



ATR  
FOUNDATION



***JUDICIAL  
HELLHOLES<sup>®</sup>***  
**2013/2014**

In dissent from the West Virginia Supreme Court of Appeals' 3-2 decision in a liability-expanding slip-and-fall case, *Hersh v. E.T. Enterprises* (2013), asserting that the majority had ***"saddled property owners with the impossible burden of making their premises 'injury proof' for persons who either refuse or are inexplicably incapable of taking personal responsibility for their own safety. . . . Ordinary homeowners will pay the highest price for the majority's pandering to persons who ignore the risk associated with open and obvious hazards that ordinary, hard-working citizens encounter every day and invariably utilize their common sense and good judgment to avoid. . . . It is decisions like this that have given this state the unfortunate reputation of being a judicial hellhole."*** —Justice Allen H. Loughry II

***"The breathtaking stupidity of this verdict would be comical if it didn't have such costly ramifications for every resident of this valley."*** —The *Las Vegas Review-Journal*, April 15, 2013, in its criticism of a \$524 million jury award, effectively punishing an innocent health insurance provider for the criminal negligence of a clinic doctor and his staff, after Clark County District Judge Timothy C. Williams sided with personal injury lawyers and kept from jurors mountains of exculpatory evidence.

***"There is an astonishing irony in the line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the expense of medical malpractice litigation and grounds that condemnation on the purpose of a statute expressly designed to limit the expense of medical malpractice litigation. . . . The public policy that animates the court's decision here is an unprecedented judicial policy that contravenes the declared objective of the Legislature."*** —Florida Supreme Court Justice Charles Canady, dissenting, and joined by Chief Justice Ricky Polston, in *Franks v. Bowers* (2013), which invalidated a medical liability arbitration agreement freely entered into by a patient and doctor prior to a surgical procedure.

# CONTENTS

---

<b>PREFACE</b> .....	2
<b>EXECUTIVE SUMMARY</b> .....	3
<b>JUDICIAL HELLHOLES</b>	
California.....	7
Louisiana.....	11
New York City.....	15
West Virginia.....	19
Madison & St. Clair Counties, Illinois.....	22
South Florida.....	24
<b>WATCH LIST</b>	
Cook County, Illinois.....	28
Baltimore, Maryland.....	30
Philadelphia, Pennsylvania.....	33
Newport News, Virginia.....	35
New Hampshire.....	36
City of St. Louis, Missouri.....	37
Clark County, Nevada.....	38
Jones County, Mississippi.....	40
Spartanburg County, South Carolina.....	40
Atlantic County, New Jersey.....	41
<b>DISHONORABLE MENTIONS</b>	
Oklahoma Supreme Court Nullifies Comprehensive Tort Reform Law.....	43
Alabama Supreme Court Imposes ‘Innovator Liability’.....	43
Florida Supreme Court Invalidates Doctor-Patient Arbitration Agreement.....	44
Illinois Appellate Decisions Add to High Workers’ Comp Costs.....	44
Massachusetts High Court Absurdly Expands ‘Consumer Protection’ Law.....	45
Minnesota Court Of Appeals Creates New Right to Sue.....	46
New Jersey Appellate Court Invites Claims Against Texters.....	47
<b>POINTS OF LIGHT</b>	
<b>IN THE COURTS</b> .....	48
Colorado Supreme Court Instructs Trial Courts to Rein in Discovery.....	48
Idaho Justices Uphold ‘Vexatious Litigant’ Rule.....	48
Illinois Supreme Court Strikes Blow Against Forum Shopping.....	49
Maryland Court of Appeals Retains Contributory Negligence Defense.....	49
New Jersey Supreme Court Strengthens Medical-Expert Standard.....	50
Colorado and Oklahoma Protect Consumers from Lawsuit Lenders.....	50
U.S. Fifth Circuit Upholds Mississippi’s Limit on Noneconomic Damages.....	51
<b>IN THE LEGISLATURES</b>	
Fourteen States Enacted Positive, Significant Civil Justice Reforms.....	52
<b>ATTORNEY GENERAL ACTIONS</b> .....	53
State AGs Crackdown on ‘Patent Trolls’.....	53
West Virginia AG Adopts Transparency in Hiring Of Outside Counsel.....	54
<b>SPECIAL SECTION</b>	
Plaintiffs’ Lawyers Try To Keep Class Actions in Judicial Hellholes.....	55
<b>THE MAKING OF A JUDICIAL HELLHOLE</b> .....	59

# PREFACE

---

Since 2002 the American Tort Reform Association's (ATRA) *Judicial Hellholes*<sup>®</sup> program has built on the American Tort Reform Foundation's (ATRF) annual report of the same name, documenting developments in **places where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner**, generally against defendants. More recently the lawsuit industry has begun aggressively lobbying for *legislative* and *regulatory* expansions of liability, as well, so Judicial Hellholes reporting has evolved to include such law- and rule-making activity, much of which can affect the fairness of a state's lawsuit climate as readily as judicial actions.

Though entire states are occasionally cited as Hellholes, specific counties or courts in a given state more typically warrant such citations. And importantly, jurisdictions singled out by Judicial Hellholes reporting are not the *only* Judicial Hellholes in the United States; they are simply among the *worst*.

Judicial Hellholes reports compile the most significant court rulings and legislative actions over the course of the year as documented in real-time [online](#). The report also reflects feedback gathered from ATRA members and other firsthand sources. Because the program has become widely known, ATRA also continually receives tips and additional information, which ATRF then researches independently through publicly available court documents, judicial branch statistics, press accounts, and various studies.

The Judicial Hellholes program considers only civil litigation; it does not reflect in any way on the criminal justice system.

## ABOUT THE AMERICAN TORT REFORM FOUNDATION

---

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

*Judicial Hellholes is a registered trademark of ATRA being used under license by ATRF.*

# EXECUTIVE SUMMARY

---

## JUDICIAL HELLHOLES<sup>®</sup> 2013/2014

- 1 CALIFORNIA
- 2 LOUISIANA
- 3 NEW YORK CITY
- 4 WEST VIRGINIA
- 5 MADISON & ST. CLAIR COUNTIES, ILLINOIS
- 6 SOUTH FLORIDA

## JUDICIAL HELLHOLES 2013/2014

The 2013-2014 report shines its brightest spotlight on six areas of the country that have developed reputations as **Judicial Hellholes**:

**#1 CALIFORNIA** sits atop the Judicial Hellholes rankings once again, as average Californians feel the pinch of the he-sues-she-sues-everyone-sues litigation climate. The food industry is the latest target of plaintiffs' lawyers who seek to take advantage of the state's plaintiff-friendly consumer protection laws and a federal court's perceived receptivity to such lawsuits. A half-hearted legislative reform did little to stem the tide of disability-access lawsuits, brought by a cadre of professional plaintiffs and profiteering lawyers, which has shuttered small businesses. Asbestos litigation continues to migrate from reform states into California's permissive courts. And even after other state courts

rejected "public nuisance" lawsuits against companies that formerly made lead paint, personal injury lawyers representing 10 local governments still persist with such a claim, pending before a California judge.

**#2 LOUISIANA** rockets up the Judicial Hellholes list after the state's high court gave new life to abusive "legacy lawsuits" that threaten the state's onshore oil and gas production. A levee board and two parishes, aided by private lawyers, also seek money from energy companies for shoreline restoration projects that are not in line with the state's Master Plan. Despite its efforts to be a good corporate citizen in the wake of the Deepwater Horizon oil spill, BP is being fleeced by "fictitious" claims. And state Attorney General James "Buddy" Caldwell continues to offer lucrative legal work to his friends and political supporters without open bidding or oversight.

**#3 NEW YORK CITY**'s litigation climate grows more costly for taxpayers, consumers, those seeking health care and the unemployed. But the man in charge of the New York State Assembly moonlights for a powerful personal injury law firm and is determined to kill civil justice reform proposals, such as amendments to the state's antiquated "scaffold law" that drives construction insurance costs through the roof. Meanwhile, the New York City Asbestos Litigation docket, known as NYCAL, is moving in the opposition direction of courts in other states, providing unfair procedural advantages to plaintiffs' lawyers. The judge overseeing the asbestos docket is currently considering a reintroduction of punitive damages, which would deplete resources available to future claimants and make cases more difficult to settle. And even a Long Island congresswoman has filed a questionable asbestos claim, while state lawmakers/lawyers resist disclosure of their conflicts of interest.

**#4 WEST VIRGINIA**'s sole appellate court expanded liability again this year by imposing a new duty on property owners' to protect guests from even the most open and obvious of hazards. The move comes after the court allowed a punitive damages award based largely on the amount of the plaintiff's attorney's fees – a move that amounted to punishing the defendant for defending itself in court. The state's new attorney general has undertaken positive ethics reforms, but a court ruling that expanded the office's power to hire contingency-fee lawyers could

make for more trouble down the road. And Mountain State courts continue to circumvent the workers' compensation system, issue excessive verdicts, and welcome questionable asbestos litigation.

**#5 MADISON COUNTY, ILLINOIS** remains the nation's epicenter for asbestos litigation, with about one in every four asbestos cases across the U.S. filed there. The county is experiencing a significant uptick in lawsuits by people with lung cancer, which likely was not caused by asbestos exposure. Madison County's neighbor, **ST. CLAIR COUNTY**, has not only seen a similar increase in lung cancer cases, but is attracting lawsuits against drug makers. Some of the cases are filed on behalf of groups of dozens of plaintiffs, a technique designed to skirt the "mass action" threshold of the Class Action Fairness Act (CAFA). CAFA made it appropriately easier for defendants to have large, multi-state lawsuits decided in a neutral federal court rather than a Judicial Hellhole.

**#6 SOUTH FLORIDA** may be known for sunny weather, but the outlook is always cloudy for its residents and insurers, who face higher costs thanks to the excessive liability climate. A broken bad-faith law incentivizes plaintiffs' lawyers to delay or obstruct settlement offers by insurers in order to pursue a large payday by alleging the insurer failed to settle claims in good faith. South Florida's personal injury attorneys also have developed methods to inflate damages for medical expenses by hiding actual costs or seeking recovery for unnecessary procedures. And perhaps learning from colleagues in California, South Florida plaintiffs' lawyers are bringing more disability-access lawsuits against small businesses, too.

## WATCH LIST

Beyond the Judicial Hellholes, this report calls attention to 10 additional jurisdictions that bear watching due to their histories of abusive litigation or troubling developments. **Watch List** jurisdictions fall on the cusp – they may drop into the Hellholes abyss or rise to the promise of Equal Justice Under Law. The unusually large number of Watch List jurisdictions relative to full-blown Judicial Hellholes shows progress. As the public and policy-makers, learn more about the negative economic effects of poorly balanced civil courts, they are more likely to undertake reforms before their jurisdictions warrant designation among the Judicial Hellholes.

**COOK COUNTY, ILLINOIS** is viewed as one of the most inhospitable places for a business to face a lawsuit in the country. It could get worse, following a court ruling that lays a welcome mat for product liability lawsuits from around the state, a worrisome development for any company whose goods land on shelves in Illinois. And Chicago itself is routinely targeted by plaintiffs looking for an easy settlement – a culture of lawsuit abuse that has cost the city \$192 million since 2012.

**THE CITY OF BALTIMORE, MARYLAND** teeters on the cusp this year as some gains were made when a trial court denied a powerful plaintiff firm's attempt to consolidate 13,000 unrelated asbestos cases and the state's high court resisted several plaintiff lawyers' attempts to expand liability. But the continuing manipulation of asbestos trust fund claims and lawsuits demonstrate how plaintiffs' attorneys take advantage of a playing field that remains tilted in their favor.

**PHILADELPHIA, PENNSYLVANIA** has improved its procedures for mass tort litigation and the state now more fairly allocates damages based on a party's responsibility for an injury. Cases before the state's high court, however,

**COOK COUNTY, ILLINOIS**  
**CITY OF BALTIMORE, MARYLAND**  
**PHILADELPHIA, PENNSYLVANIA**  
**NEWPORT NEWS, VIRGINIA**  
**NEW HAMPSHIRE**  
**CITY OF ST. LOUIS, MISSOURI**  
**CLARK COUNTY, NEVADA**  
**JONES COUNTY, MISSISSIPPI**  
**SPARTANBURG, SOUTH CAROLINA**  
**ATLANTIC COUNTY, NEW JERSEY**

could change the way the state handles class actions, product liability, and forum shopping for better or worse. The state legislature's consideration of proposals that would increase liability and litigation in the state also warrants close monitoring.

**NEWPORT NEWS, VIRGINIA** stands out among the most plaintiff-friendly jurisdictions for asbestos cases in the country, despite Virginia's generally conservative tort jurisprudence and recent reforms. The court has set a low bar for scientific reliability of expert testimony, relaxed causation standards, hidden from juries what the plaintiff's employer knew about the health hazards of asbestos, and prevented product makers from asserting widely-accepted defenses.

**NEW HAMPSHIRE** is facing a messy situation, and it is not in the groundwater, but in the legal system. The state's liability environment is awash with plaintiff-friendly rulings, contingency-fee lawyers, and legislators looking to use a record \$236 million verdict as a windfall to fatten state coffers, instead of the environmental cleanup for which it was intended.

**CITY OF ST. LOUIS, MISSOURI** is becoming a favored location for mass tort cases, with courts permitting lawyers to combine multiple plaintiffs in a single lawsuit. That, along with a recent record-setting punitive damages award and a liability-expanding supreme court, have businesses operating in the region worried.

**CLARK COUNTY, NEVADA** was declared the "undisputed jackpot justice capital of the world" after its court delivered another \$500 million verdict in April, the latest in a string of extraordinary awards stemming from a hepatitis C outbreak. Though the doctor behind the clinic outbreak was criminally sentenced to 18 years to life, civil cases have respectively pinned hundreds of millions of dollars in liability on an innocent drug maker and distributor, and, most recently, a health insurer. The state attorney general's use of out-of-state contingency-fee lawyers to sue a mortgage lender in Clark County is pending before the Nevada Supreme Court. And the high court adopted a controversial and expansive premises liability standard that could prove costly for businesses in Clark County's Las Vegas and throughout the state.

**JONES COUNTY, MISSISSIPPI** is a last bastion for silica lawsuits, which have dried up in other, more reasonable jurisdictions following a federal judge's fraud investigation in 2005. But in Jones County, where a local judge recently reversed a defense verdict, going to trial is a risky bet for defendants in product-liability cases.

**SPARTANBURG, SOUTH CAROLINA** is the place of choice for contingency-fee lawyers who use their home field advantage to sue pharmaceutical companies on behalf of the state.

**ATLANTIC COUNTY, NEW JERSEY** remains still a battleground for pharmaceutical companies who face an uphill slog against a judge they say is biased. New Jersey's highest court is poised to rule on that question of bias.

## DISHONORABLE MENTIONS

Dishonorable Mentions, which highlight singularly unsound court decisions, go to the:

- **Oklahoma Supreme Court** for nullifying a comprehensive tort reform law passed in 2009, costing the state needless time and money as the legislature was forced to reconvene and re-enact each provision of the law separately;
- **Alabama Supreme Court** for being the first and only state supreme court to impose so-called "innovator liability" on a drug company for generic products it did not make or sell;
- **Florida Supreme Court** for invalidating an arbitration agreement governing medical care disputes;
- **Illinois appellate courts** for expanding workers' compensation liability beyond its intended scope and providing excessive compensation;
- **Massachusetts Supreme Judicial Court** for allowing a trial judge to misuse the state's consumer protection law to award triple damages against a small business, even though a jury found the business's owners not responsible for the harm;

- **Minnesota Court of Appeals** for using the state’s Consumer Fraud Act to create a new private right to sue when the legislature explicitly chose not to authorize such a right; and
- **New Jersey’s Superior Court Appellate Division** for ruling that a person who sends distracting text messages to someone who is driving may be liable if there is an accident.

## POINTS OF LIGHT

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

- **Colorado Supreme Court** for instructing trial courts to play an active role in reining in overly broad discovery;
- **Idaho Supreme Court** for unanimously standing against “vexatious litigants”;
- **Illinois Supreme Court** for striking a blow against the filing of asbestos cases with no connection to the state in its Judicial Hellholes;
- **Maryland Court of Appeals** for retaining a longstanding rule that a defendant is not liable when a plaintiff’s own actions contributed to his or her injury;
- **New Jersey Supreme Court** for strengthening the standard for expert testimony in medical liability lawsuits;
- **Colorado Court of Appeals** and **Oklahoma’s legislature** and **governor** for protecting consumers and their states’ civil justice systems from abusive third-party financing of lawsuits; and
- **U.S. Court of Appeals for the Fifth Circuit** for upholding Mississippi’s \$1 million limit on noneconomic damages in general personal injury cases.

In addition to these significant court rulings, **legislatures** in fourteen states enacted significant, positive civil justice reforms, including Alabama, Arizona, Florida, Louisiana, Montana, New Hampshire, New Jersey, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Virginia and Wisconsin.

Although this report often criticizes **state attorneys general**, particularly with respect to the hiring of private-sector lawyers to represent their states on a contingency-fee basis, they also deserve recognition for steps they take to improve the civil justice system. Accordingly, this year’s report praises **West Virginia Attorney General Patrick Morrisey**’s new transparency policy for hiring outside counsel, which provides a stark break from the practices of his predecessor. It also applauds the actions of the AGs of Vermont, Nebraska, and Massachusetts for cracking down on abusive patent litigation.

## SPECIAL FEATURE

This year’s report highlights troubling attempts by plaintiffs’ lawyers to circumvent the federal Class Action Fairness Act (CAFA) by keeping massive, multi-state lawsuits in Judicial Hellholes, rather than having them heard in neutral federal courts.



# JUDICIAL HELLHOLES

---

## #1 CALIFORNIA

With a legislature that is seemingly run by and for personal injury lawyers and a wildly permissive judiciary, California remains ignominiously atop the Judicial Hellholes list for a second consecutive year. The once-Golden State continues to be a breeding ground for consumer class actions, disability-access lawsuits and asbestos claims, while also serving as something of a last-stand for a stubborn nuisance of a liability theory. Understandably then, *Chief Executive* magazine's annual survey of the nation's CEOs, the [2013 Best and Worst States for Business](#), ranked California at the very bottom. Not surprisingly, the state's unemployment rate is one of the nation's highest ([8.7% in October 2013](#)) as businesses flee high taxes, stifling regulation and unsurpassed litigiousness. As Tom Scott, executive director of California Citizens Against Lawsuit Abuse, wrote in an [online column](#), though California's litigation climate may not have been the only issue on the minds of CEOs when they responded to the survey, "The legal climate is as critical to whether a business stays in a state or relocates" because "a single abusive lawsuit can cost a company tremendously."



California's addiction to lawsuits claims average residents as victims, too. The litigation system there effectively imposed a \$33.5 billion hidden tax – or \$883 per resident – just for the costs of lawsuits settled thus far in 2013, [reported](#) *Orange County Register* columnist Joseph Perkins. "Most California residents are blissfully unaware of the tremendous toll lawsuit abuse has on the state," he observed.

Perkins pins California's poor reputation, in part, on former class-action kingpin Bill Lerach, whose seaside La Jolla Farms mansion and revoked bar membership are testimony to both the profitability and unscrupulousness of California's lawsuit industry. Lerach shows no remorse after pleading [guilty](#) for his role in concealing lucrative kickbacks that his former law firm gave to individuals for serving as on-call plaintiffs in its storied securities litigation racket. He [told](#) the *Wall Street Journal*, "I'm proud of the work we did," even after he was disbarred, sentenced to two years in prison, and ordered to pay an \$8 million penalty.

### 'FOOD COURT' ATTRACTS PREPOSTEROUS CLASS ACTIONS

Over the past two years, plaintiffs' lawyers aspiring to their own seaside mansions have filed a surge of consumer class actions targeting what they have labeled as "Big Food." Some of these claims are brought by veterans of lawsuits against the tobacco industry who are looking for the [next deep pocket](#) to sue. About a dozen plaintiffs' law firms have taken to the courts with [gusto](#), filing about 75 class action lawsuits between them in the past few years. By one [count](#), which includes filings from additional firms, more than 100 consumer class actions were filed against food makers in 2012 alone, five times the number filed four years earlier. Rarely has there been a week in 2013 without a report of another class action filed against a food maker. In some instances, the lawyers bringing the cases do not even bother to find new clients – they recycle the same individuals as lead plaintiffs, over and over again, in lawsuits involving different manufacturers and products.

California is the epicenter of this litigation due to its plaintiff-friendly consumer laws, large population, and the U.S. District Court for the Northern District of California's growing reputation for receptivity to such claims. Some also point to the federal Ninth Circuit Court of Appeals' [willingness](#) both to uphold questionable class certifications and be quite lenient when it comes to requiring consumers to show they actually relied on allegedly misleading conduct when deciding to purchase a given product. The Northern District of California, located in

San Francisco, has earned the derisive moniker of “[the food court](#),” since it hosts more food-marketing and food-labeling lawsuits than any other federal court.

Arnold & Porter’s Angel Garganta [says](#) defense of food clients now represents the overwhelming majority of his practice. “I call it greener pastures,” he says. “The asbestos litigation has pretty much dried up (in San Francisco). Tobacco – the global settlement is done. Securities class actions are not what they used to be.” So “[t]he plaintiffs’ bar has just been looking around for other targets.”

California consumer protection laws are loosely written so as to provide judges with the latitude to adjudicate and regulate from the bench as they see fit. Opportunistic plaintiffs’ attorneys have taken advantage of these broad laws to challenge advertising terms for which there is no government-approved definition, such as ingredients that qualify as “all natural.” They often seek damages for minor technical violations of labeling regulations, too, such as the font size used. This litigation only serves to make plaintiffs’ lawyers richer while it actually hurts consumers – especially disadvantaged consumers – as litigation costs are invariably passed on to them in the form of higher food prices.

For example, plaintiffs’ lawyers filed several cases over the past 15 months against companies like Chobani, Trader Joe’s and WhiteWave, which sells Horizon Organic dairy products and Silk brand products. These lawsuits claim that the companies use the term “evaporated cane juice” instead of “dried sugar cane syrup” or “sugar” to make consumers believe that there is no sugar in their product. As [pointed out](#) by WhiteWave, “evaporated cane juice was not controversial until this recent tsunami of lawsuits was filed.” An average consumer should not be surprised that cane [means](#) sugar.

Such lawsuits have resulted in varied outcomes in the Northern District, as plaintiffs’ lawyers look for the “[sweet spot](#)” in drafting their complaints to resonate with the court. Judges recently dismissed one cane juice lawsuit entirely, allowed another to continue intact, and narrowed the scope of two others. These rulings are illustrative of how other food lawsuits have fared in California federal courts. This unpredictability does not spur confidence in the civil justice system.

## DESPITE SO-CALLED REFORM, DISABILITY-ACCESS LAWSUITS CONTINUE

Abusive lawsuits brought ostensibly to enforce technical standards of the Americans with Disabilities Act (ADA) in California reached an all-time high in 2012, making small business owners feel as though they have targets on their backs. In response to the crisis, Sacramento lawmakers enacted [S.B. 1186](#) in September of 2012. Unfortunately, prior to final passage, the bill was [stripped](#) of a key provision requiring an attorney to notify a business owner of a violation at least 30 days prior to filing a claim so as to provide the business an opportunity to address the issue. California Citizens Against Lawsuit Abuse [called](#) the compromise measure the “most serious attempt at ADA litigation reform to ever come out of the Legislature,” but added that it “does not go as far as we would have preferred.”

The most virulently active of California’s ADA plaintiffs [have not been deterred](#) by this half-hearted reform law and have continued to target mom-and-pop businesses all over the state, with a reportedly disproportionate impact



on [minority and immigrant entrepreneurs](#). (Why isn’t the Civil Rights Division of the U.S. Department of Justice applying its disparate impact analysis to this legal extortion racket?) Some plaintiffs’ lawyers have already found their way around the new law’s “anti-stacking” prohibition, which prevented them from sending the same client to visit the same business numerous times so that they could seek penalties for alleged access violations during each visit. Instead, they are filing lawsuits on behalf of multiple clients against the same business for a single violation, according to the [California Chamber](#).

As a result of ADA lawsuit abuse, taxpayers in Torrance, California, are now [on the hook](#) for at least \$75,000 in legal costs, as the town fights a lawsuit challenging the accessibility of a city-owned parking lot. The lawsuit also targeted a popular Italian restaurant and a family-owned bakery that use the lot, even though the businesses have no control over it. That case was filed by a man responsible for filing hundreds of lawsuits in Los Angeles County alone. The plaintiff, Jon Carpenter, is a Los Angeles resident, but is represented by a San Diego law firm that calls itself the Center for Disability Access. But “[w]e will never let a frivolous lawsuit hold the city and its residents for ransom,” Torrance Mayor Frank Scotto said. “It’s absolutely laughable. . . . These guys aren’t looking to right a wrong, they’re looking to make money.”

Another small business casualty was the historic Lake Forest Café in Folsom, which closed its doors in June 2013. An ADA lawsuit was filed after a man in an oversized wheelchair could not enter the restaurant for reasons beyond the restaurant owner's control. The owner knew she could not afford to defend successfully against the suit, and [pointed out](#) that “[t]he problem with the ADA law, and everyone agrees with the intent, is these frivolous lawsuits. What was okay yesterday may not be okay today and certainly won't be okay tomorrow. It's created a loophole for some people to abuse the law. Typically, they settle out of court, not even caring if the modifications were made to comply with the ADA.”



## ASBESTOS

As noted in previous Judicial Hellholes reports, there has been in recent years a [steady migration](#) of asbestos lawyers to California from states that, unlike California, have enacted reasonable civil justice reform laws to give asbestos defendants a fairer shake in court. Many of these transplants hail from reform-minded Texas, for example, and have eagerly opened offices in California, particularly in Los Angeles, where more plaintiff-friendly tort law, court procedures and juries give them a sizeable advantage over asbestos defendants.

Publicly available court records show that, as San Francisco County **Superior Court Judge Teri Jackson** has worked with plaintiffs and defendants in recent years to better balance rules and procedures for asbestos litigation, plaintiffs' lawyers are looking more often to Los Angeles to file new cases – though Oakland, in Alameda County, also remains a popular if smaller jurisdiction. In 2012, a longtime trend was reversed as filings of new asbestos cases in Los Angeles (292) actually exceeded such filings in San Francisco and Oakland combined (277). Through November 2013, new filings in Los Angeles (222) again comfortably exceeded those in the two Northern California jurisdictions (166).

But knowledgeable defense counsel with whom Judicial Hellholes reporters have conferred suggest there may be reason to hope that the Los Angeles asbestos court may eventually be amenable to a better balancing of rules and procedures like that which has caused some plaintiffs' lawyers to disfavor San Francisco in recent years. But no one is anticipating such progress in Oakland anytime soon. A 2013 case there, now on appeal, speaks volumes about the utter lack of balance some asbestos defendants face in California courtrooms.

The case is *Rose-Marie and Martin Grigg v. Owens-Illinois Inc.* (No. RG12629580). Mrs. Grigg, now 82, has been diagnosed with mesothelioma, and the case argued on her and her current husband's behalf by lawyers from the politically well-connected Oakland firm of [Kazan McClain](#) plausibly claimed that she had been exposed to asbestos dust and fibers brought home on the work clothes of her former husband when he worked with insulation in the 1950s. But as defense council pointed out in pre-trial motions, California appeals court precedent in a similar “bystander” exposure case, [Campbell v. Ford Motor Company](#), in essence established that, because many decades ago, when the exposures both in Grigg and Campbell occurred, it was “unforeseeable” that such exposures could lead to disease, the defendant “had no duty” to the family members of a worker.



The Griggs' attorneys acknowledged that there was no “foreseeability” with respect to asbestos fibers but then made an evasive argument about the duty of care in connection with known poisons. In her tentative ruling posted on the court's website the night before oral arguments were to begin, Alameda County **Superior Court Judge Jo-Lynne Q. Lee** indicated she would [grant the defendant's motion](#) for summary judgment. But by the next morning, the judge's tentative ruling had mysteriously disappeared from the court website, and she ultimately decided to [assign the case](#) to **Judge Ioana Petrou** for trial.

Ultimately, the case was sent to the jury on questions of strict liability, negligence and fraud but not on the question of the foreseeability of household disease. An unbelievable [\\$27.3 million](#) compensatory and punitive damages verdict was returned, but Judge Petrou, in post-trial rulings, determined that the basis for the punitive damages

award – the alleged fraud claim and evidence – should never have gone to the jury in the first place. Incredibly, however, she did not vacate the punitive damages award. In the end, the defendant was found liable both for an injury no one could have foreseen at the time the product was sold and for punitive damages, based on a theory the jury never should have considered. Injustices such as this help make California the #1 Judicial Hellhole.

### **DISCREDITED LIABILITY THEORY KEEPS GOING AND GOING...**

Last but not least is the tellingly long tale of a personal injury lawyer-imagined theory of liability that has been dismissed and discredited everywhere it has been tried, including Illinois, Wisconsin, Missouri, New Jersey, New York, Ohio and Rhode Island. But since California courts are as permissive as any in the land, never-say-die lawyers at [Cotchett Pitre & McCarthy](#) and [Motley Rice](#), among others, have convinced 10 California cities and counties to sign on to their \$1.6 billion [lawsuit](#), which began in July 2013 before Santa Clara County **Superior Court Judge James Kleinberg**. The lawsuit pursues yet again the repeatedly unsuccessful “public nuisance” theory of liability against five companies that stopped selling lead paint decades ago.

The standard of proof for public nuisance claims, conveniently, is considerably lower than that for product liability. And the plaintiffs’ case got a boost from the California Supreme Court in 2010 when it blessed the local governments’ [contingency-fee arrangement](#) with their private-sector counsel, contravening its own 1985 precedent that said contingency fees, as opposed to a straight hourly wage, create a conflict of interest by giving outside counsel a financial stake in the outcome of a law enforcement action. Brushing off that dated and apparently quaint concern, then-**Chief Justice Ronald George** noted that the defendants are “large corporations with access to abundant monetary and legal resources.” In other words, California courts really need not worry much about providing impartial civil justice for deep-pocket corporate defendants, especially when profit-driven plaintiffs’ lawyers gang up with government officials to rifle through those pockets.



During the bench trial, which concluded in late September, the defense adduced [plenty of evidence](#) that showed the paint companies had stopped selling lead paint once science demonstrated its threats to health and child development, and before the federal government ordered a halt to such sales in 1978. Still, trial observers report that Judge Kleinberg’s very California-like antipathy toward all things corporate was repeatedly on display, such as when [he questioned](#) the industry’s strict reliance on certain American doctors and experts about lead-paint risks when international researchers had noted such risks much earlier. “I’m quite troubled by the idea that because American doctors say ‘X, Y and Z’ that that is the end of the inquiry,” the judge snapped. (Yeah, what do those darn American doctors and scientists know, anyway? They’re not the boss of me.)

It remains to be seen whether Judge Kleinberg was impressed with the scientific fact that, despite the plaintiffs’ hysterical testimony, California suffers [no appreciable lead exposure problems](#), at least not relative to the national average for such exposure. Another pesky fact is that lead paint poses no health risk whatsoever unless it’s allowed by property owners to chip, peel and flake – that’s when curious small children may ingest it. But quick, when was the last time a California judge resisted the chance to blame a corporate defendant for a perceived problem or injustice?

In any case, Judge Kleinberg’s ruling is expected sometime shortly after the release of this report, and an appeal, one way or another, is all but certain.

*[Editor’s note: As anticipated and all too typical of California’s anti-business judiciary, Judge Kleinberg issued a whopping [\\$1.1 billion plaintiffs’ verdict](#) just after this report went to press, effectively absolving individual property owners of any responsibility for proper maintenance and abatement.]*

### **A LITTLE GOOD NEWS FOR BIG BUSINESSES AND MOM & POP SHOPS, TOO**

Always hoping to find at least a little encouraging news in each of the Judicial Hellholes, we point to a recent development that might [reduce](#) some plaintiffs’ lawyers’ storied enthusiasm for California-based litigation challenging mergers and acquisitions.

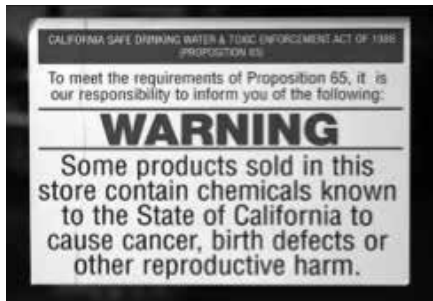
In recent years, it has become routine for plaintiffs’ law firms to announce investigations of mergers or acquisitions within hours of such announcements. Lawsuits challenging major deals are filed, on average, within two weeks. According to [Cornerstone Research](#), 93% of acquisitions announced last year and valued at over \$100 mil-

lion were almost immediately challenged, on average, by 5 lawsuits. Defendants typically settle these cases quickly, as a cost of doing business, in order to eliminate potential obstacles to the pending deal. As a result, the lawyers filing such suits, often using cookie-cutter complaints and offering no evidence that the deal hurts shareholders or the public, recover lucrative fees.

In March 2013, however, the U.S. Court of Appeals for the Ninth Circuit [sanctioned](#) a prominent California M&A lawyer, Joseph M. Alioto, and his firm for filing vexatious litigation related to his challenge of a \$1.4 billion merger between Southwest Airlines and AirTran. Mr. Alioto sued the airlines to stop their merger, but did not get his claim filed until a day after the merger concluded. After the district court dismissed his case for that basic reason, he not only appealed, but sought an emergency order from the Ninth Circuit to stop the airlines from merging their assets, broader relief than he had requested in the lawsuit.

Attorneys for the airline [characterized](#) Alioto's conduct as a modus operandi of targeting high-profile mergers at their most time-sensitive stages in an effort to win big cash settlements. The Ninth Circuit ordered Mr. Alioto and his firm to pay \$67,495 of the airlines' costs, the amount related to responding to the request for an emergency order. Mr. Alioto called the sanction, which he will pay himself, a "[badge of honor](#)" that will not deter him from challenging future mergers. Nevertheless, the ruling may give plaintiffs' firms that repeatedly challenge mergers a reason to pause before engaging in aggressive, unjustifiable tactics.

And finally, California took a very rare, if rather modest, step to rein in personal injury lawyers in October 2013, when Gov. Jerry Brown signed into law a watered-down reform aimed at the infamously shameless extortion racket that has grown up around a well-intentioned, voter-approved anti-toxins law passed in 1986, known as Proposition 65.



Prop 65 requires businesses to post notices about the presence of virtually unavoidable, everyday chemicals and substances, such as alcohol (in beer, wine and spirits), diesel engine exhaust (in every parking garage and bus depot) and coffee-roasting byproducts (in coffee shops), among countless others. And since Prop 65 allows for private lawsuits as a means of enforcement, it has "spawned a wave of frivolous lawsuits and excessive fines over improper signage," reports the [Los Angeles Times](#).

The reform bill, [A.B. 227](#), aims to reduce both nuisance lawsuits and fines for businesses by giving businesses that are notified of a possible lawsuit two weeks to post proper signs and pay nominal fines before being subject to litigation or steeper fines. But the reform excludes manufacturers, suppliers and retailers of consumer products. And because its "provisions are not retroactive," notes an [analysis](#) by McGuire Woods LLP, the new law "will not help the multiple businesses that received notices of violation early in 2013," when a huge final round of litigation was served on outlets selling alcohol by lawyers desperate to make last call.

## #2 LOUISIANA

When last year's Judicial Hellholes report listed the Pelican State at the bottom of its Watch List, there were problems, of course, but reason for optimism. The legislature in 2012 finally passed, and **Governor Bobby Jindal** signed, a law aimed at reducing the number of [often fraudulent](#) "legacy" lawsuits that have [stunted](#) Louisiana's critically important onshore oil and gas industry for decades. And lawmakers, eager to shake off their state's economy-stifling reputation for biased "bayou justice," also took a modest step to address forum shopping in connection with class actions.

But what a difference a year can make. Thanks to the continually brazen antics of the state attorney general, a horrendous state supreme court decision, shamelessly avaricious personal injury lawyers, and even parish-level



politicians now trying to get their own piece of the lawsuit pie, a flood of costly and sometimes meritless litigation again threatens to swamp Louisiana's economic future.

## THE 'BUDDY SYSTEM'

Louisiana's ethically-challenged **Attorney General James "Buddy" Caldwell** continues to hire his political patrons among the plaintiffs' bar to sue – supposedly on behalf of the state – hapless out-of-state corporations with deep pockets, whether they be energy producers, prescription drug makers or other easy marks. In addition to his office's controversial authorization of a levee board's no-bid hiring of contingency-fee lawyers to sue 100 or so oil, gas and pipeline companies in what may prove to be the mother of all legacy lawsuits (see details below), Caldwell routinely skirts state law that precludes him and other state officials from entering contingency-fee agreements.

An [investigative report](#) in May 2013 by a New Orleans television station turned up the heat on Caldwell and his so-called "[Buddy System](#)." WWL-TV's David Hammer interviewed ATRA ally Melissa Landry, executive director of Louisiana Lawsuit Abuse Watch, and relied on her [extensive research](#) into Caldwell's cozy practices. When confronted with a court transcript showing that one of his high-priced hired guns had fallen asleep during proceedings in the ongoing litigation against BP (formerly British Petroleum), Caldwell said he was not bothered by it and falsely suggested the judge catches quick naps, too.



AG Caldwell

THE COURT: Wait one second. Would somebody tap Mr. Kanner and wake him up. Mr. Kanner, are you awake?  
MR. KANNER: Yes, Your Honor.  
THE COURT: Did you get enough sleep last night? If you need to get up and walk out and get some air, you can do it, but we need need to keep you awake, okay.  
MR. KANNER: Yes, sir.  
THE COURT: All right. Go ahead, Mr. Collier. Sorry.

OFFICIAL TRANSCRIPT

Speaking of the BP litigation, the [Associated Press](#) reported in January 2013 that Caldwell had by then already "spent nearly \$24 million building the state's legal case against BP . . . , with much of the money paid to outside law firms that have contributed to his campaigns." Caldwell chose those lawyers himself, explains the AP, "under a state law that allows contracts for professional services to be awarded without a competitive process."

Refusing to be interviewed by the AP, Caldwell nonetheless tried to defend his seemingly self-serving actions in an email, noting there is no legal impediment to hiring firms or lawyers who were generous to his election bids.

"Properly handling this case requires expertise and experience in areas of mass tort and complex litigation, as well as class action and environmental law," Caldwell wrote, calling the case one of the largest and most complicated in history. "Few attorneys have this experience, and we have no staff attorneys who could fulfill this role without contract counsel."

Then the obvious question that Louisiana lawmakers, voters and taxpayers ought to be asking of AG Caldwell is this: Why, sir, doesn't your office have such experienced attorneys on staff? With so much of the state's economy dependent on the oil and gas industry, there simply can be no excuse for the Louisiana attorney general's office not being sufficiently staffed with attorneys who are well versed in related law.

Equally obvious is the need for Louisiana lawmakers to enact legislation that eliminates or severely limits no-bid contracts for legal work. If the state would not undertake a highway project without asking for competitive bids, it certainly should not undertake lawsuits without the same, good-government safeguard in place.

## HIGH COURT EFFECTIVELY GUTS LEGACY LAWSUIT REFORM

The ink of Governor Jindal's signature on the June 2012 legacy lawsuit reform law had barely dried when a January 30 decision handed down by the Supreme Court of Louisiana invited a pernicious and even more robust continuation of such suits, threatening to kill altogether what was left of onshore oil and gas production there.

The high court's [decision](#) in *Vermillion Parish School Board v. Louisiana Land & Exploration* allows surface owners to collect settlements or awards for damages from oil and gas producers that far exceed remediation costs and any amount contemplated in original land-use contracts. And since the law doesn't even require successful plaintiffs to

spend a dime of their lawsuit winnings on actual remediation, this long-running racket is surely to rev up once again.

Louisiana Lawsuit Abuse Watch's Melissa Landry said, "The decision raises serious questions about the current posture of the high court and the impact its future decisions may have on businesses, as well as Louisiana workers and their families."

As the governor and lawmakers struggle to balance the state's budget, they will need to craft a new reform statute that can effectively overturn the high court's decision if they want to boost both the production of and tax revenues provided by the onshore oil and gas industry. Otherwise they too will share the blame for killing one of the state's most promising economic golden geese.

## FLOOD OF ADDITIONAL LAWSUITS FURTHER THREATENS ENERGY INDUSTRY

If hundreds of individual legacy lawsuits are not enough to swamp Louisiana's oil and gas industry, the levee board more technically known as the Southeast Louisiana Flood Protection Authority-East is prepared to do its part. In July 2013 it [filed a lawsuit](#) against roughly 100 energy companies that have operated along, and allegedly contributed to the erosion of, the state's fragile coast. Seeking a multibillion-dollar award for damages, the lawsuit suggests the businesses were at least partially responsible for the severity of 2005's Hurricane Katrina.

But even editorial writers at *The Advocate* newspaper in Baton Rouge, who are generally sympathetic to the idea that the energy companies should chip in considerably for shoreline and wetlands restoration, are not happy about the levee board's opaque approach.

Citing a violation of "the spirit if not the letter of the Louisiana Open Meetings Law," [The Advocate noted](#) that the "board did not publicly debate its decision to file the suit, a troubling move given the potentially sweeping consequences of the litigation. The board didn't vote publicly to file the suit, although it did vote to hire attorneys who are now representing it in the litigation."

In what may be another violation of state law, the board hired on a generous contingency-fee basis and without an open bidding process personal injury lawyers to conduct the lawsuit on its behalf. To make this oily wicket stickier still, Attorney General Caldwell, already mired in other pay-to-play scandals (see above), [reportedly authorized](#) the board's hiring of outside lawyers. Caldwell has since blamed that authorization on his staff.

Though Governor Jindal has enjoyed fairly cozy relations of his own with the plaintiffs' bar, he has, to his credit, denounced the levee board's lawsuit as a disruption of state efforts to implement its Master Plan for coastal restoration. And state **Senator Robert Adley** has been even [more blunt](#), writing that, "The public can forgive a mistake but not a cover-up. Hence, the question that begs an answer is, why does the AG allow this contingency fee arrangement to remain in effect, knowing it violated laws?"

And apparently unwilling to let the levee board and its outside counsel sop up all the gravy, **Jefferson** and **Plaquemines** parishes in November 2013 collectively filed in state courts 28 lawsuits of their own against many of the same oil, gas and pipeline companies named as defendants by the levee board. As [reported](#) by the *New Orleans Times-Picayune*, the parish lawsuits at first glance do not appear tainted by unlawful contingency-fee arrangements or shadowy no-bid hiring of outside counsel. But curiously enough, both parishes' bidding processes for the legal work resulted in the selection of the *same* lead lawyer, **Vic Marcello** of **Talbot, Carmouche and Marcello**. This is a law firm that has enriched its partners by filing scores of legacy lawsuits during the past decade, and its hiring by the parishes in this instance only furthers a sordid storyline about the incestuous nature of Louisiana's litigious political culture.



## BP IS MAD AS HELL AND ISN'T GOING TO TAKE IT ANYMORE

"Until this year," began an [enlightening and game-changing article](#) by *Bloomberg Businessweek* legal correspondent Paul Barrett in late June of 2013, Gulf Coast personal injury lawyer "Kevin McLean specialized in suing nursing homes . . ." But McLean has now "switched the focus of his practice to a fund BP established to compensate busi-

ness losses from the 2010 oil spill in the Gulf of Mexico. In its attempt to dilute a legal and public-relations mess of epic proportions, BP began paying claims within weeks of the disaster and has so far spent more than \$25 billion for cleanup and compensation. That hasn't stemmed demands for more."

In fact, a federal judge's installation last year of **Patrick Juneau**, a well-connected New Orleans lawyer, as claims administrator "prompted scores of additional plaintiffs' attorneys to swarm onto the scene, signing up a new wave of clients, many located far from the once-sullied shoreline," Barrett continued. And shortly after his pivot away from nursing home litigation, lawyer McLean began soliciting new clients for his oil gusher of a racket with a letter that read in part: "The craziest thing about the [BP] settlement is that you can be compensated for losses that are UNRELATED to the spill."



Crazy indeed. So crazy, [reported \*New York Times\* columnist Joe Nocera](#), that "BP finally said 'enough.'" But when it "complained to [U.S. District] Judge Carl Barbier, who is overseeing all of the multibillion-dollar litigation against BP in New Orleans, it got nowhere." And suggesting that BP lawyers should have known what to expect from Judge Barbier, Nocera pointed out that the judge is "a former Louisiana plaintiffs' lawyer" who was "once the president of the Louisiana Trial Lawyers Association. How cozy is that?"

Exasperated with both Judge Barbier's April dismissal of its lawsuit against Juneau and otherwise nonchalant acceptance of the subsequently continuing feeding frenzy, BP took its pleas for relief to the U.S. Court of Appeals for the Fifth Circuit. In October the appellate court [ordered](#) Judge Barbier to reevaluate complex accounting issues underlying some settlement claims and to halt payments for claims that were plainly "fictitious" until that review is complete. But Barbier continued to vigorously defend his appointee, Juneau, and the administration of claims. So in the week before Thanksgiving, BP went back to the Fifth Circuit with what it called an "[emergency motion](#)," arguing "The district court has refused to enjoin payments to claimants that suffered no harm traceable to the oil spill." On December 2, the Fifth Circuit again, more forcefully, [opined](#) that Barbier "erred by not considering arguments of causation" and reordered his "expeditious consideration" thereof.

Even before that December 2 slap-down, Judge Barbier was unhappy with the Fifth Circuit's scrutiny and issued an unusual November 25 opinion, describing as "deeply disappointing" BP's efforts to "rewrite" the history of the claims agreement. But if the judge were to be more candid, he might confess that he is really upset with BP lawyers for trying to make such a big deal out of the Gulf Coast personal injury bar's craven willingness to seek settlement money their clients do not deserve. If BP is to be fairly criticized for anything, it should be for having foolishly assumed a minimum level of integrity among the shady bayou lawyers in New Orleans who, like southern sheriffs with speed traps before the interstate highways were built, never hesitated to fleece fancy car-driving city slickers from up north.

Meanwhile, the *Times*' Nocera put things in [broader context](#): "I realize that many people don't much care that a multinational corporation responsible for a huge oil spill is being fleeced in Louisiana. But they should" because, "although BP's negligence was unquestionably a significant reason for the spill, its response has been the opposite of the unfeeling corporation. . . . Yet its efforts to do right by the Gulf region have only emboldened those who view it as a cash machine. The next time a big company has an industrial accident, its board of directors is likely to question whether it really makes sense to 'do the right thing' the way BP has tried to."

Nocera added that Americans also should care about the rule of law, which "gives businesses the confidence they need to make investments" and "both parties [in a lawsuit] faith that disputes will be settled fairly. . . . [B]ut the truth is that what is going on in Louisiana today is not all that different than when a corrupt Russian official creates a fake tax liability to line his pockets at the expense of some hapless company . . . ."



## OTHER TROUBLING ASPECTS OF LOUISIANA'S LITIGATION LANDSCAPE

This report could go on, page after page, with additionally troubling tales of civil injustice from the Pelican State, but that would be unfair to the other Judicial Hellholes. So here in short form, are a few more stories we will watch until next year's report:

- The state's **Third Circuit Court of Appeal** was the subject of an extensive fall 2013 [report](#) issued by the Louisiana Lawsuit Abuse Watch, criticizing the "activist" court for among other things, its "inconsistent application of a well-established legal statute in an apparent attempt to manipulate the law to achieve a preferred outcome – namely higher award[s] for the plaintiff[s]."
- According to [CNN Money](#), the **Louisiana Municipal Police Employees' Retirement System** (LMPERS, or locally pronounced as "lampers") has become a "[securities] litigation machine," "suing companies with abandon." In one 10-day period in February, for example, "the fund sued Dell, US Airways, Hewlett-Packard, Heinz, and EnergySolutions, America's largest nuclear-waste company," and it has been described in a legal brief by an attorney who once worked for it as "the most prolific filer of shareholder litigation in U.S. history." Since Louisiana is as self-destructively litigious as it is, other retirement funds are greedily following LMPERS' meritless lead.
- Last but not least is a recent rise in **exceptionally large asbestos-exposure verdicts** for individual plaintiffs. No one begrudges mesothelioma victims and their families just compensation. But when judges withhold exculpatory and mitigating evidence from jurors, the resulting verdicts can be unjust and leave fewer funds to go around for future claimants.

## #3 NEW YORK CITY

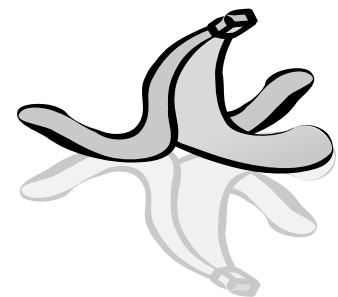
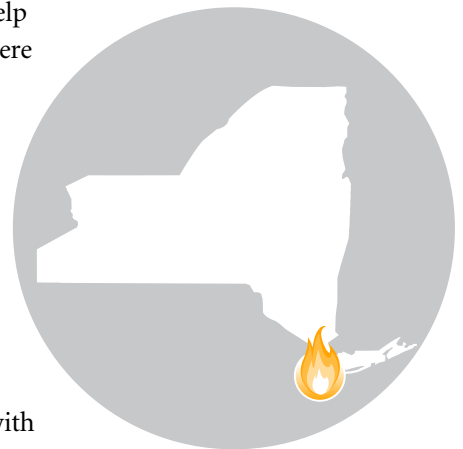
"Sue" York City has now become a perennial judicial hellhole with plenty of help from the once mighty but now crumbling Empire State's capital in Albany, where personal injury lawyer and New York State **Assembly Speaker Sheldon Silver** strangles in its crib any toddling tort reform legislation that could, if allowed to reach maturity, reasonably limit the capacity of his fellow plaintiffs' lawyers to get rich at the expense of everyone else, including consumers, taxpayers, those in need of health care, and those in need of a job. Silver



Speaker Silver

also is fighting tooth and nail the efforts of Governor Andrew Cuomo to bring some much needed transparency to state lawmakers' financial records and underreported conflicts of interest stemming from the other jobs they variously hold with law firms and consulting companies.

Among other specialties, Silver's law firm, [Weitz & Luxenburg](#), touts its prowess in asbestos and construction site slip-and-fall litigation, both of which increasingly threaten the integrity of civil justice in New York City and throughout the state. Meanwhile, thanks to lower-grossing but nonetheless enterprising slip-and-fall lawyers who aspire to be as [rich as Silver](#), the "Big Apple" may have to consider a more accurate re-branding as the "Big Banana Peel" since it continues to pay through the nose for claims made by thousands of residents and visitors who cannot seem to keep their feet on city sidewalks. And God forbid those who take a legitimate tumble break something so badly that they need immediate medical care, because ever rising insurance premiums for doctors and hospitals – the highest in the nation – are forcing more care providers to turn out the lights.



## SILVER'S FIRM EXERTING UNDUE PRESSURE ON 'NYCAL' JUDGES

With the epidemiological peak of mesothelioma cases [behind us](#) in the U.S., many civil court jurisdictions with still sizeable asbestos dockets are, in the interest of due process and fairer trials for defendants, generally moving away from the consolidation of multiple plaintiffs' claims into a single case against a given defendant or defendants (see most notably Philadelphia's definitive end to consolidation in early 2012 and a Baltimore judge's more recent denial of a plaintiff firm's motion to consolidate some 13,000 non-mesothelioma cases). But thanks in part to undue political influence exercised by Speaker Silver and a powerful partner in the personal injury law firm the speaker moonlights for, the judges presiding over the New York City Asbestos Litigation docket known as NYCAL are going in the opposite direction on consolidation, outlier verdicts and remittitur, and maybe on punitive damages, too.

Stipulating first that defendants in all jurisdictions settle the overwhelming majority of asbestos cases long before going to risky trials, aggressive consolidation of NYCAL cases raises those risks even higher. Publicly available court records show that, since the beginning of 2011, the [average](#) NYCAL plaintiff's verdict in a consolidated case was **\$29.8 million**, more than nine times greater than the **\$3.2 million** average verdict for individual cases. And the chance of a defense verdict in consolidated cases is only 1 in 5, whereas it leaps to 3 in 5 in individual cases which more fairly allow defendants to prove that plaintiffs were not exposed to asbestos from *their* products.

Meanwhile, the [average](#) jury award for plaintiffs in *all* NYCAL cases since 2007 is **\$21.7 million**, roughly seven times larger than the **\$3.1 million** average award in courts throughout the rest of New York State. And as NYCAL trials are increasingly likely to produce such outlier verdicts, NYCAL judges are decreasingly likely to reduce those verdicts in a procedure known as remittitur. From 1990 through 2005, the [average](#) trial court remittitur in a NYCAL case was **\$3.8 million**, well within the \$3 million to \$5 million award range for malignancy cases established by controlling appellate precedent (see NY Appellate Division, 1st Dept. decisions in *Pride*, *Mayer & Penn*). But from 2006 through November 2013, that average has increased a whopping **300%** to **\$11.4 million**.

Conveniently for Weitz & Luxenburg attorneys, who regularly litigate NYCAL cases, Speaker Silver had the foresight to [appoint](#) one of his firm's name partners, Arthur Luxenburg, to the powerful Judicial Screening Committee, which, according to the [New York Times](#), "reviews candidates for the State Supreme Court and its Appellate Division, and makes recommendations to the governor." So might a NYCAL trial judge who aspires to a future appellate court appointment tip the scales of justice to favor the clients of a firm with so much political influence over which judges will receive such appointments? Defense attorneys certainly think so, and NYCAL data seem to support such thinking. But if you need additional evidence, read on.

Since 1996 the case management order (CMO) governing NYCAL has set aside punitive damages claims in order to preserve assets for the medical expenses of future plaintiffs. Weitz & Luxenburg attorneys in 2013, however, filed an application for punitive damages in a pending case with **Administrative Judge Sherry Heitler**. And rather than summarily deny the application in deference to the 17-year-old CMO agreement, Judge Heitler instead directed defendants to file a response by October 25, implying that she may be ready to make the lives of Weitz & Luxenburg asbestos lawyers that much easier – as if they were not already prospering with their NYCAL practice. In any event, the judge was to hear arguments on the motion December 16, and her ultimate decision will invariably influence New York City's next ranking among the nation's Judicial Hellholes.

And a final note on yet another [questionable NYCAL claim](#) recently filed by Weitz & Luxenburg on behalf of 69-year-old U.S. **Congresswoman Carolyn McCarthy** of Long Island. The lifelong pack-a-day smoker was diagnosed with lung cancer earlier this year, but could not realistically hope to win a lawsuit against tobacco companies. So she and her lawyers are suing some 70 defendant companies that can be tied to asbestos products and worksites from which, McCarthy alleges, her father and brother brought home asbestos dust on their clothing after work when she was a child. *New York Times* colum-



nist Joe Nocera [hopes McCarthy wins her battle with lung cancer](#), but adds, “the right thing for her to do is drop this lawsuit. All it has really accomplished is showing how asbestos litigation is a giant scam.”

## SCAFFOLD LAW REFORM OBSTRUCTED AGAIN

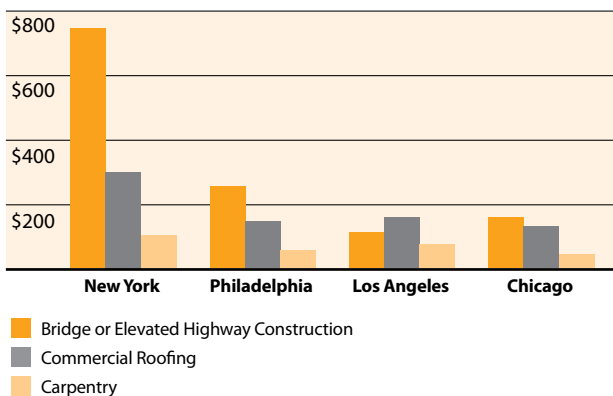
In addition to its lucrative business in asbestos lawsuits, Speaker Silver’s law firm also aggressively litigates slip-and-falls and thus has an interest in killing any and all proposed reforms of New York’s antiquated “scaffold law,” which dates back to 1885 and is the only surviving state law in the nation that [imposes](#) on contractors absolute liability for any injuries related to falls from an elevation during construction or repair work. (Illinois had a similar law before repealing it 1995.) So whether a worker is drunk or stoned or otherwise chooses to ignore worksite safety precautions, the scaffold law “imposes liability even on contractors and [property] owners who had nothing to do with the plaintiff’s accident,” wrote **Judge Robert Smith** for a [unanimous New York State Court of Appeals](#) in 2012. “And where a violation of the statute has caused injury, any fault by the plaintiff contributing to that injury is irrelevant.”



Plaintiffs’ contributions to their own injuries may be “irrelevant” to New York judges, but they are not irrelevant to the [dwindling number](#) of insurance companies willing to write policies for construction projects there.

## GENERAL LIABILITY LOSS COSTS (DOLLARS PER \$1,000 OF PAYROLL)

Source: Insurance Services Office



One major steel contractor told the New York State Senate Forum on Insurance Reform in October 2013 that the cost to renew his insurance this year was [up over 500%](#) compared to two years ago, despite an impeccable safety record. More broadly, contractors operating in New York City pay roughly three times more for insurance than those operating in the second most costly city, Philadelphia. And though there seems to be [growing political support](#) for modest reform that would apply a “comparative negligence” standard to construction-fall liability claims, Speaker Silver [killed a similar bill](#) earlier this year and is expected to prevent any such bills from becoming law as long as he holds office, even though the status quo continues to cost state taxpayers, private-sector developers and unemployed construction workers dearly.

## CITY SLIP-AND-FALLS DOWN

If there is a hopeful note for New York City’s otherwise deteriorating litigation environment, it can be found on pages 33 and 34 of the [Mayor’s Management Report](#) for fiscal year (FY) 2013. Report data show that the city’s FY 2013 tort liability was actually **down 3%**, to **\$490.2 million**, from FY 2012’s total of **\$506 million**, continuing a slight downward trend since 2010. The number of new claims against the city was down, too, from **9,695** in 2012 to **9,528** in 2013, suggesting that the city’s new defense strategy is working.

The City’s Law Department, under the leadership of **Corporation Counsel Michael Cardozo** and his trusted chief litigator **Lawrence Kahn**, has moved away from a past willingness to settle virtually every tort lawsuit that targeted the city – even many that were plainly contrived. Now city attorneys are acting “aggressively to dismiss those cases that are without merit,” successfully “reducing the citywide payout for judgments and claims,” says the management report.

But with roughly 13,000 miles of sidewalks in the five boroughs, no shortage of slip-and-fall lawyers aspiring to emulate their heroes at Weitz & Luxenburg, and a new incoming mayor, **Bill de Blasio**, whose past embrace of groups prone to suing the city, it is hard to know whether city lawyers will be allowed to defend New York City taxpayers’ wallets as tenaciously as they have under outgoing mayor, **Michael Bloomberg**.

Meanwhile, beyond tort claims, the city [paid out](#) another **\$250.7 million** in settlements and judgments for general law and contract disputes.

## HOSPITAL CLOSINGS AND ACCESS TO HEALTH CARE

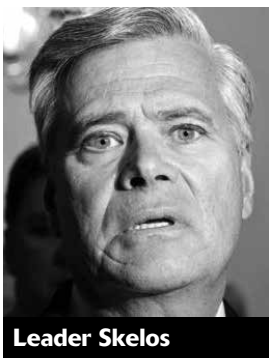
As with the above-noted construction insurance costs that are the highest in the nation as a result of litigation, medical liability insurance premiums for physicians and hospitals in New York are also the nation's highest, according to Thomas B. Stebbins, executive director of the Lawsuit Reform Alliance of New York. In his recent [letter to the editor](#) published by the *Times Ledger* in Queens, Stebbins reported that, "In New York, 19 hospitals have closed since 2000, leaving several neighborhoods underserved." Meritless lawsuits are a big reason for the closures, he added, as "astronomical medical liability costs are affecting access to healthcare," hurting "those who need it most."

Stebbins said medical liability insurance for doctors and hospitals "in New York costs more than anywhere else in the United States – double that of the next highest state, California." And unless policymakers "address the spiraling costs of lawsuits, New York hospitals will continue to close." And as total medical liability payouts throughout the state of New York continue to [dwarf](#) those of second-place Pennsylvania, steadily rising insurance premiums will likely convince more physicians to retire early or [leave the state](#) to practice elsewhere.

## ETHICS SHOWDOWN

With an eye on the White House, perhaps, and frustrated by the legislature's failure to pass an ethics law earlier in the year, Governor Andrew Cuomo signed an executive order in July 2013 to establish a so-called [Moreland Commission](#) "for the purpose of investigating public corruption" connected to lawmaker conflicts of interest that may stem from lucrative work outside the legislature with law firms and consulting companies, for example. Not surprisingly, many lawmakers, presumably with much to hide and apparently forgetting that their legislative salaries are provided by their taxpaying constituents, are [resisting the commission's efforts](#) to subpoena related documents and communications.

It is hard to believe that, in 2013, New York is without an ethics-in-government law with teeth sufficiently sharp to dissuade a lawmaker in Albany from brazenly doing the bidding of an employer for which he or she moonlights and/or a client or clients of such an employer. But that appears to be the case. And as long as Sheldon Silver and his allies have anything to say about it, no such ethics law is likely to pass anytime soon. But that cannot stop the governor from using executive branch tools to shine a little light on the den of cronyism and self-dealing in the state capital.



But at least two law firms that employ lawmakers have already [filed motions](#) in Manhattan Supreme Court seeking to quash the commission's subpoenas, and both Assembly Speaker Sheldon Silver and **Senate Leader Dean Skelos** have signaled their legislative colleagues that their attorneys will file similar motions. Desperately attempting to obfuscate and distract from the question of whether lawmakers' outside income is influencing the official positions they take on matters before the legislature, Skelos wrote,

"[W]e will not allow an Executive to ignore the Constitution or the important principle of separation of powers."

By "separation of powers," Skelos must be referring to a constitutional clause he interprets as license for lawmakers to peddle influence to the highest bidder and effectively defraud constituents and taxpayers.

To its credit, the commission, made up largely of sitting district attorneys and law-enforcement officials, is not backing down. A November 22 statement by commission attorneys said its subpoenas are fully lawful and added that "New York law prohibits members of the Legislature from receiving compensation relative to their official duties involving legislation and other government proceedings." The commission issued a [scathing preliminary report](#) on December 2. Judicial Hellholes reporters will carefully watch the political and legal fireworks that will invariably affect litigation in the city and state.

## #4 WEST VIRGINIA

For the past decade, West Virginia has been included among the top 5 Judicial Hellholes. Since it hit the #1 spot five years ago, there have been some modest improvements, including a slight expansion of the appellate rights of litigants, an occasional well-reasoned decision that does not expand liability, and replacement of the state’s notoriously plaintiff-friendly attorney general. Yet the past year indicates that the state’s high court has not changed its ways, as it broke a century of precedent to expand the liability of home and business owners and granted undefined powers to the state’s attorney general. The litigation climate in the Mountain State remains one where businesses are subject to pro-plaintiff rulings, fear excessive liability, and lack full appellate review.



### PROPERTY OWNERS HAVE NEW DUTY TO GUARD AGAINST OBVIOUS HAZARDS

West Virginia courts have [repeatedly](#) adopted rules that are out of the mainstream and impose excessive liability. In past years, for example, its high court allowed cash awards to uninjured people who brought speculative medical monitoring claims and rejected a widely accepted principle that drug companies have an obligation to educate doctors, not directly warn patients, of potential side effects of their products. This year, the West Virginia Supreme Court of Appeals abandoned over a century of state precedent by abolishing the rule that a property owner has no duty to protect people from open and obvious hazards that they may encounter on their property.

The case arose when the plaintiff, who could not walk without the aid of a cane and was falling on a daily basis, fell down stairs in a store parking lot. He alleged that the owner was liable because the stairway lacked guardrails, which were required by local ordinance. The lot owner, however, had removed the guardrails because skateboarders had taken to using them for stunts and had damaged them. The owner was afraid that the skateboarders or someone else would get hurt. New guardrails were scheduled to be installed two weeks after the plaintiff’s fall. Well settled West Virginia law provided that there is no duty to warn against “open and obvious” dangers and the trial court dismissed the case.

The West Virginia Supreme Court of Appeals [reversed](#). A 3-2 majority abolished the “open and obvious danger doctrine,” finding instead that property owners have a duty to protect people from all hazards, obvious or not. A person’s decision to ignore an obvious risk might lead a jury to reduce his or her damages, but would not impact the owner’s legal duty to provide such protection in the first place.



Under this ruling, those who own property in West Virginia have significantly greater liability exposure. For example, people will need to consider how to protect guests from natural conditions on their property, such as a stream, a hole, or a cliff, or hazards within their house or business, such as a stairway, no matter how obvious.

[Justice Allen H. Loughry II](#) dissented from the creation of this new duty. He [recognized](#) that his colleagues have “saddled property owners with the impossible burden of making their premises ‘injury proof’ for persons who either refuse or are inexplicably incapable of taking personal responsibility for their own safety.” “Ordinary homeowners,” Justice Loughry recognized, “will pay the highest price for the majority’s pandering to persons who ignore the risk associated with open and obvious hazards that ordinary, hard-working citizens encounter every day and invariably utilize their common sense and good judgment to avoid.” Justice Loughry, unlike his colleagues, recognized the practical effect of the ruling. Before changing this rule, West Virginia judges could dismiss meritless lawsuits where the plaintiff complained of an injury that resulted from ignoring an obvious hazard. Now, every slip-and-fall claim filed in West Virginia may require a full jury trial no matter how irresponsible the plaintiff’s conduct in accepting a known risk. As Justice Loughry observed, “It is decisions like this that have given this state the unfortunate reputation of being a judicial hellhole.”

## PUNISHED FOR MOUNTING A DEFENSE

In late 2012, the West Virginia Supreme Court of Appeals [affirmed](#) a trial court decision that allowed state courts to inflate punitive damage awards against companies that defend themselves in court.

The case involved an individual's claim that she was misled by a national home [mortgage lender's](#) representations when refinancing her home. Following a trial by Ohio County **Circuit Court Judge Arthur M. Recht** without a jury, the lender was found liable for unconscionable practices. Judge Recht not only awarded the plaintiff about \$17,000 in restitution, he voided the remainder of the \$144,800 loan obligation on her home. Judge Recht also awarded the plaintiff nearly \$600,000 in attorney fees and costs under West Virginia's Consumer Credit and Protection Act.

Effectively giving the plaintiff the house, in addition to compensating her for actual losses, is highly questionable. But what raises even greater concern is how the court calculated the punitive damage award. U.S. Supreme Court case law requires some level of proportionality between a plaintiff's injury and the punishment imposed on a defendant. For that reason, it appears that Judge Recht decided that the company should pay three times the plaintiff's compensatory damages as punitive damages. Rather than apply this multiplier to the plaintiff's actual loss of \$17,000, or the loan obligation of \$144,000, the judge took both of these amounts, added in \$600,000 in attorneys' fees claimed by the plaintiff's lawyers, and multiplied by three. The result: A wholly absurd award of \$2.2 million for punitive damages.



The West Virginia Supreme Court of Appeals found that the plaintiff's attorney fees were "compensatory in nature" and therefore could be properly included in calculating, or reviewing the excessiveness of, a punitive damage award. The court's reasoning fails to recognize that, generally, consumer protection statutes authorize recovery of attorneys fees to further specific public policies, such as facilitating claims involving small consumer purchases or to punish those who employ deceptive practices. Such awards do not reflect actual harm to a consumer. As a result of this ruling, in cases where attorneys' fees are recoverable, it is likely that West Virginia courts will award inflated, unconstitutionally-excessive punitive damage awards.

To its credit, the high court reversed the punitive damages award on the ground that Judge Recht had failed to conduct a "meaningful and adequate" analysis in awarding punitive damages, which requires written findings explaining his reasoning. It sent the case back to the trial court for further consideration.

But in "Wild, Wonderful, West Virginia," winning an appeal can be a lot like losing... only worse.

Since Judge Recht had retired before the high court ruled, the case was reassigned to **Judge David J. Sims**. In June, Judge Sims actually increased the multiplier from 3 to 3.5, and then applied it to compensatory damages of \$116,276.72 and attorney fees and costs that had grown to \$875,233. The [result](#): a \$3.5 million punitive damages award largely based on the plaintiff's legal expenses, rather than actual harm resulting from the defendant's conduct.

Apparently, West Virginia courts are punishing companies for having the audacity to defend themselves and exercise their right to appeal. But hope springs eternal in West Virginia. The company has filed another appeal.

## STATE AG GAINS OK TO HIRE CONTINGENCY-FEE LAWYERS, MORE POWER

As lauded among the Points of Light (see p. 54), new West Virginia **Attorney General Patrick Morrisey** has abandoned the practices of his predecessor, **Darrell McGraw**, who frequently hired contingency-fee lawyers to represent the state. Morrisey's new policy, which requires open bidding and provides transparency in such arrangements, deserves commendation. But a West Virginia Supreme Court of Appeals ruling this year, in a challenge to AG hiring practices under McGraw that Morrisey inherited, resulted in a ruling that not only upheld the AG's authority to hire contingency-fee lawyers to enforce state law, but significantly expanded the AG's ability to do so by abandoning past precedent.

Here is the background. In 2011, then-Attorney General Darrell McGraw, appointed plaintiffs' lawyers from three firms as "special assistant attorneys general" to pursue an action against credit card issuers claiming that use of "payment protection plans" violates the state's Consumer Credit and Protection Act. He retained the plaintiffs' lawyers through a three-paragraph letter giving them authority to initiate and maintain the action and select which

credit card companies to sue. The letter required only that the private lawyers keep the AG's office "apprised of any and all actions taken" and anticipated "ongoing discussions regarding tactics and strategy." The letter did not set a specific amount of compensation for the private lawyers, but "contemplated that you will advance all expenses associated with the maintenance of the action" and "subject to the approval of the court . . . earn a proper, reasonable and customary fee." The plaintiffs' lawyers filed suit on behalf of the state in August 2011 and sought, among other relief, civil penalties of up to \$5,000 per alleged violation, a remedy that is available only to the state. Also before the court was McGraw's use of a similar arrangement to sue a pharmaceutical maker for allegedly engaging in unfair and deceptive acts in the marketing of the diabetes drug Avandia.

In June, the court unanimously (with one recusal) rejected the petition and granted new powers to the AG. The court summarily rejected claims that the state's use of private lawyers who have a financial interest in collecting the highest monetary award violates due process. It then focused on whether and when state law authorizes the AG to hire outside lawyers. It found that contingency-fee lawyers hired by the state, who would be precluded by the state's ethics laws from using their office for private gain, are not public employees subject to such safeguards. The court also downplayed the potential for a conflict between the public interest and private financial motivations since the agreements did not specifically tie the lawyer's compensation to the amount of the penalties inflicted. Ignoring practical realities, the court found the private lawyers merely make "recommendations" to the AG on the direction of the case.

The outcome of this case is a more powerful West Virginia Attorney General. The court used the Petitioners' challenge to the AG's statutory authority to hire outside counsel to declare broadly that the AG has inherent common law powers and is not constrained by legislative appropriations. Ironically, the court overruled a [prior decision](#) authored by then Justice McGraw that had constrained the AG's authority. Now West Virginia's AG has undefined powers. Those powers include hiring outside counsel when not authorized to do so by the legislature and paying the private lawyers without the need for a legislative appropriation. Fortunately, Morrissey has adopted a policy for the hiring of outside counsel that addresses these concerns. But future West Virginia Attorneys General will inherit an office with more power, less constraints, and could choose to abandon Morrissey's policies and go back to the practices of McGraw or worse.

## STILL NO INTERMEDIATE APPELLATE COURT

A [survey](#) conducted by West Virginia Citizens Against Lawsuit Abuse found that most voters support creation of an intermediate appellate court and the right to appeal an adverse decision. Despite limited judicial reforms that have modestly expanded review in the state's [sole appellate court](#), West Virginia remains among only two states in the country where one does not have an absolute right to appeal.

The state's [Chief Justice Menis Ketchum](#), along with the [plaintiffs' bar](#), opposes such a proposal, claiming that providing litigants with the same ability to appeal found in other states is unnecessary and would be a waste of money. They [contend](#) that previous tweaks to the appellate system, which require the Supreme Court of Appeals to provide at least a short summary of its decisions to reject appeals, is working. And since personal injury lawyers serve as Senate President, Speaker of the House and Chair of the House Judiciary Committee, efforts to expand the right to appeal have, for the foreseeable future, a snowball's chance in a hellhole. For example, this year a [resolution](#) was [introduced](#) in the West Virginia House of Delegates that would have simply funded a year-long study of "the effectiveness and efficiency of the Supreme Court Rules on the Appeals process in West Virginia." It passed the [House](#) (though an amendment specifically requiring consideration of an intermediate appellate court was rejected), but the Senate killed it by taking no action.



## MORE OF THE SAME OLD, SAME OLD

Meanwhile, West Virginia courts continued issuing troubling rulings in a number of areas previously profiled in this report.

- West Virginia courts allow personal injury lawyers to circumvent the no-fault workers' compensation system and sue an employer for damages. The workers' compensation system is supposed to provide a tradeoff. Workers get prompt payment for injuries without having to show their employer was at fault, while employers do not have the extent of liability exposure present in a personal injury lawsuit. This system is not functioning properly in West Virginia. The latest example is a West Virginia Supreme Court of Appeals decision in November that expansively interprets an exception to the workers' compensation system that allows a lawsuit when a company acts with a "deliberate intent" to cause harm. That exception is intended to allow lawsuits if an employer intentionally harms a worker or engages in conduct that it knows is highly likely to result in an injury. But in the recent [decision](#), a divided court found the exception applied to conduct that shows only ordinary, simple negligence or a lack of oversight. As the level-headed Justice Loughry observed in [dissent](#), "The majority's opinion constitutes . . . yet another step toward its ultimate goal of rendering our deliberate intent statute a meaningless codification of simple workplace negligence standards." Justice Loughry criticized his colleagues' judicial activism, observing that "[t]his is quite simply not the type of workplace oversight for which a statutory deliberate intent is designed to provide redress."
- In April, Kanawha County **Circuit Judge Paul Zakaib Jr.** [denied](#) a [new trial](#) in a nursing home abuse lawsuit that resulted in an award of over \$91 million, finding the award was not excessive or unconstitutional. Last year's Judicial Hellhole [report](#) highlighted the monster verdict, which could adversely affect the availability of affordable nursing home care in the state. The case is now on [appeal](#) to West Virginia's sole appellate court. It calls into question whether the state's \$500,000 limit on subjective noneconomic damages applies to nursing homes.
- Numerous asbestos lawsuits are filed in the Kanawha Circuit Court. Each one typically targets dozens of defendants. In one recent case, a plaintiff claimed that [154 companies](#) are responsible for his development of lung cancer. In June, **Judge Ronald E. Wilson**, who [handles](#) the state's asbestos litigation, was [named](#) "Judge of the Year" by the West Virginia Association for Justice, the group that represents the state's personal injury lawyers. Needless to say, such recognition hardly makes defendants confident that they will get a fair shake in his courtroom.
- A federal jury late last year found that two prominent Pittsburgh attorneys, Robert Peirce and Louis Raimond, and a discredited radiologist, Ray Harron, conspired to generate fraudulent asbestos lawsuits in West Virginia. The jury awarded \$429,000 to the company that fought back against the fraud, CSX Transportation. In October, **U.S. District Court Judge Frederick Stamp** of the Northern District of West Virginia [tripled](#) the award, to nearly \$1.3 million, as permitted under the federal Racketeer Influenced and Corrupt Organizations (RICO) Act. Holding individuals responsible for bringing fraudulent claims took eight long years of litigation. It has not ended yet. The RICO verdict is now [before](#) the U.S. Court of Appeals for the Fourth Circuit.

## #5 MADISON & ST. CLAIR COUNTIES, ILLINOIS

Remaining on the list of Judicial Hellholes this year, Madison and neighboring St. Clair counties are perennial Judicial Hellholes that, in the past, have made tentative steps forward only to stumble backward. Both jurisdictions welcome plaintiffs' lawyers, with Madison County serving as the nation's busiest asbestos court, while St. Clair hosts pharmaceutical product liability claims from near and far.

### MADISON COUNTY: THE NATION'S ASBESTOS COURT

Madison County continues to cement its status as America's busiest asbestos court. Despite having only .008 % of the U.S. population, Madison County now [accounts](#) for one in four asbestos lawsuits filed in the U.S. Only 1 in 10 of the lawsuits filed in Madison County is filed by a plaintiff who ever





worked or lived in the county. Plaintiffs come from as far as Texas and Virginia to file cases in this notoriously plaintiff-friendly jurisdiction, where defendants are routinely denied rights they receive in almost every other court in the country.

Last year, Madison County broke its record for asbestos lawsuit filings with 1,563 new cases. This year, it is on track to break that record. According to Circuit Clerk Mark Von Nida, [793 asbestos suits](#) had been filed as of June 2013, as plaintiffs' firms from all over the country continue to [flock to Madison County](#). The firm of Napoli Bern Ripka Shkolnik, headquartered in NYC, recently opened up a small office in Edwardsville, and in 2012 they filed 343 lawsuits, behind only two other firms doing business in Illinois. Two local firms, Simmons Law Firm and Gori Julian & Associates, filed 500 and 340 respectively, and the top five players were rounded out by out-of-state firms.

Competition between plaintiffs' lawyers over a limited number of high-value mesothelioma claims has led some firms to bring more lawsuits on behalf of people who develop lung cancer, which may not have been caused by exposure to asbestos. The percentage of asbestos lawsuits involving lung cancer claims increased from 40% to 51% between 2009 and 2012. A significant number of these lung cancer cases are coming from the Napoli firm, which, local defense lawyers observe, has only ramped up its lawsuit filings in 2013.

Timothy Krippner, an asbestos defense attorney in Chicago, [observes](#) that "[w]ithin the last 18 months, we have seen a dramatic increase across the nation." Krippner believes "that the greatest force behind the increased filings in Madison County and elsewhere, and the greatest threat to the viability of the resources needed for people with mesothelioma, are these lung cancer cases."

It's not all doom and gloom. This November, a rare asbestos case that went to trial in Madison County ended in a [verdict](#) for the defendant, Georgia Pacific. Jurors [agreed](#) that the amount and type of asbestos the plaintiff was exposed to as a result of the defendant's products could not have caused him to develop mesothelioma, but that asbestos insulation made by others was responsible. According to local observers, the case is the first to go to trial in about three years (since most defendants simply settle out of court).

Leadership changes in the Madison County judiciary provide an opportunity for progress. In May 2013, Madison County **Chief Judge Ann Callis** [stepped down](#) from her post to run for Congress in the 13th District. She had served as the court's chief judge since 2006. Soon after her appointment, she helped improve Madison County's reputation. For example, asbestos filings hit a Madison County low the year of her appointment, before gradually rising to record levels. **Judge David Hylla** has been named Callis's successor as chief judge. In October, Chief Judge Hylla named **Associate Judge Steve Stobbs** as the new judge presiding over the Madison County asbestos docket, allowing the former presiding judge time away to focus on his [judicial campaign](#). Judge Stobbs is regarded as energetic and sharp. But Madison County is not going to shed its reputation as a Judicial Hellhole until it makes substantive [changes](#) and no longer attracts opportunistic litigation tourists from across the country.



**Judge Hylla**



**Judge Stobbs**

## ST. CLAIR COUNTY

Madison County's smaller neighbor, St. Clair County, shares its reputation. The adjacent county is dominated by many of the same plaintiffs' lawyers, lawsuits, and litigation tactics that predominate in Madison County. It also has its own major players, such as personal injury attorney [John Driscoll](#) of St. Louis, who brings lawsuits in St. Clair against makers of prescription drugs and medical devices on behalf of people from [places](#) as far away as California, Delaware, [Florida](#), Mississippi, Missouri, Pennsylvania, South Carolina, and Texas.

St. Clair County draws product liability lawsuits from around the country and has recently become known as an epicenter for lawsuits accusing a pharmaceutical maker of selling the diabetes drug Avandia without sufficiently warning of potential side effects. On a [single day](#) this June, six Avandia lawsuits were filed in the St. Clair Circuit Court that included *nearly 500 individual plaintiffs*. The lawsuits were filed in groups of less than 100, likely for the

purpose of avoiding removal of the cases as “mass actions” to federal court under the federal Class Action Fairness Act, a law sparked by abuses in the Metro East region.

While St. Clair’s asbestos docket is far smaller than Madison County, it still hosts a disproportionate share of such lawsuits and, like other jurisdictions, is experiencing a recent increase in the number of [cases](#) alleging that exposure to asbestos led to development of lung cancer.

As detailed in this report’s Points of Light section (see p. 49), in the final days of 2012 the Illinois Supreme Court reversed the St. Clair County Circuit Court after it refused to dismiss an asbestos claim of a Mississippi plaintiff who had no connection to Illinois. The high court’s action sends an important message that it will not allow plaintiffs’ lawyers to file lawsuits on behalf of people from around the country in St. Clair or other Illinois counties simply because those Illinois jurisdictions are more likely to produce favorable outcomes than are jurisdictions in plaintiffs’ home states.

## #6 SOUTH FLORIDA

South Florida has been a perennial Watch List or Judicial Hellholes jurisdiction, and this year is no different, except for the reasons behind its inclusion in the report. In years past, South Florida has been chastised for an easily manipulated Personal Injury Protection (PIP) law, excessive medical liability, and never-ending litigation against the tobacco industry. This year, “bad faith” lawsuits against insurers that act in good faith, and awards of damages for medical expenses far in excess of what a patient or her insurer actually paid move to the forefront. This excessive liability is felt by Florida residents in higher auto insurance rates, health insurance costs, and prices of goods and services. And transmitted from California, where they have become an epidemic that plagues small businesses, an outbreak of bogus disability-access lawsuits is beginning to spread in South Florida, too.



### ACTING IN GOOD FAITH GETS YOU SUED FOR ALLEGED BAD FAITH

State laws provide rights to individuals if an insurer unreasonably delays or denies paying a valid claim. Insurers are under strict time constraints in which to investigate, process and pay any claim (regardless of complexity), or else they face the prospect of punishment through damages in what is called a “bad faith” lawsuit. Florida courts have repeatedly interpreted the state’s bad faith law in a manner that is highly favorably to plaintiffs.

Personal injury lawyers, especially in South Florida, have perfected ways of gaming the system to turn a \$10,000 policy limit into a multi-million dollar payday. For example, they may ignore repeated calls and letters from an insurer attempting to settle, return an insurer’s check for a given policy’s limit, or deliberately provide few, if any, specifics on the claim or remedy sought, all to cause delays and create a pretense for bad faith litigation. In other cases they may send a letter demanding compliance with a multitude of arbitrary or unreasonable conditions, which delay the settlement process and provide a reason to reject a settlement tendered for the policy limits. Personal injury lawyers also have also been known to go into hiding and refuse to return phone calls or respond to inquiries from the insurer. That is because, in Florida, the [responsibility](#) to settle a claim is placed fully on the insurer. Florida courts have issued rulings that make it difficult for an insurer to know (1) who to contact with a settlement offer, (2) what to offer, and (3) how long the insurer has to make a fair offer.

For example, in a case from Palm Beach County last year, [Goheagan v. American Vehicle Ins. Co.](#), two judges of a three-member appellate panel allowed a bad faith claim to proceed against an insurer even when it had made extraordinary efforts to settle. In this case, the insurer, following an automobile accident, tried repeatedly to settle for the policy limits after the victim fell into a coma and died three months later. Soon after the accident, an insurance agent called the victim’s stepfather, a friend, and her mother four times, only to be told that the family



had retained an attorney, but not the attorney's contact information. The victim's mother refused to talk with the insurer, telling the agent to call back or that she was not in a position to discuss the matter. The insurer was at a loss – to whom could it give the check? The victim was in a coma, her attorney was unknown, and the victim's mother was not empowered to receive the payment on behalf of her 40-year-old daughter. To its credit, the trial court dismissed the bad faith claim against the insurer, but the appellate court reversed. The two-judge majority found that, even considering the insurer's efforts to settle, a jury could find that the insurer acted in bad faith.

Another Palm Beach case is the most recent illustration of Florida's broken bad faith system. The claim arose after a drunk driver swerved into a man who was helping to fix a flat tire on the side of the road. Geico immediately began settlement discussions with the victim's family and, soon after, offered the full policy limits, \$10,000 for personal injury, and an additional \$1,425.29 for property damage. Her lawyer rejected Geico's settlement offers and went to trial, securing a \$16.6 million jury verdict against the drunk driver. It was one of the top 100 verdicts of the year. The lawyer then attempted to collect this amount from Geico through a bad faith lawsuit.

The bad faith lawsuit proceeded in federal court, rather than state court, because the plaintiff and the insurer resided in different states and because of the large amount of money at stake. And in light of state precedent like *Goheagan*, the insurer was lucky that it did.

The federal district court [found](#) no bad faith and the U.S. Court of Appeals for the Eleventh Circuit [affirmed](#). "Even viewing the facts in the light most favorable to [the plaintiff], we find it hard to imagine how Geico acted in bad faith when it offered to pay everything it possibly could under the policy," the Eleventh Circuit wrote. "[Plaintiff] – who declined every settlement offer Geico made, refused on multiple occasions to discuss settlement, delayed providing Geico information it needed to propose a settlement, never made a counteroffer, and never made a settlement proposals – now claims that she would have settled the entire case if Geico had simply offered her . . . \$1,674.71 more in property damage," a claim the court found "patently self-serving."

The Eleventh Circuit perfectly understood Florida's bad faith litigation problem. In a footnote, the court explained, "[Plaintiff's] behavior may be rational. [Plaintiff] had a claim worth far more than the maximum amount Geico could pay in settlement. Still, one could expect [Plaintiff] to settle for that maximum amount and avoid the costs of litigation if she knew with relative certainty that [the drunk driver] was judgment proof. However, Florida's third-party bad faith cause of action creates an incentive for a claimant in [Plaintiff's] situation to reject any proposed settlements and instead plan to proceed with a bad faith claim."

The incentivized system to not settle has led to exorbitant insurance rates in Florida because all of the insurers have to pay the price. Additionally, even those plaintiffs' attorneys who want to proceed in a respectable manner are in a difficult position. If an attorney accepts a tender offer of \$10,000 and does not develop a basis to sue for bad faith, he or she could be exposed to a malpractice lawsuit for failing to secure a larger settlement.

Thus far, the Florida Legislature has not acted to address the out-of-control bad faith liability created by Florida court rulings. But in 2014 it will have an opportunity to enact a modest reform that will begin the process of curbing abuse. [H.B. 187](#), introduced by Representative Kathleen Passidomo, would require claimants to provide an insurer with a written notice of loss. If the insurer provides an offer to settle for the greater of the requested amount or the policy limits within 45 days, then it has fulfilled its obligations and is not subject to a lawsuit for bad

faith. This system would protect both the insured and the insurer. The insurance company would have adequate time to collect all of the facts and make a fair offer, while making sure that the insured would receive the necessary settlement in a timely fashion.

## PHANTOM DAMAGES

In personal injury cases, the largest element of economic damages is often medical expenses. Plaintiffs are generally entitled to recover the costs of past medical care already incurred, as well as the estimated costs of future medical care reasonably likely to be incurred, as a result of defendants' negligence. However, awards of medical expenses are often significantly inflated, resulting in what have come to be known as "phantom damages." In Florida, there are currently two main causes of these exorbitant damages.

The first cause of phantom damages arises from the difference between the amount billed by health care providers for medical services and the amount normally accepted as payment in full for those health care services.

In Florida, the jury only hears the billed rates. Florida law [prohibits](#) introduction of evidence regarding medical bills that have been discounted or written off by health care providers. As a result, if a physician charges \$100,000 for the plaintiff's medical treatment, and the plaintiff's private insurer negotiates a discounted rate and pays \$30,000 in full satisfaction of the bill, the jury is only allowed to see the original \$100,000 bill. If the jury finds the defendant liable, then the jury will award \$100,000 to the plaintiff for past medical expenses.

While a trial court judge will later "set off" (deduct) amounts not paid from the verdict, South Florida personal injury lawyers have developed a way to avoid such a reduction. They often enter a "[Letter of Protection](#)" with a client's doctor, which is an agreement to defer payment of medical expenses until after a lawsuit results in a judgment. Since there is no amount "actually paid," only the amount billed, the arrangement avoids a set off, leading to an excessive award.

It is also important to recognize that future medical expenses, which are often the most substantial part of damages in a personal injury suit, are drastically inflated in Florida, because juries calculate them based on a "sticker price" that no one pays.

Medically unnecessary procedures are a second cause of inflated medical damages. Thousands of [fraudulent](#) or unnecessary procedures are ordered in Florida every year. This occurs for the purpose of inflating the value of personal injury claims. Florida law [requires](#) plaintiffs to prove that their medical treatment is medically necessary. If a



defendant presents evidence that the plaintiff's treatment was not medically necessary, however, Florida courts have [held](#) that such an argument is tantamount to accusing the plaintiff's treating physician of medical malpractice, entitling the plaintiff to a so-called "Stuart instruction." A Stuart instruction directs the jury that if negligence is found, the defendant is [liable](#) for [all](#) of plaintiff's medical treatment, including any treatment necessitated by the negligence, mistake or lack of skill of the treating physician. As a result, health care providers are able to perform – and bill for – treatment that is not medically necessary. Defendants are forced to pay for medical treatment that was not caused by the defendant's negligence, and plaintiffs are allowed to collect a windfall in phantom damages.

As with the state's perverted bad faith law, the Florida Legislature also has a chance in its upcoming session to restrict opportunities for inflating medical damages. [Proposed legislation](#), called "Truth in Damages," would require that if medical expenses have already been paid, only evidence of the amount paid – not the amount billed

– is admissible at trial. Recovery for unpaid and future medical expenses would be determined based on evidence of the amounts customarily accepted in payment for such services by providers in the area. The legislation also limits recovery of medical expenses to the costs incurred for medically necessary services resulting from the defendant’s negligence.

## **DISABILITY-ACCESS PLAINTIFFS ON A ROLL**

As [reported](#) in November 2013 by WPTV-TV News of West Palm Beach, nearly 2,000 disability-access complaints have been filed in the last three years against South Florida businesses, most of them small and owner-operated. For those who thought this particular strain of shameless legal extortion was confined to the decidedly anti-business jurisdictions of #1 Judicial Hellhole of California, think again.

Under the direction of sometimes interview-shy personal injury lawyers, serial plaintiffs in wheelchairs, such as Joe Houston and David Ramnarine, have each pursued scores of cases against locally owned restaurants and other mom-and-pop shops. The cookie-cutter nature of many of these complaints leads some targeted business owners to wonder if the plaintiffs ever actually visited their establishments.

Pete Roubekas, owner of the Farmer Girl Restaurant in Lake Worth, Florida, told WPTV, “All of a sudden I get these papers filed to me like I am a criminal.” Among other “really picky things,” he says, the complaint claimed his salad bar was two inches too high and the pavement within a disability-access parking spot was insufficiently level.



Before disability-access plaintiffs and their lawyers start to feel as welcome in Florida as they feel in California, perhaps **Governor Rick Scott** and lawmakers in Tallahassee should consider reasonable reforms to protect the Sunshine State’s small businesses.

## **GOOD NEWS: STRONGER EXPERT TESTIMONY STANDARDS**

As discussed in past Judicial Hellholes reports, a significant contributor to South Florida’s reputation for a poorly balanced civil justice system has been the state’s application of an anything-goes standard for admission of purported expert testimony known as the “*Frye/Marsh* test.” Under this standard, most of the testimony offered in Florida by so-called experts was subject to little or no judicial scrutiny. This allowed jurors to be misled by junk science in product liability, medical malpractice and other complex cases. But in 2013, after a seven-year effort, Florida lawmakers finally [adopted](#) the more rigorous approach followed in federal and most state courts, known as the *Daubert* standard. Now judges are taking a more active role in ensuring that the testimony offered by experts is based on sound science. Sources tell ATRA that Florida courts are uniformly applying the new standard, though the future remains uncertain. It is the practice of the Florida Supreme Court, which repeatedly refused to move to the *Daubert* standard, to approve or reject changes to the rules of evidence duly enacted by the legislature. In 2014 the Florida Bar is likely to issue a recommendation to the Florida Supreme Court as to how it should act. If the Court adheres to its limited role and respects the policy judgment of the legislature, it should uphold the law and firmly bring Florida’s law on expert testimony into the mainstream.

# WATCH LIST

---

The Judicial Hellholes project calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from Hellholes status as their respective litigation climates degrade or improve. The number of jurisdictions cited on this year's Watch List is unusually large relative to the number of full-blown Judicial Hellholes, and this can be seen as a sign of tort reform progress. As the public and policy makers learn more about the well established connections between imbalanced civil courts and lower rates of economic growth and job creation, they are more likely to correct such imbalances before their courts warrant designation among Judicial Hellholes.

## COOK COUNTY, ILLINOIS

Cook County remains on the Watch List for the third straight year as a preferred place for personal injury lawyers to file their claims. There is no reason to believe the litigation environment has improved in Chicago, which for several years ranked among the worst Judicial Hellholes. In fact, a recent appellate court ruling may blow more product liability claims into the Windy City as it already spends millions annually defending *itself* against various lawsuits. Unfortunately, it is a jurisdiction that warrants continued close scrutiny.



### LAYING OUT THE WELCOME MAT FOR PRODUCT LIABILITY CLAIMS

Cook County remains a jurisdiction of choice for personal injury lawyers around Illinois and beyond. Due to a recent appellate court ruling, its dockets may get more crowded.

Jack Taylor lived in Lewiston, Illinois, in Fulton County. He purchased a motocross-style bike in Iowa. He then bought an aluminum rim tire with compliant spokes for the bike in East Peoria, Illinois. One day, Taylor took his bike to a course in Walton, Illinois, in Bureau County. While riding the bike, he performed a jump and blew out the front tire upon landing. He was injured in the fall and taken to a nearby hospital in Princeton, Illinois, in Bureau County. Taylor received follow up orthopedic care in Peoria County. The three witnesses to the accident live in Fulton and Bureau counties. The doctor who treated him practices in Bureau County. Taylor blamed his injury on the bike and component part makers, two of which are located in Wisconsin. A third named defendant operates out of Rock Falls in Whiteside County, Illinois, about 56 miles from Bureau County, but 132 miles from the Cook County courthouse.

If you are a regular reader of the Judicial Hellholes report, you know how this story ends. Taylor's lawyer filed the lawsuit in Cook County, a place where his client did not live, did not purchase the product, was not injured and was not treated; and where none of the witnesses lived, and none of the businesses sued was located. Why? Because, odds are, he would receive more favorable court treatment in Cook County than in any of the counties with a more logical connection to the claim.

The companies hauled into Cook County asked the court to transfer the case to Bureau County, where the bike accident occurred, to no avail. The Cook County Circuit Court denied their motion and, in October, an appellate court [affirmed](#) that decision.

The appellate court's faulty reasoning not only impacts where Taylor's case is heard, it could have a wide-reaching impact on automobile, pharmaceutical, and other lawsuits that arise in the state. The ruling lays out a welcome mat for personal injury lawyers to file product liability lawsuits at the Richard J. Daley Center, no matter

where in the state the injury occurred. The court found that where the primary issue in the case is product liability, the location of the accident is less significant in deciding where it should be heard than in other types of cases. The mere fact that the defendant companies sold their products in Chicago, the appellate court found, gave the Cook County Circuit Court a sufficient interest to decide the case. The court downplayed the inconvenience of litigating the case far from where the witnesses, parties, lawyers, and documents are located. “Computer technology and Internet access,” the court said, reduced such concerns.

The appellate court’s decision will make it extremely difficult for manufacturers who face a lawsuit filed in Cook County to have their case transferred to a county that has a reasonable connection to the claim.

## ‘THE CITY THAT SETTLES’

A recent Illinois Lawsuit Abuse Watch (I-LAW) [report](#) showed that Chicago has spent \$192 million on lawsuits since 2012. As a result, the city’s ability to provide adequate funding for education and other public services has been troublingly limited. The city cut \$68 million from the Chicago Public Schools budget this year, leading to the layoff of over 3,000 teachers and school-based staff. Chicago spent \$87 million defending against lawsuits in 2012, and in just the first four months of 2013, the City spent a whopping \$105 million on lawsuits. According to the I-LAW study, the city has spent nearly \$500 million of hard-earned taxpayer money on lawsuit defense just since 2008.

Consequently, students enrolled in the Chicago Public Schools this year will have larger classes, fewer music and arts programs, and fewer field trips and learning interventions as a result of the hundreds of millions of dollars Chicago has spent defending itself against lawsuits.

And the problem is getting worse. In 2012, the city settled or resolved 914 lawsuits, almost three per day. “The fact that the City of Chicago is sued so often should not be a surprise,” Travis Akin, the Executive Director of I-LAW, said, noting that Cook County is considered one of the worst local courts in the country. “Lawyers from all across the country come to Cook County to file their junk lawsuits, making Cook County



one of the premier destinations for lawsuit tourists. It is clear that the City is perceived as an easy mark by some personal injury lawyers and has earned a reputation not as ‘The City That Works’ but as [‘The City That Settles.’](#)”

Chicago managed to cut its bill for lawsuits in half, it would allow the public school system to rehire 1,403 laid off teachers, restore program cuts, provide an additional \$260 of spending per student, and reduce student fees that were raised by close to 90% at many schools this year.

The culture of lawsuit abuse in Chicago has an impact on the job market, too. Chicago’s stubbornly high unemployment rate in October 2013 was [8.3%](#), significantly higher than the national average. “Employers look to build or expand their businesses where the legal system is fair,” Akin said. “Not only are lawsuits limiting funding for schools, but lawsuit abuse is costing the area jobs and opportunities. It is time for city officials to make reforming Cook County courtrooms a priority.”

## CONSUMER CLASS ACTION LAWSUIT ABUSE

Plaintiffs’ lawyer Thomas Zimmerman has carved a [niche for himself](#) filing class action lawsuits. He was among the plaintiffs’ lawyers who jumped on the bandwagon after a photo that an [Australian teenager](#) posted on Subway’s Facebook page went viral. The photo, which depicted a Subway “Footlong” sandwich measuring marginally less than 12 inches, [sparked](#) class action lawsuits a world away. Zimmerman’s suit is one of [two](#) filed in the Northern District of Illinois, located in Chicago. The other [copycat](#) cases were filed in Arkansas, California, [New Jersey](#), and Pennsylvania.

Zimmerman’s lawsuit claims that Subway engaged in deceptive conduct by advertising the sandwich as a “foot-long” sub because the subs sometimes measure less than a full 12 inches. The plaintiff argued Subway has violated the consumer protection laws of all 50 states and demanded restitution, including actual damages, treble damages, punitive



damages, attorney's fees and costs on behalf of everyone in the country who has purchased a Footlong sandwich.

But considering that a Subway Footlong purchased randomly in Washington, D.C. last January as part of an objective Judicial Hellholes fact-finding mission actually measured closer to 13 inches (see nearby photo), reasonable, non-litigious people might conclude that, since sub-roll baking is

presumably a far less precise science than, say, docking spacecraft, Subway's "footlong" rolls probably average pretty close to 12 inches. And it's quite likely that for every 11.5 inch roll someone can find, someone else can find a 12.5 inch roll. Of course, the 12.5 inch rolls would probably draw lawsuits, too, by those claiming that Subway made them fat by foisting more calories on them than they expected.

But for the time being, Zimmerman will have to take his self-righteous indignation on the road. In June, a federal panel on multidistrict litigation [transferred](#) all of these footlong lawsuits to a federal court in Wisconsin for coordination.

Subway wasn't the only company targeted by Zimmerman in 2013. Earlier this year, using the same named plaintiff as in the Subway case, he filed a class action case alleging noncompliance with the Fair and Accurate Credit Transactions Act (FACTA), this time over a seemingly minute, but potentially devastating misread on the part of Airgas Inc. The lawsuit was also filed in federal court in Chicago. Specifically, [the suit alleges](#) that the plaintiffs received, from Airgas, a "computer-generated cash register receipt which displayed the last four digits of the plaintiff's credit card number as well as the card's expiration date." This sounds innocent at first, but the relevant section in FACTA provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last five digits of the card number *or* the expiration date upon any receipt provided to the cardholder at the point of sale or transaction."

The court dismissed the case due to lack of evidence. But in true Illinois fashion, the judge ordered that the plaintiff have an opportunity for discovery. This preposterous order [allows](#) for a fishing expedition to ensue. To make matters worse, even without proof of loss, credit card and debit card users can, according to statute, recover damages in an amount not less than \$100 and not more than \$1,000 for each act of willful noncompliance. Damages under FACTA are not capped, so a retailer could be liable for up to \$1,000 per transaction even without any proof of loss by the customer.

This isn't the first lawsuit of its kind that Zimmerman has filed. He has made FACTA into a cash cow. His [website](#) contains a list of nearly 30 such cases filed over the past few years in Illinois courts. In 2011, he filed a very [similar suit](#) against Joe Caputo and Sons, Inc. and demanded a whopping \$294 million, even though the class of plaintiffs had suffered no actual losses. The case later [settled](#) for over a half million dollars, of which Zimmerman received \$275,000 in attorney's fees. Settlements in other cases yielded [discounts](#) or [small vouchers](#) toward future purchases for consumers and more fees for Zimmerman.

## CITY OF BALTIMORE, MARYLAND

Baltimore, Maryland has made some improvements over the past twelve months, moving it down to the Watch List; however, there is still cause for concern. The next 12 months will prove to be a true test of the judicial environment in both the city and the state.

### MASS CONSOLIDATION ATTEMPT REJECTED

The reemergence of questionable practices in asbestos litigation in Baltimore are the main reason that the city finds itself back in the Judicial Hellholes spotlight. Known for its "rocket docket," the court pushes cases





through as quickly as possible, a practice that places efficiency of the court and plaintiffs' interest in collecting damages over the due process rights of the defendant. The court has a well-deserved reputation for being plaintiff-friendly and a history of large awards.



Last year's Judicial Hellholes report focused on the [motion](#) and [memorandum](#) filed with the Baltimore City Circuit Court by famed mass tort kingpin **Peter Angelos**. Angelos requested consolidation of 13,000 non-mesothelioma asbestos personal injury lawsuits, including many unimpaired claimants. He essentially argued that, because his firm has filed so many cases, the court should help expedite them by stacking the deck against the targeted defendants.

In April 2013 the *Wall Street Journal* picked up where the 2012 Judicial Hellholes report left off, [condemning](#) Angelos's consolidation game. A preliminary investigation by defense counsel indicated that more than 1,500 of the Angelos claims were duplicates. Of the remaining 11,383 plaintiffs, nearly 70% had been diagnosed by one or more of the same five doctors. One of the physicians, William Goldiner, diagnosed nearly 50% of the plaintiffs, 77 in one day. When not helping to promulgate claims for the tort bar like a well-oiled machine, Dr. Goldiner somehow finds time to work as a team doctor for the Baltimore Orioles baseball team, which, not coincidentally, is owned by Peter Angelos. Another doctor, Joseph Kligman, is a former partner of Dr. Goldiner. The other three doctors either prepared reports at Dr. Goldiner's request or relied on his exams.

"This new information all but obliges [Circuit Court] Judge [John] Glynn to . . . dig into the claims and see how many are bogus suits manufactured with the help of friendly doctors," the Journal editorialized. "[S]uch discovery is the best way for the judiciary to stop the avalanche of fraudulent claims so legitimate victims can get their day in court."

Early in 2013, Judge Glynn denied Angelos's motion to consolidate the cases, appropriately following the path established by many courts around the country, including earlier Maryland precedent. But no one steeped in the history Baltimore's asbestos court believes for a moment that the Angelos firm will not soon be back, ready to play another angle or another judge, in efforts to force asbestos defendants to the settlement table.

## CHANGING THE FACTS FOR MONEY

Baltimore City courts are not unique in experiencing manipulation by personal injury lawyers who claim one thing in a lawsuit while claiming something entirely different in administrative claims filed with trust funds – established by scores of already bankrupted asbestos companies – to compensate claimants.

Nowhere was that made clearer than in a recent case against a manufacturer of building products, CertainTeed, brought on behalf of a deceased worker who alleged asbestos exposure as a result of his presence on a construction site during the late 1970s. A Baltimore City jury returned a [rare defense verdict](#) in December of 2009, finding the plaintiff failed to show that CertainTeed's pipes were used on the plaintiffs' jobs. The defense verdict was overturned on a technicality and a retrial was scheduled for October of 2013.

During the defendant's preparation for retrial, however, it became apparent that the plaintiff was attempting to "game" the system. Immediately after the jury's decision, the plaintiff filed at least 23 claims against bankruptcy trusts alleging exposure to a wide array of asbestos-containing products between 1975 and 1978. In several sworn statements, the plaintiff attested to the fact that he was exposed to asbestos in a variety of places, a fact that he expressly denied during his prior sworn statement in the case against CertainTeed.

In a [motion for sanctions](#) against the plaintiff, the defendant noted that "the bankruptcy trust claims revealed information which either contradicted or supplemented the incomplete exposure history [the plaintiff] recounted, under the penalties of perjury, at trial." By omitting the fact that he was exposed to asbestos on a variety of occasions, "his narrative was constructed to artificially bolster his experts' opinions and prevent CertainTeed from



investigating, developing and asserting the defense that [the plaintiff's] exposure to other asbestos-containing products caused his illness- a defense which, based on his bankruptcy trust claims, was meritorious and powerful." Shortly before the scheduled retrial, the case settled.

The use of this strategy to handicap defendants with half-truths and lies to maximize the odds of recovering significant damages is not limited to this case or to Baltimore City. It has been in play for years and, until the judges crack down on these opportunistic trial attorneys, it will continue. Companies will be forced to spend millions defending themselves against baseless claims, all the while members of the asbestos litigation industry continue to rake in millions in attorneys' fees.

## MARYLAND COURT OF APPEALS ISSUES SOUND DECISIONS

For all the continuing problems with asbestos litigation in Baltimore, there was some encouraging news out of Maryland this year in the form of decisions handed down by the state's highest court. The Maryland Court of Appeals issued three landmark decisions that favored balance and fairness.

In July 2013, the Court of Appeals [retained](#) the doctrine of contributory negligence, which provides a defense against liability when a plaintiff's negligence contributed to his or her own injury. As discussed among the Points of Light on page 49, the court properly recognized that it is the legislature's responsibility to consider and change this longstanding doctrine if it is to be changed at all.

Also that month, the high court [rejected](#) an attempt by plaintiffs' lawyers to extend the asbestos liability of companies to third parties who allege secondhand exposure via the clothing of family members who had worked directly with asbestos-containing products. The Court of Appeals' decision followed a \$5 million plaintiff's verdict in Baltimore City, which was affirmed by an intermediate appellate court. But the high court reversed, holding that companies do not owe a duty of care to third parties if the alleged exposure occurred before medical science had recognized such exposures as a health threat.

In a separate [decision](#) – something of a two-for-the-price-of-one – stemming from yet another Baltimore City lawsuit, the high court rejected a scientifically unsound theory of liability pushed by plaintiffs' lawyers as they seek to squeeze money out defendants for allegedly exposing their clients to as little as a single asbestos fiber. Medical science indicates such miniscule amounts are not enough to cause harm. The court also reaffirmed the constitutionality of Maryland's limit on subjective damages for pain and suffering in wrongful death actions in this case.

Maryland's high court also once again soberly refused to adopt a "dram shop liability" law for the state. In a 4-3 [decision](#), the court held that Maryland does not recognize a cause of action against an alcohol-serving establishment for harm caused by an intoxicated patron off premises in the absence of a special relationship.

But not all of the high court's 2013 decisions went against those looking to expand liability. Earlier in the year, it waded into the thorny issue of whether a plaintiff with no injury, who nonetheless believes he or she was exposed to a toxic substance, can recover damages for medical monitoring. Many courts have [rejected](#) such speculative claims, but Maryland's Court of Appeals [allowed](#) them. It did constrain the potential for abuse, however, both by imposing requirements for scientific evidence that shows monitoring to be necessary for diagnosis and treatment, and placing any recovery into a fund that may only be used for such medical expenses.

A closing note on Maryland's high court: **Chief Judge Robert Bell** retired in 2013 after 22 years on the court (16 as chief justice). He takes with him a reflexive tendency to expand liability, which was evidenced one last time in a spirited dissent that lamented the majority's decision to let legislators retain or reform the doctrine of contributory negligence.

## MARYLAND GENERAL ASSEMBLY MAY UNDO HIGH COURT RULINGS

On cue, plaintiff lawyer-friendly members of the Maryland General Assembly have already expressed their intent to introduce legislation in 2014 that would replace the contributory negligence doctrine with comparative fault. They also intend to introduce a dram shop liability bill. And those liability-loving lawmakers may get additional inspiration in 2015 from a new attorney general to be elected next November. A prominent state senator is expected to be a leading candidate, and he has made no secret of his desire to play an [activist](#) role.

## PHILADELPHIA, PENNSYLVANIA

Reforms instituted early in 2012 by **Administrative Judge John W. Herron** of the Philadelphia Court of Common Pleas have [improved](#) court procedures for addressing mass torts, keeping Pennsylvania off the Judicial Hellholes list for another year. Last year, regular readers of this report will recall, Philadelphia moved from ranking as the #1 Judicial Hellhole, where it had reigned for two consecutive years, to the Watch List. But the jurisdiction still bears watching, given its history as a litigation magnet, three pending Pennsylvania Supreme Court cases and legislative proposals that could significantly increase litigation in Philadelphia and throughout the Keystone State.



### DEMAGNETIZING THE MASS TORT DOCKET

Shortly after the release of last year's Judicial Hellhole report, Judge Herron issued a [year-end report](#) showing the remarkable progress following the first overhaul of practices at the Complex Litigation Center (CLC) in many years. There were 70% fewer mass tort filings in 2012 than in 2011, representing a return to pre-2009 filing levels. Out-of-state filings declined slightly, but many Philadelphia cases still involve plaintiffs from outside Pennsylvania. The share of pharmaceutical cases filed by out-of-state plaintiffs fell from 88% to 86%, and in asbestos cases it fell from 47% to 44%. The overall inventory of mass tort cases pending before the CLC declined by about 14% in 2012 after more than doubling over the preceding six years.

These changes are a result of the CLC's adoption of General Court Regulation No. 2012-01, which revised and streamlined procedures governing mass tort litigation in Philadelphia. The order responded to a dramatic increase in filings after the court's leadership had invited claims from other jurisdictions. Judge Herron's order ended reverse bifurcation (deciding damages before liability) in all mass tort cases, limited consolidation of non-asbestos cases, and continued to require deferral of all punitive damages claims in asbestos litigation, among other reforms.

Judge Herron [hailed](#) the changes as an "exceptional result" leading to a much more manageable docket for the court and a "remarkable turnaround." Defense attorneys [recognize](#) that today "Philadelphia is not as attractive to out-of-state firms and forum-shopping plaintiffs." Instead, more of these mass tort cases are being filed in federal courts or in neighboring New Jersey, according to product liability experts.

### FAIR ALLOCATION OF DAMAGES IN ACCORDANCE WITH RESPONSIBILITY

In addition to judicial reforms, enactment of the Fair Share Act by the legislature two years ago also has helped improve Philadelphia's litigation environment. Pennsylvania was one of a handful of states that imposed full joint and several liability, meaning that a defendant who contributed in any way to a plaintiff's harm could be unfairly required to pay *all* of the plaintiff's damages. The Fair Share Act holds defendants accountable for their proportional share of the damages relative to their responsibility for the injury, and it only holds defendants fully liable if they are 60% or more at fault (or in other limited circumstances).

The law is beginning to have an impact. In the past, personal injury lawyers would often file lawsuits against businesses with the deepest pockets, regardless of the businesses' level of responsibility. Now, some plaintiffs' attorneys [observe](#), they are less likely to file lawsuits against businesses that allegedly played a minor part in what happened to their client. Defense lawyers in Philadelphia have [found](#) that taking joint and several liability off the table has allowed defendants "to garner more fair settlements that are more in line with the facts of the case."

### IMPORTANT CASES PENDING BEFORE THE PENNSYLVANIA SUPREME COURT

Three cases pending before the state's highest court warrant close monitoring because they could impact the litigation environment in the state, especially Philadelphia.

- **Product liability.** The high court has an opportunity to move away from its unique strict products liability jurisprudence that has become unworkable and replace it with a modern, mainstream approach in *Tincher v. Omega Flex, Inc.* in 1966 Pennsylvania adopted a “strict liability” standard for deciding product liability lawsuits that is primarily focused on mis-manufactured products, such as broken glass in a bottle. In subsequent years, Pennsylvania courts struggled to apply strict liability concepts to design-defect and failure-to-warn claims. The state’s high court is [considering](#) whether to replace this approach, with a more modern approach that includes consideration of alternatives available to the defendant.
- **Forum shopping.** The Pennsylvania Supreme Court is [reviewing](#) an appellate court’s [reversal](#) of a Court of Common Pleas of Philadelphia County order that would have transferred a case to Dauphine County. In that case, all of the defendants were from Dauphine, all witnesses were from Dauphine, and none of the Plaintiffs were from Philadelphia. Dauphine County is 105 miles from Philadelphia. At issue in *Bratic v. Rubendall* is the proper standard for deciding motions for *forum non conveniens* in Pennsylvania, which allows a court to transfer or dismiss a case upon a showing that the current venue is “oppressive or vexatious” to the defendant. The upcoming decision is expected to clarify the factors courts may consider when deciding to transfer a case. It is likely to impact the ability of plaintiffs’ lawyers to forum shop in Pennsylvania and seek favorable treatment in Philadelphia when their cases would be more appropriately heard elsewhere.
- **Class action standards.** How Pennsylvania deals with so-called “[trial-by-formula](#)” class action cases will be up for debate before the high court as justices hear an appeal of two consolidated wage-and-hour cases that resulted in a \$187 million judgment against Wal-Mart in Philadelphia County. The [case](#) involves a class of workers who allege they were forced to work off the clock. Based on the testimony and time-clock evidence of just six workers, the Court allowed the plaintiffs’ experts to apply a formula to determine damages for approximately 187,000 current and former Wal-Mart employees. As one firm [observed](#), the case “illustrates the significantly different and more liberal standard Pennsylvania courts are applying to this Commonwealth’s class certification rules than the rigorous analysis and proof necessary to obtain class certification under the federal class certification rules.”

## LIABILITY-EXPANDING LEGISLATION

The Pennsylvania General Assembly is considering several proposals that would increase litigation. One such [bill](#) would have Pennsylvania adopt its own expansive False Claims Act. The federal False Claims Act and similar state laws have led to an explosion of litigation by individuals claiming that a business engaged in inappropriate practices in a contract with the government and that, as a “whistleblower,” they should receive a substantial portion of any taxpayer recovery. Another [bill](#) would raise the limit on the liability of political subdivisions, such as cities and counties, from \$500,000 to \$2 million. The bill would undermine a Pennsylvania appellate court [ruling](#) finding the \$500,000 limit constitutional, though the sponsor [says](#) there is no connection to the court case. That case is now [pending](#) before the Pennsylvania Supreme Court. A third [bill](#) would provide Pennsylvania’s Attorney General with extraordinary new powers to enforce antitrust laws.

## LACK OF BROTHERLY LOVE AMONG LAWYERS

Speaking of antitrust laws, there is a [fight underway](#) in federal court between two personal injury law firms who are battling for clients in Philadelphia. Philadelphia-based Larry Pitt & Associates PC alleges a rival firm, Lundy Law LLP, violated federal antitrust laws by negotiating exclusive deals to advertise its services on buses operated by regional transit authorities. The contracts prevent the Pitt law firm and others from advertising through those outlets. According to the plaintiff-plaintiffs’ firm, Lundy Law has [engaged](#) in predatory conduct and is attempting to monopolize personal injury, Social Security disability and workers’ compensation law in the area. Clearly, competition among personal injury lawyers remains [fierce](#) for Philadelphia’s lucrative lawsuit business.

## NEWPORT NEWS, VIRGINIA

For too long Newport News has managed to avoid the discomfiting heat of the Judicial Hellholes spotlight, perhaps because it is situated in state that is widely known as friendly to business, or perhaps because the asbestos litigation there is largely dominated by local lawyers who discreetly choose to keep their golden goose to themselves without inviting out-of-state forum shoppers to join in. And though pending asbestos lawsuits in the Newport News Circuit Court number in the thousands, the number of cases that actually go to trial each year, on average, is less than a handful.

Why? Because any defendant who chooses to roll the dice at trial is virtually guaranteed to lose, and lose big. The body of laws – substantive, procedural and evidentiary – that has emerged in Newport News asbestos litigation is among the most plaintiff-friendly of any court in the country. A few quirks should be noted about Virginia’s procedure and practice. First, despite civil justice reforms enacted in early 2013 by state lawmakers that better balance tort litigation generally, the summary judgment practice in Newport News asbestos litigation is, for all intents and purposes, non-existent, as affidavits and critical depositions [may not be used](#) to support most asbestos theories upon which motions for summary judgment are based, such as evidence of frequency, regularity and proximity of exposure. Second, Virginia recognizes neither *Daubert* nor *Frye* standards for admission of scientific evidence, but has a more general test of “[scientific reliability](#).” Consequently, trial courts have very broad discretion to admit or deny expert testimony. Finally, and arguably most significant, little avenue for appellate relief exists. Only one appellate court (the Virginia Supreme Court) hears such cases, and appeals are [discretionary](#), not as of right. Armed with these procedural advantages, plaintiffs’ lawyers have circumvented the limitations of Virginia’s otherwise generally reasonable tort laws by pursuing shipyard and Navy cases under general maritime law, which offers claims and remedies not available in a [Virginia-law action](#).



Most notably, maritime law permits a plaintiff to recover under the [relaxed](#) “substantial contributing factor” causation standard, and the Newport News court’s interpretation of that standard is indeed one of the most relaxed versions applied in any court. The jury is instructed that “any” exposure, as long as it is “real, not imaginary,” is a substantial contributing factor, “without regard to quantity.” Coupled with plaintiffs’ experts, who are permitted to offer freely the “every exposure contributes” opinion, product identification is virtually all

that is required to get to a jury. Only if a defendant then can prove that the plaintiff’s disease was “solely caused” by other exposures can a defendant escape becoming jointly and severally liable for a multi-million dollar verdict. This “alternative cause” defense is really no defense at all since plaintiffs and their witnesses seldom recall the other numerous shipboard exposures (particularly those resulting from now-bankrupt defendants’ products), and circumstantial evidence (*e.g.*, in the form of Navy ship records and military specifications) is rarely permitted.

Making matters far worse, however, a defendant on trial is virtually prohibited from mounting any low-dose chrysotile or other scientific defense to the “every exposure contributes” opinion, because the Newport News court liberally characterizes such evidence as impermissible “dose reconstruction.” For example, a defendant is not permitted to demonstrate that the level of asbestos fibers released from its product is below OSHA’s permissible exposure limit. Nor is a defendant’s expert permitted to opine to a numerical threshold of exposure required to cause mesothelioma. And a defendant is not permitted to rely upon any peer-reviewed medical or scientific literature based in any way upon “dose estimates” (literature that is routinely accepted without question in asbestos trials in other states).

Ironically, as the “every exposure contributes” theory is increasingly discredited by other courts, it has become the junk-science standard in Newport News against which defense experts are effectively barred from arguing. In

response to plaintiff experts' opinions that a defendant's products caused the plaintiff's mesothelioma, a defendant's expert can do little more than offer vague principles of physiology and medicine.

Defendants are also categorically prohibited from introducing evidence regarding what the plaintiff's employer – in most cases, the Newport News Shipbuilding & Dry Dock Company or the U.S. Navy – knew about the health hazards of asbestos, or did or failed to do that may have caused or contributed to the exposures. The Newport News court has long held that commonly available defenses such as the government contractor, sophisticated user/learned intermediary, and intervening negligence/superseding cause defenses are unavailable to a product defendant.

## NEW HAMPSHIRE

New Hampshire's civil litigation system is in danger of falling into the Hellholes abyss with the same speed that the Granite State's famous "Old Man of the Mountain" rock formation suddenly crumbled in 2003. The combination of contingency-fee lawyers, plaintiff-friendly judges, and ambitious politicians seeking reelection has created a liability lawsuit environment that threatens to undermine the legitimacy of New Hampshire's legal system while endangering the state's economic competitiveness.

In April 2013, Exxon Mobil Corporation was found liable in a case alleging that the gasoline additive MTBE (methyl tertiary-butyl ether) had contaminated groundwater. The trial in a New Hampshire Superior Court lasted more than three months, but the jury deliberated [less than 90 minutes](#) before awarding the state an astronomical [\\$236 million](#). The verdict was by far the largest in Granite State history and one of the largest in all the United States during 2013.

Though it has since been phased out, MTBE is one of the "oxygenates" approved by the Environmental Protection Agency for use as an additive, required by the [Clean Air Act](#), to make gasoline burn cleaner and reduce vehicle emissions. But product mishandling and sometimes leaky underground storage tanks resulted in instances of contaminated groundwater. Nevertheless, New Hampshire's lawsuit is questionable for several reasons.

First, there is very little groundwater contamination reported in the state, and no reports exceeded the level that state environmental experts say requires environmental clean-up. In fact, the state's water suppliers consistently tell the public that the drinking water is safe.

Second, rather than sue individual gas station owners, whose underground tanks may have leaked, New Hampshire went after the deep pockets of big refiners. And instead of using lawyers from the state attorney general's office, New Hampshire hired private-sector personal injury lawyers on a contingency-fee basis to prosecute the case. Such arrangements, as documented over the years in this report and elsewhere, [raise troubling questions](#) about conflicts of interest, political cronyism, and even corruption.

Third, though New Hampshire's contingency-fee lawyers promised the judge and jury during the trial that any verdict would be used to monitor and clean up MTBE contamination, they are now fighting against an Exxon motion to have the judgment paid into a trust expressly designated for MTBE clean-up. And spendthrift New Hampshire politicians also [want to spend the money](#) on things unrelated to groundwater contamination.

Governments in other states, including [Massachusetts](#), [Maryland](#), [Illinois](#) and [Indiana](#) have similarly treated MTBE settlements as no-strings-attached "windfalls," suggesting that their lawsuits were little more than efforts to fatten government budgets without raising taxes, thereby increasing incumbent politicians' reelection chances.

Finally, presiding **Superior Court Judge Peter Fauver** made several decisions that are inconsistent with long-settled New Hampshire law, all of which favored the plaintiff. For example, defense attorneys argue their client was [deprived of a fair trial](#) by rulings, before and during the trial, against the admissibility of certain evidence.



Judge Fauver

One such [ruling](#) precluded expert testimony from a former EPA official who would have testified about actions taken by New Hampshire under the reformulated gasoline (RFG) program that effectively mandated the use of MTBE. Judge Fauver also allowed plaintiff’s counsel to advance the justifiably controversial theory of “commingled market share liability,” which the New Hampshire Supreme Court has not adopted.

If New Hampshire’s attorney general and other state officials think they can fleece out-of-state corporations as a means to easier reelection, the state will quickly come to find itself cited among Judicial Hellholes in future reports. And, sadder still, the state’s residents will eventually come to learn that such extortion-by-lawsuit drives employers and investors to other states, taking jobs and economic growth with them.

## CITY OF ST. LOUIS, MISSOURI

The City of St. Louis is gaining a reputation as a favorite forum for those filing mass tort cases. According to one attorney interviewed for this report, St. Louis “is Philadelphia all over again.” Objectively, it may be too soon to say that, but the jurisdiction warrants scrutiny.

St. Louis was named a Judicial Hellhole in 2002 and 2003 for being home to the state’s highest verdicts and a disproportionate share of the state’s personal injury and medical malpractice claims. In 2005, the legislature enacted statewide comprehensive reforms to reduce unfair joint and several liability, put reasonable limits on noneconomic damages in medical liability suits and tighten venue laws to preclude unreasonable forum shopping. The reforms led to a [flood](#) of claims in the City of St. Louis in late 2005 (FY 2006) by plaintiffs’ lawyers eager to file lawsuits before the new laws went into effect.

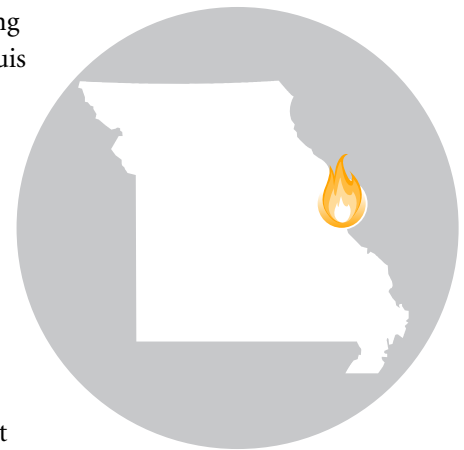
The [2005 reforms](#) significantly improved St. Louis’s reputation and, due to Missouri’s improved venue laws, about half as many personal injury claims are filed in the city in recent years compared to those immediately preceding the legislation. This year, however, the number of asbestos, other product liability, and general personal injury claims hit their post-reform high in St. Louis, according to [court statistics](#). Fortunately, this growth is constrained by the state’s venue law, but it is still a reason for concern.

ATRA sources observe that the City of St. Louis is becoming known for permitting lawyers to combine multiple plaintiffs, sometimes from different states, in toxic tort and pharmaceutical cases. While there is typically some common element (i.e. they took the same drug), there is little else linking their claims. Plaintiffs’ lawyers



reportedly find a St. Louis plaintiff to establish jurisdiction in the local court, then join other individuals from other areas to the suit. This prejudicial practice makes it difficult for businesses to mount a practical defense. The different facts and laws at issue make it challenging for a court to fairly consider the evidence. Important questions of causation may be eclipsed by sympathy when a single trial includes several injured individuals who may or may not have been harmed by the product at issue.

For example, lawyers who represent businesses in St. Louis courts are still [winning](#) from a \$358 million verdict delivered in 2011, the third highest in the state’s history. Indications are that jurors, who were told by the court to expect an eight-week trial, were exhausted by what were ultimately three months of expert testimony in a complex toxic tort case. The lawsuit was brought by residents who alleged that lead emissions from a smelter near their homes had caused or contributed to their children’s health problems. The case, known as *Alexander v. Fluor*, was



originally filed as three separate lawsuits, but later combined into a single trial involving 16 separate personal injury cases. The verdict included \$320 million in punitive damages – \$112 million more than even the plaintiffs’ lawyers had sought. The Missouri Court of Appeals is now [considering](#) whether the trial court gave faulty jury instructions and allowed flawed expert testimony. Hundreds of similar lawsuits are expected to [continue](#) for years. According to a local attorney, the *Fluor* verdict was “a reality check to a lot of corporations facing liability in the region,” pushing them to settle rather than take high-stakes cases to trial.

The increasingly troublesome litigation climate in the City of St. Louis and Missouri more broadly is traceable, at least in part, to the Show Me State’s high court. As [reported](#) last year, the Missouri Supreme Court [struck down](#) a limit on pain and suffering damages in medical malpractice cases, undermining the [progress](#) made since 2005. Most state courts, including those in neighboring [Kansas](#), have found that, in order to protect access to affordable health care, legislatures may limit these subjective awards as long as recoveries for actual medical expenses and other objectively measureable economic losses are not affected. [Efforts](#) are [underway](#) to reinstate the cap by providing a statutory remedy for medical malpractice, rather than providing for recovery through common law. The Missouri Supreme Court had previously [upheld](#) application of the cap in wrongful death cases on that basis.

## CLARK COUNTY, NEVADA

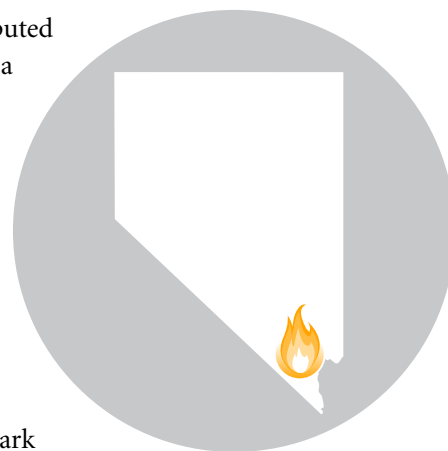
In April 2013 the *Las Vegas Review-Journal* [declared](#) Sin City to be “the undisputed jackpot justice capital of the world” after another Clark County jury delivered a \$500 million verdict against a health insurer. The massive award is the latest in the continuing fallout from the hepatitis C outbreak stemming from unsanitary practices at Dr. Dipak Desai’s endoscopy clinic.

A doctor’s pockets are only so deep, especially when he’s fighting criminal charges, so plaintiffs’ lawyers targeted every major business associated with the clinic. First, in 2010, they got a \$500 million verdict against a drug manufacturer and distributor on the theory that they produced the anesthetic, Propofol, in vials large enough to be reused by clinic staff in treating colonoscopy patients. The following year, plaintiffs’ scored another \$162 million windfall against those businesses. And only days later, another Clark County lawsuit yielded [\\$90 million](#) more in compensatory and punitive damages for a single patient. After those outcomes, the drug maker, Teva, [settled](#) most of the remaining cases for \$285 million.

But the plaintiffs’ lawyers were not through. They turned their attention to local insurer Health Plan of Nevada (HPN), claiming that the insurer also had a role in the outbreak because it failed to remove Dr. Desai from its network of doctors despite quality-of-care concerns. This April, that trial resulted in \$24 million in compensatory damages to three patients plus a mind-boggling [half-billion dollars](#) in punitive damages.

HPN noted that if the verdict is allowed to stand, it will affect the affordability of health insurance in Nevada. “The only numbers that matter here are the higher insurance premiums that Nevadans may pay if health plans are held liable for the criminal conduct of independent doctors,” the statement said. As the *Las Vegas Review-Journal* more colorfully observed, “The breathtaking stupidity of this verdict would be comical if it didn’t have such costly ramifications for every resident of this valley.”

Clark County jurors were kept in the dark about Dr. Desai’s misconduct, allowing plaintiffs’ lawyers to focus on demonizing whatever deep-pocket business they had dragged into court. As Peabody Award-winning investigative reporter George Knapp [observed](#) in the first trial, “jurors were never allowed to hear a host of arguments, evidence and experts who would have offered alternative explanations.” Knapp also noted that “the presiding judge, **Jesse Walsh**, was viewed as overtly friendly to the plaintiff’s attorneys. The fact that those attorneys contributed such a large percentage of Walsh’s campaign war chest is only part of the explanation.”





Similarly, in the HPN case, another Clark County **District Judge Timothy C. Williams** barred the jury from hearing such evidence, including evidence about how insurers rely on numerous private and government regulators' site visits and credentialing and licensing processes, none of which uncovered improper practices at Dr. Desai's clinic over several years, the *Review-Journal* reported. Jurors also were not told that other juries had already found the drug companies at fault.

In October, Dr. Desai was [sentenced](#) to 18 years to life in prison for his criminal convictions in the deadly hepatitis C outbreak.

The *Review-Journal* has cautioned that the Clark County plaintiffs' bar and judiciary's response to the Desai case is "a warning to businesses everywhere: You won't get a fair shake in the Nevada justice system — not even close. Rest assured, our casinos offer fair play. But the courts are rigged."



## ALL EYES ON THE NEVADA SUPREME COURT

Nevada **Attorney General Catherine Cortez Masto's** repeated use of private law firms to enforce Nevada law, and her office's compensation of these outside lawyers based on the amount of fines they impose on those who do business in the state, are of continuing concern. A challenge to this practice, discussed in last year's Judicial Hellholes report, remains pending before the Nevada Supreme Court, which heard oral arguments in June 2013.



That appeal stems from a [Clark County case](#) in which AG Masto hired Washington, D.C.-based plaintiffs' class-action law firm, Cohen Milstein, to challenge the business practices of homebuilders and mortgage lenders. Given that Nevada has among the [highest foreclosure rates](#) in the country, such lawsuits are politically popular. But by pursuing such actions through contingency-fee arrangements, these lawsuits seem more influenced by the profit-motives of self-interested out-of-state lawyers than by justice in the public interest. ATRA filed an [amicus brief](#) in the case.

AG Masto has failed to explain adequately why her own substantial, taxpayer-funded staff cannot handle this litigation. Nor has she explained why she is letting an out-of-state private law firm [drive](#) such massive litigation in Nevada, though Cohen Milstein lawyers have generously supported her campaign fundraising and the Democratic Attorneys General Association in recent years.

In fact, Masto's use of private lawyers could [jeopardize](#) a \$127 million settlement between a mortgage-processing company and 49 other states and the District of Columbia. The holdout is Nevada, where the Masto-Milstein deal gives the private firm "[virtual veto power](#)" over any settlement offer. As the *Wall Street Journal* [explained](#), "under [the mortgage processor's] settlement with other states, the states can renegotiate if any state gets a different deal. So if Nevada's trial lawyers insist on a bigger payday for themselves, [the processor] has to return to the negotiating table." If she allows this to happen, AG Masto will have an awful lot of explaining to do.

Observers are not optimistic that the Nevada Supreme Court will intervene in the arrangement between Masto and her contingency-fee lawyers. And last year, the high court became the only appellate court in the nation to embrace a highly controversial rewrite of the law governing premises liability. In that case, the state's high court [reversed](#) a trial court's dismissal of a "trip-and-fall" case against Costco, finding that the store had a duty to guard against hazards that are open and obvious to all, such as a wooden pallet left in a warehouse aisle. This aspect of the decision is similar to the unsound West Virginia ruling detailed on page 19 of this report. But the Nevada Supreme Court went further. It imposed upon businesses and homeowners a new duty to guard against risks to *any* person who comes onto their property, even if that person is trespassing, adopting Section 51 of the American Law Institute's model Restatement of the Law (Third) of Torts: Liability for Physical and Emotional Harm (2012). In contrast to Nevada and as [noted](#) among Points of Light in last year's report, the clear trend nationally is to reject the new Restatement's radical approach.

## JONES COUNTY, MISSISSIPPI

Jones County, located in southeastern Mississippi, is [proud](#) of its manufacturing, service, and oil industries. But its litigation industry, and the fairness of its circuit court, is of considerable concern to American businesses.

For example, silica lawsuits have dried up around the country but are experiencing a resurgence in Jones County. Back in 2005, thousands of silica lawsuits, which alleged that exposure to silica dust in the workplace resulted in lung damage known as silicosis, were [exposed](#) by a federal judge in Texas as fraudulent. U.S. District **Judge Janis Graham Jack** [found](#) that the number of silicosis cases had exploded in Mississippi, rising from just 40 and 76 claims in 2000 and 2001 respectively, to 10,642 in 2002. Between 2002 and 2004, the 20,479 new silicosis claims filed in Mississippi, Judge Jack found, were more than five times greater than the total number of silicosis cases one would expect over the same period across the entire United States. Her 249-page opinion concluded that “these diagnoses were driven by neither health nor justice: they were manufactured for money” by conspiring lawyers, doctors, and screening companies.

Following that ruling, the silica litigation surge subsided. But an exception is Jones County, where new, flimsy silica cases [reportedly](#) still find a welcoming home. In fact, one of the doctors who previously supported Judge Jack’s findings, pulmonologist **Steven Haber** of Houston, now works for the Mississippi personal injury lawyers who bring the lawsuits, billing \$450 an hour for depositions and \$5,000 a day for trials. Nice work if you can get it.

To their credit, Jones County jurors have shown openness to rejecting such suits. For example, in April 2013 jurors reached a defense verdict, finding that that while a plaintiff, Richard Pierce, was exposed to silica sand, the defendants’ products were not defective in their warnings or design. On cue, **Judge Billy Joe Landrum**, the principal source of anxiety for the silica defendants that find themselves being dragged into Jones County, threw out the verdict and granted the plaintiffs a do-over. Judge Landrum’s June 2013 order granting a retrial found that, in his view, a reasonable jury could not have possibly found for the defendants without ignoring the overwhelming amount of evidence presented at trial.

Going forward with a trial before Judge Landrum is a risky proposition. Some silica cases have resulted in [million dollar](#) verdicts. Other types of product liability cases also come before the court. Ford [reportedly](#) felt it was treated unfairly in a 2010 rollover case that resulted in a \$132.5 million *compensatory* damage verdict. The plaintiff, a promising baseball player, was driving over 80 miles per hour without a seatbelt when he drifted off the road. The plaintiffs’ lawyer [touted](#) the Jones County result as “the largest award ever against Ford in a lawsuit involving a Ford Explorer or Ford Expedition.” Not surprisingly, Ford opted to settle before the punitive damages phase of the trial began. And unless appellate courts or Magnolia State lawmakers in Jackson crack down on Jones County shenanigans, the carmaker will not likely be the last out-state-corporation to do so.



## SPARTANBURG COUNTY, SOUTH CAROLINA



Judge Couch

Spartanburg County is the jurisdiction of choice for lawsuits against pharmaceutical companies by contingency-fee lawyers hired by South Carolina Attorneys General.

In the past three years, plaintiffs’ lawyers at Harrison, White, Smith & Coggins PC have repeatedly sued drug companies on behalf of the state in Spartanburg County, each time summoning defendants to appear before **Circuit Court Judge Roger L. Couch**.

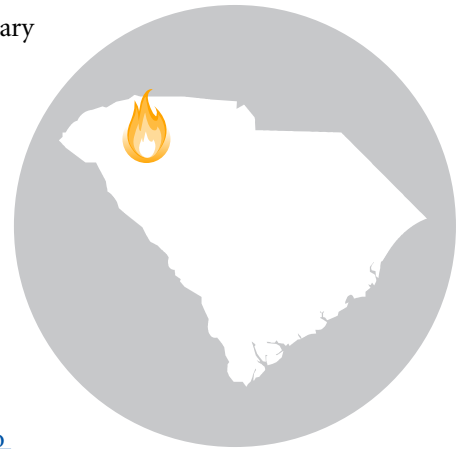
Eli Lilly settled such a suit that challenged the marketing of its antipsychotic drug, Zyprexa, in 2009. The state attorney general signed a [contingency-fee agreement](#) with John White Jr. of Harrison, White, which is based in Spartanburg; John Simmons of the Simmons Law Firm in Columbia, S.C.; and Kenneth Bailey Jr. of Bailey Perrin Bailey in Houston,

Texas. The case settled for \$45 million, which, at that time, was the largest monetary settlement any state in the U.S. had won from Lilly, and it was the second-largest state settlement in South Carolina history.

But the state broke all records in 2011 with Judge Couch's decision to level a \$327 million penalty against Johnson & Johnson subsidiary Janssen Pharmaceutica Inc. for marketing its antipsychotic drug Risperdal in a manner that allegedly downplayed a possible link between the drug and diabetes. Judge Couch [assessed](#) the company \$300 for every sample box it gave out and a \$4,000 penalty for each "Dear Doctor" letter it published. The drug manufacturer [appealed](#) to the South Carolina Supreme Court in March, but it has yet to announce its decision in the case.

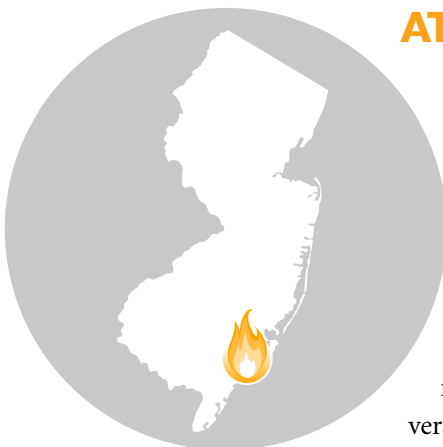
After that blockbuster award, AstraZeneca Pharmaceuticals LP [decided to settle for \\$26 million](#) in August 2012 over the state's allegation that it deceptively marketed its antipsychotic drug Seroquel. The final tally included \$20 million in damages and restitution to the state, \$5 million in penalties, \$1 million in costs, and \$4.35 million for an attorneys' fees fund. This can be compared to AstraZeneca's [\\$68.5 million settlement](#) of similar lawsuits in March 2011 with attorneys general from California (\$5.2 million), Texas (\$3.8 million), New York (\$3.1 million), Ohio (\$2.7 million), New Jersey \$1.85 million), the District of Columbia and 34 other states. Many other states, including Maryland and Nevada, received settlements in the \$1 million to \$2 million range. The private lawyers representing South Carolina sought massive civil fines (\$5k for each prescription) and would have collected a contingency fee based on those penalties if they had moved to trial.

So why Spartanburg, a county that is nearly one hundred miles from the state capital? John White of Harrison, White, Smith & Coggins PC proudly proclaims his office on Main Street in Spartanburg. His [firm bio](#) highlights his connection to [Judge J. Mark Hayes II](#), one of three Circuit Court judges – along with Judge Couch – to call Spartanburg their home bench. Judge Hayes was one of the name partners in the firm along with White, until Hayes was elected to the bench in 2003. Despite the South Carolina Supreme Court's footnoted [admonishment](#) that, "[t]he location of a lawyer's office should not enter into the analysis of whether a defendant resides in a particular county for purposes of venue," it appears that, at least when it comes to the state's pharmaceutical complaints, that prescription is not followed.



## STATEWIDE REFORM HAS HELPED

South Carolina has enacted reforms that have leveled the playing field for defendants in previously plaintiff-friendly jurisdictions within the state. For example, the [South Carolina Fairness in Civil Justice Act](#), which went into effect in 2012, placed various safeguards on punitive damage awards and protected the ability to appeal an adverse judgment, among other reforms.



## ATLANTIC COUNTY, NEW JERSEY

A recusal fight percolating in ongoing Accutane litigation puts Atlantic County, New Jersey, back on the Watch List for another year. Many eyes are now turned toward the New Jersey Supreme Court to settle Hoffmann-La Roche's allegations of bias against **Judge Carol E. Higbee**.

### ONE STEP FORWARD, THREE STEPS BACK

Last year's Judicial Hellholes report applauded Judge Higbee's June 2012 [decision](#) to reject claims brought by plaintiffs against brand name drug manufacturers when plaintiffs allegedly suffered harm from using generic versions of the drugs. But despite the judge's thoughtful stance against inno-

vator liability, pharmaceutical defendants before the judge's bench have often complained about unfair treatment, including in prior cases against Merck, the maker of Vioxx. This year, one defendant took direct steps to address the judge's alleged bias against pharmaceutical companies.

Hoffmann-La Roche, the manufacturer of Accutane, is facing more than 7,700 cases in multicounty litigation (MCL) in New Jersey. While federal MDL courts have [rejected](#) many cases for lack of reliable scientific evidence linking Accutane to inflammatory bowel disease (IBD), Judge Higbee has refused to hold a hearing on the reliability of the plaintiffs' causation expert. And turning a blind eye to [newer studies](#) showing no scientific link between the drug and IBD was only one example that defendants pointed to as indications of the judge's partiality to plaintiffs. Other actions cited include:

- Appearing on a seminar panel during the middle of the trial with the lead plaintiffs' lawyer and expressing an opinion on a key issue pending before the court;
- Placing a defense lawyer under oath and conducting a surprise examination regarding a discovery dispute;
- Refusing to read defense motions and ruling against the defense on motions that were unopposed by the plaintiffs;
- Failing to apply settled New Jersey law, but using a Florida decision to find for plaintiffs (a ruling later reversed by the appellate court);
- Personally seeking a document that plaintiffs wanted and assuming a defense expert lied about her ability to obtain it;
- Making negative comments about pharmaceutical companies in general that were unrelated to the case in front of her, but were based on earlier cases she participated in; and
- Faulting the company for not settling the litigation.

## JUDGE FINDS HERSELF TO BE UNBIASED

Hoffmann-La Roche [filed a motion](#) in December 2012 listing these incidents, asking Judge Higbee to recuse herself from the pending Accutane cases. However, the judge shot back with an order denying the motion and finding herself to be "even-handed and fair" while declaring that "defendant's counsel have been less respectful to the Court, less candid in their representations to the Court, and much more difficult to deal with than plaintiffs' counsel when it comes to any type of compromises to move the litigation forward."

The intermediate appellate court denied Hoffmann-La Roche's [motion to appeal](#) the judge's decision without issuing an opinion, so the company [filed a motion](#) in the New Jersey Supreme Court in August to seek Judge Higbee's recusal. Besides the judge's hostile actions toward defendants, her inaction in handling the Accutane docket was also highlighted. Defendants noted that in one Accutane case, the judge took three years to issue a final appealable order. More than 5,700 of the cases are considered backlogged by the New Jersey courts' own standards – a total that accounts for 17% of the entire state's backlog of cases.

"Requiring years of further litigation before the issue of recusal is finally decided will needlessly result in literally hundreds of legal decisions, including multiple trials, being infected with serious doubt about the judge's partiality," the defendants wrote in their appeal to the high court. As of press time, the mass tort bar waits anxiously to hear while the New Jersey Supreme Court considers the evidence of bias in the Atlantic County courthouse.



# DISHONORABLE MENTIONS

“Dishonorable Mentions” generally comprise singularly unsound court decisions, abusive practices, legislation or other actions that erode the fairness of a state’s civil justice system.

## OKLAHOMA SUPREME COURT NULLIFIES COMPREHENSIVE TORT REFORM LAW

In June 2013, the Oklahoma Supreme Court, by a vote of 7-2, [struck down](#) a comprehensive package of civil justice reforms enacted in 2009 by overwhelming and bipartisan majorities of elected Oklahoma lawmakers with the support of the governor. The court’s majority in *Douglas v. Cox Retirement Properties, Inc.* absurdly reasoned that the Comprehensive Lawsuit Reform Act violated the Oklahoma Constitution’s “single subject” rule, a provision intended to ensure that legislators have adequate notice of the potential effect of each bill. Of course, given the name of the bill, its purpose was patently obvious.



Justice Winchester

As the dissenting opinion, written by Justice James R. Winchester and joined by Justice Steven W. Taylor, noted, “the legislature and the public understood the common themes and purposes embodied in the legislation; it was tort reform. The vote in the House of Representatives was 86 in favor of the bill and 13 opposed. The Senate voted 42 in favor of the bill and 5 against it. Governor Brad Henry signed the bill.”

Unfortunately for taxpayers, consumers, and those in need of accessible and affordable health care in Oklahoma, the Sooner State’s high court took it upon itself to usurp the prerogatives of the proper policy-making branches of government.

But a fast-acting Governor Mary Fallin called a special session and, in September, reform bills this time were passed individually. Lawmakers approved 23 separate bills aimed at deterring frivolous lawsuits and making Oklahoma a more business-friendly state, demonstrating they knew exactly what they were passing the first time. According to the *Oklahoman* newspaper, “business and legislative leaders all praised lawmakers for acting quickly to protect the state’s economy and business community.” Governor Fallin [praised](#) the measures as “a big win for Oklahomans” that will “protect our businesses and our medical community from frivolous lawsuits and skyrocketing legal costs.”



Governor Fallin

Ultimately, the Oklahoma Supreme Court’s action wasted five days of the legislature’s time to reenact bills it had already passed and cost Oklahoma taxpayers approximately [\\$30,000 for each day](#) of the special session.

## ALABAMA SUPREME COURT IMPOSES ‘INNOVATOR LIABILITY’

“Innovator liability” is a relatively new and outrageous theory from the ever creative plaintiffs’ bar whereby a product manufacturer is subject to liability not only for products it made or sold, but also for harm caused by a competitor’s similar products. This theory imposes [unwarranted liability](#) on companies that invest significant time and expense to develop new products that are later copied by a company that sells a generic version.

While federal and state courts [across the country](#) have rejected invitations to abandon the fundamental principle that a company is responsible *only* for its own products and not those of other companies, the Alabama Supreme Court in January 2013 became the first state high court to do otherwise.

In *Wyeth v. Week*, the plaintiff sustained injuries from the long-term use of a generic drug, but sued the manufacturer of the brand-name drug on which the generic was based. He alleged misrepresentation and fraud, claiming his physician was not adequately warned of the potential consequence of long-term use when the drug was marketed and sold by the brand-name manufacturer. In an 8-1 decision, the court held that it was foreseeable

to the brand name manufacturer that statements it made about its products could later result in a patient taking and being harmed by its generic counterpart. But foreseeability alone does not determine duty in tort law. It is just one of the many factors the court can consider when determining liability.



The liability imposed by this theory is not a result of the brand name manufacturer's conduct, but of laws over which they have no control. Congress made a public policy decision to lower barriers of entry for generic drugs, as have state legislatures enacting laws to require certain prescriptions be filled with available generics. These laws have led to 90% of prescriptions for a given brand-name drug being filled with generic versions within months of a brand-name drug's patent expiring.

Saddling a company that has less than 10% of the market share with 100% of the liability exposure creates an unsustainable imbalance. This imbalance will result in brand name manufacturers raising drug prices during periods of exclusivity to pay for the liability. Then the companies may depart the market once the drug's patent expires, taking their knowledgebase with them, rather than prolonging their liability exposure.

Fortunately, the Alabama State Supreme Court is reconsidering its decision and is expected rule again at the end of 2013.

## FLORIDA SUPREME COURT INVALIDATES DOCTOR-PATIENT ARBITRATION AGREEMENT

In stark contrast to a U.S. Supreme Court [decision](#) on the same day *upholding* an arbitration agreement, the notoriously trial lawyer-friendly Florida Supreme Court on June 20, 2013, [overturned](#) a lower court and threw out such an agreement freely entered into by a hernia patient and his surgeon, immediately qualifying for recognition among this year's Dishonorable Mentions.



Justice Canady

Before undergoing surgery, a patient and his doctor [agreed](#) to settle any possible medical liability claim in arbitration, without personal injury lawyers and their high fees. But because the agreement limited non-economic damages to \$250,000 (an amount significantly less than the high-end limit of \$1 million permitted had the case gone to trial) without requiring the doctor to first admit liability, the court majority of justices deemed it unlawful.

In a strong dissent, however, **Justice Charles Canady** discounted the notion that state law is "thwarted" by voluntary agreements designed to limit costs connected to medical litigation, incredulously noting that the law is supposed to control such costs.

"There is an astonishing irony in the line of judicial reasoning that condemns as invalid a voluntary agreement designed to limit the expense of medical malpractice litigation and grounds that condemnation on the purpose of a statute expressly designed to limit the expense of medical malpractice litigation," wrote Canady, joined in his dissent by **Chief Justice Ricky Polston**. "The public policy that animates the court's decision here is an unprecedented judicial policy that contravenes the declared objective of the Legislature."

Hear, hear!

## ILLINOIS APPELLATE DECISIONS ADD TO HIGH WORKERS' COMP COSTS

Workers' compensation costs are taking an unfair toll on Illinois companies. [According](#) to Illinois Chamber of Commerce CEO Doug Wilkin, Illinois has the fourth-highest premiums of the 50 states, when it used to be somewhere in the middle. As a result, employers in Illinois now pay \$10.10 more in workers' comp costs per \$1,000 in salary than an employer in Florida and \$12.30 more than an employer in Texas, he said. And this problem is not limited to just the private sector. Taxpayers for the City of Chicago and the state of Illinois each pay more than \$100 million a year in workers' compensation.

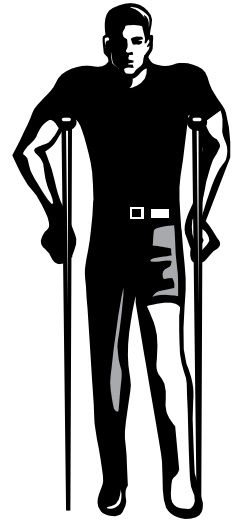
Much of this problem is attributed to activist judges who have taken it upon themselves to run the system as they see fit. "The pattern of adverse decisions being rendered by Illinois courts in workers' compensation cases is such that an employer or insurance company may well conclude that, no matter how egregious the indignity" it has no choice but to

settle and pay, the Illinois Chamber [report](#) says. “The judiciary is not in line with policy objectives aimed at promoting job growth.” The Chamber highlighted 19 cases in which decisions by the Illinois Industrial Commission that would have limited payments to injured workers were overturned or weakened by Illinois appellate courts. More than half of the decisions departed from long-standing precedent. As a result, some of the benefits that were promised in a major workers’ compensation reform package, which was adopted by the legislature in 2011, have not materialized.

In one instance, a maid was awarded workers’ compensation when she fell in her own driveway. The individual, who was employed by a janitorial service to clean churches, offices and residences, was deemed a “traveling” employee because she did not work at a fixed job site. On appeal, the court [held](#) that the injuries sustained when she slipped and fell on her snow- and ice-covered driveway while walking to the vehicle that would transport her to her next cleaning assignment were compensable because, as a traveling employee, her “walk to the minivan constituted the initial part of her journey to her work assignment.”

In another case, an appellate court [overturned](#) a 100-year-old precedent when it decided that the shoulder was no longer considered part of an arm, and awarded a claimant permanent partial disability benefits under the law’s “person as a whole” provision instead. And an appellate court [allowed](#) an employee who used his employers’ truck for personal errands to recover workers’ compensation when he got into an accident on his way home.

These types of rulings, which either expand workers’ compensation liability beyond the work-related injuries for which the system is intended or provide excessive compensation, lead to high costs for Illinois employers and taxpayers while discouraging businesses from locating or expanding in the state.



## MASSACHUSETTS HIGH COURT ABSURDLY EXPANDS ‘CONSUMER PROTECTION’ LAW

A recent decision by Massachusetts’ Supreme Judicial Court shows how disturbingly far consumer protection laws have been stretched and contorted beyond their intended purpose.

*Klairmont v. Gainsboro Restaurant* arose after a college student, during a night of drinking, strayed into a back area of Our House East, a local restaurant-bar. There were no witnesses to what happened next, but he was later found at the bottom of a stairway leading to a basement storage room, where he died from a fall. A jury considered the evidence and found that the small business was not responsible for his death under the state’s wrongful death law. But the case did not end there.



The trial judge [disregarded](#) the jury’s verdict. He is allowed to reach his own conclusions under Massachusetts’ consumer protection law, known as Chapter 93A, which is among the most pro-plaintiff of such laws in the country. The judge transformed the jury’s defense verdict on the wrongful death claim into a consumer protection award of \$2.25 million, which he then tripled to \$6.7 million, and added \$2.3 million in attorneys’ fees and costs.

How does an award go from zero to \$9 million? The judge found that because the stairway that the plaintiff fell down was constructed decades earlier without a permit and was not up to code, the bar had somehow willfully committed an unfair business practice. Although the jury had found that the condition of the stairway did not cause the student’s death, the judge found otherwise. Under Ch. 93A, the judge, not the jury, decides liability.

On [appeal](#), the Supreme Judicial Court found that the state’s consumer protection law could be used this way when a plaintiff’s lawyer can dig up a statutory or regulatory violation that can be allegedly connected to the injury and conveniently, if not convincingly, defined as an unfair business practice. (To its credit, the Supreme Judicial Court did find that it was improper for the trial court to award damages for loss of consortium and loss of future income, amounts authorized under the wrongful death statute, and sent the case back to the trial court for a recalculation of damages and reconsideration of attorney fees). After issuing its decision, the high court required the

small business to pay an additional \$223,977 in fees and nearly \$10,000 in costs to cover the plaintiffs' appellate expenses before remanding the case for further consideration.

As ATRA explained in an [amicus brief](#) filed in the case, states enacted consumer protection laws as “gap fillers” – to provide a means for people to recover when they are duped into buying a product or service by a deceptive advertisement or unfair practice. Since the typical loss in a day-to-day consumer purchase is small, it was felt that the economic realities did not leave consumers with an effective means of recovery. For that reason, Ch. 93A, similar to some other state consumer laws, provides for recovery of triple damages and legal expenses.

The *Klairmont* case is tragic, but it is not the type of injury that consumer protection laws are intended to address. Massachusetts has a wrongful death law tailored to fairly adjudicate allegations of negligent conduct that result in death, which allows high damage awards. In this instance, the jury found that the business owners were not at fault. But an activist judge perverted the state's overly broad consumer protection law to find otherwise.

The Supreme Judicial Court had an opportunity to place rational bounds on private lawsuits brought under Ch. 93A. It failed to do so. Thus Massachusetts businesses and their customers are doomed to pay the price for another terrible case of “bad facts making bad law.”

## MINNESOTA COURT OF APPEALS CREATES NEW RIGHT TO SUE

As discussed in ATRA's recent report, [State Consumer Protection Laws Unhinged](#), plaintiffs' lawyers are using state consumer protection laws to create ways to sue under other state laws. A prime example of this legislating from the bench came out of the [Minnesota Court of Appeals](#) this year.

Typically, when a state legislature passes a law regulating a consumer, business, or health or safety issue, it makes a conscious decision as to how the law will be enforced. In some instances, legislators charge a government agency with enforcing the law. For example, a health inspector may impose fines on a restaurant that violates the health code, but a guest who ate there and did not get sick cannot sue. In other instances, legislators may authorize individuals that are harmed by a violation of the law to bring a private lawsuit. Such laws typically specify the type of evidence needed to prevail in such a suit and how damages are to be calculated. When a statute is silent on whether it authorizes a private right of action, plaintiffs' lawyers often attempt to bootstrap their claim for a regulatory violation into the state's consumer protection law. They do so by claiming that the conduct prohibited under a law that charges the government with sole responsibility for enforcement also constitutes an “unfair or deceptive” practice.

In the Minnesota case, administrators of health insurance plans sued the state's pharmacies, claiming the pharmacies had failed to fully pass on to customers the savings realized when a generic drug was provided rather than a brand-name drug, as required by the state's generic substitution law. The trial court found that the legislature did not intend to create a private remedy under that state law, but instead established a Board of Pharmacy with significant enforcement tools, including the ability to suspend or revoke licenses and impose fines of up to \$10,000

per violation. The trial court also questioned the merits of the claim, noting that the plaintiffs had not indicated any misrepresentation made by the pharmacies and finding that pharmacies had no more of a duty to disclose the prices they pay at wholesale than grocery stores.

An intermediate appellate court agreed that there is no private right of action under the state generic substitution law, but found that an alleged violation of that law could violate the Minnesota Prevention of Consumer Fraud Act (CFA). It ruled that the trial court was wrong in dismissing the consumer fraud claim and remanded the case for trial.





[Judge Heidi S. Schellhas](#) disagreed with the majority’s ruling on the CFA. In dissent, she wrote, “Recognizing new causes of action is something that we have generally declined to do.” She concluded that that the plaintiffs’ lawyers “are attempting to circumvent Minnesota’s administrative remedies and create a private right of action when the legislature has not.”

The appellate court decision, which hands regulatory authority to the plaintiffs’ bar, is on appeal to the Minnesota Supreme Court. ATRA filed an [amicus brief](#) in the case, warning that the appellate “holding will transform statutes intended to permit government enforcement on behalf of the public good into mechanisms for private plaintiffs to seek large damage awards against Minnesota businesses, who would bear the increased costs of defending against consumer lawsuits.” At press time, the high court was slated to hear oral argument on December 11.

## NEW JERSEY APPELLATE COURT INVITES CLAIMS AGAINST TEXTERS

In May of 2012, New Jersey Superior Court Judge David Rand properly [dismissed a lawsuit](#) against a young woman who had sent a text message to a friend shortly before he crossed into oncoming traffic and gravely injured a middle-aged couple on a motorcycle.

Plaintiffs’ attorney [Stephen “Skippy” Weinstein](#) had argued that the texter should have known her friend was driving and was therefore partly responsible for his client’s injuries. But Judge Rand decided that, “Were I to extend this duty to this case, in my judgment, any form of distraction could potentially serve as the basis of a liability case.”

Weinstein [appealed](#) Judge Rand’s decision and nearly got what he was after. On August 27, 2013, a three-judge panel of the Superior Court Appellate Division ruled that “a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving.” But the appellate panel also decided that there was insufficient proof that the texter in this particular case could have known her friend was driving.



Nonetheless, the appellate court decision invites countless lawsuits against anyone or any company that could somehow be accused of knowingly distracting drivers who end up in accidents on New Jersey roads and highways. Among this gigantic pool of potential defendants are individuals who place cell phone calls to family, friends or colleagues; radio shock-jocks, fast-food restaurants with drive-thru windows, billboard advertisers and the providers of GPS devices and services. For it could be argued that all of these people and companies – and many more – know their actions *might* distract a careless driver.

Unfortunately, Weinstein has chosen [not to appeal](#) the case to the New Jersey Supreme Court, which many observers had hoped would disagree with the appellate court by firmly and reasonably limiting such third-party liability in Garden State auto-accident cases. But New Jersey being hyper-litigious New Jersey, after all, it will likely be just a matter of time before the high court finally has an opportunity to weigh in.

# POINTS OF LIGHT

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

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

In its “Points of Light” section, the Judicial Hellholes report highlights jurisdictions in which judges, legislators, the electorate and/or the media have intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the depths of a hellhole or otherwise keep itself from sinking to those depths in the first place. This year’s report again focuses on both judicial and legislative actions, and also commends several state attorneys general who acted to address lawsuit abuse.

## IN THE COURTS

### COLORADO SUPREME COURT INSTRUCTS TRIAL COURTS TO REIN IN DISCOVERY

A Colorado Supreme Court [decision](#) in June instructed trial courts to take an active role in managing discovery to curb abuses and delays, and to lower litigation costs.

Plaintiffs’ lawyers often abuse the discovery process, demanding millions of seemingly irrelevant paper and electronic documents from defendants in order to drive litigation costs high enough to force settlements or otherwise provide grounds for additional lawsuits. Such a fishing expedition is what a trial judge [allowed](#) in *DCP Midstream LLP v. Anadarko Petroleum Corporation*.

But the defendant appealed to Colorado’s high court, which unanimously remanded the case back to the trial court with instructions to require plaintiffs to show the relevance of the discovery documents they sought. **Chief Justice Michael Bender**, writing for the court, told Colorado trial courts that they must “determine the appropriate scope of discovery in light of the reasonable needs of the case and tailor discovery to those needs.”

Some legal observers view the case as a “[landmark decision](#),” because judges often take a hands-off approach to discovery disputes.

ATRA had filed an [amicus brief](#) urging the high court to set reasonable discovery limits and hopes other state supreme courts will follow suit.

### IDAHO JUSTICES UPHOLD ‘VEXATIOUS LITIGANT’ RULE

In April 2013, the Idaho Supreme Court [unanimously upheld](#) a lower court’s decision to declare a frequent lawsuit filer a “vexatious litigant” under a [court rule](#) aimed at neutralizing those who repeatedly file frivolous lawsuits.

**Holli Lundahl Telford** will now need a judge’s permission before bringing another lawsuit in Gem State courts.

**Administrative District Court Judge David Nye** issued the pre-filing order after several other district court and magistrate judges made the request. Judge Nye found that Telford satisfied the criteria set by the law for a vexatious litigant because state courts in Utah and Texas, federal courts in California, Idaho and Montana, and the U.S.

Supreme Court had already designated her as such. Telford also qualified as a vexatious litigant because she had filed three or more pro se litigations in Idaho courts that were determined adversely to her over a seven-year period. A search of court records by the [Idaho State Journal](#) revealed that Telford had filed nine cases in Idaho courts since 2006.

Not surprisingly, Telford challenged her designation as a vexatious litigant with bizarre accusations, meritless arguments regarding the rule's constitutionality, and factually and legally questionable procedural claims.

The Idaho Supreme Court rejected each of Telford's arguments in the first appeal of a vexatious litigant designation under the rule, which went into effect in July 2011, just months before her designation. Telford was also ordered to pay the costs associated with her appeal.



## ILLINOIS SUPREME COURT STRIKES BLOW AGAINST FORUM SHOPPING

As this report has repeatedly documented, certain Illinois counties have long attracted plaintiffs' lawyers from around the country. In December 2012, the Illinois Supreme Court dealt a blow to the ability of plaintiffs' lawyers to file their cases before judges they believe will be most receptive to their claims.

The Illinois Supreme Court [ruling](#) reversed a St. Clair County trial court's refusal, affirmed by a divided mid-level appellate court, to dismiss a Mississippi man's asbestos lawsuit against a railroad that had no connection to Illinois. In that case, *Fennel v. Illinois Central Railroad Co.*, the plaintiff was a lifelong Mississippi resident. He worked primarily in Mississippi and his exposure to asbestos occurred primarily in Mississippi and Louisiana. The vast majority of the witnesses, including the plaintiff's treating physicians, were located in Mississippi. In fact, the plaintiff's lawyers originally filed the claim in a Mississippi state court before re-filing in St. Clair County. The lawsuit's only Illinois connections, the court found, were that the plaintiff's attorneys and an expert witness for the plaintiff were located in the state, and that a defendant's law firm, which had accumulated evidence in asbestos litigation, was located not far from the St. Clair courthouse.



St. Clair County **Judge Lloyd Cueto** had extended the welcome mat to asbestos claims in his court, [writing](#) in his order retaining the Mississippi case that "St. Clair County no longer has congested trial dockets. In fact, there are so few trials that as a matter of policy in Courtroom 404 if the attorneys agree on a jury week they get it. Guaranteed!"

But the Illinois Supreme Court decided that, "Decent judicial administration cannot tolerate forum shopping as a persuasive or even legitimate reason for burdening communities with litigation that arose elsewhere and should, in all justice, be tried there." The high court instructed lower courts to more carefully consider all of the factors governing whether a case should be dismissed because it has a greater connection, and is more fairly decided, in another jurisdiction.

The decision could help curtail forum shopping, reducing the flow of lawsuits from other states to Illinois counties viewed as Judicial Hellholes.

## MARYLAND COURT OF APPEALS RETAINS CONTRIBUTORY NEGLIGENCE DEFENSE

On July 9, 2013, Maryland's highest court retained the doctrine of contributory negligence in [Coleman v. Soccer Association of Columbia](#). Contributory negligence, a settled part of state law for more than 165 years and prevents someone at fault for his or her own injuries from collecting damages in a lawsuit.

In the opinion, **Judge John Eldridge** cited the Court's decision in a 1983 case, in which the court also chose not to adopt comparative negligence, which allows a person who is partially at fault to recover damages. Judge Eldridge emphasized that the Court, in its prior ruling, "declined to abandon the doctrine of contributory negligence in favor of comparative negligence, pointing out that such change 'involves fundamental and basic public policy considerations properly to be addressed by the legislature.'" He pointed to the legislature's express choice to not adopt comparative fault through proposed legislation 21 different times before the court's 1983 decision and "continually" since.

The opinion concluded, “Although this Court has the authority to change the common law rule of contributory negligence, we decline to abrogate Maryland’s long-established common law principle of contributory negligence.”

## NEW JERSEY SUPREME COURT STRENGTHENS MEDICAL-EXPERT STANDARD

At issue in medical liability lawsuits is whether a doctor’s treatment of a patient fell below the level of care and skill that, in light of the surrounding circumstances, is recognized as acceptable and appropriate by similarly qualified and reasonably prudent health care providers. Expert testimony is necessary to establish this standard of care and evaluate whether the treatment provided by the patient’s doctor met that standard. In New Jersey, some courts had allowed doctors to testify as expert witnesses when they did not specialize in the type of care provided to the patient. Such expert testimony may lead to erroneous results. In April, a unanimous New Jersey Supreme Court provided a helpful safeguard in such malpractice cases, [ruling](#) that an expert witness on a patient’s behalf must hold the same credentials as the physicians accused of making a mistake.

While licensed doctors share the same basic foundation of medical knowledge, they practice in very different areas. Even when two doctors have experience treating similar conditions, they may do so in substantially different environments and contexts. For example, an emergency room doctor is likely to have experience stabilizing patients who are rushed to the hospital after a heart attack, while a cardiologist may have more in-depth knowledge of heart conditions and the efficacy of surgery. An ER doctor does not have the expertise to testify to whether a cardiologist properly performed open-heart surgery. Nor is a cardiologist in a position to judge whether, in an emergency room’s sometimes chaotic circumstances, a doctor diagnosed and responded quickly enough to a heart attack.

That is precisely what occurred in the New Jersey case, which involved two ER physicians who treated a patient for carbon monoxide poisoning stemming from inhalation of fumes during home remodeling work. The plaintiff’s expert critiqued the care provided by the ER physicians based on his experience as doctor who is board certified in internal and preventive medicine and who specializes in the use of hyperbaric oxygen in the treatment of carbon monoxide poisoning. Although the expert was not an ER doctor, it was his view that the ER doctors should have immediately referred the patient for treatment with hyperbaric oxygen, a treatment method with [mixed](#) scientific support.

Wisely, the New Jersey Supreme Court found that if a plaintiff’s lawyer is going to sue an ER doctor, he or she must present supporting testimony by another ER doctor to establish the standard of care. The court’s decision furthers the purposes of New Jersey’s Patients First Act, which responded to a dramatic escalation in medical liability insurance premiums that jeopardize accessible and affordable health care in the Garden State.



## COLORADO AND OKLAHOMA PROTECT CONSUMERS FROM LAWSUIT LENDERS

As Abraham Lincoln encapsulated succinctly in an 1850 law lecture, “Never stir up litigation. A worse man can scarcely be found than one who does this.” This year, both a state court and legislature acted in the spirit of Lincoln’s words when they stemmed abusive lawsuit lending practices.

In recent years, an industry has emerged in which certain businesses offer to lend funds to plaintiffs in exchange for a portion of the expected settlement in personal injury lawsuits. Consumer lawsuit lenders seek out plaintiffs and offer them “up front” cash to cover immediate living or medical expenses while they are engaged in a lawsuit. These loans, which are often provided at [sky-high interest rates](#), are then paid back to the lender from any settlement or judgment award the plaintiff may later receive. Lawsuit loan balances can quickly explode and leave borrowers, as the [New York Times](#) has illustrated, literally worse off than they would have been if they had lost their lawsuits.

Legal standards have traditionally prohibited third-party financing of litigation for good reasons: It introduces significant ethical issues that threaten the fairness of the judicial system, encourages questionable claims that might

not otherwise be litigated, and it can discourage reasonable settlements, as ATRA detailed in [comments](#) submitted to the American Bar Association.

The growing lawsuit lending industry takes the position that their services are not subject to safeguards established for consumer loans. In May 2013, a unanimous Colorado Court of Appeals [rejected](#) that position. In that case, two of the nation's [largest](#) lawsuit lenders, Oasis and LawCash, unsuccessfully sued Colorado **Attorney General John W. Suthers** and the Administrator of Colorado's Uniform Consumer Credit Code after the state found the lenders had violated the law. The court agreed with the attorney general, significantly hemming in a controversial industry that many call "predatory."

Also this year, Oklahoma **Governor Mary Fallin** signed the nation's first [law](#) to curb lawsuit lending abuses. The new law, enacted in May, clarifies that lawsuit lenders are subject to the Uniform Consumer Credit Code so that they must play by the same rules as others who provide loans in the state.

## **U.S. FIFTH CIRCUIT UPHOLDS MISSISSIPPI'S LIMIT ON NONECONOMIC DAMAGES**

In February 2013 the U.S. Court of Appeals for the Fifth Circuit [upheld](#) Mississippi's limit on noneconomic damages in general personal injury cases. By an overwhelming majority, Mississippi lawmakers enacted a \$1 million limit on subjective awards for pain and suffering in 2004. The limit was among several [reforms](#) that helped Mississippi jurisdictions climb out of the ranks of Judicial Hellholes.

The Fifth Circuit found that Mississippi's limit on noneconomic damages did not violate the state constitution's jury-trial guarantee and separation of powers provisions. State law places no restriction on the amount that a plaintiff can recover for economic losses, such as medical expenses or lost income.

Mississippi **Governor Phil Bryant** had [urged](#) the Fifth Circuit to uphold the limit on noneconomic damages, saying it was crucial to reducing insurance premiums, boosting local economies and shedding the state's reputation as a haven for "jackpot justice." In fact, in asking the court to uphold the law, Governor Bryant's [brief](#) emphasized that Mississippi once was a poster child for tort reform, repeatedly named as a "Judicial Hellhole" between 2002 and 2005.



The Fifth Circuit found that litigants' right to a jury trial does not negate legislators' authority to define available legal remedies. It also found that the noneconomic damages limit did not interfere with judges' power to reduce excessive verdicts nor impermissibly constitute a legislatively promulgated procedural rule.

The federal appellate court had earlier asked the Mississippi Supreme Court to weigh in on the law's constitutionality, but the state's highest court [declined](#) to do so, finding that because the jury did not itemize how much of the award represented noneconomic damages, it could not evaluate whether the cap had definitely been exceeded.

Observers are closely watching how a state appellate court will rule on a pending challenge to the state's \$500,000 limit on noneconomic damages in medical negligence actions. The 2002 law [helped](#) avert a health care crisis, improved patient access to care, and allowed Mississippi doctors to find affordable insurance.

## IN THE LEGISLATURES

Fourteen states adopted significant, positive civil justice reforms during the 2013 legislative sessions. Below, in alphabetical order, is a state-by-state listing of some of these new laws:

- **Alabama** placed safeguards on state hiring of private lawyers on a contingent-fee basis ([H.B. 227](#)).
- **Arizona** adopted fair procedures for class actions, including interlocutory appeal of certification rulings ([S.B. 1346](#)).
- **Florida** finally replaced its anything-goes standard for expert testimony with the more rigorous *Daubert* standard that experts use reliable methods, joining the federal courts and most states ([H.B. 7015](#)).
- **Louisiana** passed two [modest](#) reforms, one that clarified class action standards ([H.B. 472](#)), and another that protects a defendant's right to a trial by jury in small civil cases ([H.B. 589](#)).
- **Montana** protected the ability of defendants to appeal an extraordinary award by limiting the bond that a defendant can be required to pay to protect its assets during the appellate process to \$50 million ([H.B. 224](#)).
- **New Hampshire** authorized judges to order vexatious litigants (those who have filed three or more frivolous lawsuits) to retain an attorney of good character to represent them in all actions or to post a cash or surety bond sufficient to cover all attorney fees and anticipated damages ([S.B. 96](#)).
- **New Jersey** reasonably limited the threat of, and costly burdens imposed on corporations by, activist shareholder class action and derivative lawsuits ([A.B. 3123](#)).
- **Oklahoma** required transparency between the asbestos claims filed with trust funds of bankrupt companies and lawsuits filed in court ([S.B. 404](#)), clarified that businesses that engage in lawsuit lending are subject to Oklahoma's Uniform Consumer Credit Code ([S.B. 1016](#)), and recognized that, when a contract includes an agreed-upon post-judgment interest rate, that rate applies ([S.B. 1080](#)). And as noted among Dishonorable Mentions on page 43, Oklahoma lawmakers quickly responded this year when the state's high court struck down a bipartisan, comprehensive civil justice reform package enacted in 2009 on grounds that it violated the state constitution's "single issue" clause, by convening in special session and passing 23 separate bills, one at a time.
- **Pennsylvania** allowed health care providers to make benevolent gestures prior to the start of medical malpractice lawsuits and not have those statements or gestures used against them as long as such actions are not statements of negligence or fault. ([S.B. 379](#))
- **Tennessee** adopted a higher standard for punishing a company with punitive damages when it is only vicariously liable for the conduct of another ([S.B. 222](#)) and limited liability of each party in a multi-defendant suit to damages in proportion to its responsibility ([S.B. 56](#)).
- **Texas** provided an automatic mechanism for state courts to dismiss long dormant asbestos and silica claims, while preserving a claimant's ability to refile a dismissed case should the claimant develop an impairing condition ([H.B. 1325](#)).
- **Utah** codified current state law regarding trespass liability to provide that a land owner does not owe a duty of care to a trespasser except in a few limited circumstances ([H.B. 347](#)).
- **Virginia** adopted closer review of expert witness opinions in medical malpractice litigation ([H.B. 1545](#)) and required plaintiffs to have their claims certified by a qualified physician before filing suit ([S.B. 699](#)), amended the state's venue law to reduce forum shopping ([H.B. 1618](#)), and codified cur-



rent state law regarding trespass liability to provide that a land owner does not owe a duty of care to a trespasser except in a few limited circumstances where a common law or statutory right of action already exists ([H.B. 2004](#)).

- **Wisconsin** adopted three important pieces of reform; one that governs the practice of government hiring private, outside plaintiff attorneys on a contingency fee basis ([A.B. 27](#)); another that created a clear reasonable standard for physicians when providing patients with information about the risks and benefits of reasonable alternate treatment and made it clear that a negligent diagnosis claim is separate from an informed consent claim ([A.B. 139](#)); and finally, one that made much needed changes to Wisconsin's lemon law. Specifically, the legislature eliminated automatic double damages; added more time for the manufacturer and dealer to provide a comparable vehicle; reduced the statute of limitations; allowed a court to extend deadlines, reduce, damages, attorneys' fees and costs if a party fails to reasonably cooperate with another party; and clarified what constitutes "out of service" ([A.B. 200](#)).

## STATE ATTORNEYS GENERAL

### STATE AGS CRACK DOWN ON PATENT TROLLS

Three state attorneys general deserve credit for taking action to crack down on so-called "patent trolls," entities that exist solely to accumulate patent rights and threaten lawsuits. These entities own and assert patents, but generally produce no real products or services.

During the past decade or so, patent litigation has surged. Patent lawsuits filed in the United States nearly [doubled](#) between 2009 and 2012. More than [60%](#) of these cases are filed by patent trolls. As a [report](#) prepared for President Barack Obama noted, "Although many significant settlements are from large companies, the majority of PAE suits target small and inventor-driven companies." For example, one lawyer who represents patent trolls has sent more than 8,000 letters to coffee shops, restaurants, and hotels that provided Wi-Fi service to customers, threatening them with lawsuits if they did not pay licensing fees of \$2,500 to \$3,000 for the associated technology, as documented in a recent Manhattan Institute [report](#). Those targeted by patent trolls often settle to avoid substantial litigation costs and the disruption of their operations.

As the Judicial Hellholes report previously [observed](#), the Eastern District of Texas is the most [popular venue](#) for patent trolls because the court moves cases to trial quickly and its juries are perceived to be plaintiff-friendly. Two other federal courts, the District of Delaware and the Central District of California, also host significant patent troll litigation.

In May, Vermont Attorney General William Sorrell was the first to bring an [action](#) against MPHJ Technology Investments, LLC (MPHJ), claiming the entity's conduct violated the state's unfair and deceptive business practices law. MPHJ allegedly sent dozens of predatory demand letters to small businesses, accusing them of infringing patents by using basic office photocopiers to attach scanned documents to emails. MPHJ demanded that the businesses either purchase a license of \$1,000 per employee or be sued for patent infringement.

Two months later, Nebraska Attorney General Jon Bruning [ordered](#) MPHJ to stop sending demand letters to local businesses while the state investigates whether the letters violated consumer protection laws. Minnesota Attorney General Lori Swanson [launched](#) a similar investigation, which in August led to a [settlement](#) with MPHJ. Under its [terms](#), MPHJ may not send demand letters to anyone in Minnesota without first giving the Attorney General's office notice and receiving its consent.

Most recently, Massachusetts Attorney General Martha Coakley warned that her office is also considering ways to crack down on patent trolls. While she did not mention any specific actions, Coakley [expressed concern](#) that "these frivolous lawsuits are serving as an anchor on our [startup companies](#) and our innovation economy as a whole."



## WEST VIRGINIA AG ADOPTS OUTSIDE COUNSEL HIRING POLICY

Time and again, former West Virginia Attorney General Darrell McGraw hired personal injury lawyers to bring lawsuits on behalf of the state. Not coincidentally, many of these personal injury lawyers had [contributed](#) to his political campaigns. He gained a reputation as [leading the way](#) for the expanding, troubling practice of states farming out the work of law enforcement to contingency-fee lawyers who are motivated by profit and self-interest, not justice and the public interest. McGraw's [well-documented](#), behind-closed-doors-with-the-shades-drawn deals fueled the state's reputation as a Judicial Hellhole. And it was one of several factors that finally prompted West Virginia voters to [retire](#) the long-serving attorney general last Election Day.

Refreshingly, his successor, **Patrick Morrisey**, moved [quickly](#) to let the sunshine in. While Morrisey [defended](#) his office's authority to hire outside counsel in a court case stemming from his predecessor's practices, he concurrently developed a new policy to govern any future contracts that his office may enter.

After providing the public with notice of the [proposed policy](#) and an opportunity to comment, Morrisey adopted a new policy that provides a process for hiring outside counsel when the attorney general's in-house staff lacks specialized experience or may otherwise be unavailable to prosecute timely litigation in the public interest. The [adopted policy](#) went into effect on July 16, 2013.

The new policy includes, first and foremost, a long overdue competitive bidding process for the selection of outside counsel that is comparable to those for road- or school-building contracts. Another important provision calls for the attorney general to provide written explanations as to why, precisely, office staff needs help from outside lawyers for particular lawsuits.

In addition to providing safeguards intended to ensure that the attorney general's office remains in control of the litigation for which outside counsel is hired, Morrisey's new policy sets critical limits on just how much of the taxpayers' money outside counsel can siphon off in contingency fees. All of these provisions are significant steps in the right direction.

Attorney General Morrisey deserves considerable credit for bringing the hiring of outside counsel into the light. And West Virginia voters deserve credit for choosing good-government reform over more of the same old shady dealings that had damaged their state's reputation. Digging out of a Judicial Hellhole is not easy, but it can be done when both citizens and policymakers grab shovels and work together.





# SPECIAL FEATURE

---

## PLAINTIFFS' LAWYERS TRY TO KEEP CLASS ACTIONS IN JUDICIAL HELLHOLES

Congress enacted the Class Action Fairness Act of 2005 (CAFA) in [response](#) to a handful of jurisdictions, such as Madison County, Illinois, becoming magnets for massive lawsuits against out-of-state businesses. CAFA, which gained bipartisan support, moved many of these multi-state class actions into neutral federal courts. Plaintiffs' lawyers, however, have developed strategies to exploit exceptions in the law to dodge federal jurisdiction and keep their cases in state courts, which are often those considered Judicial Hellholes.

To game the system, plaintiffs use a two-pronged approach with increasing frequency and, unfortunately, success: (1) join token plaintiffs from defendants' home states for the sole purpose of defeating federal jurisdiction over multi-state ("diversity") cases; and (2) gerrymander plaintiffs into groups of less than 100 in order to avoid federal jurisdiction over "mass actions" under CAFA.

As readers of this report might guess, plaintiffs often use these tricks to try to keep suits in Judicial Hellholes, including state courts in [California](#) and St. Clair County, Madison County, and Cook County, [Illinois](#). Other mass actions percolating in South Florida; St. Louis, Missouri; and Nueces and Hidalgo County, Texas; likewise show-case plaintiff efforts to keep cases in courts highlighted in this report. Until courts see these schemes for what they are, defendants around the country will continue to labor under the burden of litigating a multiplicity of claims in plaintiff-friendly jurisdictions; claims that should be removed to federal court.

In 2005, Congress enacted the Class Action Fairness Act (CAFA). It was bipartisan legislation – Senators Barack Obama, Chuck Schumer, and Dianne Feinstein all supported it, for instance – intended to end certain abusive practices in a handful of quirky state court jurisdictions that, in Congress's view, were extracting suspiciously exorbitant settlements from out-of-state defendant corporations. These state courts, though few in number, could work an unusual amount of mischief, Congress determined, because their lax procedural rules permitted local lawyers to recruit plaintiffs from all over the country to file their cases there. Dispassionate academics referred to such courts as "magnet jurisdictions," wry plaintiffs lawyers called them "magic counties," and irate tort reformers called them "judicial hellholes." –[Fortune](#), 1/7/13

### FRAUDULENT MISJOINER

The first way plaintiffs attempt to evade federal jurisdiction is by including as parties one or more plaintiffs from a defendant's home state. This "fraudulent misjoinder" is the flip side of another plaintiff favorite: "fraudulent joinder," where a plaintiff names a token local defendant for the sole purpose of defeating federal jurisdiction. In that circumstance, if the plaintiff has no real claim against the local defendant, another defendant may move the matter to federal court by arguing that the token defendant was joined only to avoid deciding the case in federal court. The federal diversity law's aim of providing a neutral federal forum for out-of-state defendants is equally threatened by the inclusion of token, local plaintiffs. The Eleventh Circuit first [sounded the alarm](#) over this strategy for violating a defendant's right to move multi-state cases from state to federal court.

But other courts have not followed the Eleventh Circuit's lead. This is partly because the issue is difficult to raise in federal appellate courts. When a federal trial court sends a case back to state court, the decision is usually

not appealable. And in one notable instance where the procedural posture of a case allowed a federal appellate court to consider misjoined plaintiffs, the Eighth Circuit [punted](#) on the opportunity to crack down on fraudulent misjoinder. The court found that federal court rules permit “all reasonably related claims for relief by or against different parties to be tried in a single proceeding.”

What was it that led the Eighth Circuit to find that a Minnesota state court was the right place to try the claims of over 100 plaintiffs, divided among three lawsuits, from states such as Pennsylvania, New Jersey, and New York together? According to the court, it was enough that all plaintiffs alleged some injury resulting from the defendants’ hormone replacement therapy. Even though the individual plaintiffs alleged different injuries suffered in their home states after their own doctors, also in their home states, evaluated the patients’ unique medical symptoms before prescribing the defendant’s drug, the Eighth Circuit felt that a single proceeding was fine. Numerous district courts within the Eighth Circuit have since followed *In re Prempro* and returned multi-plaintiff cases to friendly state courts with no chance for defendants to appeal the remand decisions.

Worse still, plaintiffs have used fraudulent misjoinder to avoid federal jurisdiction even after the federal court system creates a Multi-District Litigation (MDL) docket—often at the request of the same plaintiffs’ counsel—to consolidate the cases for purposes of ruling on evidentiary and procedural issues before trial. The federal Judicial Panel on Multi-District Litigation will only order cases transferred and consolidated for coordinated MDL proceedings where it will promote the just and efficient conduct of the actions. But plaintiffs who engage in jurisdictional gamesmanship through fraudulent misjoinder to avoid federal MDLs in favor of Judicial Hellholes are thwarting the entire purpose of MDL proceedings by making cases less efficient and more expensive to litigate. But that’s the goal: make cases more expensive and more disruptive to defendants’ businesses; keep a cache of cases out of the MDL, and try to ramp up the pressure on defendants to settle.

## **PLAINTIFF GERRYMANDERING**

The effort would not be successful if plaintiffs did not also extend their gamesmanship to avoid removal of multi-plaintiff lawsuits under CAFA. CAFA’s “mass action” provision provides that neutral federal courts may decide “any civil action in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.”

CAFA’s sponsors in Congress made it clear that this provision means any proposal to have any part of a claim determined jointly across 100 or more plaintiffs may be decided in federal court. It does not have to be a trial where 100 or more plaintiffs try all aspects of their case to verdict before a single jury. Plaintiffs’ lawyers two-step around this requirement by first [arbitrarily dividing](#) their claims into buckets of just under 100 and then filing cookie-cutter complaints on behalf of each bucket. The result? Often-times several cases will be filed on behalf of hundreds of plaintiffs, with each case including a token plaintiff from the defendant’s home state. For example, this summer, two local lawyers joined by a Louisiana attorney filed six lawsuits involving [nearly 500 plaintiffs](#) in the St. Clair County Circuit Court. The lawsuits, which were brought against GlaxoSmithKline on behalf of individuals who took Avandia, each included about eighty plaintiffs.

With this tactic, plaintiffs not only skirt CAFA, but avoid paying what would otherwise be tens or hundreds of thousands of dollars in filing fees for what should rightly be individual lawsuits, depriving budget-strapped state courts of the money necessary to administer the cases. And it has yet another benefit to out-of-state lawyers: by filing six or seven cases rather than individual lawsuits on behalf of 500 or more plaintiffs, they sidestep limits on the number of times that an out-of-state attorney can appear in a local court (known as *pro hac vice* appearances), which, in some states, would prevent them from shipping their cases, en masse, from their home state to a Judicial Hellhole.

But plaintiffs do not end the gamesmanship with mathematical gymnastics. The second part of the plaintiff two-step comes later, after the cases are filed in state court. If the cases are filed in a jurisdiction with more than one judge and assigned across multiple judges’ dockets, then plaintiffs’ lawyers file motions to transfer all the cases to a single local judge. If defendants argue that this sort of coordinated or consolidated proceeding is exactly what CAFA calls a “mass action,” plaintiffs protest that they never used the magic words “joint trial.” Does CAFA’s grant

of federal jurisdiction really depend on a plaintiff incanting the specific words “joint trial?” Surely Congress’s [stated intent](#) to “restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance” cannot be defeated by a plaintiff’s choice of words alone.

The Seventh Circuit recognized the absurdity of this proposition when it rightly found that a plaintiff’s proposal for a joint trial may be “implicit” in the consolidation motion. In an October 2012 [ruling](#), in *In re Abbott Laboratories*, the court found plaintiffs had implicitly proposed a joint trial where they moved to consolidate their cases in a single Illinois county based, in part, on their desire to resolve common questions “without the risk of inconsistent adjudication.” The plaintiffs made no mention of how they wanted the claims tried, but the court noted that in complex litigation, many types of proceedings have some elements of a joint trial. For example, bellwether trials, in which test



cases are tried to get a sense of the strength of the parties’ positions and potential liability, do not try all plaintiffs’ cases jointly, but they may influence the resolution of all claims. Similarly, a consolidation proposal allowing the court to determine the ultimate method of trying some or all cases is, implicitly, a proposal for a joint trial.

In November 2013, the Eighth Circuit followed *Abbott* in *Atwell v. Boston Scientific Corp.* Addressing motions to assign several multi-plaintiff cases to a single trial judge, the court [ruled](#) that CAFA mass action jurisdiction applied

because plaintiffs sought to “place multiple cases in a procedural setting where bellwether trials would be the normal way to efficiently prevent inconsistent judgments.”

But the Ninth Circuit’s September 2013 [decision](#) in *Romo v. Teva Pharmaceuticals* turns a blind eye to these realities of complex litigation and, in the process, to CAFA’s purpose. In *Romo*, the court considered whether plaintiffs’ motion to consolidate proceedings under California’s Judicial Council Coordinated Proceeding (JCCP) process amounted to a proposal for joint trial. The consolidation motion asked for a judge to hear “all of the actions for all purposes,” in order to avoid “duplicative and inconsistent rulings, orders, or judgments;” further, cases assigned to JCCP proceedings are consolidated “for all purposes,” *including trial*. The court decided that this request for comprehensive coordination was not a request for a joint trial, and that, improbably, CAFA removal should be “strictly construed.” In rehearing proceedings, plaintiffs are pushing this reliance on formalism even further, arguing that the mass action provision should apply only if plaintiffs explicitly propose a joint trial wherein all of 100 or more plaintiffs’ claims are heard in exactly the same trial proceeding. In modern litigation, this sort of behemoth trial is impossible for a number of reasons, including the court’s calendar, the jury’s attention span, and the parties’ pocketbooks. It is rather unimaginable that Congress bothered to legislate jurisdiction over only these unlikely types of “joint trials”—and not the kind of bellwether or similar proceedings that actually take place.

## COURTS & CONGRESS SHOULD SAY NO TO PLAINTIFF LAWYER MANIPULATION

Lower courts need a reminder that magic words do not control CAFA jurisdiction. Fortunately, the Supreme Court just provided one: in its March 2013 [decision](#) in *Standard Fire Insurance Co. v. Knowles*. The case arose in Miller County, Arkansas, where, as reported by [Fortune](#), “a handful of local law firms have made almost \$400 million in fees over the past seven years, all from class-action settlements that have been procured without a judge’s ever having ruled that these cases are even worthy of class treatment, let alone meritorious.” Plaintiffs’ lawyers were able to keep Miller County a class action magnet following CAFA by inserting into each complaint a “stipulation” that the class members would not seek more than \$5 million dollars, the threshold amount needed for federal courts to have jurisdiction under the federal law.



The Supreme Court held that plaintiffs' lawyers cannot avoid CAFA through such manipulation. Writing for the Court, Justice Stephen Breyer held that to find otherwise would "exalt form over substance, and run directly counter to CAFA's primary objective: ensuring 'Federal court consideration of interstate cases of national importance.'" He went on to observe that allowing the plaintiff to stipulate to damages below the jurisdictional level would "have the effect of allowing the subdivision of a \$100 million action into 21 just-below-\$5-million state-court actions." This is exactly the type of gerrymandering plaintiffs are engaged in with the 100-plaintiff limit, and courts should put a stop to it. So far, however, the only points of light on the mass action issue are found in the Seventh and Eighth Circuits. The Ninth, as well as the [Eleventh](#), Circuit has ignored the Supreme Court's direction by exalting form over substance and rewarding plaintiffs' tactics.

Other appellate courts soon to hear cases on this issue have the opportunity to see reason and recognize the cases as "mass actions" under CAFA. If they fail to do so, lawmakers should ask themselves whether CAFA is being applied as it was intended. As the final referee in disputes about statutory grants of federal court jurisdiction, Congress can make the call to end plaintiffs' jurisdictional games: amend CAFA to be sure that courts find federal jurisdiction over identical suits against identical defendants that fairly implicate the claims of more than 100 plaintiffs and seek more than \$5 million in damages. Game over.

# 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, 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 there 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 one notorious example, West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.
- **Improper Class Action Certification.** Judges certify classes without sufficiently common sets of 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 allow to stand excessive punitive or pain and suffering awards that are influenced by improper evidentiary rulings, tainted by passion or prejudice, or unsupported by the evidence.

## UNREASONABLE EXPANSIONS OF LIABILITY

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

## JUDICIAL INTEGRITY

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





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

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