JUDICIAL Hellholes®

2024
2025

Pennsylvanians Stuck in Nation's Worst Judicial Hellhole®

Formula for Disaster Piling onto Plastics Pollution

Lawsuit Loans Fuel the Fire

ATR FOUNDATION

"Philadelphia is like a slot machine. It's a slot machine that everybody wants to play."

– A regional healthcare professional

"You have government-appointed officials who argue in front of [judges] and [the judges] depend on their jobs from elected officials. It's a horrible cycle of back scratching at the expense of the general public."

– South Carolina State Representative Jordan Pace

"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.

"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."

"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.

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 Judicial 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 **2024-2025 Judicial Hellholes®** report shines its brightest spotlight on 10 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 THE PHILADELPHIA COURT OF COMMON PLEAS & THE SUPREME COURT OF PENNSYLVANIA Lawsuit abuse in the City of Brotherly Love has reached a fever pitch with nuclear verdicts becoming the norm and novel theories of liability flourishing. Eye-popping nine-figure damage awards were issued without hardly a thought and medical liability lawsuits continue to flood the Philadelphia Court of Common Pleas due to the Pennsylvania Supreme Court's decision to eliminate an important requirement for entry. The situation is not expected to improve as a recent Pennsylvania Supreme Court decision allows for duplicative damages in certain types of cases.

#2 NEW YORK CITY A "fraudemic" hit the Big Apple in 2024. Some of the worst examples of lawsuit abuse came to light in New York City with the filing of several RICO lawsuits against plaintiffs' firms. Unique New York laws like the Scaffold Law and the state's consumer protection act are ripe for abuse and plaintiffs' lawyers have seized the opportunity to cash in.

#3 SOUTH CAROLINA ASBESTOS LITIGATION South Carolina's asbestos judge has a clear bias against corporate defendants. This bias is obvious in rulings that result in unfair trials and severe verdicts. Anti-corporate bias is also evident in the judge's imposition of unwarranted sanctions, a willingness to overturn or modify jury verdicts to benefit plaintiffs, and frequent appointment of a receiver to maximize recoveries from insurers.

#4 GEORGIA Georgia's civil justice system is plagued by skyrocketing nuclear verdicts®, inflated awards for medical costs, expansive premises liability, and laws that set-up defendants to fail creating endless liability. Georgia courts also continue 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.

#5 CALIFORNIA The trial bar goes to California to pursue innovative new theories of liability and push the envelope with regard to expanding liability for business. The state also has the most nuclear verdicts® of any state in the country and the state attorney general is leading the charge in baseless environmental litigation. The state's unique Lemon Law is a gold mine for plaintiffs' lawyers and "no-injury" Private Attorney General Act (PAGA) and Americans with Disability Act (ADA) accessibility lawsuits bog down business.

#6 COOK COUNTY, ILLINOIS The county is home to a disproportionate amount of the state's litigation and nuclear verdicts®. No-injury litigation, including claims filed under the state's Biometric Information Privacy Act and consumer protection laws, is the main contributor to Cook County's sustained appearance on the Judicial Hellholes® list. The county is a hotbed for asbestos litigation and Illinois plaintiffs' lawyers contribute millions of dollars to campaigns to maintain the status quo.

#7 ST. LOUIS, MISSOURI Judges in St. Louis issue plaintiff-friendly rulings and embrace junk science, signaling to plaintiffs' lawyers across the country, and now the globe, that St. Louis courts are open for their business. St. Louis courts also remain a hotspot for asbestos lawsuits. Rather than address rampant lawsuit abuse, the Missouri legislature has turned a blind eye and has been complicit in creating an unjust legal system.

#8 THE MICHIGAN SUPREME COURT The Michigan Supreme Court sent mixed signals about junk science, continues to take an expansive approach to premises liability and created innovative new ways for employees to sue their employers.

#9 KING COUNTY, WASHINGTON The county makes its first ever appearance on the Judicial Hellholes® list thanks to judges' proclivity for unfair group trials, allowing junk science, and substitution of the laws of other states for Washington law when favorable to plaintiffs.

#10 LOUISIANA Nuclear verdicts® plague the state's civil justice system, bringing it in line with other Judicial Hellholes®. Meanwhile, the Louisiana Supreme Court caved to political pressure from the plaintiffs' bar and discarded established constitutional protections in favor of lawsuits. Perennial issues also plague the state's civil justice system - coastal litigation bogs down the state's economy and fallout from "Operation Sideswipe" continues.

WATCH LIST

Beyond the Judicial Hellholes®, this report calls attention to an additional jurisdiction that bears watching due to its history of expanding liability.

TEXAS'S COURT OF APPEALS FOR THE FIFTH DISTRICT The Texas Supreme Court overturned three noteworthy liability-expanding decisions issued by the Texas Court of Appeals for the Fifth District. There is a continued need for oversight of this state intermediate appellate court to ensure that it stays in line with Texas precedent and does not expand liability in the state.

DISHONORABLE MENTIONS

Dishonorable Mentions comprise singularly unsound court decisions, abusive practices 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 Maryland high court rejected a higher standard for expert evidence, Tennessee is a new hotspot for abusive Americans with Disabilities Act Litigation, and three Illinois counties remain the venue of choice for asbestos claims.

POINTS OF LIGHT

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

Among the positive developments, several states strengthened their expert evidence rules, federal courts stressed the importance of judicial gatekeeping, and the Third Circuit ruled that lawsuits alleging that a product contained insufficient warnings, despite federal approval, cannot proceed. Additionally, the Kentucky Court of Appeals overturned a problematic ruling that helped land the state on last year's Watch List and the Utah Supreme Court upheld the state's statute of repose for medical liability lawsuits.

CLOSER LOOKS

THE SEARCH FOR JACKPOT JUSTICE – TRIAL LAWYERS SET SIGHTS ON NEW INDUSTRY: In America's courtrooms a disturbing trend is unfolding that threatens the health and lives of the most vulnerable among us: premature infants relying on life-sustaining baby formula. Trial lawyers, armed with dubious science and driven by the prospect of massive paydays, have zeroed in on baby formula manufacturers, risking yet another public health crisis that could leave parents scrambling.

THE LOOMING LEGAL BATTLE OVER PLASTICS: Plaintiffs' lawyers are partnering with local and state governments, NGOs and environmental activists to target corporations they allege are responsible for the "plastics pollution crisis." The trial bar is seeking to represent local and state governments in a concerted effort to shift costs associated with recycling and pollution onto plastic manufacturers and the oil and gas industry. The flood of lawsuits creates legal chaos. It may fill government budget gaps and line the pockets of trial lawyers, but it does little to help people or solve problems.

HIDDEN OUTSIDE MONEY POURS INTO CIVIL LITIGATION: Civil litigation provides a means of resolving disputes between parties, those named in a lawsuit as plaintiffs and defendants. Common law doctrines traditionally prohibited "strangers" to a lawsuit from meddling in litigation or having a financial interest in the outcome due to the potential for litigation abuse. As those principles have fallen by the wayside, outside investors have poured money into civil litigation. Today, funders include commercial litigation finance companies, hedge funds, businesses, and wealthy individuals. There are even now litigation funders that fund other litigation funders. The outside financiers are not just funding litigation, they are creating it.

Judicial Hellholes®

TOP ISSUES

- **Proliferation of nuclear verdicts®**
- **Forum shopping in medical liability cases**
- **Expansive product liability and other problematic decisions by Supreme Court**

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Pennsylvania residents pay a "tort tax" of **$1,431.34** and **171,197** 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 **$18.57 billion**.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of the state courts' propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$232 million** on more than **2.17 million** advertisements across television, print, radio, digital platforms and outdoor mediums. In Philadelphia alone, they spent **$52.4 million** on over **516,000** advertisements across all mediums.

PHILLY 2024 - Q1-Q2

Medium	$	#
Spot TV	$7,363,488	67,510
Print	$600,186	78
Radio	$5,146,306	111,548
Digital	$1,371,227	9,520
Outdoor	$4,762,527	
	$19,243,734	**188,656**

Lawsuit abuse in the City of Brotherly Love has reached a fever pitch with nuclear verdicts becoming the norm and novel theories of liability flourishing. Eye-popping nine-figure damage awards were issued without hardly a thought and medical liability lawsuits continue to flood the **Philadelphia Court of Common Pleas** due to the Pennsylvania Supreme Court's decision to eliminate an important requirement for entry.

The situation is not expected to improve as a recent Pennsylvania Supreme Court decision allows for duplicative damages in certain types of cases and the court is now considering a case that will impact the availability of arbitration in the Keystone State.

There is a glimmer of hope for potential improvement in 2025. In October, **Representative Torren Ecker** held a press conference addressing the "urgent need for tort reform in Pennsylvania." He and other lawmakers recognize the financial toll and burden lawsuit abuse on Pennsylvania residents. He laid out a legislative package, that if enacted, would be a crucial step toward restoring balance to Pennsylvania's broken civil justice system and protecting citizens and small business from the economic fallout of excessive litigation.

Campaign Contributions

Plaintiffs' lawyers spend millions of dollars to ensure that Pennsylvania remains a plaintiff-friendly jurisdiction. Since 2017, overall contributions to **LawPAC**, the state trial bar's PAC, and the **Committee for a Better Tomorrow**, the Philadelphia Trial Lawyers' Association's PAC,

exceed $15.3 million. The Top 4 plaintiffs' firm donors to these PACs are: **Kline & Specter; Saltz Mongeluzzi & Bendesky, PC; Ross Feller Casey;** and **Feldman Shepherd.** All four gave more than $1 million since 2017.

The Top 2 recipients of trial bar campaign contributions, **Justice Daniel McCaffery of the Pennsylvania Supreme Court** and **Judge Maria McLaughlin of the Pennsylvania Superior Court**, received $1.8 million and $1.1 million respectively since 2017. **Pennsylvanians for Judicial Fairness**, a group funded by "traditional Democratic allies in organized labor and the Philadelphia trial bar," also received more than $1 million in donations from the trial bar.

Nuclear Verdicts®

According to a recent report by the **U.S. Chamber of Commerce**, from 2013 to 2022, Pennsylvania ranked #7 for top states by cumulative nuclear verdicts® ($10 million or more) in personal injury and wrongful death cases.

In 2023, Philadelphia courts hosted the highest number of nuclear verdicts in the last seven years and Philadelphia juries were twice as likely to award a verdict of $1 million or more than in the years pre-pandemic. Of 2023 civil jury verdicts in the **Philadelphia Court of Common Pleas**, 11.5% were for $1 million or more and 3.2% were $10 million or higher. This is compared to the 2017-2019 average of only 4.9% of verdicts being $1 million or higher.

Plaintiffs also are winning more than 50% of their cases since the pandemic, rising well above the approximately 40% success rate between 2017 and 2019.

Update on Record Breaking $1 Billion Verdict

A nearly $1 billion verdict in a product liability case in the **Philadelphia Court of Common Pleas** in October 2023 helped propel the jurisdiction to the top of 2023/2024 Judicial Hellholes list. In April 2024, **Judge Sierra Thomas Street** tacked on an additional $33.4 million in delay damages (a form of interest on the judgment) increasing the total verdict to $1.009 billion.

The extraordinary 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 astronomical result 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. Mitsubishi has appealed the verdict.

Other Nuclear Verdicts® in 2024

In May, Exxon was hit with a $725 million verdict in the **Philadelphia Court of Common Pleas** in a claim filed by a New York auto service station mechanic alleging that exposure to benzene caused his development of leukemia. In September, the presiding judge added $90 million in delay damages, bringing the total to over $800 million.

In this case, the plaintiff handled gasoline and cleaning solvent products with bare hands between 1975 and 1980, and claimed he was exposed to benzene. About 40 years later, in 2019, he was diagnosed with Leukemia and then claimed Exxon hid information about benzene that may have led him to be less careful when handling these products.

Judge Carmella Jacquinto presided over the week-long trial. According to Exxon's post-trial brief, **Judge Jacquinto** inflamed the jury by discussing climate change and fossil fuels in the jury instructions, which had nothing to do with the dispute at hand. Ultimately, Exxon was found entirely at fault despite there being 14 co-defendants. The court ordered the company to pay $435 million for past, present and future pain and suffering, $18 million for "embarrassment and humiliation," $253 million for "loss of enjoyment of life," and an additional $18 million for disfigurement.

Following the trial, information regarding one of the jurors came to light. In August, Exxon claimed it found evidence that one of the jurors was biased, pointing to statements on the juror's social media accounts stating that Exxon is responsible for climate change, Exxon is "objectively a villain," and that the juror wanted to "stick it to the man" by awarding the verdict. Despite these concerning developments, Exxon's motion for a new trial was denied. There is fear that should this decision stand, it will lead plaintiffs' lawyers to flood Philadelphia with benzene lawsuits.

Prior to the *Exxon* decision, **Judge Jacquinto** oversaw another trial that resulted in yet another nuclear verdict involving an accident between a utility truck and a pedestrian. The plaintiff's lawyer framed the case as "your classic big company" that "just turned their back on an innocent pedestrian." The jury's April 2024 verdict found the company that employed the driver liable for $12 million, over 90% of which was for pain and suffering and other forms of noneconomic damages.

Penske asked **Judge Jacquinto** to remit the excessive $10 million pain and suffering award to a more appropriate amount, a request she denied in May, just 3 days after the request, despite previously stating that the company's settlement offer of $2.3 million prior to trial was "a very reasonable offer."

Examples of additional 2024 nuclear verdicts(R) in the Philadelphia Court of Common Pleas include a $68.5 million verdict in a construction accident case (**Judge Angelo Foglietta**) in June and a $45 million verdict in a medical liability case (**Judge Glynnis Hill**) in August.

Glyphosate Litigation

The Philadelphia Court of Common Pleas is now home to the largest single-plaintiff Roundup verdict in the nation after a jury awarded an astounding $2.25 billion in damages in January 2024. The award included $225 million in compensatory damages and $2 billion in punitive damages. The massive verdict

was based on junk science that other courts had excluded, including in Philadelphia (to be discussed later in this section) with a jury that reached its extraordinary verdict after only one hour of deliberation. In June, **Judge Susan Schulman** reduced the multi-billion award to $404 million, a decision the plaintiff plans to appeal.

In February, **Judge James Crumlish of the Philadelphia Court of Common Pleas** rejected a challenge by Monsanto to a $175 million Roundup verdict that was levied against it in October 2023. The plaintiff, who used Roundup in his garden for years, alleged that exposure to glyphosate in the weedkiller caused him to develop non-Hodgkin's lymphoma. **Judge Crumlish** issued an emotionally charged opinion, characterizing the defendant's challenge to the verdict as "indignant" and "self-promotional" as well as "denigrating" of the condition of the plaintiff. He also insulted the tactics of the defense at every turn, using visceral language such as "oblivious" and "remorseless" as descriptors. In the same decision, **Judge Crumlish** added $2.3 million in delay damages against Monsanto, bringing the total verdict to over $177 million.

Thomas Kline, the plaintiff's lawyer in the case, teased that the Roundup® program was "going to be the marquee program [in the Philly Complex Litigation Center] for the foreseeable future" and he is doing his part to make sure that happens. Never mind that science isn't on his side.

In October, another jury handed up a verdict — $3 million in compensatory damages and $75 million in punitive damages — in Philadelphia Court of Common Pleas Judge Craig Levin's courtroom after nearly a month of trial and two and a half hours of deliberation. During closing arguments prior to the verdict, the plaintiff's attorneys urged the jury to hold the "multibillion-dollar mega corporation" Monsanto accountable not just for causing their client's cancer, but also poisoning "the birds, the butterflies and the environment" in the 50 years that Roundup has been on the market. Monsanto has asked Judge Levin to throw out the "grossly excessive" verdict, stating that the jury's view of the company was tainted because of the lawyers' claims of poisoning the environment.

The **Pennsylvania Supreme Court** helped pave the way for these lawsuits by adopting a lesser standard for admission of expert evidence, which allows junk science to permeate state courthouses. In its 2020 decision in ***Walsh v. BASF***, the Court declined to recognize the role of a trial court judge as a gatekeeper over the reliability of expert testimony. Pennsylvania is one of the last remaining states to use the weaker *Frye* standard when evaluating expert evidence.

Despite the imbalanced litigation environment, defendants are still sometimes able to prevail in these cases in Philadelphia. For example, in March 2024, Monsanto scored its first defense verdict in a Roundup trial in the **Philadelphia Court of Common Pleas** after a string of astounding losses. This important win came after **Judge Joshua Roberts**, the judge overseeing mass tort litigation in Philadelphia, diligently examined the plaintiffs' proposed expert testimony and prevented lawyers from introducing junk science.

Judge Roberts excluded the infamous IARC study that is the foundation for the Roundup litigation. This 2015 report — in stark contrast to more than 800 scientific studies as well as analyses by the **U.S. Environmental Protection Agency (EPA)** and **Health Canada** — concluded that glyphosate is "probably carcinogenic." **ATRF** has written extensively about the problems surrounding the report, including the fact that an "invited specialist," **Christopher Portier**, who had no prior experience working with glyphosate, advised the study while being paid by an anti-pesticide group and law firms suing over glyphosate. Following Portier's arrival at IARC, the final glyphosate study was altered in at least 10 ways to either remove or reverse conclusions finding no evidence of carcinogenicity.

Judge Roberts also excluded dubious expert evidence discussing purported flaws in the EPA's analysis.

The impact of Judge Robert's decision to exclude junk science shows the importance of judges acting as gatekeepers. The IARC report and other baseless science had been admitted in other trials in the **Philadelphia Court of Common Pleas** that resulted in massive plaintiffs' verdicts. Unfortunately, not all Philadelphia judges embrace their gatekeeping role and the difference in litigation results are staggering.

Medical Liability

Medical Liability Explodes in Philadelphia Thanks to State High Court Decision

Pennsylvania had the 4th highest amount of payouts per capita in medical malpractice cases of all states, according to a 2022 analysis, totaling $252 million in 2021.

In August 2022, the **Supreme Court of Pennsylvania** unilaterally eliminated constraints that 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 of this rule 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.

> ***"Philadelphia is like a slot machine. It's a slot machine that everybody wants to play."***
>
> —A regional healthcare professional

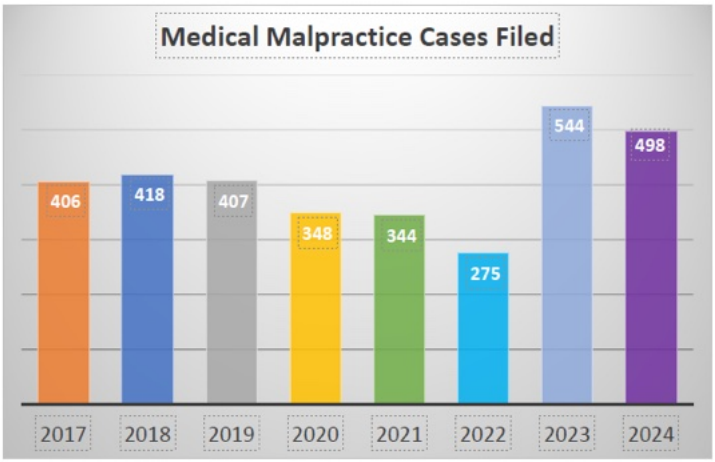
Due to the Supreme Court's rule change, attorneys can sue for medical malpractice not only where medical treatment took place, but also any additional location where the healthcare provider operates an office, any additional hospital locations in which the physician provides care, or where a physician lives. Of course, the state's personal injury bar, through the **Pennsylvania Association for Justice,** supported the change.

Plaintiffs now flock to areas like Philadelphia, where juries are more willing to award higher verdicts in favor of plaintiffs. Immediately following the rule change, Philadelphia experienced a surge in malpractice suits the same month, when its court saw triple the number of cases normally filed. According to recent data, 43% of all medical malpractice complaints filed in Philadelphia (657 complaints) between January 1, 2023 and April 2024, arose from care provided outside the city. As one regional professional put it, "Philadelphia is like a slot machine. It's a slot machine that everybody wants to play."

Additionally, in 2024, the **Rothman Orthopedic Institute** ended its partnership with the Philadelphia Eagles and its doctors no longer serve as official team physicians. In ending this relationship, the Institute cited the risk of liability after the Institute and Dr. James Bradley were ordered to pay $43.5 million in a medical malpractice suit to former Eagles team captain after a treatment

Medical Malpractice Cases Filed

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total	Avg./Mo.
2017	45	34	26	32	50	39	36	33	20	22	34	35	406	34
2018	44	31	29	37	33	33	42	29	36	47	35	22	418	35
2019	24	27	31	40	38	48	36	26	36	25	32	44	407	34
2020	29	33	29	31	24	28	33	36	19	33	30	23	348	29
2021	32	32	31	32	37	23	32	23	26	24	39	13	344	29
2022	18	24	23	24	20	26	21	21	28	20	25	25	275	23
2023	70	47	38	50	53	42	43	50	31	44	33	43	544	45
2024	42	42	51	59	55	57	46	54	36	56			498	50



Prepared by: Office of Civil Administration, TD-Civil; As of November 1, 2024

"What I can tell you is that when OB-GYNs leave the state of Pennsylvania because of fear of malpractice, it means there are fewer clinical resources for mothers to access."

— Joanne Craig, co-chair of the Pennsylvania Maternal Mortality Review Committee

for a 'career ending knee injury'. **The Rothman Orthopedic Institute** was responsible for $14.3 million of the award, which recently increased to $15.8 million after delay damages. The Institute also cited the general increase in medical liability awards and a surge of medical malpractice cases filed in Philadelphia.

Other specialty healthcare providers are concerned about an access to care crisis similar to what occurred in the early 2000's before the adoption of the medical liability venue rule. OB-GYNs are particularly worried about the impact venue shopping and nuclear verdicts® will have on their practices and insurance premiums.

Asbestos Lawsuits

Philadelphia is a jurisdiction of choice for plaintiffs' lawyers to file asbestos lawsuits. Philadelphia hosts the fourth most asbestos lawsuits in the nation. According to KCIC's 2024 midyear report, plaintiffs' lawyers filed 115 asbestos claims in Philadelphia in the one-year period ending July 31, 2024 compared to 101 during that period in 2023, a 14% increase. This marks the fifth consecutive year the city has ranked in the top four.

Pennsylvania Supreme Court

Duplicative Damages Now Available in Consumer Protection Cases

In 2024, the **Supreme Court of Pennsylvania** issued a decision that will exacerbate a trend of expanding liability exposure under the state's **Unfair Trade Practices and Consumer Protection Law (UTPCPL)** and lead to extortionate settlement demands. In ***Dwyer v. Ameriprise Financial Inc.***, the Court held that a trial court must award treble (triple) damages in cases brought under the UTPCPL when a jury awards punitive damages on a similar tort claim. This decision eliminates the ability of trial court judges to utilize discretion when issuing damage awards. Here, 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. The Supreme Court's decision effectively allows for duplicative damages for the same conduct, as pointed out by a coalition of civil justice and business groups in its amicus brief.

Expansion of Product Liability Law

The **Supreme Court of Pennsylvania** expanded liability for product manufacturers in December 2023 with its decision in ***Sullivan v. Werner***. The Court held that evidence of a product's compliance with industry and government standards is inadmissible in product liability cases. While it would seem that this information would be an important factor to consider when determining whether a product is unreasonably dangerous, the Court reasoned that such evidence may "distract" a jury and that "the proper focus of a design defect case is on the characteristics of the product and not the conduct of the manufacturer." For that reason, the Court ruled that the plaintiff could prevent the manufacturer of a scaffold from educating the jury about government regulations and industry standards for scaffold design, which the product met.

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 a product's noncompliance with standards to bolster their product liability claims.

Cases to Watch

Forum non Conveniens

The **Supreme Court of Pennsylvania** will decide the applicable standards for granting a *forum non conveniens* motion. ***Tranter v. Z&D Tour*** stems from a group of consolidated lawsuits over a fatal bus crash that were filed in the **Philadelphia Court of Common Pleas**, despite the accident occurring in Westmoreland County, on the other side of the state, near Pittsburgh. The defendants argued that Philadelphia was an "oppressive" venue because more than 60 potential witnesses would have to travel over 240 miles to testify at trial. The trial court agreed and transferred the case to Westmoreland County; however, the intermediate appellate court reversed the decision, allowing the case to proceed in plaintiff-friendly Philadelphia finding that the travel burden was not sufficient enough to warrant transfer. This is one of several instances in which the Pennsylvania appellate court has reversed trial courts that have agreed to transfer cases that plaintiffs' lawyers clearly filed in Philadelphia because they viewed the city as more favorable than the area in which the claim arose.

The doctrine of *forum non conveniens* permits a court to transfer a case to a more appropriate county when a plaintiff's lawyer has chosen to file it in a county with little or no connection to the allegations, making it difficult for a party to present witnesses and evidence. This most often occurs when plaintiffs' lawyers file lawsuits in Philadelphia but their clients live, and the accidents or injuries occurred, elsewhere. The doctrine is an important check on blatant forum shopping by plaintiffs' attorneys, who prefer to litigate their cases in courts known for finding liability and returning big awards. It also protects the public's interest in deciding local cases locally, and prevents burdening local jurors and courts with cases lacking a tie to their community. It is the only recourse available for defendants to get cases out of the Philadelphia Court of Common Pleas.

Limits on Damages in Cases against State Agencies

The **Pennsylvania Supreme Court** will decide the future of the state's statutory limit on damages in cases involving state agencies. ***Freilich v. Southeastern Pennsylvania Transportation Authority*** involves a passenger injured in an accident on a public transit bus. The Transportation Authority admitted negligence and agreed to a $7 million stipulated verdict. The trial court then decreased the award to $250,000 in compliance with the statutory limit, which permits limited recovery against the state as it is otherwise entitled to sovereign immunity. While applying the law, **Philadelphia Court of Common Pleas Judge James Crumlish** did not hide his feelings about the cap in his opinion, calling it "profoundly unfair if not unconscionable." The plaintiff has challenged the constitutionality of the cap, arguing that the limit, which the legislature has not increased in many years, is unfair. Such a ruling would take a policy decision that protects taxpayers

out of the hands of the legislature, which can choose to adjust the statutory limit, and expose government agencies to unpredictable and potentially limitless liability.

Arbitration in the Crosshairs

In a case that has been well-chronicled in the Judicial Hellholes® report, the **Pennsylvania Supreme Court** will determine whether "digital arbitration agreements can be enforced under the same rules applicable to other contracts."

In this case, a passenger sued Uber in the **Philadelphia Court of Common Pleas** after she was injured on a ride, despite having agreed to Uber's terms and conditions requiring arbitration of claims. In July 2023, the full **Pennsylvania Superior Court** upheld a three-judge panel's decision to invalidate Uber's arbitration provision in its agreement. The **Superior Court** disregarded the **Federal Arbitration Act**, which prohibits states from disfavoring arbitration agreements, 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.

TOP ISSUES

- **The emergence of the "fraudemic"**
- **Rampant lawsuit abuse highlighted in RICO filings**
- **Prolific producer of nuclear verdicts®**
- **Serial plaintiffs target small businesses with ADA lawsuits**
- **Prime target for no-injury consumer class action lawsuits**

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. New York residents pay a "tort tax" of **$2,319** and **418,355** jobs are lost each year according to a recent study by The Perryman Group. If the New York legislature enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **$45.6 billion**.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of New York courts' propensity for liability-expanding decisions and nuclear verdicts® and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$152.4 million** on more than **1.62 million** advertisements across television, print, radio, digital platforms and outdoor mediums in New York. In 2023, they spent almost **$47 million** on more than **234,400** ads in New York City alone in 2023.

NEW YORK 2024 - Q1-Q2

Medium	$	#
Spot TV	$24,171,906	376,892
Print	$2,390,414	432
Radio	$10,429,151	95,823
Digital	$1,798,081	52,993
Outdoor	$16,536,366	
	$55,325,918	**526,140**

A "fraudemic" hit the Big Apple in 2024. Some of the worst examples of lawsuit abuse came to light in New York City with the filing of several RICO lawsuits against plaintiffs' law firms. Lawsuit abuse is driving up the costs of goods and services and driving employers and insurance companies out of the state. Unique New York laws like the Scaffold Law and the state's consumer protection act are ripe for abuse and plaintiffs' lawyers have seized the opportunity to cash in leaving New York small businesses and unknowing residents left to pick up the pieces. To make matters worse, judges across the five boroughs turn a blind eye to the abuse and do not hold plaintiffs' firms accountable. The current civil justice environment paints a bleak picture of the future for New York City unless state leadership tackles the problem with a true vigor.

Plaintiffs' Lawyers Play Big in Elections

Plaintiffs' law firms across New York state have poured millions of dollars into strategic campaign investments to keep the status quo aligned in their favor. Since 2017, the top 20 plaintiffs' firms for statewide political giving have contributed a combined total of more than $4.7 million into New York political campaigns. **Sacks & Sacks** and **Gair, Gair Conason** were the two largest donors, contributing more than $553,000 and $538,000 respectively. Nearly 70% of these contributions went to LawPAC,

the political action committee affiliated with the **New York State Trial Lawyers Association**, which in turn funneled significant sums to candidates and other campaigns.

The top recipients of contributions from the Top 20 law firms, **LawPAC,** and **ATL PAC** (New York State Academy of Trial Lawyers' PAC) include: the **Democratic Assembly Campaign Committee** ($912k), **NYS Democratic Senate Campaign Committee** ($810k), **Gov. Kathy Hochul** ($545k), former **Gov. Andrew Cuomo** ($342k), the **NYS Republican Campaign Committee** ($329k), the **New York State Democratic Committee** ($301k), and **Attorney General Letisha James** ($290k).

It is important to note that while **Gov. Hochul** is among the top recipients of contributions from the firms and PACs analyzed, she has taken a balanced approach when faced with the most egregious of the trial bar's priorities, recognizing the negative economic impacts of liability expansion.

Pulling Back The Curtain On The 'Fraudemic'

New York City thrives on a culture of hustling, where ambition and the pursuit of wealth and success is woven into the fabric of daily life. However, the rampant lawsuit abuse overwhelming New York City's tort system has exposed the cost of when ambition becomes greed, and the law is exploited for profit. Prime examples of this lawsuit abuse are the complex fraud schemes that have infiltrated New York's construction and transportation industries. Every day New Yorkers are left footing the bill through higher insurance rates, increased housing costs, and a tort system bogged down by meritless claims.

Construction Fraud Schemes

The Gilded Age of New York City was defined by rapid infrastructural advancements and groundbreaking innovation in architecture and engineering. These developments, which were driven by the challenges of rapid urban expansion, laid the foundation for the city's iconic skyline that we know today. In an attempt to protect the workers who were responsible for constructing these skyscrapers, lawmakers enacted New York's **Scaffold Law**, which imposed a strict liability standard for gravity-related construction accidents. Despite decades of criticism and the fact that the law's excessive liability accounts for about 10% of the state's construction costs, New York is the only state that still maintains such a law.

The **Scaffold Law** opened the floodgates for fraudulent personal injury lawsuits, which have cost insurance companies billions in payouts. However, the consequences of the Scaffold Law and these fraudulent lawsuits extend far beyond the insurance companies' bottom line. **Habitat for Humanity** has cited the Scaffold Law as an obstacle for disaster relief and affordable housing projects. The **Building Trade Employers Association** stated that the Scaffold Law is a significant barrier for minority- and women-owned businesses. Members of Congress have blamed the law for increasing the costs of infrastructure development by millions.

Recent investigations into the Scaffold Law have revealed systematic exploitation that is organized by Russian gangsters, and includes MS-13 members, corrupt surgeons, lawyers, and third-party litigation financers.

A RICO suit filed in the **U.S. District Court for the Southern District of New York** in March 2024 alleges that a group of 46 individuals and businesses systematically exploited the New York State Workers' Compensation system and state labor laws. The complaint in ***Roosevelt Road Re, Ltd. v. Hajjar***, alleges that those involved participated in a scheme to submit false or exaggerated injury claims to secure windfall settlements under the Scaffold Law.

This scheme reportedly targeted foreign-born workers who lack proficiency in English, encouraging them to file claims for fabricated or exaggerated injuries. In some cases, the injuries—a simple trip and fall, for example—would be exaggerated on paper into multi-million-dollar permanent disability claims. Videos of the alleged fraudulent falls have even surfaced, featuring workers staging accidents at construction sites, further highlighting the brazen nature of the fraud.

The impact of this alleged misconduct is staggering. According to the complaint, claims under this scheme have caused liability claim expenses for one reinsurer to balloon from $14 million in 2018 to over $142 million by 2022, exponentially increasing each year.

Despite a drop in the number of fatal construction accidents, suspicious claims continue to flood the system, contributing to skyrocketing workers' compensation costs and inflating insurance premiums for businesses across New York. These scams are not only hurting construction companies but also driving up the cost of living for everyday New Yorkers, who are now facing some of the highest workers' compensation costs in the nation.

In addition to the *Hajjar* case, New York personal injury law firms like **Subin Associates, Wingate Russotti Shapiro Moses & Halperin,** and **Bangel, Cohen & Falconetti** have come under scrutiny for their role in representing plaintiffs involved in these cases. **Subin Associates** is currently embroiled in multiple lawsuits and investigations over its practices and has already withdrawn from hundreds of cases, citing ethical concerns about the source of its referrals.

Further, an investigation by **ABC Eyewitness News** uncovered claims that **Subin Associates** had allegedly filed a fraudulent workers' compensation lawsuit using the identity of Carlos Ramirez-Naranjo without his knowledge. Naranjo, who does not speak English, claimed that an acquaintance deceived him into signing legal documents under the pretense of a job application. Unbeknownst to Naranjo, these documents were used to file a lawsuit against a construction company for injuries he never suffered. The firm stated that Naranjo had signed a retainer agreement with them, but when Naranjo confronted them, they refused to provide him with copies of the legal documents. Later, Naranjo received a check from a pre-settlement funding company. The acquaintance reportedly told Naranjo to cash the check and give him $13,000 in cash, leaving Naranjo with $2,000.

It is unclear whether any of the federal investigatory agencies will get involved in the efforts to crackdown on the "fraudemic." The involvement of the FBI has been hinted at, suggesting a high-stakes investigation that could bring federal criminal charges akin to those seen in major financial fraud cases. Recent statements by U.S. prosecutors asserting zero tolerance for large-scale corruption also suggest the possibility of future federal involvement.

Judges Playing a Role

New York judges play a key role in perpetuating the lawsuit abuse by allowing personal injury law firms to withdraw from cases when ethical concerns come to light. In 2024, **Subin Associates** requested to withdraw from 200 to 300 cases because of "ethical concerns" involving its referral source. One judge, **Judge Devin Cohen**, has allowed plaintiffs' counsel to withdraw from at least eight cases in 2024 with almost no questions asked, including six cases where **Subin Associates** was the plaintiffs' counsel. **Judge Cohen** is also on record demonstrating support and protection of plaintiffs' lawyers, even preventing the defense

counsel in one Scaffold Law case from questioning doctors who were to be called as expert witnesses about their involvement in the fraudulent practices alleged in the RICO cases. Other judges engage in *ex parte* discussions with plaintiffs' counsel, despite a rumored instruction to all sitting judges advising against it.

The prevalence of third-party financing in these cases creates additional consequences for victims when judges allow discontinuances and dismissals without question. These funders provide plaintiffs with money up front to pay the doctors and lawyers involved in the elaborate schemes. Judges have reportedly allowed lawyers to walk away from cases without consequence, leaving plaintiffs owing thousands of dollars to the lenders.

For example, after falling on a sidewalk in Manhattan, Lesly Ortiz was referred to **Subin Associates** by one of their notorious runners. The law firm then sent her to **Dr. Michael Gerling** who performed two surgeries on her, despite ER doctors having told her that nothing was wrong. Ultimately, **Judge Lynn N. Kotler** granted Subin's request to be relieved from the case after the defense counsel brought to the court's attention the fact that Subin's office was prosecuting lawsuits for eleven other people who resided in the same building as Ortiz. Ortiz suffered from "unbearable pain" following her surgeries and was left with no recourse. Unfortunately, the pain from the surgeries was not the only consequence Ortiz faced. She never received any money from the suit and was left thousands of dollars in debt to a lending firm who gave her money for her medical and legal bills.

It appears to be a trend among judges to look the other way when presented with details of these scams, either by allowing firms to withdraw from cases without consequence or by keeping suspicious cases alive until they settle. By continuously granting plaintiff attorneys' requests for orders to show cause, these judges clog the court's dockets, delay legitimate plaintiffs' claims, and cost defendants money. And by allowing plaintiffs' counsel to easily withdraw from these cases without suffering consequences, judges are allowing the lawsuit abuse to continue ravaging New York's tort system.

A judicial shrugging of the shoulders in the face of criminality—if proven—is very concerning. When courts start looking the other way when given details of suspicious lawsuits, they are effectively enabling and facilitating the wrongdoing and allowing New York's "fraudemic" to thrive.

Automobile "No-Fault" Fraud Schemes

Unfortunately for New Yorkers, the Scaffold Law is not the only contributor to the city's "fraudemic." Recently, New York City's automobile insurance market has been overwhelmed by a surge of fraudulent claims, with dire consequences for both insurers and consumers. The City's requirement for the highest commercial-vehicle insurance coverage in the country has turned these insurance policies into lucrative targets for fraudulent schemes, which are similar to the construction schemes. Additionally, New York is a "no-fault" state, which means that insurers are required to pay for medical expenses and property damages regardless of who caused the accident. Like the construction schemes, these scams also involve gangs, corrupt lawyers and doctors, and third-party litigation financers who recruit vulnerable individuals to stage accidents involving commercial vehicles, including rideshare cars and delivery trucks. Some of the scammers even go as far as encouraging these individuals to undergo unnecessary surgeries to increase the potential insurance payouts.

A recent lawsuit filed by **Union Mutual Fire Insurance Company** alleged that several medical facilities and doctors have been orchestrating an insurance fraud scheme where they file claims for unnecessary and excessive treatments and provide inaccurate medical reports. According to the complaint, the defendants led insurance companies to believe that the treatment was necessary, knowing that the false reports would result in additional treatments for the patients, including painful and expensive surgeries, and costly liability lawsuits.

A different surge of RICO lawsuits are being filed by insurance companies against small and local New York pharmacies. Twenty-six such suits were filed in one week in October. These suits allege that the parties are exploiting New York's "no-fault law." The law allows health care providers and pharmacies to bill insurance companies directly for services and treatments.

Insurance companies have stated that this "massive scheme" is "systematic and carefully orchestrated." According to one complaint, these pharmacies have allegedly been providing patients with medically unnecessary topical pain creams, oral pain medications, and muscle relaxers rather than the less expensive, over-the-counter versions. The complaint claims that the pharmacies have kickback arrangements with "no-fault clinics," where the patients are being prescribed these expensive and unnecessary treatments.

The scale of the litigation is staggering; between 2010 and 2018, jury awards for trucking-related lawsuits increased almost 1,000%, with the average award increasing from $2.3 million to $22.3 million. As a result of these staggering settlements and jury verdicts, **American Transit Insurance Company (ATIC)**, which insures around 60% of the city's commercial taxis, black cars, and rideshare vehicles, is "on the brink of collapse." **ATIC** reportedly had $700 million in losses due to insurance fraud and rising settlement costs. And who will suffer if insurers like ATIC collapse? Everyday New Yorkers. If **ATIC** is liquidated or taken over by the state, it will be New York taxpayers footing the bill for unpaid claims. Further, the thousands of drivers left uninsured will either flee New York or find new coverage with likely higher premiums. Either way, New Yorkers will be left to pay the price.

Trip-and-Fall Schemes

As if the strict liability scammers have not profited enough from the construction fraud schemes, they also seem to be lining their pockets with payouts from questionable slip and fall claims. In fact, **New York City** is the number one city in America for questionable slip and fall claims, which cost taxpayers $53.5 million in 2023.

Nuclear Verdicts® Bog Down The Big Apple

New York courts are prolific producers of nuclear verdicts®, targeting a variety of industries. 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 recent study by the **U.S. Chamber of Commerce**, New York was home to the third most nuclear verdicts® in the country in personal injury and wrongful death trials with 131 reported between 2013 and 2022. The state also rose to number two on a per capita basis. From 2013 through 2022, $4 billion in damages were awarded and New York had a median nuclear verdict® of $20 million. Plaintiffs' lawyers have urged New York juries to award amounts as high as $140 million for pain and suffering alone, making them feel that awarding $59 million is a reasonable compromise.

Premises liability cases made up 26% of these nuclear verdicts, thanks in large part to the state's unique **Scaffold Law**, which, as discussed above, creates strict liability for employers in construction-related premises liability cases. Medical liability cases also made up a quarter of New York's nuclear verdicts.

Recent nuclear verdicts in 2024 include:

- **March 2024**: $72.5 million verdict in a negligence case (New York County, **Judge Suzanne Adams**).
- **May 2024**: $23.3 million verdict in a medical liability wrongful death case (Westchester County, **Judge Lewis Jay Lubell**).
- **August 2024**: $287 million verdict in a product liability wrongful death case (Livingston County, **Judge Craig J. Doran**).

New York Laws Open Door To No-Injury Litigation

Food and Beverage Litigation

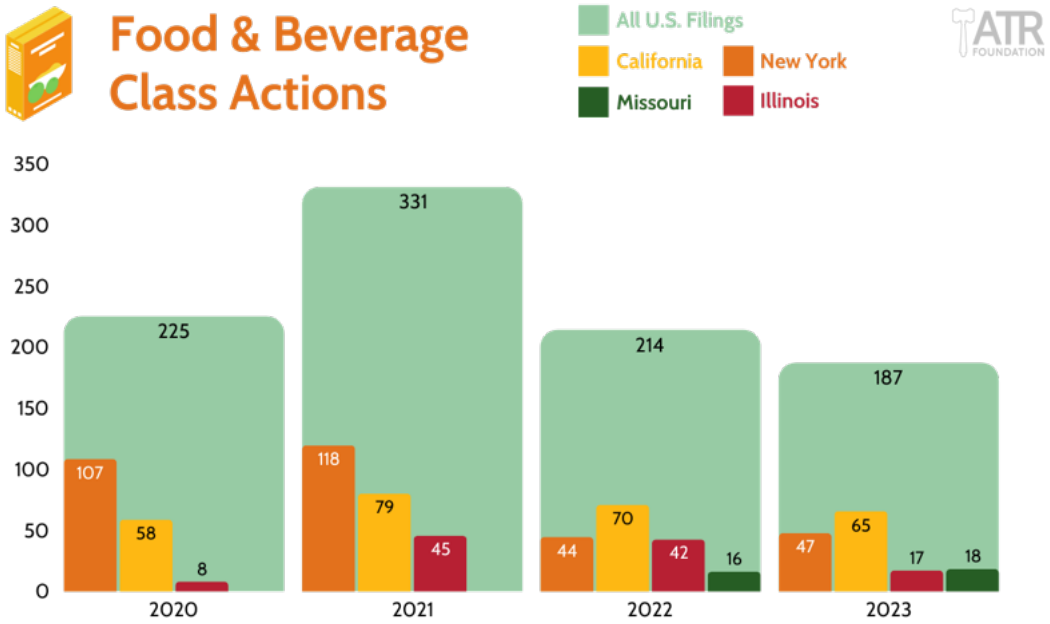
New York continues to be a preferred jurisdiction for consumer class actions targeting the labeling or advertising of foods and beverages. Lawyers filed 187 food and beverage class actions in 2023 nationwide. Twenty-five percent of these lawsuits – 47 – were filed in New York.

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.

Food and beverage class actions filed in New York courts in 2024 have included lawsuits claiming that Velveeta mac and cheese is misleadingly labeled as "made with real cheese" due to the presence of other ingredients, Poland Spring water is not "100% natural spring water" due to alleged traces of phthalates and microplastics, and sunscreen is not "reef friendly" as advertised. One lawsuit alleges that Campbell's soup has too many potatoes and carrots to place in the product's name "beef" before "with county vegetables." In addition, a federal judge this year permitted a class action to move forward alleging that a box of graham crackers that accurately indicates the amount of whole grain they contain per serving might mislead consumers to believe whole grain is the main flour. A court also allowed a lawsuit challenging whether Combos snacks have sufficient cheese to be labeled "made with real cheese" to proceed.

Americans with Disabilities Act Litigation

New York battles fellow Judicial Hellhole® California for the top spot for the most lawsuits filed under the **Americans with Disabilities Act** challenging whether a public accommodation, such as a restaurant or retailer, is sufficiently accessible. For the second year in a row, New York led the country with 2,759 lawsuit filings, while California had 2,380. Through the first half of 2024, New York was second with 1,106 filings.



Sources: Perkins Coie Food & Consumer Packaged Goods Litigation Year in Review 2023, 2022, 2021, and 2020

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.

Serial Plaintiffs

SERIAL Plaintiffs

Few lawsuits are filed by plaintiffs who face real injury from lack of access, and a growing number of 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. These businesses are extorted into low-dollar settlements, as the alternative is to spend more money on defense costs.

Over the course of the last year, New York law firm **Mizrahi Kroub** filed more than 1,100 web-accessibility lawsuits, accounting for about a quarter of all digital ADA cases in the country. According to the ***Wall Street Journal,*** **Mizrahi Kroub** frequently files dozens of lawsuits for a single plaintiff, or what is known as a serial plaintiff. The firm has been criticized for filing "cut-and-paste pleadings designed to extract quick settlements and not make websites more accessible." When questioned about these cases, **Edward Kroub** stated that, "there are millions of websites that are not accessible.... If you say my number is 3,000, I'm probably not doing enough."

In February 2024, **Judge Mary Kay Vyskocil of the Southern District of New York** called out another firm, the **Clark Law Firm**, for representing a serial plaintiff and filing 10 "carbon-copy" ADA accessibility actions against different defendants in that court on the same day. **Judge Vyskocil** dismissed the action before her because the plaintiffs "provide no actual support for their conclusory claims, they have failed to establish a 'real and immediate threat of repeated injury.'" She reasoned that the plaintiffs' assertions are "vague, lacking in support, and do not plausibly establish that [Plaintiffs'] 'intent to return' to the website."

New York City Asbestos Litigation

ASBESTOS LITIGATION

New York City saw 305 asbestos-related lawsuits filed in 2023, a 7% increase over the prior calendar year. That increase continued into 2024, with 192 lawsuits filed as of July, a 9% increase over the preceding mid-year period. 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 asbestos litigation.

Asbestos litigation can result in nuclear verdicts. For example, a New York appellate court recently upheld a $23 million award, including $13 million for past pain and suffering and $10 million for future pain and suffering, to an 81-year-old former steamfitter who developed cancer.

Novel Social Media Litigation on The Rise - Cases to Watch

Meta Platform Litigation

A New York trial court has allowed a claim to proceed against Meta Platforms, Google, Alphabet, and other social media companies alleging that the "defective and unreasonably dangerous design" of the companies' "defective products" facilitated a school shooting. The plaintiffs claim that the companies' algorithms displayed a consistent stream of hateful content. The companies urged the court to dismiss the lawsuit, arguing that the **Communications Decency Act (CDA)** precludes claims seeking to impose liability upon online service providers for user created content that they simply host on a website. This marks the first time a court has allowed a product liability theory against a social media company to move forward.

Instagram and TikTok Litigation

Similarly, a mother has sued the parent companies of TikTok and Instagram for wrongful death after her teenage son was killed while participating in the viral "subway surging challenge," a challenge that was popularized on social media. Subway surfing is where people ride on the outside of subway cars. The lawsuit claims that "[a]s a result of the unreasonably dangerous design of Social Media Defendants' products, Zachary was targeted, goaded and encouraged to engage in Subway Surfing." She also sued the **Metropolitan Transportation Authority (MTA)**, claiming that it knew young people were participating in the subway surfing challenge and did nothing to prevent it.

New York Legislature Has Created A 'Lawsuit Inferno'

Rather than address the rampant lawsuit abuse wreaking havoc on the state's civil justice system, New York legislators exacerbate it. In July 2024, the New York legislature was named a '**Lawsuit Inferno**' in a report released by the **American Tort Reform Association**. New York state lawmakers pursued several problematic pieces of legislation in 2024, including bills that would drastically expand wrongful death liability and significantly increase meritless consumer class action lawsuits.

TOP ISSUES

- **Frequent appointment of receiver expands the litigation**
- **"Desperately incestuous" legal system**
- **Extraordinary pro-plaintiff rulings**
- **Routine imposition of sanctions**
- **Lax causation standard**
- **Supreme Court bolsters outlier rulings**

ECONOMIC IMPACT

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SOUTH CAROLINA 2024 - Q1-Q2

Medium	$	#
Spot TV	$20,573,466	573,324
Print	$180,673	384
Radio	$307,096	14,911
Digital	$1,119,342	158,016
Outdoor	$4,402,752	
	$55,325,918	**526,140**

South Carolina's asbestos environment first landed on the Judicial Hellholes® list in 2020. Since that time, the trial judge who oversees the Palmetto State's asbestos litigation – **former South Carolina Supreme Court Chief Justice Jean Toal** - has become more extreme, seemingly emboldened by the hands-off approach of the South Carolina appellate courts and some influential lawyer-legislators. Lawyers for corporate defendants in this hostile environment frequently express the view, "just when you think it can't get much worse, it does."

South Carolina's asbestos judge has a clear bias against corporate defendants, particularly insurers. This bias is obvious in rulings that result in unfair trials and severe verdicts. Anti-corporate bias is also evident in the judge's imposition of unwarranted sanctions, a willingness to overturn or modify jury verdicts to benefit plaintiffs, and frequent appointment of a receiver to maximize recoveries from insurers.

Recently, the **South Carolina Supreme Court** endorsed the trial court's low evidentiary requirements and liability expanding rulings. The state is a hotspot for asbestos claims.

More Claims, Driven By Out-Of-State Firms, Perceived Favoritism For Former Law Clerk

South Carolina asbestos filings have "more than doubled" since the state's high court picked **Judge Jean Toal** to "serve as judge for all of the state's asbestos cases in 2017." Before Judge Toal's appointment, "the state was not a very active asbestos jurisdiction," according to consulting firm KCIC. Beginning in

2019, however, the number of asbestos filings took off under Judge Toal. On a percentage basis, the number of new asbestos cases filed in South Carolina in recent years "is one of the largest increases in the nation." KCIC notes "this data only captures filings against traditional asbestos defendants and does not include talc-based cases that are also being filed in **Richland County**, which are also on the rise."

Cases alleging that asbestos exposure caused a person's lung cancer in particular are significantly increasing. As of mid-October 2024, there were triple the number of lung cancer lawsuit filings in the Palmetto State (twelve) compared to all of 2023 (four). 2024 lung cancer filings are on pace to shatter the previous record over a ten-year period (seven in 2022). Before Judge Toal took over the asbestos docket, lung cancer filings were rare in South Carolina (eight cases total from 2014-2017).

Year-end filings in South Carolina are likely to be far higher. After the period for which KCIC collected 2024 filing data, the **Law Offices of Dean Omar Branham Shirley, LLP** from Dallas, Texas filed a 91-page complaint on behalf of over 150 asbestos plaintiffs seeking damages against De Beers PLC and its affiliated companies.

Most of the asbestos lawsuits in South Carolina since Judge Toal took over the docket have been filed by the **Dean Omar firm**. 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**, which includes partner **Thiele Branham McVey,** the sister of Dean Omar name partner Trey Branham. Kassel McVey attorney **Jamie Rutkoski** is a former law clerk to Judge Toal.

In 2021, **Dean Omar** partner **Jessica Dean** 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.

Other out-of-state plaintiff firms that have filed asbestos cases in South Carolina include **Meirowitz & Wasserberg, LLP** of New York City and Florida; St. Louis-based **Maune Raichle Hartley French & Mudd**; and **Flint Cooper LLC** from southern Illinois.

Insurers "Alter Ego" Of Defunct Entities

Judge Toal has expanded the asbestos docket by appointing a receiver over various 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 Judge Toal has created at least twenty-one receiverships, using the same receiver – South Carolina personal injury lawyer **Peter Protopapas** – to pursue coverage under insurance issued to defunct companies. **Lester Brickman**, emeritus professor at Cardozo School of Law in New York and an expert on asbestos litigation, has said he is "not aware of this procedure having been adopted in any other jurisdiction."

A September 2024 Legal Newsline article explains how the process works in South Carolina:

> *Armed with subpoena power and a contingency-fee agreement awarding him a third of whatever he recovers, Peter Protopapas has used the receiver power granted to him by Toal to take control of more than 20 dead companies and sue their former insurers over old policies he says cover asbestos claims, scoring millions of dollars as the leader of these zombies.*
>
> *He's acting in the name of a nonexistent company and doesn't need approval from anyone once associated with it. The money he recovers doesn't flow directly to plaintiffs: In some cases, it goes into secretive Delaware partnerships where Protopapas has broad discretion to spend it on anything related to asbestos litigation, including fees for other plaintiff lawyers.*

The Delaware partnerships, called "qualified settlement funds" or QSFs, operate "almost entirely out of public view thanks to orders signed by Judge [Toal]," according to Legal Newsline. The arrangements were the topic of an October 2024 **American Legal Record** podcast with **Legal Newsline writer Daniel Fisher**. According to **Legal Newsline**, "The QSFs are structured under a provision of the federal tax code allowing money to flow into partnerships without incurring tax as long as the money is ultimately used for litigation expenses."

Judge Toal has reportedly approved at least ten QSFs in asbestos cases. In just one of those matters, it has been reported that the receiver "collected a third of at least $50 million" in settlements with dissolved company Covil Corp.'s former insurers to fund a QSF.

One website notes, "Since that first payday, all subsequent 'settlements' have been under seal and the amounts have not been publicly disclosed." Some insurers support maintaining the confidentiality of their settlements with the receiver as necessary to their "ability to resolve cases fairly and consistently in the future."

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.

In May 2024, a New Jersey federal court refused an effort by the receiver to block talc supplier Whitaker Clark & Daniels (WCD) from filing bankruptcy in New Jersey. **Judge Toal** appointed the receiver following a verdict of over $29 million against WCD in South Carolina in 2023.

In another matter, **Judge Toal** appointed a receiver for Payne & Keller, a Texas firm that was dissolved in the early 1990s. Her order "suggest[ed] that a South Carolina state court somehow has the power to revoke the termination of a foreign corporation and reinstate its corporate existence in another state as if the dissolution never happened."

Judge Toal also appointed a receiver for Atlas Turner, a Canadian asbestos mining firm that was "once owned by the government of Quebec." When this foreign company refused to respond to discovery in a South Carolina asbestos case in 2023, **Judge Toal** held the company in contempt, struck its pleadings, held it in default, and, at plaintiffs' request, appointed a receiver to "administer 'any insurance assets' including 'any claims related to the actions or failure to act of Atlas's insurance carriers.'"

In addition, **Judge Toal** appointed a receiver for Cape Plc, "a onetime South African asbestos mining company whose corporate successor is now owned by a French billionaire." She gave the receiver, **Protopapas**, broad powers to "sue third parties for money to pay asbestos claims." The receiver has sued Cape's former insurers in Cape's name and has sued other companies including Anglo American and De Beers, "accusing them of a long-running scheme to hide assets from U.S. asbestos claimants." The South Carolina trial is scheduled for February 2025. It has been reported that Judge Toal has "issued unusual rulings, including one finding that

since Cape refused to answer claims in her court all of the allegations [the receiver] made against third parties and Anglo American are accepted as fact."

Cape asked the **High Court of Justice** in the U.K. to halt the receiver "from suing others … in Cape's name." In the U.K. suit, Cape argued that "**Judge Toal** has no jurisdiction over the company and no authority to appoint [the receiver] in charge of an operating company that has its own board of directors." **Protopapas** "allegedly slammed the door on a process server after threatening them with a trespassing notice."

In November 2024, the **High Court of Justice** issued a worldwide ruling that sets up an "international legal clash." The Court issued an injunction prohibiting **Protopapas** from acting or purporting to act as a receiver for Cape. The Court found that **Protopapas** "has purported to make admissions, and to run a positive case, which is positively damaging to the legitimate interests of the company over whose assets he has been appointed, despite the fact that one of his obligations is to act in its proper interests." For instance, the Court said that Protopapas has made admissions as Cape's representative that "would make it much easier for plaintiff lawyers to win cases against Cape, the company Protopapas is supposed to be defending."

The British court said that **Protopapas** had committed the tort of acting as an "imposter" for causing or potentially causing loss in South Carolina while purporting to act as agent of Cape without authority recognized in English law. The **High Court of Justice** noted that a British court in a landmark prior case, ***Adams v. Cape Industries*** (1990), specifically rejected arguments that Cape is subject to the jurisdiction of the courts in South Carolina – "meaning Protopapas is actually making legal arguments the company he purports to represent already defeated in court."

The High Court also noted the "aggressive propensities" employed by **Protopapas**, saying his conduct "looks intimidatory." For instance, the Court explained how **Protopapas** threatened to sue solicitors for Cape, forcing them to withdraw from the case. The Court said, "To English eyes at least, to commence proceedings against solicitors who bona fide advance a case on behalf of their client on the basis that it is 'extortion' is, to put it mildly, completely misplaced." The Court added that Protopapas' "ultimatum that the solicitors withdraw a letter sent on behalf of a client, or face being sued personally, makes a demand that the solicitors could not properly comply with because of their duties to their clients. It is surprising that a lawyer (which Mr. Protopapas is) would not appreciate that." The Court also noted that **Protopapas** used aggressive discovery demands to pressure a former federal judge from the Fourth Circuit Court of Appeals to abandon expert opinions he offered on Cape's behalf regarding the powers of a receiver under South Carolina law.

"To English eyes at least, to commence proceedings against solicitors who bona fide advance a case on behalf of their client on the basis that it is 'extortion' is, to put it mildly, completely misplaced."

– UK High Court of Justice

Similarly, **Judge Toal** appointed a receiver for Asbestos Corporation Ltd. (ACL), a Canadian company that still has active management and assets. The appointment of a receiver for ACL was made as a discovery sanction even though ACL claimed it was unable to respond to the requested discovery pursuant to Canadian law. Very recently, certain insurers filed a petition for writ of prohibition in the South Carolina Supreme Court asking the court to void the appointment of a receiver in ACL and prohibit the receiver from taking any action on behalf of ACL.

"Desperately Incestuous" Legal System

State Representative Jordan Pace recently described the state's legal system as "desperately incestuous" in the *Palmetto State News*. He explained, "You have government-appointed officials who argue in front of [judges] and [the judges] depend on their jobs from elected officials. It's a horrible cycle of back scratching at the expense of the general public." He said, "The Toal situation just adds to that already problematic system."

Indeed, Judge Toal's courtroom "represents a microcosm of South Carolina's political structure." As explained, Judge Toal's frequent appointments of a receiver in South Carolina has generated substantial fees for the receiver and related counsel. One of the lawyers allegedly benefitting from this scheme is **Speaker of the South Carolina House of Representatives, G. Murrell Smith**, a lawyer who represents the court-appointed receiver.

Speaker Smith is a key figure in South Carolina's judicial selection system. In South Carolina, a **Judicial Merit Selection Commission (JMSC)** screens and recommends candidates for judicial office to the General Assembly. The "Senate and the House of Representatives are charged with electing justices to the Supreme Court, and judges to the Court of Appeals, to the Administrative Law Judge Division, to the Circuit Court, and to the Family Court." South Carolina is one of two states where the Legislature elects most judges.

The **JMSC** is currently comprised of ten members; the Senate and House of Representatives each appoint five members. This means that the Speaker not only selects half of the members of the judicial nominating committee but has considerable influence over any vote on the House floor to confirm the judges.

It has been reported that "[f]ive of the six lawmakers" on the JMSC are personal injury lawyers: "**Chairman, GOP Rep. Micah Caskey**; **Sens. Ronnie Sabb**, **Luke Rankin** and **Scott Talley**; and **Rep. Todd Rutherford**." Those five legislators as well as another lawmaker on the JPMC, Rep. Wallace "Jay" Jordan Jr. have received substantial contributions from the **South Carolina Association for Justice**. The trial bar has "given $1.6 million to state candidates over 17 years, with more than $100,000 going to the six members of the [JMSC]."

Legal Newsline reports that "[t]hree of the four citizen members of the commission also are personal injury lawyers, one of whom has offices at the same address as [receiver Protopapas].

The **South Carolina Senate Judiciary** is another example of the trial bar's influence over the judicial process. Almost half (ten) of the committee's twenty-three members are personal injury lawyers, including **Chairman Luke Rankin**.

The "South Carolina Bar counts 28 lawyer-legislators in the 124-member House and 19 in the 46-member Senate."

A reform measure (**S.B. 1046**) passed in June giving the governor four picks on an expanded 12-member JSMC, but that law does not go into effect until July 2025. In a signing statement, **Governor Henry McMaster** described the modest reform of the state's judicial selection process as "a first step - but by no means the last - in implementing meaningful judicial reform."

Large Number of Defendants Named

Before Judge Toal began managing the South Carolina asbestos docket, the number of defendants named in South Carolina cases was less than the national average. Since Judge Toal began managing the docket, however, the number of defendants has skyrocketed for both mesothelioma and lung cancer lawsuits. Since 2020, the number of defendants named in South Carolina asbestos cases has far exceeded the national average, according to KCIC data.

File Year	Average Defendants - SC Filings		Average Defendants - All Filings	
	Mesothelioma	Lung Cancer	Mesothelioma	Lung Cancer
2014	32	26	61	54
2015	37	49	67	72
2016	61	35	67	68
2017	43		62	73
2018	49	42	60	72
2019	63	44	61	75
2020	96	134	64	72
2021	104	116	62	73
2022	109	96	64	77
2023	94	109	66	82
10/15/2024	90	114	61	85

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. She has "ordered sanctions on several occasions, including monetary, additurs, and the striking of pleadings." According to a 2024 article, "Judge Toal has a pattern of using sanctions orders-including rich fees for the lawyers who seek them-to discipline companies she believes have been defying her."

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.

> ***"Judge Toal has a pattern of using sanctions orders-including rich fees for the lawyers who seek them-to discipline companies she believes have been defying her."***
>
> – *Legal Newsline* article, 2024

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. Respectfully, this historic injustice finds no support in the record of this case or the law governing these issues, and it demands reversal.*

The **South Carolina Court of Appeals** summarily affirmed the trial court's order "without explanation or even holding oral argument." The **South Carolina Supreme Court** agreed to review ***Howe***, but the appeal was dismissed after the parties resolved the case.

The **South Carolina Court of Appeals** affirmed another post-trial sanctions order in ***Glenn v. 3M Co***. The **South Carolina Supreme Court** denied review in August 2024.

In 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."

"Welcome To Hell"

Judge Toal has a broad record of pro-plaintiff rulings from the discovery stage of cases to "pretrial rulings that hardly ever favor the defense" to unfair trials and then, "after the jury returns the inevitable plaintiff verdict, the judge is more likely to issue an additur than a JNOV." In a September 2024 commentary titled "Welcome to Hell," one lawyer described a pretrial experience in a "designated Judicial Hellhole®" that undoubtedly was Judge Toal's courtroom:

> *The judge did not even attempt to hide full-blown contempt for the defense positions. There was a visible, emotional impact to the judge's adverse rulings. The judge seemed angry that the defense had the temerity to try to defend itself. But when the plaintiff lawyers argued, the judge's features softened. There were nods of appreciation, and occasional suggestions for other points that might support the plaintiff's position. We couldn't help but recall the old Rumpole of the Bailey stories by John Moritimer (who was himself a barrister in London courts). Dear old Rumpole at one point politely inquired of a judge whether they might be more comfortable climbing down from the bench and assuming a seat at opposing counsel's table.*
>
> *The judge drastically curtailed the scope of defense expert witness opinions. It seemed that these rulings were animated not so much by the rules of evidence as by the simple fact that the judge disagreed with the defense experts. The judge also excluded most theories of alternative causation. There were several moments when it looked as if the judge would issue a directed verdict in favor of the plaintiff. Why even go through a show trial?*
>
> *We had heard that this judge sometimes told defendants in open court that they were in for a rough time, so maybe they should seriously consider settlement. Mind you, these suggestions of reeling in ambitions and settling for a nonoptimal amount were never directed to plaintiffs. Anyway, we did not get to hear that speech from the judge. But we did get the message. After seeing, and feeling the reasons for ATRA's entirely correct designation, we got out.*

What advice did the commentator give after witnessing "justice" meted out in Judge Toal's courtroom? "Stay away. Get out of cases early, do as little business in the jurisdiction as possible, and drive 500 miles

out of the way if need be to avoid being anywhere near the place," the article warned. "If anything," the commentator said, "the ATRA Hellhole designation understates how one-sided the court system (at least the one specific docket) is in this otherwise charming place."

Trial Court "Fattens Verdicts When She Wants" And Boosts Awards Through Unfair Partial Setoffs, Blessed By SC Supreme Court

On at least two occasions, **Judge Toal** increased jury awards when she believed the juries did not award enough money to the plaintiffs. A recent headline referred to **Judge Toal** as a "Jury of one" who "fattens verdicts when she wants." To benefit plaintiffs, **Judge Toal** applies a doctrine known as *nisi additur*, which is "banned as unconstitutional in federal courts." She also allows plaintiffs to allocate pretrial settlements in a way that deprives defendants of a full setoff for those payments after a verdict, substantially boosting plaintiffs' awards.

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 – "a multiplier of almost eight times the jury's verdict" - and nearly tripled the wife's award to $290,000. Judge Toal's order "gave the defendant's a choice: Pay the higher amount or risk a new trial." The plaintiffs had already obtained $2.3 million in pre-trial settlements from other defendants.

The **South Carolina Supreme Court** affirmed in 2024. The court conceded that the additur award was a "significant increase" but nevertheless decided that Judge Toal was within her discretion to increase the award based on general observations by one of the plaintiffs' experts. The Jollys did not provide any documentation to support the expert's estimate. **Chief Justice John Kittredge** issued a dissent, pointing out that Judge Toal's decision "represent[ed] an increase far beyond any additur this Court has upheld."

ATRA filed an amicus brief in *Jolly*, explaining that "[w]ithout clear boundaries, South Carolina risks becoming an outlier jurisdiction in its use of additur in asbestos cases." ATRA's brief 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 v. Scapa Waycross Inc., … where the same trial court increased an asbestos plaintiff's survival damages from $600,000 to $1 million.*

ATRA's amicus brief also noted that 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.'"

The South Carolina Supreme Court's *Jolly* decision suggests that the Court "is unlikely to disturb a lower court's grant of a motion for a new trial *nisi additur* except in the rare circumstance where it finds the decision 'wholly unsupported by the evidence.'"

Separately, the **South Carolina Supreme Court** in *Jolly* affirmed a decision by Judge Toal to allow the plaintiffs to "unilaterally designate a third of the $2.3 million in prior settlements as payments toward an expected wrongful death case" after Mr. Jolly's death. This further boosted the plaintiffs' recovery by denying the defendants a setoff for the large portion of the settlements that the plaintiffs allocated for future wrongful death claims.

As explained in ATRA's amicus brief in *Jolly*, "The combined effect of the trial court's additur and setoff rulings is that . . . Plaintiffs will recover more than $3 million ($2.27 million in settlements and $823,333.33 from [the two trial defendants] after partial setoffs), plus interest significantly above the prime rate, for claims the jury determined were worth only $300,000."

In ***Edwards v. Scapa Waycross, Inc.***, **Judge Toal** increased a jury's $600,000 survival damages award

to $1 million. She 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. The **South Carolina Supreme Court** denied review of this aspect of the appellate court's opinion.

Weak Causation Standard Applied, Affirmed

In ***Edwards v. Scapa Waycross, Inc.***, the **South Carolina Supreme Court in 2024** delivered a significant blow to South Carolina's asbestos litigation environment by affirming a verdict 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 cumulative dose 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 Supreme Court** views cumulative dose testimony as admissible background information to aid the jury's understanding of medical causation. This permissive approach allows plaintiffs' experts to present their theory to juries, leading jurors to find, as in *Edwards*, that minimal exposure to a defendant's product was a "substantial factor" in bringing about the result.

ATRA filed an amicus brief in ***Edwards*** joined by a number of allies. ATRA's amicus brief explained:

> *[T]he widely-rejected every exposure approach [and] cumulative exposure testimony propounded by Plaintiff's experts…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.*

The South Carolina Supreme Court's holding stands 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."

Nuclear Verdicts®

In August 2024, a couple won a $63.4 million verdict against Johnson & Johnson (J&J) and co-defendant beauty product manufacturer American International Industries (AII) alleging that the plaintiff's mesothelioma was caused by asbestos in talc-based baby powder. The jury awarded the plaintiff $3.8 million in economic damages and $19.3 million for pain and suffering. The plaintiff's spouse was awarded $9.6 million in loss of consortium damages. In addition, the jury held J&J liable for $30 million in punitive damages and AII liable for $760,000 in punitive damages. Jurors were not allowed to hear that the plaintiff "worked in a building later condemned for being 'full of asbestos' and told his doctor about his suspected exposure to the deadly fibers."

A J&J spokesperson said the verdict "is irreconcilable with the decades of independent scientific evaluations confirming talc is safe, does not contain asbestos, and does not cause cancer." J&J filed a motion for judgment notwithstanding the verdict and/or a new trial. The brief argues that "numerous errors of law were made by **Judge Toal** before and during the trial and allowed to proceed."

In March 2023, a woman won a $29.1 million verdict against ex-talc 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, the plaintiff worked for Metal Masters at a turkey processing facility owned by Kraft Heinz. The plaintiff alleged that he and his father were exposed to asbestos through their work at the facility, and brought asbestos home on their clothing. The plaintiff'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 the plaintiff'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.

Even When Defendants Win, They May Lose

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." **Judge Toal** used this incredible power in ***Crawford*** to order a new trial, giving the plaintiff a second chance to win a case that was lost.

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 review 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 manager 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

- **Prolific producer of nuclear verdicts®**
- **Courts embrace plaintiffs' lawyers' favorite tactics to achieve high awards**
- **State embraces archaic seatbelt "gag rule"**
- **Expansive premises liability**
- **"Got-you!" approach to bad faith liability**

Georgia's civil justice system is plagued by skyrocketing nuclear verdicts®, inflated awards for medical costs, expansive premises liability, and laws that set up defendants to fail creating endless liability. Georgia also 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. The state's fall from the top-spot this year is due in part to the sheer volume of abuses occurring in other jurisdictions, but also due to a sense of optimism that 2025 may bring some much-needed legislative relief.

This renewed hope for reform is fueled by Governor Brian Kemp's focus on addressing lawsuit abuse. He has positioned this issue as a top priority for his administration in 2025. To that end, he has held multiple roundtables with affected businesses and industry leaders to discuss policy solutions and legislative fixes. This comes following a year when the **Georgia General Assembly** enacted legislation to address

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Georgia residents pay a "tort tax" of **$1,372.94** and **137,658** jobs are lost each year according to a recent study by The Perryman Group. The economic impact of lawsuit abuse is even more pronounced in the state's capital. Atlanta residents pay a "tort tax" of more than **$2,000** per person and more than **117,600** jobs are lost each year due to excessive costs associated with lawsuit abuse. If Georgia enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by *$14.98 billion*.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of the state courts' propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$233.5 million** on more than **3.4 million** advertisements across television, print, radio, digital platforms and outdoor mediums.

GEORGIA 2024 - Q1-Q2

Medium	$	#	% $	% #
Spot TV	$30,090,841	686,788	46.41%	58.69%
Print	$272,871	35	0.42%	0.00%
Radio	$11,473,002	230,858	17.70%	19.73%
Digital	$1,931,414	252,581	2.98%	21.58%
Outdoor	$21,066,258		32.49%	
	$64,834,386	**1,170,262**		

rising insurance costs. In November, the Insurance Commission released an extensive report highlighting the need for civil justice reform to address the growing insurance rates and specific litigation abuses laid out in this year's Judicial Hellholes® report. The **ATRF** is encouraged by the prospect of reform in the coming year and will keep a close eye on the Peach State moving forward.

Nuclear Verdicts®

According to a recent study by the **U.S. Chamber of Commerce**, from 2013 to 2022, Georgia had the fourth most nuclear verdicts® (awards of $10 million or more) in personal injury litigation on a per capita basis with 64 verdicts. $6 billion was awarded to plaintiffs during this period with a median award of $24 million. **DeKalb**, **Fulton**, and **Gwinnett** counties recorded the largest share of these verdicts.

Trials continue to result in nuclear verdicts® in Georgia courts. For example, a Gwinnett County $16.2 million nuclear verdict® resulted when a jury found Amazon 85% responsible after a delivery partners' driver struck an unsupervised child who crossed the street on an electric bike. It was the first case of its kind in Georgia in that it held Amazon liable as an employer for a driver employed by another company on the theory that Amazon had not sufficiently trained the driver. The jury apportioned just 10% of the liability to the driver and 5% to the non-party neighbor who had agreed to watch the eight-year-old.

In October, a **DeKalb County State Court** jury returned a $50 million verdict in the retrial of a dental malpractice case, quintupling the previous verdict which was already the highest verdict in Georgia history for a dental malpractice case. The case arose from a root canal that, according to the plaintiff's complaint, "ended in lingering pain in her left cheek, chin and lip." The previous $10 million verdict was vacated after a judge found that the damages were "more punitive than appropriate" and "contrary to the evidence." In the 2024 retrial, after less than two hours of deliberations and despite arguments that the defendant dentist's actions were in line with medical standards, the jury returned the record-setting $50 million verdict.

Other recent nuclear verdicts® in Georgia include:

- **March 2024:** $25.7 million in a wrongful death case in **Hall County**
- **March 2024:** $25.5 million in a wrongful death case in **Fulton County**
- **April 2024:** $28 million in an auto-accident case in **Gwinnett County**
- **August 2024:** $47 million in a medical liability case in **Union County**

The threat of a nuclear verdict® in Georgia courts has led businesses and insurers to enter massive settlements rather than risk trial. In January of 2024, for example, a **Gwinnett County** case involving a driver

who collided with a turning tractor-trailer resulted in a $32.5 million settlement in which the defendants denied any wrongdoing. The pre-trial settlement is "the largest of its kind reached before trial in a single-victim wrongful death case in Georgia."

Drivers Of Nuclear Verdicts®

There are three main drivers of nuclear verdicts® in Georgia: anchoring tactics, the availability of phantom damages, and plaintiffs' lawyers use of the Reptile Theory.

ANCHORING

Anchoring is a tactic that lawyers use to plant an extremely high amount into jurors' minds to set a base dollar amount for a pain and suffering award. While some courts prevent or limit this tactic, Georgia is one of a few states with a specific statute allowing the practice. Additionally, Georgia does not limit the amount of pain and suffering damages a plaintiff can receive, which makes the allowance of anchoring all the more concerning.

In January 2024, the **Georgia Court of Appeals** solidified the state's open-arm approach to anchoring and issued a ruling that will further incentivize improper tactics by plaintiffs' lawyers. In ***White v. McGoirk***, the trial court permitted several inflammatory statements by the plaintiff's lawyer including "your verdict should be for a lot of money because it's a lot of damage, the past, now, and in the future. I said 65 [million]. They mentioned $5 million. I don't know where they got that. I mentioned $65 million." The attorney also pointed out that there are people who "make more than that in a year," noting that Los Angeles Angels star centerfielder "Mike Trout makes $37 million a year." He also noted that "[a] few weeks ago, we learned that a golfer, a guy named Dustin Johnson — they call him DJ — making $125 million to go play golf." The lawyer also urged jurors to use their "voice" and "power" to make the doctor and medical practice they had sued "take responsibility for ruining someone's life." Given such figures, the jury may have viewed its award of $10 million in compensatory damages to the plaintiff plus $100,000 to the plaintiff's husband for loss of consortium as relatively modest.

The **Georgia Court of Appeals** upheld the verdict, finding the statements not so extreme or improper to warrant reversal. The Court also found urging the plaintiffs' lawyer's plea that the jury to make the defendants "take responsibility" did not cross the line into urging the jury to punish the defendants when there was no evidence of misconduct that would justify a punitive damage award.

PHANTOM DAMAGES

Georgia courts routinely award phantom damages, providing a windfall to plaintiffs and their attorneys. "Phantom damages" occur when courts calculate a plaintiff's medical expenses using a healthcare provider's list price for medical services (chargemaster rate), which may appear on an invoice, instead of the amount the patient, or the patient's insurer, Medicare, Medicaid, or workers' compensation actually paid, and the healthcare provided accepted, as full payment for the treatment. For example, a hospital may bill $20,000 for an emergency room visit, while the amount the hospital actually receives may be $8,000. The $12,000 difference is not owed or ever paid for the treatment – that is the amount of phantom damages.

These phantom damages occur because Georgia courts misinterpret the collateral source rule, which allows a plaintiff to collect damages from a defendant that has engaged in tortious conduct even if the plaintiff's expenses will be covered by insurance. Georgia courts have inappropriately expanded this doctrine to find that plaintiffs are entitled to recover medical expenses based on full chargemaster rates that few, if any, patients or insurers actually pay. Georgia courts even prevent juries from learning amounts a healthcare provider accepted as full payment, telling them only the list prices of medical services. It is the amount actually paid and accepted, however, that indicates the reasonable value of medical services, not rates that exist only in medical billing systems.

Consequently, litigation in Georgia results in higher verdicts and settlements based on exaggerated (phantom) amounts, which produce larger contingency fees for trial lawyers. Awarding such inflated

amounts does not serve the purpose of compensatory damages, which is to make an injured party whole. Instead, the practice of awarding damages based on rates that are often three or four times or more than the actual value of medical care unnecessarily increases the cost of the liability system, which results in homeowners, drivers, and businesses paying higher insurance costs and consumers paying more for goods and services.

REPTILE THEORY

Georgia plaintiffs' lawyers also resort to using the "reptile theory," a tactic that manipulates jurors into deciding cases based on raw emotion and perceived threats rather than evidence presented at trial. Georgia judges routinely allow plaintiffs' lawyers to introduce evidence of a company's general policies, practices, or alleged lack of compliance with government regulations, even if only remotely related to the plaintiff's case, to portray the business as a threat to public safety.

This tactic was on full display in a case in which a plaintiff rear ended a tractor trailer after the truck driver hit the brakes to avoid colliding with a van that passed through his lane. At trial, the defense presented evidence (video and vehicle data) showing that the truck driver acted appropriately under the circumstances. In closing arguments, the defense argued that the driver "did not have time to safely evaluate other potential alternative maneuvers as the van passed through his lane" and that the plaintiff collided with the truck because he followed the vehicle too closely. Plaintiff's counsel, however, focused on the truck driver's failure to follow "a host of trucking industry standards, leading to the crash." The jury reached a $16.6 million verdict, finding the trucking company 60% responsible and the plaintiff 40% responsible for the crash. After trial, the plaintiff's attorney pointed to the effectiveness of the reptile theory, noting that "we built our strategy around the violation of a few trucking industry standards" to overcome the challenge that it was his client that rear-ended the truck.

Update on Record $1.7 Billion Verdict

A case chronicled by recent Judicial Hellholes® reports involves a $1.7 *billion* punitive damage verdict against Ford. In August 2022, a Gwinnett County jury returned this massive verdict in a rollover accident case in which the plaintiff alleged that the automaker's "Super Duty" models had defectively weak roofs. This astronomical verdict helped propel Georgia atop the 2022-2023 Judicial Hellholes® list. The case went to the jury after the trial court stripped Ford of its defenses, as a "death penalty" sanction for introducing expert testimony in a previous trial that the court viewed as beyond the scope of what it had permitted. The case was riddled with ethically questionable events and biased court orders. Ford was prohibited from informing the jury that the plaintiffs were improperly wearing their seatbelts during the crash or about scientific studies finding that the roof's strength did not cause the plaintiffs' deaths. The award practically *tripled* the prior Georgia record. Nevertheless, **Judge Joseph C. Iannazone** refused to reduce the award or grant a new trial, as Ford requested.

In an encouraging decision in November, the **Georgia Court of Appeals** threw out the massive verdict, finding the trial court should not have sanctioned Ford as it did and should have allowed the automaker to introduced evidence of seatbelt usage and potentially the rollover studies. The Court ordered a new trial and advised the lower court to revisit the admissibility of several pieces of evidence.

While this is a significant development, the plaintiffs' lawyers have indicated their intent to appeal the ruling to the Georgia Supreme Court.

The Future of the Seatbelt Gag Rule

A key part of the Georgia Court of Appeal's *Hill* ruling was on the state's seatbelt gag rule. The Court overturned the lower court, finding that it erred in prohibiting the introduction of evidence showing that the plaintiffs were not properly wearing their seat belts at the time of the crash. Current Georgia law states that "[t]he failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle

which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation, or insurer, shall not be any basis for cancellation of coverage or increase in insurance rates, and shall not be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle."

Interpreting the plain language of the statute and previous precedent, the **Court of Appeals** reasoned that evidence of complete failure to wear a seatbelt – i.e. "it is not 'on the person'" is not permissible; however, the statute does not exclude evidence of it being worn improperly because the seatbelt is still "on the person." In this instance, the plaintiffs improperly tucked the shoulder straps under their arms, so they were still wearing the belt.

Judge J. Wade Padgett wrote a dissent in which he agreed with the majority opinion except for its decision regarding the admissibility of the seatbelt evidence. He disagreed with the majority's interpretation of legislative intent and its reading of the plain language of the statute, specifically the word "wear." This disagreement amongst members of the court signals the need for a legislative fix to address the uncertainty around the statute.

Excessive Sanctions on Defendants

Honda experienced similar disproportionate treatment in a trial before **Clayton County State Court Chief Judge Michael T. Garrett**. In September 2024, **Chief Judge Garrett** issued debilitating sanctions against Honda for an inadvertent mistake in a PowerPoint presentation used during opening statements and statements made during *voir dire*. In response, the Chief Judge struck Honda's answers and ability to present affirmative defenses, thereby preventing the company from defending itself, effectively handing the plaintiffs a victory.

On the other hand, when plaintiffs' attorneys make similar mistakes or improper arguments, judges often give the jury a curative instruction, find such errors not sufficiently prejudicial to require a new trial, and do not go to the extreme of dismissing a complaint.

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.

In 2023, the **Georgia Supreme Court** issued a decision that **ATRF** warned would only lead to further deterioration of the state's civil justice system and drastically expand liability for landowners. In ***CVS Pharmacy LLC v. Carmichael***, the Court embraced an overly broad test for "foreseeability," significantly expanding the scope of liability for property owners. In that instance, the plaintiff sued CVS after he was shot in the store's parking lot, where he had arranged to meet an acquaintance 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.

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 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 that places a premises owner on

notice of the need to address a specific safety risk. 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 decision seems to allow even crimes occurring near a landowner's premises to be considered in the foreseeability test.

As a result of this decision, businesses operating in dangerous neighborhoods 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. Businesses like pharmacies and supermarkets will be less likely to open locations where they may be needed most due to the potential liability for criminal activity that they cannot control near their stores.

In 2024, the effects of this decision have been on display. In ***Pappas Restaurant, Inc. v. Welch***, the **Georgia Court of Appeals** upheld a trial court's decision to allow a case to go to trial that seeks to hold an Atlanta-area restaurant and its security company liable after a customer was robbed and shot in its parking lot. Though no similar crimes had previously occurred, the plaintiffs claim the restaurant owner knew there was an uptick in property crimes, such as car break-ins, in the area and should have taken additional steps to secure the parking lot.

Abuse Under State's 'Standard of Triviality'

The flexible and context-dependent "standard of triviality" used by Georgia courts creates almost no restriction on when nominal damages can be awarded in personal injury cases and no limit on the amount that can be awarded. A jury can choose to award only nominal damages when there is a small injury or strong mitigating circumstances but jurors still feel a plaintiff is entitled to some degree of recovery.

According to the **Georgia Court of Appeals**, "In Georgia, the term 'nominal damages' is purely relative, and carries with it no suggestion of certainty as to amount. Instead of being restricted to a very small amount, the sum awarded as nominal damages may, according to circumstances, vary almost indefinitely."

Relying on this standard, the **Georgia Court of Appeals** upheld a $1 million award in nominal damages for a Georgia plaintiff, despite the jury not awarding any damages for medical expenses or pain and suffering.

A Walmart employee who was walking backwards, bumped into the plaintiff as she sat in a motorized shopping cart. The impact was "very light, not harsh at all." The plaintiff declined when Walmart employees asked if she needed paramedics; however, she went to the emergency room in the evening for head pain and blurred vision. "According to the treating physician at the emergency room, a head CT scan showed no sign of injury, and he found no signs of concussion." At closing, the plaintiff requested more than $5.5 million in damages for future medical expenses and future pain and suffering.

The jury returned a verdict in favor of the plaintiff but chose only to award nominal damages in the eye-popping amount of $1 million. Walmart appealed, arguing that $1 million in nominal damages "was excessive as a matter of law and not a legal award of nominal damages."

The **Court of Appeals** disagreed and upheld the startling award. The Court relied on the "test of relativity," as opposed to limiting nominal damages to a "trivial sum." In practice, this seems to allow nominal damages awards of any amount, as long as the original damages amount requested by the plaintiff is high enough. The court reasoned that the award of $1 million damages was not excessive because it was "less than one-fifth the amount requested by the plaintiff."

This behavior by the courts aligns with Georgia's history of nuclear verdicts®. These lax standards allow for irrational verdicts that are unsupported by evidence and contribute to Georgia's plaintiff-friendly reputation, which has made it a choice destination for litigation tourism.

Mirror-Image Rule

Lawyers in Georgia engage in gamesmanship in which they make settlement demands full of conditions, then claim that an insurer did not comply with one of the many requirements. The goal is to seek amounts far above the insurance policy limits by claiming that the insurer operated in "bad faith" by having them innocuously overlook 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 proposed agreements, then assert that the insurer's response does not comply, thus nullifying the 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.

The **Georgia Supreme Court** had an opportunity to create a "materiality exception" to the rule when a plaintiffs' lawyer makes a settlement offer in bad faith, however, in January 2024, it declined to review the underlying case.

Cases To Watch

The **Georgia Supreme Court** is considering a case that could lead to more nuclear verdicts® and spark a medical liability crisis. In ***Medical Center of Central Georgia v. Turner***, the Court will decide whether the state's limit on non-economic damages in medical liability cases applies to wrongful death claims against healthcare providers. In that case, a jury awarded $9.2 million in damages, including $7.2 million in non-economic damages. The defendant requested that the trial court reduce the portion of the verdict awarded for noneconomic damages to $350,000 as required by the state's statutory limit. The trial court denied the motion, stating that a 2010 Georgia Supreme Court decision had completely invalidated the cap as a violation of the right to jury trial. An intermediate appellate court summarily affirmed that ruling in August 2024.

Most state high courts have upheld a legislature's authority to set a maximum amount of damages for highly subjective noneconomic damage awards, making Georgia an outlier. About half of states limit pain and suffering awards, and a few cap total damages in medical liability cases, recognizing that stable, accessible, and affordable healthcare for all citizens is more important than providing a windfall to a few plaintiffs and their attorneys. This is particularly critical in Georgia, where about one out of three of the state's nuclear verdicts in personal injury and wrongful death cases between 2013 and 2022 were in medical liability trials.

MEDICAL Liability

The case before the **Georgia Supreme Court** presents the high court with three choices. The first path is to maintain its 2010 decision, but find that the limit constitutionally applies to wrongful death claims, a type of action that did not exist at common law. The second path is to reconsider its earlier ruling and find the legislature may constitutionally modify the remedies available in a tort claim, bringing Georgia law into the mainstream. The final, and most problematic course, is for the court to extend its 2010 ruling to wrongful death cases, affirming the lower courts and exacerbating the significant risk of nuclear verdicts® against healthcare providers.

TOP ISSUES

- **Top producer of nuclear verdicts**
- **Innovative new theories of liability**
- **Leading the charge in environmental litigation**

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. California residents pay a "tort tax" of **$2,297** (third-highest) and **825,475** jobs are lost each year according to a recent study by The Perryman Group. If the California legislature enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **$89.7 billion.**

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of California courts' propensity for liability-expanding decisions and nuclear verdicts® and spend millions of dollars on advertising. Through July 2024, plaintiffs' lawyers had spent over **$110 million** on advertisements in the Los Angeles media market alone, the most spent in any single media market in the U.S.

During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$352.9 million** on more than **3.54 million** advertisements across television, print, radio, digital platforms and outdoor mediums in California.

CALIFORNIA 2024 - Q1-Q2

Medium	$	#
Spot TV	$50,110,692	674,471
Print	$1,445,291	484
Radio	$27,694,277	434,506
Digital	$3,182,145	69,302
Outdoor	$31,622,522	
	$114,054,927	**1,178,763**

California is the trial bar's laboratory. It's where they go to pursue innovative new theories of liability and push the envelope with regard to expanding liability for business. The courts welcome these theories with open arms and businesses are overwhelmed with claims. In addition to creating new avenues to sue, the state also has the most nuclear verdicts® of any state in the country and the state attorney general is leading the charge in baseless environmental litigation.

Campaign Contributions by Consumer Attorneys

Since 2017, the Top 20 plaintiffs' firms that donated the most to political campaigns in California made combined contributions totaling more than $15.5 million.

The **Law Offices of Walkup, Melodia, Kelly & Schoenberger** lead the pack with more than $2.5 million in contributions to California-based candidates and committees. Notably, several other firms also made significant donations, with four firms – **Cotchett, Pitre & McCarthy; Knight Law Group; Singleton Schreiber;** and **Altair Law** – surpassing the $1 million mark.

More than 43% of all donations from the Top 20 firms analyzed – or $6.7 million – were made to committees affiliated with the **Consumer Attorneys of California**, the state's leading advocacy group for trial lawyers. **California Governor Gavin Newsom** also received nearly $2 million in contributions from these firms.

Nuclear Verdicts®

According to a recent report published by the **U.S. Chamber of Commerce**, California had the most nuclear verdicts® in personal injury and wrongful death litigation of any state from 2013 through 2022 with 199. Even considering its size, the state places in the Top-10 on a per-capita basis. During this time, courts awarded more than $9 billion in damages in these cases.

Auto-accident cases (35.2%) and product liability cases (22.6%) made up more than half of the massive verdicts and Los Angeles was home to more than one-third of the verdicts.

Recent nuclear verdicts include:

- **December 2023:** A **$41.49 million verdict** ($30 million in punitive damages) in **Los Angeles County** under **Judge Michael P. Linfield** in a retaliatory and discriminatory firing case.
- **December 2023:** A **$61 million verdict** ($59.7 million in noneconomic damages) in **Los Angeles County** under **Judge Ronald F. Frank** in a wrongful death case.
- **April 2024:** Three separate verdicts amounted to **$80.2 million** ($75 million in punitive damages) in **Sacramento County** under **Judges Jeffrey S. Galvin** and **Kenneth C. Mennemeier** for three former employees in unlawful termination cases.

California Innovation – New Ways To Sue

Product Liability

Duty to Innovate

This summer, the **California Supreme Court** agreed to review an intermediate appellate court decision that created a new theory of liability that, even by California standards, is outlandish.

In ***Gilead Tenofovir Cases, Gilead Sciences v. Superior Court of the City and County of San Francisco***, the **California Court of Appeal** imposed a new duty to innovate on manufacturers. It found that even if a product is not defective or unreasonably dangerous, a company can be held liable if it was researching and developing another product that it "knew" was "safer" and did not release that product fast enough.

The ***Wall Street Journal*** pointed out that this theory could be used against any manufacturer, not just those that make prescription drugs: "Software, phone, car and medical-device manufacturers—the universe of potential defendants is endless." Prescription drugs are already subject to multiple FDA trials and approval processes which can be barriers to innovations and it's unclear how this new duty to go to market would complicate or interact with the FDA process.

This is the latest example of California's courts serving as a breeding ground for novel legal theories, reinforcing its reputation as a laboratory for plaintiff lawyers. The **California Supreme Court** has an opportunity to prevent further abuse by rejecting this liability-expanding theory.

Benzene/Valisure

It should come as no surprise that when plaintiffs' lawyers went searching for a favorable jurisdiction to file a new wave of junk science litigation, they looked no further than California. In 2024, they filed a series of lawsuits in California federal court against Walgreens, Kenvue and Johnson & Johnson alleging that their acne products contain unhealthy amounts of benzene and that the companies failed to warn consumers of these dangers in the products' labels.

The lawsuits come almost immediately following **Valisure**, a private lab, submitting a citizen's petition to the FDA requesting an immediate recall of benzoyl peroxide (BPO) products following its detection of a "high level of benzene, a known human carcinogen, in many specific batches of BPO products…"

What follows should raise eyebrows for anyone considering the credibility of this litigation. The petition goes on to say, "the current evidence suggests that on-market BPO products could produce substantial amounts of benzene when stored at above-ambient temperatures, specifically 37°C (98.6°F), 50°C (122°F) and 70°C (158°F)," temperatures well above those found in a consumer's home or storage space.

This isn't the first time **Valisure** has created concerns over products when heated to unrealistic temperatures. Federal multidistrict litigation in Florida involving Zantac was dismissed in 2022 after flaws behind the science of plaintiff experts' claims were exposed by **U.S. District Court Judge Robin Rosenberg**. That litigation too was sparked by testing conducted by **Valisure**. **Judge Rosenberg** said "there is no scientist outside this litigation," despite extensive study of the question after the product's voluntary withdrawal, "who concluded ranitidine causes cancer."

Judge Rosenberg wrote in her opinion that "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."

> ***"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."***
>
> **— U.S. District Court Judge Robin Rosenberg**

Valisure's testing methodology for Zantac 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.

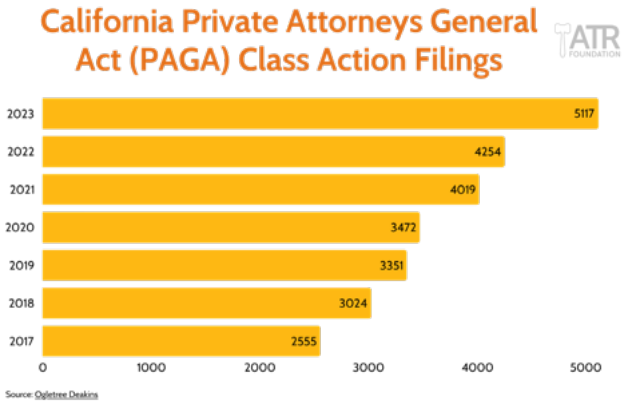
Given the unlikelihood of consumers storing their acne medication at temperatures above 90°F, let alone 100°F+, federal judges evaluating this new wave of litigation must rigorously scrutinize the testing relied upon by the plaintiffs and prevent junk science from entering their courts.

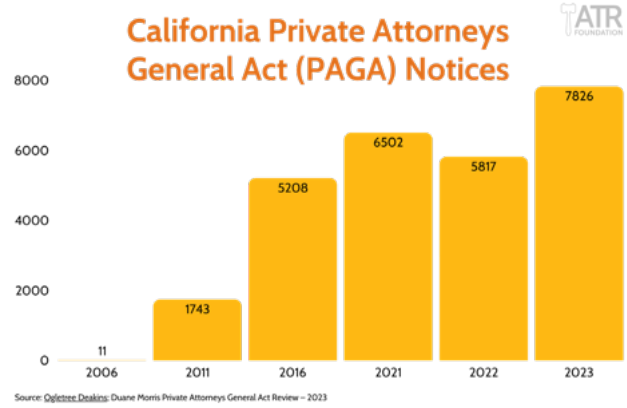
PAGA Or The "Sue Your Boss" Law

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. The number of these lucrative lawsuits doubled between 2017 to 2023.





Manageability of PAGA Claims

The **California Supreme Court** had an opportunity to rein in predatory "unmanageable" PAGA cases in 2024 but chose not to do so. In January 2024, the Court upheld a decision by the **Fifth District Court of Appeal** finding that manageability is only a requirement for class actions, not PAGA claims.

Allowing "unmanageable" PAGA cases to proceed will unfairly burden defendants and lead to inefficiencies and significant pressure to settle cases because of the overwhelming discovery that plaintiffs will seek.

Legislature Takes Action

In July, **Governor Gavin Newsom** signed two pieces of legislation aimed at addressing some of the problems around PAGA - **A.B. 2288**, authored by **Assembly Member Ash Kalra**, and **S.B. 92**, authored by **Senator Tom Umberg.**

Among the provisions included in the legislation:

- Increases penalty allocation from claims to employees from 25% to 35%, reducing the financial incentive for plaintiffs' lawyers.
- Requires employee to "personally experience" the alleged violations in a claim. Formerly, employees could bring claims on behalf of others.
- Lowers PAGA penalties for employers, setting specific amounts (e.g. $25 for a minor wage infraction) for smaller violations that were remedied to avoid litigation
  - If employers take 'reasonable steps' to address a PAGA notice within 60 days, they cannot be penalized for more than 30% of the applicable penalty
- Establishes "new, higher" penalties for employers acting "maliciously, fraudulently or oppressively" in violation of labor laws

While the legislature should be applauded for taking steps to address PAGA abuses, there is cautious optimism as to whether these changes will sufficiently address the problem.

Lemon Law

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**, known as the California lemon law, have been on the rise. Lawsuits under the lemon law reached record levels in 2023 and 2024. In 2023, there were 22,265 cases filed under the lemon law statewide, which was a 52% increase from 2022, and plaintiffs' lawyers are on pace for filing over 30,000 claims in 2024.

A handful of law firms have established a niche market using the lemon law to target manufacturers. In 2023, just seven law firms filed 54% of all state lemon-law claims. These firms increased their filings by up to 75% between 2022 and 2023. This is particularly a problem in **Los Angeles County**, where judges report 700 to 800 lemon law-related cases on their docket.

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 that consumers may be inclined to accept because of the ability to recover unlimited attorneys' fees for minor legal problems. 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.

A **California Supreme Court** ruling in March 2024 illustrates the excessive and unreasonable liability automakers face under California's lemon law. In that instance, a consumer sued Fiat Chrysler after the manufacturer did not buyback a Jeep after making repairs. A jury found a violation of the lemon law and awarded the $40,000 purchase price of the vehicle, $5,000 in incidental damages, and $60,000 in civil penalties for the automaker's failure to provide the plaintiff a timely buyback. The trial court even refused to deduct from the verdict the $19,000 trade-in credit the plaintiff had received toward a new vehicle. While an intermediate appellate court found that such an award provided the plaintiff with a windfall, the state's high court reinstated the trial court's ruling.

Legislative Activity

A.B. 1755 was enacted and provides that lemon law claims must be filed within one year after expiration of a relevant warranty and cannot be brought more than six years after original delivery of a vehicle. Beginning in April 2025, consumers must provide written notice to a manufacturer prior to seeking civil penalties.

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.

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. Failure to comply can cost up to $2,500 per day in fines, and settlements can cost $60,000 to $80,000.

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.

Through October 1, there were 763 Prop-65 settlements for a total of more than $19.5 million with $16.8 million going towards attorneys' fees and costs. This is 85% of the total settlement amount.

Prop-65 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. This includes allegations that products contain traces of heavy metals, such as lead, cadmium, and arsenic. The key product categories for notices relating to heavy metals include seafood products, spices, and protein supplements.

In August, Kroger and Ralphs' Grocery were hit with a Prop-65 lawsuit due to alleged presence of heavy metals in their snacks and cinnamon products without having "clear and reasonable warnings." The complaint alleges that the defendants are liable for up to $2,500 per day in civil penalties per individual exposure to Cadmium or Lead. The **Consumer Advocacy Group**, one of the top-10 Prop-65 serial plaintiffs, filed the lawsuit.

Prop-65 "60-day notice" filings have skyrocketed in recent years. 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 October 1, 4,118 notices had been filed in 2024, far exceeding the prior year's total at the same point in the year.

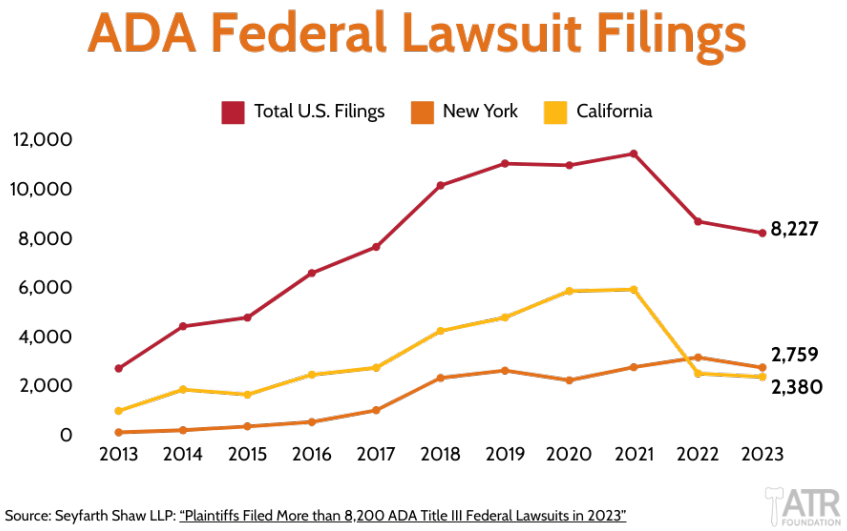
The money companies spend on compliance and litigation unnecessarily drives up the cost of goods for California consumers. It also harms small businesses that do not have the in-house expertise or means to evaluate the need for mandated warnings or handle litigation.

Plaintiff	Number of Settlements (2024)	Non-Contingent Civil Penalty	Attorney's Fees	Counsel
Environmental Health Advocates, Inc.	87	$2,007,500	$1,795,500	Entorno Law LLP
Ema Bell	>79	>$1,159,750	> $1,094,750	Evan Smith
Gabriel Espinoza	>77	> $1,299,000	> $1,211,000	Evan Smith
Keep America Safe and Beautiful	58	$1,329,340	$1,177,875	Seven Hills LLP, Stephanie Sy, Manning Law, APC
Dennis Johnson	46	$727,480	$657,380	Voorhees & Bailey LLP
Precila Balabbo	44	$806,000	$757,000	Evan Smith
CA Citizen Protection Group, LLC	32	$713,250	$692,000	Khansari Law Corporation
Sandra Assareh	27	$366,500	$260,700	Gil Alvandi
Ramy Eden	26	$1,311,500	$754,500	Jarrett Charo APC
CalSafe Research Center, Inc.	25	$550,600	$495,540	Manning Law APC
Consumer Advocacy Group, Inc	23	$1,962,000	$1,631,000	Reuben Yeroushalmi

As of October 1, 2024

Americans with Disabilities Act Litigation

In 2023, California's federal courts hosted nearly 30% of the nation's ADA lawsuits alleging that businesses did not meet accessibility standards. That year, plaintiffs' lawyers filed 2,380 accessibility lawsuits – second to only to New York, a fellow Judicial Hellhole®. Plaintiffs' lawyers also file a substantial number of these lawsuits in California state courts, which they may view as a more favorable forum in which they can tack on additional claims.



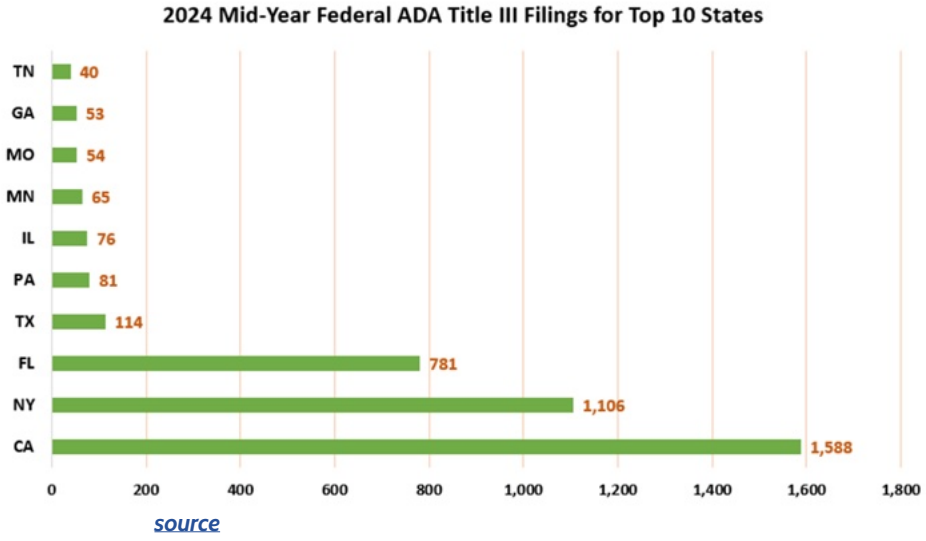
Source: Seyfarth Shaw LLP: "Plaintiffs Filed More than 8,200 ADA Title III Federal Lawsuits in 2023"

These lawsuits claim 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. Most often, small businesses are the main target of this abusive litigation because they lack the resources to defend themselves and are more likely to settle.

One of the most prolific areas of ADA abuse in California involves website accessibility. California courts are currently split on whether there needs to be a nexus with brick-and-mortar presence for websites to qualify as a place of public accommodation.

In California, penalties for accessibility violations are much higher due to the state's **Unruh Civil Rig 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.

Unfortunately for California small businesses, California had regained the top spot with 1,588 federal ADA lawsuits filed during the first half of 2024.



source

ADA Serial Plaintiffs

The **U.S. Supreme Court** had an opportunity to provide California small businesses some relief from lawsuit abuse by serial ADA plaintiffs, but unfortunately, the Court declined to weigh in.

In February 2024, the **U.S. Supreme Court** denied certiorari of a troublesome **Ninth Circuit** decision that prevents courts from considering the litigiousness of the plaintiff when determining whether the plaintiff has standing to bring an ADA accessibility lawsuit. The plaintiff, Chris Langer, a serial litigant represented by the **Center for Disability Access**, filed a complaint against owners of a lobster shop and smoke shop claiming a 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 assertion that he planned on returning to the establishment not credible based, in part, on his record of bringing ADA claims. 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. According to the **Ninth Circuit**, district courts cannot "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 found the majority should have respected the trial court's finding that the plaintiff's assertions were not credible and observed it was "implausible to think that Langer intended to actually patronize the nearly 2,000 businesses that he had sued."

Arbitration Activity to Watch

The California courts and legislature have long attempted to undermine the right of employers and employees to agree to arbitrate disputes and avoid costly litigation. **ATRF** has been monitoring two pending cases before the **California Supreme Court** that could significantly impact the availability of arbitration in the state.

In July, the Court issued its long-awaited decision in ***Ramirez v. Charter Communications***, a case involving the question of whether provisions in an arbitration agreement that are found to be unenforceable can be struck from the agreement or whether they render the entire agreement void. The **California Supreme Court** clarified that courts may sever unconscionable terms in arbitration agreements when an illegal provision is collateral to the contract's main purpose, it is possible to cure the illegality by means of severance, and enforcing the contract would be in the interest of justice.

Additionally, the **California Supreme Court** is reviewing a lower court's decision that involves a state law that "requires companies to pay their arbitration bills within 30 days or risk having consumer and employment claims filed against them removed to court." In ***Hohenshelt v. Superior Ct.***, the Superior Court initially held that the state statute was allowed under the **Federal Arbitration Act ("FAA")**. The majority found that the state law was compatible under the FAA because it "keeps the private-judging process moving."

> ***"No other contracts are voided on a hair-trigger basis due to tardy performance... Only arbitration contracts face this firing squad. This statute thus is preempted."***
>
> – Judge John Shepard Wiley Jr. in a written dissent

The dissent written by **Judge John Shepard Wiley Jr.** disagreed, stating "No other contracts are voided on a hair-trigger basis due to tardy performance...Only arbitration contracts face this firing squad. This statute thus is preempted."

California on The Forefront of Environmental Litigation

War on Plastic

California is leading the charge in pursuit of deep pockets to pay for clean-up and recycling projects across the country. This litigation trend is discussed in further detail in the **Closer Look** section.

In September 2024, California's attorney general **Rob Bonta** and a coalition of environmental activist groups, including the Sierra Club, filed a pair of lawsuits alleging Exxon is responsible for litter across the state due to its production of plastic products. The lawsuits claim violations of California's public nuisance, natural resources, false advertising and unfair competition laws. The lawsuits take issue with the company's efforts to provide "advanced" or "chemical" recycling of plastic waste, claiming these promises have not come to fruition.

A representative for Exxon responded to the suits by saying, "Instead of suing us, they could have worked with us to fix the problem and keep plastic out of landfills...To date, we've processed more than 60 million pounds of plastic waste into usable raw materials, keeping it out of landfills." An amicus brief filed by the **business community** in a similar case filed by a California municipality argues that cases like these improperly seek a public policy objective – banning plastic packaging – through the courts rather than the legislature. The brief also points out the unproductive nature of attempting to impose liability for costs resulting from people who litter and do not recycle based on a company's efforts to promote recycling.

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 a 135-page complaint filed in September 2023, 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.

In June 2024, the complaint was amended to include seeking a novel remedy now available thanks to the enactment of **A.B. 1366**. This legislation, signed into law in 2023, allows the attorney general to seek disgorgement from a defendant for a violation of the state's consumer protection laws in addition to already-available restitution and civil penalties.

This lawsuit is in addition to other litigation filed by localities across the state that continue to work their 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.

PFAS

As the **Center for Disease Control and Prevention (CDC)** and the **U.S. Environmental Protection Agency (EPA)** continue to grapple with the potential health effects of exposure to different PFAS, California lawyers have taken to the courts to try and capitalize on the important public health debate.

Costco is facing a potential class action due to the alleged presence of PFAS in its Kirkland Signature Baby Wipes. The complaint, filed in June 2024, alleges among other things that Costco misled consumers by depicting the wipes as "made of naturally derived ingredients." According to the complaint, an unidentified lab's testing found PFAS levels of 3.7 parts per billion in the product. Importantly, the complaint does not allege that the class members suffered any harm from using the products. Costco responded that the complaint does not identify the lab that conducted the testing, state when or where the plaintiff purchased the product, or indicate the type of PFAS allegedly detected (most of which pose no risk). The lawsuit is one of many similar class actions alleging consumer products have traces of PFAS, most of which have been filed in California.

Additionally, the **City of Santa Monica** is suing 3M, DuPont and more than a dozen other companies for PFAS contamination of properties, natural resources and water systems. The lawsuit alleges claims including public nuisance, design defect, failure to warn and trespass.

Asbestos

Los Angeles ranked in the top 10 for most asbestos lawsuit filings in 2023. The 119 lawsuits filed in Los Angeles in 2023 marked a 17% increase from the previous year.

A **California Appellate Court** upheld a lower court's decision to hold a company strictly 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. This expansive decision extends a business's duty of care to prevent exposure to individuals who are not even a part of an employee's household, creating potentially limitless liability. In August 2024, the **California Supreme Court** announced that it would not review the decision, allowing it to stand.

Burdensome Discovery Orders

Companies facing litigation in California can face burdensome, expensive discovery. Long-running multidistrict litigation ("MDL") in the **Northern District of California**, which questions whether a rideshare company had sufficient safeguards to protect passengers from driver misconduct, illustrates this problem. In that mass-tort action, a federal magistrate judge, **Lisa Cisneros**, a former plaintiffs' lawyer overseeing litigation led by the same firm for which she previously worked, has repeatedly required the defendants to produce policies and other documents that are irrelevant to the claims at issue or not proportional to the needs of the case, as required by the federal rules. Expansive discovery orders of this kind burden companies with never-ending document production mandates and costs, pressuring them to settle litigation regardless of the merits.

A Legislative HeatWatch

The California legislature was put on a ***HeatWatch*** in a mid-year report issued by the **American Tort Reform Association**. Members of the Legislature continue to pursue laws that further exacerbates the state's Judicial Hellholes status. Their agenda emboldens the litigation lobby and puts employers at increasing liability risk. While 2024 was a mixed bag by way of results, it's important to recognize the impact a state's legislature has on a state's civil justice system.

TOP ISSUES

- **No-injury lawsuits**
- **Home to a disproportionate amount of the state's litigation and nuclear verdicts**
- **Asbestos litigation hotbed**

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Cook County residents pay a "tort tax" of **$2,497** and **195,924** jobs are lost each year according to a recent study by The Perryman Group. If the Illinois legislature enacted specific reforms targeting lawsuit abuse, Cook County would increase its gross product by **$21.3 billion**.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of Cook County courts' propensity for liability-expanding decisions and nuclear verdicts® and spend millions of dollars on advertising. From January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$58.9 million** on more than **475,500** advertisements across television, print, radio, digital platforms and outdoor mediums in the Chicago market.

CHICAGO 2024 - Q1-Q2

Medium	$	#
Spot TV	$8,969,130	61,930
Print	$176,559	32
Radio	$5,495,095	108,704
Digital	$349,467	4,044
Outdoor	$3,975,033	
	$18,965,284	**174,710**

Cook County is home to a disproportionate amount of the state's litigation and nuclear verdicts®. No-injury litigation, including claims filed under the state's **Biometric Information Privacy Act** and consumer protection laws, also contributes to Cook County's sustained appearance on the Judicial Hellholes® report. Additionally, the county is a hotbed for asbestos litigation and Illinois plaintiffs' lawyers contribute millions of dollars to campaigns to maintain the status quo.

According to the latest statistical study prepared by the **Administrative Office of the Illinois Courts**, plaintiffs' attorneys filed 54,544 new civil cases each seeking over $50,000 in the **Cook County Circuit Court** in 2022—an astounding 91% of 59,925 filings of this kind statewide. Yet, Cook County's 2022 population (5,109,292) is only 40.6% of the state's total (12,582,032).

Based on these statistics, plaintiffs' lawyers filed one lawsuit seeking over $50,000 for every 94 Cook County residents in 2022.

Meanwhile, the circuit court for Illinois's second most populous county, **DuPage County** (920,901), received just 59 new civil filings seeking over $50,000 in 2022 — one lawsuit filed per 15,608 residents. Lake County, the third largest county by population (709,150), had 303 new civil filings seeking over $50,000 in 2022 — one lawsuit filed per 2,340 residents.

Plaintiffs' Lawyers Campaign Contributions

Plaintiffs' lawyers are pouring millions of dollars into state political campaigns to preserve Illinois' favorable civil justice environment. From September 2023 through September 2024, the **Illinois Trial Lawyers Association** PAC raised over $616,000. The PAC has raised over $11.8 million since 1994.

No-Injury Lawsuits

BIPA

Abuse under the state's **Biometric Information Privacy Act** hit a fever pitch in 2023 following landmark liability-expanding rulings by the **Illinois Supreme Court**. 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.

As detailed in the 2023 Judicial Hellholes® report, the **Illinois Supreme Court** issued two rulings that led to a dramatic increase in BIPA filings. First, the 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. This facilitated substantially larger class actions.

Just a few weeks later, the **Illinois Supreme Court** issued 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 is transmitted to a third party, not only upon the first scan and first transmission.

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.**

Companies targeted by BIPA litigation range from large national companies like Flowers.com and Krispy Kreme to local Chicago small businesses. 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.

The Legislature Responds

During the 2024 legislative session, the legislature enacted a bill in direct response to the *White Castle* ruling. **S.B. 2979**, signed by **Governor J.B. Pritzker** in August, limits the number of violations occurring to a single instance, regardless of how many times a business scans or transmits a person's biometric information.

S.B. 2979 marks a good first step towards addressing the series of abuses occurring under BIPA. However, concerns remain as "[e]ven at one statutory recovery per plaintiff, the liability implications for the statute are huge and outsized to any actual harm or injury in almost all conceivable situations," said **Matt Provance of Mayer Brown LLP**. Just look at the $228 million judgment against BNSF in 2022 (which later settled for a mere $75 million). While it amounted to only one recovery per worker, more than 44,000 drivers included in the class were to receive $5.000 in damages.

> ***"[E]ven at one statutory recovery per plaintiff, the liability implications for the statute are huge and outsized to any actual harm or injury in almost all conceivable situations."***
>
> — Matt Provance, Mayer Brown LLP

Some recent BIPA litigation activity in Cook County include:

- **March 2024:** A class action against Target accusing their surveillance systems of violating BIPA by collecting biometric data such as face recognition without the consent of the customers.
- **July 2024:** $2.4 million settlement with Crate & Barrel and its employees. The case involved an alleged BIPA violation stemming from the company's collection of fingerprint/hand/palm data from employees as they clocked in and out of work between July 2013 and March 2024 without written consent. As a result of the settlement, each of the 1,796 class members will receive a payment of about $860. Meanwhile, the attorneys raked in about $847,000 -- about 35% of the total award.

Healthcare BIPA Exception

In late 2023, the **Illinois Supreme Court** ruled that healthcare providers are exempt from BIPA liability based on a plain language reading of the Act. **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**."

Heathcare providers argued that the "or" before information establishes an entire category of information that is not limited to patients. Under this category, they argued that collection, use, and storage of their workers' information is related to the treatment of their patients. The **Illinois Supreme Court** agreed and overturned a lower court decision that found otherwise.

An intermediate appellate court almost immediately restricted the application of this sound ruling. In August 2024, the **First District Appellate Court** upheld a **Cook County Circuit Court** decision and ruled that the patient-in-healthcare-setting exception to BIPA does not apply to an "online try-on" tool for nonprescription glasses. This ruling came about in a case in which a business sells nonprescription glasses online, with a feature allowing potential customers to use their facial geometry to try glasses on virtually before they make a purchase. The lawsuit alleges that collection of that facial geometry without "written, informed consent" violated BIPA.

The appellate court rejected the defendant's argument that the healthcare-setting exception to BIPA applied. "We cannot agree that a person providing their biometric identifiers to obtain any of those products becomes a 'patient in a healthcare setting' under the Act and therefore falls outside of the Act's protections," the appellate court said.

GIPA

As we wait to see the impact of the BIPA legislative reform, the next wave of class action abuse has already arrived. The 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 attempt to exploit GIPA's broad definition of "genetic information" and the availability of substantial statutory damages. **Seyfarth Shaw LLP** reports that over 60 GIPA suits were filed in 2023, and before then only 2 cases were filed under GIPA in the previous 25 years. The statute provides damages between $2,500 and $15,000 for each violation, depending on if the violation is deemed negligent or willful, respectively.

Food and Beverage Litigation

Illinois once again ranked in the Top-4 states for the most food and beverage class action filings in 2023. Only fellow Judicial Hellholes® California, New York and Missouri are home to more. Illinois is a magnet for these types of lawsuits because it has one of the "broadest, most flexible" consumer protection laws which makes it ripe for abuse. The vast majority of these cases are filed in federal court in the **Northern District of Illinois**, which includes Cook County.

Spencer Sheehan, a prolific filer of no-injury consumer class actions in Illinois and elsewhere, slowed down his activity after being held in civil contempt in November of 2023 by a New York federal judge and will likely be even more cautious after a federal judge in Florida imposed $144,047 in sanctions on him in September 2024 for filing frivolous claims. 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…"

More Cases in Judicial Hellholes®?

The Illinois plaintiffs' bar and **Illinois Attorney General Kwame Raoul** are leading an effort to abolish the doctrine of intrastate *forum non conveniens* in Illinois. This doctrine permits a court to transfer a case that is filed in an Illinois county with little or no connection to the allegations to a more appropriate county. This most often occurs when plaintiffs' lawyers file lawsuits in Cook County but their client lives, and the accident or injury occurred, elsewhere. The doctrine is an important check on blatant forum shopping by plaintiffs' attorneys. It also protects the public's interest in deciding local cases locally, and prevents burdening local jurors and courts with cases lacking a tie to their community.

In a case involving the legislature's ability to set a specific venue for deciding lawsuits challenging state laws and regulations, the Attorney General filed a brief with the **Illinois Supreme Court** suggesting that it consider abolishing intrastate *forum non conveniens*. The **Illinois Trial Lawyers Association** then chimed in with an amicus brief urging such action, suggesting that the ability to conduct remote trials renders the doctrine unnecessary, while ignoring the vital public interests that the doctrine continues to serve.

Should the Court accept the plaintiffs' bar's invitation to abolish the doctrine, plaintiffs' lawyers can be expected to file many more cases in Cook County and other plaintiff-friendly Illinois counties.

Nuclear Verdicts®

According to a recent report by the **U.S. Chamber of Commerce**, Illinois ranked 5th nationwide with 64 nuclear verdicts® in personal injury and wrongful death cases between 2013 and 2022. Over $2 billion was awarded during this time. Thirty-nine percent of the state's nuclear verdicts® resulted from medical liability trials — which is nearly double the national average. The paper notes that "all but a handful of Illinois' nuclear verdicts in state courts came from the **Cook County Circuit Court**."

According to another study, Cook County hosted 79% of the state's verdicts over $10 million against corporations between 2009 and 2022.

Asbestos Litigation

Plaintiffs' lawyers filed 95 asbestos cases in Cook County in the one-year period ending July 31, 2024, compared to 71 at the same time last year. This marks a 33.8% increase in Cook County during a period in which asbestos lawsuits nationwide were up 8%. Only St. Clair County, Illinois experienced a larger increase. In 2023, Cook County was in the top-10 (#7) in asbestos lawsuit filings with 156, which was a 41.8% increase from the 110 lawsuits filed in 2022.

A $45 million talc verdict against Johnson & Johnson in Cook County in April 2024 showcased an imbalance in the latitude afforded to plaintiffs' experts compared to those for the defense. The court allowed **Dr. Steven Haber,** serving as the plaintiff's expert, to lecture the jury for four days on topics far outside his expertise as a pulmonologist, including geology and talc mining techniques. **Dr. Haber** admitted to taking "geology courses" just to testify, yet the court permitted him to opine on a wide range of technical subjects. The court wasn't only lax in its gatekeeping functions – it failed in them altogether.

Meanwhile, **Dr. Ed Kuffner**, the company's chief medical officer for consumer health products, was harshly restricted in his testimony despite personal knowledge of key issues. The court prohibited him from discussing the history of the company's talc business, stating that he had "no fricking knowledge" of it. Dr. Kuffner also was prohibited from explaining how J&J addressed talc safety concerns, including his personal investigations and the established safety of J&J's talc, the FDA's 1976 finding that Johnson's baby powder did not contain asbestos, the agency's denial of a citizen's petition seeking a warning label on Johnson's Baby Powder, and evidence of talc safety from a 1994 symposium co-sponsored by the FDA.

Even more concerning, the court shut down testimony from **Dr. Rachel Damico**, a renowned Johns Hopkins pulmonologist and an expert in genetic causes of cancer. **Dr. Damico** was precluded from testifying about hereditary mutations that could have caused the plaintiff's cancer, effectively dismantling the defense's ability to offer alternative causation theories.

In July, the **Cook County Circuit Court** awarded $24 million to family of a janitor who contracted mesothelioma and alleged it was due to exposure while working at an Avon product facility. The verdict included $16 million for shortened life expectancy. Avon argued that the court should have entered a direct verdict in its favor due to the lack of evidence presented that Ramirez even worked at the Avon-owned facility, and because Ramirez could not name a supervisor that he claimed he worked with daily. The company also argued that evidence showed Avon had taken proactive steps to eliminate talc at least a decade before the plaintiff began working at the facility.

Asbestos-Related RICO Case

Simmons Hanly Conroy LLP, a frequent filer of asbestos lawsuits, has been accused of fraud and racketeering in a case filed in federal court for the **Northern District of Illinois.**

A complaint filed by J-M Manufacturing alleges that **Simmons Hanly** has engaged in practices involving "involving perjured testimony, suppressed evidence and baseless claims" to extract settlements from companies they are filing cases against. The complaint also alleges that the law firm uses a strategy when filing cases that involves looking into a client's work history and the companies of products used by the client, then compiling a list of 70 defendants "regardless of whether there is any evidence of exposure to the defendant's asbestos-containing product."

In addition, the complaint indicates that the depositions used by **Simmons Hanly** allegedly involve statements from 30+ years earlier that are difficult to disprove.

Simmons Hanly, headquartered in Illinois with offices in New York, California, Missouri, and Massachusetts, has represented over 6,000 clients in asbestos cases, recovering over $9.3 billion.

Other Litigation Issues

Climate Change

In February 2024, the **City of Chicago** sued oil and gas companies, claiming that the industry falsely advertised their products as safe and promoted their use while knowing of potentially negative environmental effects. In so doing, the City joined other state and local governments attempting to regulate the energy industry through litigation. 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. In May, **Chicago** requested that the federal court in Northern Illinois transfer the litigation back to the **Cook County Circuit Court**, where it was originally filed. As of publication, the motion is pending.

TOP ISSUES

- **Prolific producer of nuclear verdicts®**
- **Plaintiffs' lawyers in pursuit of new litigation jackpot**
- **Hotspot for asbestos litigation**
- **International reputation as plaintiff-friendly jurisdiction**

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Missouri residents pay a "tort tax" of $1,095.44 and 62,082 jobs are lost each year according to a recent study by The Perryman Group. The impact is even greater in St. Louis where residents pay a "tort tax" of $1,475 and 28,836 jobs are lost each year. If the Missouri legislature enacted specific reforms targeting lawsuit abuse, St. Louis would increase its gross product by $3.14 billion.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of St. Louis courts' propensity for liability-expanding decisions and nuclear verdicts® and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping $30.9 million on almost 500,000 advertisements across television, print, radio, digital platforms and outdoor mediums in the St. Louis market.

ST. LOUIS - 2024 - Q1-Q2

Medium	$	#
Spot TV	$6,074,319	78,683
Print	$902,017	156
Radio	$1,878,533	93,676
Digital	$219,310	4,010
Outdoor	$1,706,247	
	$10,780,427	**176,525**

Judges in St. Louis issue plaintiff-friendly rulings and embrace junk science, signaling to plaintiffs' lawyers across the country, and now the globe, that St. Louis courts are open for their business. In pursuit of the next nuclear verdict®, plaintiffs' lawyers flock to St. Louis. The latest litigation targets makers of life-sustaining formula for premature babies. St. Louis courts also remain a hotspot for asbestos lawsuits. Rather than address rampant lawsuit abuse, the Missouri legislature has turned a blind eye and has been complicit in creating an unjust legal system.

Nuclear Verdicts®

Eye-popping verdicts stole the show in the "Show-Me-Your-Lawsuit" state in 2024, but this is indicative of a decades-long problem. In 2016, *Bloomberg* noted that "St. Louis has developed a reputation for 'fast trials, favorable rulings, and big awards' drawing product liability lawsuits of out-of-state plaintiffs to Missouri." Rather than address the issue, it has festered and bogged down St. Louis's economy and job growth.

According to a recent report by the **U.S. Chamber of Commerce,** Missouri ranked in the top-10 for the most nuclear verdicts® in personal injury and wrongful death cases from 2013-2022 with St. Louis accounting for a large percentage of these awards. More than one-third of these verdicts were in product liability cases and almost half of the verdicts included punitive damages.

An additional factor contributing to these massive verdicts is "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. They can even tell jurors how much famous singers, actors, and professional athletes make to establish an anchor. 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.

Big-Rig Collision Results in Big Verdict

In September 2024, a St. Louis jury handed down a $462 million verdict against Wabash National Corp. following a fatal highway collision. The staggering damage award included $450 million in punitive damages, an amount the plaintiffs' lawyer urged the jury to award as representing the amount Wabash allegedly saved by manufacturing trailers with faulty guards for over three decades.

The plaintiffs' car rear-ended a big rig that was stopped in traffic and slid underneath its trailer. The plaintiffs' lawyers argued that the car was able slide underneath the tractor trailer because of a defective Rear Impact Guard (RIG). However, the RIG was in compliance with federal regulatory standards at the time it was built.

The court prevented the jury from hearing crucial evidence including the fact that neither the driver nor passenger was wearing a seatbelt at the time of the crash. Missouri law recognizes the so-called "seatbelt gag-rule," which precludes a jury from hearing such evidence. The unfairness of this law was on full display when the court allowed the plaintiffs' lawyer to argue that the plaintiffs would have survived a crash at the same speed had the truck's rear impact guard worked properly; however, the defendants could not rebut this by pointing to the fact the occupants were not wearing seatbelts.

The court also prevented the jury also from learning that the driver's blood alcohol level was over the legal limit at the time of the accident. The accident occurred in mid-afternoon on a clear and sunny day, so driver impairment could have played a role in causing the crash.

Baby Formula

Plaintiffs' lawyers have launched a dangerous assault on life-sustaining baby formula as they search for the next litigation jackpot. These lawsuits concern specialized preterm products prescribed by NICU doctors, and not the formula available for purchase in retail stores. St. Louis courts are playing a central role in this litigation, which is examined in more detail in a **Closer Look** section.

In July 2024, a nonunanimous St. Louis jury handed down a nearly $500 million verdict against Abbott Laboratories. The award, reached after only a few hours of deliberation following a three-week trial, included $400 million in punitive damages. The plaintiff's lawyer claimed that prescribed, fortified infant formula increases the risk of a life-threatening intestinal disease in preemies called necrotizing enterocolitis (NEC), pinning the blame for a tragic situation on the formula manufacturer.

This litigation relies upon junk science that flies in the face of established medical science and regulatory guidance. The **American Academy of Pediatrics** stated unequivocally in a response to these lawsuits: "Courtrooms are not the best place to determine clinical recommendations for the care of infants." The organization emphasized that special formulas for preterm infants are an essential source of nutrition, prescribed by doctors in neonatal intensive care units. Further, the **Food and Drug Administration (FDA)**, which oversees baby formula regulation, does not require warnings about NEC risk because the science simply doesn't support such claims, and several other public health organizations have cautioned about the detrimental effects the litigation will have on the health of premature babies.

St. Louis Jury Restores Some Sanity Even After Judge Tilts the Playing Field

GOOD NEWS

A second trial against St. Louis Children's Hospital, Abbott Laboratories and Mead Johnson Nutrition Company began in early October. A premature infant developed NEC after consuming cow's milk-based baby formulas manufactured by the defendant. In this instance, the plaintiff argued that the manufacturers promoted the formula to hospitals while withholding information about the risks of NEC from the public and medical providers.

In the midst of trial, the judge, who also oversaw the case above, ruled that the manufacturers could not inform the jury that the **National Institute of Health (NIH), FDA** and **Centers for Disease Control and Prevention (CDC)** jointly issued a statement in October 2024 recognizing that formula is "part of the standard of care" for preterm infants when milk is not available or insufficient, and that there is "no conclusive evidence that preterm infant formula causes NEC." Nor would the court permit them to introduce a recent **NIH** report, authored by a working group of doctors and researchers, finding a lack of scientific evidence supporting such claims. The judge took the extreme step of sanctioning a key member of the defendants' legal team, precluding him from fully participating in the final week of trial. At closing arguments, the plaintiff's lawyer asked the jurors to award $6 billion in punitive damages, on top of $276.9 million in compensatory damages, telling the jury that "the industry is watching."

Despite the judge's concerning decisions that tilted the playing field in favor of the plaintiff, the jury ultimately rejected the junk science and ruled in favor of the defendants.

Asbestos Litigation

St. Louis is one of the most popular jurisdictions in the county to file asbestos lawsuits. In 2023, St. Louis placed sixth in the nation for the number of asbestos lawsuits filed, 168. That level was a 21% rise from the previous year and St. Louis's increase was almost three times the national average (8%).

St. Louis's reputation as a favored court for asbestos litigation continued this year. Midway through 2024, plaintiffs' lawyers had filed 75 asbestos cases in St. Louis. While this is a slight decrease in activity as compared to the same period last year, St. Louis was still in the top-10 (#7) in asbestos lawsuit filings.

St. Louis ranked in the top-3 for most lawsuits filed claiming asbestos exposure caused a person's lung cancer in 2023, thanks in large part two law firms, the **Gori Firm** and **Karst & Von Oiste**, which increased their lawsuit filings by 46% and 35% respectively.

Eighth Circuit Opens Floodgates to International Litigation in St. Louis

In August, the **U.S. Court of Appeals for the Eighth Circuit** issued a decision that will have a monumental impact on Missouri's civil justice system, especially in St. Louis. The **Eighth Circuit** affirmed a lower court's decision to hear a case involving foreign citizens and injuries suffered abroad.

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 from state court to federal district court. Though the allegation that the facility's emissions harmed nearby residents was brought by Peruvian citizens, against a Peruvian company, and based on Peruvian operations subject to Peruvian environmental law, a federal court ruled that it would decide the case, applying Missouri tort law, a decision affirmed by the **Eighth Circuit.**

> ***"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."***
>
> **— The Associated Industries of Missouri**

As a result of this decision, American businesses engaged in legitimate international activity face a risk of liability in U.S. courts. **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 its own environmental and economic development policies. It gives a green light for opportunistic plaintiffs' lawyers to bring foreign suits in U.S. courts, seeking to apply favorable state laws in friendly courts.

Missouri Legislature Creates 'Lawsuit Inferno'

A recent report published by the **American Tort Reform Association** called out the **Missouri Legislature** for the role it has played in making the state, and St. Louis in particular, a "**Lawsuit Inferno**." In its 2024 session, Missouri lawmakers failed to move several reforms needed to address lawsuit abuse. The Missouri legislature's failure to act landed it among some of the worst state legislative bodies in the country.

The reforms that stalled included a bill that would have reduced Missouri's statute of limitations for personal injury lawsuits, which is among the longest in the nation, to be consistent with other states. Another bill would have made state rules governing class actions mirror the federal rules, creating a more predictable and uniform legal environment in the state. A third bill that did not advance would have allowed juries to allocate fault in tort actions among all parties whose actions contributed to a plaintiff's injuries, not just those named as defendants in the lawsuit. This bill would have discouraged lawsuits targeting only businesses viewed as having deep pockets and ensured that defendants are only held responsible for their fair share of damages, creating a more balanced legal environment.

TOP ISSUES

- **Wavering approach to junk science**
- **Expansive premises liability**
- **Creation of innovative ways to sue**

After appearing in the Judicial Hellholes® report for the first time last year, it appears the **Michigan Supreme Court** is ready to become a mainstay. The Court sent mixed signals about junk science, continues to take an expansive approach to premises liability and created innovative new ways for employees to sue their employers.

Expert Evidence Standards

The **Michigan Supreme Court** took a contradictory approach to junk science in 2024. On the one hand, in March 2024, the Court took a positive step by amending **Rule 702 of the Michigan Rules of Evidence** to mirror the newly-amended federal **Rule 702.** The reinforced rule clarifies that a party seeking to introduce expert testimony must demonstrate that the testimony is based on reliable scientific principles and methods and emphasizes the judge's gatekeeping role. On the other hand, the Court issued a ruling that will allow junk science to permeate Michigan courtrooms. In ***Danhoff v. Fahim***, the Court held that "scientific literature is not always required to support an expert's standard-of-care opinion, but that scientific literature is one of the factors that a trial court should consider…" Additionally, the Court held that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of **MRE 702."**

In this instance, the trial court found that a plaintiff's expert's testimony on the standard of care in a medical liability action lacked any foundation in scholarly literature, and as a result, dismissed the case. The **Michigan Court of Appeals** affirmed the dismissal because, under Michigan law, supporting literature is an important factor in whether testimony is admissible, and "it is generally not sufficient to simply point

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Michigan residents pay a "tort tax" of **$1,046** and **97,167** 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 **$10.5 billion**.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of the state courts' propensity for liability-expanding decisions and nuclear verdicts and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$82.15 million** on more than **1.3 million** advertisements across television, print, radio, digital platforms and outdoor mediums.

MICHIGAN 2024 - Q1-Q2

Medium	$	#
Spot TV	$16,328,871	283,662
Print	$288,462	118
Radio	$2,221,945	52,571
Digital	$1,489,850	89,661
Outdoor	$4,528,622	
	$24,857,751	**426,012**

to an expert's experience and background to argue that the expert's opinion is reliable." The **Michigan Supreme Court** reversed the lower courts, however, finding the absence of published literature supporting the expert's position did not preclude the expert's testimony.

The dissent, authored by **Justice Brian Zahra**, noted that the trial court struck the expert's testimony not simply due to a lack of support for it in scientific literature, but because an expert cannot "rely solely on his or her own word to establish reliability." **Judge Zahra** noted that the Michigan statute governing admissibility of expert testimony provides 7 factors to determine whether an expert witness's testimony is reliable (such as whether it is tested, published in a peer reviewed journal, or generally accepted), and that the proposed testimony had met none of these factors.

Specialties

The **Michigan Supreme Court** took a relaxed approach to the state's expert evidence statute when deciding whether an expert witness in a medical liability case must be an expert in the "one most relevant" specialty to be qualified to testify. The Court found that so long as an expert is in the same general speciality as the defendant doctor, it does not matter if they are in different "subspecialities."

In ***Estate of Horn v. Swofford***, the plaintiff submitted to the court an affidavit of merit from a doctor specializing in neuroradiology to support a claim that a diagnostic radiologist misinterpreted his wife's condition from a cranial CT scan, which should have led him to perform brain surgery. The parties disagreed about whether a doctor who spends 90% to 95% of his practice on neuroradiology is qualified to evaluate the care provided by a diagnostic radiologist, who is a generalist. The trial court had excluded the testimony of the neuroradiologist, finding a diagnostic radiologist is the most relevant specialty, but the intermediate appellate court reversed.

The Court reasoned that subspecialities are subsumed by a general specialty under the statute, overturning long-standing precedent. The Court ruled that the precedent was flawed and ignored portions of the statute.

Expansive Approach to Premises Liability

Last year, the **Michigan Supreme Court** overturned a long-standing framework for deciding slip-and-fall cases. The two companion cases involved an individual who slipped on ice while walking from a car into a gas station and a supermarket shopper who fell over a cable that indicated a check-out lane was closed. In both instances, the defendants asked the trial courts to dismiss the case on the basis that a premise owner has no duty to protect guests from dangers that are "open and obvious," a defense long available under Michigan law. In ***Kandil-Elsayed v. F&E Oil, Inc.***, however, the **Michigan Supreme Court** overruled precedent, finding that despite the obvious nature of these hazards, a premises owner still has a duty to protect visitors. Instead of dismissing cases in such circumstances, courts will be required to conduct a trial in which a jury may allocate fault to the plaintiff, reducing his or her damages. From a practical standpoint, this means that it will be nearly impossible for premises owners to have slip-and-fall cases dismissed even when it involves the most obvious hazard, like ice and snow in Michigan.

> ***"Considering the expansion of premises liability occasioned by our decision last term in Kandil-Elsayed v F & E Oil, Inc, now is not the time to recognize a new category of premises-liability claims."***
>
> — Michigan Supreme Court Justice Brian Zahra

Following this decision, in July 2024, the Court further expanded premises liability by ruling that

a condo association can be sued by a member who slipped on an icy sidewalk. Lower courts dismissed the case because the condo association's duty of care is to protect visitors to the property, but the plaintiff was a co-owner of the land. The **Michigan Supreme Court** reversed and overruled precedent, finding that a condominium co-owner is an invitee to which the association owes a duty of care. Writing for the dissent once again, **Justice Zahra** remarked, "Considering the expansion of premises liability occasioned by our decision last term in *Kandil-Elsayed v F & E Oil, Inc*, now is not the time to recognize a new category of premises-liability claims."

Creation of New Ways to Sue

This year the **Michigan Supreme Court** created new pathways for employees to sue their employers, opening the door for entrepreneurial plaintiffs' lawyers to flood the courts with these types of claims.

A New Way to Sue for Wrongful Discharge

First, in ***Stegall v. Resource Technology Corp.***, the Court ruled that terminated employees can sue their employers through a "public-policy cause of action" for wrongful termination rather than follow procedures already set for retaliation claims under applicable workplace safety laws.

In this case, an auto plant worker expressed concerns to his employer about potential asbestos at his job site and threatened to contact federal and state regulators. Two months later, the employee was terminated from his job, at a time in which the automaker was ending production of a vehicle made at that facility, closing down the plant, and transferring and laying off workers. After the worker's termination, he filed a complaint with the **Michigan Occupational Safety and Health Administration (OSHA)**, alleging retaliation for raising safety concerns. The employee then filed a wrongful termination lawsuit. **Michigan OSHA** investigated and found no asbestos at the plant.

The trial court and intermediate appellate court both ruled that a worker who claims retaliation must follow laws in place for that very purpose and that provisions in workplace safety laws provided an employee's exclusive remedies. The **Michigan Supreme Court** reversed, holding that a tort claim for termination in violation of public policy is allowed because it considered those remedies inadequate. **Justice Zahra**, in dissent, criticized the majority for substituting its own remedy for a remedy enacted by federal and state legislatures, and noted that even if a separate wrongful termination could proceed, the defendant had easily shown a legitimate, non-retaliatory reason for the plaintiff's termination – the plant closure. He concluded that the majority is "breathing life into plaintiff's preempted and otherwise meritless claims."

Judicial Activism on Display

In ***Mothering Justice v. Attorney General***, the **Michigan Supreme Court** inappropriately inserted itself into a public policy matter involving the state's employment laws.

In 2018, two laws were proposed that met the ballot initiative requirement under Michigan law called the **Improved**

Workforce Opportunity Wage Act (WOWA) and **Earned Sick Time Act (ESTA)**. Included among the provisions was a private right of action against employers who question or act against an employee's use of sick and overtime hours.

When considering a ballot initiative, the Michigan legislature has three options: (1) adopt the initiative into law as is; (2) reject the measure and it will appear on the ballot; or (3) propose an alternative measure that will then appear on the ballot alongside the original proposal. In the leadup to the 2018 election, the state legislature adopted the initiative as it was written; however, post-election, it amended the Acts to alter several provisions and create exemptions.

Several organizations joined by **Attorney General Dana Nessel** challenged the legislature's constitutional authority to adopt an initiative, then amend it, during the same legislative session.

The **Court of Appeals** rejected the lawsuit, finding that amending an initiative is within the legislature's prerogative to make law. But the **Michigan Supreme Court** reversed, 4-3, deeming the legislative actions unconstitutional. As a result, the original ballot initiatives **WOWA** and **ESTA**, including the provision allowing a private right of action, will go into effect unaltered by the legislative changes.

As aptly put by the dissent written by **Chief Justice Elizabeth Clement**, "as tempting as it might be to step into the breach" and decide whether the initial proposal or amended employment laws should become law, "the Court lacks the power to create restrictions [on the legislature's power to make and amend laws] out of whole cloth."

Case To Watch

A federal court has requested that the **Michigan Supreme Court** decide the constitutionality of the state's limit on noneconomic damages in medical liability cases. In ***Beaubien v. Trivedi***, patient's estate alleged that a doctor negligently failed to detect a brain tumor that ultimately led to his death. At trial, the jury awarded his estate $115,000 in medical expenses and $6.5 million in noneconomic damages, plus $2 million to his wife for loss of consortium. Michigan law limits noneconomic damages in medical liability actions to about $1 million in cases involving permanent, severe injuries and $569,000 in other cases, including this one (a similar inflation-adjusted limit applies in product liability actions). The estate then challenged the cap, arguing it violates the Michigan Constitution's right to jury trial and equal protection clause. Most courts, however, have upheld statutory limits on subjective noneconomic damages, which provide predictability and stability in the civil justice system, and protect access to affordable healthcare. Michigan's intermediate appellate courts have repeatedly found the statutory limit constitutional, but the state supreme court has not decided the issue.

Legislative HeatCheck

The **Michigan Legislature** was put on "***Heat Watch***" by the American Tort Reform Association's Legislative HeatCheck this summer. Michigan's lawmakers landed the state on the "Heat Watch" list due to a major shift following the 2022 elections, which flipped the balance of power in the state legislature. This emboldened the trial bar to push an aggressive liability-expanding agenda.

Several pending bills raised red flags for potential lawsuit abuse. Already, the legislature repealed a law in 2024 that precluded lawsuits alleging that medications are defective when the FDA had approved the product and its labeling.

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1st TIMER

JUDICIAL Hellhole

TOP ISSUES

- **Prejudicial consolidated trials**
- **Junk science**
- **Law shopping**

King County, Washington makes its first ever appearance on the Judicial Hellholes® list thanks to judges' proclivity for unfair group trials, allowing junk science, and substitution of the laws of other states for Washington law when favorable to plaintiffs. The **Washington Supreme Court** has an important opportunity to rein in the lower court and signal to King County that these abuses will not stand.

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Washington state residents pay a "tort tax" of **$2,289.17** (4th highest) and **163,679** jobs are lost each year according to a recent study by The Perryman Group. If the Washington legislature enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **$17.8 billion**.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of Washington courts' propensity for liability-expanding decisions and nuclear verdicts® and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$23.4 million** on more than **460,000** advertisements across television, print, digital platforms and outdoor mediums in Seattle.

Prejudicial Consolidated Trials

Over the past 5 years, King County trials in which parents, teachers, and students alleged their health problems stemmed from exposure to polychlorinated biphenyls (PCBs) from aging fluorescent light fixtures at the Sky Valley Education Center have resulted in over $1.7 billion in damages. The education center installed these lights decades ago, well before PCBs were banned, and Monsanto spinoff Pharmacia has not produced PCBs for a half-century. The companies have disputed the contention that PCB exposure is the source of the plaintiffs' health problems and have indicated that the school disregarded repeated warnings to retrofit the lights.

In these actions, King County courts engaged in the controversial and highly prejudicial practice of holding group trials that each include several plaintiffs. This approach can mislead jurors to believe that if multiple people claim that a business's product or conduct injured them, it is likely to be true. Plaintiffs' lawyers can also use this tactic to hide weak cases among stronger ones or push jurors to set aside doubts about whether exposure tied to a substance or product, and not some other factor, actually caused a particular plaintiff's medical condition. Multi-plaintiff trials not only significantly increase the likelihood of a plaintiff's verdict, but also lead to substantially higher awards. It can also result in juries giving similar awards to plaintiffs with significantly different injuries. The approach sacrifices due process in the name of efficiency.

The latest December 2023 trial, which combined the claims of seven former students and parent volunteers, resulted in an $857 million verdict. The verdict, which was the seventh-highest of any civil case in the nation that year, included an award of $112 million in punitive damages to each plaintiff. This April, the trial court reduced that verdict to a still-massive $438 million, after finding the punitive damage award unconstitutionally excessive. Earlier multi-plaintiff PCB trials in King County resulted in verdicts of $165 million to

six teachers and a custodian in November 2023; $72 million to two plaintiffs but deadlocking on five other plaintiffs in July 2023; $82 million to one of four plaintiffs in December 2022; $275 million to 10 students in October 2022; $62 million to four students, two parents, and another adult in November 2021; and $185 million to three teachers in July 2021. In these cases, the plaintiffs blamed a myriad of health problems on PCB exposure.

At the time of publication of this paper another trial was underway—this one including 15 plaintiffs. In their opening argument, the plaintiffs' lawyers told the King County jury they would ask for $750 million for compensatory damages – $30 million to $50 million per plaintiff – plus punitive damages.

Nuclear Verdicts®

Washington ranked third among states for nuclear verdicts® "per capita" in personal injury and wrongful death cases during a recent ten-year period, according to a **U.S. Chamber of Commerce** study, largely because of verdicts from trials of PCB exposure cases in the **King County Superior Court.** King County's nuclear verdicts® have also come in other areas. This year, for example, trip-and-fall and bicycle accidents trials in King County resulted in awards of $13.1 million and $16 million, respectively.

Junk Science

Another central issue in these cases is the use of "junk science" to establish causation. Plaintiffs' expert **Kevin Coghlan** relied on novel methods to estimate historical PCB concentrations at the educational center. In May 2024, the **Washington Court of Appeals,** in the first of these cases to reach a decision on appeal, reversed the $185 million verdict in ***Erickson v. Pharmacia***. The appellate court found that the trial court should have excluded Mr. Coghlan's testimony because his approach was "novel," "not generally accepted in the scientific community," not used by other scientists, and not supported by "any peer-reviewed literature."

This decision spotlights the critical need for courts to enforce rigorous standards for scientific evidence, especially in cases where speculative models drive damages. The pending appeals of other verdicts in other cases attributing medical conditions to PCB exposure raise similar concerns about the validity of Coghlan's methods. Nevertheless, in the latest trial, **King County Superior Court Judge Michael Ryan** admitted Mr. Coghlan's testimony, despite the *Erickson* ruling, stating that "no one knows" how the Court of Appeals would rule today in a different case.

Law Shopping

Although the plaintiffs' alleged exposure to PCBs occurred in a school located in a Seattle suburb, the King County court applied favorable aspects of Missouri law, rather than Washington law, to the claims.

For example, the **Washington Product Liability Act (WPLA)** includes a statute of repose, a crucial protection limiting liability for old products. This law states that a product seller is not liable for injuries that occur after the product's "useful safe life" has ended. The statute of repose includes a rebuttable presumption that if the harm was caused more than 12 years after delivery, the useful safe life has expired. The plaintiffs, however, argued that Missouri law, which has no statute of repose for product liability claims, should apply since the chemicals at issue were manufactured in Missouri and the manufacturer's principal place of business was in Missouri. The trial court agreed.

In its ruling in ***Erickson***, the **Court of Appeals** reversed, finding the trial court erred in not applying Washington's statute of repose to the lawsuits. The statute of repose, the **Court of Appeals** observed, is "fundamental to the existence of a claim" and protects industries from excessive litigation while preserving

the right of consumers to seek redress for injuries caused by unsafe products. The law provides certainty to product manufacturers and sellers by cutting off long-term liability risks for product-related claims.

In addition, some may question how King County trials are resulting in massive punitive damage awards when punitive damages are not recoverable under Washington law, unless expressly authorized by statute. Since the **WPLA** does not expressly authorize punitive damages, they are not available in product liability claims under Washington law. Yet, the trial court accepted the plaintiffs' invitation to circumvent this restriction and make punitive damages available by applying Missouri law to the claims. While the **Court of Appeals** in ***Erickson*** found that Washington's statute of repose applies, it reached a different conclusion with regard to punitive damages. It found that Missouri's punitive damage law could apply, reasoning that Missouri has a greater interest than Washington in punishing Missouri-based companies if they show indifference or conscious disregard for the safety of others. Still, the appellate court found that Missouri law did not impose a post-sale duty to warn on manufacturers, so punitive damages would not be available on that claim.

The Washington Supreme Court's upcoming review of expert evidence standards, the applicability of the statute of repose, and availability of punitive damages in ***Erickson*** is a critical test of the state's commitment to maintaining a balanced civil justice system.

Expanding Liability for the Criminal Acts of Others

Recent court rulings signal a troubling shift toward expanding duty-of-care obligations in Washington, a trend that may contribute to a rise of litigation targeting entities for the criminal acts of third parties.

Generally, people and businesses have no legal duty to aid or protect others from harm. This general rule also means that that there is no broad legal duty to protect others from the wrongful or criminal conduct of third parties. One exception, however, is when there is a "special relationship" between the actor and the perpetrator or between the actor and the plaintiff/victim.

In a January 2024 decision, the **Washington Supreme Court** considered whether universities owe a special duty to protect students from foreseeable harm by other students. The Court held in that case, ***Barlow v. State of Washington***, that the University had such a duty of care, but limited the duty to prevent on-campus incidents or incidents under the university's control, noting that universities lack the type of extensive control over students typically seen in K-12 settings.

The **U.S. Court of Appeals for the Ninth Circuit** relied on this Washington Supreme Court decision in August 2024, when it ruled that, under Washington law, rideshare companies, such as Uber, have a duty to drivers to use reasonable care when matching them with riders. In ***Drammeh v. Uber Technologies Inc.***, the Court found that the relationship between Uber and its drivers had the "traits of dependence and control" necessary to qualify as a special relationship. Specifically, the majority found that drivers entrust Uber with

their safety because Uber controls "the verification methods of drivers and riders" and "what information to make available to each respective party." As a result, Uber was subject to liability after a carjacker murdered a driver, even when the carjacker requested the ride using a fake account and a burner phone.

Together, ***Barlow*** and ***Drammeh*** illustrate the broader push in Washington to test and expand duty-of-care boundaries, challenging an established limit on liability for the acts of third parties. This trend could affect businesses and other institutions by subjecting them to lawsuits for unanticipated and possibly unavoidable acts of criminals, escalating liability risks for entities operating in King County and beyond.

TOP ISSUES

- **Nuclear verdicts on the rise**
- **Coastal litigation drags on**
- **Louisiana Supreme Court caves to political pressure**

Nuclear verdicts® plague the state's civil justice system, bringing it in line with other Judicial Hellholes®. This year, an auto accident case in a Louisiana case resulted in a $220 million verdict. Meanwhile, the **Louisiana Supreme Court** caved to political pressure from the plaintiffs' bar and discarded established constitutional protections in favor of lawsuits. Public trust in the state's judicial system has been on the decline and this latest action only magnifies this concern. Perennial issues also plague the state's civil justice system - coastal litigation bogs down the state's economy and fallout from "Operation Sideswipe" continues.

Campaign Contributions

Governor Jeff Landry has received significant campaign contributions from Louisiana trial lawyers over the years. He has received more than $700,000 from plaintiffs' lawyers, which is more than former Democratic **Governor John Bel Edwards** received. This is particularly noteworthy because during the 2024 legislative session, his first as governor, **Governor Landry** vetoed much needed legislation that would have prevented plaintiffs, and their attorneys, from receiving a windfall from litigation by basing damages for medical care on inflated list prices that no one ever paid.

The sizeable contributions raise concern over the future prospect of civil justice reforms in the state. Kevin Cunningham of the **Louisiana Legal Reform Coalition** found it particularly concerning that the trial bar's support appears to be tied to promises from Landry that he would act as an ally to trial lawyers if elected. Still, he is hopeful that Landry will support needed checks on excessive liability in the state rather than determine his support for legislation based on donations from plaintiffs' lawyers.

ECONOMIC IMPACT

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Louisiana residents pay a "tort tax" of **$965.22** and **40,562** jobs are lost each year according to a recent study by The Perryman Group. The individual "tort tax" in New Orleans specifically is even more burdensome - **$1,917**. If the Louisiana legislature enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by **$4.4 billion**.

TRIAL LAWYER ADVERTISING DATA

Plaintiffs' lawyers are well aware of Louisiana courts' propensity for liability-expanding decisions and nuclear verdicts® and spend millions of dollars on advertising. During the 18-month period of January 1, 2023 through June 30, 2024, trial lawyers spent an eye-popping **$66.3 million** on more than **1.43 million** advertisements across television, print, digital platforms and outdoor mediums in Louisiana.

MICHIGAN 2024 - Q1-Q2

Medium	$	#
Spot TV	$13,205,013	353,087
Print	$32,680	10
Digital	$377,612	104,436
Outdoor	$7,513,317	
	$21,128,622	**457,533**

Nuclear Verdicts®

Louisiana state courts awarded $409 million in nuclear verdicts® (awards of $10 million or more) against businesses in 2023, according to a study by **Marathon Strategies**. The most frequent recipients of these verdicts in Louisiana over the years are the pharmaceutical, oil and gas, and trucking industries. A separate study by the **U.S. Chamber of Commerce** found that Louisiana placed eighth among the states for the most nuclear verdicts® in personal injury and wrongful death cases in 2023, according to preliminary data.

A recent example occurred in September 2024, when an **Opelousas** jury (**St. Landry Parish**) returned an eye-popping $220 million verdict in a trial stemming from a collision between an ambulance and a pickup truck. The plaintiff, an EMT, was unrestrained in the back of the ambulance at the time of the crash. The other driver, who turned in front of the ambulance, was transporting several electrical line coworkers home from a job. The verdict against the pickup truck driver's employer included noneconomic damages in seven categories totaling $155.5 million.

Court Caves to Political Pressure

In May 2024, the **Louisiana Supreme Court** issued a rare announcement that it would rehear a case it had just decided a few months prior. The initial ruling found unconstitutional a state law that retroactively disregarded the statute of limitations in certain cases. On rehearing, the **Louisiana Supreme Court** vacated its earlier decision, allowing the legislature to revive time-barred claims.

It is highly unusual for a state high court to rehear a case just a few months after deciding it, particularly when one considers there were no errors in the court's understanding of the underlying facts. This extraordinary step, made during a sustained pressure campaign from the legislature and state attorney general, raises concerns about the court's independence and respect for precedent.

In its original 4-3 decision in March 2024, the Court rightly joined courts in other states such as Colorado, Kentucky, and Utah in finding that reviving time-barred claims violates defendants' due process rights. Rehearings typically are reserved to correct factual errors — even in the most horrific cases as was the case in this matter — not to re-argue legal reasoning in the face of political criticism.

Both its original ruling and its June 2024 decision on rehearing recognized that the ending of what Louisiana calls a "prescription period" (more commonly referred to as a statute of limitations) provides defendants with a vested right to be free from claims. However, the new majority found that the legislature can abolish a vested right whenever legislation has a "rational relationship to a legitimate government interest."

While the prior majority had stated that it would not upend "nearly half of a century's jurisprudence that recognizes the unique nature of vested rights associated with liberative prescription," the new majority departed from *stare decisis* and characterized the prior case law as "questionable" and "logically faulty."

In dissent, **Justice James Genovese** expressed concern that the majority had granted the legislature "unbridled authority … to enact legislation which supersedes and tramples our constitution." He also observed that subjecting defendants to lawsuits that expired fifty years earlier after all of the witnesses and documents are likely gone is "tantamount to a violation of due process."

Coastal Litigation

For the past decade, Louisiana courts have had their hands full with coastal litigation. Louisiana parishes have sued more than 200 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 drags 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 a 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 producers drill and extract excess oil that was critical to the war effort.

In December 2023, the **Parish of Cameron** and the **State of Louisiana** reached a "landmark settlement" with BP, Shell and Hilcorp. This is the first case to settle, and **District Court Judge Penelope Richard** issued a protective order to conceal the settlement amounts until all the parties sign off.

Despite this settlement, several cases remain. In May 2024, the **U.S. Court of Appeals for the Fifth Circuit** returned two of the lawsuits to state court for trial. It affirmed the lower court's ruling from October 2022, finding that "just because oil and gas exploration and production operations during World War II were conducted on behalf of a federal war effort, the companies were not 'acting under' a federal officer's direction in their drilling practices and those actions were not 'connected or associated with' orders given by federal officials."

Fall Out From 'Operation Sideswipe' Continues

Fueled by a climate of lawsuit abuse, the high cost of auto insurance has long plagued Louisiana families and businesses.

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 and a second 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. More than 60 individuals have been charged, pleaded guilty, or sentenced for their role in the scheme. Four people pled guilty in early 2024, and unfortunately, two co-conspirators were indicted on charges of murdering an informant who cooperated with the police in their investigation of "Operation Sideswipe."

The Watch List

The Judicial Hellholes® report calls attention to 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.

THE TEXAS COURT OF APPEALS FOR THE FIFTH DISTRICT

In 2024, the **Texas Supreme Court** overturned three noteworthy liability-expanding decisions issued by the **Texas Court of Appeals for the Fifth District** (otherwise known as the Fifth Court). There is a continued need for oversight of this state intermediate appellate court to ensure that it stays in line with Texas precedent and does not expand liability in the state.

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.

While, fortunately, the **Texas Supreme Court** has addressed these erroneous decisions, the Fifth Court's history of erroneous rulings has the practical effect of imposing unnecessary delays and costs for litigants. **ATRF** will continue to keep a watchful eye on the Court and subsequent actions by the Texas Supreme Court to ensure that the Fifth District properly applies Texas law.

Expansive View of Product Liability

Statute of Repose

The **Fifth Court** has shown a propensity to expand liability in seemingly straightforward cases to benefit plaintiffs. One example is the court's ruling in ***Parks v. Ford Motor Company***. In this case, Ford sought to dismiss a product liability action filed 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 understood the "sale" date 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** 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.

Fortunately, in June 2024, the **Texas Supreme Court** reversed this decision. It held that proof regarding the exact date the dealer paid for the vehicle in full is not necessary for establishing the 15-year statute of repose. The opinion cited the **Uniform Commercial Code** as well as common law to determine that sales can be established before payment is made.

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 Firth 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.

Design Defects

In June 2024, the **Texas Supreme Court** overturned another expansive product liability ruling by the Fifth Court. In ***American Honda Motor Co. v. Milburn***, the **Fifth Court** affirmed a $26 million nuclear verdict against the automaker. The plaintiff prevailed despite a Texas statute providing a presumption that products meeting 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.

The **Texas Supreme Court** overturned the Fifth Court's decision and issued a "take nothing" judgment in favor of Honda. It held that Honda was entitled to a presumption of nonliability when the seatbelt system in the vehicle, which the plaintiff claimed to be defective, indisputably complied with applicable **Federal Motor Vehicle Safety Standards**. Additionally, the Court held that "the presumption was not rebutted, as no evidence supports the jury's finding that the federal safety standards failed to adequately protect the public from unreasonable risks of injury."

Procedural Errors on Display

In ***Wade v. Valdetaro***, the **Texas Supreme Court** reversed a Fifth Court decision that deprived a civil defendant of the basic due process right to be properly notified of a trial.

In that case, shareholders sued a former company CEO for breach of fiduciary duty, theft, embezzlement and fraud. The case was initially dismissed for lack of prosecution, but the court later scheduled a bench trial via Zoom. The court mailed notice of the trial to the wrong address, and the defendant did not learn of the trial until a Zoom invitation was emailed on the morning of the trial. He then appeared without counsel or evidence to present. After being berated by the judge due to complaining about the circumstances of the trial, the defendant was hit with a $21 million verdict after just an hour of deliberation.

The **Fifth Court**, instead of making an easy reversal due to a clerical error by the trial court, affirmed the decision.

In August 2024, the **Texas Supreme Court** reversed with clear reprehension towards the lower courts. The **Texas Supreme Court** ruled that the defendant was deprived of due process, as the rule is that "absent an agreement otherwise, notice must be effected not less than 45 days before a first setting." Additionally, under the **Texas Rules of Civil Procedure**, service of notice by mail is complete when a postpaid and "properly addressed" document is deposited in the mail, which had not occurred. Even if a party mistakenly fails to update an address or correct an incorrect address that the court has on file, due process does not allow the court to effectively sanction that party by holding a trial without notice, the **Texas Supreme Court** ruled.

Case to Watch

In September 2024, the **Texas Supreme Court** granted review of the Fifth Court's decision in ***Cadot Restaurant v. Myers***, a case involving the state's Dram Shop liability statute. Here the **Fifth Court** overturned the trial court and held Cadot Restaurant liable for overserving a patron who was involved in a car crash after leaving the establishment. The patron was arrested for driving under the influence of alcohol and had a BAC of .139 at the scene of the crash.

At trial, Cadot testified that they were not aware the patron was intoxicated while at the restaurant and that he did not exhibit any obvious signs. The **Fifth Court** reasoned that the trial court relied too much on Cadot's testimony, finding that the statute does not require evidence that the provider of alcohol witnessed intoxicated behavior for liability under the state statute.

The Fifth Court's decision directly conflicts with a Houston Court of Appeal's ruling in a very similar case, and if allowed to stand, the Fifth Court's ruling would significantly expand liability for establishments that serve any amount of alcohol.

Dishonorable Mentions

This report's **Dishonorable Mentions** generally comprise singularly unsound court decisions, abusive practices 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.

Madison and St. Clair Counties are Plaintiffs' Preferred Jurisdictions for Asbestos Claims

Two Illinois counties – **Madison and St. Clair**, in addition to **Cook County** – have remained hotspots for asbestos claims, attracting plaintiffs from across the country due to their favorable litigation environments. 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.

Madison County

Madison County remains the top jurisdiction for asbestos claims nationwide with 905 lawsuits filed in 2023. Through the first seven months of 2024, there were 483 lawsuit filings and the county held onto the top spot.

St. Clair County

St. Clair County has experienced a significant increase in asbestos claims over the last two years. St. Clair County was the second most popular jurisdiction for plaintiffs' attorneys to file asbestos lawsuits, following Madison County, with 591 filings in 2023 – a 10.5% increase from 2022. St. Clair's increase in asbestos lawsuits filed in 2024 was even more pronounced. Through July 31, 2024, plaintiffs' lawyers filed 389 asbestos claims in St. Clair County, marking a 39.4% increase (294 filings) year over year. This is the most significant increase in the nation's top-10 jurisdictions.

St. Clair County is the most popular county in the country for claims alleging a person's lung cancer stemmed from asbestos exposure. In 2023, plaintiffs' lawyers filed 39% of these lung cancer claims in St. Clair County.

Maryland High Court Rejects Proposed Rule 702 Amendment

The **Maryland Supreme Court** rejected amendments to **Rule 5-702**, the state's expert evidence rule, that would have brought Maryland in line with the federal rule. The newly amended federal **Rule 702** reinforces the critical role judges serve as gatekeepers that prevent junk science from serving as the basis for litigation. This disappointing development stands in stark contrast to other state courts, as mentioned in the **Points of Light** section.

Tennessee: A New Hotspot for Abusive Americans with Disabilities Act Litigation

Tennessee has become a hotspot for claims alleging that some aspect of a business, such as a restaurant or retailer, fails to meet accessibility standards under the **Americans with Disabilities Act (ADA)**. In 2023, Tennessee ranked 7th in the country for these claims with 134 lawsuits filed. Midway through 2024, plaintiffs' lawyers had filed 40 more of these lawsuits in Tennessee, placing it on track to remain in the top 10.

According to a recent report compiled by the **Tennessee Fuel & Convenience Store Association,** a handful of plaintiffs and a single law firm are the driving force behind the significant activity. **Wampler, Carroll, Wilson, and Sanderson**, a Tennessee plaintiffs' firm, has partnered with five serial plaintiffs and filed nearly 200 ADA lawsuits in Tennessee over the past few years.

The law firm is reportedly implementing a "shakedown business model" whereby it hires disabled potential plaintiffs to visit businesses in multiple states across the country, including Tennessee. The lawyers then send those targeted businesses with any level of noncompliance a demand letter with a boilerplate complaint and threatens to sue. These demand letters ask for $10,000 in attorney's fees in exchange for not filing a legal complaint. According to a recent investigative news story, **B.J. Wade** of Memphis, an attorney for Wample, texted an associate, "We have pursued over 4,000 of these cases across the country and in 90% of cases, we have been successful in requiring the property owners to get in compliance with the ADA."

If this statement is accurate, these lawyers have brought in as much as $40 million in attorneys' fees while their clients receive about $200 for each location they visit.

Points of Light

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

States Strengthen Expert Evidence Rules, Stay in Line with Newly Amended Federal Rule 702

State supreme courts in Arizona, Michigan and Ohio amended their states' rules of evidence governing the admissibility of expert testimony to be consistent with the newly amended **Rule 702 of the Federal Rules of Evidence.** Louisiana made the change through legislation in 2024.

The amendments correct widespread misapplication of the rule in which many courts had improperly treated the reliability of an expert's methods and data as going to its weight, rather than its admissibility. As a result, courts that took this approach allowed unreliable and misleading testimony based on faulty data to go to juries. The amendments to **Rule 702** require a party that seeks to introduce expert testimony to demonstrate to the judge that it is "more likely than not" that the testimony meets all of the rule's requirements before it is admitted. The amendment also reminds courts that an expert cannot "make claims that are unsupported by the expert's basis and methodology." This amendment reinforces the role of judges to serve as gatekeepers responsible for keeping junk science out of courtrooms.

Federal Courts Stress Importance of Judicial Gatekeeping Under Newly Amended Rule 702

Following the enactment of amended federal **Rule 702**, a handful of courts threw out junk science that plaintiffs' lawyers offered as the basis for mass torts. The amended rule places additional emphasis on the importance of judicial gatekeeping.

> ***"[]udicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support."***
>
> — Judge Denise Cote, U.S. District Court for the Southern District of New York

Acetaminophen Litigation

One of the first decisions under the newly amended rule, which went into effect December 1, 2023, was entered by **Judge Denise Cote** of the **U.S. District Court for the Southern District of New York**. Judge Cote oversaw ***In re: Acetaminophen- ASD-ADHD Products Liability Litigation***, a multidistrict litigation (MDL) proceeding probing the alleged effects on children of acetaminophen use during pregnancy.

In December 2023, **Judge Cote** demonstrated the gatekeeping her position requires by barring evidence from the plaintiffs' experts. The MDL complaint asserted that maternal use of acetaminophen leads to attention deficit hyperactive disorder and autism spectrum disorder in children. **Judge Cote** underscored the "great public health significance" of the trial, emphasizing the profound consequences for families and communities.

By excluding testimony from the plaintiffs' experts, she highlighted the responsibility of judges as gatekeepers, particularly under the reinforced guidelines of **Rule 702**. Judge Cote's approach extended beyond evaluating experts' qualifications, focusing keenly on methodologies — an additional emphasis under the amended guidelines.

Talc Litigation

In March, **U.S. District Judge Michael Shipp**, the federal judge overseeing over 53,000 talc cases in multidistrict litigation, agreed to rigorously re-examine the plaintiffs' expert testimony under newly amended **Federal Rule of Evidence 702**. He observed that earlier Rule 702 decisions should be reassessed in light of both new science and the "recent changes to Federal Rule of Evidence 702."

While the **American Cancer Society** additionally acknowledges mixed evidence on any link between talc use and ovarian cancer, emphasizing the minimal increase in risk, if any, this litigation still has resulted in multimillion-dollar verdicts.

Paraquat Multidistrict Litigation

In April, **Chief U.S. District Judge Nancy Rosentengel** excluded plaintiffs' junk science in paraquat litigation. **Chief Judge Rosenstengel**, who is overseeing the multidistrict litigation that includes more than 5,000 cases, granted the companies' motion for summary judgment, dismissing four cases that alleged paraquat can cause Parkinson's Disease.

The cases had completed discovery and were ready for trial. However, **Judge Rosenstengel** found that expert testimony from a Cornell University professor must be excluded. She characterized the professor's analysis as "a textbook example of the type of standardless presentation of evidence that courts have cautioned against. His proffered opinion required several methodological contortions and outright violations of the scientific standards he professed to apply."

Additionally, Judge Rosenstengel indicated that the 2023 amendments "emphasized that the proponent bears the burden of demonstrating compliance with **Rule 702** by a preponderance of the evidence, and that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology." She also aptly recognized that one of the reasons behind the amendments was that "courts had erroneously admitted unreliable expert testimony based on the assumption that the jury would properly judge reliability."

Third Circuit Rules That Lawsuit Alleging Product Contained Insufficient Warnings, Despite Federal Approval, Cannot Proceed

In August 2024, the **U.S. Court of Appeals for the Third Circuit** ruled that state tort lawsuits that would require a weedkiller to carry cancer warnings that a federal agency has found unwarranted by science must be dismissed.

The lawsuit, brought by a landscaper, blamed Monsanto's Roundup for his development of non-Hodgkin's lymphoma and claimed the product should have warned of this risk.

Chief Judge Michael Chagares wrote the unanimous opinion for the Third Circuit panel, holding that Pennsylvania tort law claims that would require labeling that is in addition to or different from labeling approved by the EPA is preempted by the **Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)**. In this instance, the **EPA** had reviewed the health risks of the active ingredient in the product, glyphosate, and repeatedly found, based on the scientific consensus, that it is not likely to be carcinogenic.

An infamous **International Agency for Research on Cancer (IARC)** monograph is the foundation for much of the Roundup litigation. The 2015 report, which concluded that glyphosate is "probably carcinogenic," stands in stark contrast to more than 800 scientific studies as well as analyses by the **EPA** and **Health Canada.**

The Third Circuit's commonsense ruling avoids confusion that would result from unnecessary and conflicting warning labels stemming from state failure-to-warn lawsuits. It also allows the appropriate federal regulators to do their job and respects sound science.

Kentucky Court Of Appeals Overturns Problematic Ruling That Helped Land State on Watch List

Kentucky was placed on the Watch List last year due in part to a concerning trial court ruling that resulted in a verdict punishing an employer for investigating and reporting a suspicious surge of disability claims. In May 2024, the **Kentucky Court of Appeals** threw out a multi-million-dollar defamation verdict that followed, requiring a new trial.

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. The trial court sent the case to the jury, but refused to instruct the jury that defamation law includes a "qualified privilege" that generally allows parties with a common interest, such as addressing potentially fraudulent claims, to share information without fear of liability absent a malicious intent. Without this instruction, a **Greenup Circuit Court** jury returned $23 million verdict, including $21.4 million in punitive damages and $1.4 million in compensatory damages.

In May 2024, the **Kentucky Court of Appeals** overturned the verdict. The Court held that the evidence required the trial court to instruct the jury to consider the qualified privilege, as the insurers and licensing boards had a common interest with Dr. Heligman in investigating potential fraud.

Failing to apply this privilege to employers with legitimate suspicions of fraudulent claims would have deterred 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.

Utah Supreme Court Upholds Statute of Repose for Medical Liability Lawsuits

In September 2024, the **Utah Supreme Court** upheld a provision of the **Utah Health Care Malpractice Act** that requires lawsuits against healthcare providers to be filed no more than 4 years after the alleged malpractice, known as a statute of repose.

After a trial court dismissed a plaintiff's claims against a doctor because they were filed ten years after the surgery at issue, her lawyers challenged the constitutionality of the statute of repose under both the Utah and U.S. Constitutions.

The **Utah Supreme Court** rejected the constitutional challenge, finding the legislature adopted the statute of repose, which had been in place since 1976, to address rising malpractice claims, judgments, and settlements that had substantially increased the cost of medical malpractice insurance and health care. The Court recognized that, in the medical liability context, statutes of repose provide a predictable end-date to the risk of lawsuits by eliminating the possibility that, many years after a doctor provides treatment, a patient will allege that he or she only recently discovered a health problem attributed to the earlier care (known as "long tail" liability).

The Court respected the legislature's policymaking authority to draw lines in setting the length of time healthcare providers are exposed to liability. It found the statute of repose is a "reasonable means for achieving a legitimate legislative goal" — protecting the public from rising medical malpractice insurance costs by providing a reasonable time to bring lawsuits "while limiting that time to a specific period for which professional liability insurance premiums can be reasonably and accurately calculated." The Court properly declined the plaintiff's invitation to second-guess the legislature's decision to enact the law or to substitute its own policy views.

The Utah Supreme Court's decision is in the mainstream, as most other state supreme courts have upheld similar laws. Some courts, however, such as the supreme courts of Pennsylvania (2019) and Washington (2023), have struck down statutes of repose in the medical liability context.

Closer Look

The Search for Jackpot Justice – Trial Lawyers Set Sight on New Industry

In America's courtrooms a disturbing trend is unfolding that is threatening the health and lives of the most vulnerable among us: premature infants relying on life-sustaining baby formula.

Trial lawyers, armed with dubious science and driven by the prospect of massive paydays, have zeroed in on baby formula manufacturers, risking yet another public health crisis that could leave parents scrambling. We need only recall the panic and shortages of 2022 to understand the potential impact on newborns and their desperate caretakers as this needless litigation threatens to upend infant food supplies.

Plaintiffs' lawyers in these cases claim that prescribed, fortified infant formula increases the risk of a life-threatening intestinal disease in preemies called necrotizing enterocolitis, pinning the blame for tragic loss on manufacturers of life-sustaining formulas. This misguided litigation potentially jeopardizes a critical nutritional lifeline for at-risk infants.

By allowing the plaintiffs' lawyers to pursue these "failure to warn" consumer protection claims, judges are second-guessing the expertise of doctors, nurses and other health care professionals that have dedicated their careers to protecting some of the most vulnerable. It must be emphasized that these formulas are not available for over-the-counter purchase by parents and caretakers. They are highly specialized products that are prescribed and administered by health care professionals. Unfortunately, courts have rejected the defendants' use of the learned intermediary doctrine for these products, even though they are prescribed and administered by healthcare professionals in an intensive care hospital setting. This defense doctrine protects manufacturers from liability provided "they have adequately warned the prescribing physician as opposed to the patient about the risks inherent in a drug."

Additionally, the products' labels are regulated by the **Food and Drug Administration (FDA).** The FDA does not require warnings about NEC risk because the science simply doesn't support such claims.

What Do the Real Experts Say?

These rulings, along with the evidence on which they are based, fly in the face of established medical science and regulatory guidance.

> ***"Courtrooms are not the best place to determine clinical recommendations for the care of infants."***
>
> –The American Academy of Pediatrics (AAP)

The **American Academy of Pediatrics (AAP)** stated unequivocally in a response to these lawsuits: "Courtrooms are not the best place to determine clinical recommendations for the care of infants." The organization emphasized that special formulas for preterm infants are an essential source of nutrition, prescribed by doctors in neonatal intensive care units. The **NEC Society** echoed these sentiments and cautioned that recent nuclear verdicts® "may prompt ICUs to reconsider their approaches to feeding neonatal patients, but not necessarily in a way that better protects infants from NEC." The NEC Society's statement continued, "Moreover, such litigation may result in unintended harmful consequences for babies and the elimination of potentially beneficial therapy choices."

"Moreover, such litigation may result in unintended harmful consequences for babies and the elimination of potentially beneficial therapy choices."

– The NEC Society

In October, the **FDA, Center for Disease Control (CDC)**, and the **National Institutes of Health (NIH)** together issued a consensus statement concluding that there is no conclusive evidence that preterm infant formulas cause NEC. The agencies also noted that preterm infant formulas are part of the standard of care for premature infants where the supply of human milk is insufficient. The statement stressed the importance of feeding preterm babies "as soon as is medically feasible through whatever appropriate nutritious food source is available."

This statement follows a report published in September by the **NIH's Working Group on NEC**. Like the AAP and NEC Society, the **Working Group** declared that NEC is a multifactorial disease with many associated risk factors. It stated that the best way to prevent the disease is focusing on preventing pre-term birth.

Even plaintiffs' experts agree that removing these products from the market "would be a significant concern for our premature population" and would cause significant public health problems. They also have admitted that they continue to prescribe the formula and that they have not learned anything through the litigation that has impacted their use of products.

Plaintiffs' Lawyers Success In Judicial Hellholes

Unsurprisingly, lawyers peddling junk science related to baby formula safety already are seeing some success finding big payouts with juries in Judicial Hellholes® awarding nuclear verdicts®. In July, a **St. Louis, Missouri**, jury handed down a nearly $500 million verdict against Abbott Laboratories while in March, Mead Johnson was ordered to pay $60 million by a **St. Clair County** jury.

This may be just the tip of the iceberg. Many claims still are pending, with an overwhelming majority in St. Clair and Madison Counties in Illinois — both of which are mainstays in the Judicial Hellholes® report. These jurisdictions, known for plaintiff-friendly rulings, are magnets for speculative litigation based on junk science that puts profit before public health.

Conclusion

The consequences of this legal onslaught could be dire. Formula manufacturers, facing the prospect of crippling liability, may be forced to remove these vital products from the market. There also is the risk of parents of infants in need, stoked by fear, refusing doctor-recommended formula for premature infants.

When faced with litigation based on dubious science, judges must embrace their roles as gatekeepers and prevent junk science from flooding their courts. They should defer to true experts and place public health interests above the profit-seeking interests of the plaintiffs' bar.

The Looming Legal Battle over Plastics

Environmental litigation has been an active area of business for the trial bar in recent years. From climate change litigation to cases alleging PFAS contamination, plaintiffs' lawyers have sought to regulate industries through litigation while simultaneously lining their own pockets. Now, plaintiffs' lawyers are partnering with local and state governments, NGOs and environmental activists to target corporations they allege are responsible for the "plastics pollution crisis."

The trial bar is seeking to represent local and state governments in a concerted effort to shift costs associated with recycling and pollution onto plastic manufacturers and the oil and gas industry. These lawsuits create legal chaos. It may fill government budget gaps and improve the bottom line for trial lawyers, but it does little to help people or solve problems.

The Playbook

Whether it's the tobacco litigation from the 1980's, or the more recent opioid and climate change litigation, the trial lawyer playbook remains the same. Trial lawyers pitch litigation as a way of addressing complex public policy concerns to friendly local and state governments while offering to manage it for them on a contingency fee basis. The trial lawyers convince these governments that litigation will yield the necessary resources to fund solutions and fill state coffers.

Plaintiffs' lawyers actively court governments as "clients" because they understand that bringing lawsuits in the name of a government may provide them with power and leverage not present in ordinary "private" civil litigation. It also entitles them to what are expected to be outsized legal fees in the event of a verdict or a settlement. The incentive for these lawyers is to maximize their fees regardless of what is truly in the public interest.

The problem with this approach is that this is not the courts' intended purpose. The nation's civil justice system, which includes lawsuits brought by local and state governments, exists to resolve disputes – not to perform the functions of legislators and regulators. Broader public policy challenges should be addressed by those entrusted with those responsibilities. They are obliged to serve and protect the public, and they are accountable to us all. By contrast, plaintiffs' lawyers operating on a contingency fee basis are driven by a profit motive.

The Growing Litigation Problem

In September 2024, California's attorney general **Rob Bonta** joined AGs in Connecticut, New York, and Minnesota in filing litigation related to plastics. **Bonta** and a coalition of environmental activist groups, including the Sierra Club, filed a pair of lawsuits against Exxon Mobil Corp., alleging Exxon is responsible for litter across California and the Pacific Ocean due to the production and recyclability of plastic. The California lawsuits claim violations of California's public nuisance, natural resources, false advertising, environmental marketing, and unfair competition laws. The lawsuits attack the company's use of its advanced recycling technologies that recycle plastic waste.

> ***"Instead of suing us, they could have worked with us to fix the problem and keep plastic out of landfills…To date, we've processed more than 60 million pounds of plastic waste into usable raw materials, keeping it out of landfills."***
>
> – A representative for Exxon

A representative for Exxon responded to the lawsuits by saying, "Instead of suing us, they could have worked with us to fix the problem and keep plastic out of landfills…To date, we've processed more than 60 million pounds of plastic waste into usable raw materials, keeping it out of landfills."

An amicus brief filed by the **U.S. Chamber Coalition** in a similar case pending in California argues that cases like these improperly seek a public policy objective – banning plastic – through the courts rather than the legislature. The brief also points out the unproductive nature of imposing liability for costs resulting from litter and the failure to recycle.

The California filing came a few months after the Mayor and the **City of Baltimore** filed a similar lawsuit against Pepsico and The Coca-Cola Company (and a few other companies). The June filing marks one of the first by a municipality. The City is represented by multiple plaintiffs' firms including the **Milberg Firm**, **Napoli Shkolnik** and **Smouse & Mason**. In October, **Los Angeles County** followed in Baltimore's footsteps, and filed suit against Pepsico and The Coca-Cola Company. The County is represented by **Motley Rice LLC**.

This, however, is likely just the tip of the iceberg. **Former Governor Asa Hutchison** has expressed concern about the growing coordinated efforts. "Such litigation, combined with the fact that attorneys general

from across the country and their staffs are continuing to organize for a plastics litigation war show how these efforts appear to be gaining steam."

In September, the Michael Bloomberg-funded **State Energy & Environmental Impact Center at New York University School of Law** held a coordination event titled **Plastics: A Forum on Research & Advocacy** for state attorneys general and other interested parties. Attorneys general from each of the states that have filed litigation spoke as part of the multi-day agenda.

The **State Energy & Environmental Impact Center** at the **New York University School of Law** was established and initially funded in 2017 with a $6 million grant from **Bloomberg Philanthropies**. Its stated mission is to "support state attorneys general in defending and promoting clean energy, climate and environmental laws and policies," including through "direct legal assistance to interested attorneys general to identify and hire NYU Law Fellows who serve as special assistant attorneys general."

The Center is no stranger to being on the forefront of environmental litigation and has been one of the main drivers of climate change litigation by embedding its fellows in state attorneys' general offices. It proposes the idea of embedding its lawyers to a state attorney general or a top aide. If there is interest, the AG's office makes a formal request to the Center and outlines its needs. The Center then farms out the lawyers to work specifically on climate and other environmental issues.

The practice of allowing private interests to pay their way into positions of authority in state government offices does not serve the public interest and raises significant ethical concerns.

Positive Development

New York Attorney General Letitia James' quest to hold Pepsico and its subsidiary Frito-Lay responsible for polluting the Buffalo River and nearby waterways hit a substantial roadblock after her case was thrown out by the **State of New York Supreme Court for Erie County. Judge Emilio Colaiacovo** dismissed the case in October, finding that the attorney general was making "phantom assertions of liability that do nothing to solve" the pollution and recycling problems in Buffalo. He continued, "This is a purely legislative or executive function to ameliorate and the judicial system should not be burdened with predatory lawsuits that seek to impose punishment while searching for a crime."

Here, **Attorney General Letitia James** argued that Pepsico should be held liable for other people failing to properly discard their products, which then accumulated in the Buffalo River and other waterways. She contended that the company had contributed to a public nuisance by polluting the river and engaged in deceptive and misleading statements about the recyclability of their products because, among other factors, the company did not meet internal plastic reduction goals.

> ***"This is a purely legislative or executive function to ameliorate and the judicial system should not be burdened with predatory lawsuits that seek to impose punishment while searching for a crime."***
>
> – Judge Emilio Colaiacovo

The court issued a strong rebuke of the arguments made by the attorney general, pointing to the fact that it was other people that had polluted the waterways, not the company. "As Defendants rightly note, there are recycling bins everywhere along canalside and the other water tributaries… Yet, people continue to litter. Instead of pursuing those who commit the act, the Attorney GeneraI wishes to penalize those who produce the discarded item. This theory has never been adopted by a court in this state or any other."

"Absent the legislature passing a law or the executive branch issuing an order establishing such a theory of liability or imposing restrictions on what type and amount of plastic can be used, this lawsuit is simply policy idealism."

The Search for Litigation Success… but Who Will Benefit?

Experience demonstrates that lawsuits motivated and brought by contingency-fee lawyers on behalf of governmental entities will not solve complex public policy issues and proceeds are diverted for other purposes. Governments and their lawyers point to the "success" of the tobacco litigation from a generation ago as a basis to justify litigation. A closer examination of that experience, however, shows that the tobacco settlement did little for smoking cessation efforts. For example, in FY 2024, states will collect $25.9 billion from the 1998 tobacco settlement and tobacco taxes, but will spend just 2.8 percent of it on prevention and cessation programs. Contingency fee lawsuits will do little to help the victims while lining the pockets of trial lawyers.

There is reason to be skeptical as to whether a significant portion of any sum that a state or local government receives as a result of plastics litigation would actually be spent on projects associated with pollution or instead go to lawyers' fees, unrelated projects, or a state's general fund.

Time for Real Solutions

Former Secretary of Health and Human Services Dr. Tom Price recently laid out where the real focus should be when it comes to plastics and pollution. Rather than drumming up litigation that only serves the profit-seeking interests of the trial bar, he pointed out how leaders should be discussing "the entirety of the science, best practices, and solutions."

He also expressed concern about the impact that litigation could have on public health. "Plastics enable the production of safe, sterile medical devices and packaging, which are essential for preventing infections and ensuring patient safety. They are also used in various health care applications… Additionally, plastic packaging helps maintain the integrity of medications and vaccines during storage and transport, protecting them from contamination and extending shelf life. Banning them could lead to shortages of essential medical supplies that could have serious follow-on effects."

Conclusion

The simple reality is that significant problems arise when states, cities, towns, counties, and other local entities across the country each bring lawsuits seeking money or action on the same issue. The authority to fully resolve the litigation is complicated by the number of entities involved. Competing interests make judicial resolution much more difficult, if not impossible, to achieve. The protracted litigation may delay implementation of programs to actually help resolve the societal ills.

States must ensure that any litigation it initiates serves the public interest and they should combat problems that arise with localities litigation. Major public crises demand a major response by government leaders, but a continued wave of contingency-fee litigation brought by state and local governments is the wrong approach. It won't do much to help victims or solve the crisis, and instead creates lasting problems for the civil justice system.

Hidden Outside Money Pours into Litigation: Third Party Litigation Funding

Civil litigation provides a means of resolving disputes between parties, those named in a lawsuit as plaintiffs and defendants. Common law doctrines traditionally prohibited "strangers" to a lawsuit from meddling in litigation or having a financial interest in the outcome due to the potential for litigation abuse. As those principles have fallen by the wayside, outside investors have poured money into civil litigation. Today, funders include commercial litigation finance companies, hedge funds, businesses, and wealthy individuals. There are even now litigation funders that fund other litigation funders.

Consequences of Hidden Outside Funding

For many, litigation funding is purely about profit, with the goal of maximizing a return on their investment. This infusion of money and risk sharing between contingency-fee lawyers and investors facilitates increasingly speculative claims. Funds are used to pay for TV advertising, social media, and even cold calls to recruit people to file lawsuits. The goal is to pressure a company into a settlement based on the sheer number of lawsuits—an understandable decision when faced with never-ending litigation and a risk that, even if the business prevails in nine out of ten trials, one will result in a nuclear verdict.

In addition, the presence of a funder that is entitled to a significant chunk of any settlement, and may be influencing the litigation, can pose a challenge to resolving litigation for an amount that would otherwise be reasonable to all parties. Conflicts of interest may arise among litigation funders, lawyers, and their clients. Funders, unlike attorneys, have no duty to act in the best interests of the plaintiffs. After taking their shares of a settlement or judgment, attorneys and funders may become the primary beneficiaries of the litigation.

Others may fund litigation for nefarious purposes. This may be a person who is hell-bent on destroying a business, a company that hopes to gain intelligence about a rival or burden a competitor with litigation expenses, or a foreign adversary that seeks to gain sensitive national security information, for example.

Exponential Growth

"Backing lawsuits to get a piece of the outcome has become a multi-billion-dollar, lightly regulated industry," according to *Bloomberg Law*. The amount of outside money flowing in U.S. litigation appears to be exponentially growing. Major dedicated commercial litigation funders alone had more than $15 billion invested in U.S. litigation in 2023. **Burford Capital**, the largest dedicated litigation funder, grew from a $130 million investment fund in 2009 to an investment portfolio of $7.4 billion this year.

From mass tort litigation to intellectual property lawsuits brought by "patent trolls," litigation funding plays a major, but hidden, role in bringing, pursuing, and settling cases. In addition, litigation funders increasingly finance entire caseloads or portfolios of litigation, rather than fund individual cases. For example, portfolio deals accounted for two thirds of new funding commitments for dedicated litigation funders in 2023.

"Our Worst Fears Confirmed"

Over the past year, concerns regarding the pervasiveness of litigation funding, funder control over litigation, and the involvement of foreign actors have all been realized.

Litigation funders, advertisers known as "lead generators," and plaintiffs' attorneys are, in fact, working hand-in-glove to generate mass tort litigation. The **Consumer Attorney Marketing Group's (CAMG)** indicates that rather than fund existing lawsuits, "the funder's capital is used to create a new docket through advertising with CAMG." The firm runs advertisements that generate leads for lawsuits, working directly

with litigation funders and plaintiffs' lawyers. *Bloomberg Law* reports that CAMG's new chief strategy officer **Max Doyle** intends "to focus on expanding its funder program, which CAMG says now accounts for more than half of its business."

While litigation funders often claim they are merely passive investors and that their "clients are free to run their litigations as they see fit," this façade is collapsing. In full public view, **Burford Capital** has attempted to gain full control over antitrust litigation in which it invested approximately $140 million. Burford funded a pair of lawsuits filed by food distributor Sysco Corporation against beef and pork suppliers. The relationship hit a snag when Burford blocked settlement offers that it considered too low, but Sysco considered reasonable. A federal magistrate judge in Minnesota observed that Burford's request to be assigned Sysco's right to pursue the litigation would "allow a financer with no interest in the litigation beyond maximizing profit on its investment to override decisions made by the party that actually brought suit." And the district court judge found in denying the assignment in June 2024, "Sysco and Burford's conduct is precisely the kind of conduct of which courts are wary."

Former employees and clients of **Fortress Investment Group**, which heavily invests in mass tort and patent litigation, note the funder's "hands on" approach to lending money to law firms and other litigation funders. Law firms that take money from Fortress reportedly "have their bank accounts tracked weekly and their cases monitored closely" by the investor. A Fortress managing partner and co-CIO warns, "We see where funds go. If you do something you're not supposed to do, we're gonna be upset."

Patent trolls backed by unseen litigation funders increasingly drive intellectual property litigation. The Chief Judge of federal district court in Delaware, **Colm F. Connolly**, raised concern that a patent monetization firm, **IP Edge LLC**, used "shell" companies to obscure its influence and financial interest in patent infringement cases. In November 2023, he referred the plaintiffs' attorneys involved to the bar for potential disciplinary action for hiding the real parties involved from the court. "I don't believe our courts are casinos where people should just go to profit," he later commented.

Foreign entities are indeed investing in U.S. litigation. A Chinese firm, **Purplevine IP**, has financed intellectual property lawsuits in U.S. courts against Samsung Electronics Co. **Joe Matal**, a former acting director of the US Patent and Trademark Office, commented that disclosure of a litigation funder tied to China "is our worst fears confirmed" because "nothing over there is really independent" of the government. Meanwhile, *Bloomberg Law* exposed that an investment firm connected to Russian oligarchs with ties to **Vladimir Putin** has financed lawsuits in New York and London bankruptcy courts to recover billions embezzled from a Moscow bank, illustrating how litigation funding may be used to evade international sanctions. **Fortress Investment Group**, mentioned earlier, has been acquired by the investment arm of an Abu-Dhabi sovereign wealth fund.

Predatory Consumer Lawsuit Loans

While much of the focus on outside money is understandably on the influx outside money that pays for litigation, there is another form of lawsuit lending that also raises significant concern—predatory consumer loans. A separate industry, akin to payday lenders, offers individual plaintiffs loans, usually while they are awaiting anticipated or all-but-assured settlements. These "pre-settlement" loans, which lenders say average about $2,500 but can be substantially higher amounts, often carry extraordinary interest rates and fees. These loans can make it difficult for plaintiffs to accept a reasonable settlement offer, since they realize that, after their lawyer takes a third and the lender recoups its share plus interest, there will be little or nothing left.

Victims of these predatory arrangements have included professional football players, 9/11 first responders, and veterans, as well as those who bring common slip-and-fall and auto accident claims. The cash-for-lawsuits industry, in many states, is unregulated. Lenders do not consider their products "loans" subject to ordinary consumer lending laws and usury prohibitions because a plaintiff who does not receive a settlement or judgment typically does not have an obligation to repay the money. Since these arrangements

are often not disclosed, courts and the parties may not know of a lender's predatory practices or a hidden obstacle to settlement.

Slow Moving Progress at the Federal Level

While some courts have taken steps to require disclosure of arrangements in which outside parties that have an interest in the litigation, the federal judiciary has slow rolled the issue for over a decade as the industry has vastly expanded. Finally, in October 2024, the **Federal Rules Advisory Committee** formed a subcommittee to focus on the need for a rule requiring disclosure in all federal court cases.

The move came after over 120 companies, in a wide range of industries, submitted a letter pleading for judicial action to ensure that courts and parties are aware of who is backing, controlling, or stand to benefit from, litigation. **Lawyers for Civil Justice** and the **U.S. Chamber Institute of Legal Reform** also sent a rules suggestion to the **Advisory Committee** showing that developments over the three years since the Committee last discussed the issue show the need for action.

Legislators have also introduced bills in Congress that would require disclosure of third party litigation funding and address the potential for foreign manipulation of the judicial system. These proposals have not yet advanced.

Progress in the States

Four states have enacted legislation addressing third party litigation funding over the past two years.

Montana set the standard in 2023 by passing the comprehensive **Litigation Financing Transparency and Consumer Protection Act (S.B. 269)** with unanimous support. The Montana law not only provides for disclosure of litigation financing contracts in any civil action to the court and other parties, it requires litigation financers to register with the Secretary of State. The new law also prohibits a litigation financer from attempting to influence litigation or settlements, in addition to banning other practices of concern, such as paying or accepting referral fees or commissions. In addition, the law caps the percentage that a litigation funder may recover from any award or settlement at 25%. Montana's law also applies to consumer lawsuits loans, prohibiting lenders from charging rates above usury levels.

In 2024, **West Virginia** extended safeguards the state had adopted for consumer lawsuit lending to all forms of third party litigation funding. That legislation **(S.B. 850)** will require automatic disclosure of litigation funding agreements to other parties and prohibit funders from attempting to influence the litigation or its resolution, as well as from engaging in other practices that present conflicts of interest. The West Virginia law also keeps an 18% cap on the annual fee that consumer lawsuit lenders may charge.

Indiana took a narrower approach in passing legislation providing that litigation funding agreements are discoverable. That law **(H.B. 1160)**, like Montana and West Virginia, also includes helpful provisions that preclude funders influencing the litigation or settlement. In addition, the Indiana law prohibits a party from disclosing documents or information subject to a court order to seal or protect with a commercial litigation financier. Finally, the Indiana law bars any "foreign entity of concern" from directly or indirectly funding litigation.

The final state to recently address TPLF, **Louisiana**, enacted a law **(S.B. 355)** that also focuses on foreign litigation funding concerns. Under this law, foreign funders must file a report with the attorney general, along with a copy of the funding agreement, when they have a right to receive payment based on the outcome of the litigation or they have or are entitled to receive proprietary information or information affecting national security interests. The Louisiana law ensures that the legislature remains aware of developments in this area by requiring the attorney general to submit an annual report on foreign involvement in litigation financing. In addition, the law prohibits all funders from influencing the litigation or settlement. Like Indiana, the Louisiana law provides that litigation financing agreements are subject to disclosure in discovery.

Some state judiciaries are also considering amending their rules to require TPLF disclosure, a move that several federal courts and judges have taken. While **New Jersey's Supreme Court Civil Practice Committee** issued a disappointing report that declined to take action on TPLF disclosure in January 2024, citing "the need for further development through experience in this area," in July, **Texas Supreme Court Chief Justice Nathan Hecht** directed the state's Supreme Court Advisory Committee to consider whether the Court should adopt rules in connection with TPLF, and draft any recommended rules.

This progress in ensuring that, at the very least, courts and parties are aware of the presence of outside funders in litigation, and placing checks on conflicts of interest, is expected to continue in 2025.

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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