurer is operating in "bad faith" by tricking them into innocuously overlooking one of the trick conditions.

Georgia courts [require](#) that "an insurer's response to a demand must be a mirror image of the demand" to be an enforceable settlement. Any deviation from the demand, no matter how immaterial, voids the settlement agreement.

This has [incentivized](#) plaintiffs' attorneys to insert needless technical requirements into a proposed agreement, then assert that an insurer's response does not comply, thus nullifying a settlement. When there is no settlement, the plaintiff can then bring bad-faith-failure-to-settle claims against the insurer. Despite Georgia law favoring settlements, the mirror-image rule [penalizes](#) insurers for trying to settle.

In June 2023, the **Georgia Court of Appeals** issued a [ruling](#) that demonstrates just how imbalanced this area of the law has become. After receiving a plaintiff's demand which included a provision stating that a payment of \$25,000 was to be "received 15 days after [the Insurer's] written acceptance of th[e] offer," an insurer sent a timely acceptance letter including a settlement check that said it was "void after 180 days." The plaintiff then moved forward with filing a personal-injury claim, arguing that the insurer did not accept the pre-suit settlement offer because the check was delivered *before* the 15th day after acceptance, there was a missing comma in the law firm's name on the check, and the check included an expiration date.

The trial court ruled in favor of the insurer; however, the **Court of Appeals** reversed, finding the acceptance was not a “mirror image” of the demand. Instead, the Court of Appeals found the insurer’s response constituted a counteroffer and there was no settlement agreement.

THE PREDATORY CASH FOR LAWSUITS INDUSTRY



Companies that provide loans to plaintiffs in personal injury suits in exchange for a percentage of their awards are permitted to charge extremely high interest rates despite Georgia’s usury law.

Unfortunately, the legislature has not acted to address these practices, which take advantage of vulnerable consumers and complicate the ability of parties to resolve litigation.

Georgia finds itself in this situation after the **Georgia Supreme Court** ruled in [Ruth v. Cherokee](#) (2018) that litigation funding companies are not subject to the state’s [Payday Lending Act](#) because their repayment of lawsuit loans is contingent upon the success of the underlying case. In January 2020, a federal judge, bound by the Georgia Supreme Court decision, [reluctantly found](#) that lawsuit lenders can charge any usurious rate they want in the state.

In its 2018 ruling, the **Georgia Supreme Court** noted that the **Georgia General Assembly** may revisit the scope of the law should they disagree with the decision. There has been no movement, however, in the Georgia legislature to address the growing concern posed by unbound lawsuit lending, which leads to unreasonable settlement demands, and lengthier, more costly litigation.

In addition, Georgia does not require companies that provide lawsuit loans, or who otherwise invest in litigation to disclose their involvement. [Lack of funding transparency](#) permits predatory financing companies or lenders who act unethically to operate without any regulatory oversight. Other states like [Indiana](#), [Montana](#), [Wisconsin](#) and [West Virginia](#) have recently enacted legislation that requires disclosure of consumer litigation financing.



#1 Pennsylvania

THE PHILADELPHIA COURT OF COMMON PLEAS
AND THE SUPREME COURT OF PENNSYLVANIA

TOP ISSUES

- Litigation Tourism
- Flood of Medical Liability Litigation in Philly
- Uptick in Nuclear Verdicts
- Liability-expanding Decisions by High Court

The Philadelphia Court of Common Pleas and the Supreme Court of Pennsylvania joined Georgia as the nation's top Judicial Hellholes®. In 2022, the Supreme Court of Pennsylvania eliminated the state's venue rule for medical liability litigation. There was concern this decision would open the flood gates for personal injury lawyers to file medical liability claims in courts they view as favorable and that is just what has happened, especially in the perennial Judicial Hellhole® court – the Philadelphia Court of Common Pleas. Additionally, the Pennsylvania Supreme Court broadly applied the state's venue rule, which will further increase litigation tourism in the state.

It comes as no surprise, as the Philadelphia court continues to issue nuclear verdicts at a staggering rate. An eye-popping almost \$1 billion award was levied against Mitsubishi in a product liability case in 2023. The Philadelphia Court of Common Pleas also continues to be a hotbed for out-of-state plaintiffs' mass torts claims. Plaintiffs' lawyers also are looking to expand premises liability for business owners in the city. Additionally, the Pennsylvania Supreme Court issued a problematic decision on punitive damages, which will only lead to more abuses and more massive verdicts.

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Pennsylvania residents pay a "tort tax" of \$1,391.33 and 171,091 jobs are lost each year according to a recent study by [The Perryman Group](#). If Pennsylvania enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by \$18.04 billion.

TRIAL LAWYER ADVERTISING

Plaintiffs' lawyers are well aware of the state courts' propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent more than \$92 million to air approximately 765,000 local legal services television advertisements across Pennsylvania's media markets.



In a somewhat surprising turn of events, the **U.S. Supreme Court** issued a decision that will allow even more out-of-state plaintiffs to drag out-of-state defendants into Philadelphia courtrooms.

LITIGATION TOURISM

In 2023, the **United States Supreme Court** and the **Pennsylvania Supreme Court** eliminated important constitutional and statutory jurisdictional barriers that protected defendants from being dragged into plaintiff-friendly courts with no direct ties to the events or parties involved in a claim. Without these protections in place, plaintiffs' lawyers can file lawsuits in the state court of their choosing, taking advantage of a court's reputation for high verdicts and plaintiff-friendly rulings.

Through its decision in *Mallory v. Norfolk Southern*, the **United States Supreme Court** opened up Pennsylvania state courts to additional cases involving out-of-state parties and the **Pennsylvania Supreme Court** adopted a broad application of the state's venue rule, which then will allow a majority of these cases to be filed in plaintiff-friendly county courts like the **Philadelphia Court of Common Pleas**.

SCOTUS Greenlights Litigation Tourism in Philadelphia



On June 27, 2023, a fragmented **U.S. Supreme Court** handed down the *Mallory* decision – a plurality opinion that broadens the opportunity for attorneys to pursue lawsuits in Philadelphia that have no connection with the events or involved parties.

In *Mallory v. Norfolk Southern Railway*, a Virginia resident sued a Virginia-based railroad in Pennsylvania, relying purely on the railroad's registration to do business in the state. A state statute, [42 Pa. C.S.A. § 5301](#), provides that by registering to do business in Pennsylvania, a company consents to general jurisdiction in the state's courts.

Given a series of U.S. Supreme Court decisions limiting the ability of state courts to assert jurisdiction over defendants in disputes that lack a connection to the forum state, the **Pennsylvania Supreme Court** [ruled](#) that the statutory scheme “does not constitute voluntary consent to general jurisdiction but, rather, compelled submission to general jurisdiction by legislative command,” and is unconstitutional under the due process clause. In those cases, the **U.S. Supreme Court** had limited general jurisdiction, which does not require a link between the claim and the forum state, to situations in which a business was “at home” in the state, meaning it was incorporated or had its principal place of business there.

The **U.S. Supreme Court**, to the surprise of many, reversed. It [found](#) that constitutional due process concerns are not implicated “when an out-of-state defendant submits to suit in the forum State” as the Pennsylvania business registration statutes require. By virtue of registering to do business in the state, because of the statute, a business consented to be sued for any purpose in its courts.

The **Philadelphia Court of Common Pleas** has a [long-standing reputation](#) for allowing out-of-state plaintiffs to flood court dockets with relatively low barriers of entry and this decision will further embolden the court. This policy benefits plaintiffs but negatively impacts Pennsylvanians. It clogs courts, drains court resources, and drives businesses out of the state leading to job loss.

Pennsylvania Supreme Court Adopts Broad Application of State Venue Rule

In late November, the **Pennsylvania Supreme Court** issued its long-awaited opinion in *Hangey v. Husqvarna Professional Products*. The disappointing decision already has been [termed](#) “one of if not the most impactful venue decisions in the last 20 years” by the plaintiffs’ bar, as it opens up plaintiff-friendly courts, like the **Philadelphia Court of Common Pleas**, to even more cases that lack a direct connection to the venue.

A plaintiffs’ attorney filed that lawsuit, stemming from a lawn mower accident, in Philadelphia even though the plaintiff purchased the equipment in Bucks County and was injured in Wayne County. The manufacturer was not registered to do business in Philadelphia, had no warehouses or other facilities, no

address or telephone numbers, no property, and no employees or officers there. Just 0.005% of the manufacturer's sales took place in Philadelphia. The manufacturer argued that the case should be transferred to Wayne County, where the accident occurred, or to Bucks and Montgomery Counties. In response, the trial court had transferred venue to Bucks County, where the plaintiff had purchased the allegedly defective lawnmower, based on this de minimis percentage, but a mid-level appellate court reversed.

The **Pennsylvania Supreme Court** found that the case could be decided in Philadelphia County. It held that Pennsylvania's venue provision- which states that an action may be brought in a county where a corporation "regularly conducts business"- applies even when a defendant only has established a mere presence. The Court's opinion dealt with its longstanding "quality-quantity" test under the statute, concluding that the trial court's reliance on the percentage of the defendant's total business in Philadelphia County was improper.

The Court explained that percentage of revenue is just one "data point" in a broader assessment of how "regular" a defendant's business activities are in a forum. In doing so, the Court did not mention percentage of revenue at all; it noted only that the defendant's sales to its two authorized dealers in the county had been "consistent" and were "not interrupted" during the relevant time period. The Court held that so long as "a company maintains a constant physical presence in the forum county" to perform acts in furtherance of its business objectives—even if only through an authorized dealer—venue will be appropriate in that county.

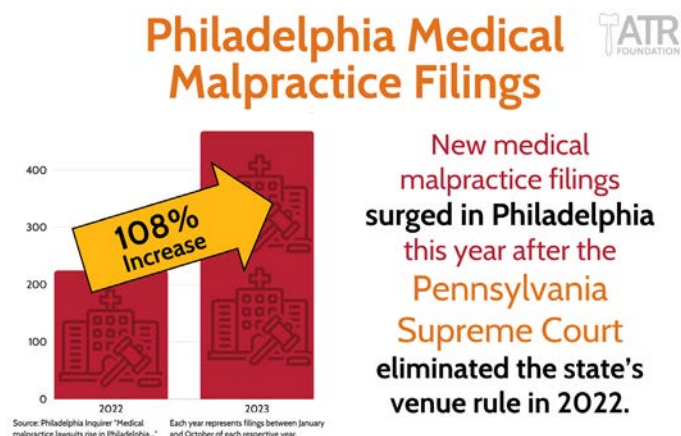
By expanding the application of the state's venue rule, the Court will only further the forum-shopping problem already plaguing the Pennsylvania judicial system. It has eliminated an important safeguard for defendants and further tilts the scales in favor of plaintiffs who can choose to sue in the county that they view as most likely to return a favorable verdict and large award, rather than the county connected to the lawsuit.

Medical Liability Explodes in Philadelphia Thanks to State High Court Decision

In August 2022, the **Supreme Court of Pennsylvania** unilaterally eliminated constraints that have prevented lawyers from picking the most plaintiff-friendly jurisdiction for filing medical liability actions. At issue was a 2002 [court rule](#) that required plaintiffs' lawyers to file medical liability lawsuits in the county where treatment occurred, not where a jury is expected to view the claim most favorably or return the largest award. The purpose was to reduce forum shopping and create a more fair and balanced playing field. Excessive medical liability drives up doctors' insurance expenses, increases costs for patients, and reduces the public's access to healthcare.

In light of the newly eliminated rule, attorneys can sue for medical malpractice not only where medical treatment took place, but also any additional location where the healthcare provider operates an office, any additional hospital locations in which the physician provides care, or where a physician lives. Of course, the state's personal injury bar, through the **Pennsylvania Association for Justice**, supported the change. Plaintiffs will now flock to areas like Philadelphia, where juries are more willing to award higher verdicts in favor of plaintiffs.

As expected, new medical liability filings [are surging](#) in Philadelphia. Through October 2023, there was a 108% increase in filings (468) when compared to the same time last year (225). From 2017 to 2019, plaintiffs suing healthcare providers in Philadelphia County won at a [36% rate](#), compared to a 12% and 9% rate in nearby **Montgomery** and **Lancaster** counties, respectively. As a result of the elimination of the rule, cases filed against health systems in a variety of different counties across the state have now been [refiled](#) in Philadelphia.



In May 2023, the **Pennsylvania Coalition for Civil Justice Reform (PCCJR)** sent the **Pennsylvania Supreme Court** a [formal request](#) to immediately review the rule change. The letter points out how every month of 2023 has shown a significant increase in filings in Philadelphia over the previous six years for the same month. Philadelphia courts are struggling to keep up with the increased case load and if the current filing rate continues, the trial calendars for 2025, 2026, and 2027 will be filled – by the end of 2023.

Medical malpractice insurance rates have predictably increased since the rule change went into effect. According to PCCJR's [letter](#), “manual rates have been increased by specialty, with a minimum increase of 10.5% and a maximum increase of 16.1%.”

NUCLEAR VERDICTS RISE



Philadelphia's reputation as a pro-plaintiff jurisdiction with a propensity for nuclear verdicts is a main reason it's a hotspot for medical liability cases and mass tort litigation.

Between 2017 and 2019, seven-figure awards made up three to seven percent of all Philadelphia verdicts. In 2022 and 2023, it grew to [11 percent](#) of all verdicts. The percentage of plaintiff victories has likewise grown in Philadelphia from 41 percent in 2017 to 52 percent in 2023. According to a 2022 [U.S. Chamber study](#), Pennsylvania had 78 nuclear verdicts (\$10 million or more) in

personal injury and wrongful death cases between 2010 and 2019. These verdicts totaled over \$11 billion in damages, with a median of \$20 million. The state ranked third in per capita nuclear verdicts and fifth in total nuclear verdicts. Medical malpractice and product liability cases pose the most risk of an astronomical award. They accounted for more than 60 percent of nuclear verdicts. Not surprisingly, the **Philadelphia Court of Common Pleas** hosted more than half of the state's nuclear verdicts.

Record-Breaking Verdicts

In April 2023, a Philadelphia court awarded the largest medical malpractice award in Pennsylvania history – \$182.7 million. This fall, the first Roundup case to go to trial in Philadelphia resulted in a \$175 million verdict for an 83-year-old man who blamed the herbicide for his cancer diagnosis. The verdict was not only contrary to findings that the product is safe by the EPA and the scientific consensus, but inconsistent with 9 of the preceding 11 Roundup cases that had ended in defense verdicts. In its post-trial motion for relief, Monsanto brought to light troubling issues with the jury's deliberations. According to information volunteered by a juror after the verdict, after a three-week trial, the jury had been unable to reach a decision on liability, with, at one point, five members siding with the defendant and one more considering shifting to the defense side. The jury foreperson asked the judge overseeing the case, **Judge James Crumlish**, how to proceed. Through his [court clerk](#), Judge Crumlish instructed the jury that they had to reach [ten "yes" or "no" votes](#) or they would be required to return on Monday and again on Tuesday and Wednesday if the deadlock continued. As soon as jurors learned they would be required to come back again and again, the frustrated jurors quickly moved back to the plaintiff's side so that they could go home. These interactions between the jury and the court improperly occurred off the record with no notice to the parties. The deadlock instruction conveyed to the jury was contrary to careful instructions developed by the **Pennsylvania Supreme Court** that are designed to avoid the very result that reportedly occurred. In addition, the juror shared that some of its members had not agreed on the \$175 million award and were surprised to hear it announced in court, but likely did not object because they knew it would prolong the trial. That extraordinary verdict would soon be overshadowed by another Pennsylvania record breaker – a nearly [\\$1 billion verdict](#) in a product liability case in the **Philadelphia Court of Common Pleas** this October.

The latest nuclear verdict stemmed from a car accident in which the plaintiff, a Bucks County resident, when attempting to pass a vehicle, drove off the side of the road to avoid oncoming traffic, colliding

into trees. He would later allege that the seatbelt of his 1992 Mitsubishi 3000 GT failed to adequately restrain him and contributed to his injuries. The jury awarded the plaintiff and his family \$180 million in compensatory damages (including \$160 million in noneconomic damages) after prevailing on the design defect claim. In the second phase of the trial on punitive damages, the jury awarded an additional \$800 million dollars after [less than 30 minutes](#) of deliberation. It is the [largest crashworthiness verdict ever](#) awarded in the state.

The extraordinary verdict becomes less surprising considering what evidence the court kept from the jury and the court's instructions. The court did not allow the automaker to tell the jury that the seatbelt design met motor vehicle safety standards, even as the plaintiffs' lawyers asserted that the manufacturer had not tested the vehicle. In fact, the court instructed the jury that it should not consider compliance with safety standards when determining liability. The court also neglected to tell the jury that, in a case involving the crashworthiness of a vehicle, a manufacturer is liable only for injuries beyond those that would have otherwise occurred in the accident. Nor did the court tell the jury that a plaintiff, when claiming a product is defective, must show there was a feasible alternative, safer design that would have avoided the injury. Instead, the court framed the need to show an alternative as optional. When it came to the jury's consideration of punitive damages, the court did tell the difference between negligence and gross negligence, which is not sufficient to warrant such punishment, and willful or reckless conduct, which can be.

This case shows the practical impact of the Pennsylvania Supreme Court's [Hangey](#) decision, discussed earlier in the section. The plaintiff was allowed to bring his case in the more favorable **Philadelphia Court of Common Pleas** instead of Bucks County court, where he lives and the accident occurred, because Mitsubishi does an infinitesimally small percentage of its business in the county.

Pennsylvania law also prevents defendants from introducing evidence of their compliance with state and federal regulations in products liability actions. Here, Mitsubishi was able to present limited details of the car's regulatory compliance to rebut the plaintiff's charge of willfulness, yet the jury was never instructed by the trial court judge to consider this evidence in their decision regarding punitive damages. [Sullivan v. Werner](#), discussed in more detail later in the section, presents an opportunity for the **Pennsylvania Supreme Court** to correct this manifest unfairness for defendants that comes to light in cases like these.

Other 2023 nuclear verdicts in the **Philadelphia Court of Common Pleas** include a \$43.5 million to a former NFL player in a suit arising from knee surgery. This amount was [more than five times](#) what the player contended he lost in future NFL earnings.

Judge Doesn't Hide His Pro-Plaintiff Views

In May 2023, a Philadelphia court awarded a plaintiff \$26 million following unsuccessful treatment of a leg injury at Temple University Hospital. The plaintiff also requested an additional \$3.7 million in delay damages. Following the verdict, Temple filed a motion for the court to reduce the damages and asked for a new trial. Temple [argued the damages](#) were excessive and would impact the provider's ability to provide healthcare in an underserved North Philadelphia community: "This excessive verdict is an unsustainable economic hit to TUH's ability to provide quality care to the population in an area where medical care is desperately needed."

In denying the defendant's motion and [granting](#) the additional damages for delay, **Judge James Crumligh** of the **Philadelphia Court of Common Pleas** issued a scathing [opinion](#) that inappropriately dripped with sarcasm and rebuke of the hospital. He said the healthcare provider had a "skewed view of the facts" and relied "upon the purposefully vague and generalized nature of their spin asserted facts to propel the parties on a court-conducted frolic and detour...as if the entirety of the burden to prevent a medical malpractice crisis falls upon the shoulders of this court and the victim of their admitted catastrophic malpractice." **Judge Crumligh** also found that Temple's efforts were "wholly without merit and represents a disingenuous effort to enlist the court to relieve the defendants from miscalculations in their trial strategy, an unsatisfactorily tried case and equally noncredible and unpersuasive witness testimony."

TIME TO CLOSE THE COMPLEX LITIGATION CENTER?

For years, Philadelphia's presence on the Judicial Hellholes® list was in large part due to [Philly's Complex Litigation Center \(CLC\)](#), created in 1992 to handle complex mass tort cases. The CLC, while criticized for its slow-moving litigation and high costs to the system, quickly became a magnet for trial lawyers nationwide who flocked to Philadelphia with hopes of scoring a nuclear verdict.

However, recent court data reveals that the Center's dominant mass tort program is dwindling — the CLC's case docket decreased [60 percent](#) since 2020. Risperdal litigation alone accounted for a staggering 6,912 cases in 2019. But the volume of these cases sits at fewer than 330 today.

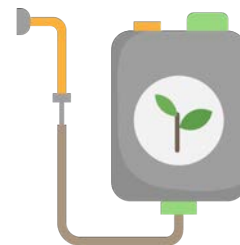
This astounding reduction forces the question: is it [time to close](#) Philadelphia's CLC altogether? Closure would re-focus court resources more effectively on matters relevant to local taxpayers and send a clear message to out-of-state trial lawyers that Philadelphia is no longer the preferred destination for "litigation tourism."

Despite the decrease in activity, there are still a few active mass tort cases working their way through the system.

Paraquat

In 2021, paraquat litigation was designated a [mass tort](#) in the **Philadelphia Complex Litigation Center**. Plaintiffs across the country have filed suits alleging that paraquat, a main chemical in one of the most commonly used commercial herbicides, was responsible for the development of their Parkinson's disease. After months of disputes between the parties regarding how the proceedings should be consolidated, in March of this year, the court approved [a complaint](#) allowing the litigation to proceed.

The ongoing paraquat litigation also offers some remarkable insights into how the state's personal jurisdiction statute burdens out-of-state defendants, particularly in the wake of the U.S. Supreme Court's decision in [Mallory v. Norfolk Southern](#). For example, in the litigation against Syngenta, a manufacturer of paraquat, at least 350 of the 400 plaintiffs who sued in the Philadelphia Complex Litigation Center lack any connection to Pennsylvania, with [many joining soon](#) after the Court's decision in *Mallory* provided a green



light for plaintiffs to flock to this jurisdiction.

Paraquat Litigation Against Syngenta



Syngenta [challenged the Court's exercise](#) of personal jurisdiction over these plaintiffs, relying in large part on [Justice Alito's concurring opinion](#) in which he signaled the possibility that the state's consent-by-registration statute was unconstitutional under the **Dormant Commerce Clause**. Furthermore, unlike the railroad in *Mallory* that had "substantial operations" in Pennsylvania, Syngenta has fewer than fifteen employees in the entire state. Regrettably, the **Philadelphia Court of Common Pleas** [denied the preliminary objection](#) to its jurisdiction. Despite this denial, this case presents an excellent opportunity for Pennsylvania appellate courts, and potentially the U.S. Supreme Court, to again weigh in on the validity of this statutory scheme.

Zantac

Lawsuits alleging that Zantac, an over-the-counter heartburn medication, contains a carcinogen have surged over the past year. Zantac litigation is now the [largest](#) of the four mass torts added in 2022 in the Complex Litigation Center. Plaintiffs from across the country have flocked to Philadelphia to file their claims due to the court's pro-plaintiff reputation. An attorney involved in the litigation [stated](#) that "state court is typically a preferable battleground for plaintiffs" and that Philly's Zantac case list is likely to grow. As of November 2023, there were [nearly 398 cases in the CLC database](#).

The defendants attempted to [challenge](#) the jurisdiction of the CLC over cases brought by out-of-state plaintiffs because the corporations are neither incorporated nor retain a principal place of business in the state of Pennsylvania.

Meanwhile, the federal judge overseeing Zantac cases pending in federal court [dismissed](#) them months earlier.

Zantac was pulled off the market in 2020 after a study by Valisure, a private lab, found that one of the medication's ingredients could possibly become carcinogenic under highly unlikely circumstances.

In dismissing the litigation, **Judge Robin Rosenberg** exposed the flaws behind the science of Valisure's claims, which, as she pointed out in her [opinion](#), "undermines the credibility of their findings."

Valisure's testing methodology involved heating the product to well over 200 degrees, which is clearly not a realistic scenario for how an individual would consume the drug, considering that is double the temperature of the average healthy person.

Besides heating the product to temperatures it would not otherwise be subjected to, Valisure also tested the product with an artificial stomach containing unusually high amounts of salt – amounts that humans could not safely ingest.

To make matters worse, the FDA actually found that Valisure's lab equipment created NDMA, the cancer-causing chemical in question.

Judge Rosenberg wrote in her [opinion](#) that "There is no scientist outside this litigation who concluded ranitidine causes cancer, and the Plaintiffs' scientists within this litigation systemically utilized unreliable methodologies with a lack of documentation on how experiments were conducted, a lack of substantiation for analytical leaps, a lack of statistically significant data, and a lack of internally consistent, objective, science-based standards for the evenhanded evaluation of data."



Asbestos

ASBESTOS LITIGATION

Despite national asbestos claims falling 7% nationwide from last year, the **Philadelphia Court of Common Pleas** saw a [nearly 20% increase](#) in filings from 2021 to 2022, making it one of the top three jurisdictions with the greatest year-to-year increase. As of July 2023, Philadelphia [ranked fourth](#) nationwide in total asbestos claims, its fourth consecutive year ranked in the top four.

Philadelphia's asbestos litigation has resulted in nuclear verdicts. For example, in December 2022, the **Philadelphia County Court of Common Pleas** awarded a mesothelioma plaintiff who alleged he was exposed to asbestos contained in gaskets and packing materials \$25 million in damages.

The manufacturer argued that the \$25 million award was excessive and [requested a new trial to recalculate damages](#). The \$15 million verdict for noneconomic damages is [far greater](#) than what is typically awarded in similar cases and is seven times larger than what the plaintiff's lawyers had previously obtained in any prior asbestos case. The manufacturer further argued that the jury should have learned that the plaintiff was exposed to asbestos in other products produced by companies not named as parties to the lawsuit. The plaintiff sued [dozens of companies](#) alleging exposure to asbestos-containing products caused his disease. Before a decision could be made regarding a new trial, the case [settled](#).

LIABILITY-EXPANDING DECISIONS BY PENNSYLVANIA SUPREME COURT

Punitive Damages

A key factor in evaluating whether a punitive damage award is appropriately proportional is the ratio between the harm (the compensatory damages) and the punishment (the punitive damages). In July 2023, the **Supreme Court of Pennsylvania** issued a long-awaited decision that will have vast implications in cases involving multiple defendants in which there is a punitive damage award.

[Bert v. Turk](#) arose when a business sued a competitor, two of its subsidiaries, and a former employee alleging they poached its sales force and client base. The jury awarded \$250,000 in compensatory damages and \$2.8 million in punitive damages. In that instance, the trial court judge had calculated the ratios by dividing the punitive damages assessed to each defendant (rather than the total punitive award) by the total compensatory award, resulting in much lower ratios. **The Supreme Court of Pennsylvania** affirmed this per-defendant approach.

The state high court also found that punitive damages that are more than nine times compensatory damages are constitutional, despite [U.S. Supreme Court precedent](#) finding that a 9:1 ratio is rarely constitutional and even a 4:1 ratio pushes the boundary in a typical case. The **Pennsylvania Supreme Court** reasoned that even though the U.S. Supreme Court has signaled that double digit ratios are likely unconstitutional, the high court has repeatedly declined to adopt a rigid line and has instead relied on terms like “reasonableness” when instructing lower courts.

This decision will drive up damage awards across the state and has the potential to create more nuclear verdicts, especially in Philadelphia.

Expansion Of Premise Liability

In May 2023, the **Supreme Court of Pennsylvania** increased liability for contractors that unknowingly create potentially dangerous conditions on job sites even when they no longer have access to the property.



In [Brown v. The City of Oil City](#), Oil City contracted with the defendants to renovate a set of concrete stairs leading to the city’s public library. The contractors finished the work by the end of the year, but shortly after, Oil City learned the stairs were degrading. Between 2012 and 2015, the condition of the stairs worsened, yet the city made no efforts to repair the stairs or warn the public. A visitor to the library tripped and fell down a deteriorated section of the stairs and suffered fatal injuries. Her estate sued Oil City as well as the contractor who performed the work, alleging a breach of duty of care.

The City settled for the maximum amount permitted against government entities. The case proceeded to trial against the contractor, with the trial court ruling that contractors are liable “for *all* defective conditions of structures on land which they are responsible for creating through their repair work,” even though the contractor was no longer responsible for the property or under contract.

On appeal, the contractor argued that the company was unable to repair its work on its own nor was it instructed to make any repairs by the city. Holding the contractor liable encourages property owners to neglect to inspect and repair dangerous defects on their property.

The [dissent](#) agreed, pointing out the majority’s opinion placed a higher burden on contractors than landowners. “The practical effect of the majority’s position is to make the manufacturers and contractors strictly liable under conditions where they are not in a position to correct or ameliorate against the dangers posed while possessors and third parties need not take any precautions against dangers of which they are aware.”

Cases to Watch



On July 13, 2021, Matthew Maguire was fatally stabbed in the parking lot of a McDonald’s in Philadelphia County. In July 2023, Huy Nguyen, the administrator of Maguire’s estate, claimed that McDonald’s knew or should have known about the risk of violence to their customers and failed to provide adequate security.

Personal injury lawyers also filed a pair of negligence claims against Pat’s King of Steaks, a beloved restaurant in South Philadelphia. The first, brought in July, resulted from a [deadly shooting](#) that took place outside the restaurant. Although the perpetrators of this crime were ultimately brought to justice, the estate of the victim sued Pat’s, alleging that they were liable for their failure to take prior measures to prevent the shooting. More recently, in September, the [estate](#) of an individual

who was beaten to death outside of the restaurant sued Pat's, claiming that the restaurant owners had a duty to protect its customers or intervene in the altercation.

As these cases demonstrate, businesses are becoming increasingly vulnerable to lawsuits arising from criminal acts beyond their control. These types of lawsuits will burden businesses that operate in high-crime areas. They will be forced to decide to either close their stores or charge higher prices to offset the significant costs of additional security measures that may not be able to stop crime from occurring around the store.

SUPREME COURT CASES TO WATCH

Treble Damages in Consumer Protection Cases

In January, the **Supreme Court of Pennsylvania** agreed to decide whether a court must award treble (triple) damages in cases brought under the state's **Unfair Trade Practices and Consumer Protection Law (UTCPL)** when a jury awards punitive damages on a similar tort claim. In that instance, the trial court properly found that trebling damages on top of an award that already included punitive damages, in addition to substantial compensatory damages and attorneys' fees, was not necessary or appropriate. As pointed out by a coalition of civil justice and business groups in its [amicus brief](#), the alternative would result in duplicative damages for the same conduct. Finding that a trial court lacks discretion to find treble damages unnecessary in such circumstances would exacerbate a trend of expanding liability exposure under the UTCPL and lead to extortionate settlement demands.

During oral arguments, several justices of the Supreme Court of Pennsylvania [signaled their disapproval](#) of the trial court's ruling. **Justice Christine Donohue**, for example, asked, "Why would we take into account any other damage award? This statute...makes no reference to other considerations," in reference to the trial judge's decision to consider the punitive damage award as part of the treble damage determination.

Design Defect Litigation

Also in March 2023, the **Supreme Court of Pennsylvania** heard arguments in a case regarding whether courts should admit evidence of industry and government standards in cases alleging that a product's design is defective. In [Sullivan v. Werner](#), a carpenter sued a scaffold manufacturer, alleging a design defect after falling through the platform and injuring his back. The plaintiff's lawyer sought to keep the jury from learning about government regulations and industry standards for scaffold design offered by the manufacturer, citing the Superior Court's decision in [Gaudio v. Ford Motor Co.](#) He argued that evidence of a product's compliance with industry standards may be kept from the jury in a strict liability claim because the reasonableness of the manufacturer's conduct is irrelevant.



As an [amicus brief](#) recognized, however, industry and government standards “promote uniformity in product design, reduce costs associated with development and testing, and ensure the product is safely designed and manufactured.” Businesses rely on such standards to manufacture safe products. The standards are “widely recognized by the majority of courts as relevant to a design-defect claim.” It is also fair to permit defendants to offer such evidence, particularly when plaintiffs routinely introduce evidence of noncompliance to bolster their product liability claims.

PENNSYLVANIA SUPERIOR COURT INVALIDATES “BROWSE-WRAP” ARBITRATION AGREEMENTS

In July, the full **Pennsylvania Superior Court** [upheld](#) a [three-judge panel’s decision](#) to invalidate Uber’s arbitration provision in its “terms and conditions” agreement. Here, the plaintiff sued Uber in the **Philadelphia Court of Common Pleas** despite having agreed to Uber’s terms and conditions prior to registering an account.

The **Superior Court** disregarded the **Federal Arbitration Act** and held that a stricter burden of proof is necessary to ensure users understand they are waiving their right to a jury trial. This happened even after the Superior Court concluded that the plaintiff would have been bound by the other contractual provisions under the regular application of contract law.

This decision calls into question the validity of countless arbitration agreements found in consumer contracts. Uber, like many companies, has included provisions like these in its terms and services under the expectation that the Federal Arbitration Act prohibits their disparate treatment. Further, the use of arbitration to settle consumer disputes is a benefit to businesses and consumers alike, providing a quicker and cheaper resolution process.

The decision has been appealed to the **Pennsylvania Supreme Court**, but the Court has not yet decided whether to review it.



TOP ISSUES

- BIPA Lawsuit Abuses Bog Down Business
- New Wave of No-Injury Lawsuits on the Horizon
- Food & Beverage Litigation Floods Docket
- Liability-Expanding Legislation Worsens Problems

The prevalence of no-injury lawsuits in Cook County has propelled the county near the top of this year's list. Litigation brought under the state's **Biometric Information Privacy Act (BIPA)** continues to flood the state's court system, with some of the most notable cases brought in Cook County. Rather than rein in abuse, **Illinois Supreme Court** rulings have only incentivized more filings.

Illinois also rivals California and New York for the most food and beverage class actions in the country due to the state's reputation for allowing no-injury lawsuits and plaintiff-friendly consumer protection laws. Lawyers file most of these cases in federal court in the Northern District of Illinois, which includes Cook County.

Illinois courts are prone to hosting nuclear verdicts and the plaintiff-friendly state legislature enacted more liability-expanding bills that will further burden businesses across the state.

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Illinois residents pay a "tort tax" of **\$1,689** and **202,563** jobs are lost each year according to a recent study by [The Perryman Group](#). If Illinois enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **\$21.4 billion**.

In Chicago (Cook County), excessive tort litigation costs residents more than **\$2.24 billion** in personal income annually and results in a loss of more than **187,390** jobs each year. Excessive costs result in an annual "tort tax" of **\$2,321** per person.

TRIAL LAWYER ADVERTISING

Plaintiffs' lawyers are well aware of the state courts' propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent **\$39.98 million** to air more than **462,000** local legal services television advertisements across Illinois media markets. Of that total, approximately **\$23.2 million**, or **58%**, was spent in the Chicago media market while approximately **30%** of all Illinois local legal services television advertisements aired in the Chicago market.



GROUND ZERO FOR NUCLEAR VERDICTS IN THE STATE



A recent U.S. Chamber [study](#) found that over a 10-year period (2010-2019), Illinois ranked sixth among states for the number of nuclear verdicts (\$10 million and more) in personal injury and wrongful death cases and fourth for nuclear verdicts per capita. The **Cook County Circuit Court** hosted two-thirds of these nuclear verdicts.

There have been [13 nuclear verdicts](#) reported in Illinois since 2022 ranging from \$10.5 million to \$363 million, and all but one came from Cook County. Many of these verdicts were in medical liability cases; however, the largest verdict, a \$363 million award (including \$325 million in punitive damages), was awarded in a case blaming a company's emissions for a resident's development of breast cancer. The award set an Illinois record for a single plaintiff in a personal injury action.

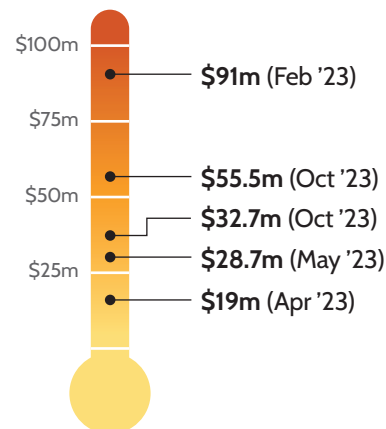
Businesses Know They Face an Uphill Battle

In February 2023, 7-Eleven reached a [\\$91 million settlement](#) with a plaintiff who sued the company after a motorist accidentally drove a car into the storefront, pinning the plaintiff between the car and the building. The plaintiff sued 7-Eleven because it had not installed "bollards" between the storefront and the parking spaces. Despite complying with all local building codes and ordinances, the company chose to settle the lawsuit rather than go through with a trial.

Other 2023 nuclear verdicts in **Cook County** include:

- [\\$19 million](#) wrongful death lawsuit against St. Bernard Hospital (April 2023)
- [\\$28.7 million](#) wrongful death lawsuit against Gottlieb Memorial Hospital (May 2023)
- [\\$32.7 million](#) medical malpractice lawsuit against Central Dupage Emergency Physicians (October 2023)
- [\\$55.5 million](#) medical malpractice lawsuit against University of Illinois Hospital (October 2023)

NUCLEAR VERDICTS IN COOK CO. (2022-23)



ILLINOIS COURTS: "DOORS ARE OPEN, NO INJURY REQUIRED"

Biometric Information Privacy Act



2023 was a year of seminal rulings by the **Illinois Supreme Court** that will reshape the legal climate in the state for years to come. Illinois lawmakers enacted the [Biometric Information Privacy Act \(BIPA\)](#) in 2008, but it lied dormant until 2015 when plaintiffs' lawyers discovered its business potential. BIPA provides a private right of action to a person whose fingerprint, voiceprint, hand or facial scan, or similar information is collected, used, sold, disseminated, or stored in a manner that does not meet the law's requirements.

BIPA requires companies to inform an individual in writing and receive a written release prior to obtaining or retaining his or her biometric data. If a company fails to follow this procedure or meet other requirements, then any "aggrieved" person can

seek the greater of \$1,000 or actual damages for each negligent violation, and the greater of \$5,000 or actual damages for each violation they allege was recklessly or intentionally committed.

The Court issued two rulings that, in the span of just a few short months, have already led to a dramatic increase in BIPA filings.

In February, the **Illinois Supreme Court** [ruled](#) that BIPA lawsuits are subject to the state’s “catch-all” statute of limitations, which provides five years to file claims with no defined period, as opposed to the state’s one-year default statute of limitations for privacy actions. The high court agreed with the **Cook County Circuit Court**, which had [held](#) that the five-year period applied.

Five years is an exceptionally long statute of limitations. It will make no-injury BIPA claims especially lucrative for plaintiffs’ lawyers because the longer the statute of limitations, the larger the classes and number of alleged violations subject to civil penalties. Most state consumer protection laws, for example, set a statute of limitations of [two or three years](#).

As noted by the **Illinois Chamber of Commerce** in its [brief](#) in the case, *Tims v. Black Horse Carriers*, additional time does not protect workers or promote BIPA compliance. “Allowing plaintiffs five years to bring Privacy Act claims will effectively delay compliance with the statute and risk compromising more individuals’ privacy rights.” A one-year statute of limitations would allow employers in the state to “focus on hiring employees, keeping stores and warehouses open, and staying in business, as opposed to litigating expensive class actions.” Extending the statute of limitations will impose severe costs on businesses that must now defend themselves against claims previously thought to be barred. BIPA lawsuits are also especially time-consuming and expensive to litigate, which will only worsen with a longer limitations period.

Just a few weeks later, the **Illinois Supreme Court** issued yet another ruling that expanded liability for businesses under BIPA. In [Cothron v. White Castle](#), the Court ruled that a BIPA claim accrues each time a business scans a person’s biometric information and each time it’s transmitted to a third party, not only upon the first scan and first transmission.

Employees sued their ex-employer, White Castle, in **Cook County Circuit Court** for failing to obtain permission before collecting their fingerprints to use as log-in credentials for accessing work computers and collecting paychecks. White Castle filed a motion to dismiss, arguing that the statute of limitations on the claims had expired, as the injury – collecting the employee’s data without written consent – occurred in 2008.

The plaintiffs’ lawyers countered by arguing that it was a new BIPA violation each time the improperly collected BIPA data was utilized, and therefore, it was a violation every time an employee logged in to the system.

As pointed out in an [amicus brief](#), under the plaintiff’s rule “damages in these cases reach truly stratospheric levels” – collection and use of one employee’s biometric information could lead to thousands of distinct claims against the employer.

The dissent recognized the punitive nature of this decision and the severe impact it would have on businesses. **Justice David Overstreet**, joined by **Chief Justice Mary Jane Theis** and **Justice Holder White**, observed that “the legislature never intended the Act to be a mechanism to impose extraordinary damages on businesses or a vehicle for litigants to leverage the exposure of exorbitant statutory damages to extract massive settlements.” Subsequent scans after the first collection do not violate that privacy further, as no new information is collected. The dissent continued, “the majority’s construction of the Act does not give effect to the legislature’s true intent but instead eviscerates the legislature’s remedial purpose of the Act and impermissibly recasts the Act as one that is penal in nature rather than remedial.”

“[T]he legislature never intended the Act to be a mechanism to impose extraordinary damages on businesses or a vehicle for litigants to leverage the exposure of exorbitant statutory damages to extract massive settlements.”

– Justice David Overstreet

In the two months following the *White Castle* decision, BIPA lawsuit filings jumped [65%](#). The lawsuits are brought primarily by small- and medium-sized law firms, with a sizable portion brought by Chicago-based firm **Justicia Laboral LLC**. This onslaught of litigation does not appear to have an end in sight, as the Illinois legislature has not yet taken any steps to amend the statute and prevent this “[annihilative liability](#)” from being imposed. The **Illinois Supreme Court** [has made it clear](#) they do not see this issue as something they can remedy, saying that “we continue to believe that policy-based concerns about potentially excessive damage awards under the Act are best addressed by the legislature.” As two defense attorneys [put it](#), “Absent legislative intervention, BIPA will remain a significant issue for the foreseeable future.”

Companies targeted by BIPA litigation range from large national companies like Flowers.com and Krispy Kreme to local Chicago small businesses. A recent [report](#) by **Illinois Citizens Against Lawsuit Abuse** shows that a total of 1,141 BIPA cases are currently pending in Illinois state and federal courts, with seven law firms representing plaintiffs in more than two-thirds of those cases. This litigation has proven lucrative for these firms. In one case, plaintiffs’ lawyers received a nearly \$100 million payday while their clients each received just over \$400. As Illinois businesses continue to suffer from the unintended consequences of this law, it is a small group of law firms that are profiting at their expense.

“Many smaller companies implemented ‘biometric’ technology because they viewed it as a way to gain efficiencies with fewer resources. Now those resources are being spent defending litigation. Companies are resolving cases not because they have merit, but because limited resources are better expended elsewhere instead of fighting these claims through trial.”

– [Mary Smigielski](#), Lewis Brisbois Bisgaard & Smith LLP

Cases To Watch



There are two important pending cases, both of which originated in **Cook County**. In [Mosby v. Ingalls Memorial Hospital](#), the **Illinois Supreme Court** will decide whether healthcare providers are exempt from BIPA liability. Section 10 of the Act provides that “biometric identifiers do not include information captured from a patient in a health care setting or information collected, used, or stored for health care treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996.”

Health care providers argue that the “or” before information establishes an entire category of information that is not limited to patients. Under this category, they argue that collection, use, and storage of their workers’ information is related to the treatment of their patients. The lower court disagreed and found that healthcare providers could still be held liable under BIPA.

Upholding this decision would have a detrimental impact on medical providers in the state and would impose significant costs. As pointed out in an [amicus brief](#), regulatory compliance already imposes high costs on healthcare providers. Allowing a private cause of action for alleged privacy violations is inconsistent with HIPAA’s statutory scheme and, given the intangible harms associated with privacy interests, would leave hospitals vulnerable to abusive litigation practices.

Given recent decisions by the Court in *White Castle* and *Black Horse Carriers*, imposing liability on healthcare providers in this context would be disastrous and discourage these entities from collecting biometric data in ways that promote patient health and safety.

The other case to watch, [*Palacios v. H&M Hennes*](#), is the first class action following the *White Castle* decision. The case was originally filed in 2018 but was held until the Illinois Supreme Court's ruling. The class includes any Illinois H&M worker who was required to use a fingerprint scanner between 2014 and 2019.

Genetic Information Privacy Act

While the state continues to grapple (unsuccessfully) with the BIPA litigation abuses, [another wave](#) of class actions is on the horizon. Illinois' [Genetic Information Privacy Act \(GIPA\)](#), enacted in 1998, addresses the disclosure and use of an individual's genetic information. It restricts employers from requiring genetic testing as a condition of employment and states that the results of genetic testing cannot be used to affect the terms of employment. Given their immense success under BIPA, plaintiffs' lawyers will look to exploit GIPA's [broad definition](#) of "genetic information" and large damages provision. Already, in 2023, it is estimated that [nearly 40 cases](#) have been filed in the state under the Act, with more and more plaintiff firms bringing these cases. The statute provides damages between \$2,500 and \$15,000 for each violation, depending on if the violation is deemed negligent or willful, respectively.

In August, plaintiffs' lawyers filed two GIPA class actions in **Cook County Circuit Court**:

- [*Mendoza v. Advocate Health Care and Hospitals Corp.*](#): An employee alleges that Advocate violated GIPA when asking questions during pre-employment physicals related to families' medical history. The class action includes all who have applied for a job with the company within the past five years.
- [*Berry v. Chicago Transit Authority*](#): This class action lawsuit similarly alleges that the Chicago Transit Authority violated GIPA by requesting that applicants complete a pre-employment physical that asks questions about family medical history.
- More recently, GIPA class actions brought in Cook County have targeted [life insurance providers](#) and [pharmaceutical companies](#).

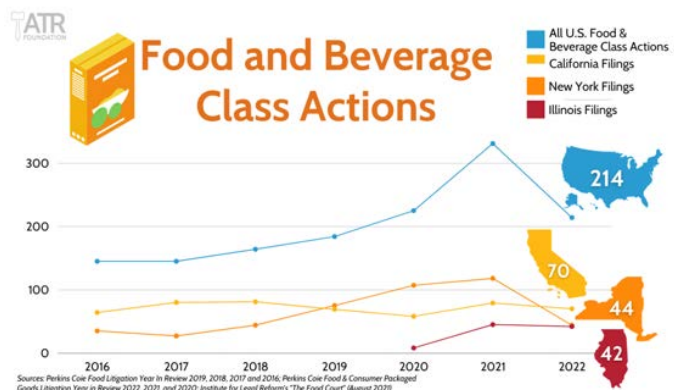
Food & Beverage Litigation

The rate of consumer class actions targeting the marketing of food and beverage products in Illinois remained steadfast in [2022](#) (42), following a 450% increase in 2021 (45). Illinois was third in filings for the second consecutive year behind New York and California. Illinois is a magnet for these types of lawsuits because it has one of the "[broadest, most flexible](#)" consumer protection laws. The vast majority of these cases are filed in federal court in the Northern District of Illinois, which includes Cook County.

This jump in lawsuits is aided by a prolific filer of no-injury consumer class actions, [Spencer Sheehan](#), who continues to file in Illinois after a string of defeats in New York's federal courts. However, he may soon be looking to a new jurisdiction following a strong rebuke by an Illinois federal judge.

In a May 15 opinion dismissing a lawsuit claiming that consumers expected more olive oil in a jar of mayonnaise, **Judge Steven Seeger** wrote that,

"The shelf life of the complaint has long since expired. In fact, the theory of the case was past its prime from the very moment that it arrived in the federal courthouse. Plaintiff's counsel has peddled this theory time and again, in case after case, without much success in this district. The complaint joins a warehouse of complaints filed by plaintiff's counsel that are not fit for public consumption."



In [Guzman v. Walmart](#), Sheehan alleged that the Great Value reduced-fat mayonnaise labeled “with olive oil” was deceptively labeled as it only contains a “de minimis” amount of olive oil.

Judge Seeger further stated, “At this point, this Court has gone round and round the carousel a number of times with plaintiff’s counsel in cases about deceptive product labeling. The case at hand is yet another spin on an increasingly unpleasant ride. It is time for the carousel to come to a halt.”

Noting a lawyer’s obligation to file claims in good faith, **Judge Seeger** required **Sheehan** to provide the court with a spreadsheet showing each case that he has brought alleging a product contained a “de minimis” amount of an ingredient, indicating the outcome of any motion to dismiss stage. The ruling challenged Sheehan, who had become “a wrecking ball when it comes to imposing attorneys’ fees on other people,” to explain why he should not be required to pay the defendant’s attorney’s fees. “Plaintiff’s counsel has taken everyone on a ride, and Plaintiff’s counsel must show who should pay for the ticket.”

Days after the olive oil ruling, another federal judge in Illinois dismissed a lawsuit claiming that consumers expect gum to contain actual mint or peppermint because a blue leaf appears on the package. **Judge Iain D. Johnston** [observed](#) that “mint” didn’t even appear on the Trident package and requested a copy of the spreadsheet requested by Judge Seeger.

Following these rulings, another target of Sheehan’s meritless lawsuits, Sazerac, urged another federal judge to [impose sanctions](#) on the attorney. This came after the court dismissed a claim alleging that the packaging of its Fireball Malt mini bottles misleads consumers to believe it is whiskey when it is a malt beverage. The core problem with that lawsuit was that, contrary to the complaint’s allegations, the product isn’t sold in Illinois.

According to one attorney’s [count](#), “Between January 1, 2020 and April 7, 2023, Mr. Sheehan filed 553 complaints. Of those, 120 (21.6%) were dismissed outright and 35 (6.3% survived a motion to dismiss at least in part. The remaining 398 (roughly 72%) were either settled or are still pending. Mr. Sheehan’s filings have slowly been increasing in number each year, and were it not for [Judge Seeger’s] order, which appears to have chilled his filing pace, he was on pace in 2023 to surpass his prior record of 187 complaints in 2022.”

“Plaintiff’s counsel has peddled this theory time and again, in case after case, without much success in this district. The complaint joins a warehouse of complaints filed by plaintiff’s counsel that are not fit for public consumption.”

– Judge Steven Seeger

OTHER LIABILITY EXPANDING ISSUES

Judgment Interest

In 2021, **Governor J.B. Pritzker** signed into law [S.B. 72](#), the **Prejudgment Interest Act**, which imposes prejudgment interest in personal injury and wrongful death actions from the day in which the action was filed at an annual rate of 6%. Critics of the legislation noted the [negative impact](#) it would have on defendants, especially in unfavorable jurisdictions like Cook County. By imposing prejudgment interest in cases where damages are often highly subjective, this law creates pressure to quickly settle claims before a defendant can accurately assess the merit and value of the claim.

Recognizing this unfairness, litigants challenged the constitutionality of the **Prejudgment Interest Act** under the Illinois State Constitution’s Due Process Clause and other provisions. By August 2022, a pair of Cook County trial court judges issued conflicting rulings on the constitutionality of the law, leaving its status unclear. The **Illinois Appellate Court, First District** was the first appellate court to review the statute. There, the court dismissed the defendant’s due process concerns that the law punishes litigants for delays that are often out of their control, stating that “the assessment of interest is neither a penalty nor a bonus.” (internal quotations omitted).

Currently, this decision is binding on all trial courts in Illinois. However, future appeals, including one before the [Appellate Court, Fourth District](#), raise the likelihood that the Illinois Supreme Court will weigh in on this issue, making it something to watch in the state going forward.

Arbitration

In another case arising in **Cook County**, the **Illinois Court of Appeals** appeared to join a group of state courts exhibiting hostility toward arbitration provisions in consumer contracts. In this case, the plaintiff sued Airbnb after an injury at a listed property. The plaintiff had agreed to Airbnb's updated terms of service which provided that any dispute "arising out of or relating to" the use of the website would be resolved through arbitration. However, in this case, the plaintiff challenged the enforcement of the provision on the

ground that he was not the one who booked the reservation. In response, Airbnb argued that the threshold question of whether the parties agreed to arbitrate these claims should be decided by the arbitrator, citing a Nevada Supreme Court decision to that effect.

The **Illinois Court of Appeals, First Division**, affirmed the trial court's ruling in favor of the plaintiff in a [split panel decision](#). The appellate court determined that the threshold question of arbitrability is within the discretion of the trial court as a matter of law, reasoning that following the Nevada Supreme Court decision would be an "absurd result." In dissent, **Justice Terrence Lavin** found that the mere fact that the plaintiff did not book this particular property was irrelevant to the question of whether he agreed to arbitrate disputes with Airbnb. Moreover, the dissent observed that it is perverse to hold Airbnb liable for injuries to house guests while, at the same time, finding they cannot be deemed to have agreed to the terms of staying there.

Asbestos

Cook County remains [one of the top jurisdictions](#) in the country for asbestos litigation, with filings surging in the first half of 2023 after a modest decline in 2022. Overall, **Cook County** was in the top-10 (#7) in filings for asbestos filings for 2022, but the current pace of filings in 2023 could result in the county rising in the rankings.

ASBESTOS LITIGATION

LIABILITY-EXPANDING LEGISLATION

Punitive Damages

In August, **Governor Pritzker** signed [H.B. 219](#) into law, despite significant opposition by state business leaders. The legislation amends the state's wrongful death statute to allow for the recovery of limitless punitive damages in most wrongful death cases. This shift makes Illinois an [extreme outlier](#) when compared to the rest of the states as most cap



“Disguised as a safety bill, this legislation could make rideshare too expensive for many communities. It could also lead to reduced rideshare availability, removing transportation options and earnings opportunities for tens of thousands in Illinois.”

– Uber statement

for rideshare companies like Uber and Lyft by categorizing them as common carriers, who have “vicarious liability” for accidents that are the result of their employees. Rideshare companies voiced their concern over the legislation and the impact it would have on the cost of providing service in Illinois.

Phil Melin, executive director of Illinois Citizens Against Lawsuit Abuse, also pointed to the immense power of the state’s plaintiffs’ bar. “The Illinois Trial Lawyers Association’s practice of donating heavily to lawmakers, including more than \$400,000 to sponsors of the common carrier bill over the last three years, means the trial lawyers have unfair sway.”

or otherwise limit both punitive and noneconomic damages in some way, which Illinois does not. The bill was [pushed through](#) at the last minute with no time for businesses to provide input and suggested improvements.

The impact of these expansive legislative efforts in Judicial Hellholes® will be discussed in more depth in the [“Wrongful Death” Closer Look section](#).

Rideshare Bill

Governor Pritzker also signed [H.B. 2231](#) into law in August. The bill removes liability protections



TOP ISSUES

- Endless Prop-65 Litigation Targets a Variety of Industries
- No-Injury Lawsuits Bog Down Business
- Unique Lemon Law is a Gold Mine for Plaintiffs' Lawyers
- Arbitration under Attack
- Environmental Litigation Heats Up

The “Golden State” is the plaintiffs’ bar’s laboratory for finding innovative new ways to expand liability through both the courts and legislature. These novel theories of liability are burdening small businesses and bogging down the state’s economy. Even in areas where the U.S. Supreme Court has stepped in to rein in lawsuit abuse, the **California Supreme Court** has disregarded precedent and expanded liability.

From abusive Proposition 65 and Private Attorneys General Act (PAGA) litigation, to serial plaintiffs filing hundreds of lawsuits under the Americans with Disabilities Act, the list of issues with the state’s civil justice system is endless. Rather than address the abuses and improve the litigation climate, state leaders seem to embrace the Judicial Hellholes® moniker.

PROP-65

Proposition 65, a well-intentioned law enacted in 1986, has become one of the plaintiffs’ bar’s favorite tools to exploit. Baseless Prop-65 litigation unjustly burdens companies that do business in California.

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. California residents pay a “tort tax” of **\$2,119.35** (third highest) and **787,490** jobs are lost each year according to a recent study by [The Perryman Group](#). If California enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **\$83.16 billion**.

TRIAL LAWYER ADVERTISING

Plaintiffs’ lawyers are well aware of the state courts’ propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent **\$183.15 million** on local legal services television advertisements, digital advertisements, radio advertisements, and outdoor advertisements. More than half of that spending, more than **\$94 million**, was spent to air more than **918,000** ads on local television. Radio was the next most popular medium across California, with about one-quarter of total spending going toward more than **575,000** radio ads.





Through October 18, 2023, there were 797 Prop-65 settlements for a total of more than \$18.9 million with \$16.68 million (88%) going towards attorneys' fees and costs.

Under **Prop-65**, businesses are required to place ominous warning signs on products when tests reveal the presence of even the slightest, non-threatening trace of more than [1,000 chemicals](#) that state environmental regulators deem carcinogenic or otherwise toxic. Eight [new chemicals](#) were added in 2023. Failure to comply can cost up to \$2,500 per day in fines, and settlements can cost \$60,000 to \$80,000. Through **October 18, 2023**, there were 797 Prop-65 settlements for a total of more than \$18.9 million with \$16.68 million (88%) going towards attorneys' fees and costs.

A troublesome part of the law allows private citizens, advocacy groups and attorneys to [sue on behalf](#) of the state and collect a portion of the monetary penalties and settlements, creating an incentive for the plaintiffs' bar to pursue these types of lawsuits. Law firms identify serial plaintiffs who are willing to file multiple lawsuits despite not suffering any injuries or harm.

Serial Plaintiffs

SERIAL Plaintiffs

Each year, plaintiffs' lawyers send thousands of notices to companies threatening Prop-65 lawsuits and demanding a settlement. Food and beverage companies are among the [prime targets](#). Over

the last decade (2012-2022), what are known as Prop-65 "60-day notice" filings increased from [908 in 2012](#) to [3,170 in 2022](#), a rise of 250%. These notices are often sent by organizations or individuals to companies asserting a Prop-65 violation, threatening suit, and demanding labeling changes and monetary settlement. As of November 1, 3,382 had been filed in 2023, already exceeding the prior year's total.

The money companies spend on compliance and litigation unnecessarily drives up the cost of goods for California consumers. It also harms small businesses that do not have the in-house expertise or means to evaluate the need for mandated warnings or handle litigation.

Glyphosate

The most infamous Prop-65 case involves Monsanto's Roundup® products. California added the popular weed killer's active ingredient, [glyphosate](#), to the Prop-65 listing in July 2017.

Regulators and scientists worldwide have deemed glyphosate safe, except for the **International Agency for Research on Cancer (IARC)**, whose study was [riddled with controversy](#). The single IARC report stating glyphosate is carcinogenic is in stark



contrast to [more than 800 studies](#) submitted to the **U.S. Environmental Protection Agency (EPA)**.

In June 2020, the **National Association of Wheat Growers** filed a lawsuit seeking an injunction to block California’s attorney general from requiring a cancer warning on glyphosate products. The district court granted the injunction the same month and the case was appealed to the Ninth Circuit.

In response to this litigation, the **California Office of Environmental Health Hazard**

Assessment amended the regulation to no longer require the phrase, “Glyphosate is known to the state of California to cause cancer.” The [amended phrasing guidelines](#), which took effect on January 1, 2023, still require manufacturers to warn of the risk of glyphosate but allows them to acknowledge that competing studies exist on whether the chemical is linked to cancer.

[T]he warning “still conveys the overall message that glyphosate is unsafe which is, at best, disputed.”

– Ninth Circuit

fell short of these criteria. Highlighting the stark lack of consensus in the scientific community regarding the link between glyphosate and cancer, the panel stated that even with the OEHHA’s amendments, the warning “still conveys the overall message that glyphosate is unsafe which is, at best, disputed.” The panel [concluded](#) that none of the warning iterations were narrowly tailored to advancing the state’s interest in protecting consumers from carcinogens. Further, the Court noted that the state has “less burdensome ways to convey its message than to compel Plaintiffs to convey it for them.”

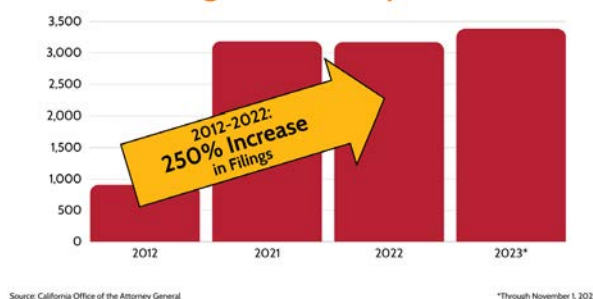
Personal Injury Litigation

California courts’ willingness to rely on junk science has given rise to thousands of baseless personal injury claims against Roundup®. These cases have had mixed results with Monsanto [winning](#) a vast majority of the more recent cases. However, in October, a San Diego jury delivered a \$332 million verdict against Monsanto, finding that its alleged negligence in designing Roundup® and failure to warn of its health risks substantially contributed to the plaintiff’s cancer. Notably, the award consisted of \$325 million in punitive damages, along with \$7 million in noneconomic damages. Expressing its intent to appeal, the company [pointed out](#) that significant legal and evidentiary errors were made during the trial, and that it had resolved most of the claims of this case in previous Roundup® litigation victories.

Prop-65 & Food Litigation

Over the past five years, Prop-65 [pre-litigation notices](#) targeting the food and beverage and supplement industries have been on the [rise](#). Allegations that products contain traces of heavy metals, such as lead, cadmium, and arsenic are most common, accounting for over 90% of all notices in 2022. The key product categories for notices relating to heavy metals include seafood products, spices, and protein supplements.

California Proposition 65 Pre-Litigation 60-Day Notices



PROP-65 PRE-SUIT NOTICES OF VIOLATION (SOURCE)

| Year | 2019 | 2020 | 2021 | 2022 |
|-----------------|------|------|------|------|
| Food & Beverage | 413 | 1328 | 1046 | 1174 |
| Supplements | 121 | 218 | 202 | 183 |

NO-INJURY LAWSUITS BOG DOWN STATE ECONOMY, DRIVE BUSINESS OUT OF STATE

California Supreme Court Ignores U.S. Supreme Court, Expands Liability Under 'Private Attorney General Act'

Enacted in 2004, California's **Private Attorneys General Act (PAGA)** has become known as the "[Sue Your Boss](#)" law. While its initial purpose was to protect workers, it has done little to help them. The plaintiffs' bar has been the true beneficiary.

PAGA authorizes "aggrieved" employees to file lawsuits seeking civil penalties on behalf of themselves, other employees, and the State of California for labor code violations. Many PAGA lawsuits revolve around technical nitpicks, such as an employer's failure to print its address on employees' pay stubs, even though the address was printed on the paychecks themselves.

[Three quarters](#) of the penalties paid by non-compliant employers go to the state's Labor and Workforce Development Agency while only 25 percent go to the "aggrieved employees" and their lawyers who take a third or so of that. In some cases, the plaintiffs' lawyers receive even more.

Standing in PAGA Claims

In June 2022, the **U.S. Supreme Court** issued a decision in [Viking River Cruises v. Moriana](#) that many hoped would impact California plaintiffs' lawyers' ability to circumvent arbitration agreements.

The **U.S. Supreme Court** held that the **Federal Arbitration Act (FAA)** prohibits California courts from not enforcing employment arbitration agreements as it violates each litigant's right to agree to resolve disputes without litigation. Therefore, the Court ruled that a dispute between a plaintiff and Viking Cruises should be decided through arbitration, as provided by the agreement, and the representative claims (those the plaintiff brought on behalf of other people) should be dismissed, as the plaintiff no longer has standing to bring them.

As a result of the U.S. Supreme Court's ruling, the **California Supreme Court** agreed to hear *Adolph v. Uber*, recognizing that the lower court's decision may conflict with the *Viking Cruises* decision. In *Adolph*, an Uber driver sued the company in state court, alleging Uber misclassified him as an independent contractor. Despite signing an arbitration clause in his employment contract with Uber, he sought statutory damages under PAGA in court. Uber filed a motion to compel arbitration of the individual claim and dismiss the representative claims. Nevertheless, both the trial court and appellate court denied the motion and allowed both the individual and representative claims to move forward.

In July 2023, the **California Supreme Court** strayed from the *Viking* decision and [held](#) that representational PAGA claims can stay in court even when individual



claims are sent to arbitration. According to the Court, “an order compelling arbitration of the individual claims does not strip the plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA.”

Several cases involving arbitration clauses were pending as California courts awaited this decision. *Adolph* opened the floodgates for these PAGA claims, and others, to proceed in the trial courts.

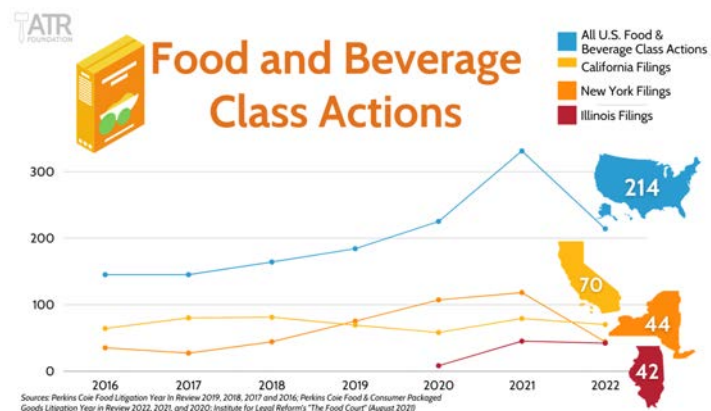
Manageability of PAGA Claims

The **California Supreme Court** [is reviewing](#) whether PAGA suits can proceed when discovery is “unmanageable.” The **California Fifth District Court of Appeal** held that manageability is only a requirement for class actions, not PAGA claims. Allowing “unmanageable” PAGA cases to proceed would [unfairly burden](#) defendants and lead to inefficiencies and significant pressure to settle cases because of the overwhelming discovery that plaintiffs would seek.

‘Food Court’

California regained its status as the plaintiffs’ bar’s favorite food court. It beat out **New York** for the most “no-injury” consumer class action filings targeting the food and beverage industry. About one third of the nation’s lawsuits taking issue with food labeling – 70 of 214 – were filed in California.

These lawsuits often claim that some aspect of a product’s packaging or marketing misleads consumers, even though it is unlikely to have made a difference in anyone’s decision to buy a product.



Trial Lawyers’ Newest Statutory Gold Mine

On January 1, 2023, the [California Privacy Rights Act of 2020](#) (CPRA) went into effect. This Act replaced the **California Consumer Privacy Act (CCPA)** and [addressed](#) some of the CCPA’s ambiguities. It eliminates a business’ [30-day window to cure](#), grants new rights to consumers, and increases business’s contractual obligations. It also creates the [California Privacy Protection Agency](#) to enforce the CPRA, which will fine businesses \$2,500 for violations and \$7,500 for intentional violations and those involving a minor. While the Act took effect in 2023, it applies to data collected beginning on January 1, 2022.

In July, **California Attorney General Rob Bonta** [announced](#) that his office was doing an “investigative sweep” of all large employers in the state to ensure they are in compliance with the Act.

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

Americans with Disabilities Act Lawsuit Abuse

In 2022, California was home to nearly one third of the nation’s **ADA** accessibility litigation. That year, plaintiffs’ attorneys filed [2,519](#) accessibility lawsuits in **California** – the state was second to only **New York**, a fellow Judicial Hellhole®. These are federal lawsuits claiming that businesses violated standards under the ADA that are intended to ensure that public places are accessible to everyone but have been abused by serial plaintiffs and certain attorneys.

In California, penalties for **accessibility** violations are much higher due to the state’s [Unruh Civil Rights Act](#), which provides for a fine of [\\$4,000 per violation](#), a fine [other states](#) do not have, plus attorneys’

fees. Often these so-called “violations” are as minor as a mirror that is an inch too high or a sidewalk or parking lot that is angled one degree too much.

In the [first half of 2023](#), there were 1,020 ADA lawsuits filed in California federal courts. This represents a 35.8% decline from the 1,587 lawsuits filed in the first half of 2022. However, California still had the second-highest number of federal ADA filings among other states.

California’s dip in filings may in part be attributed to less filings by **Potter Handy LLP** and the **Center for Disability Access**. As a result of their lawsuit abuse, these entities were hit with actions by the San Francisco and Los Angeles District Attorneys.

SERIAL Plaintiffs

The [Potter Handy](#) law firm set up the **Center for Disability Access (CDA)** and filed thousands of lawsuits on behalf of just a handful of plaintiffs over the past few years. For example, **CDA** worked with a quadriplegic plaintiff to file over [4,000 ADA claims](#) in California from 2010 to 2021, which amounts to roughly 1 lawsuit per day for 11 straight years. The plaintiff filed over 1,000 claims in 2021 alone, forcing businesses, already struggling to recover from the pandemic, to close for good. A federal grand jury [indicted](#) the plaintiff for tax fraud in 2019 after failing to pay taxes on his lawsuit income.

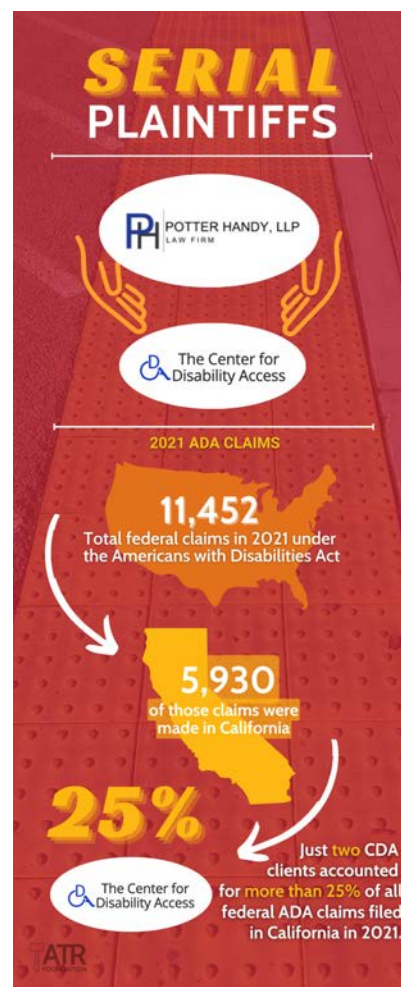
CDA filed [560 ADA claims](#) on behalf of another plaintiff in 2021, bringing his grand total to [over 1,700 claims](#) filed. In one suit, federal **Judge Vince Chhabria** (Northern District) [levied](#) a \$35,000 sanction against **CDA** for conspiring to falsify pleadings. “You may not lie in an effort to keep your lawsuit alive. And that is the real problem here,” said **Judge Chhabria** in his sanction order.

In April 2022, the San Francisco and Los Angeles district attorneys filed a joint suit against **Potter Handy** for “[unlawfully circumventing](#)” California state procedural requirements by “filing thousands of boilerplate, cut-and-paste federal court lawsuits that falsely assert its clients have standing under the [ADA].” The DAs’ action alleged that the [sheer number of claims](#) made it “literally impossible for the Serial Filers to have personally encountered each listed barrier, let alone intend to return to hundreds of businesses located hundreds of miles away from their homes.”

The DAs’ action further [alleged](#) that these ADA shakedown lawsuits have extracted tens of millions of dollars from California businesses. Plaintiffs demand between \$10,000 and \$20,000 to settle, and most businesses have no choice but to pay because litigating a case can cost \$50,000 or more even if the business wins. The opportunistic plaintiffs’ lawyers target mom-and-pop shops with little financial resources, especially owners who speak English as a second language. The lawsuit demanded that CDA return all settlement money to California business owners.

Unfortunately, in August 2022, **San Francisco Superior Court Judge Curtis Karnow** [dismissed](#) the lawsuit. He found that Potter Handy’s filings were covered under the state’s “litigation privilege.” This bars a third-party litigant from using client communications and lawsuit filings as evidence against the firm. The judge found the privilege applies “irrespective of the communication’s maliciousness or untruthfulness.”

The cities appealed the dismissal in October 2022. The **Los Angeles DA** [dubbed the appeal](#) “the best course of action” to guard against more “frivolous boilerplate lawsuits.” Meanwhile, the **San Francisco DA** [said](#) she was appealing “to protect business from preda-



tory law firms that are abusing disability protections by filing these fraudulent lawsuits.” The case is [currently pending](#) in the **California Court of Appeals for the First District**.

Ninth Circuit Decision Emboldens Serial Plaintiffs

In January 2023, the Ninth Circuit [issued a disappointing decision](#) that prevents courts from taking the “littigiousness of the plaintiff into consideration.” Here, the plaintiff, Chris Langer, is a paraplegic, serial litigant represented by the **Center for Disability Access**. He filed a complaint against owners of a lobster shop and smoke shop for lack of accessible parking. This was just one of nearly 2,000 ADA lawsuits that he has filed over the past 30 years.

The district court found Langer’s testimony to be unreliable based on the fact that he was a serial plaintiff and found that he had no intention of returning to or patronizing the establishment. According to [District Judge Robert Benitez](#), “On the day he filed this lawsuit, he also filed six other lawsuits. Yet, [Langer] was unfamiliar with those suits as well as the businesses involved.”

Unfortunately, the **Ninth Circuit** [reversed](#) the district court’s decision, holding that a plaintiff’s motive for visiting a place of public accommodation is irrelevant to standing. District courts are not allowed to “question the ‘legitimacy’ of an ADA plaintiff’s intent to return to a place of public accommodation simply because the plaintiff is an ADA tester or serial litigant.”

The dissent said the majority ignored its “‘significantly deferential’ standard of review” and observed it was “implausible to think that Langer intended to actually patronize the nearly 2,000 businesses that he had sued.”

In February, the shop owners filed a [petition to rehear](#) the case. The petition was [deferred](#) pending the U.S. Supreme Court’s decision in *Acheson Hotels v. Laufer*, which raises the issue of when a person may sue as a “tester” under the ADA.

LEMON LAW ABUSE



Lawsuit abuse under California’s [Song-Beverly Consumer Warranty Act](#), otherwise known as the California lemon law, has reached a fever pitch and legislative efforts to address the abuse stalled in 2023.

While automobiles have become more reliable and the frequency of problems with them have [generally decreased](#) over the past decade, lawsuits under California’s Song-Beverly Consumer Warranty Act have actually [increased](#).

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

The intent of the law was to ensure manufacturers would repair, replace, or repurchase a consumer’s defective vehicle as quickly as possible. However, plaintiffs’ lawyers have learned to exploit loopholes in the law and create windfalls for themselves at the expense of a fair resolution for consumers. The law provides an incentive for attorneys to pursue litigation even when companies make a reasonable offer and consumers may be inclined to settle. This draws out the process for consumers and delays the time it takes to reach a fair resolution. The costly litigation also drives up the price of vehicles in the state. The true winners of the prolonged litigation are the plaintiffs’ lawyers. By dragging out a case, they run up hefty legal fees on top of the statutory lemon law fee entitlement.

Courts Make It More Difficult to Reach Timely Resolution

This year, a California appellate court issued [a decision](#) that makes it nearly impossible for automobile manufacturers to make things right with consumers on a reasonable, timely basis. In that instance, a consumer

had issues with the dashboard media and back-up camera system in a leased 2019 Sentra. The consumer contacted Nissan, and after some back and forth, agreed to a \$3,500 settlement and sent the plaintiff a Settlement Agreement and Release. The release stated that the consumer released Nissan from any claims “whether arising in the *past or present*.” The consumer reviewed and signed the release and received a settlement check in October 2019.

The consumer then filed a lawsuit in May 2020 claiming that the release was void under a [provision](#) of the Song-Beverly Act that states “any waivers by the buyer of consumer goods... except as expressly provided” are deemed against public policy and are unenforceable.

The trial court disagreed with the plaintiff, finding that the specific provision applied to waivers “sought on the front end, in connection with the purchase of a product – not to releases negotiated to end disputes...” The trial court also found that “if a lemon law plaintiff is prohibited from waiving the provisions of the Song-Beverly Act in order to settle, no settlement would ever be possible.”

Unfortunately, in June, the **Fourth District Court of Appeal** [reversed](#) the lower court’s decision, finding that the release violated the plaintiff’s substantive rights and is unenforceable as it’s against public policy. The court found no evidence that the plaintiff was aware of his rights under the Act since he was not represented by counsel. “The circumstances suggest unequal bargaining strength between a consumer unaware of his rights and a manufacturer seeking to circumvent its statutory obligations.”

This decision puts manufacturers in the difficult position of having to advise consumers of their rights under the Song-Beverly Act, their entitlement to repurchase and replace, and that the manufacturer has an affirmative duty to offer those remedies after a reasonable number of repair efforts. It will lead to more time-consuming and inefficient litigation.

Does a Used Car Count as a ‘New Vehicle’?

In July 2022, the **California Supreme Court** agreed to decide whether a used car should be considered a “new vehicle” under the state’s lemon law. In *Rodriguez v. FCA*, plaintiffs filed a lemon law claim after experiencing issues with a used vehicle they purchased from a car dealership with two years and 55,000 miles of road wear that was still under a manufacturer’s limited warranty.

The trial court granted summary judgment for the manufacturer, holding that a used vehicle cannot qualify as “new,” regardless of its warranty status. The appellate court [affirmed](#) the decision and noted that the plaintiff’s position (that any car under a limited warranty still qualifies as “new”) would lead to “problems,” inconsistencies and absurd results.

ARBITRATION UNDER ATTACK

The California courts and legislature have long attempted to undermine the right of employers and employees to enter into arbitration agreements.

Despite the U.S Supreme Court’s [clear rulings](#) finding arbitration agreements are enforceable and may not be disfavored by state laws, the California legislature attempted to bar employers from requiring employees to sign agreements to [arbitrate claims](#).

In 2018, the California legislature enacted **A.B. 51** to [ban arbitration agreements](#) as a condition of employment by essentially “[criminalizing the act](#) of entering into an arbitration agreement.” The law deterred employers from using arbitration agreements by preventing contracts from including “[non-negotiable terms](#) requiring employees to waive certain rights, including the right to sue.”

In February 2023, the **U.S. Court of Appeals for the Ninth Circuit** [held](#) that the **Federal Arbitration Act (FAA)** preempts **A.B. 51**, upholding a lower court’s injunction that temporarily prevented California from enforcing the law. The **Ninth Circuit** held that the deterrence created by A.B. 51 contravened the FAA’s equal treatment principle.

Case to Watch

The **California Supreme Court** is deciding whether unfair and unconscionable provisions in an arbitration agreement are severable or if the entire agreement is void. In [*Ramirez v. Charter Communications*](#), the plaintiff is arguing that an arbitration agreement is a contract of adhesion and procedurally unconscionable. The plaintiff also is arguing that it is substantively unconscionable for several reasons. The defendant disagrees and maintains that even if certain provisions are unconscionable, they should be severed, and the arbitration agreement should still be enforced.



Anti-Arbitration Legislation Enacted

In October, **Governor Gavin Newsom** signed [S.B. 365](#) into law. The legislation is intended to deter the use of arbitration agreements by not automatically pausing trial court proceedings during the pendency of an appeal of whether arbitration is required. The law will benefit plaintiff's attorneys as it will likely increase civil litigation and lead to more lengthy, time-consuming trials.

ASBESTOS LITIGATION

ASBESTOS LITIGATION

Los Angeles asbestos lawsuit filings have [increased 9.8%](#) through July 30, 2023, and the city is the seventh most popular jurisdiction in the country for asbestos claims.

In July, a family of a 45-year-old man who died of mesothelioma was awarded [\\$107 million](#), including \$75 million in punitive damages. The eye-popping verdict came about after the plaintiff's counsel made several inflammatory comments during closing arguments. In response, the defendant twice asked for a mistrial, which the court denied.

Among the statements according to defendant's motions, plaintiffs' lawyers [stated](#), "the punitive damages are substitute for jail, suggesting a crime has been committed, suggesting that making an example of Union Carbide will send a message to other companies – Monsanto [sic], Exxon [sic], Philip Morris [sic]; evoking images of Roundup litigation and verdicts, oil spills, environmental disasters, and big tobacco litigation," all of which had nothing to do with an asbestos case. The plaintiffs' lawyer also charged that the company had "poisoned a bunch of people," according to the motions, and made reference to "the absence of corporate representatives at trial, unfairly implying that Union Carbide was not showing proper respect for the trial, decedent or Plaintiffs."

Talc Litigation Update

In November of this year, **Los Angeles County** added fuel to the state's asbestos litigation landscape by [filing a first-of-its-kind lawsuit](#) on behalf of its residents against Johnson & Johnson. In doing so, the county joined the nationwide wave of lawsuits alleging a connection between the company's talc-related products, purportedly containing asbestos, and cancer. The complaint argues that J&J continued to sell its talc-containing products to county residents despite alleged awareness of potential health risks. To support this contention, the county extensively relies on a dated 1971 study linking talc and cancer, which apparently put J&J on notice in the mid-1970s of health risks associated with its products. The county additionally capitalized off J&J's occasional consideration of replacing talc in its products and discontinuing their sale.

The outcome of this lawsuit in the **Los Angeles Superior Court** remains to be seen. Nevertheless, the county's decision to engage in the talc-asbestos lawsuits against J&J may propel even more plaintiffs to file claims against the company, contributing to the mounting asbestos litigation in Los Angeles.

Case to Watch

The **California Supreme Court** [is reviewing](#) a lower court's decision to hold a company liable for "take-home-exposure" after a plaintiff alleged that he was exposed to asbestos when he visited his brother after he came home from work where asbestos was present. At trial, the plaintiff was awarded [\\$2.69 million](#).

In 2016, the **California Supreme Court** [held](#) that employers and premises owners had a "duty to take reasonable care to prevent secondary (take-home) asbestos exposure to members of a worker's household." Now, the Court will decide whether that duty extends to individuals that are not a part of the same household. Should the Court adopt this expansive approach to liability, there would be [no logical end](#).



CALIFORNIA LEADS THE CHARGE BEHIND ENVIRONMENTAL LITIGATION

Climate Change Litigation

California Attorney General Rob Bonta has joined efforts to pin costs associated with global climate change on the oil and gas industry. In his [135-page complaint](#) filed in September, he alleges that the state has incurred substantial financial burdens in combatting extreme weather, droughts, rising sea-levels and other climate-related events that are "destroying people's lives and livelihoods," and that the industry should pay these costs because they allegedly created a public nuisance and engaged in misleading marketing.

This lawsuit is in addition to [other litigation](#) filed by localities across the state that continues to work its way through the courts.

Piecemeal litigation in state courts is an inappropriate and ineffective way to tackle climate change, a matter of national and global significance deserving of a coordinated international response.

Greenwashing Litigation



An effort is underway in California to attack companies that tout their environmental sustainability efforts with lawsuits.

In July, a court [dismissed](#), for the second time, a proposed class action [alleging](#) that Coca-Cola and two other bottled water manufacturers misrepresent their plastic bottles as "100% recyclable." The plaintiff argued that this phrase misleads consumers into thinking that recyclability is a guarantee, when realistically, consumers may dispose of the bottles in a manner that leads many of them to end up in a landfill or burned.

Another class action, filed in May, [alleges](#) that Delta Airlines misleads consumers by calling itself the "first carbon neutral" airline. Plaintiffs claim that Delta's participation in the carbon offset market does not make it carbon neutral, and that the airline continues to release carbon into the atmosphere while benefiting from an environmentally friendly image.

BATTLE OVER CLASSIFICATION OF WORKERS

A.B. 5 & Prop-22

[A.B. 5](#), enacted in 2019, codified the **California Supreme Court's** decision that introduced the "[ABC](#)" test to distinguish between employees and independent contractors in worker-classification disputes. This test presumes a worker is an employee, with independent contractor status attainable only under narrow conditions. Certain industries within the state have disproportionately felt the impact of this law.

In May, the **California Trucking Association** [challenged the constitutionality](#) of **A.B. 5** after a [second attempt](#) at blocking its enforcement through a preliminary injunction a few months prior. Among other allegations, the [third amended complaint](#) addressed the law's potential violation of the Equal Protection Clause by exempting truck drivers in construction-related services, while forcing other truck drivers to classify as employees. Subsequently, a trade association of independent owner-operators of trucking companies [joined the suit](#) in June, arguing that **A.B. 5** deters its members from conducting business in the state by forcing them to “fundamentally change the way they operate at a significant cost.” The case is currently pending in the **U.S. District Court for the Southern District of California**.

The unfavorable impacts of **A.B. 5** also have been addressed in another context, namely, the gig economy. In November 2020, California voters [approved Prop-22](#), which exempted gig economy companies, including app-based ride-share and delivery services, from **A.B. 5** and allowed them to classify workers as independent contractors. In lieu of traditional employee benefits, **Prop-22** [guaranteed that](#) gig economy workers received alternative benefits that were more suited to the nature of their roles.

Despite the glimmer of hope brought about by **Prop-22**, a group of plaintiffs [sought](#) to declare it unconstitutional. In August 2021, the plaintiffs initially succeeded in their endeavor when a California trial court [struck the law down](#) for encroaching on the legislature's “plenary” authority to pass workers’ compensation laws. This past March, however, a California appellate panel [revived the proposition](#), finding that authority over workers’ compensation legislation is granted to *both* the legislature and voters under the state constitution. Unsatisfied with this turn of events, the plaintiffs petitioned the **California Supreme Court**, which [accepted review](#) of the matter in June and has yet to issue its decision.





TOP ISSUES

- Nuclear Verdicts Bog Down Businesses
- Expansive Liability Laws Lead to Lawsuit Abuse
- No-injury Consumer and ADA Litigation, and Excessive Premises Liability
- Legislature Continues to Pursue Trial Bar Agenda

New York City has long been known for its beautiful city skyline, and now it's known for its sky-high verdicts too. Nuclear verdicts burden businesses in the city and bog down economic growth. Liability-expanding laws have led to a never-ending surge of meritless lawsuits in courts across the state and third-party litigation financing feeds the city's litigation machine.

The New York Legislature has turned a blind eye to the deteriorating civil justice climate, and rather looks for ways to expand liability by pursuing a pro-plaintiff agenda. It continues to consider legislation that, if enacted, will further entrench New York City on the Judicial Hellholes® report for years to come.

NUCLEAR VERDICTS BOG DOWN BIG APPLE

New York City continues to see a surging number of nuclear verdicts, obtained by plaintiffs' lawyers who use manipulation tactics like "reptile theory" and

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. New York residents pay a "tort tax" of **\$2,013.52** (fifth highest) and **376,738** jobs are lost each year according to a recent study by [The Perryman Group](#). If New York enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **\$39.94 billion**.

TRIAL LAWYER ADVERTISING

Plaintiffs' lawyers are well aware of New York City's propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent **\$55.2 million** to air nearly **757,000** local legal services television advertisements across New York state media markets. Approximately **60%** of total spending on local legal services television advertisements in the state occurred in New York City specifically.





“anchoring” to drive up awards using New York’s generous liability laws.

One of the main drivers of nuclear verdicts is a New York law, [CPLR 4016\(b\)](#), which allows plaintiffs’ lawyers to request that a jury award a specific dollar amount for any element of damages. Plaintiffs’ lawyers use this law to engage in a tactic known as “anchoring,” in which they place an extremely high figure into the jurors’ minds to start as a base dollar amount for a pain and suffering award, which, unlike medical expenses or lost wages, lacks a

means of objective measurement. Although [New York law](#) confines a plaintiff’s recovery to “reasonable compensation,” its courts have [repeatedly awarded](#) amounts beyond its former de facto cap of \$10 million for a pain and suffering award. According to a 2022 study released by the **New York Civil Justice Institute**, in 90% of the [cases](#) where a plaintiff’s lawyer asked a jury to award more than \$20 million, the jury awarded at least the level requested.

According to a [recent study](#) by the **U.S. Chamber**, there were 151 recorded nuclear verdicts between 2010 and 2019 in New York totaling over \$5 billion. New York had the second most nuclear verdicts per capita. New York is unique in the fact that most of the state’s nuclear verdicts are concentrated in two areas – premises liability (29.8%) and medical liability (22.5%). The state’s problematic “Scaffold Law,” which will be discussed later in the report, is a driving factor behind the sky-high premises liability awards.

In October 2022, a former running back for the New York Giants football team was awarded \$28.5 million in a lawsuit following an unsuccessful ankle surgery. The injury ultimately ended his football career and the doctors argued that no amount of treatment would have been sufficient to prolong it.

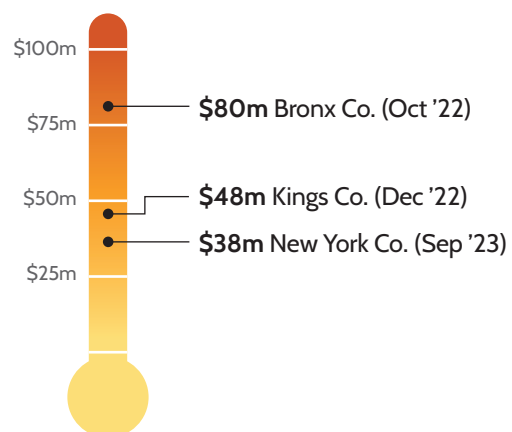
Following this verdict, the **American Orthopedic Society for Sports Medicine**, as well as other prominent medical organizations, released an [open letter](#) stating their concern over the rising liability costs associated with providing care for professional athletes. The letter stated that sports medicine physicians are in a uniquely difficult position as they must go through extensive training in order to provide care to elite athletes that are at an increased likelihood of injury by nature of their profession. These athletes will also typically suffer a loss of future income far greater than the average person.

Given the training needed to work in the specialty of sports medicine and related subspecialties within that field, “testimony in support of critical medical care should come from an expert in their subspecialty.” Dr. Scott Rodeo, head physician for the New York Giants, also stated that the recent trend of cases may discourage physicians from providing care to athletes.

Other recent New York City nuclear verdicts include:

- **October 2022: \$80 million verdict** (comprised of \$10 million in past pain and suffering and \$70 million for future pain and suffering) in a medical liability case in **Bronx County**
- **December 2022: \$48 million verdict** (including \$35 million for past and future pain and suffering) in a construction liability case in **Kings County**
- **September 2023: \$38 million verdict** (including \$6.5 million in punitive damages) in an asbestos case in **New York County (Manhattan)**

NUCLEAR VERDICTS IN NEW YORK CITY (2022-23)



Things Could Get A Lot Worse...

The state legislature added fuel to the fire by once again passing the **Grieving Families Act (GFA)**. The legislature only made minor changes to a problematic bill that **Governor Kathy Hochul** vetoed at the end of 2022.

The **Grieving Families Act (GFA)**, introduced by **State Senator Brad Hoylman**, expands compensable damages in New York's wrongful death actions. Though state law previously limited recovery to pecuniary losses, plaintiffs' lawyers will now be able to seek unlimited and subjective damages for grief or anguish as well as other forms of noneconomic damages. The **GFA** also expands the eligible recipients of these damages to include "close family members," including, spouses, domestic partners, children, parents, grandparents, stepparents, and siblings.

Whether a person qualifies as a "close family member" would be an issue to be decided by a jury at trial. In addition, the **GFA** increases the statute of limitations for filing lawsuits to blame someone for a person's death from two to three years and applies retroactively. In sum, the **GFA** means more wrongful death lawsuits, by more people, with larger awards will soon arrive in New York. The changes will surely increase litigation costs, settlement demands, and verdicts.

"By passing this bill, New York lawmakers are ignoring the concerns of local governments, doctors, and hospitals, and feedback from Governor Hochul's office."

– Tom Stebbins, Executive Director
of New York Civil Justice Institute

According to Milliman, Inc., if enacted, the legislation will increase general and automobile policy premiums by 11%, or almost \$2.14 billion for New York residents and businesses.

The New York medical community also has raised serious concerns over the proposed legislation. According to the **Medical Society of New York**, "these costs would cause significant damage to our healthcare safety net, imposing staggering new costs for our hospitals, driving physicians out of

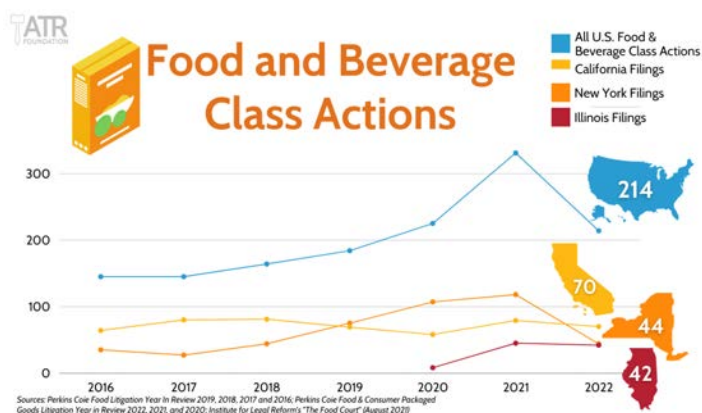
state, and exacerbating the already challenging patient access to care issues we face, particularly in underserved areas." It is expected to increase the medical liability costs for doctors and hospitals by 40%.

New York also would be an outlier in its approach to wrongful death liability. Most states that allow subjective damages for emotional harm impose limits, especially in the medical malpractice context. The proposed statute includes no such caps and expands the categories of relief in a way that will lead to duplicative awards.

BIG APPLE IS BIG TARGET FOR FOOD & BEVERAGE LITIGATION

Food Lawsuits

Lawyers filed 214 food and beverage class action suits nationwide in 2022. About one-in-five of these lawsuits – 44 (21%) – were filed in New York. Plaintiffs' lawyers regularly abuse the vague language of New York's consumer protection law ([GBL § 349](#)), which does not require a plaintiff to demonstrate that the business intentionally misled consumers or that a consumer actually relied on the misrepresentation to her detriment. Although a plaintiff must demonstrate that a practice is "likely to mislead a reasonable consumer acting reasonably under the circumstances," some New York courts have refused to assume that



a reasonable consumer reads the product's ingredients.

Lawsuits targeting products marketed as “all natural” continue to [surge](#) in Judicial Hellholes® across the country and New York City is one of the preferred jurisdictions. Several class actions were filed in 2023, including one filed against [Snapple](#) alleging that Snapple's all natural label misleads consumers when the drinks contain citric acid and food coloring. A [similar lawsuit](#) was filed against Kraft Heinz in January targeting its Capri Sun drink. And in May 2023, lawyers filed a [class action](#) against Bayer alleging that it falsely advertises its “One A Day” multivitamins as “natural” when they include synthetic ingredients.

Gig's Up for Vanilla Vigilante?

After years of meritless filings by the “Vanilla Vigilante,” Spencer Sheehan, New York's courts finally grew tired of his antics. He redirected his efforts (unsuccessfully, see [Cook County section](#)) to Illinois, but not before a New York federal judge tossed yet another lawsuit. Sheehan sued Starbucks, alleging that its French Roast 100% Arabica Coffee was misleadingly labeled since it contains added potassium. A federal court dismissed the lawsuit, finding that the complaint failed to identify any evidence supporting this assertion. The court also observed that, since it's an ordinary cup of coffee, a reasonable consumer would not assume that 100% Arabica Coffee means it has no additives, vitamins, or minerals.

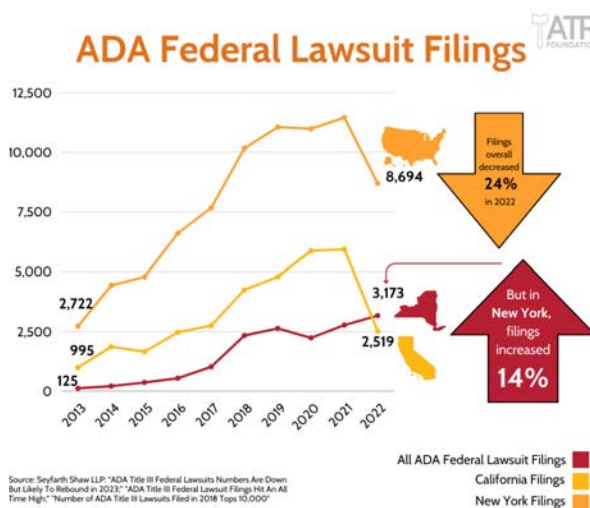
LIABILITY-EXPANDING LAWS LEAD TO LAWSUIT ABUSE

“Americans With Disabilities Act” Lawsuit Abuse

New York has now surpassed California in the number of **Americans with Disabilities Act Title III** filings. In 2022, 3,173 cases were filed in New York compared with 2,519 in California. The vast majority of these cases are brought [in](#) the **Southern District of New York**, which includes New York City. Through August of 2023, over 70% of the more than 1,500 ADA cases in New York were brought in this district. While earlier ADA cases often asserted that a store's physical location or parking lot did not meet all accessibility regulations, many of these cases now claim that a business's website lacks features to assist those who are visually impaired. A plaintiffs' lawyer or serial plaintiff can look for lawsuits to file on a computer. Of those filed in 2022, 1,660 (70%) were filed in New York. Five law firms, three of which are based in New York, filed more than 66% of the cases. New York, [by far](#), exceeds all other states in hosting these claims in the first half of 2023.

Plaintiffs' lawyers take advantage of New York's [unique set](#) of disability laws. New York is one of just a few states whose state disability laws go far beyond what the federal Americans with Disabilities Act (ADA) provides. **New York** does not require a plaintiff to show that a disability “substantially limits” any major life activities. Plaintiffs may also obtain statutory damages that are unavailable under the federal ADA. Few lawsuits are filed by plaintiffs who face real injury from lack of access, and most of these cases are filed by firms and serial plaintiffs who make vague and conclusory allegations about the inaccessibility of websites to those who are visually impaired.

These website accessibility lawsuits are [increasingly targeting small businesses](#). After several years of these lawsuits, plaintiffs' firms have hit larger companies with website accessibility claims, sometimes multiple times. For that reason, lawyers are not focusing on smaller companies. These businesses are extorted into low-dollar settlements, as the alternative is to spend more money on defense costs.



The high concentration of ADA filings in New York places a [serious strain](#) on judicial resources. In 2022, ADA-related case filings accounted for nearly 21% of all the civil cases in the **Southern District of New York**, which includes New York City.

SCOTUS Seemed Poised to Weigh in on ADA “Serial Testers” ... Until They Didn’t

SERIAL **Plaintiffs**

In March 2023, the **U.S. Supreme Court** agreed to decide whether serial “testers,” individuals who bring suits against numerous entities for alleged violations of the ADA without necessarily planning on using the service, have standing to sue. The question regarding standing turns on whether the plaintiff suffered a “sufficiently concrete injury.” While the case targeted a hotel in Maine, the outcome could have significant implications for such cases in New York and nationwide.

As pointed out in an [amicus brief](#), “Serial tester plaintiffs run roughshod over the constraints on federal-court jurisdiction imposed by Article III. Some, like Respondent here, do not even contend that they intend to visit the allegedly violating business at all. Predictably, this opens the floodgates to litigation, as Respondent and other serial filers can identify new targets from their homes, armed with only an internet connection.”

While it looked like the **U.S. Supreme Court** would have the opportunity to weigh in on this vexatious form of litigation, the plaintiff in this case voluntarily dismissed the lawsuit prior to oral arguments. In October, during [oral arguments](#), some of the justices [signaled](#) that the case may now be moot as a result, meaning that it may take another case for the Court to address the standing question. Notably, **Chief Justice John Roberts** did express concern about leaving this question for a later date, stating that plaintiffs could “manipulate the court’s jurisdiction” by dismissing their cases after the court grants certiorari.

While it is unclear why the plaintiff decided to dismiss her case, one possible [reason](#) is that a three-judge panel of the federal district court in Maryland [recommended](#) a six-month suspension of the plaintiff’s lawyer for ethics violations related to ADA litigation, including filing over 600 “tester” complaints across the country on behalf of just two clients. Investigations into the lawyer’s filings revealed a pattern of behavior in which the two parties filed identical pleadings in different actions, before then requesting thousands of dollars in legal fees during settlement negotiations. This behavior suggests that the real motive behind these “tester” cases is not to promote compliance with ADA, but instead to harass and pressure defendants into paying out tens of thousands of dollars in fees.

Scaffold Law

New York City is now tied as the [most expensive](#) city to live in worldwide. One root cause of the high cost of living in New York is excessive construction costs due in part to the state’s “[Scaffold Law](#).” Over a century ago, the state legislature enacted the Scaffold Law to protect construction workers who helped build the concrete jungle known as New York City today. After Illinois [repealed](#) a similar law in 1995, **New York** is the only state that maintains this form of absolute liability.

Written in **New York Labor Law’s Section 240/241**, the **Scaffold Law** assigns strict liability for any gravity-related injury. Contractors and employers are virtually defenseless from lawsuits regardless of the workers’ negligence or recklessness. Eliminating the strict liability component would create over 27,000 new jobs and [12,600 additional housing units](#).

There is now a growing concern about “[suspicious](#)” injury claims. Members of the **New York City Special Riggers Association (NYCSRA)** believe there is an increasing trend of false scaffold injury claims, where new hires “fall from a very, very low height.” According to the Association, these accidents appear to be staged and never have witnesses.

“We’d just like to be able to defend ourselves in a court of law. If you can’t defend it, it just becomes a settlement, dollars and cents issue.”

– Michael DiFonzo, President of Central Construction Management, LLC and Vice-President of the NYCSRA

Court's Expansive View of Law

While the legislature turns a blind eye to the abuses under this law, the courts continue to expand liability. In May 2023, an appellate court found a defendant [liable](#) for a New York City plaintiff's injuries that occurred when he and other coworkers attempted to transport a piece of machinery from the sidewalk to the street. The workers had placed a ramp to cover a trench which was two feet deep. When the machine went down the ramp it broke and injured the plaintiff's foot. While the distance between the curb and the street was minor, the court found that the failure to provide safety devices while moving machinery to a different elevation is within the scope of the Scaffold Law.

New Laws

Auto Insurance Coverage

In August, legislation went into effect that requires all New York drivers to pay for auto insurance policies that include "supplemental spousal liability coverage," whether they are married or not. This coverage allows a person to sue his or her spouse when injured in an accident caused by the spouse's negligent driving. The legislation is expected to [drive up](#) insurance premiums and New Yorkers already are paying some of the highest rates in the country. The bill received [strong support](#) from the **New York Trial Lawyers Association** and the state's **Academy of Trial Lawyers**, as their members will certainly benefit from the expected increase in litigation.

Personal Jurisdiction

The New York legislature once again passed [legislation](#) that would require any corporation registered with the state to do business to consent to general jurisdiction for disputes which lack a connection to the state. The bill is on Governor Hochul's desk awaiting a decision. **Governor Hochul** vetoed a similar version in 2022.

Enacting this legislation would have significant implications for some of the world's largest corporations. Many multinational corporations are registered to do business in New York, regardless of where they are headquartered and incorporated. If [S.7476](#) is enacted, these corporations could be dragged into New York courts for conduct occurring anywhere worldwide. The [legislative findings](#) which accompanied the bill showed that businesses in the state are concerned about the "high administrative costs" which the bill will impose. The bill will also burden the New York court system, which is already experiencing a massive backlog of cases coming out of the COVID-19 pandemic.



'CASH FOR LAWSUITS' FEEDS THE BEAST



Plaintiffs' lawyers are not the only ones profiting off litigation in New York City. An industry offers "pre-settlement" funding or advances, which prey on vulnerable consumers, while making it more difficult to resolve cases for reasonable amounts.

These businesses operate like payday lenders, encouraging individuals with lawsuits to take a relatively small "advance" on their expected settlement. [Examples abound](#) of consumers taking a small loan (\$350 to \$1,200) while a run-of-the-mill claim like a slip-and-fall is pending and then being on the hook to pay the lender five or ten times that amount. These amounts are taken from the plaintiff's settlement, after payment of the personal injury attorney's contingency fee. When a settlement is reached, a consumer may have little or nothing left. In one instance, a lawsuit lender reportedly charged New Yorkers interest rates as high as [124%](#). According to a **New York City Bar Association** [report](#), lawsuit lenders avoid state usury laws that prohibit excessive rates by char-

acterizing the loans as “non-recourse,” meaning that the borrower’s obligation to repay the loan is not absolute, but contingent on receiving recovery in the lawsuit (which is virtually certain).

Unlike some jurisdictions, **New York** does not require litigants to disclose the existence of a litigation funding agreement.

Fall Out from Funding Scheme Continues

In April 2023, **Adrian Alexander**, a New York litigation funder, was sentenced to [36 months in prison](#) for his role in an illegal scheme to obtain settlements and judgments related to fake slip-and-fall cases. Other members of the scheme, including the fake plaintiffs and doctors who offered expert testimony had previously been convicted at trial in 2020 and 2021.

The defendants were caught recruiting [vulnerable individuals](#), also referred to as “patients” by the perpetrators, to stage trip-and-fall accidents in various areas of New York City. After the patient staged an accident, the two attorneys would file personal injury lawsuits on their behalf against businesses and insurers. The two doctors would then instruct patients to undergo unnecessary medical and chiropractic treatments to maximize the value of their claims. Afterwards, the patients received a mere post-surgical [stipend](#) of \$1,000 to \$1,500.

The litigation funder would offer to pay for patients’ medical and legal costs in exchange for up to 50% [interest rate](#) on medical loans and up to 100% on personal loans.

The scam, which began in 2013, involved more than [400 patients](#) and generated almost [\\$31 million](#), according to prosecutors.

NEW YORK CITY ASBESTOS LITIGATION

ASBESTOS LITIGATION

New York City saw [283 asbestos-related lawsuits filed](#) in 2022, a 12.3% increase year over year. As of July 2023, filings had

increased more than 30% year over year. New York City courts continue to serve as the [third most popular jurisdiction](#) for asbestos litigation. Only **Madison** and **St. Clair counties** in Illinois host more. Talcum powder filings now make up nearly 20% of all asbestos-related lawsuits filed in New York.

Asbestos litigation can result in nuclear verdicts. Recent asbestos nuclear verdicts in New York City include a [\\$15 million](#) pain and suffering award to the family of a drywall installer who claimed 11 companies contributed to his exposure and [\\$23 million](#) to an 81-year-old former steamfitter who developed cancer, including \$10 million for future pain and suffering.





TOP ISSUES

- Extraordinary Pro-Plaintiff Rulings
- Lax Causation Standard
- Routine Imposition of Sanctions
- Frequent Appointment of Receiver Expands the Litigation
- Appellate Court Bolsters Outlier Rulings

South Carolina's asbestos environment continues to erode following its initial appearance on the Judicial Hellholes® list in 2020. In the past three years, the state has cemented an unwelcome reputation for bias against corporate defendants, unwarranted sanctions, low evidentiary requirements, liability expanding rulings, unfair trials, severe verdicts, a willingness to overturn or modify jury verdicts to benefit plaintiffs, and frequent appointment of a receiver to maximize recoveries from insurers. The state is a [hotspot](#) for asbestos claims.

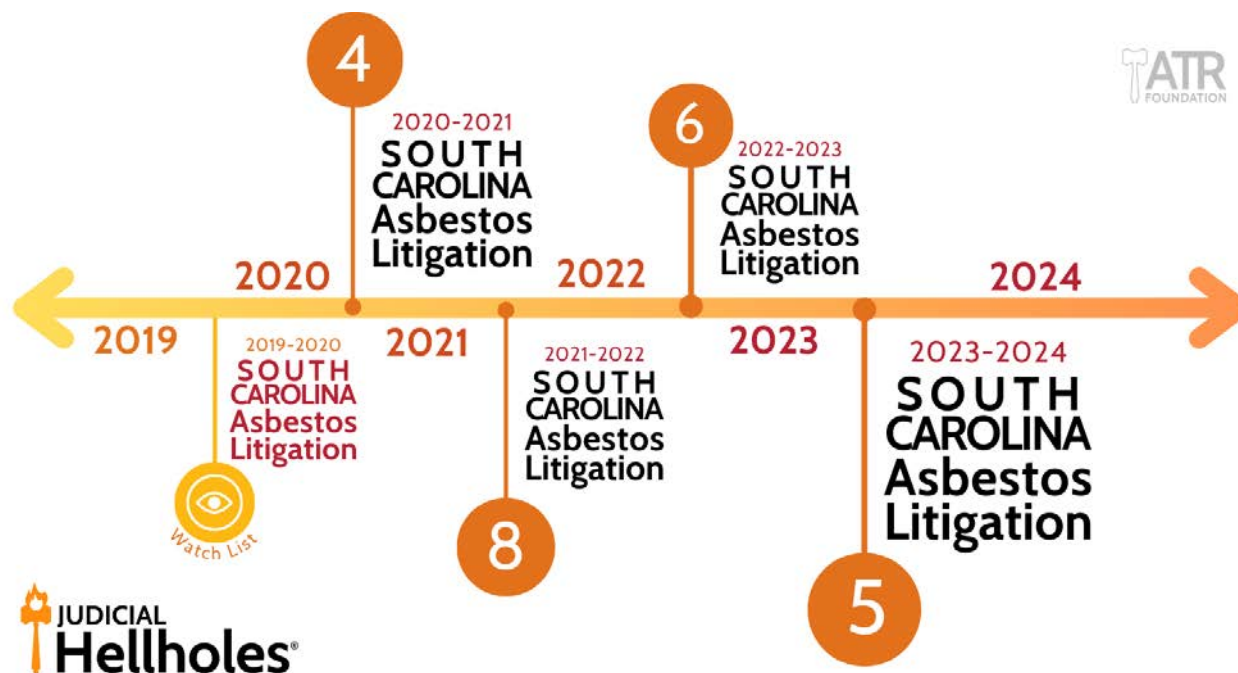
RULINGS FAVOR PLAINTIFFS

ASBESTOS LITIGATION

In 2017, retired **South Carolina Supreme Court Chief Justice [Jean Hoefer Toal](#)** was appointed to preside over South Carolina's asbestos docket. Judge Toal has a broad record of pro-plaintiff rulings, including imposition of severe and unwarranted sanctions on defendants.

In several asbestos cases, **Judge Toal** has imposed unfair sanctions, overturned or substantially modified jury verdicts she did not agree with, and made the unusual move of naming insurance carriers as the "alter egos" of their insureds.

In 2020, Zurich American Insurance Company [asked](#) the **South Carolina Supreme Court** to recuse **Judge Toal** from its litigation, [writing](#) that "factually unsubstantiated and procedurally irregular findings call into question Chief Justice Toal's impartiality and create an unacceptable risk of actual bias."



The **South Carolina Court of Appeals** has affirmed several of Judge Toal’s expansive rulings, contributing to the state’s reputation as an outlier in its handling of asbestos cases.

Two asbestos cases pending in the **South Carolina Supreme Court**—[*Edwards v. Scapa Waycross, Inc.*](#) and [*Jolly v. General Electric Co.*](#)—provide important opportunities for the Palmetto State’s high court to return some elements of the state’s asbestos jurisprudence to the legal mainstream.

A DESTINATION FOR OUT-OF-STATE LAW FIRMS

South Carolina asbestos filings have risen [dramatically](#) since 2018, especially due to the activity of out-of-state plaintiffs’ firms such as the [Law Offices of Dean Omar Branham Shirley, LLP](#) from Dallas, Texas. Those familiar with South Carolina asbestos litigation say that **Judge Toal** typically sides with the **Dean Omar firm** and its local counsel, [Kassel McVey Attorneys at Law](#).

In 2021, [Jessica Dean](#), the Dean Omar firm’s lead partner, [withdrew](#) from several South Carolina cases after [news broke](#) that a paralegal signed and filed Dean’s out-of-state-attorney applications without her knowledge. Courts in Connecticut and Iowa [rejected](#) Dean’s requests to participate in cases in those states, and a Minnesota judge [sanctioned](#) her firm \$78,000 in defense fees and costs after a plaintiff’s witness flouted a court order.

Recently, the Dean Omar firm’s percentage of overall South Carolina filings has declined as more firms are getting in on the action. Several more plaintiff firms have filed asbestos cases in South Carolina in recent years including [Meirowitz & Wasserberg, LLP](#) of New York City and Florida, St. Louis-based [Maune Raichle Hartley French & Mudd](#), Houston-based [Bailey Cowan Heckaman PLLC](#) and [Shrader & Associates, LLP](#), Tampa-based [Vinson Law Office](#), and [Flint Cooper LLC](#) and [Simmons Hanly Conroy](#) from southern Illinois, among others.

Large Number of Defendants Named

Filing behaviors have changed along with the roughly two-fold increase in filings in 2023 compared to 2018. The number of defendants named in South Carolina cases hovered between 50-60 defendants in 2018 and 2019, then skyrocketed. Beginning in 2020, South Carolina asbestos cases have named over 105 defendants on average each year. This is much higher than the national average. According to consulting firm [KCIC](#), 70 companies were named, on average, in asbestos lawsuits in 2022.

WEAK CAUSATION STANDARD APPLIED

In [*Glenn v. 3M Company*](#), decided in April 2023, [*Edwards v. Scapa Waycross, Inc.*](#), decided in August 2022, and [*Jolly v. General Electric Co.*](#), decided in September 2021, the **South Carolina Court of Appeals** delivered significant blows to South Carolina’s asbestos litigation environment by affirming verdicts based on a controversial [“cumulative dose” theory](#) of causation espoused by plaintiffs’ experts. The [theory](#) allows plaintiff’s experts to testify that every exposure to asbestos contributes to the development of asbestos-related disease, making it easier for plaintiffs to establish causation. The theory is an outgrowth of the discredited “each and every exposure” [theory](#), which espouses the view that “every exposure to asbestos above a threshold level is necessarily a substantial factor in the contraction of asbestos-related diseases.” As the **U.S. Court of Appeals for the Seventh Circuit** has [explained](#), “just like ‘each and every exposure,’ the cumulative exposure theory does not rely upon any particular dose or exposure to asbestos, but rather all exposures contribute to a cumulative dose.” Both theories are incompatible with the substantial factor standard required for causation, but the [South Carolina Court of Appeals](#) views cumulative dose testimony as “background information essential for the jury’s understanding of medical causation.”

The South Carolina appellate court’s holdings stand in stark contrast to jurisdictions such as **New York**, which reaffirmed in [*Nemeth v. Brenntag North America*](#) in 2022 that “plaintiffs must rely on expert opinions that establish a scientific expression of [dose](#) with sufficient, case-specific, specificity, to establish [proof](#)

of causation that a particular defendant's product caused their injuries. Conclusory or qualitative statements do not suffice."

The **South Carolina Supreme Court** granted review in [Edwards](#) to clarify the state's causation standard. ATRA filed an [amicus](#) brief in *Edwards* joined by a number of allies. ATRA's [amicus](#) brief explains:

The Court of Appeals erred in distinguishing the widely-rejected every exposure approach from the cumulative exposure testimony propounded by Plaintiff's experts. The theories are identical in foundation and application—neither one excludes minor workplace or bystander exposures. By lumping various exposures, regardless of substantiality, under the heading of "cumulative," plaintiff's experts attempt to transform even the most limited exposure into a legally "substantial" one.

"Every exposure" and "cumulative exposure" theories are inconsistent with the substantial factor causation standard in South Carolina and many other jurisdictions. The Court should join the many other courts that have rejected attempts by plaintiff experts to repackage the rejected every exposure approach as "cumulative exposure."

SEVERE AND UNWARRANTED SANCTIONS

National asbestos attorneys say Judge Toal's discovery orders are more frequent, broader, and the sanctions more severe than in any other jurisdiction. As one defense firm [explains](#), "**Justice Toal** has ordered sanctions on several occasions, including monetary, additurs, and the striking of pleadings."

Sanctions in asbestos cases are rare outside of South Carolina. Also, lawyers familiar with asbestos litigation in South Carolina say they cannot remember sanctions motions being filed in the seven years before **Judge Toal** took over the asbestos docket from [Judge D. Garrison Hill](#).

The **Dean Omar firm** routinely demands overbroad discovery in conjunction with corporate defendant depositions, in which businesses are required to turn over what they believe are excessive, irrelevant, and often impossible to produce documents. When defendants cannot comply, or **Dean Omar** does not like the answers at the deposition, the firm seeks sanctions. In a 2020 [sample](#) of five cases, the firm filed 22 motions for discovery-related [sanctions](#), including eight in one case.

In three cases involving bankrupt defendant Covil Corp., **Judge Toal** issued what is referred to as a "doomsday sanction," striking all of the insulation company's pleadings. In its appeal, Covil described the sanctions as a "[hydrogen bomb](#)" and wrote that the judge abused her discretion in imposing a punishment so disproportionate to the alleged litigation misconduct, which the company denied.

Defendants had hoped that the **South Carolina Supreme Court** would curb Judge Toal's extraordinary habit of imposing sanctions in asbestos cases when the court [agreed](#) to review "the largest monetary sanction ever reported in South Carolina jurisprudence—over [\\$300,000](#)." The sanction was imposed *after* a jury returned a defense verdict in *Howe v. Air & Liquid Systems Co.*

The asserted basis for the sanction was Cleaver-Brooks, Inc.'s production of documents during trial that rebutted a surprise theory sprung by the plaintiff's lawyers at trial that turned out to be factually inaccurate. According to [Cleaver-Brooks](#), the documents "were never the subject of any discovery request, and they had no relevance to the case prior to the Plaintiff's surprise in-court questioning." Cleaver-Brooks described Judge Toal's sanction as an "[historic injustice](#)."

Cleaver-Brooks won this case at trial by jury, yet has been slapped with the largest monetary discovery sanction in this state's history—over \$300,000—without any explanation from any court as to what it did wrong or what it could possibly have done differently.

The **South Carolina Court of Appeals** summarily [affirmed](#) the trial court's order in *Howe* "[without explanation or even holding oral argument](#)."

The **South Carolina Supreme Court** agreed to review *Howe*, but in June 2023 the appeal was [dismissed](#) after the parties notified the court of an agreement ending the fully briefed dispute.

The South Carolina appellate court [affirmed](#) another post-trial sanctions order in [Glenn v. 3M Co.](#) in 2023.

In August 2022, the **South Carolina Supreme Court** in [Kovach v. Whitley](#), a non-asbestos case, held that **Judge Toal** erred in imposing a sanction against a plaintiff who filed a lawsuit that was at odds with representations the plaintiff made in a prior criminal action. The **South Carolina Supreme Court** found “[no factual basis on which to justify an award of sanctions](#).” The Court also noted there were “a host of reasons” why the amount of the sanction may have been “an additional abuse of discretion.” The Court did not address the merits of the amount of the sanction because the prior issue was dispositive.

OVERTURNED DEFENSE VERDICT, ADDS TO JURY AWARDS

Judge Toal has a record of overturning or modifying jury verdicts with which she disagrees.

For example, in a 2018 case, after Covil Corp. said it could not produce old documents because the papers had been destroyed in a fire, the court found that spoliation occurred and [sanctioned](#) the company with an adverse instruction effectively telling the jurors to presume the company exposed the plaintiff to asbestos in his workplace.

The judge did this even though the plaintiff did not identify Covil in his deposition and a representative for another company, Daniel Construction, testified that did not have any records indicating that Covil supplied insulation for the plaintiff’s workplace and could not definitively place Covil as a supplier or contractor at the plant.

Despite the judge’s instruction and after hearing all of the testimony, the jury reached a defense verdict.

Three months later, **Judge Toal** threw out the [verdict](#) by invoking South Carolina’s “**thirteenth juror**” doctrine. As explained by the **South Carolina Supreme Court**, the effect of the thirteenth juror doctrine “is the same as if the jury failed to reach to a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome.” According to [Judge Toal](#), “as the ‘thirteenth juror,’ the trial judge can hang the jury by refusing to agree to the jury’s otherwise unanimous verdict.” She used this incredible power in *Crawford* to [order](#) a new trial, giving the plaintiff a second chance to win a case that was lost.

On at least two occasions, **Judge Toal** increased jury awards when she believed the juries did not award enough money to the plaintiffs.

In [Edwards v. Scapa Waycross, Inc.](#), **Judge Toal** increased a jury’s \$600,000 survival damages award to \$1 million. The judge also refused to reallocate plaintiff’s internal apportionment of settlement proceeds to be more reasonable under the facts. The **South Carolina Court of Appeals** [affirmed](#) on both issues.

In [Jolly v. General Electric Co.](#), **Judge Toal** increased an award to a worker and his wife by some \$1.6 million. The jury awarded the worker \$200,000 in actual damages and \$100,000 to his wife for loss of consortium. **Judge Toal** increased the worker’s award to \$1.58 million and his wife’s award to \$290,000. She also refused to allow a setoff for the portion of prior settlements that plaintiff’s counsel had allocated to future losses. The **South Carolina Court of Appeals** [affirmed](#) on both issues, signaling “the Court of Appeals will give much [deference](#) to the circuit court and is disinclined to disturb these rulings in the absence of an obvious abuse of discretion.”

The combined effect of the trial court’s additur and setoff rulings in *Jolly* is that, unless reversed by the **South Carolina Supreme Court**, the plaintiffs will recover more than \$3 million (\$2.27 million in settlements and \$823,333.33 from Fisher and Crosby after partial setoffs), plus interest significantly above the prime rate, for claims the jury determined were worth only \$300,000.

ATRA filed amicus briefs in both the *Edwards* and *Jolly* appeals. In its *Jolly* [amicus](#) brief, ATRA noted that “[t]he trial court and Court of Appeals rulings essentially give the trial court absolute discretion to replace a jury’s determination of damages with the trial court’s subjective view of what the jury should have awarded.” ATRA further [explained](#):

Additur is virtually nonexistent in asbestos cases outside of South Carolina. For instance, a Lexis+ search of the term “additur” in the Mealey’s Asbestos Litigation Reporter database—which reports regularly on rulings in asbestos cases nationwide—returns only two examples of a court outside of South Carolina awarding additur in an asbestos case in over thirty years. South Carolina, in comparison, boasts two recent examples: [Jolly] and Edwards....

Further, additur is rare in non-asbestos cases in South Carolina and nationally.... In states allowing the practice, empirical evidence suggests “almost no use of additur.”



Nuclear Verdicts

In March 2023, a woman won a [\\$29.1 million](#) verdict against extalc supplier Whittaker Clark & Daniels alleging that she developed mesothelioma from exposure to asbestos in cosmetic talc products. The company was forced to file bankruptcy after the verdict and **Judge Toal** appointed a receiver to “[take over its operations](#).”

In 2021, a jury awarded [\\$32 million](#) to a worker whose wife died from mesothelioma allegedly caused by second-hand asbestos exposure. **Judge Toal** [presided](#) over the case. In the 1980s, Robert

Weist worked for Metal Masters at a turkey processing facility owned by Kraft Heinz. Weist alleged that he and his father were exposed to asbestos through their work at the facility and brought asbestos home on their clothing. Weist’s wife allegedly died from exposure to asbestos while doing their laundry. Kraft Heinz and Metal Masters were [ordered](#) to pay \$11 million in survival damages, \$10 million in wrongful death damages, and \$1 million in loss of consortium damages. The jury imposed another \$10 million in [punitive damages](#) against Kraft Heinz. What the jury [did not learn](#) is that Weist’s wife was not just exposed to asbestos on her husband’s clothing, but that her father, an insulator, and uncle also worked in places where asbestos was present.

The **South Carolina Court of Appeals** affirmed a \$5.125 million award in 2023 in [Glenn v. 3M Co.](#)

INSURERS “ALTER EGO” OF DEFUNCT ENTITIES

Judge Toal has [expanded](#) the asbestos docket by appointing a [receiver](#) over various entity defendants. She has made a practice of declaring insurers the “[alter ego](#)” of defunct entities to subject the companies to lawsuits like other asbestos defendants. One defense firm [explains](#), “**Justice Toal** has regularly appointed receivers for defunct companies who supplied, installed, manufactured asbestos products, etc., and has regularly ruled that a company’s insurance policies, which would cover claims in SC, give her the authority to appoint a receiver.” Persons familiar with South Carolina asbestos litigation says that circuit court has created at least twenty-one [receiverships](#), using the same receiver and receiver counsel, to pursue coverage under insurance issued to defunct companies. They also indicate these appointments are made without any kind of substantive hearing. Some of the companies for which receivers have been appointed are not based in South Carolina, and some are not U.S. companies or even [defunct](#).

IMPROPER CONSOLIDATION OF ASBESTOS TRIALS

In 2020, **Judge Toal** [granted](#) a motion to consolidate two vastly dissimilar cases into one trial in which the plaintiffs claimed they contracted cancer as a result of exposure to asbestos in talc products.

One lawsuit involved a man who died at the age of 70 from pleural mesothelioma, a cancer that occurs in the lining of the lungs and is associated with asbestos exposure. Before this death, the plaintiff testified that he also worked with asbestos at a facility that manufactured products containing asbestos. Defendant Johnson & Johnson argued the man’s cancer was more likely to have been caused by his occupational exposure.



The other case involved a 20-year-old woman who was diagnosed at the age of 14 with peritoneal mesothelioma, which affects the lining of the abdomen and is less strongly associated with occupational asbestos. Studies cited by J&J, show between 95-99% of that type of mesothelioma in women is the result of naturally occurring genetic errors during cell replications. The woman underwent surgery and chemotherapy and was cancer-free.

In its appeal of the consolidation order, J&J pointed out that South Carolina juries have heard three asbestos cases against the company and had yet to return a plaintiff's verdict. One case resulted in a defense verdict and two others resulted in hung juries. Plaintiffs wanted to combine the above two cases, the company said, to "[tilt the scales](#) of the trials in their favor."

The **South Carolina Supreme Court** [agreed](#) to an immediate review of Judge Toal's consolidation order, but the case settled before the appellate court had an opportunity to rule.

DOOR OPENED FOR MORE LAWSUITS

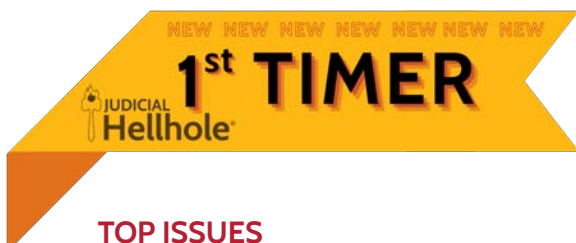
In 2021, the **South Carolina Supreme Court** in [Keene v. CNA Holdings, LLC](#) upheld a \$16 million award to the family of a maintenance worker who died following years of asbestos exposure at a polyester fiber plant. Plaintiff's employer had been hired by the plant's owner to provide all maintenance and repair workers at the plant. The plant owner's corporate successor argued that the plaintiff was a statutory employee so the state's workers' compensation law provided the exclusive remedy for his claims.

The **South Carolina Supreme Court** [disagreed](#). In a landmark [decision](#), the court narrowed the state's "statutory employee" doctrine, making it easier for workers to bring lawsuits for many workplace injuries. The Court [held](#):

If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business man-

ager has legitimately defined the scope of her company's business to not include that particular work.

"In short," a practitioner [explains](#), "[c]ourts will honor the company's decision to have the work performed by someone other than an employee, the [statutory employee] doctrine will not apply, and the company can be sued in tort for injuries suffered by the worker." The **South Carolina Supreme Court** added that the original purposes of the statutory employee doctrine are "certainly not served by granting [the plant owner] immunity for its wrongful conduct." **Dissenting Justice George C. James, Jr.** said that the majority's comment "will be taken to heart," likely leading to more litigation against employers.



TOP ISSUES

- High Court Expands Premise and Workplace Liability
- An Expansive Approach to Medical Liability
- A Barrage of Liability-Expanding Legislation

The capital of Michigan, home to the state's high court and legislature, is a newcomer to the Judicial Hellholes® list in 2023. Lansing, Michigan's appearance is due to liability-expanding decisions by the **Michigan Supreme Court** and pro-plaintiff legislative activity. The **Michigan Supreme Court** overturned several precedents over the past year, increasing liability in cases ranging from slip-and-falls to medical liability actions. These decisions, combined with a barrage of liability-expanding legislation, are creating an unjust and imbalanced civil justice environment that unfairly burdens defendants and will drive up the costs of goods and services for Michigan consumers.



ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Michigan residents pay a "tort tax" of **\$917** and **87,839** jobs are lost each year according to a recent study by [The Perryman Group](#). If Michigan enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **\$9.22 billion**.

TRIAL LAWYER ADVERTISING

Plaintiffs' lawyers are aware of the state courts' propensity for liability-expanding decisions and spend millions of dollars on advertising. In 2022, trial lawyers spent more than **\$41 million** to air more than **568,000** local legal services television advertisements across Michigan's media markets.

HIGH COURT EXPANDS LIABILITY FOR BUSINESS

Premises Liability



In a case with significant implications for property owners and insurers in Michigan, the **Michigan Supreme Court** [overturned](#) a long-standing framework for deciding slip-and-fall cases. The decision arose in a case in which a person sued after slipping on ice while walking from her car into a gas station. The gas station moved to dismiss the lawsuit on the ground that, under Michigan law, a property owner owes no duty to protect invitees from dangers that are "open and obvious."

The open-and-obvious doctrine long has been an important resource for property owners in the state and most recently was applied by the Michigan Supreme Court in 2001. In the recent lawsuit, however, the plaintiff argued on appeal that the open-and-obvious doctrine was inconsistent with Michigan's adoption of comparative negligence, since this framework does not bar recovery when a plaintiff's own negligence contributes to their injury.

In [Kandil-Elsayed v. F&E Oil, Inc.](#), the **Michigan Supreme Court** overruled precedent, holding that landowners, in all instances, possess a duty to exercise "reasonable care to protect invitees from an unreasonable risk of harm caused by a dangerous condition of the land." Despite the obvious nature of the hazard, a landowner still has a duty to protect visitors.

Justice David Viviano, in a thorough dissent, criticized the majority's departure from decades of precedent. In his view, the open-and-obvious doctrine reflects the "straightforward notion" that property owners owe no duty to protect others from hazards that are both clearly visible and avoidable. The dissent expresses concern that the majority's ruling will create uncertainty among business and homeowners, alike, who may be "faced with the increased threat of liability." The dissent argued that few recent court decisions have the potential to "wreak such havoc" as this one.

As a result, Michigan courts are [expected to see a wave](#) of slip-and-fall cases in the coming months. The shift in law will require many more cases to be decided by juries rather than the court, which will lead to more expensive and time-consuming litigation. One Michigan defense lawyer [stated](#) that the court's decision appears to turn the open-and-obvious doctrine "from a shield for the defense to a sword for the plaintiff."

Workplace Liability

In July 2023, the **Michigan Supreme Court** [overturned](#) yet another precedent in a workplace liability case. In that case, a worker experienced a concussion after a workplace accident. She returned to work two months later only to continue suffering from a mental disability she alleged was related to the accident. She then sought workers' compensation benefits which a magistrate judge denied, finding insufficient evidence linking her disability to the workplace accident. The denial of benefits was based on a 4-factor test expounded by the Michigan Supreme Court in [Martin v Pontiac School District](#), which considers "(1) the number of occupational and nonoccupational contributors, (2) the relative amount of contribution of each contributor, (3) the duration of each contributor, (4) the extent of permanent effect that resulted from each contributor."

In *Cramer v. Transitional Health Services of Wayne*, the Court disregarded the *Martin* test, and adopted in its place a test that considers the totality of the circumstances, placing less weight on the presence and duration of conditions that predate the alleged workplace injury.

The dissent argued that the *Martin* test comports with the statute because the legislature intended that a plaintiff with a pre-existing condition should have to provide evidence showing that his injury was work-related. Contrary to the majority's view, the Court had never viewed the 4-factor test as an absolute bar to recovery, and instead merely considered a pre-existing condition when determining whether the plaintiff had established his or her burden of proof.

Expansive Medical Liability

Affidavit of Merit

In July, the **Michigan Supreme Court** overturned a 23-year precedent in a medical liability case involving the state's affidavit of merit requirement. An affidavit of merit is a signed statement by a medical expert that supports a plaintiff's claim that a healthcare provider did not meet the applicable standard of care. It discourages meritless lawsuits against doctors and hospitals that drive up the cost of health care.

In [Ottgen v. Katranii](#), the Court held that while an affidavit of merit is required for a medical liability case to proceed, it does not need to be filed within the statute of limitations. This decision overrules *Scarsella v. Pollak*, which held that an affidavit of merit was required to begin a lawsuit.

There is [concern](#) that following this decision, there will be an increase in questionable medical liability cases.

"Scarsella's holding effectuates the legislature's intent to make a demonstration of merit at the inception of the action mandatory and to thereby deter frivolous claims. A decision to overrule Scarsella will create an open-ended exception to the law."

– Litigation Center of the American Medical Association and State Medical Societies

Cases to Watch

Standard for Expert Evidence

In May, the **Michigan Supreme Court** agreed to review the state's standard for the admissibility of expert testimony regarding the standard of care in medical liability cases. In [*Danhoff v. Fahim*](#), the plaintiff's expert's testimony lacked any foundation in scholarly literature, and as a result, the trial court dismissed the case. The **Michigan Court of Appeals** upheld the dismissal because, under Michigan evidence laws and court precedent, supporting literature is an important factor in whether testimony is admissible, and "it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable."

The ATRF will keep a watchful eye on Michigan's Supreme Court to see whether it upholds Michigan law or once again overturns long-standing precedent and allows junk science into state courtrooms.



Who Can be an Expert?

In [*Estate of Horn v. Swofford*](#), the **Michigan Supreme Court** will decide whether an expert witness in a medical liability case must be an expert in the "one most relevant" specialty to be qualified to testify. Here, the plaintiff included an affidavit of merit from a doctor specializing in neuroradiology in a case alleging that the defendant doctor failed to identify the severity of his condition and neglected to perform brain surgery. The parties disagreed about whether neuroradiology or diagnostic radiology should be considered the most relevant specialty.

A BARRAGE OF LIABILITY-EXPANDING LEGISLATION

The 2022 statewide elections flipped the balance of power in the Michigan legislature. As a result, the trial bar was emboldened and pushed an aggressive liability-expanding agenda that was adopted by Michigan legislators.

FDA-Defense Bill

[*S.B. 410*](#) repeals an existing liability protection, in place for over 25 years, that ensures that the expertise of the federal agency charged with ensuring drug safety is reflected when courts decide lawsuits challenging whether a medication was unreasonably dangerous or a warning or label was inadequate.

These protections have been mischaracterized by the plaintiffs' bar as an "[absolute defense](#)" in these actions. In reality, the existing statute stands for the modest proposition that the considered judgment of federal regulators, who are experts in their field, should hold great weight when determining liability, and the law should consequently align with the FDA's decision making. Lawsuits that assert that a medication is unsafe, even when the FDA has found it beneficial, or that claim warnings are inadequate, even as the FDA specifically mandated those warnings, are in conflict or at least considerable tension with the FDA. The current statute permits lawsuits if the manufacturer sells the drug after the FDA withdraws its approval or recalls the drug, or if the FDA finds that the manufacturer withheld or misrepresented information about risks from the agency.

Soon after the bill passed, **Michigan Attorney General Dana Nessel** stated that she expects the law to aid her office's litigation against drug manufacturers in the state.

Liability-Expanding Bills Under Consideration In 2024

Bad Faith Legislation to Drive Costs Sky-High

[S.B. 329](#) creates a cause of action against insurers for “bad-faith” failures to settle claims. In addition to benefits wrongfully withheld, plaintiffs may recover emotional distress damages, punitive damages and attorney’s fees.

A priority of the trial bar, this new law will lead to [substantial increases](#) in the costs of insurance while providing little benefit to consumers. Michigan state law already requires the prompt payment of valid insurance claims and data [shows](#) that the vast majority of property and casualty claims are timely paid. Under existing law, insurance companies can be fined or have their license revoked if an investigation finds evidence of abuse. The only people who will benefit from new bad-faith action are trial attorneys, who will reap millions in fees and settlements at the expense of Michigan consumers.

According to a [new study](#), “The legislation would create 35 new avenues for legal action against insurance companies, creating a potential cost to Michigan consumers ranging between \$2.4 billion and \$4.7 billion” or “11% to 21% of the estimated current annual premium paid by Michigan residents and businesses.” The study goes on to say that some increases to individual premiums may be even higher.

Consumer Protection Act Expansion

Michigan legislators are also seeking to pull back reasonable constraints on liability under the state’s consumer protection statute, a move that would expose a wide range of businesses and professionals to new forms of unnecessary and costly litigation. Currently, the [Michigan Consumer Protection Act \(MCPA\)](#) includes a “regulatory compliance exemption” that the Michigan Supreme Court has [interpreted](#) as barring litigation that centers on transactions or conduct that is authorized under state and federal law or already regulated by a government agency. In a series of bills, most notably [H.B. 5201](#), these protections would almost entirely be removed, making businesses that are already compliant with various state and federal regulations open to private lawsuits, including class actions. The proposed [legislation](#) would also authorize use of the statute in certain business disputes, and permit higher civil penalties in certain cases that can be aggregated “per violation,” such as each time an ad is viewed.

“Polluter Pays” Package

In October, members of the Michigan legislature [introduced a package](#) of environmental litigation bills that are certain to benefit trial attorneys across the state. The bills attempt to



[undo legislative enactments](#) from the 1990s, in which the state government took responsibility for funding various environmental cleanup efforts. The package intends to [revive the statute of limitations](#) for these claims, allowing plaintiffs to sue companies for operations dating back nearly three decades.

Making matters worse, proposed legislation would also [provide a medical monitoring cause of action](#), allowing plaintiffs to seek damages even if they have experienced no injury. Instead, one need only allege that exposure to a hazardous substance has led to an “increased risk” of developing a serious disease, a standard notoriously difficult to articulate or refute. The bill’s vague language contributes to this difficulty, as it does not specify what level of exposure is needed to state a claim and defines “serious disease” to encompass any condition that has the potential to cause a later disability. This, combined with the statute’s fee-shifting provision and the potential for class action lawsuits, would provide a strong incentive for plaintiffs’ lawyers to pursue mass “no injury” medical monitoring claims.



TOP ISSUES

- Coastal Litigation Drags On
- Insurance Claim Fraud and Manipulation
- Much-Needed Transparency Legislation Vetoed by Governor

Louisiana's civil justice system continues to be plagued by the same problems as in years past. If the state wants to be removed from the Judicial Hellholes® list once and for all, it must take meaningful steps to address these perennial issues.

Coastal litigation continues to bog down economic growth and there is no end in sight. Additionally, the imbalanced civil justice system has fostered numerous insurance schemes now coming to light and **Governor Jon Bel Edwards** once again vetoed much needed reform legislation.

The outgoing governor, an attorney with deep ties to the plaintiffs' bar, was a roadblock for reforms, vetoing several pieces of legislation during his governorship. The ATRF will keep a watchful eye on incoming **Governor Jeff Landry** to see if there might be an opportunity for the state to improve its civil justice environment.

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Louisiana residents pay a "tort tax" of \$1,118 and 48,696 jobs are lost each year according to a recent study by [The Perryman Group](#). If Louisiana enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by \$5.17 billion.

TRIAL LAWYER ADVERTISING

Plaintiffs' lawyers are well aware of the state courts' propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent more than \$39 million to air nearly 858,000 local legal services television advertisements across Louisiana's media markets.



COASTAL LITIGATION ... WILL IT EVER END?



For the past [decade](#), Louisiana courts have had their hands tied with coastal litigation. Louisiana parishes have sued more than 200 other energy companies alleging that their operations have damaged coastal marshes and wetlands. Coastal litigation has had enormous implications for the state's energy industry with the potential to dish out billions of dollars in damages.

The litigation continues to drag on with no end in sight, and even more importantly, no help for the coast. There are over 40 lawsuits filed by six Louisiana parishes against Chevron, ConocoPhillips, and ExxonMobil. The lawsuits continue to be stalled in the preliminary battle over whether they should proceed in state or federal court.

Energy companies maintain that the lawsuits involve federal questions and should remain in federal court, not the various local state courts where they were filed. They [argue](#) that returning the litigation to state court would rob oil companies of the opportunity to present a federal defense that arises directly out of their relationship with the government. The companies cite WWII-era directives that demanded oil producers drill and extract excess oil to support the war effort. To meet oil production quotas, the companies [contend](#) that the federal government directed them to ditch their best practices and overlook the potential damage that the excessive drilling could cause the coastal marshes.

In February, the **U.S. Supreme Court** [refused to review](#) a federal appellate court's decision to send the 42 lawsuits back to state court.

Among the myriad of lawsuits, a [\\$7 billion coastal erosion lawsuit](#) brought by Cameron Parish is the first one scheduled for a state court trial at the end of November. In an attempt to shift the proceedings to a more neutral venue, the defendants, including BP, Shell, and others, sought an emergency stay of the trial from the **U.S. Supreme Court**. They argued that each of the potential jurors in the Cameron Parish have both personal and financial stakes in an outcome favoring the parish. The Court, unmoved by this assertion, [rejected](#) the oil companies' request without any further explanation.

Government Cronyism on Full Display

In April 2023, the **Secretary of the Louisiana Department of Natural Resources (DNR)**, Tom Harris, [testified](#) that DNR charged the plaintiffs' law firms representing the parishes with the task of searching for regulatory violations, a job usually reserved for the government. Harris also testified that **DNR** did not investigate the claims levied by the plaintiffs' firms to determine their validity, despite having access to the records. Secretary Harris [allowed](#) the plaintiffs' lawyers – who have a substantial financial interest in the outcome of the litigation – to perform the DNR's duties and responsibilities.

“The trend toward local and parish governments ceding their responsibilities to plaintiffs' lawyers does not seem to be waning. Citizens should be aware that their elected representatives are failing to do their jobs and are allowing private lawyers to make millions of dollars for themselves while discouraging private employers and manufacturers from investing in their communities, thus depriving them of job opportunities and the benefits of tax dollars to the community.”

– Karen Eddlemon, Executive Director, Louisiana Legal Reform Coalition

According to a [2023 study](#) by the **American Petroleum Institute**, Louisiana has the largest direct employment effects from the oil and gas industry. It supports more than 346,000 jobs, accounting for over 13% of the state's total employment, and provides more than \$25 billion in wages. Overall, the oil and gas industry contributes more than \$54 billion to the state's economy.

INSURANCE SCHEMES TAKE ADVANTAGE OF PRO-PLAINTIFF LAWS AND LACK OF REFORMS

“Operation Sideswipe”

Fueled by a climate of lawsuit abuse, the high cost of auto insurance has long plagued Louisiana families and businesses. Louisiana drivers pay an [average](#) of \$2,906 per year for full coverage car insurance, ranking Louisiana as the second most expensive state in the nation behind Florida.

One driver of Louisiana's high cost of auto insurance is simply fraud. A sprawling federal investigation, dubbed “**Operation Sideswipe**,” is exposing the scope of one such scheme: [staged accidents](#) with [big rigs](#) in the New Orleans area. These accidents typically involved a driver (“the slammer”) intentionally colliding with a tractor trailer then another person entering the vehicle and feigning injury. Working with lawyers and doctors who may have been in on the scheme, the participants would then demand compensation for the bogus accident. Those involved ultimately secured settlements from insurance companies that provided coverage for the commercial carriers.

The dominos continue to fall in this ongoing investigation. In [February 2023](#), the Eastern District of Louisiana's U.S. Attorney's office obtained convictions of four more individuals in connection to Operation Sideswipe. Three of the individuals served as collision passengers and caused the insurance company for the tractor-trailer to pay over \$140,000 in settlement funds. The fourth individual recruited passengers to participate in the staged accidents. In [March 2023](#) and [June 2023](#), another four more individuals were sentenced for their roles, and in [August 2023](#), another five were indicted. The total number of sentenced individuals has reached over 50, and the number is expected to continue to grow in the coming months.

Hurricane Scheme

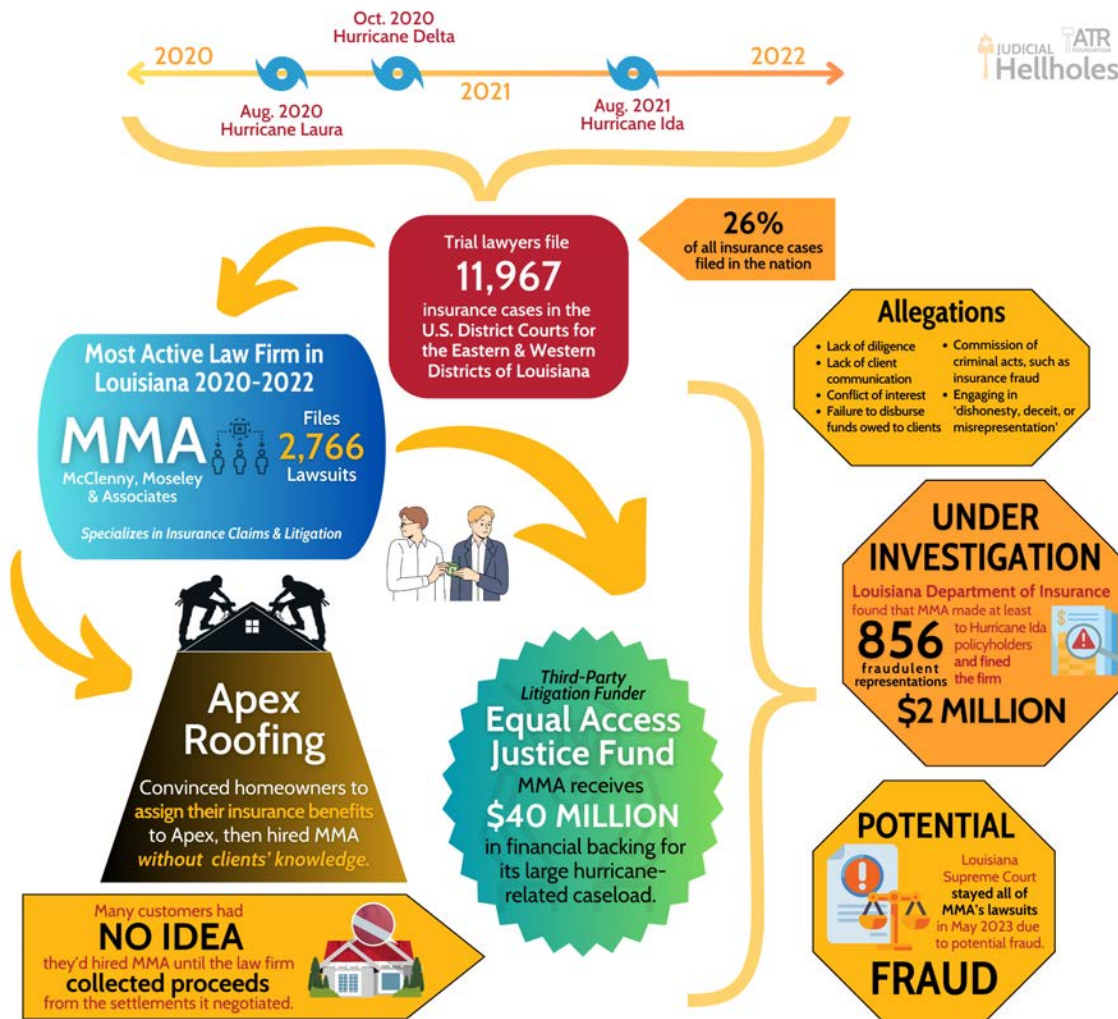
Following Hurricanes Delta (2020), Laura (2020) and Ida (2021), lawsuits against insurers skyrocketed in Louisiana. Between 2020 and 2022, plaintiffs' lawyers filed [11,967 insurance cases](#) in the **U.S. District Courts for the Eastern and Western Districts of Louisiana**, which represented approximately 26% of all insurance cases filed in the nation. Insurers paid out over [\\$23 billion](#) in claims during these two years. The high volume of claims and payouts is having a drastic impact on Louisiana's insurance market. Numerous insurance companies have either declared [insolvency or withdrawn](#) from the market.

One of the drivers behind the surge is Louisiana's [bad faith laws](#), which not only incentivize plaintiffs' lawyers to file lawsuits, but also to inflate claims. Under these laws, insurance companies that fail to pay a claim or make a written settlement offer within 30 days of proof of loss, can be penalized up to 50% of the amount due, even if a delay is due to a technical issue.

Texas Law Firm Caught Up in Insurance Scheme

McClenny, Moseley and Associates (MMA) is a Houston-based plaintiffs' firm that specializes in insurance claims and litigation. MMA was identified as the [most active law firm](#) in Louisiana from 2020 to 2022, filing [2,766 suits](#) during this time.

In 2022, **MMA** filed hundreds of Hurricanes Laura, Delta, and Ida property damage suits on behalf of Louisiana residents. The **Louisiana Supreme Court** [stayed all of these lawsuits](#) in May 2023 due to potentially fraudulent conduct and unfair business practices. The firm's lawyers have been accused of violating professional codes by soliciting clients, forging signatures, mishandling funds, and failing to communicate with their clients.



According to a [statement](#) by Louisiana Supreme Court Chief Justice John L. Weimer, “The Supreme Court took this extraordinary action due to the serious and unprecedented circumstances presented by MMA’s alleged recent actions and the possible consequences to affected litigants.”

Louisiana’s **Office of Disciplinary Counsel** [petitioned](#) the Louisiana Supreme Court for MMA’s suspension, arguing that MMA engaged in ethics violations such as: “lack of diligence, lack of client communication, conflict of interest, failure to disburse funds owed to clients, commission of criminal acts, such as insurance fraud, and engaging in ‘dishonesty, deceit, or misrepresentation.’”

MMA is alleged to have made duplicate lawsuit filings, sued insurance companies having no business relationships with the plaintiffs, and filed lawsuits on behalf of clients who had previously settled their claims with insurers.

The **Louisiana Department of Insurance** is also investigating these and issued a cease-and-desist order in February. It fined the firm \$2 million and found that MMA made at least 856 fraudulent representations to Hurricane Ida policyholders.

Firm Takes Advantage of Lack of ‘Assignment of Benefits’ Law

Unlike most states, Louisiana law allows homeowners to assign their insurance benefits to third parties. MMA [established a relationship](#) with a roofing company, **Apex Roofing and Restoration**, which it used to sign up more clients. Apex convinced customers to assign their insurance benefits to the company to

cover repairs, and in doing so, signed agreements “on behalf of” customers to hire MMA as their lawyer. As a result, many customers had no idea they had hired MMA until the law firm collected proceeds from the settlement it negotiated. MMA told insurers it represented Apex’s customers without their knowledge in at least 850 cases.

In November, the **Louisiana Police Department** [launched a criminal investigation](#) into the scheme between Apex and MMA, contemplating a range of possible criminal charges. The decision to investigate Apex reflects an earlier order issued by **U.S. District Court Judge Michael B. North**, highlighting that Apex “assisted” MMA as its “agent.” In the face of conspiracy allegations, Apex attempted to distance itself from MMA’s wrongdoings by launching its own [malpractice lawsuit](#) against MMA in March.

Amid the ongoing investigation and malpractice lawsuit, two former Apex employees have [spoken out](#) about the scheme. Their testimonies unveiled the deceptive practices employed by both entities in making Apex employees unwittingly get customers to hire MMA.

Good News



In response to this conduct, the **Louisiana State Legislature** addressed assignment of benefits reform during its 2023 session. In June, [H.B. 183](#) was signed into law and went into effect this summer. This legislation prohibits any attempt to solicit or accept an assignment of insurance benefits, and voids any attempt to assign insurance benefits.

Third-Party Litigation Financing Funded the Scheme



Louisiana’s lack of third-party litigation financing disclosure requirements allowed MMA to [engage with private investors](#) to back their work on behalf of hurricane victims. An [estimates and restoration company](#) that

was writing estimates for the firm’s lawsuits was simultaneously funding the law firm. The company [sued](#) MMA because MMA allegedly “[promised](#) to pay them a percentage of each claim and a percentage of the attorney’s fees” and never did.

Additionally, one of MMA’s partners admitted in open court to receiving [\\$40 million in funding](#) from a large, private hedge fund (**Equal Access Justice Fund, LP**).



GOVERNOR SHUTS DOWN MOVE FOR TRANSPARENCY

In June, **Governor John Bel Edwards** [vetoed](#) legislation that would have provided much needed transparency around third-party litigation financing (TPLF). [S.B. 196](#) required parties to disclose third-party litigation financing agreements in civil actions. As discussed above, TPLF is the practice of investors buying an interest in the outcome of a lawsuit. Hedge funds, institutional investors, and public and private com-

“This commonsense legislation sought to address the issue of [TPLF] ... Because funders are not required to disclose agreements, no one knows how much control or influence they have regarding strategic litigation decisions, like whether to settle or take a case to trial.”

– [Lana Venable](#), Executive Director
of Louisiana Lawsuit Abuse Watch

panies are pouring billions of dollars into funding litigation. Third-party litigation funders front money to law firms in exchange for an agreed-upon cut of any settlement or money judgment. Investors are attracted by the prospect of a large profit.

The presence of an unknown third party with a stake in the outcome of a lawsuit can change what is essentially a two-party negotiation into a multi-party process with a “behind-the-scenes” influencer. For example, it may be in the best interests of plaintiffs to accept an early, fair settlement offer that would provide reasonable compensation for their injuries. On the other hand, a litigation funder that is solely motivated by profit may pressure the attor-

neys involved to reject the offer in the hopes of receiving a jackpot verdict. Without disclosure requirements and other transparency measures, the financial interests of a third-party are never known by the court.



TOP ISSUES

- Junk Science Finds Way into Courtroom
- Nuclear Verdicts
- International Reputation as Plaintiff-Friendly Jurisdiction
- Legislation Continues to Stall

ECONOMIC IMPACT OF LAWSUIT ABUSE

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Missouri residents pay a “tort tax” of **\$995** and **57,905** jobs are lost each year according to a recent study by [The Perryman Group](#). If Missouri enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **\$6.136 billion**.

In St. Louis, excessive tort litigation costs residents more than **\$12.54 billion** in personal income annually and results in a loss of more than **32,249** jobs each year. Excessive costs result in an annual “tort tax” of **\$1,608** per person in St. Louis.

TRIAL LAWYER ADVERTISING

Plaintiffs’ lawyers are well aware of the courts’ propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. In 2022, trial lawyers spent **\$19.7 million** to air more than **366,000** local legal services television advertisements across Missouri’s media markets. Of the total spent on local legal services television advertisements in Missouri media markets, more than **42%** was spent in the St. Louis media market alone.

Judges in St. Louis seem to have embraced their reputation for skirting both state law and U.S. Supreme Court precedent. They have allowed junk science to enter their courtrooms, going so far as to allow expert witnesses to testify who other courts have found unreliable. Nuclear verdicts are becoming more frequent. Not only are plaintiffs from other states flocking to the jurisdiction, but international parties are coming to St. Louis courts as well.

Much-needed civil justice reform legislation has stalled in Missouri for the past few years, and the legislature must prioritize reforms to address the lawsuit abuse bogging down business in the state.

JUNK SCIENCE

Roundup® Litigation

St. Louis, along with fellow Judicial Hellhole® California, is home to tens of thousands of lawsuits against Monsanto involving its



Roundup® weedkiller. These lawsuits allege that the active ingredient in the product, glyphosate, causes non-Hodgkin lymphoma.

Despite the Missouri legislature [requiring](#) closer scrutiny of proposed expert testimony in 2017 by adopting a standard consistent with federal courts and most other state courts, St. Louis judges have allowed junk science in their courtrooms. Because of this, law firms across the country are flocking to St. Louis to file their lawsuits.

Monsanto has successfully defended itself in most cases heard in the venue; however, the judges continue to stack the deck against them.

In May 2023, Monsanto [secured another victory](#), even after the plaintiff's counsel put forward two questionable "experts" who argued glyphosate caused the plaintiff to develop non-Hodgkin lymphoma more than ten years after she had used the product. [Dr. Beate Ritz](#), an epidemiologist from UCLA, is known for testifying in previous trials against Monsanto that glyphosate in Roundup® causes this form of cancer.

Her opinions have previously been called into question as junk science by **Judge Vince Chhabria** of the **U.S. District Court for the Northern District of California**. In a 2018 Roundup® trial, Dr. Ritz was [questioned](#) on the ground that she [did not adjust](#) her analysis to account for exposure to other pesticides or other factors that might cause cancer, despite her own testimony that it would be wise to consider such data, or "adjusted odd ratios." Other epidemiologists also testified the same.

Dr. Ritz also was called out for "cherry-picking" results by downplaying other studies showing that the link between glyphosate and non-Hodgkin lymphoma is insignificant and **Judge Chhabria** called her conclusion that glyphosate causes cancer "dubious."

A second St. Louis expert, [Dr. Dennis Weisenburger](#), [claimed](#) that the plaintiff's use of Roundup® from 1992 to 2005 was a significant factor in her non-Hodgkin lymphoma diagnosis, but discounted other health risk factors. Dr. Weisenburger has served as expert on behalf of plaintiff in previous Roundup® lawsuits [and has said](#) that using Roundup® for more than 2 days in a year doubles the risk of developing non-Hodgkin lymphoma. When questioned on cross examination about the fact that no regulatory body aside from the International Agency for Research on Cancer (IARC) has classified glyphosate as carcinogenic, he could not give a direct answer.

For St. Louis to move off the Judicial Hellholes® list, judges must embrace their role as gatekeepers at the outset of trial and not allow junk science to be heard in their courtrooms.

Case to Watch: *Allegrezza et al. v. Monsanto Co.*



In yet [another Roundup® trial](#) held in **St. Louis County** in September 2023 over allegations that the weedkiller caused a plaintiff's cancer, the plaintiff's expert exposed her unshakable bias during cross-examination. The plaintiff had retained [Dr. Kristan Aronson](#), a recently retired epidemiologist and cancer causation researcher, to express an opinion that glyphosate causes non-Hodgkin lymphoma.

During her testimony, Aronson plunged into research dating back to 2015, coinciding with the year when IARC published its monograph that classified glyphosate as a probable human carcinogen. Upon closer scrutiny by Monsanto's lawyers, it emerged that Aronson had only inspected and formed an opinion on this research nearly six years later, when the plaintiff's legal team approached her in the fall of 2021. Essentially, the plaintiff's lawyers colored their expert's testimony by supplying the motive for Aronson to turn to their favorite research.

Shortly after this damaging revelation, the plaintiff's lawyers rested their case. The next day, **Judge Brian May** granted a [directed verdict](#) to Monsanto, representing Monsanto's ninth Roundup® trial win in a row. The plaintiff's team expressed their intent to appeal the ruling.



THE CITY WANTS IN ON ACTION

In March, the **City of St. Louis** [sued](#) Hyundai and Kia in federal court for manufacturing, marketing, distributing, and selling automobiles that lack an “anti-theft measure” known as an “engine immobilizer.” Rather than hold thieves responsible for their criminal actions, **St. Louis Mayor Tishaura Jones** blames the auto manufacturers for contributing to a significant rise in vehicle thefts in St. Louis.

Among other claims, the City alleges that the companies created a public nuisance because stolen cars represent a public safety hazard, contribute to violence, and divert St. Louis law enforcement of resources as they respond to property destruction and dangerous driving of stolen cars around the city. According to [Mayor Tishaura Jones](#), “Big corporations like Kia and Hyundai must be held accountable for endangering our residents and putting profit over people.”

ASBESTOS LITIGATION

St. Louis remains a preferred jurisdiction for the plaintiffs’ bar. As of July 2023, St. Louis had seen a [10.5% increase](#) in filings and was the fifth most popular jurisdiction for filing asbestos cases nationwide. Plaintiffs’ lawyers filed more asbestos lawsuits through the first seven months of this year than all of the previously recorded years.

ASBESTOS LITIGATION

A 2022 nuclear verdict in an asbestos case in St. Louis highlights the need for reform. In [Trokey v. Chesterton Co.](#), the plaintiff claimed he was exposed to asbestos while working on Ford brakes as a gas station mechanic, causing him to develop mesothelioma. Ford argued that the plaintiff never worked for Ford, did not regularly work as a mechanic, and that his exposure likely came from a source other than brake linings. Nonetheless, the jury awarded [\\$20 million](#) – \$10 million to him and \$10 million to his wife. The \$20 million award was the same amount the plaintiffs’ lawyer requested in his [closing argument](#). The case is on appeal.



NUCLEAR VERDICTS

According to a [recent study](#), Missouri ranked in the top-10 states for most nuclear verdicts in personal injury and wrongful death cases from 2010 to 2019. Nuclear verdicts are those that exceed \$10 million.

Among the factors contributing to these massive verdicts is the allowance of “anchoring.” Missouri law permits plaintiffs’ lawyers to urge juries to return a specific amount to compensate a person for his or her pain and suffering and other subjective noneconomic

damages. Lawyers will suggest an unreasonably large award, making that number an “anchor” point in jurors’ minds. As a result, jurors can be manipulated into awarding levels that are far beyond amounts they would otherwise reach and that truly serve a compensatory purpose.

In September 2023, parents were awarded \$745 million after a 25-year-old woman was struck and killed on the sidewalk by a driver who had passed out after consuming nitrous oxide. The driver had purchased the nitrous oxide chargers from Coughing Cardinal, a shop in St. Louis. United Brands manufactured, distributed and sold the nitrous oxide under the name “Whip-It!” as a [food propellant](#).

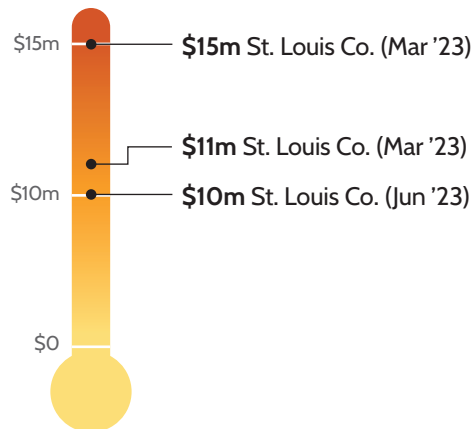
The [lawsuit alleged](#) that United Brands, Coughing Cardinal, and others are involved in an illicit nitrous oxide distribution ring; that United Brands and Coughing Cardinal intentionally exploited the illicit market for nitrous oxide by marketing it to young individuals, despite knowing its dangers; and, that United Brands was the “supplier” and Coughing Cardinal was the “drug dealer.” United Brands [argued](#) that it is no more liable than a beer manufacturer would be for a drunk driver causing a wrongful death. The driver alone

should be liable for misusing the product by inhaling it. The jury ultimately assigned 10% liability to the driver, 20% to Coughing Cardinal, and 70% to United Brands.

Other 2023 nuclear verdicts include:

- **March 2023:** [\\$11 million verdict](#) in product liability case in **St. Louis County Circuit Court**.
- **March 2023:** [\\$15 million verdict](#) in wrongful death suit in **St. Louis County Circuit Court**.
- **June 2023:** [\\$10 million verdict](#) in a case arising out of a “relatively minor” car accident in **St. Louis County Circuit Court**.

NUCLEAR VERDICTS IN ST. LOUIS (2022-23)



COURT-AWARDED ‘PHANTOM DAMAGES’ PROVIDE WINDFALL TO PLAINTIFFS



In 2017, the Missouri Legislature passed **S.B. 31**, which included an overhaul of the collateral source rule. For years, the statute was interpreted by all to prohibit the introduction of evidence to recover damages based on the amount billed by a healthcare provider if that amount

exceeded the amount that the healthcare provider accepted as full payment from a patient or an insurer or other party for that treatment. This rule, which is consistent with the [statutory text](#) and legislative intent, limited damages to the amount actually paid for medical care.

In recent years, however, Missouri courts have allowed plaintiffs’ lawyers to introduce evidence of inflated amounts billed purportedly to show the severity of the plaintiff’s injuries, rather than the amount of damages sought. Allowing this evidence has artificially increased damage awards, delayed settlement of cases and increased the cost of insurance premiums in Missouri.

Missouri should close the loophole and prohibit courts from admitting evidence of billed amounts for medical treatment that no one ever paid.

INTERNATIONAL REPUTATION AS ‘PLAINTIFF-FRIENDLY’ COURT

In April, the **U.S. Court of Appeals for the Eighth Circuit** [agreed to hear](#) a case that will have a monumental impact on the Missouri civil justice system, specifically in St. Louis.

Beginning in 2007, several international plaintiffs filed lawsuits against American companies, including Doe Run, in the City of St. Louis over a Peruvian company’s operation of a smelting facility in the Andes Mountains. The case was then removed to federal district court. Though the allegation that the facility’s emissions harmed nearby residents was brought by Peruvian citizens against a Peruvian company based on its Peruvian operations that are subject to Peruvian environmental law, a federal court [ruled](#) that it would decide the case, applying Missouri tort law.

Should the Eighth Circuit uphold the lower court’s decision, there is vast potential liability for American businesses engaged in legitimate international activity. The **Associated Industries of Missouri** described [the potential impact](#): “St. Louis City juries, which are well known for issuing record-setting verdicts, will be invited to assess liability against companies located anywhere in the world on behalf of foreign nationals who have never been to Missouri, irrespective of the law or policy of the foreign nation.”

In addition, imposing the standards of Missouri tort law upon an environmental remediation project in Peru has significant [international implications](#), overriding a country’s sovereign right to regulate and enforce



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— Associated Industries of Missouri

its own environmental and economic development policies. It would give a green light for opportunistic plaintiffs’ lawyers to bring foreign suits in U.S. courts, seeking to apply favorable state laws in friendly courts.

LEGISLATIVE REFORMS STALLED

Much-needed reforms continue to stall in the Missouri legislature as several legislators have accepted campaign contributions from the trial bar and are now doing its bidding.

[Senator Mike Moon](#), a Republican representing the 29th Senatorial District, is [seeking re-election](#) in the upcoming 2024 elections. During the election cycles spanning from 2014 to 2022, Senator Moon accepted [a total of \\$24,850](#) in contributions from the trial bar. The majority of these funds were secured during his 2020 Senate campaign.

Another Republican legislator, [Senator Bill Eigel](#), currently representing the 23rd Senatorial District, is vying for the Republican [gubernatorial nomination](#). Across his prior campaigns, Senator Eigel has collected [a total of \\$32,759](#) in trial bar donations, with a significant portion directed towards his 2020 Senate campaign. Notably, Senator Eigel [enjoys support from](#) the Believe in Life and Liberty (BILL) PAC, which, over the years, has received [\\$306,169](#) in contributions from trial lawyers. Additionally, Senator Eigel is backed by the 100 PAC, which has accepted [\\$183,560](#) in trial lawyer donations.



Watch List

The Judicial Hellholes® report calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from a designation as a Judicial Hellhole®, and they are ranked accordingly.



KENTUCKY

KENTUCKY WATCH LIST

Kentucky makes its first appearance on the Judicial Hellholes® report's Watch List in 2023 due to a handful of percolating issues. State courts have exposed those who report suspected fraudulent claims to liability, eliminated a critical screening mechanism for medical liability claims, and are experiencing larger verdicts. And to top things off, some lawyers have resorted to unethical measures to obtain wins. If the state continues this path, it may land among the hellhole ranks in coming years.

Employer Liability for Asbestos Take-Home Exposure

In July, the **Kentucky Court of Appeals** created a new tort duty for employers to prevent take-home asbestos exposure to household members of employees.

Shortly before the plaintiff died from mesothelioma, she [sued](#) her father's prior employer, Square D, and a manufacturer of molding compounds, Union Carbide, for their roles in causing her illness. During the late 1960s to mid-1980s, the plaintiff was allegedly exposed to asbestos-containing dust from contact with her father's work clothes, as well as during her own 3-month employment at Square D.

The **Fayette Circuit Court** [found](#) that there was no foreseeable risk that would impose a duty on the defendants to protect people beyond their own employees or those who use their products from exposure to asbestos, agreeing with the defendants. The court characterized the employee's daughter as a "bystander of a bystander," based on evidence that her father was a white-collar worker who spent more time in Square D's offices than its molding rooms and her alleged exposure primarily stemmed from contact with his work clothes. "To hold otherwise," the trial court observed, "would create an unlimited duty for product manufacturers to warn and/or protect every person in the world from potential risks occurring on the premises of its customers, including those who may encounter employees of others after leaving the workplace."

The **Kentucky Court of Appeals**, however, [shot this reasoning down](#). Viewing the evidence in the plaintiff's favor, the court found that the plaintiff's father was in fact frequently exposed to asbestos on the job. The crux of the appellate court's opinion, however, centered on the foreseeability which gives rise to a duty under Kentucky law. The court relied on the vague premise that "the danger [of take-home asbestos] was well known and generally accepted by the late 1960s," to find that the harm to household members of employees was "reasonably foreseeable" to employers like Square D. As for Union Carbide, the court held the manufacturer strictly liable under state products liability law as a matter of public policy.

Additionally, Square D had argued that the **Kentucky Workers' Compensation Act** provided the exclusive means of recovery for the plaintiff's injuries, since the plaintiff had been a Square D employee herself. But according to the appellate court, her time at the company was not a significant source of exposure to asbestos, so it rejected this argument on "fundamental fairness" grounds.

Kentucky employers must now be wary of a new tort duty relating to second-hand exposure to asbestos or other potentially hazardous substances. This ruling could lead to an influx of companies being compelled to defend against asbestos-related claims dating back several decades.

ASBESTOS LITIGATION

Ability To Report Suspected Fraudulent Claims at Risk

A Kentucky trial court has punished a business for its conscientious investigation and reporting of a suspicious surge of disability claims asserted by its employees by stretching the torts of defamation and tortious interference.

A railroad, CSX Transportation, Inc. (“CSXT”), had a policy of providing furloughed employees up to four months of benefits, but allowing employees who are out of work due to a medical condition at the time of the furlough to continue to receive benefits for two years. In 2017, a surge of employees attempted to [exploit this policy](#) following announcements of expected workforce reductions. CSXT became suspicious when it received an unprecedented number of nearly identical injury claims filed on behalf of employees by two chiropractors who frequently treated CSXT railroad workers. Initiating an internal investigation, CSXT and its medical director, Dr. Heligman, sent a letter to the Railroad Retirement Board, as well as several private insurers and chiropractic boards, alerting them of the potential fraud involving the doctors and the employees. The investigation confirmed CSXT’s concerns, prompting the company to [discontinue accepting](#) injury claims submitted by these doctors.

The doctors [sued](#) CSXT and Dr. Heligman in 2018, alleging that their letter cautioning other entities of potential fraud was defamatory, and that they tortiously interfered with the doctors’ business relationships with the employees. A **Greenup Circuit Court** jury delivered a [substantial judgment](#) in favor of the plaintiffs, consisting of \$21.4 million in punitive damages and \$1.4 million in compensatory damages. The court subsequently denied the defendants’ post-trial motions.

CSXT appealed and ATRA submitted an [amicus curiae brief](#) in support, urging the **Kentucky Court of Appeals** to reverse the judgment. Of particular concern is the trial court’s failure to properly apply the qualified privilege that protects those who report suspected fraud to appropriate authorities and to those who share a common interest in investigating and responding to potential abuse from defamation claims. Failing to apply this privilege to employers with legitimate suspicions of fraudulent claims would deter businesses and insurers from investigating lawsuit abuse. This is particularly relevant in mass tort litigation, where illegitimate claims can easily get mixed in with viable ones, making it susceptible to fraudulent conduct. Fraudulent claim schemes can also arise in a wide range of other contexts, from staged accidents to clinics that, working with attorneys, exaggerate injuries or inflate medical bills.

A business’s legitimate interest in reporting potentially fraudulent claims is a defense to a tortious interference lawsuit, which the trial court omitted in its instructions to the jury. Instead, the trial court told the jury that if they found that Dr. Heligman’s feelings toward the two chiropractors motivated him to report his suspicions, this could suffice to prove malice for tortious interference liability. But the personal feelings of a business’s employees should not be at the forefront. A business should be able to protect itself and others from the exorbitant costs incurred by fraudulent claims.

The case is pending in the **Kentucky Court of Appeals**.

Medical Malpractice Lawsuits

Medical malpractice lawsuits have increasingly become a thorn in Kentucky’s civil justice system. In 2017, the **Kentucky Legislature** enacted [S.B. 4](#), which established panels of healthcare providers to review and evaluate medical malpractice claims before they are filed in court. The law was commendably aimed at screening out meritless medical malpractice lawsuits; however, its benefits were short-lived. Only a few months later, **Franklin Circuit Judge Phillip Shepherd** [struck the law down](#) as an unconstitutional barrier to the court system. The following year, the **Kentucky Supreme Court** [affirmed](#) the lower court’s decision in [Commonwealth of Kentucky v. Claycomb](#), and medical review panels were eliminated.

The Kentucky court system has since hosted a plethora of medical malpractice cases, including some that have culminated in nuclear verdicts. In August, a [\\$44.5 million award](#) was delivered in **Jefferson Circuit Court** against an oncologist in a wrongful death suit. According to the [Kentucky Trial Court Review](#), this is “the largest single plaintiff personal injury compensatory damages verdict in Kentucky

history.” One year earlier, in August 2022, a medical malpractice trial in **Warren County Circuit Court** resulted in a [\\$21.3 million verdict](#) against a clinic that was forced to subsequently file for bankruptcy.

While the verdicts are less egregious than some of the hundred-million-dollar verdicts pumped out of other jurisdictions, it is important to place them within the broader context of Kentucky’s prior lack of nuclear verdicts. A [recent report](#) showed that in 2020, Kentucky did not see a single nuclear verdict. However, this trend took a turn in 2021, when the state’s nuclear verdict sum jumped to \$74 million after a [wrongful death suit](#) in **Boone County**. The pattern persisted in each year since then, including judgments of [\\$22.8 million in 2022](#) and [\\$14 million in March 2023](#).

The trend of rising damages in medical lawsuits is exacerbated by Kentucky courts allowing plaintiffs to recover phantom damages for billed medical costs that are written off or reduced by insurers or other third parties.

With an effective filter for insignificant medical lawsuits dismantled, a rise in substantial verdicts, and a practice of awarding phantom damages, a troubling litigation climate may be brewing in Kentucky’s medical liability sphere.

Plaintiff’s Lawyer Misled Court to Keep Suit Alive

In a desperate attempt to circumvent Kentucky’s one-year statute of limitations, a plaintiff’s lawyer invented a false narrative in the affidavits submitted to the court.

In March 2020, a former coal miner sued 3M claiming that he developed black lung due to the company’s allegedly defective respirators. 3M swiftly moved for summary judgment, arguing that the action was time-barred because the plaintiff had constructive knowledge of his claims dating back to his 2013 diagnosis. 3M also referenced a January 2019 letter, sent by the plaintiff’s attorney, Glen Hammond, to the plaintiff’s pulmonologist to request medical records for the plaintiff’s injury claim. This clearly demonstrated that the claim had been under investigation for over a year before it was formally filed.

In opposition to summary judgment, Hammond submitted an affidavit with a fabricated explanation of this damaging letter. He contended that the letter referred to an entirely different claim, namely, a denial of workers’ compensation coverage. To substantiate this lie, Hammond presented some handwritten notes that supposedly originated from a May 2018 meeting between himself and the plaintiff, discussing the coverage denial.

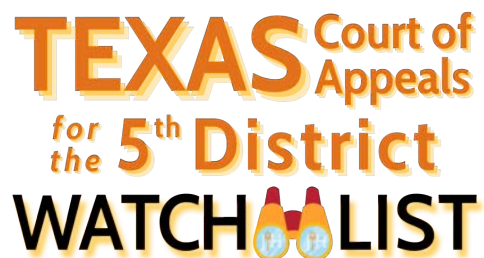
Notwithstanding the **Pike Circuit Court’s** rejection of 3M’s summary judgment motion, Hammond’s [lies were unraveled](#) during a deposition. The deposition revealed that the plaintiff’s coverage denial did not occur until 2019, highlighting an obvious inconsistency with the reference to a May 2018 meeting on this topic. Furthermore, the handwritten note actually stemmed from one of the plaintiff’s hospital visits that occurred six months after the May 2018 meeting. 3M immediately moved to strike both Hammond and Wilson’s affidavits.

Although caught red-handed, the plaintiff’s legal team moved for sanctions against 3M, claiming that 3M’s motions to strike the affidavits were in bad faith, and that it deliberately mishandled production of documents from the plaintiff’s former employer. [In response](#), 3M pointed out that “it is not sanctionable to expose a lie.” Moreover, the document controversy was invented by Hammond’s co-counsel to distract the court from the false affidavits it had been fed.

In March, the circuit court dismissed the plaintiff’s case. Following this, Hammond’s co-counsel moved the court to stay the other proceedings in which Hammond was representing plaintiffs against 3M. Their request was prompted by their discovery that Hammond had withheld critical documents that demonstrated the plaintiff had indeed engaged his services back in May 2018 in connection with the respirator claims.

TEXAS COURT OF APPEALS FOR THE FIFTH DISTRICT

The **Texas Court of Appeals for the Fifth District** (otherwise known as the Fifth Court) has maintained its plaintiff-friendly reputation in the state due to a series of liability expanding decisions and the court's failure to adhere to Texas Supreme Court precedent. In 2023, the **Texas Supreme Court** reversed the **Fifth Court** in two cases with significant civil justice implications, with more liability-expanding rulings to be heard on appeal in the coming months.



While, fortunately, the state's high court has been willing to address these erroneous decisions in the past, the Fifth Court's [repeated history](#) of mistakes has the practical effect of imposing unnecessary delays and costs for litigants.

The **Fifth Court** is located in Dallas, Texas and has jurisdiction over appeals arising from **Dallas County Court** as well as five other surrounding counties. The court is comprised of 13 justices, including the Chief Justice, who are elected to six-year terms.

Plaintiff Friendly Ruling in Products Liability Case

The **Fifth Court** has shown a propensity to expand liability in seemingly straightforward cases and these decisions invariably benefit plaintiffs. One such example is the court's ruling in [Parks v. Ford Motor Company](#). In this case, Ford sought to dismiss a products liability action that had been brought outside the state's statute of repose, which requires actions of this kind to be brought within 15 years of the product's sale. Ford defined the date of "sale" as the day the vehicle was released to the dealership which, in this case, fell outside the statutory period. This argument prevailed in a 2021 [case](#) before the U.S. Court of Appeals for the Fifth Circuit in a case that arose under similar circumstances.

The **Fifth Court** disagreed, finding the factual record unclear as to whether a vehicle is "sold" when it is released to the dealership or when final payment from the dealership is received by the manufacturer. Even though the title to the vehicle transferred on the day the vehicle was released, the Court determined that Ford was required to provide evidence that full payment was received outside the statutory period to dismiss the suit.

The public policy behind the statute of repose is if there is a defect in the design or manufacturing of a product then it should be revealed within fifteen years of the time of sale. After that time, a problem with the product is more likely to result from ordinary wear and tear, than a defect. A statute of repose eliminates the threat of never-ending liability for manufacturers of products that may be used for many years. The Fifth Court's strained interpretation of the time of sale detracts from the statute of repose's usefulness as a resource for manufacturers to dispense with cases like these without engaging in costly trials.

Fifth Court Affirms Outrageous Trial Court Discovery Orders

An important function of appellate courts is correcting trial court errors, particularly when the error threatens to release a litigant's confidential information. In [In re Lyft](#), a group of plaintiffs sought to obtain Lyft's excess insurance policies in discovery, which are contracts containing highly valuable proprietary information. As a result, the parties agreed to a protective order allowing the plaintiffs to access the documents provided they maintain their confidentiality. However, after receiving the materials, one of the plaintiffs petitioned the trial court to remove the protective order, claiming he could "[put the policies on CNN](#)." Amazingly, the trial court agreed.

On appeal, the **Fifth Court** affirmed the trial court's ruling without providing its reasoning. Lyft has appealed to the **Supreme Court of Texas** to prevent this order from being enforced.

Instances like these are not uncommon for the **Fifth Court**. Just weeks later, the **Fifth Court** [summarily affirmed](#) a series of trial court discovery rulings, again without any reasoning provided. In an insurance

dispute, the plaintiff sought to compel the deposition of a corporate representative and an insurance claims adjuster. They challenged it on the ground that their testimony would be unnecessary and wasteful, given that they had already stipulated to various factual questions about the policy in dispute. The trial court disagreed, ordering the deposition to take place, while denying the defendant access to relevant medical records. The **Texas Supreme Court** granted an [emergency stay](#) in the proceedings until it is able to weigh in.

Decisions like these which survive on appeal encourage parties to engage in similarly abusive discovery practices.

The **Texas Supreme Court** granted another [emergency stay](#) in a case arising from the Fifth Court involving whether a trial court erred in barring a defendant's motion to amend its filings. In this case, a business owner was sued for the purported negligence of its employee, who was alleged to have been within the scope of his employment when he was involved in a vehicle collision with the plaintiff. After initially admitting through discovery that the employee was acting within the scope of his employment, the owner later learned that the employee was engaged in unlawful racing at the time of the accident and sought to amend his admission. The trial court denied the motion, leaving the defendant unable to make its most compelling defense. The **Fifth Court** [denied](#) the defendant's petition for relief, despite precedent from the Texas Supreme Court holding that amendments like these should be granted absent a showing of bad faith or undue prejudice.

Court's Errors Continue to be Highlighted by State Supreme Court

Fifth Court ruling on noneconomic damage award unanimously reversed on appeal

The Fifth Court's reputation for violating established precedent is second to none in the state of Texas. In June, the **Texas Supreme Court** reversed a Fifth Court [decision](#) involving a \$15 million award of noneconomic damages in a wrongful death action.

On appeal to the **Fifth Court**, the defendant argued that Texas law requires a plaintiff to show evidence both of the existence of noneconomic damages and evidence supporting the particular amount requested. The defendant cited Texas Supreme Court [precedent](#), yet the **Fifth Court** was unpersuaded. Instead of following the more exacting standard of review, the Court utilized a "shocks the conscience" standard to uphold the nuclear award despite the plaintiff having introduced no evidence supporting the amount requested at trial.

In his dissent, **Justice David Schenck** emphasized the inconsistency with this ruling and Texas Supreme Court precedent. In his view, the majority conflated the distinction between the existence of the injury and its quantification and, in doing so, failed to conduct a meaningful review of the jury's award. The opinion further noted the importance of having meaningful appellate review of noneconomic damage awards, stating that the failure to do so results in arbitrary judgments, raising serious due process concerns.

The **Texas Supreme Court** [agreed](#) with Justice Schenck's reasoning, finding that the **Fifth Court** failed to adhere to the standard of review it had prescribed in prior cases. The **Supreme Court** noted that noneconomic damages, while often difficult to calculate, are still intended to be compensatory in nature, and must therefore, be reasonable and supported by evidence. It concluded that the "shocks the conscience" standard applied by the Fifth Court is "vague and subjective" and that "it is error to allow a verdict to stand when no rational basis for the verdict's amount is proffered."

State Supreme Court Reverses Fifth Court's Pain and Suffering Damage Award

In [United Rentals North America v. Evans](#), the defendants challenged a trial court's \$5 million dollar pain-and-suffering award. Under Texas's survival law, a person's family can recover for a person's losses prior to death, including conscious pain and suffering. An accident reconstruction and medical expert witnesses testified that there was no way of determining whether a driver died instantaneously when a bridge beam suddenly collapsed on his vehicle or was aware of what had occurred, even if only for a fraction of a second. Yet, despite this inconclusive testimony from the plaintiff's own expert witnesses, the **Fifth Court** stated that

a “lack of direct evidence on this issue does not preclude a jury from reasonably inferring” that the plaintiff consciously suffered pain and suffering from the injury.

In a unanimous opinion, the **Texas Supreme Court** [reversed](#), finding that the evidence in support of the pain and suffering damages was legally insufficient. The high court reasoned that “if there is no evidence one way or another,” any jury award “could only have been based on speculation, not evidence.”

Key Case to Watch



The **Texas Supreme Court** is reviewing a case appealed from the Fifth Court with significant implications for products liability actions in the state, *American Honda Motor Co. v. Milburn*. In that case, a plaintiff received a \$26 million verdict against the automaker. The plaintiff prevailed on a design defect theory despite there being a statutory presumption that products that meet federal safety standards are not defective. Honda appealed, arguing that the plaintiff’s expert witness failed to rebut this presumption because the expert did not address whether the applicable regulations were inadequate to promote public safety, as the statute requires. Nevertheless, the **Fifth Court** [affirmed](#) the jury’s verdict.

The **Texas Supreme Court** [agreed to review](#) the case in June. It’s a much-needed opportunity to clarify this statute’s application, which is intended to ensure that a product’s compliance with government safety standards aligns with product liability determinations. As an [amicus brief](#) observes, the Fifth Court’s decision “threatens to render this important liability protection meaningless.” The Court should find that a plaintiff “must do more than merely second-guess the relevant federal safety standards” to rebut the presumption of nonliability.

NEW JERSEY

New Jersey again appears on the Judicial Hellholes® report’s Watch List in 2023 due to ongoing concern about conditions that could increase lawsuit abuse in the state. This year, the plaintiffs’ bar continued to exercise outsized power and bipartisan influence over New Jersey’s Legislature. Also, the political balance of the New Jersey Supreme Court has shifted to the left and recent decisions by the state’s lower courts indicate a corresponding shift toward increased liability for businesses. Accordingly, ATRA will keep a watchful eye on New Jersey to see if the plaintiffs’ bar will succeed in pushing its liability-expanding agenda in the state’s legislature and courts, turning New Jersey into a full-blown Judicial Hellhole®.



The Plaintiffs’ Bar Still Wields Outsized Power And Bipartisan Influence Over New Jersey’s Legislature

New Jersey’s Senate President, [Senator Nicholas Scutari](#), is a practicing plaintiffs’ personal injury attorney whose legislative agenda is pro-plaintiff. As the second most powerful politician in the state, **Senator Scutari** has leveraged his position to push pro-plaintiff policies. He works closely with influential [Senator Jon Bramnick](#), who is also a plaintiffs’ personal injury attorney, to pursue his agenda.

Upon his ascension to Senate leadership in 2022, **Senator Scutari** successfully enacted legislation entitled the “[New Jersey Insurance Fair Conduct Act](#),” which allows policyholders to bring private civil actions against their auto insurers for any “unreasonable delay or unreasonable denial of a claim for payment of [UM/UIM] benefits under an insurance policy.” This legislation did not define an “unreasonable” delay or denial, which will generate high-stakes litigation because of this legal uncertainty combined with the bill’s punitive remedies. **Senator Scutari** then sought to move a large package of legislation seeking to upend the state’s automobile insurance market for the benefit of the plaintiffs’ bar. Out of this package, **Senator Scutari** was successful in enacting a bill that will increase mandatory auto insurance coverage

amounts to the highest in the nation, thereby increasing the pot of money available to plaintiffs' attorneys in auto accident litigation and incentivizing more lawsuits.

In 2023, during the Legislature's annual budget negotiations, the plaintiffs' bar has sought to move legislation ([A5353/S3818](#)) seeking to impose a mandatory award of attorneys' fees to prevailing plaintiffs in workers' compensation cases. This mandatory award would be equal to 25 percent of any award, order for payment, or approved settlement, without any regard for the circumstances of the case or actual work performed by the plaintiff's attorney. In short, the bill would eliminate judicial discretion to determine reasonable attorneys' fees to be awarded to plaintiffs in these cases. The only group that stands to benefit from such legislation are plaintiffs' attorneys.

Also in 2023, the plaintiffs' bar has sought to move legislation ([A3715/S1410](#)) designed to protect a new litigation tactic employed by the plaintiffs' class action bar called "mass arbitration." Confronted with court decisions protecting individualized arbitration of consumer and employment disputes, plaintiffs' lawyers instead file thousands of identical individual arbitrations against a defendant-business, triggering massive up-front costs for the business, which routinely agree to pay most, or all, arbitral fees. Even if the plaintiffs' claims are meritless, the business is either pressured to settle, abandon arbitration altogether, or pay the huge, upfront fees simply to have the chance to defend itself.

To counter this tactic and preserve their contractual right to individualized arbitration, many businesses have redesigned their arbitration clauses to include a version of the "bellwether" process, which is commonly used in multidistrict litigation. Essentially, this process requires the plaintiffs and defendant to select a handful of bellwether cases to arbitrate first. Depending on the outcomes of the bellwether cases, the parties can then negotiate early settlement of all cases before the business is forced to shoulder the massive cost of arbitration fees. [A3715/S1410](#) seeks to outright prohibit inclusion of this bellwether process in arbitration clauses, so that plaintiffs' lawyers can continue to exploit businesses' agreements to pay arbitration fees to force massive settlements.

Unfortunately, **Governor Phil Murphy**, does not serve as a reliable check on the plaintiffs' bar's power and influence over New Jersey's legislature. **Governor Murphy** is a strong progressive, who has shown no interest in civil justice reform. Indeed, **Governor Murphy** has signed numerous liability-expanding bills during both his first and second terms, and his Attorney General has supported the plaintiffs' bar's positions in important court cases by appearing as amicus curiae.

New Jersey's Courts Take Aim at Businesses

Recent decisions from New Jersey's trial and intermediate courts reflect a growing trend towards the expansion of business liability. In what has proven to be a continuing pattern, these courts have pushed the boundaries of statutory and case law in favor of consumers. Among other things, New Jersey's lower courts have invalidated standalone class action waivers as a matter of public policy, rejected the business community's attempts to effectively manage mass arbitration, and expanded available remedies under New Jersey's Consumer Fraud Act.

Notably, in September 2023, the judge presiding over the mass-tort talc litigation involving Johnson & Johnson [issued case management orders](#) consolidating dozens of plaintiffs' cases for discovery and trial. As a result, rather than address individual plaintiffs' claims in separate actions, Johnson & Johnson will have to face the allegations of batches of unrelated plaintiffs in consolidated trials. This "batch-and-blend" approach to trials permits plaintiffs' attorneys to hide the deficiencies in individual litigant's claims. Plaintiffs' attorneys can highlight certain helpful aspects from each plaintiff's case—ignoring their individual deficiencies—to build a case around a composite "perfect plaintiff." Studies have shown that the "batch-and-blend" approach typically yields higher recoveries against defendants by blurring the line between individual claims and incensing juries. Contrary to the time-honored principle that each individual litigant's claim should rise and fall on its own merit, the consolidation approach adopted by the trial court in the talc litigation threatens to distort justice by stacking the deck against defendants.

Anti-business sentiment in the lower courts is concerning against the backdrop of a changing **New Jersey Supreme Court**. New Jersey recently added several young justices to its Supreme Court. Indeed, by the end of Governor Murphy's second term, he will have appointed five of the seven justices who sit on the Court and tilted the political balance of the court to the left. If these new justices are reappointed after their initial seven-year terms, they will serve until the mandatory retirement age of seventy (70) years old, and thereby have a longstanding impact on New Jersey law and public policy.

Governor Murphy's most recent appointee to the Supreme Court, **Justice Michael Noriega**, has ties to the plaintiffs' bar. **Justice Noriega** joined the Court on July 6, 2023, filling the seat previously occupied by **Justice Barry T. Albin**. Prior to his appointment to the Court, **Justice Noriega** was a law partner of **Senator Jon Bramnick**, a prominent New Jersey plaintiffs' personal injury lawyer.

Dishonorable Mentions

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



DELAWARE SUPREME COURT ADOPTS EXPANSIVE VIEW OF PUBLIC NUISANCE AND TRESPASS LIABILITY



Delaware has traditionally recognized public nuisance and trespass liability as being cabined to the party that controls the nuisance, or the party that intrudes upon another's land, whether in their person or by an instrumentality they control. In 2020, **Delaware Attorney General Kathleen Jennings** pursued a novel expansion of these common law principles in an effort to hold Monsanto responsible for the cleanup of polychlorinated biphenyl's (PCBs). The State's litigation was misdirected, however, as Monsanto was not the polluter. The company ceased its lawful manufacturing of PCBs over four decades ago and had no influence over the third parties that introduced the chemicals into the environment. The **Superior Court of Delaware** properly recognized this glaring issue with the State's claims and dismissed the complaint.

On appeal, however, the **Delaware Supreme Court** [ruled](#) in June that a manufacturer can be held liable if it "participated to a substantial extent in carrying out the activity that created the public nuisance or caused the trespass." In essence, this ruling makes businesses that lawfully make and sell goods absorb the cost of wrongful conduct by purchasers over which the manufacturers had no control. Though lower court decisions have hesitated to expand public nuisance liability, which traditionally involves land use, to product-based claims, such as for societal harm attributed to [guns](#) or [opioids](#), the Court simply dismissed their apprehension as "unsupported."

Given that a robust number of businesses incorporate in Delaware and submit to the jurisdiction of its courts, creating "super-torts" out of traditional public nuisance and trespass claims will be significantly disruptive to their operations. This decision opens the floodgates for countless future lawsuits that will be born out of a known or perceived harm that can in some way be tied back to a business. While some products may pose risks, the proper solution is prospective legislation, not retroactive regulation.

ILLINOIS COUNTIES REMAIN VENUE OF CHOICE FOR ASBESTOS CLAIMS

ASBESTOS LITIGATION

Three Illinois counties - **Madison**, **St. Clair**, and **Cook** - have remained a hotspot for asbestos claims, attracting plaintiffs from across the country due to their favorable litigation environments. Even as asbestos claims continue to fall nationwide, plaintiffs' firms continue to choose this trio of counties as their preferred destination while defendants bear the burden of fighting what are often unsubstantiated claims. Making matters worse, [wrongful death legislation](#) signed by **Governor J.B. Pritzker** on August 11 will now allow plaintiffs to seek punitive damages in these cases.



Madison County

Madison County remains the [top jurisdiction](#) for asbestos litigation in the country, with more than double the claims of neighboring **St. Clair County** and hosts nearly a third of all asbestos lawsuits filed nationwide. Like in years past, mesothelioma claims predominate in **Madison County**, making up close to [90% of the counties asbestos](#) related caseload.

Out-of-state plaintiffs continue to make up the bulk of cases seen in **Madison County**, with over [90% of all filings in this jurisdiction](#) coming from outside Illinois. Over-naming defendants has also been an enduring issue in both Madison and Cook Counties. The average number of companies named as defendants in each complaint rose from 61 in 2021 to 64 the following year.

Thus far in 2023, asbestos litigation has further increased in **Madison County**, [up 5.6% year over year](#) through July. Lawsuits alleging that traces of asbestos in talcum powder products was responsible for a person's injury increased in the county by 35%, consistent with a nationwide rise in such claims.

St. Clair County

Despite a modest decline in asbestos lawsuits filed in 2022 from the previous year, **St. Clair County** [still ranks towards the top](#) in asbestos litigation nationwide. Lung cancer claims, in particular, make up most asbestos filings in the county. Like in Madison County, the [vast majority of these claims](#) are brought by out-of-state plaintiffs seeking to benefit from this favorable venue.

A mid-year report shows that, like in Madison County, in 2023, claims in **St. Clair County** are outpacing years [past by nearly 10%](#).

MINNESOTA LEGISLATURE ENACTS LIABILITY-EXPANDING AGENDA



The 2023 Minnesota legislative session was bleak for the state civil justice system. In May, **Governor Tim Walz** signed multiple omnibus bills that impose substantial new liability burdens on manufacturers, employers, and health care providers.

For example, [S.F. 2909](#), expands private consumer litigation by eliminating the need to show that the litigation benefits the public, as previously required by the **Minnesota Supreme Court** in *Ly v. Nystrom* (Minn. 2000). This amendment will lead to misuse of the state's consumer protection law to address purely private disputes to take advantage of the ability to recover attorney's fees. Another provision of the same bill does away with a constraint in wrongful death actions that that had constrained recovery in pecuniary losses, those with an objective monetary value.

One provision of [S.F. 2744](#), the "**Family Protection Act**," prohibits family member exclusions from boat insurance coverage for bodily injuries. This may prompt family members to sue each other just to recover damages paid for by their boat insurance.

Lastly, [S.F. 3035](#) substantially revises employment laws in the state. Among other negative provisions, this new law allows employees in several industries, including the meatpacking, warehouse, and nursing home industries, to sue their employers if certain workplace conditions are not met.

WISCONSIN COURTS' RULINGS SHOWS STATE 'NOT OPEN FOR BUSINESS'

After being struck from behind at high speed by an inattentive teenage driver, a plaintiff sought to shift the blame for his severe injuries to the maker of his 2013 Hyundai Elantra. The plaintiff faulted his driver's seat — specifically the seat's headrest design — as the source of his injuries. The result — a \$32 million verdict — stemmed from a series of errors that is a cautionary tale for those who attempt to defend product liability cases in Wisconsin courts.

In 2011, **Wisconsin** enacted reforms including strengthening its standard for admissibility of expert testimony, adopting a rebuttable preemption that products that comply with safety standards are not defective, and permitted manufacturer to improve the safety of their products without concern that such changes could be used against them. After Wisconsin adopted these changes, it declared the state “open for business.” The trial of this product liability case threw that proposition in doubt, as the court allowed use of junk science and permitted introduction of product recalls that were not relevant to the injury.



After both the **Wisconsin Court of Appeals** and the **Wisconsin Supreme Court** let the trial court’s rulings stand, there can be no doubt: Wisconsin is *not* “open for business.”

For full context, it is critical to understand the legal missteps the Wisconsin trial court committed and that the appellate courts summarily affirmed. Here, the trial court:

- Admitted the testimony of a plaintiff’s “expert” who presented a theory that the seatback caused the injury that defied basic physics and had not been tested;
- Allowed that witness, a biomechanical engineer with no medical expertise, to offer a conclusory opinion on the cause of the plaintiff’s injuries;
- Allowed the plaintiff’s treating physician to offer opinions that ventured into the realm of biomechanical engineering;
- Allowed the plaintiff to tell the jury about 85 unrelated voluntary product recalls that Hyundai and its sister company had conducted spanning three decades -- highly prejudicial information with no relevance to the Elantra seat at issue that punishes companies for protecting customer safety.

Now Wisconsin law apparently allows all voluntary product recalls to be used against a manufacturer—even if those recalls are entirely unrelated to the alleged defective product at issue. Plaintiffs may now “rebut” the presumption that a product is non-defective if it adheres to federal safety guidelines by showing the jury unrelated recalls on different products of that manufacturer, or recalls from a *different manufacturer*—i.e., that manufacturer’s sister company.

Now that the **Wisconsin Supreme Court** has denied review of the Wisconsin Court of Appeals decision affirming the trial court’s judgment, the Wisconsin court system has effectively wiped-out significant portions of the legislature’s tort reform—sadly answering the question: Wisconsin is not “open for business.”

Points Of Light



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

IN THE COURTS

STATE SUPREME COURTS REJECT MEDICAL MONITORING

It is well established that at the center of any tort action, there must be a cognizable “injury-in-fact,” or an invasion to one’s legally protected interest. Generally, the injury must be both “concrete and particularized” and “actual or imminent.” [Recently](#), various state courts have considered whether an increased *risk* of harm for an injury, absent a present physical injury, can satisfy this requirement.

In late August, a unanimous **Delaware Supreme Court** [definitively stated](#) that a plaintiff cannot recover expenses for medical monitoring of a hypothetical injury without the present manifestation of a physical illness. The underlying case was brought by a plaintiff on behalf of a class of Delaware residents living next to Atlas Point, a surfactant manufacturing plant owned by defendant Croda, Inc. The **Environmental Protection Agency** had suggested that residents living in the zone surrounding the plant were “up to four times more likely to develop cancer than the average American” due to their exposure to the chemical, ethylene oxide. Plaintiffs’ lawyers ran to the **U.S. District Court for the District of Delaware** with this statistic, attempting to recover costs for monitoring nearby residents’ yet-to-exist illnesses. The federal trial court dismissed the case and, once the issue landed in the state high court’s lap, that court was equally unenthused.

The Court cited both federal and state case law in arriving at its conclusion that a fear of disease or injury does not amount to a legally cognizable injury. Notably, the Court highlighted the public policy concern that allowing recovery for hypothetical risks of future injuries opens the floodgates to limitless and unpredictable litigation. Quoting from the **U.S. Supreme Court’s** 1997 decision in [Metro-North Community Railroad v. Buckley](#), the opinion observes that “tens of millions of individuals *may* have suffered exposure to substances that might justify some sort of substance-exposure-related medical monitoring,” but may never result in any actual harm. A ruling that grants undue recognition to no-injury claims could also siphon resources from those presently suffering from a physical injury or those who actually develop a medical condition in the future. While the Court acknowledged that awarding medical-surveillance damages could alleviate future medical costs for economically disadvantaged plaintiffs, it rightfully held that the legislature is better situated to address the thorny nuances that accompany recognizing medical monitoring a separate cause of action.

The **New Hampshire Supreme Court** [reached a similar conclusion](#) this past year, holding that increased risk of illness as a result of alleged exposure to a toxic chemical is not a compensable injury. In its review of the traditional elements of a negligence action, the Court determined that the “mere existence of an increased risk” is not sufficient to state a claim for damages given that there is no “present physical injury” alleged. The Court similarly emphasized the importance of leaving complex questions like this to the legislature. As recently as 2020, the New Hampshire legislature had considered establishing a cause of action for medical monitoring, but the bill was vetoed. In this case, the Court was unwilling to overstep its bounds and accomplish through judicial action what trial lawyers were unable to achieve through democratic means.

NEW JERSEY COURT OF APPEALS REJECTS JUNK SCIENCE

Expert testimony that is founded upon speculative conclusions, questionable methodology, and otherwise junk science is notorious in talcum powder litigation. This trend has seen a handful of repeat offenders appearing in trials across various jurisdictions, including California, Missouri, and New Jersey. However, a recent appellate decision in New Jersey offers a glimmer of hope by reaffirming the importance of rigorous expert vetting by trial court judges.

The underlying case consolidated the claims of four plaintiffs who alleged that their long use of Johnson & Johnson's talcum products exposed them to asbestos, causing them to develop mesothelioma. The 2019 trial, overseen by **Judge Ana Viscomi** of the **Middlesex County Superior Court**, featured testimony from three plaintiff experts. Notably, **Judge Viscomi** felt no need to conduct hearings to assess the admissibility of their testimonies and denied Johnson & Johnson's requests to do so. Ultimately, the trial culminated in a massive jury verdict of [\\$224 million](#) against Johnson & Johnson.

ASBESTOS LITIGATION

In October, the **New Jersey Court of Appeals** [tossed the verdict](#), and with it, the testimonies of all three experts. It found that the trial court abused its discretion by failing to exercise its "gatekeeping function" in keeping out unreliable expert testimony. [Dr. James Webber](#) and [Dr. Jacqueline M. Moline](#) both testified that non-asbestiform cleavage fragments could cause mesothelioma, but the panel held that neither expert adequately explained the facts or methodology upon which they relied to arrive at their conclusions. [Dr. William Longo](#), meanwhile, extrapolated the extent of asbestos exposure each plaintiff experienced due to their use of Johnson & Johnson products, but the panel remained unconvinced that his methodology was sound or widely accepted in the scientific community.

This decision marks the second time that the New Jersey appellate court reversed a multi-million talcum verdict on grounds of unreliable expert testimony. In a 2021 case, [Lanzo v. Cyprus Amax Minerals Co.](#), the panel similarly [excluded](#) the testimonies of **Dr. Weber** and **Dr. Moline**, which had been allowed in by the very same **Judge Viscomi**.

All three experts are popular picks for the mass tort bar, especially for testifying against Johnson & Johnson. In addition, **Dr. Moline** is the [subject of a lawsuit](#) that Johnson & Johnson's subsidiary filed against her in May. The company alleges that she persistently and knowingly disseminated false and disparaging statements tying its products to cancer, perpetuating years of asbestos litigation underscored by her dubious claims.

The New Jersey appellate panel's refusal to allow junk science to slip through the cracks is commendable, and ideally, will invite other state courts to more thoroughly examine expert testimony.

TEXAS SUPREME COURT REJECTS MANIPULATION OF JURIES THROUGH ANCHORING

"Anchoring" is a tactic that personal injury lawyers use to manipulate juries into reaching damage awards that far exceed levels they would reach if left to decide an amount based on the evidence presented at trial, and their life experience and values. This year, the **Texas Supreme Court** firmly rejected one particularly outrageous attempt at jury manipulation.

Anchoring implants in the minds of jurors either an arbitrary amount or suggests use of a mathematical formula (such as an amount per day or hour) designed to lead to excessive awards. While any category of damages may be influenced by anchoring, the practice has the greatest impact on noneconomic damages because these awards are highly subjective. Empirical research and trial experience confirm that an "anchor" creates a psychologically powerful baseline for jurors struggling with assigning a monetary value to pain and suffering. Once a lawyer provides an anchor, jurors either accept the suggested amount or "compromise" by negotiating it upward or downward.

In January 2023, the **Texas Supreme Court** [rejected](#) an attempt at anchoring that should be emulated by other courts. In that instance, the state high court ordered a new trial after a plaintiffs' lawyer, in a tragic auto accident case, referenced the values of objects with no connection to the case, including the \$71 million cost of a Boeing F-18 fighter jet and the \$186 million auction price of a coveted painting by Mark Rothko. The lawyer then suggested that the jury award the families, for mental anguish and loss of companionship, two cents for every one of the 650 million miles the defendant's trucks drove during the year of the accident (because "I've been trying to give this company and their lawyers my two cents worth"). In that instance, the jury awarded \$38.8 million, an amount that the state high court observed matched the "two cents" suggestion "within one-half of one percent."

The Court observed that the plaintiffs' lawyers presented no evidence at trial supporting the \$38.8 million award. Rather, the only arguments made to justify it were these "impermissible appeals to irrelevant considerations." The Court rejected the invitation to allow juries to rely on such arbitrary figures or to essentially permit lawyers to "pick and number" and ask the jury to "put it in the blank." As the Court understood, "The self-evident purpose of these anchors . . . is to get jurors to think about the appropriate damages award on a magnitude similar to the numbers offered, despite the lack of any rational connection between reasonable compensation and the anchors suggested." The Court observed that "unsubstantiated anchors like those employed here have nothing to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the extent of the injuries to the amount awarded." It concluded that "unsubstantiated anchors" are not "the type of information a jury can rightfully rely on when crafting a verdict" because they "are of no assistance in rationally explaining why the amount of noneconomic damages awarded reasonably compensates a decedent's family."

The **Texas Supreme Court** instructed lower courts that they have an obligation to prevent improper jury anchoring, applying a rule of civil procedure that requires attorney arguments to be confined to the evidence and arguments of opposing counsel.

WEST VIRGINIA SUPREME COURT REASONABLY LIMITS EMPLOYER LIABILITY FOR EMPLOYEE CONDUCT OUTSIDE OF WORK

In addition to seeking compensation for hypothetical injuries like an increased risk of harm, plaintiffs' attorneys also have tried to expand the duty owed by employers as another way of opening businesses up to limitless liability. One such example occurred in *Speedway v. Jarrett*, in which the plaintiff sought to hold a gas station convenience store liable for an auto accident caused by a new employee who was under the influence of illicitly obtained prescription drugs. The accident occurred an hour after the employee's shift had ended, seven miles away, while the employee was running a personal errand. It was undisputed that the employer was not aware of the employee's drug use, which she had hidden. Nevertheless, because the employee appeared tired at work and the employer asked her to work an extra hour, the plaintiff alleged that the store engaged in "affirmative conduct" that created a risk of harm and had a duty to stop its employee from driving at the end of her shift. A West Virginia jury found the employer at fault for 30% of the resulting damages, in excess of \$2 million.

The employer challenged the verdict, arguing that it owed the plaintiff no duty of care and was not responsible for an employee's negligent conduct outside of work. The **West Virginia Supreme Court of Appeals** agreed in a [unanimous opinion](#), ruling that an employer cannot be held liable for the actions of employees acting outside the scope of their employment. The Court declined to find that the employer had engaged in affirmative conduct that created a foreseeable risk of harm. It distinguished the case from situations in which an employer provided an employee with alcohol or required an employee who warned his supervisor that he was exhausted to continue to work an extraordinarily lengthy shift. Here, the employer was not even aware of the employee's drug abuse and had asked the employee if she would like to leave early, an offer she declined. Thus, the Court reasoned that the plaintiff had failed to show the employer

“created an unreasonable risk of harm to the motoring public,” and had no duty to prevent the employee from driving.

IN THE LEGISLATURE

In their 2023 legislative sessions, nine states enacted significant reforms to address excessive liability and litigation abuse.

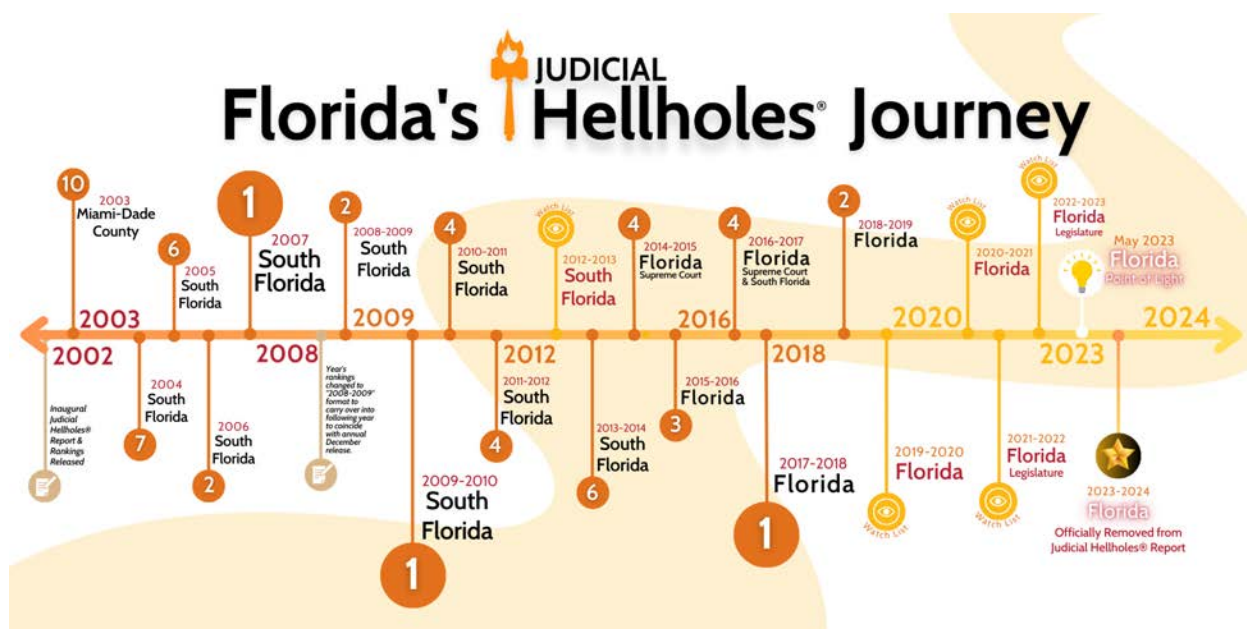
FLORIDA LEGISLATURE ENACTS LANDMARK REFORMS, STATE REMOVED FROM JUDICIAL HELLHOLES® REPORT

Florida has a long [history](#) as a “Judicial Hellhole®,” with a legal system that has been plagued by excessive litigation, frivolous lawsuits, fraudulent claims, and outrageous awards. Florida was named the No. 1 Judicial Hellhole® in [2018](#) and No. 2 in [2019](#).

Several state Supreme Court appointments made by **Governor Ron DeSantis** were a catalyst for positive change, resulting in ATRF removing Florida from the Judicial Hellholes® list in [2020](#). However, the [Florida Legislature](#) remained on the report’s “[Watch List](#),” due to the need to make important improvements in the civil justice system, such as addressing transparency in damages.

At long last, Florida’s leadership, including **Governor DeSantis**, **House Speaker Paul Renner** and **Senate President Kathleen Passidomo**, prioritized civil justice reform, recognizing the negative impact lawsuit abuse is having on Florida residents and the state’s economy. The 2023 legislative session brought a great sea change for the state’s civil justice system. Florida lawmakers passed legal reform bills that have the potential to rebalance the state’s legal system for many years to come.

The most significant of the bills, [H.B. 837](#), sponsored by **Representatives Tommy Gregory** and **Tom Fabricio** and **Senator Travis Hutson**, among other things, requires transparency in damages presented in court trials. During a trial, Florida jurors currently only hear evidence of the initially invoiced amount of medical expenses, which is essentially a “sticker price,” often three or more times the amount ultimately paid. This results in a large gap between the two amounts. Under the prior system, some lawyers and allied medical clinics would inflate the damage award, hide the true value of medical expenses from the court through misuse of “letters of protection,” and collect larger fees. [H.B. 837](#) ensures jurors receive accurate information on the actual value of medical expenses.



Other highlights of the bill include:

- Adjusting Florida’s negligence system so that a plaintiff who is more than 50% responsible for his or her own injuries cannot recover damages from a defendant;
- Permitting defense attorneys to obtain information about referral relationships between lawyers and doctors;
- Modifying Florida’s “bad faith” insurance litigation to create a more balanced playing field;
- Eliminating the contingency fee multiplier for an attorney fee award in most cases to bring Florida in line with the federal standard;
- Limiting the application of Florida’s one-way attorney fee shifting provision;
- Allowing juries to consider the responsibility of criminals when allocating fault in cases blaming the owner of the property on which the crime occurred;
- Providing a presumption against liability in negligent security cases for apartment complexes that implement certain security features and safety audits;
- Reducing the statute of limitations for general negligence cases from an exceptionally-long four years to two years.

In the days leading up to the enactment of **H.B. 837**, trial lawyers rushed to courthouses around the state to file tens of thousands of cases in hopes of cashing in on the old system one last time.

In addition to H.B. 837, **Governor DeSantis** signed **S.B. 360**, sponsored by **Senator Travis Hutson**, into law in April. The bill shortens the timeframe within which a construction defect claim must be filed from ten to seven years and clarifies when the timeline begins. Florida was an outlier, and this bill brings it more in line with a majority of the states.

Finally, Florida enacted [legislation](#) aimed at regulating deceptive practices in legal services ads. Lawyers spent an estimated [\\$271.8 million](#) on TV, outdoor, radio, digital, and print ads for local legal services or soliciting legal claims in Florida. The state accounted for nearly 12% of all legal services advertising spending across the United States last year.

A 2019 FDA study shows the real-life consequences of deceptive trial lawyer ads. The report found 66 incidents of adverse events following patients discontinuing the use of blood thinner medication (Pradaxa, Xarelto, Eliquis, or Savaysa) after viewing a lawyer advertisement. The median patient age was 70, and 98% stopped medication use without consulting their doctor. Thirty-three patients experienced a stroke, 24 experienced another severe injury, and seven died.

The new law prohibits such practices as presenting lawsuit ads as “medical alerts,” suggesting a product has been recalled when it has not, displaying government logos that suggest the agency has endorsed or backed information in the ad. It also requires ads targeting FDA-approved prescription drugs or medical devices to indicate that the product remains approved, if that is the case, and warn viewers that they should consult a physician before making any decision regarding prescribed medication or medical treatment.

The significance of these enactments cannot be overstated and the ATRF commends the state’s leadership for prioritizing these issues and working to create a more fair and balanced civil justice system in Florida.

OTHER STATE ACTIVITY

Eight additional states enacted significant reforms including:

- **Georgia** codified the “apex doctrine,” allowing a court to grant a protective order prohibiting the deposition of current or former high-ranking corporate officers or government officials who lack unique personal knowledge of matters relevant to the lawsuit. ([S.B. 74](#))
- **Indiana** required plaintiffs to disclose consumer lawsuit loans to other parties and their insurers. ([H.B. 1124](#))
- **Iowa** limited noneconomic damage awards in medical liability and trucking cases. ([H.F. 161](#); [S.F. 228](#))
- **Kansas** lowered the state’s prejudgment interest rate. ([S.B. 75](#))
- **Montana** enacted a series of reforms that will go a long way toward improving the state’s civil justice climate. Included among them are:
 - Comprehensive product liability reform ([S.B. 216](#))
 - Third-party bad faith reform ([S.B. 165](#))
 - Regulation and disclosure of third-party litigation financing ([S.B. 269](#))
 - Punitive damages reforms ([S.B. 169](#))
- **Texas** established a framework for arbitration and civil actions against rideshare services and provided that rideshare services are generally not subject to vicarious liability absent gross negligence. ([H.B. 1745](#))
- **Utah** addressed over-naming of defendants in asbestos cases and required plaintiffs with nonmalignant conditions to demonstrate impairment based on objective medical criteria ([H.B. 328](#))
- **West Virginia** limited the amount of noneconomic damages recoverable in “deliberate intent” cases against employers. ([H.B. 3270](#))

Closer Looks



PLAINTIFFS' LAWYERS PUSH TO DROP GUARDRAILS IN STATE WRONGFUL DEATH ACTS

Personal injury lawyers have mounted a nationwide campaign to expand liability under state wrongful death acts. Plaintiffs' lawyers know that tragic accidents present an opportunity for excessive awards that go far beyond providing reasonable compensation to those who have lost a loved one (and a substantial contingency fee). They also know it is difficult for policymakers to push back against legislation presented as aiding "grieving families." State officials can look to the courageous example set by **New York Governor Kathy Hochul** who vetoed the most extraordinary overreach in this area in recent years.

Under early common law, a person's death extinguished personal injury claims that he or she could have brought. This rule was often criticized, leading states to adopt **Wrongful Death Acts** in the mid-to-late 1800s. **Wrongful Death Acts** provided a new statutory remedy for family members of a person who had died due to negligent or other tortious conduct. They typically authorize a personal representative of the decedent to seek damages on behalf of the person's spouse and children.

When states enacted **Wrongful Death Acts**, legislators were keenly aware that litigation following a person's death poses a significant risk of excessive verdicts. For that reason, these laws often limit recoverable damages to pecuniary losses – items for which one can establish an economic value, such as lost future income. Pecuniary damages also include the value of services that a spouse would have contributed to a household or the education, guidance, and training a parent might have provided to a minor child. The value of pecuniary damages, which is often established through expert testimony, can be substantial.

While some states have allowed recovery by spouses or children for loss of consortium, society, comfort, or companionship, most states have not opened the door to broader recovery of noneconomic damages, such as for grief or mental anguish. That limitation is consistent with traditional tort law principles that ordinarily do not permit recovery of damages for purely emotional harms absent special circumstances. It also reflects the fact that the grief associated with the loss of a family member is an inevitable part of life, whenever it occurs. These limitations typically do not affect the availability of compensation for any pain and suffering a person experienced *before* he or she died, which is usually recovered through a separate "survival" claim.

Some state laws limit the total amount of damages or nonpecuniary damages recoverable in a wrongful death action or have a separate law limiting noneconomic damages in all civil cases or medical liability actions.

Legislators adopted these types of constraints because they recognized that the tragedies underlying these claims, and understandable sympathy for the victims and their families, can easily lead to unjustifiably huge awards. Rather than provide reasonable compensation to family members, as the civil justice system is intended, a wrongful death suit can transform an accident that a company may not have been able to prevent into a multi-million-dollar verdict that can destroy an individual or business.

The plaintiffs' bar is engaged in a concerted effort to eliminate the reasonable constraints that have long been a part of **Wrongful Death Acts**. At least eleven states considered legislation over the past year that would have allowed a broader range of people to sue, expanded recoverable damages for emotional harm, raised or eliminated damage caps, authorized punitive damages, or lengthened the statute of limitations for bringing such claims.

Some legislation, like the "**Grieving Families Act**" ([S74A](#)), which **Governor Hochul** vetoed in January 2023, combined many of these expansions of liability. The bill was a dream for the state's personal injury

bar – allowing anyone who could claim a “close” relationship to the decedent to sue, nearly doubling the amount of time to file a lawsuit from two to three-and-a-half years, and adding several new categories of nonpecuniary damages, including for grief or anguish, without any damage limit. In her [veto message](#), **Governor Hochul** recognized that the bill represented an “extraordinary departure from New York’s wrongful death jurisprudence and may result in significant unintended consequences.” She observed that these consequences would include confusing judges, juries and litigants with overlapping categories of damages, requiring courts and claimants to grapple with competing claims asserted by family members, worsening the “already-high insurance burdens on families and small businesses, and further straining already-distressed healthcare workers and institutions.”

Ultimately, five states enacted expansions of liability under **Wrongful Death Acts** into law in 2023. **Maine** ([H.P. 581](#)) raised the amount recoverable for loss of comfort, society and companionship, including emotional distress, from \$750,000 to \$1 million, which will automatically increase each year for inflation, and increased the law’s punitive damages maximum from \$250,000 to \$500,000. **Delaware** ([S.B. 81](#)) and **Illinois** ([H.B.0219](#)) added the threat of punitive damages in wrongful death claims. **Minnesota** altered its wrongful death and survival statutes to permit recovery beyond economic losses ([S.F. 2909](#)), [repudiating](#) decades of precedent. And **Rhode Island** increased its unique minimum recovery in wrongful death actions from \$250,000 to \$350,000 ([H. 5513](#)).

This trend is continuing. In fact, within months of **Governor Hochul** vetoing the New York bill, legislators introduced another bill ([S.6636/A.6698](#)) that, rather than taking a more moderate approach, doubles down by including the [same extreme aspects](#) as the original proposal. The state legislature passed the bill this summer and the governor is reviewing it though the legislation has not officially been delivered to her desk yet. If enacted, New York’s reputation will be further cemented at or near the top of the list for [massive verdicts](#), [medical liability payouts](#), and [auto insurance costs](#).

LITIGATION TOURISM: JUDICIAL HELLHOLES® ARE OPEN FOR BUSINESS



Judges in Judicial Hellholes® have made a habit of swinging open their courtroom doors to out-of-state plaintiffs. This policy benefits plaintiffs but negatively impacts the states’ civil justice systems. It clogs courts, drains court resources, and drives businesses out of the states leading to job loss.

Plaintiffs’ lawyers flock to plaintiff-friendly courts seeking to take advantage of low barriers of entry and reputations for nuclear verdicts and expansive rulings.

Unfortunately, this year, the **United States Supreme Court** created significant ambiguity with respect to plaintiffs’ ability to drag out-of-state defendants into Judicial Hellholes® that have little or no connection to the case at hand.

Mallory v. Norfolk Southern Railway Co.

On June 27, 2023, a fragmented U.S. **Supreme Court** handed down its decision in [Mallory v. Norfolk Southern Railway Co.](#)— an opinion that may broaden plaintiffs’ opportunity to pursue lawsuits in problematic trial courts that have no connection with the events or involved parties. Specifically, the Court rejected a constitutional due process challenge to Pennsylvania’s [statutory arrangement](#) providing that a corporation’s registration to conduct business within the state constitutes consent to allow Pennsylvania courts to “exercise general personal jurisdiction” in any lawsuit brought against that corporate entity. In [Mallory](#), a Virginia resident sued a Virginia-based railroad in Pennsylvania, relying purely on the railroad’s registration to do business in the state. A plurality of four justices concluded that constitutional due process concerns are not implicated “when an out-of-state defendant submits to suit in the forum State” as the Pennsylvania business registration statutes require.

Four justices [dissented](#) from this conclusion. These justices recognized that the absence of constitutional limitations on consent-by-corporate-registration statutes will open the door to a free-for-all with no practical limits on state courts' exercise of jurisdiction. The dissenting justices would not allow state legislatures the ability to eliminate constitutional protections by following the Pennsylvania statutory model.

This decision will not only embolden the plaintiffs' bar in Pennsylvania, but in other Judicial Hellholes® as well. The **Georgia Supreme Court**, the [high court](#) in this year's No. 1 Judicial Hellhole®, reached a [similar decision](#) in 2021 and the New York legislature is considering enacting a [statute](#) similar to the one at issue in Pennsylvania.

Mallory in the Context of the Supreme Court's Other Jurisdictional Decisions

The *Mallory* decision seems to continue the Supreme Court's retreat from clear limitations on state courts' ability to exercise personal jurisdiction over out-of-state corporate defendants. Prior rulings had signaled certain defined boundaries that state courts could not cross when attempting to exercise jurisdiction.

For example, in [BNSF v. Tyrell](#) (2017), the Court concluded that due process allows general jurisdiction over a corporate defendant only where the defendant is "essentially at home," typically just its state of incorporation and where its principal place of business is located. The fact that the corporation does substantial business in the forum state, even employing thousands of people and operating extensive facilities, "does [not suffice](#) to permit the assertion of general jurisdiction over claims . . . that are unrelated to any activity occurring in [the forum state]." In contrast, *Mallory* found general jurisdiction less constrained, concluding that a corporation's simple act of registering to do business in Pennsylvania is sufficient to enable the state to exercise general jurisdiction pursuant to the statute's consent provision.

The less exacting requirements for establishing jurisdiction seen in *Mallory* also seem to comport with the softening of the specific jurisdiction analysis employed in [Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.](#), (2021). Prior to *Ford*, the Court had indicated in [Bristol-Meyers Squibb v. Superior Court of California](#) that due process considerations limited the exercise of specific jurisdiction to situations in which the lawsuit "arises out of or relates to the defendant's contact with the forum," meaning that the lawsuit stems from an "activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." Even though the defendant in *Bristol-Meyers Squibb* sold its pharmaceutical product nationally, the fact that specific non-resident plaintiffs did not purchase, ingest or suffer injury from the product in California deprived the courts in that state of specific jurisdiction over the non-residents' claims due to the lack of a "connection between the forum and the specific claims at issue[.]" But in *Ford*, the Court concluded that the state courts could exercise specific jurisdiction even though Ford did not sell the accident-involved vehicles in the forum state. The Court ruled that Ford's forum state advertisement, sale and servicing of the same model as the vehicles at issue was sufficient to establish that lawsuits "relate to" the defendant's contacts with the forum sufficient to allow specific jurisdiction.

Lower courts have struggled to find consistency in deciding what facts will establish adequate contacts by a corporation with the forum state that "[relate to](#)" the [subject matter](#) of a lawsuit. Courts in Judicial Hellholes® have ceased this opportunity to allow litigation tourism to flourish in their states. Without clear guidance from the U.S. Supreme Court, plaintiff-friendly courts across the country are likely to stretch the boundaries and further extend their jurisdiction over foreign defendants.

The Future of Mallory and Consent-by-Registration Statutes

Justice Samuel Alito's [concurring opinion](#) determined the direction of the *Mallory* ruling, and his constitutional analysis contains competing elements. On the one hand, Justice Alito concluded that Pennsylvania's statutory arrangement did not run afoul of due process limitations even though the statutes enable abusive litigation tactics to require corporate defendants to defend lawsuits in infamous trial courts having no connection to the parties or the events at issue.

On the other hand, Justice Alito observed that other constitutional protections, including state sovereignty, federalism, and the dormant commerce clause, are likely infringed by the consent-by-registration statutory arrangement. Justice Alito identified the potentially “devastating” consequences of consent-by-registration laws, which will be most severe for small businesses that cannot afford the risks of remote litigation and may therefore forgo out-of-state expansion altogether.

Accordingly, if constitutional arguments on the alternative grounds he identified had been properly raised, he seemingly would have struck down the statutes. His assessment therefore leaves the constitutionality of Pennsylvania’s consent-by-registration statutes unresolved and subject to further litigation on remand.

The Making of a Judicial Hellhole:

QUESTION: What makes a jurisdiction a Judicial Hellhole?

ANSWER: The judges.

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

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

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

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

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

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

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

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

PRETRIAL RULINGS

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

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

DECISIONS DURING TRIAL

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

UNREASONABLE EXPANSIONS OF LIABILITY

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

JUDICIAL INTEGRITY

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



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