

JUDICIAL HELLHOLES[®]

2006

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

—Richard “Dickie” Scruggs, Mississippi trial lawyer, whose firm will collect \$1.4 billion in legal fees from the tobacco settlements and has now shifted his focus to lawsuits against HMOs and asbestos claims.

“You may not like it . . . but we’ll find a judge. And then we’ll find a jury” that will find restaurants liable for their customers’ overeating.²

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

“As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so.”³

—Hon. Richard Neely, who served as a West Virginia Supreme Court of Appeals Justice, including several terms as Chief Justice, for over 22 years until 1995, is now in private practice at a firm primarily handling personal injury cases.

“There’s some merit to the accusations of bias in Madison County. I don’t know if it’s a judicial hellhole, but just figure it out. When people come from hither and thither to file these cases, there’s gotta be an inducement, doesn’t there? They’re not coming to see beautiful Madison County.”⁴

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

“West Virginia was a ‘field of dreams’ for plaintiffs’ lawyers. We built it and they came.”⁵

—West Virginia Judge Arthur Recht

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PREFACE

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

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

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

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

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

To the extent possible, ATRF has tried to be specific in explaining why defendants are unable to receive fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members are justifiably concerned about reprisals if their names and cases were identified in this report – a sad commentary about the Hellholes in and of themselves. Defense lawyers are “loathe” to get on the bad side of the local trial bar and

ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

“almost always ask to remain anonymous in newspaper stories.”⁶

ATRF interviewed individuals familiar with litigation in the Judicial Hellholes and verified their observations through independent research of press accounts, studies, court dockets and judicial branch statistics, and other publicly available information. Citations for these sources can be found in the more than 450 endnotes following this report.

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

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

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

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EXECUTIVE SUMMARY

Judicial Hellholes are places where judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil lawsuits. In this fifth annual report, ATRF found several interesting trends. Overall, the type of extraordinary and blatant unfairness that sparked the Judicial Hellholes project and characterized the report over the past few years has decreased across-the-board. This improvement is a shared result of shining the spotlight on litigation abuse with this report and the wise corrections by both the judicial and legislative branches of state governments. It may also indicate that litigation formerly concentrated in a single jurisdiction has dispersed across wider areas. This year's report includes several points of light shining out of Judicial Hellholes that show judges are stopping litigation abuse. For example, Madison County, historically the preeminent Hellhole, has significantly improved in fairness due to the efforts of some in the Illinois judiciary over the past two years.

The danger of regression, however, persists and is very real. The new leadership of the American Association for Justice (AAJ), formerly known as the Association of American Trial Lawyers of America (ATLA), has pledged to undertake a massive political and public relations campaign. We believe that this effort could counter reasonable efforts to increase the fairness and predictability of the civil justice system. New expansions of liability are on the rise, most notably with respect to so-called consumer protection lawsuits and public nuisance actions. For example, some courts have made extremely poor decisions, such as in Louisiana where the state's high court permitted a separate award for "hedonic damages," and in Rhode Island where a trial court vastly expanded public nuisance law. Some legislatures have also made mistakes, such as the California legislature's effort to fund parts of the state budget through punitive damage awards.

In addition, the Class Action Fairness Act (CAFA) reduces business for Judicial Hellholes in actions against *out-of-state* defendants by allowing such defendants to move their cases to federal courts. CAFA is of less use, however, when class actions are brought against businesses that are incorporated or have their principal place of business in the state. (See Dishonorable Mention for New Jersey on page 31). Cases are only assured of being transferred when more than two-thirds of the plaintiffs are from out-of-state. The bottom line is that CAFA sends an important signal to corporate CEOs regarding where they locate: "Be careful about locating in or near a Judicial Hellhole! You may be subject to more class actions with judges favoring plaintiffs."

JUDICIAL HELLHOLES 2006

- 1 West Virginia
- 2 South Florida
- 3 Rio Grande Valley and Gulf Coast, Texas
- 4 Cook County, Illinois
- 5 Madison County, Illinois
- 6 St. Clair County, Illinois

2006 JUDICIAL HELLHOLES

The 2006 report focuses on six Judicial Hellholes:

1 WEST VIRGINIA

West Virginia courts have “served as the home field for plaintiffs’ attorneys determined to bring corporations to their knees.”⁷⁷ The state has a history of alliances and close personal connections among personal injury lawyers, the state’s attorney general, and local judges. Personal injury lawyers prefer West Virginia courts because they can pick-and-choose where they file claims. Also, a state legal rule allows a claimant to collect cash simply by showing that he was exposed to a potentially dangerous substance, even if he has no sign of injury. The state is a popular venue for asbestos cases and, this year, its high court invalidated a law enacted by the legislature to stem blatant forum shopping. West Virginia has recently been plagued by allegations of fraudulent lawsuits, including a phantom doctor who apparently did not exist but signed medical documentation supporting lawsuits. Fake identities have been used at medical screenings, and a local physician is reportedly under investigation for making as many as 150 asbestos-related diagnoses a day.

2 SOUTH FLORIDA

South Florida has a reputation for high awards, improper evidentiary rulings, class actions, asbestos cases, and medical malpractice payouts. This year, the state’s highest court threw out a \$145 billion award against the tobacco industry, which included the largest punitive damage award in American history. It is an area where a lawyer once considered the “King of Torts” is accused of overcharging his clients and misappropriating \$13.5 million in settlements to support his waterfront mansion, opulent lifestyle, and production of “B” movies. Appellate courts have reversed area trial courts for inappropriately certifying class actions, allowing people who are not injured to sue, and permitting junk science.

3 RIO GRANDE VALLEY AND GULF COAST, TEXAS

Rio Grande Valley and **Gulf Coast, Texas**, have each earned reputations as a “plaintiff paradise.” It is an area where extremely weak evidence can net multimillion dollar awards; jurors have relationships with the litigants in their cases; car accident lawsuits are decided without jurors knowing all the facts, including that the plaintiff was not wearing a seatbelt; and huge awards in asbestos cases are overturned due to junk science.

4 COOK COUNTY, ILLINOIS

Cook County, Illinois, is known for its general hostility toward corporate defendants. It hosts a disproportionate share of the state’s lawsuits, has experienced a surge in asbestos claims, and is popular for class actions. Courts there often allow burdensome discovery, put expediency over the rights of defendants, make evidentiary rulings that favor plaintiffs over defendants, and welcome claims with little or no connection to the county. While the area’s once robust manufacturing sector has been dealt a severe blow, the litigation industry is booming in Chicago.

5 MADISON COUNTY, ILLINOIS

Extraordinary changes in **Madison County, Illinois**, that began in 2005 and gained momentum in 2006, have led ATRF to move the jurisdiction up from the worst-of-the-worst to “purgatory.” Lawsuit filings, including class action and asbestos cases have declined dramatically. Local judges have taken action to stop the type of blatant forum and judge shopping that for many years characterized Metro East. Such a reputation does not fade fast, and civil defendants still shiver at the prospect of facing a lawsuit in Madison County.

6 ST CLAIR COUNTY, ILLINOIS

St. Clair County, Illinois, continues to host a disproportionate number of large lawsuits, about double the number of suits seen by trial courts in Illinois counties with similar populations. Class action filings surged more than tenfold between 2002 and 2004 and filings continued to increase in 2005. While class action filings have substantially dropped in neighboring Madison County, St. Clair seems more resistant to change. Many claims are brought on behalf of people who do not live in the county or involve events that occurred outside of Illinois altogether.

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

WATCH LIST

In addition to these Hellholes, the report calls attention to several other areas that we have been watching due to suspicious or negative developments in the litigation environment.

- 1 Miller County, Arkansas
- 2 Los Angeles County, California
- 3 San Francisco, California
- 4 Philadelphia, Pennsylvania
- 5 Orleans Parish, Louisiana
- 6 Delaware

- 1 **Miller County, Arkansas**, a newcomer to this report, hosts more personal injury cases per capita than any other county in the state, and the number of filings continues to increase. Although many of the businesses in downtown Texarkana have closed, law offices are among the most vibrant of businesses. The small, rural county sees more than its fair share of major class action lawsuits and has hosted several high-profile multimillion dollar settlements.
- 2 **Los Angeles County, California**, formerly known as “The Bank” for its large verdicts, has also seen an improvement in the fairness of the litigation climate over the years, though problems persist.⁸
- 3 **San Francisco, California**, was also named for the first time by survey respondents and lawyers familiar with the area.
- 4 **Philadelphia, Pennsylvania**, has long been known for high awards and its abysmal medical liability climate. Shortcuts used by Philadelphia courts strip asbestos defendants of their due process rights by having juries reach monetary awards before even finding that a defendant is responsible for the injury at issue.
- 5 **Orleans Parish, Louisiana**, was known for many years as a Judicial Hellhole. But after the Katrina disaster, the civil justice system came to a standstill. Now, long stalled lawsuits are moving forward and judges are inundated with hurricane-related claims. Will elected judges apply the law

fairly to both sides or tilt the scales of justice to favor their voting constituents over businesses? Will judges meet the challenge of a full docket by fairly addressing such claims or take shortcuts that violate due process? Stay tuned....

- 6 **Delaware** courts are generally known to be fair, but the actions of judges in Madison County, Illinois, to cut down on forum shopping has led personal injury lawyers to file asbestos cases in Delaware. Delaware courts have been fair to both sides and ATRF is hopeful that this following-of-the-letter and spirit of the law will prevail despite a growing wave of new cases.

DISHONORABLE MENTIONS

Dishonorable mentions recognize particularly abusive practices or unsound court decisions. This year’s dishonorable mentions include:

- 1 Providence, Rhode Island
- 2 Massachusetts Supreme Court
- 3 Louisiana Supreme Court
- 4 New Jersey
- 5 Nebraska Supreme Court
- 6 California

- 1 A **Providence, Rhode Island**, trial court vastly expanded plaintiffs’ ability to bring public nuisance lawsuits against businesses regardless of their responsibility.
- 2 The **Massachusetts Supreme Court** interpreted state law to permit individuals who have not even seen or heard an allegedly deceptive advertisement to bring a lawsuit attacking the advertisement as deceptive. Also, it allowed plaintiffs with highly individualized claims to sue as a class.
- 3 The **Louisiana Supreme Court** permitted separate awards for “hedonic” damages, which purportedly provide compensation for lost enjoyment of life but are duplicative of compensation already provided for pain and suffering.

- 4 **New Jersey** courts in the past year have rendered a string of rulings that expand liability in asbestos, consumer fraud, and public nuisance cases. New Jersey courts have allowed class certification of nationwide class actions and rendered overtly anti-defendant evidentiary rulings in personal injury trials. Soon, Atlantic City may become known more for payouts in courtrooms than casinos.
- 5 A **Nebraska Supreme Court** decision overturned 25 years of case law that resulted in the government shutting down public playgrounds and pools.
- 6 The **California** legislature sought to extend a law that encouraged courts and juries to award disproportionate punitive damages by earmarking a significant portion of those awards for state use. It also provided lawyers with a contingency fee based on the full amount of the award. While the bill extending the law was passed by the California Senate and Assembly, it was vetoed by the state's governor. We hope that it will not be resurrected.

SOLUTIONS

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

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

POINTS OF LIGHT

A hallmark of the Judicial Hellholes report is its “points of light” section. These examples highlight judges and legislators who have intervened to stem abusive practices. In addition to the significant improvements in Madison County, reasons for cautious optimism can be found in several other Judicial Hellholes and “watch list” areas. This year's points of light include:

- 1 The **Illinois Supreme Court** firmly rejected consumer class action abuse.
- 2 A **California Appellate Court** required that all members of a class show that they sustained some injury to be part of the action. This issue is on appeal to the California Supreme Court; ATRA will be closely following that case.
- 3 **Florida's** legislature enacted reforms that address unfair joint and several liability, venue, class action and appeal bond rules.
- 4 Various state legislatures and courts are fairly and effectively **Addressing Asbestos and Silica Claims**.
- 5 An **Oregon Trial Court** held the line and rejected a request for loss of companionship damages in a case involving injury to a pet. Such damages would have been new and unprecedented and could negatively impact access to affordable veterinary care.

THE MAKING OF A JUDICIAL HELLHOLE:

THE DEVIL IS IN THE DETAILS

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 hallowed than the judiciary.

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

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, a few judges in Judicial Hellholes do not. A few judges may simply favor local plaintiffs' lawyers and those lawyers' clients over defendant corporations. Some, in remarkable moments of candor, have admitted their biases.⁹ More often, judges may, with the best of intentions, make rulings for the sake of expediency or efficiency that have the effect of depriving a party of its right to a proper defense.

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

Weaknesses in evidence are routinely overcome by pre-trial and procedural rulings. Product identification and causation become "irrelevant because [they know] the jury will return a verdict in favor of the plaintiff."¹⁰ Judges approve novel legal theories so that plaintiffs do not even have to be injured to receive "damages." Class actions are certified regardless of the commonality of claims. Defendants are named, not because they may be culpable, but because they have deep pockets or will be forced to settle at the threat of being subject to the jurisdiction. Local defendants

may also be named simply to keep cases out of federal courts. Extraordinary verdicts are upheld, even when they are unsupported by the evidence and may be in violation of constitutional standards. And judges allow cases to proceed even if the plaintiff, defendant, witnesses and events in question have no connection to the Hellhole jurisdiction.

Not surprisingly, personal injury lawyers have a different name for these courts. They call them "magic jurisdictions."¹¹ Personal injury lawyers are drawn to these jurisdictions like magnets and look for any excuse to file lawsuits there. Rulings in these Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.

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

PRE-TRIAL RULINGS

- **Forum Shopping.** Judicial Hellholes are known for being plaintiff friendly, so many personal injury lawyers file cases there even if little or no connection to the jurisdiction exists. Judges in these jurisdictions often do not stop this forum shopping.
- **Novel Legal Theories.** Judges allow suits not supported by existing law to go forward. Instead of dismissing these suits, Hellhole judges adopt new and retroactive legal theories, which often have inappropriate national ramifications.

- **Discovery Abuse.** Judges allow unnecessarily broad, invasive and expensive discovery requests to increase the burden of litigation on defendants. Judges also may apply discovery rules in an unbalanced manner that denies defendants their fundamental right to learn about the plaintiff's case.
- **Consolidation & Joinder.** Judges join claims together into mass actions that do not have common facts and circumstances. In one notorious example, in 2002, the West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.
- **Improper Class Certification.** Judges certify classes that do not have sufficiently common facts or law, 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. In Madison County, Illinois, for example, judges are known for scheduling numerous cases against a defendant to start on the same day or by giving defendants a week of notice before a trial begins.

DECISIONS DURING TRIAL

- **Excessive Damages.** Judges facilitate and allow to stand extraordinary punitive or pain and suffering awards that are not supported by the evidence, tainted by passion or prejudice, or influenced by improper evidentiary rulings.
- **Junk Science.** Judges do not act as gatekeepers to ensure that the science admitted in a courtroom is credible. Rather, they allow a plaintiffs' lawyer to introduce "expert" testimony that has no credibility in the scientific community, yet purports to link the defendant(s) to alleged injuries.
- **Uneven Application of Evidentiary Rules.** Judges allow plaintiffs greater flexibility in the kinds of evidence that can be admitted at trial, while rejecting evidence that might be favorable to a defendant.
- **Biased Jury Instructions.** Giving improper or slanted jury instructions is one of the most controversial, yet under reported, abuses of discretion in Judicial Hellholes.

UNREASONABLE EXPANSIONS OF LIABILITY

- **Private Lawsuits under Consumer Protection Statutes.** The vague wording of state consumer protection laws has led some judges to allow individuals to sue even if they cannot show actual financial loss resulting from reliance on the conduct they claim is deceptive. (See *Lawsuits Without Injury Under State Consumer Protection Statutes*, p. 7.)
- **Expansive Public Nuisance Claims.** Similarly, the vague concept of a public "nuisance" has led to a concerted effort to broaden public nuisance theory into an amorphous tort in order to pin liability for societal issues on manufacturers of lawful products. Public nuisance theory has always targeted how properties or products are used, not manufactured, which is the province of products liability law. As one court observed, if this effort succeeds, personal injury lawyers would be able to "convert almost every products liability action into a [public] nuisance claim."¹² (See *A Big Nuisance*, p. 9.)
- **Expansion of Damages.** There also has been a concerted effort to expand the scope of damages, which may hurt society as a whole, such as hedonic damages in personal injury claims or "loss of companionship" damages in animal injury cases.

JUDICIAL INTEGRITY

- **Trial Lawyer Contributions.** Trial lawyer contributions make up a disproportionate amount of donations to locally elected judges. A poll found that 46 percent of judges said donations influenced their judicial decisions.¹³
- **Cozy Relations.** There is a revolving door among jurists, personal injury lawyers, and government officials.

WE ARE WINNING, BUT CHALLENGES REMAIN ON THE HORIZON

Over the past five years, the Judicial Hellholes report has contributed to restoring balance in state courts by shining a spotlight on abuses of the civil justice system. Each year since initial publication of this report, the number of Judicial Hellholes has fallen. This demonstrates that the civil justice system has been improving, and the first part of this section focuses on those successes.

Nevertheless, significant challenges remain. First, as New York Stock Exchange Chief Executive John Thain has recently observed, “Class action lawsuits and the cost of litigation pose a tax on all companies in the U.S.”¹⁴ He also said that America’s litigation climate acts as “a deterrent to foreign companies looking to expand in this market.”¹⁵ Concurring with Thain and Treasury Secretary Henry Paulson, a November 22, 2006 *Washington Post* editorial pointed out that, “As a share of gross domestic product, U.S. tort costs are twice those in Germany and Japan and three times those of Britain.”

Second, as this report has continually shown, a single court decision can effectively nullify previous gains. Individual judges ultimately responsible for the litigation climate come and go. Third, the organization now known as the American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), has recently been bolstered by new leadership and electoral results. It is poised to aggressively attack reasonable limits on liability in both the courts and legislatures.

SUCCESS IN JUDICIAL HELLHOLES

When the Judicial Hellhole reports spotlight specific abuse, courts, legislatures and voters have intervened to fix the problems.

CALIFORNIA

Voter passage of Proposition 64 in 2004 and recent appellate-level decisions have begun to curb shakedown lawsuits under

the state’s unfair competition law, which had permitted lawyers to profit by bringing obscure claims on behalf of people who experienced no injury.

FLORIDA

South Florida has been included as a Judicial Hellhole for the past three years due to its high verdicts, improper class certifications, asbestos litigation “rocket docket,” and medical malpractice woes.

- In 2003, the legislature adopted modest limits on noneconomic damages in medical malpractice cases.
- In 2004, Judge McCarthy, who presides over all the asbestos cases in South Florida, dismissed numerous lawsuits that had no connection with the area.
- In 2005, the legislature enacted medical criteria reform for asbestos and silica claims so that a person would have to show credible evidence of an asbestos or silica-related injury in order to file a claim.
- In 2006, the legislature eliminated the rule of joint and several liability that in some cases required defendants to pay for the responsibility of others. The reform helped stem “litigation tourism” by lawyers from other states looking for favorable courts and protected the right of a civil defendant to appeal. (See Point of Light, p. 35.)

ILLINOIS

Madison County has been the poster child of the Judicial Hellholes program for its systematic bias against out-of-state defendants in civil lawsuits, uneven application of the law, favoritism for local plaintiffs' lawyers, creation of previously unknown causes of action and implementation of procedures foreign to due process. Neighboring St. Clair County has also been named as a Judicial Hellhole for some spillover class action abuse and medical malpractice woes.

- In 2004, citizens, tiring of a reputation as the worst Judicial Hellhole, began to rebel. They rejected a Madison County judge for the Illinois Supreme Court, and now have begun raising questions during jury selection of the legitimacy of out-of-state claims.
- That same year, Madison County and St. Clair County courts adopted inactive dockets for plaintiffs who allege they have been exposed to asbestos but cannot demonstrate any injury. These rulings give priority to claims of the truly sick.
- In 2005, President Bush visited Madison County, using the courthouse as a backdrop for announcing his civil justice reform agenda. Soon thereafter, Congress enacted the Class Action Fairness Act, which helped assure that Illinois class actions brought against out-of-state defendants will be heard in federal court.
- The Illinois legislature enacted medical malpractice reforms in 2005, placing limits on noneconomic damages awarded against doctors and hospitals.
- In 2004, the local asbestos judge stepped aside after being criticized for abusive techniques against corporate defendants. His replacement has thrown out a number of asbestos cases that should have been filed elsewhere.
- Recent reports show that class action, asbestos claims, and large lawsuit filings in Madison County have decreased dramatically. Local judges have acted to rein in blatant forum and judge shopping.

MISSISSIPPI

Mississippi has been transformed from the "jackpot justice capital of America"¹⁶ to America's number one reformer. The 2002 and 2003 Judicial Hellholes report cited problems in several Mississippi counties, including Copiah, Claiborne, Holmes, Hinds and Jefferson. The report spotlighted numerous problems, including the abuse of the state's venue laws, the permissive joinder rule allowing for "mass actions" and the naming of the same local drug store in pharmaceutical litigation to stop out-of-

state manufacturers from properly removing the cases to federal court. Substantial improvements have occurred:

- The legislature protected local retailers, such as the local drug store, by providing that a defendant whose liability is based solely on its status as a product seller may be dismissed if there is another defendant from whom the plaintiff may recover.
- Governor Haley Barbour ushered through a comprehensive reform package that curbed venue and joinder abuse by requiring a "substantial" connection between the lawsuit and the county in which it is filed and that venue be proper for each plaintiff.¹⁷ It also included limits on noneconomic damages, limits on punitive damage awards against small businesses, the abolition of joint and several liability, innocent seller protections and better jury service rules.¹⁸
- The Mississippi Supreme Court strengthened the state's venue, mass action and joinder rules by dismissing claims of out-of-state plaintiffs and requiring the claims of Mississippi residents to be heard in a county with a connection to their claims.¹⁹
- Voters elected to the state Supreme Court justices who campaigned against out-of-control litigation.²⁰

MISSOURI

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 restricted venue laws to stop unreasonable forum shopping, among other things.²¹ The reforms have led to a lessening of its Hellhole reputation.²²

PENNSYLVANIA

Philadelphia has been spotlighted the last three years for its unpredictable and high verdicts in medical malpractice litigation. Early on, it became a magnet for the state's medical malpractice claims, causing health care costs and insurance premiums around the state to skyrocket.

- To minimize Philadelphia courts' impact on the state's health care costs, the legislature required medical malpractice claims to be filed where the care was received. It also required an independent expert to certify a claim.
- The number of medical malpractice lawsuits appears to have significantly declined in Philadelphia, though fear remains among area doctors and medical residents.²³

- Reports acknowledge that controversial and complex civil cases have been handled more fairly in 2005, while the number of large damage awards appears to have subsided.²⁴

SOUTH CAROLINA

Hampton County was the No. 3 Judicial Hellhole in 2004 and received a Dishonorable Mention in 2002 and 2003 for its reputation as a destination for litigation tourism – a place plaintiffs go only to file lawsuits. Local judges were abusing South Carolina’s loose venue laws and allowing plaintiffs’ lawyers to serve ostensibly as travel agents for these litigation tourists, filing cases in Hampton County that had no relation to the county. As recognized in the 2005 report, last year the South Carolina legislature²⁵ and Supreme Court²⁶ strengthened the state’s venue rules.

TEXAS

Most notable among the named Hellholes are Jefferson, Starr, Nueces and Hidalgo Counties, with Jefferson County being known as the “Barbary Coast of Class Action Litigation.”²⁷ Jefferson, as well as the other counties, has seen a disproportionate amount of asbestos litigation and outrageous verdicts, as past Judicial Hellholes reports have documented.

- In 2003, the state’s Civil Justice Reform Act reduced abuse in venue, forum nonconveniens and state class actions. It also meaningfully reformed products liability, proportionate liability, appeals bonds and multi-district litigation.
- That same year, the state legislature enacted medical criteria laws for asbestos cases in order to give priority to the claims of the truly sick.²⁸
- Voters also passed Proposition 12 in 2003, giving the legislature authority to limit excessive non-economic damage awards in medical liability suits.

WEST VIRGINIA

Named in every Judicial Hellhole report, West Virginia is known for its cozy relations between plaintiffs’ lawyers, judges and the attorney general. It also was home to one of the largest asbestos mass consolidations, where 8,000 plaintiffs – most from out of state – were joined in one lawsuit against 250 defendants.²⁹ The state Supreme Court also has created loose criteria for new causes of action for medical monitoring and fear of cancer.

- In 2003, the legislature thought it closed the state’s loose venue law by forbidding out-of-state residents to file lawsuits in the state unless the injury occurred in West Virginia or they could not sue the defendant in their home state court. That law, however, was overturned by the state supreme court and is now pending before the Supreme Court of the United States. (See page 13.)

- In 2003, the legislature limited non-economic damages in medical liability cases.³⁰ Medical malpractice lawsuits and settlements appear to be down.³¹
- In 2004, West Virginians voted out Justice McGraw, who authored the medical monitoring decision and was widely considered to be part of the lawsuit abuse problem.
- In 2005, the legislature reformed joint and several liability and curbed third-party bad faith insurance suits.

CLASS ACTION FAIRNESS ACT

In 2005, Congress enacted the Class Action Fairness Act (CAFA) to end many of the class action abuses in Judicial Hellholes. Prior to CAFA, personal injury lawyers could bring massive class action claims in local courts involving parties and conduct having little or nothing to do with the jurisdiction. They could circumvent the federal courts that were established to provide a neutral forum for deciding lawsuits involving residents of different states simply by including a local defendant, such as a retailer or salesperson who sold the product at issue or by asking for no more than \$75,000 per plaintiff (the amount needed for federal court jurisdiction).

Naturally, plaintiffs’ lawyers gravitated to Judicial Hellholes where they expected local courts to allow such claims to move forward, even if they ran afoul of class certification standards and the defendants’ right to due process. A number of these cases ended with lawyers raking in millions of dollars in fees while their clients, who may not even have known of the lawsuit, got coupons.³²

CAFA has achieved its intended effect of moving national class action lawsuits out of local Judicial Hellholes. Since the law took effect in February 2005, state courts are transferring more class actions to federal courts and more lawyers are opting to file their class action claims in federal court rather than shop them to Judicial Hellholes.³³

As the *Chicago Lawyer* recently observed, “In one fell swoop, [CAFA] has transformed the class action landscape from one dotted with lawsuits filed in small counties in downstate Illinois, Alabama, and Texas – ATRA’s ‘judicial hellholes,’ where class action suits were born and corporate defendants died – into one in which virtually every class action suit of any size or significance will land in federal court.”³⁴ That may be a slight overstatement, as CAFA continues to allow large class actions to remain in state courts if they are primarily composed of residents of the state in which they are filed but, as the reduction in filings in places such as Madison County demonstrates, CAFA has had a substantial impact in restoring fairness to Judicial Hellholes.

TRIAL LAWYERS 'TAKE THE GLOVES OFF'

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), has a new name, new leadership and a new attitude. Both of its new leaders, CEO Jon Haber and President Mike Eidson, have significant political and public relations savvy. First, the group has dropped the “trial lawyer” albatross from its name. Then, in the 60th Anniversary edition of its monthly magazine, *Trial*, the group launched multiple attacks against entire industries, promised to increase challenges to civil justice reform, and suggested that members “take the gloves off” to fight limits on liability locally and nationally.³⁵

“Our research shows that if our message is about helping lawyers, we lose. On the other hand, if we’re about getting justice and holding wrongdoers accountable, we win.”³⁶

—Former ATLA President Kenneth M. Suggs

The name change, leadership switch, and special magazine edition represent a new effort, unprecedented in scope, to redefine the organization’s image and open new markets for trial lawyers by expanding liability. Let no one be confused: Steven Seagal was “Out for Justice.” But AAJ, like ATLA before it, will always be out for trial lawyers’ profits. In fact, the organization’s name change is a misrepresentation that invites the kind of deceptive advertising lawsuit in which so many of its members specialize.

Mr. Haber, an individual with substantial public relations and political expertise, will lead the fight against civil justice reform.³⁷

The group intends to triple its communications budget and staff, and has hired pollsters and campaign strategists to improve its image.³⁸ It has established a “war room” and is committed to using media outreach, paid advertising, Internet outreach and a rapid response system to fight civil justice reform.³⁹ The organization has already placed paid advertisements in *USA Today* and established several blogs and websites.⁴⁰

Mr. Eidson, a personal injury lawyer who hails from Judicial Hellhole South Florida, says that he would like to draw the nation’s attention to the benefits of litigation.⁴¹ He plans to focus his organization’s strength in support of political candidates opposed to restrictions on lawsuits, and in responding to criticisms of personal injury lawyers.⁴²

AAJ is expected to vilify industries in the media to keep them from getting a fair trial as future defendants. It also will fight state tort reform initiatives in legislatures and courts. In fact, AAJ Deputy Director of Communications Bill Straub has called on trial lawyers “to launch a full frontal attack” on those who he says are deceiving America with arguments for reining in lawsuits.⁴³

“Trial lawyers must stop playing defense and go on offense. . . .”⁴⁴

—AAJ Deputy Director of Communications Bill Straub

AAJ’s affiliated Center for Constitutional Litigation, led by President Bob Peck, will lead state trial lawyer organizations in challenging the constitutionality of state reform measures.⁴⁵ As *Business Week* recognized, “ATLA is shedding the gold cuff links as it laces up the boxing gloves.”⁴⁶ And considering the 2006 election results, there is concern that earlier progress made in restoring some balance to Judicial Hellholes could be rolled back.

RISING FLAMES IN JUDICIAL HELLHOLES

In recent years, the heat from Judicial Hellholes has caused two types of claims to boil over their traditional boundaries. The first is the use of state consumer protection laws to sue on behalf of people who have not even seen the allegedly deceptive advertisement or relied upon it and who have not experienced any financial loss as a result.⁴⁷ This tactic was examined in depth by an ATRF study released earlier this year. The second type is the use of public nuisance theory, which traditionally provided a means for governments to stop quasi-criminal conduct that affected the public at large. Now public nuisance theory is being contorted to attack manufacturers of lawful products.

In both instances, judges are tempted by personal injury lawyers to establish universal lawsuits that allow anyone to sue over just about anything, even when they cannot meet the basic requirements of tort and product liability law. Many courts have withstood the temptations; others have not.

LAWSUITS WITHOUT INJURY UNDER STATE CONSUMER PROTECTION ACTS

When the average person thinks of consumer protection, he or she is likely to envision a government agency that investigates a complaint and orders a business to stop a practice if it is deceptive. Or the term “consumer protection” may lead people to think of an individual who brings a small claim seeking restitution after being duped into purchasing a product or service that ultimately had decidedly less value or quality than advertised. Indeed, these were the types of regulation that state legislators had in mind when they adopted consumer protection acts (CPAs).

State CPAs were once used by state attorneys general to combat truly deceptive practices, and by consumers in bringing small claims for reimbursement following fraudulent acts. CPAs were meant to protect the “little guy” but, in recent years, personal injury lawyers have discovered their nearly unlimited potential for exploitation. Since these acts allow lawsuits for any conduct that can be characterized as “unfair” or “deceptive,” they provide a tool for plaintiffs’ lawyers to invent lawsuits and make money.



The lawsuits they bring are often not small consumer claims, but massive claims seeking millions or billions of dollars with potentially huge contingency fees.

‘CONSUMER PROTECTION’ TODAY

Today, consumer protection lawsuits have become a key money-making tool for plaintiffs’ lawyers and provide a way for special interest groups to regulate entire industries outside of the political process. Some courts have been all too willing to let these suits move forward, even if the people on whose behalf the lawsuit is brought never saw, heard or relied upon the conduct at issue and did not experience a financial loss.⁴⁸ As one can imagine, these types of unpredictable and unfettered lawsuits wreak havoc on large and small businesses alike, without providing a real benefit to average consumers.

Below is just a sampling of the types of claims that creative plaintiffs’ lawyers have brought or threatened to bring under state consumer protection laws in recent years:

- Lawyers claim that the popular nonstick coating, Teflon®, could pose a health risk – despite a lack of scientific or real-life evidence of any such danger – and seek billions of dollars, purportedly on behalf of consumers of pots and pans in twenty states and the District of Columbia.⁴⁹
- Lawyers have sued cellular phone companies claiming that they should provide users with free headsets because radiation from the phone could cause a brain tumor, despite the companies’ full compliance with safety standards established by the Federal Communications Commission.⁵⁰
- Lawyers have sued sunscreen manufacturers claiming that their products, rather than protecting the public, lull consumers into a false sense of security over prolonged sun exposure, increasing cancer risks and other dangers.⁵¹
- Lawyers have sued breakfast cereal manufacturers claiming that the use of cartoon characters, such as SpongeBob SquarePants, on cereal boxes forces parents, who are apparently incapable of resisting their children’s pleas, to purchase the allegedly unhealthy products.⁵²
- Lawyers have sued the dairy industry and supermarkets for not warning about the effects of lactose intolerance⁵³ or for representing milk as part of a healthy weight loss program,⁵⁴ and have an ongoing lawsuit against McDonalds for making people fat.⁵⁵
- Lawyers have threatened to sue soda makers for selling their products to schools.⁵⁶

- Lawyers have threatened to sue potato chip makers on the theory that bags should include labels warning that the fat substitute olestra could cause cramps and diarrhea, even though the Food and Drug Administration (FDA) studied the issue and found such a warning unnecessary.⁵⁷
- Lawyers have succeeded in certifying a nationwide class action in New Jersey against Merck related to Vioxx.⁵⁸ But unlike Vioxx personal injury claims, the lawyers do not claim their clients suffered any harm from using the drug or even that it did not work for their arthritis; just that it was not worth what they paid for it. In fact, the plaintiffs are not even individual consumers, but labor unions and health maintenance organizations that paid for the drug on behalf of their members – hardly the average consumer such laws were meant to protect. If the plaintiffs win, then they will be entitled to triple damages, and the lawyers will receive a tremendous payout.

What these types of lawsuits generally have in common is that they are generated by lawyers and interest groups for profit or politics, not by consumers who have experienced a loss.

These lawsuits add to the cost and/or limit the availability of many products while providing no real benefit to ordinary, reasonable consumers. Private consumer protection claims are now routinely used to make end-runs around the rational requirements of product liability, tort and contract law.

TARGET INDUSTRIES

- Chemical companies
- Breakfast cereal manufacturers
- Dairy industry
- Sunscreen manufacturers
- Cellular phone companies
- Soda makers
- Snack Food Producers
- Pharmaceutical firms

HOW DO THEY GET AWAY WITH IT?

This type of lawsuit abuse occurs in many states because consumer protection laws do not explicitly require private plaintiffs to show the essential proof typically required in civil lawsuits, including such fundamental elements as actual injury, causation and damages. State consumer protection laws often provide for generous recovery, including attorneys' fees, monetary damages in excess of actual harm and triple damages, even if the conduct was unintentional. Some courts have not required private litigants to show that they actually saw or heard the advertisement and relied upon it in suffering a loss. They have allowed massive class actions that can effectively regulate the conduct of entire industries and threaten employers with bankruptcy for conduct the employers did not know was wrong. For example, Alan Kluger, the attorney bringing a suit claiming that Teflon® is toxic despite no evidence of harm over forty years has said, "I don't have to prove it causes cancer. I only have to prove that DuPont lied in a massive attempt to continue selling their product."⁵⁹ The *Charleston Gazette* called that "a goofy standard that isn't worth two cents, much less the billions of dollars Kluger and the other lawyers seek," adding that it is "toxic to civil justice and the American economy."⁶⁰

PUTTING THE 'CONSUMER' BACK INTO CONSUMER PROTECTION LAWS

Courts and legislatures can and should restore the interests of "consumers" to consumer protection laws. They can start by ensuring that consumers who lose money due to deceptive practices are made whole, and by eliminating the lawyer and interest group-generated lawsuits that are brought for profit and politics. (See *Addressing Problems in Judicial Hellholes*, p. 38.) California voters' overwhelming support for Proposition 64, requiring that plaintiffs suffer an actual loss of money or property, shows public support for reform. (See *Point of Light: California Courts Uphold Voter Intent to Rein in Shakedown Lawsuits*, p. 34.)

A BIG NUISANCE

What to do about global warming? Sue the car makers, of course. Obesity a problem? It must be the fault of restaurants or food producers. Lead poisoning? Force any company that is still around and lawfully made lead paints and pigments more than fifty years ago to pay for it. Underage drinking? Blame the alcoholic beverage industry. Gun crime? Target gun manufacturers.

Welcome to the concerted effort to transform mild-mannered public nuisance theory into Super Tort – capable of leaping tall buildings and "convert[ing] almost every product liability action into a [public] nuisance claim."⁶¹ Personal injury lawyers and some attorneys general have been trying to move public nuisance theory far beyond its traditional boundaries in order to avoid the well-defined strictures of products liability law. The result, as one court explained, is a public nuisance "monster that would devour in one gulp the entire law of tort."⁶²

WHAT IS A 'PUBLIC NUISANCE'?

The history of public nuisance law had nothing to do with product manufacturing. Rather, it empowered governments to stop quasi-criminal conduct that unreasonably interferes with the public's ability to exercise a public right. The traditional public nuisance involves blocking a public roadway, dumping sewage into a public river or blasting a stereo when people are picnicking in a public park.⁶³ Statutes and ordinances also have defined certain conduct as a public nuisance, such as planting hedges on one's property that might block the sight of drivers.

Despite the generic name of the tort, "nuisance," a *public* nuisance claim has very specific requirements. First, there must be an *injury* to "a right common to the general public," such as a blocked public road or a polluted public river.⁶⁴ This is not an ordinary personal injury. Second, the defendant's *conduct* must *unreasonably interfere* with the public right.⁶⁵ Third, the defendant must *control* the nuisance, meaning that he or she has the ability to stop or remedy it.⁶⁶ Finally, the defendant, not the action of another, must be the true *cause* of the harm.

Given the tendency for mischief, courts have developed over centuries significant restraints on public nuisance claims. Specifically, only governments may bring public nuisance claims to stop the activity that unreasonably interferes with the rights of others or force an individual or business to abate the public nuisance itself. Governments, however, cannot seek monetary damages for the state or for private citizens. On the other hand, an individual can seek compensation for a specific injury and loss he or she has sustained due to the nuisance, but not an injunction or abatement.

In short, public nuisance law was *not* developed to give private citizens the power to stop or abate otherwise legal conduct, to allow government to bring suits for financial gain, to spread the risk of an enterprise, or to punish employers.⁶⁷

HOW IS PUBLIC NUISANCE LAW BEING ABUSED?

Most attempts to turn public nuisance law into a super tort that pins liability for a societal ill on a product manufacturer involve the redefining core elements or removing traditional restrictions. Personal injury lawyers try to take advantage of the fact that the word "nuisance" has a generic popular meaning, regardless of its more restricted legal application. As the principal torts text in the 1980s observed, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people...."⁶⁸

Some personal injury lawyers and state attorneys general have tried to classify any potential harm, inconvenience or annoying activity as a public nuisance. They try to redefine or shed the specific damages requirement for private lawsuits – doing so allows for broader recoveries and class actions – or drop the elements of control and proximate cause. In Rhode Island, a court even dropped the conduct requirement, stating that as long as the *injury*

was “unreasonable,” the lawsuit could proceed (See Dishonorable Mention, Rhode Island: The Birth of a Hellhole? p. 28), though it is still unclear if there is such a thing as a reasonable injury.

Regardless of the particular legal web being spun, the common thread is an effort to get a court to issue an ends-justify-the-means decision. Consider the remarkably candid comment by a New York court in allowing a public nuisance claim against a company that was neither the polluter nor the controller of the polluted area. The judge held that while the suit raised “essentially a political question to be decided in the legislative arena,”⁶⁹ he “[n]onetheless” would allow the claim because “[s]omeone must pay to correct the problem.”⁷⁰

MANY COURTS REJECT THIS LITIGATION ABUSE

Courts outside Judicial Hellholes have largely rejected this distortion of public nuisance law. As one jurist observed, if this effort succeeds, one could “convert almost every products liability action into a [public] nuisance claim.”⁷¹

“All a creative mind would need to do is construct a scenario describing a known or perceived harm of a sort that can somehow be said to relate back to the way a company or an industry makes, markets and/or sells its non-defective, lawful product or service, and a public nuisance claim would be conceived and a lawsuit born.”⁷²

—Judge George D. Marlow, New York Supreme Court, Appellate Division, First Department

However, in Judicial Hellholes, the interpretation of public nuisance law is great cause for worry, particularly when litigation targets sweeping social ills or “unpopular” defendants. Such targets have included global warming, obesity, and the makers of lead paint, alcohol and guns, among others.

JUDICIAL HELLHOLES

2006

HELLHOLE # 1

WEST VIRGINIA

There was hope that the infamously unfair litigation climate that led ATRF to repeatedly name the entire state of West Virginia as a Judicial Hellhole might improve after the state legislature enacted a law to curb forum shopping abuse by personal injury lawyers. But this year, the state's highest court thwarted that progress and made it likely that the flood of lawsuits with no real connection to West Virginia will rise again.⁷³ A divided court held the state's venue statute to be unconstitutional under a highly questionable interpretation of the Privileges and Immunities Clause in Article II of the Constitution of the United States. The decision is discussed in detail in this section.

West Virginia continues to grow its reputation for lawsuit-happy lawyers, plaintiff-friendly judges, and questionable and potentially fraudulent claims. It is a place where plaintiffs' attorneys sometimes seek more in fees than their clients receive in recovery,⁷⁴ and where personal injury lawyers sue each other and their own prior clients over litigation expenses.⁷⁵

A Field of Dreams for Plaintiffs' Lawyers

West Virginia courts are considered "a favorite for wealthy personal injury lawyers."⁷⁶ People sued in West Virginia courts often settle rather than risk unfair treatment.⁷⁷ As West Virginia Judge Arthur Recht has recognized, "West Virginia was a 'field of dreams' for plaintiffs' lawyers. We built it and they came."⁷⁸

"West Virginia has served as the home field for plaintiffs' attorneys determined to bring corporations to their knees. . . . [T]oo many lawyers use the threat of litigation as leverage to pry cash out of companies. Some firms' cases may have been based on fabricated evidence. Some judges seem reluctant to throw out even the most flimsy cases. Lawsuits become settlements. Plaintiffs get their cut. Lawyers get their cut. And West Virginia loses."⁷⁹

—The State Journal



Personal injury lawyers love West Virginia because there they can pick-and-choose the courts in which they file claims, and because a legal rule allows plaintiffs with no signs of injury to collect cash merely by showing they were *exposed* to a potentially dangerous substance.⁸⁰ In addition, there seems to be no reasonable limit on damages in the Mountain State, and a defendant that is only partly responsible for an injury can be forced to pay 100 percent of a damages award.⁸¹ West Virginia also has a history of alliances and close personal connections

between personal injury lawyers, the state's attorney general, Darrell V. McGraw, Jr., and state judges.⁸² Recently, for example, the attorney general hired a campaign contributor to bring lawsuits against credit card companies, drug companies and insurers.⁸³ This is a state, after all, where former West Virginia Supreme Court of Appeals Justice Warren McGraw, the attorney general's brother, filed a lawsuit this year blaming a car accident for his losing a bid for re-election in 2004.⁸⁴ He claims that back pain from the accident caused him to grimace during a debate, the videotape of which was then used to produce negative campaign ads.⁸⁵ A bit far fetched, but this is West Virginia.

Personal injury lawyers also find West Virginia to be an extremely attractive forum to file lawsuits, particularly in asbestos cases, because the state's trial courts allow them to group together thousands of individual claims.⁸⁶ This both put enormous pressure on defendants to settle, and severely limits the ability of courts and defendants to focus on the merits of individual claims. Many of these claims are also brought by people who do not reside in West Virginia. It is not out of the ordinary for lawyers to file joint cases on behalf of several out-of-state plaintiffs against over a hundred separate defendants.⁸⁷ A lawsuit filed this year in federal court claims that at least some of these claims are fraudulent.⁸⁸

Some have estimated that excessive litigation costs West Virginia's economy as much as \$626.3 million annually, a permanent loss of over 16,000 jobs, and about \$1,500 per family per year through higher inflation, lost income and decreased spending.⁸⁹

“West Virginia long ago became a favorite dumping ground for asbestos suits because of its reputation for jackpot justice. The state’s court system responded by consolidating suits into mass litigation, thus denying defendants the ability to contest individual cases. This in turn became an invitation for tort lawyers to generate as many claims as possible. . . .”⁹⁰

—*Wall Street Journal*

A Fraudulent Lawsuit Factory?

West Virginia is at the center of allegations that personal injury lawyers and their hired-hand doctors have drummed up fraudulent evidence to support asbestos and silica claims. For instance, this year, defense attorneys for CSX Transportation discovered that a doctor who signed medical reports supporting an asbestos claim of a former railroad worker does not exist. CSX found that a supposed office address for “Dr. Oscar Frye” at 1507 Fifth Avenue in Huntington, West Virginia, has been nothing more than a vacant lot for the past 50 years. The Board of Medicine, state Board of Chiropractic, and Board of Osteopathy had no record of any license issued to a Dr. Frye. The phone number provided on legal papers and purporting to be that of Dr. Frye belonged to someone else.⁹¹ The company also found that the medical report bearing Dr. Frye’s signature included language identical to other medical documentation that it had received from other doctors around the country in support of asbestos suits. This led CSX attorneys to conclude that the Pittsburgh-based personal injury firm that filed the case in Marshall County had provided doctors with preprinted materials. They also were led to question how many other fraudulent claims were pending in West Virginia courts. The personal injury firm reacted by withdrawing from its representation of the client with the apparently fraudulent medical records, but reportedly has resisted efforts to verify the authenticity of other asbestos claims it has filed.⁹² Steve Cohen, director of West Virginia Citizens Against Lawsuit Abuse, and his trusty dog Lucy tried to help sniff out the elusive Dr. Frye.⁹³ But failing to pick up any scent, Lucy’s diligent search ended when she retreated from the hot sun and found a nice shady spot for a nap on the empty lot.⁹⁴

Dr. Frye is not the only doctor involved in the asbestos and silica mess. A real doctor, Ray Harron of Bridgeport, West Virginia, has found himself neck-deep in accusations of supporting highly questionable asbestos and silica claims. Dr. Harron reportedly was paid millions by personal injury lawyers to diagnose potential asbestos victims. He did so with amazing efficiency – on some days, at a rate of about one patient per minute. According to the *New York Times*, Dr. Harron made 75,000 diagnoses since the

mid-1990s, commonly reading as many as 150 x-rays per day, at a rate of \$125 each.⁹⁵ He reviewed asbestos claims for the same law firm involved in the “Dr. Frye” scandal. Dr. Harron found himself called to testify before the United States Congress. He refused to answer questions on the grounds of self incrimination and is reportedly facing criminal investigation. Dr. Harron also has come under national fire for reportedly double-diagnosing thousands of plaintiffs with both silicosis and asbestosis, even though the medical literature makes clear that the chances of contracting both conditions are remote.⁹⁶

But wait, there’s more. In another case, evidence shows that a worker who had been previously diagnosed with asbestosis and received a cash settlement impersonated another unimpaired worker so that he too could collect. These screening shenanigans were all sponsored by the same law firm and were signed by of Dr. Harron.⁹⁷ CSX’s attorneys have responded to the questionable conduct in these and other cases by taking the unprecedented step of filing their own lawsuit alleging fraud against the personal injury firm that has brought such claims. Observers have commented that the suit “is remarkable because it may represent a changing tide” in West Virginia’s long reputation as a Judicial Hellhole.⁹⁸ West Virginia Judge Arthur M. Recht, who is overseeing the mysterious Dr. Frye case, deserves acknowledgement for allowing CSX to investigate the suspected fraud, rather than simply dismissing the case – a cover tactic that would be expected in the worst Judicial Hellholes.⁹⁹

“It’s high time the claims themselves, and the tactics of the firms who file them, are examined in detail.”¹⁰⁰

—*Charleston Daily Mail*

Moving Forward

In recent years, the West Virginia legislature has stepped in to try to restore some level of fairness to the state’s civil justice system. In 2005, the legislature enacted reforms to address unfair joint and several liability that place minimally at-fault defendants at risk of paying the entire judgment. It also curbed third-party, bad-faith insurance suits.

The enactment of medical liability reforms in 2001 and 2003 has dramatically helped improve access to medical care. In fact, Dr. Frederic H. Pollack, who serves as the Director of Orthopedic Trauma at Charleston Area Medical Center, has said that his hospital’s recruitment of physicians to assist in the trauma center has been “remarkable” and “unprecedented” since the reforms and has included four orthopedic surgeons, three plastic surgeon nurses, three general surgeons, a spine specialist, two noninvasive vascular specialists, three maxillofacial surgeons and a neurosurgeon.¹⁰¹

“All things are coming together to make West Virginia an attractive place to practice medicine.”¹⁰²

—Evan Jenkins, Executive Director of the State Medical Association and a Democratic State Senator from Cabell County

Further, Governor Joe Manchin III has recognized that the reforms enacted under his predecessor, Governor Bob Wise, “have worked, cutting medical malpractice lawsuits significantly and reducing the total amount of paid verdicts and settlements by over 50 percent.”¹⁰³ Insurers have filed to cut their malpractice premiums by as much as 15 percent this year, the overall number of medical liability claims has fallen about 40 percent, and the state is on track to have a “banner year” in terms of attracting new doctors.¹⁰⁴ But it is too early to sound the “all clear” on the medical liability front. Many are worried that the state’s high court could strike down the reforms.¹⁰⁵

Sliding Backward

There is good reason to worry since that is precisely what happened to the 2003 law intended to curb the forum shopping that had led to the filing of thousands of asbestos suits in the state. That reform barred suits in West Virginia courts by those who do not live in West Virginia unless a “substantial part” of the acts or omissions giving rise to the claim occurred in the state or the plaintiff was unable to sue in another state.¹⁰⁶ In addition, the legislature required that every plaintiff satisfy the new venue requirements so as to prevent out-of-state plaintiffs from riding on the coattails of a plaintiff for whom venue is proper.

In *Morris v. Crown Equipment Corp.*, the law was applied to tell a plaintiff from Virginia, whose workplace injury occurred in Virginia on a forklift that was sold and used in Virginia while all witnesses and evidence were presumably in Virginia, too, that he could not sue the Ohio manufacturer in West Virginia simply because the distributor, a codefendant, was incorporated there.¹⁰⁷ Do not pass go; go back to Virginia. But the West Virginia Supreme Court of Appeals invalidated the 2003 law on June 29, 2006, saying that it discriminated against out-of-state residents under the Privileges and Immunities Clause of the United States Constitution.¹⁰⁸

The decision of the West Virginia court conflicts with prior decisions by the United States Supreme Court which allowed states to favor residents over nonresidents in providing access to their courts.¹⁰⁹ Other courts have upheld such rational anti-forum shopping measures, pro-

tecting the tax dollars and judicial resources of one state from citizens of other states.¹¹⁰

Nonetheless, doors to litigation by large numbers of out-of-state plaintiffs in the West Virginia courts have been reopened. Nonresident plaintiffs will be allowed to bring product liability and other mass litigation suits in West Virginia without any showing of acts or omissions in the state, so long as each plaintiff can allege a colorable claim against one West Virginia defendant. As a result of the West Virginia Supreme Court of Appeals striking down the law, local courts could again become overrun with mass tort cases. As this publication goes to press, an appeal to the United States Supreme Court is pending.¹¹¹

“These nonresident plaintiffs who may have very legitimate claims are nevertheless expending the time and limited resources of our State court system, to the detriment of resident plaintiffs, when their claims could have been brought elsewhere. Unfortunately, the majority opinion eviscerates [the West Virginia venue law] . . . against this type of abuse.”¹¹²

—Justice Maynard, dissenting

HELLHOLE # 2

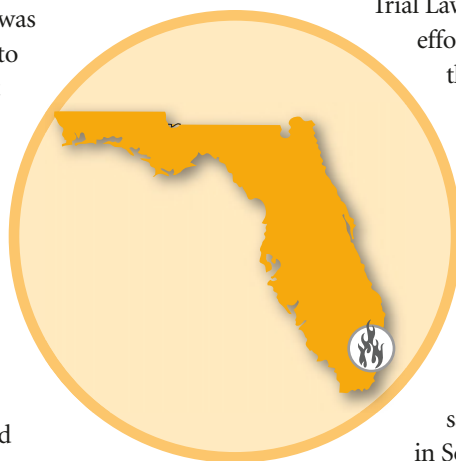
SOUTH FLORIDA

South Florida, primarily Miami-Dade and Palm Beach counties, consistently makes the list of Judicial Hellholes for its high awards, improper evidentiary rulings, class actions and medical malpractice payouts. The events of the past year show that South Florida’s well-earned reputation continues to grow. South Florida is also home to Lewis S. “Mike” Eidson, the new president of the American

Association for Justice, formerly known as the Association of Trial Lawyers of America. Mr. Eidson has vowed to fight efforts by the American Tort Reform Association, the Institute for Legal Reform, and others working to promote rationality and fairness in our civil justice system.¹¹³

A Reputation for High Awards Continues

South Florida is known for its high awards. For example, in most jurisdictions, an award to a person who contracted mesothelioma due to asbestos exposure would range between several hundreds of thousands of dollars to a few million dollars. But in South Florida, a mechanic who had alleged



exposure from working on friction brakes received \$31 million, the largest reported asbestos verdict of 2005.¹¹⁴ Also, a Palm Beach County court awarded billionaire financier Ron Perelman \$1.58 billion (\$850 million in punitive damages on top of a \$727 million compensatory award) based on allegations that Morgan Stanley covered up the financial health of Sunbeam, a camping equipment company, when it sold the firm to Perelman. Morgan Stanley has appealed the decision on the grounds that it was not permitted by the trial judge to fully defend itself.¹¹⁵

Perhaps the most extraordinary award out of South Florida was the \$145 billion award against the tobacco industry. This verdict is believed to be the largest punitive damages award in American history. The 2000 verdict came out of a class action suit on behalf of all smokers in the state after a two-year trial in Miami. In 2003, an intermediate appellate court overturned the award in a harshly worded opinion, finding that the trial court conducted “a fundamentally unfair proceeding.”¹¹⁶ The appellate court found it was improper to certify the class when each individual smoker would need to show that smoking caused their particular illness and, with respect to fraud claims, that each plaintiff relied on the representations at issue.¹¹⁷ In addition, the intermediate appellate court ruled that the trial court “put the cart before the horse” in awarding punitive damages before determining compensatory damages, a procedure that violated the due process standards required by the United States Supreme Court.¹¹⁸ Finally, the court found that the excessive award flowing from the “runaway jury” was a result of “numerous improper comments,” including comparing the sale of cigarettes to slavery and the Holocaust, and asking the jury to disregard the fact that the sale of cigarettes is legal.¹¹⁹

In July 2006, the Florida Supreme Court agreed with the intermediate appellate court that a \$145 billion punitive damages award violated due process and was excessive.¹²⁰ In a split decision, a majority of the court let stand factual findings made in the trial court with respect to the defendants’ conduct and smoking’s causal link to certain diseases.¹²¹ This will allow members of the class to proceed with individual actions in which they will need to show that they smoked the defendant’s product. But they will not have to prove the product caused their particular disease. If they allege fraud to make their case, they will have to show that they relied on the defendant’s statements, but they will not have to prove that the product was defective or that, in general, it causes a wide variety of cancers.

As one of the plaintiff’s lawyers commented, allowing the class action factual findings to stand “makes these cases very attractive to lawyers because they’re 90 percent of the way to the finish line.”¹²² South Florida should brace itself for many more lawsuits by smokers and, indeed, a Palm Beach attorney has predicted that the court “is going to be flooded with them.”¹²³ Other South Florida attorneys reportedly predicted “an avalanche” of future claims, noting that it was estimated that the class action covered 300,000 to 700,000 Florida smokers, each of whom could now opt to bring lawsuits of their own over the next year.¹²⁴

When large numbers of asbestos claims were filed in Miami-Dade, Broward and Palm Beach counties, the courts created a “rocket docket” that encourages settlements.¹²⁵ This measure, which establishes rules and time limits for case resolution, has “resolved” as many as 5,000 cases since its inception, leaving fewer than 20 going to trial.¹²⁶ While this expediting practice certainly cuts down on the number of outrageous jury verdicts, it also prods defendants toward settlements with unimpaired plaintiffs. To curb such abuse, some judges, such as Palm Beach Circuit Court Judge Timothy McCarthy, have taken more aggressive action to dismiss claims that should be filed elsewhere.¹²⁷ But these efforts to discourage forum shopping have actually been hindered by Florida appellate courts in some cases.¹²⁸ For example, the state’s Fourth District Court of Appeal overturned two of Judge McCarthy’s asbestos venue rulings in 2005, and this will likely lead to similar appeals by plaintiffs in at least 80 other asbestos cases. In other words, that translates into 80 more suits for South Florida and 80 more expedited settlements.

Scandalous Miami

Miami-Dade also is home to one of the numerous asbestos scandals that demonstrate how mass tort litigation can be abused. More than 4,000 asbestos victims are suing both the Florida Bar Association and Louis Robles, a lawyer purportedly representing them in a proposed class action. Robles, who shut down his legal empire in October 2002 and left his client files laying on the floor of a West Miami-Dade warehouse,¹²⁹ was once considered the “King of Torts” and lived in a Key Biscayne waterfront mansion. His asbestos clients filed a complaint with the Florida Bar alleging that he overcharged them and misappropriated about \$800,000 of their funds.¹³⁰ The bar took away his license in 2003.

Recent reports suggest, however, that the bar complaint addressed just the tip of the iceberg. The latest lawsuit now charges that after Robles reached settlements with asbestos manufacturers, he would deposit the payouts in his trust account and then steal them, instead of mailing them to clients, as promised. They claim that he stole \$13.5 million in settlements.¹³¹ According to the complaint, Robles orchestrated a “bold but fraudulent scheme to steal millions of dollars from over 4,000 asbestos clients . . . to support his flagrant lifestyle and his production of a series of ‘B’ movies.”¹³² The new lawyer for the asbestos claimants went after the Florida Bar because it refused to compensate the asbestos victims out of its security fund program, which compensates individuals wronged by their lawyers.

“Clients were calling, desperate for money. He wouldn’t return their calls.”¹³³

—Charles Duross, Chief Prosecutor

Robles, who routinely traveled by limousine and private jet, pled not guilty in May 2006 to 41 counts of mail fraud.¹³⁴ The indictment charges that he stole client money to fund his Florida mansion, apartments in New York and Los Angeles, a condominium in Telluride, Colorado, an investment in a movie production, and to pay his ex-wife's alimony. Prosecutors say that at least 4,500 of his 7,000 clients were victims of theft.

Not only have asbestos clients found themselves subject to lawyer misconduct, but the City of Miami was duped when a deal negotiated by its city manager and a plaintiffs' lawyer went bad. In 2004, Miami settled for \$7 million a lawsuit claiming that the city unconstitutionally imposed a fire-rescue fee. But instead of the money going to reimburse 80,000 potential taxpayers, just seven people divided the settlement, and the lawyers planned to take a \$2 million share. How did they get away with it? They claimed that since the judge had never formerly certified the case as a class action, they were free to settle on their own. Much of this came to light earlier this year. The court, feeling duped by the lawyers involved, vacated the settlement in March 2006 and ordered the return of \$3.5 million of the settlement.¹³⁵ The court then allowed the class action, which is expected to settle quickly on behalf of all taxpayers, to proceed. The *Miami Herald* has called upon the Bar "to investigate the conduct of all of the lawyers involved – and punish anyone who has violated legal standards."¹³⁶

Reversed: No Class Actions for Those with No Injuries

Inappropriate certification of class actions and allowing people that are not injured to file lawsuits are two characteristics of Judicial Hellholes. Both of these elements came together in a Miami-Dade trial court's certification of a class action on behalf of uninjured women who used the hormone replacement therapy, Prempro, a drug that continues to be approved by the FDA.¹³⁷ The lawsuit sought medical monitoring on behalf of those that used the drug after a study showed an increased risk of breast cancer and other conditions when used by certain patients. Even the plaintiffs' expert conceded that Prempro may only be hazardous when prescribed for prevention of cardiovascular disease, a use not approved by the FDA, while the plaintiffs used the drug for osteoporosis, and the lead plaintiffs' physician admitted that he continues to prescribe the drug.¹³⁸ In a February 2006 ruling, the appellate court reversed the trial court. It found that treating all of the individual cases together as a class action was inappropriate because plaintiffs used the drug for different purposes and for different lengths of time, and had different risk factors.¹³⁹ It also found that the lead plaintiff was not suited to represent the class members because she stopped taking the drug after its potential adverse effects were discovered, did not read the drug's label, did not see the manufacturer's advertisements, and was warned of the risks of the drug by her physician.¹⁴⁰ Finally, it found that a medical monitoring program would do no more than cover the regular

examinations that all women are advised to complete regardless of whether they used the drug or not.¹⁴¹ The court concluded with a warning against junk science: "[T]he courtroom is not the place for scientific guesswork even of the inspired sort. Law lags science[;] it does not lead it."¹⁴²

Some who criticize the naming of Judicial Hellholes may argue that a reversal of a poor decision shows that the system works. But unfair treatment at the trial court level still costs defendants considerable time and money and may adversely affect a company's stock price and its ability to provide jobs.

Steps Forward

In past years, Florida has taken steps to address unfairness in its civil justice system. For example, in 2003, the Sunshine State enacted modest reforms to address the stampede of doctors being chased from South Florida by high malpractice premiums that included limits on non-economic damage awards to \$500,000 for individual practitioners and \$750,000 for medical institutions.¹⁴³ The following year, Florida voters passed a constitutional amendment limiting contingency fees for plaintiffs' attorneys in medical malpractice actions to 30 percent of the first \$250,000 and 10 percent of any additional amount.¹⁴⁴ Last year, the legislature addressed South Florida's reputation as a magnet for asbestos and silica cases brought by out-of-state claimants by providing that only those who have a physical impairment resulting from their exposure may move forward with their suits.¹⁴⁵ The legislation was expected to weed out as many as 4,500 speculative claims while prioritizing the claims of the truly sick.¹⁴⁶ Personal injury lawyers, however, have sought to overturn the new law and the question of its constitutionality is now pending before the Florida Supreme Court.¹⁴⁷

This March 2006, the Florida legislature abolished joint and several liability,¹⁴⁸ a law that encouraged plaintiffs to target "deep pocket" companies even if they had little responsibility for the injury at issue. In fact, the support of South Florida legislators was crucial to moving the proposal forward in the state Senate.¹⁴⁹ Under the old law, if a person was injured and there were multiple defendants (e.g., a hospital, doctor, nurse and anesthesiologist; or a manufacturer, distributor and retailer), some of those defendants could have been required to pay more than their fair share of the judgment if one or more of the others were unable to pay. Under the new law signed by Governor Jeb Bush, each defendant will be responsible for paying his or her fair share of the judgment, not more, not less.¹⁵⁰ In completely abolishing joint and several liability, Florida joined its neighbors Georgia, Mississippi and Louisiana in hopes of attracting new businesses to its region of the country.¹⁵¹

Additionally, in April of this year, the Florida legislature enacted laws restricting rampant "litigation tourism" by out-of-state lawyers looking for favorable courts and protecting the right of a civil defendant to appeal.

HELLHOLE # 3

RIO GRANDE VALLEY AND GULF COAST, TEXAS

The Rio Grande Valley and Gulf Coast of Texas have earned a reputation as a “plaintiff paradise”¹⁵² and a “lawsuit-happy hunting ground.”¹⁵³ According to defense lawyers, “this jurisdiction has been viewed as one of the toughest jurisdictions for corporate defendants in the country.”¹⁵⁴ Although comprehensive tort reform legislation enacted in 2004 significantly improved the litigation environment in much of the Lone Star State,¹⁵⁵ no amount of legislative change has thus far dissuaded “a few bad apples,” including Jefferson, Brazoria, Cameron, Hidalgo, Nueces and Starr counties, from cultivating abusive litigation.¹⁵⁶

Big Money and Questionable Evidence in a Small Town

One does not need to be a personal injury lawyer to evaluate this case. A 71-year-old man died of a heart attack. He had a 28-year history of heart disease, underwent a quadruple bypass, was overweight, a smoker and had high blood pressure. For somewhere between seven and 17 days, he took a pain reliever found to raise the risk of heart attack, but only when used for more than 18 months. Is this a strong case to bring to trial? Most lawyers would walk away; but in Texas’s Gulf Coast, they grabbed this fourth Vioxx case, weak as it was, and asked for over \$1 billion. After all, just months earlier and only a few miles away, a jury in neighboring Brazoria County brought back a \$253 million verdict in the first Vioxx case to go to trial.¹⁵⁷ They may have also remembered a \$1 billion verdict for one family in a Fen-Phen lawsuit against Wyeth. As the trial was set to begin in Rio Grande City, a town of about 13,000 near the Mexican border, the Associated Press (AP) reported that “[b]usiness suits, Blackberries and laptops seem to have taken over this town.”¹⁵⁸ The AP paraphrased “legal experts” who indicated the case “would have little hope of making it to trial anywhere but the Rio Grande Valley.”¹⁵⁹ Well, the case not only made it to trial, but it resulted in a \$32 million verdict for the plaintiff in April 2006.¹⁶⁰ After the trial, it was discovered that one of the jurors who decided the case not only *knew* the plaintiff but had *accepted interest-free loans from her* and made several phone calls to her after receiving his juror summons and again just prior to the trial. Anyone who insists there are six degrees of separation has never lived in Rio Grande City.

Neighboring Nueces County also found itself in the news when a court awarded \$29.5 million to a woman who was seriously injured when she was ejected from her sport utility vehicle as it rolled over. The accident occurred when an 11-year-old spare

tire blew out. The plaintiff’s lawyer argued that Ford should have warned of the dangers of driving with old tires. The court did not allow the defendants to present evidence to the jury that the plaintiff was not wearing her seatbelt, which could have drastically reduced the extent of her injuries.¹⁶¹

Another example of unfair evidentiary rulings came out of Jefferson County, where its district court awarded \$850,000 to the family of a man who died from lung cancer. The family claimed the lung cancer was due to exposure to asbestos while he

was working on Mobil Oil Corporation’s premises, but the man was also a pack-a-day smoker for 40 or 50 years.¹⁶² The verdict was reversed when an appellate court found that there was no reliable scientific evidence to support it.

In addition, Corpus Christi became ground zero for litigation over Guidant defibrillators. Decisions by a local judge show how court actions can influence litigation. First, the court moved up the trial date from October to February, which compressed discovery and coincided with key business developments, as Guidant was being taken-over by Boston Scientific. Second, it took no action

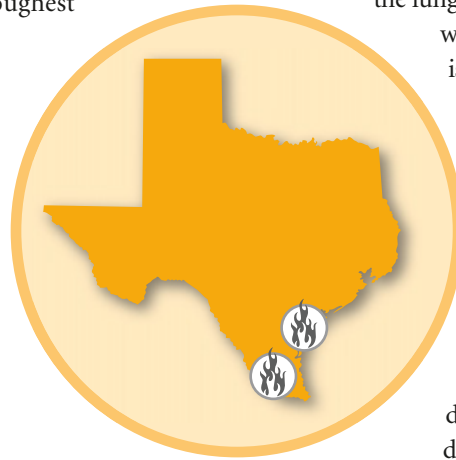
against the plaintiffs’ lawyers who apparently tried to create media pressure on the company – a favorite plaintiffs’ lawyer tactic – by releasing protected company documents minutes before the court closed for the Christmas holiday. The *New York Times* reported on these documents.¹⁶³ The case was ultimately rescheduled a couple of times and awaits action.

Texarkana Triangle

Another area that is a well-known plaintiffs’ haven is just north of the Texas Gulf Coast in Marshall, Texas. While the area has received significant attention in the past for tort litigation and class action suits, this year’s Judicial Hellholes report has observed a new growth area for entrepreneurial trial lawyers: patent litigation. The *New York Times* reports that “an oft-told joke is that the passage of tort reform was when many local lawyers made the trip from P.I. to I.P. [Personal Injury to Intellectual Property].”¹⁶⁴ As with tort litigation, the area is known to be particularly “plaintiff-friendly”; patent plaintiffs win 78 percent of the time in Marshall, compared with 59 percent nationwide.¹⁶⁵ Not surprisingly, plaintiffs from around the country are filing their patent cases in Marshall. In 2002, there were only 32 patent suits filed in Marshall, but that number has reached 234 cases this past year – more than Chicago, New York, San Francisco, and Washington.¹⁶⁶ As local P.I. turned I.P. lawyer, Samuel Baxter, has said, “You know lawyers: they go where the money is.”¹⁶⁷

Areas of Improvement

Many people are speaking out about the success of the comprehensive tort reform enacted in 2004. For example, Mike Scott,



co-owner of a Nueces County construction company, noted, “We got sued continuously 10 years ago. We were almost sued out of business. We got hit twice a month. Now we see four or five [lawsuits] a year. [Tort reform] has changed the business community around.” South Texas doctor Keith Rose, a vocal proponent of tort reform, said that “Two years ago I was paying close to \$20,000 [for medical malpractice insurance], even though I had never been sued or named in a suit. I got insurance this year for \$4,000.”¹⁶⁸ Limits on punitive damages also have checked wholly unreasonable awards that often result from improper evidentiary rulings, such as the \$253 million Vioxx jackpot.

Between 1999 and 2003, medical insurance premiums for many Texas doctors doubled.¹⁶⁹ Orthopedic surgeons, neurosurgeons, obstetricians and other high risk specialists were leaving the state, and there was a critical shortage of doctors and nurses in places such as Beaumont and the Rio Grande Valley.¹⁷⁰ Proposition 12, which was passed in 2003, continues to allow those injured by a medical mistake to recover their full medical bills, lost earnings, rehabilitation and custodial care expenses; but it does limit non-economic damages, such as those for pain and suffering, to \$750,000 per claimant.¹⁷¹ Within two to three years following enactment of this medical liability reform, not only had insurance rates stabilized, but many doctors actually saw substantial rate reductions – some by nearly 50 percent.¹⁷² Doctors are saving about \$50 million in annual premiums.¹⁷³ Although cautioning that claims are still being filed and multimillion dollar verdicts are still possible, insurers continued to lower rates this year.¹⁷⁴ “Physicians are now flocking to Corpus Christi and the Rio Grande Valley, rather than leaving The statewide gains in pediatric specialists have been remarkable,” said Dr. Spencer Berthelsen, Chairman, Board of Directors, Kelsey-Seybold Medical Group, Houston.¹⁷⁵ At least 3,000 more physicians are now practicing in Texas since enactment of the reform.¹⁷⁶ In May 2006, the American Medical Association removed Texas from its list of states experiencing liability crises, marking the first time it has removed any state from the list.

In addition, Beaumont plaintiffs’ lawyers were shocked to have a jury return in just two hours with a defense verdict in a Fen-Phen case. The lawyers in that case had originally asked for \$250,000, but then amended their complaint just before trial to ask for \$1 million.¹⁷⁷

HELLHOLE # 4

COOK COUNTY, ILLINOIS

Last year, Cook County made its debut on the Hellholes list at # 2. The county has a long-established reputation as a friendly place for lawsuits¹⁷⁸ and “known hostility toward corporate defendants.”¹⁷⁹ Cook County hosts a disproportionate share of the state’s law-

suits. According to statistics compiled by the Illinois judiciary, 63 percent of the state’s major civil litigation is filed in Cook County, even though the county is home to just 42 percent of the state’s population.¹⁸⁰ A decade earlier, Cook County’s share of state litigation (46.6 percent) was roughly proportionate to its population share, which has grown slightly since.¹⁸¹ The county also draws large numbers of cases from across the Midwest and beyond.

As detailed in the 2005 Hellholes report,¹⁸² Cook County joined the list of Judicial Hellholes due to a substantial surge in asbestos lawsuits,¹⁸³ its embrace of class action lawsuits,¹⁸⁴ evidentiary decisions that favored plaintiffs over defendants, and the unwillingness of some judges to dismiss claims with little or no connection to the county.¹⁸⁵ Some of these problems continue today and were accentuated by the flow of litigation to Cook County after Madison and St. Clair counties cracked down on forum shopping and prioritized the asbestos claims of those who are truly sick over those with no sign of injury. Cook County has a reputation for pushing asbestos cases forward and setting many cases for trial each month, which may come at the expense of defendants’ due process rights. Some Cook County judges also are known for permitting personal injury lawyers to go on “fishing expeditions” that require defendants, to photocopy, organize and produce thousands of business records spanning decades that have no connection to the allegations of the lawsuit at issue; an expensive and time consuming proposition.

Damage to the Economy and Lost Jobs

As the volume of civil litigation in Cook County has grown, Illinois’ economy has suffered. An area’s reputation for litigiousness factors into many employers’ decisions about remaining in or relocating from a particular state or county. For example, Chicago, which is home to about 15 percent of the state’s manufacturing industry, has lost 453 plants over the past five years.¹⁸⁶ In 2005 alone, 106 plants left Cook County.¹⁸⁷

The state as a whole also suffers from its unfriendly business environment.¹⁸⁸ In fact, Illinois experienced a loss of 32,000 manufacturing jobs last year.¹⁸⁹ Coming out of recession from 2002 through 2005, the national economy grew at an average annual rate of 2.9 percent, but Illinois’ economy struggled with growth of only

1.8 percent, or nearly 40 percent less.¹⁹⁰ According to the

Bureau of Labor Statistics, Illinois lost 23 percent or

199,500 of its good-paying manufacturing jobs

– many in Cook County – from 2000 through

August 2006,¹⁹¹ while the national loss of

manufacturing jobs over the same period

was comparably less at 17 percent.¹⁹² While

there are several additional factors that

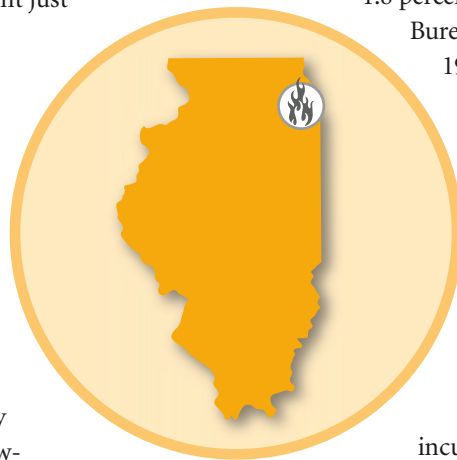
contribute to manufacturing job loss, it is

a plainly established fact that businesses,

both small and large, avoid high litigation

jurisdictions like the plague.

Though she ultimately failed to defeat incumbent Governor Rod Blagojevich in the



November 7, 2006 general election, challenger Judy Baar Topinka, the state treasurer, argued during the campaign that outsized damage awards coming from Cook County, as well as Madison and neighboring St. Clair counties, can send the message that the state is hostile to business. Topinka told reporters at one campaign stop that, “[w]ith three of the six worst counties for litigation abuse right here in Illinois, it should come as no surprise that companies like Honda are choosing to expand their operations and build new plants in other states.”¹⁹³

Help Wanted: Area Employers Seek Defense Lawyers

Unfortunately, as Illinois’ manufacturing sector declines, litigation has become a booming business in Cook County, according to the *National Law Journal*.¹⁹⁴ As Citigroup commercial loan manager Dan Bishop observed, “The firms [in Chicago] are growing, they’re building up the number of lawyers and their hours are growing.”¹⁹⁵

When lawsuits proliferate, plaintiffs’ lawyers prosper. But while litigation continues to blow into the windy city, defense law firms also are beefing up their presence in Cook County to better serve their corporate clients.¹⁹⁶ Many major law firms are considering opening offices in Chicago. Those that already have offices are considering vast expansions or mergers. For example, Paul Hastings, Janofsky & Walker plans to open a 100-lawyer office this year; Reed Smith is considering merging with a Chicago-area firm; and Morgan Lewis & Bockius is said to be planning on doubling the size of its 40-member Chicago office.¹⁹⁷ With many employers in the services and financial sectors moving to the Midwest to escape high rents on the coasts, it makes sense for law firms to follow. But make no mistake, the growing concentration of lawsuits in Cook County and southern Illinois also serves as a big draw. And considering the caliber of some lawsuits filed there, such as the 2005 class action against Loews Cineplex Theaters alleging movie previews last too long, the Cook County litigation defense business continues to look promising.¹⁹⁸

Solutions Proposed, But Stalled

In February 2006, Illinois legislators, frustrated with the poor business and litigation climate in their state, introduced a series of bills to address the problems in Cook County and other areas. Their proposals included requiring plaintiffs to file their lawsuits in the county where most of the allegations behind the lawsuit took place;¹⁹⁹ restricting class action certification to cases in which most of the plaintiffs are from Illinois; ensuring the case is heard in a court with a rational relationship to the lawsuit;²⁰⁰ making each defendant pay only for its fair share of fault of the total damage award;²⁰¹ allowing a defendant to request that juries determine liability and punitive damages in separate phases of a trial, thereby establishing closer judicial review of noneconomic damage awards, such as compensation for pain and suffering;²⁰² establishing new criteria for the admissibility of expert testimony;²⁰³ and, in asbestos cases, allowing juries to consider sources of asbestos, beyond the

defendant’s products or workplace, to which the plaintiff was exposed.²⁰⁴ Few of these proposals, however, were even considered in a committee hearing, let alone put up for a vote in 2006.

Access to Health Care Begins to Improve, But the Future Is Uncertain

Illinois lawmakers have managed to enact one significant reform, however, in the area of medical malpractice. In late 2005, a new Illinois law took effect, limiting pain and suffering awards in such cases to \$1 million against hospitals and \$500,000 against doctors.²⁰⁵ The reform was overdue. As Cook County obstetrician-gynecologist Basil Chronis recently wrote to the *Chicago Tribune*, when she started practicing in 1960, her annual malpractice insurance premium was \$224.²⁰⁶ Now the yearly cost is \$155,000.²⁰⁷ In the year since enactment of medical liability reforms, malpractice lawsuits in Cook County dropped 25 percent – down from an average of 1,332 filings over the previous five years to 979 in the one-year period since Governor Rod Blagojevich signed the bill and the reforms took effect.²⁰⁸ While it often takes time for cautious insurers to adjust premiums downward as they wait to see that an initial drop in litigation is not merely a fleeting aberration or that the reform stands up to future court challenges,²⁰⁹ there is evidence that the premium spikes characterizing the market in recent years (including a 15 percent increase in 2005) have stopped and rates may be beginning to come down.

Insurers have good reason to be cautious.²¹⁰ In 1996, medical malpractice lawsuit filings in Cook County experienced a similar drop after the legislature enacted a law limiting non-economic damages, but that reform was declared invalid by the Illinois Supreme Court the following year.²¹¹ The award limits were dismantled and the size and frequency of awards continued unabated. It is possible that the state’s high court could again strike down the latest medical malpractice reform, which is already being challenged in lower courts, including Cook County.²¹²

HELLHOLE # 5 (PURGATORY)

MADISON COUNTY, ILLINOIS

On the Road to Recovery

As a perennial Judicial Hellhole, Madison County, Illinois, earned its reputation as a horrible place to be targeted by a class action or mass tort lawsuit. Madison County became known for plaintiff-friendly rulings and thus attracted an extraordinary number of lawsuits, including asbestos claims and class actions. Not coincidentally, the legal climate drove an increase in medical malpractice insurance premiums, which in turn prompted an exodus of doctors from the Metro-East region (east of St. Louis, across the Mississippi River) and a health care access crisis for residents. Over the past two years, however, increased attention to lawsuit abuse by local judges, intervention from the Illinois Supreme Court to stem abusive prac-

tices, and reasonable restrictions on tort lawsuits enacted by both the state legislature and Congress have brought Madison County to a turning point.

“Madison County gained its reputation as a judicial hellhole over decades, and it won’t be easy to shake it. However, Madison County Chief Judge Ann Callis and her fellow judges seem determined to speed the process.”²¹³

—Belleville News-Democrat

Blatant Forum Shopping

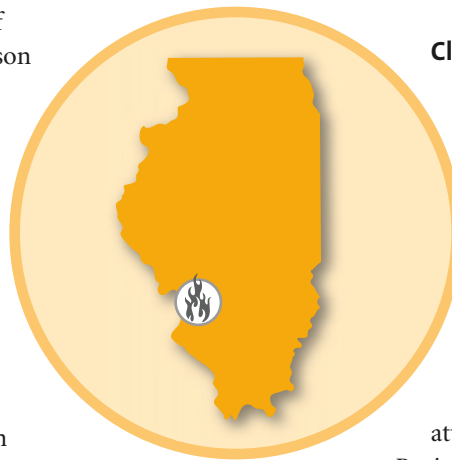
Personal injury lawyers from the far reaches of Illinois and from other states trekked to Madison County in hopes of striking gold. For a long time, local judges allowed them to use Illinois’ “sue anywhere” venue law to bring their cases in Madison County. In a given year, Madison County hosted four times as many lawsuits as some of the more populous counties in Illinois. Lawsuit filings seeking over \$50,000 rose from 1,246 in 1999 to a peak of 2,102 in 2003 before subsiding to 1,436 in 2004. In 2005, 1,315 new lawsuits seeking over \$50,000 were filed in Madison County, marking a rollback to the same level of filings as in 2000.²¹⁴

Asbestos lawsuit filings followed a similar trend. Madison County was by far the busiest place for asbestos lawsuits with many claims filed on behalf of claimants from all over the country, many of whom never even heard of Madison County.²¹⁵ Asbestos claims quickly rose from 65 in 1996 to a peak of 953 in 2003, before dropping 50 percent to 477 in 2004.²¹⁶ Last year, the number of asbestos claims filed in Madison County fell to 389²¹⁷ and have this year dropped even further to 287.²¹⁸ This decrease in filings and the related falloff in court-generated revenue have prompted Madison County to freeze government hiring.²¹⁹

The decline of lawsuit filings in Madison County has occurred for several reasons. A unanimous decision by the Illinois Supreme Court chastised Madison County for abusing its discretion in not dismissing a class action brought by a Louisiana resident who sought to apply Illinois’ favorable consumer protection law to conduct throughout the nation.²²⁰ Local judges have also made it more difficult for out-of-state attorneys to bring cases that have no direct relationship to the county. For example, when he took over the asbestos docket from notoriously plaintiff-friendly Judge Nicholas Byron, Judge Daniel Stack cracked down on forum shopping by dismissing the cases of out-of-state plaintiffs. The court also established a differed docket to prioritize the asbestos claims

of those who are sick over those who are not.²²¹ And in July 2006, reform-minded Circuit Court Chief Judge Callis placed Stack, with his commitment to restoring confidence in the judiciary, in charge of the county court’s entire civil division.²²²

Despite this impressive progress, Madison County may still be the nation’s most litigious venue for asbestos claims, and its declining filings merely coincide with similar declines elsewhere.²²³ There is still evidence that word of Madison County’s new approach has not spread to lawyers in far away places, because they continue to file claims in the county with no relation to the area.²²⁴ In fact, local personal injury attorneys continue to literally search the phone book, trying to find evidence that companies did business in Madison County so they can haul them into court there.²²⁵ But as the *Daily Herald* observed, “shopping should be done for clothes and automobiles, not for legal outcomes.”²²⁶



Class Actions

As documented in other ATRF reports, class action lawsuits filed in Madison County increased each year, from two in 1998 to a peak of 106 in 2003, before declining slightly to 82 in 2004.²²⁷ In 2005, 46 class actions were filed in Madison County.²²⁸

This year, just two class actions have been certified in Madison County.²²⁹ But about 175 more are still pending,²³⁰ and these class actions can be lucrative work for plaintiffs’ attorneys.²³¹ Nonetheless, as *Crain’s Chicago*

Business recently observed, “The flow of class-action lawsuits to Downstate Madison County, once a magnet for plaintiffs’ lawyers from around the country, has come to a virtual halt in the wake of federal legislation and Illinois court rulings aimed at curbing forum-shopping.”²³²

“Madison County’s national prominence as a favored jurisdiction for plaintiff lawyers in class-action cases is probably over as a result of recent federal legislation and three Illinois Supreme Court decisions.”²³³

—Chicago Daily Law Bulletin

Several factors have contributed to this change. In 2005, enactment of the federal Class Action Fairness Act, which President George W. Bush promoted in Madison County, moved many cases involving out-of-state plaintiffs and defendants to neutral federal courts. The state’s highest court has also slapped trial courts on the wrist for unwarranted certification of class actions. In December 2005, the Illinois Supreme Court overturned a \$10.1 billion verdict against Phillip Morris USA that was entered in a 2003 class

action by Madison County Circuit Judge Nicholas Byron.²³⁴ The court also tossed out a class action against State Farm Mutual Automobile Insurance Co. brought in nearby Williamson County, finding that nationwide claims cannot be pursued under the state's frequently-abused Consumer Fraud Act.²³⁵ As noted earlier, the Illinois Supreme Court overturned another Madison County class action because the plaintiff had no connection to the state.²³⁶ J. Steven Beckett, director of trial advocacy at the University of Illinois at Urbana-Champaign's College of Law, told *Crain's* that that ruling "sent the message to the plaintiffs' bar: 'You better be careful about bringing class actions in Madison County.'"²³⁷ The bottom line is that Madison County judges are now more likely to require class actions to have a connection to the area and insist that plaintiffs live in Illinois.²³⁸

Kudos to Madison County Judges

The Madison County judiciary itself deserves much credit for the decline in class actions. Since starting her new position in May 2006, Circuit Court Chief Judge Ann Callis has instituted rules to make it harder for out-of-state lawyers to file cases in Madison County and for plaintiffs to change judges readily, in hopes of finding a friendly one.²³⁹ Judge Callis announced the change as the "first step in the reform process. . . . There'll be more to come."²⁴⁰ Not surprisingly, one of the local mega-class action filing firms did not accept the new rule with grace and charged that the court exceeded its authority.²⁴¹ "We are trying to restore credibility," Judge Callis told *Crain's*.²⁴² Meanwhile, Judge Stack also is dismissing class actions when the plaintiffs claim fraud but cannot demonstrate any financial loss.²⁴³

As the *Belleville News-Democrat* observed, "Today, thanks to the national spotlight shining on Madison County and changes in the federal law governing class actions, the one-time class-action capital of the country is now the last place plaintiffs' attorneys want to be."²⁴⁴ The *Chicago Daily Record* has also expressed its support for the changes: "Madison County's diminished status as a magnet for class-action lawsuits is a positive development. . . . The concept of attorneys shopping for plaintiff-friendly county courts is offensive and stands contrary to the basic notions of fairness and blind justice. If a class-action lawsuit or any other kind of lawsuit possesses enough merit to be filed, it ought to have sufficient merit to withstand scrutiny in any jurisdiction and not only a select few."²⁴⁵

Still, some prominent local personal injury lawyers are in denial about the changes to the law and procedures, and can be expected to continue filing class actions in Madison and neighboring St. Clair County.²⁴⁶ It also is important to keep the spotlight on Madison County, particularly considering the recent election of Dave Hylla, a former trial lawyer,²⁴⁷ to the Madison County bench. It has been reported that he raised

\$150,000 for his race from "the prominent plaintiff's firm of Simmons Cooper."²⁴⁸ Earlier this year, Madison County Circuit Judge George Moran, Jr. resigned his seat, in part, because he "accepted free luxury box tickets to a Cardinals game at Busch Stadium from prominent trial lawyer Stephen Tillery, who has appeared before the judge."²⁴⁹

"We have introduced several measures in the last few months making it more difficult for out-of-state attorneys to bring cases here that have no direct relationship to our county. In addition, judges in the civil division have taken a strong stand by rejecting cases that don't belong here. We also have instituted a local judicial rule limiting the ability of class action lawyers to object repeatedly to judges, effectively 'shopping' for a preferred judge."²⁵⁰

—Madison County Chief Judge Ann Callis

Access to Health Care

Lawsuits and high insurance premiums in the Metro-East region also had caused many doctors to flee the area, and those that remained stopped performing high risk procedures. In 2005, Illinois enacted legislation to protect the access to health care.²⁵¹ The new law placed a \$500,000 limit on noneconomic damages for doctors and a limit of \$1 million for hospitals. One year later, doctors are beginning to see relief. For example, ISMIE Mutual Insurance Co., a major medical malpractice insurer in the state, announced that it would cut premiums by 5 percent effective July 1, 2006.²⁵² Consequently, doctors have begun to return. In fact, six months after the reform took effect, a neurosurgeon joined the staff of St. Elizabeth's Hospital in Belleville, ending three years with no such specialist available in the area.²⁵³ As the only neurosurgeon in the area, he expects an extraordinarily heavy workload, so the news is not all rosy. According to the *Belleville News-Democrat*, while hospitals have had some success in recruiting new doctors, the reputation of the Metro-East continues to make it difficult to attract specialists.²⁵⁴ Some doctors have tired of years of high premiums and are continuing to leave the area. For example, Dr. Brad Campbell's family had been in the area for 200 years, but after being forced to moonlight in the emergency room and under-fund his retirement to afford malpractice insurance, he tearfully packed up and left for Fayetteville, Arkansas this year.²⁵⁵ And remember, the Illinois Supreme Court could invalidate the 2005 reform law and send the system into a backward spiral.

HELLHOLE #6

ST. CLAIR COUNTY, ILLINOIS

St. Clair County, a Judicial Hellhole since 2004, continues to earn its reputation as a plaintiff-friendly area. Court records indicate that plaintiffs' lawyers filed 783 new lawsuits seeking more than \$50,000 in damages in the St. Clair Circuit Court in 2005. That was a slight increase over the 768 such suits filed the previous year, but less than the number of claims filed in the preceding three years.²⁵⁶ The number of large lawsuits filed in St. Clair County remains about double the number of suits seen by trial courts in Illinois counties with similar populations, such as McHenry (457), Sangamon (360) and Winnebago (460).²⁵⁷ Lawsuits are a cash cow for the county. The St. Clair clerk's office took in over \$3.6 million in filing fees in 2005, just a little less than the \$4 million collected by its infamous neighbor, Madison County, and far more than the \$2.5 million cost of operating the court, including all personnel salaries and administrative expenses.²⁵⁸ Only three substantially larger counties in Illinois took in more filing fees from lawyers than did St. Clair and Madison counties, respectively.²⁵⁹

Class Warfare

Class action filings in St. Clair County surged from 2 to 24 between 2002 and 2004 (an 1100 percent increase).²⁶⁰ That number continued to grow in 2005, up to at least 28 filed.²⁶¹ Despite enactment of the Class Action Fairness Act and Illinois Supreme Court rulings discouraging class action abuse, St. Clair seems resistant to change. *The Record*, a local newspaper that reports on the judicial systems in Madison and St. Clair counties, observed that in the first six months of 2006, about 10 class actions were filed in St. Clair County Circuit Court, compared with none in Madison County.²⁶² The difference may be due to the additional measures taken by Madison County judges to discourage forum and judge shopping in their courts. For example, one class action filed in St. Clair against Allstate this year involved nine Madison County residents and just one St. Clair resident.²⁶³ The class action, which was brought on behalf of all Illinois automobile and homeowner policy holders, claims that the insurer violated the state's consumer fraud law by charging different premiums to customers with similar risks.

Not surprisingly, class action filings in St. Clair County frequently are on behalf of people who do not live in the county, or they involve situations that occurred outside of Illinois altogether. Consider two examples. The first is a class action lawsuit filed on June 1, 2006, against State Farm Mutual Insurance Company for allegedly violating *Missouri* law.²⁶⁴ (St. Louis is in Missouri; East St. Louis is in St. Clair County, Illinois). The allegations are that State Farm violated Missouri law by making a subrogation claim for medical payments for a person injured in an auto accident in Missouri, a state that does not allow medical payments to be subrogated. To keep the lawsuit from being removed from St. Clair County, the lawyers created a class of Illinois residents only and claimed that the alleged violation of Missouri subrogation law was contrary to Illinois' Consumer Fraud Act.²⁶⁵

The second example is a class action filed in January 2006 on behalf of residents of Kentucky, Tennessee and Alabama, not Illinois.²⁶⁶ The lawsuit alleges that the prescription drug, Bextra, caused them, or their next of kin, strokes or heart problems. St. Clair County was chosen for the lawsuit based solely on the fact that Monsanto, one of the defendants, operates a plant in St. Clair County.

While St. Clair County continues to draw lawyers and large claims from around the country, there appears to be some improvement in two areas. First, St. Clair followed the lead of Madison County in adopting a system in February 2005 that prioritizes the asbestos claims of those who are sick over those who are not, alleviating the clog of asbestos claims there.²⁶⁷ And second, though St. Clair's reputation as a haven for medical malpractice claims remains in tact, state medical liability reforms enacted in 2005 seem to be working. Malpractice insurance premiums, though still high, have stabilized, and the exodus of doctors from the Metro-East has slowed.²⁶⁸ Through the first nine months of 2006, plaintiffs filed eighteen medical malpractice lawsuits in St. Clair County Circuit Court, or seven fewer than the total number filed in 2005.²⁶⁹ But the medical malpractice crisis, observes Dr. Carol Kugler of Collinsville, "is still very much alive" in the Metro-East, and more action is needed to stem shopping for friendly judges.²⁷⁰



WATCH LIST

This report calls attention to several other areas that either have been cited in previous Judicial Hellholes reports or are new areas that are being closely monitored due to suspicious or negative developments in the litigation environment.

MILLER COUNTY, ARKANSAS

IS IT MILLER TIME?

Miller County, a mostly rural area located in southwest Arkansas with a population of 43,000, is known by some as the “Gateway to the Southwestern United States.” Others may know it as one of the nation’s most plaintiff-friendly jurisdictions.²⁷¹ Although many of the downtown buildings in Texarkana have deteriorated as many businesses have closed, law offices there remain “most vibrant.”²⁷²

Miller County hosts more tort cases relative to its population than any other county in the state.²⁷³ According to statistics compiled by the Arkansas Administrative Office of the Courts, personal injury lawyers are twice as likely to file their lawsuits in Miller County than in other jurisdictions of roughly the same population, such as Baxter and Greene counties.²⁷⁴ In fact, the number of personal injury claims filed in Miller County has increased 50 percent over the past five years, while the number of such claims has remained stable statewide and fallen in many comparable counties.²⁷⁵

Miller County also appears to host more than its fair share of major class action lawsuits. Just as Madison County’s courthouse saw 19 class actions filed in the week leading up to enactment of the federal Class Action Fairness Act, Miller County witnessed “a similar flurry of filings.”²⁷⁶ Centerpoint, a utility company, faces a class action alleging its prices cheated consumers even though the plaintiffs could not demonstrate that it had done any business in Arkansas.²⁷⁷ But after being removed to federal court, the multi-million dollar case was sent back to Miller County much to the plaintiffs’ delight.²⁷⁸ And given reports that “the nation’s insurance industry is being slammed with a mammoth class action suit in Miller County,” the worst may be yet to come.²⁷⁹ That class action, filed by local law firms in 2005, targets 584 insurance companies on behalf of hundreds of thousands of policyholders alleging that insurance industry software shortchanges policyholders when it calculates claim payments.²⁸⁰



Miller County also is home to large awards and unfair rulings. For example, a Tennessee trucking company was not notified by its registered agent in Arkansas of a lawsuit stemming from a collision in Florida involving one of its drivers. It was too late in responding to the lawsuit, and a Miller County court entered a default judgment against the company for a whopping \$4.8 million.

When the trucking company finally learned of the suit and responded, the court refused to vacate the award. The Arkansas Supreme Court had to step in and remind the Miller County court that a default judgment establishes liability, but not damages, and that the plaintiff must show objective evidence to support an award in a hearing beyond his or her own self-serving testimony.²⁸¹ Ultimately, the case was sent back to Miller County for a trial on damages, which resulted in an award of just \$78,000.²⁸² While hearing the case on remand, the trial court allowed the jury to learn that the plaintiff had similarly demanded \$3.9 million to settle an earlier accident claim. The plaintiff appealed the ruling, but was shot down again by the state supreme court this year.²⁸³

Not surprisingly, the legal environment in Miller County has led companies to settle rather than risk going to trial. KPMG and Bearingpoint paid \$34 million in 2004 to settle a case alleging they over-billed clients because they received discounts on travel expenses, while PriceWaterhouseCoopers shelled out \$54.4 million five months earlier to terminate its part in the same suit.²⁸⁴ As one KPMG representative remarked, the settlements ended “what promised to be a long and costly litigation.”²⁸⁵ A large class action filed in 2005 against Google by advertisers alleging “click fraud” was removed to federal court,²⁸⁶ but then moved back to Miller County when plaintiffs’ lawyers went on the offensive.²⁸⁷ Of course, when this case settled for \$90 million this year, \$30 million went to the Miller County lawyers while the plaintiffs received zero cash – just coupons toward future advertising.²⁸⁸

LOS ANGELES AND SAN FRANCISCO

POOR REPUTATIONS RENEWED

ATRF has named Los Angeles County as a Judicial Hellhole in past reports. There is some indication that changes in the Los Angeles Superior Court, referred to as “the Bank” due to a string of multimillion-dollar awards, have lessened concern.²⁸⁹ In fact, some have praised the Central Civil West division of the court for its fair handling of complex civil litigation.

However, rulings like the Los Angeles Superior Court’s certification of a class action on behalf of all people who purchased Listerine – whether or not they heard, saw or relied upon representations that the mouthwash was as effective as flossing (a decision that was reversed, see *Point of Light: California Courts Uphold Voter Intent to Rein in Shakedown Lawsuits*, p.34) – give continuing credence to L.A.’s longtime reputation as a bad place to be a defendant. That may be why personal injury lawyers chose Los Angeles to file nine coordinated lawsuits against major sunscreen manufacturers this year, claiming that their advertising provided sunbathers with a false sense of security, leading them to put themselves at greater risk of cancer.²⁹⁰ While it appears that court-centered litigation abuses are not as concentrated in Los Angeles as in past years, strong evidence remains about the unfairness of California’s litigation climate.

San Francisco Treat: Bad Verdicts

This year, several respondents to ATRF’s Judicial Hellholes survey named San Francisco for the first time. In fact, this year, a San Francisco jury awarded \$10.3 million to a single plaintiff in a mesothelioma case – one of the largest verdicts of its kind in California within the past fifteen years.²⁹¹ Also in 2006, San Francisco was home to a first-in-the-country \$5 million verdict against a refrigeration company in a case that alleged asbestos exposure from equipment.²⁹²

Beyond asbestos litigation, a San Francisco jury awarded \$175 million in punitive damages against manufacturers of solvents used by dry cleaners for not properly instructing dry cleaners on how to appropriately dispose of the chemicals. Though he slashed the award to \$12.7 million, the judge allowed the verdict to stand, despite the fact that the law requires proof that manufacturers acted maliciously in order to support a punitive award.²⁹³

Influx of Nonresident Cases

Recent data collected by the Coalition for Litigation Justice, an insurer group, found that hundreds of nonresident plaintiffs are flocking to California.²⁹⁴ According to the coalition, over 30 percent of pending asbestos claims sampled in California involve plaintiffs with out-of-state addresses.²⁹⁵ Some California venues, including



San Francisco, have become dumping grounds for cases that can and should be heard elsewhere.²⁹⁶

The influx of cases into California may be a response to crackdowns on “litigation tourism” in Illinois, Mississippi and Texas.²⁹⁷ As one San Francisco personal injury attorney in silica litigation noted, “There is a trend of Texas lawyers moving in here.”²⁹⁸

California judges have recognized the growing problem and expressed concern. San Francisco Superior Court Judge Ernest Goldsmith has said the local trial judges “often” saw situations where “the gravity of the case is in another state and there is little contact with our jurisdiction.”²⁹⁹ Likewise, San Francisco Superior Court Judge Tomar Mason has expressed concern that the presence of nonresident cases puts an additional and inappropriate burden on the county’s citizens.

“We understand and are proud of the fact that our bar is educated on these issues and that they [out-of-state plaintiffs] have confidence in our bench, but I query whether our 750,000 residents or citizens are being properly used as jurors in cases which have nothing to do with them.”³⁰⁰

—San Francisco Superior Court Judge Ernest Goldsmith

Some Fair Treatment, But Problems Persist

Some recent defense rulings provide evidence that civil defendants can receive fair treatment in California courts. Examples include a Los Angeles court’s defense verdict in a Vioxx trial ending in August of this year and a San Francisco court’s ruling that California Attorney General Bill Lockyer could not sue tuna fish producers for failing to include mercury warnings on their cans that would have conflicted with federal law and state regulation.³⁰¹ Also, recent actions by California courts to uphold voter intent to rein in shakedown lawsuits through Proposition 64 illustrate a commitment to fair treatment under the law. Furthermore, some San Francisco judges have shown a willingness to dismiss asbestos cases where there is a lack of evidence supporting the claims.³⁰²

In a particularly noteworthy ruling, San Francisco Superior Court Judge Stephen Allen Dombrink granted a defense motion to give a simple and straightforward instruction to the jury on the effect of joint and several liability, i.e., that any finding of a proportionate share of liability for economic damages³⁰³ would result in the defendant being responsible for the full amount of economic damages. The proliferation of asbestos-related bankruptcies means that the issue of joint liability may be an important factor in more cases.³⁰⁴

PHILADELPHIA

BACKWARDS, UPSIDE-DOWN CHEESE STEAK WITH EVERYTHING ON IT

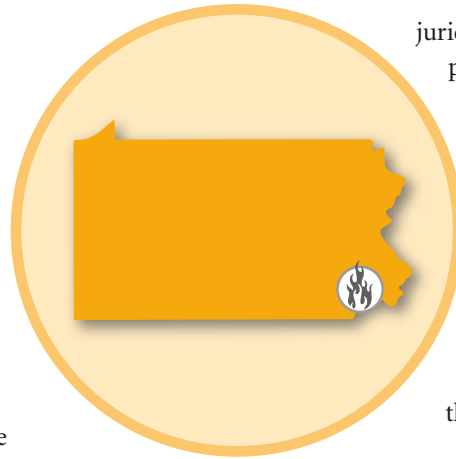
Philadelphia's poor litigation climate has received recognition in each Judicial Hellholes report since 2002. By and large, the problem has been a reputation for high awards and an abysmal medical liability environment. Last year, Philadelphia dropped to the Watch List because of evidence indicating improvement under the spotlight of criticism. Indeed, a state Supreme Court report shows a 55 percent decrease in 2005 filings of medical malpractice cases in Philadelphia compared to the average number of such filings from 2000 through 2002.³⁰⁵

Is this a sign of actual improvement, or are the claims simply being dispersed to other jurisdictions?

Ken Kilpatrick, a spokesperson for the Politically Active Physicians Association, suggests that the decline in Philadelphia cases stems from venue reforms and a "suburban sprawl" of filings in neighboring counties.³⁰⁶ Consider, for example, that the same report shows that Montgomery County, which had a combined 79 cases filed between 2000 and 2003, saw 102 cases in 2004 and 104 cases in 2005. Similarly, Bucks, Chester and Delaware counties saw their medical malpractice filings increase by 19 percent, 6 percent and 13.5 percent, respectively. In fact, the total dollar amount of awards made against doctors in Pennsylvania last year rose 13.5 percent to \$448 million.³⁰⁷

Philadelphia also makes this year's Watch List because of a practice in Philadelphia courts that systemically strips asbestos defendants of their due process rights. The practice, referred to in the tongue-in-cheek section title above as a "backwards, upside-down cheese steak with everything on it" is actually called "reverse, bifurcated consolidated trials." Under this system, asbestos trials are broken down into two phases. In phase one a jury assesses plaintiffs' damages. In phase two a jury apportions those damages among the dozens of defendants named. In Philadelphia, multiple plaintiffs and defendants are often combined into one litigation blender .

There are several problems with the process. First, defendants cannot present factual defenses for each individual claim, such as showing proof that their product could not have caused the alleged injury. Second, in the liability phase, juries tend to spread damages against all defendants and not pay close attention to actual causation. Third, unlike other jurisdictions that have employed this tactic,³⁰⁸ Philadelphia uses the same



juries for both phases, which is believed to compound jury biases.

Courts generally view this litigation technique as "drastic"³⁰⁹ but efficient when culpability has been well-established among a handful of companies. The Final Report on the Civil Programs in the Philadelphia Court of Common Pleas issued by the National Center for State Courts in September 2004 noted that reverse bifurcation has been effective in "routine cases, e.g., those without unlitigated causation issues."

But while the report may have fairly characterized asbestos litigation years ago – such as in 1995 when Philadelphia began the practice of reverse bifurcation – it no longer does. In the words of Dickie Scruggs, a well-known plaintiffs' attorney, asbestos litigation has become an "endless search for a solvent bystander."³¹⁰ Currently, more than 8,500 defendants³¹¹ are "ensnared in the litigation"³¹² – up from 300 in 1982.³¹³ These new defendants are only peripherally connected to the alleged exposure, making general and specific causation issues central to the litigation.

Asbestos litigation has taught us that, in mass tort litigation, these types of shortcuts, which have the practical effect of creating settlement pressures, have the opposite of the intended effect. Instead of unclogging court dockets as intended, explained mass tort expert Francis McGovern of Duke University Law School, "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."³¹⁴

In Philadelphia, Judge Bernstein has indicated that perhaps the time has come to end reverse bifurcation: "At the time coordination of trials and reverse bifurcation were initiated it was needed to handle an overburdened docket. The transformation of the Philadelphia Courts and elimination of all backlogged civil cases may make coordination of cases and reverse bifurcation unnecessary. . . ."³¹⁵

ORLEANS PARISH, LOUISIANA

KATRINA PUTS HELLHOLE STATUS ON HOLD

Orleans Parish received the distinction of being named a Judicial Hellhole in 2002, 2003 and 2004. As discussed in preceding reports, the Big Easy gained a reputation for bias against corporate defendants, which manifested itself in multimillion- and billion-dollar awards, massive class actions, prejudicial arguments, and unfair treatment at both the trial and appellate court levels. In August 2005, Hurricane Katrina ravaged the city,



closed the parish's courts and brought civil litigation to a temporary standstill. Following the disaster, the practice of law in the city was thrown into disarray with lost files, difficult-to-locate clients and witnesses, and thousands of attorneys having either left the area or retired.³¹⁶

But not all lawyers took a break in the wake of Katrina. Bruno & Bruno – a local law firm run by four brothers who specialize in class-actions, medical malpractice and personal injury claims – posted signs on utility poles as early as October 2005 seeking business from homeowners who felt wronged by their insurance companies and others.³¹⁷ Within months of the storm, the firm filed dozens of lawsuits targeting the United States Army Corps of Engineers, local authorities that oversaw New Orleans' failed levees, an oil company, a nursing home and insurers, among others.³¹⁸

The Orleans Parish Civil District Courthouse reopened its downtown courthouse in January 2006.³¹⁹ The local courts are struggling to keep up with the incoming Katrina-related lawsuits on top of the many civil trials that were delayed due to the storm.³²⁰ The court also faces unique challenges, such as a substantially depleted jury pool.³²¹

Understandably, New Orleans courts have begun to fast-track hurricane-related litigation to get money to the victims as fast as possible³²² – a practice that may be beneficial so long as it does not violate the due process rights of the defendants. In the asbestos context, for example, massive influxes of claims and expedited procedures place extraordinary pressure on defendants to settle, regardless of the merits of the plaintiff's case, because the time constraints make it nearly impossible for the defendants to fully research, prepare for, and defend against each claim.

As the one-year anniversary of Hurricane Katrina approached, hundreds of lawyers filed claims in the Orleans courthouse, crowding the clerk's office and pouring out into the hallway.³²³ They did so out of caution to ensure that their claims met the state's one-year statute of limitations for insurance disputes, even though the state had extended the deadline by an additional year. More than 1,100 suits were filed in one week, more than half of them Katrina-related, which is about the same amount of lawsuits ordinarily filed during a full month.³²⁴ The Bruno & Bruno firm filed a massive class action lawsuit against 161 insurance companies on behalf of more than 4,000 homeowners.³²⁵

As these lawsuits move forward, Orleans Parish judges, who are selected by local residents in partisan elections, will have to make difficult choices. They will be face-to-face with thousands of their "constituents" who have lost everything. The judges will be in the unenviable position of deciding whether to apply the clear language of contracts or to circumvent contract provisions and permit unjust awards for losses against which individuals did not insure themselves.

Due to the inherent conflict of interest in having local judges, who themselves may have expe-

rienced hurricane losses, decide disputes between local residents and insurers, many of the claims have been filed or transferred to federal court.³²⁶ As Louisiana State University Law Professor John Baker recognized, "The fear of 'home cooking' or having local juries and elected judges decide cases pitting neighbors against companies from other states is a concern held by attorneys across the country and abroad, not just Louisiana. . . . The federal courts are supposed to be neutral."³²⁷ Federal courts in Louisiana and Mississippi have moved forward with fairness to plaintiffs and defendants, finding that the standard flood exclusion used in virtually all private insurance contracts for decades is valid and does not provide coverage for damage resulting from any type of surface water, but that losses caused by wind and wind-carried rain are covered.³²⁸ A separate, optional federal program has covered losses caused by floods since 1968, though relatively few people in New Orleans purchased the coverage.³²⁹ For that reason, the litigation centers on a highly factual determination as to the amount of damage caused by wind and rain and the amount due to flooding. As cases move forward in Orleans Parish, local judges should follow the lead of the federal courts. Meanwhile, Louisiana plaintiffs' lawyers have come up with inventive arguments. For example, they have claimed that the flooding was not an "act of God," but a result of a breach in the levees, and that the insurers should cover the entire loss even if only a small portion of the damage was caused by wind covered under the policy.³³⁰

It is too early to say whether Orleans Parish will return to the list of Judicial Hellholes. Much has changed since it was last named in 2004. The deluge of hurricane-related cases pending in state court and the backlog of ordinary civil cases will put the fairness of local judges to the test.

DELAWARE

THE BRIDGES OF MADISON COUNTY LEAD TO THE FIRST STATE

It may come as a surprise to Delaware residents that their state is in danger of losing its solid reputation for being fair to businesses in personal injury cases.³³¹ Why?

Because the same law firms that once flooded Madison County with asbestos litigation have been looking to storm other jurisdictions.

Consider the following: The number of new asbestos claims being filed in Delaware – particularly those generated by out-of-state law firms on behalf of out-of-state plaintiffs who have appropriately had the courthouse door slammed in their faces elsewhere – has virtually exploded in the past two years.

According to court records obtained by ATRE, there were only 61 new asbestos cases filed



in the First State from May 1, 2004 through April 30, 2005. From May 1, 2005 through August 25 of 2006, there were 272 such cases filed, the bulk of which have been driven by out-of-state firms. According to one report, “While the number of new asbestos lawsuits has dropped precipitously in Madison County, a deluge of filings is keeping clerks in a Delaware court working nights and weekends to keep up.”³³² Although Michael J. Angelides, a partner and chief asbestos litigator with the Illinois-based firm Simmons Cooper, admitted in the August 16, 2006 edition of the *Delaware Law Weekly* to spreading political contributions around the state to those who “believe in issues that we believe in,” he also expected readers to believe that such contributions are not intended to win advantage for his clients.³³³ Other veteran Madison County players have also set up shop in Delaware, including Baron and Budd of Dallas, Texas.³³⁴ The law firm of Peter Angelos has filed suits in Delaware, too.³³⁵

Delaware is attractive to the personal injury bar for several reasons. Personal injury lawyers can file claims in Delaware on behalf of clients in other states because many businesses are incorporated in Delaware.³³⁶ This allows nonresidents to file in Delaware without fear of dismissal or removal.³³⁷

In addition, the mass scheduling of asbestos cases now prevalent in Delaware, sometimes obligating defense counsel to be in several courtrooms at once, constitutes an all but irresistible pressure to settle before trial. Further, the public record makes clear that judges frequently refuse to hear defendants’ motions for summary judgment until they enter “good faith” settlement negotiations.

It is not only the defendants who believe Delaware is being overwhelmed by imported asbestos litigation. In her August 28, 2006 letter to New Castle County Commissioner David White, Kathleen Hadley, a plaintiffs’ attorney with the Angelos law offices in Wilmington, explained that out-of-state plaintiffs have “contributed to this backlog of cases.”

Fortunately, this scene has played out before, so Delaware’s honorable judges and legislators may wish to follow the same script as their reform-minded counterparts in Illinois, Texas and elsewhere to regain control of their courts and protect their economy.

OTHER AREAS TO WATCH

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

- **Jefferson and Choctaw Counties, Alabama.** Considered by some to have “relatively high civil lawsuit verdicts and [the state has] a failure to enact few or any comprehensive reforms.”³³⁸ Also, “corporate attorneys, who normally have a large say in where a major business will locate or expand, say the legal climate plays a very big part in making such decisions. These attorneys do not choose Alabama”³³⁹ for new business locations.
- **Alameda County, California.** This county is a popular jurisdiction for asbestos cases, as local judges often reject improper venue and forum nonconveniens motions. Local judges have refused to adopt an inactive docket that prioritizes asbestos claims alleging actual physical impairment; and they will not compress discovery, leaving defendants to be burdened by plaintiffs’ “fishing expeditions.”
- **Eastern Kentucky.** Pike County and areas in Eastern Kentucky were cited in the 2005 Judicial Hellholes “Watch List” for its reputation for egregious awards and medical liability issues. ATRF continues to monitor this litigation environment.
- **Baltimore, Maryland.** This jurisdiction is perennially cited by respondents to the Judicial Hellholes survey as a place where plaintiffs’ lawyers, such as Baltimore Orioles owner Peter Angelos, have home field advantage. Judges are known to cluster cases and deny pre-trial defense motions.
- **Mississippi.** Despite the state’s adoption of comprehensive tort reform legislation, several areas in Mississippi continue to be regarded as particularly plaintiff-friendly. For example, when Mississippi Attorney General Jim Hood filed a lawsuit against the insurance industry just weeks after Hurricane Katrina last year, he filed it in Hinds County, a former Judicial Hellhole (2003). According to a December 19, 2005, story in *Lawyers Weekly USA*, Hood explained, “We’ve got some judges who live down on the coast and who have to be elected.” On April 18, 2006, the *Associated Press* reported that the attorney general had also compared insurance companies to Nazis during a luncheon speech, looking to inflame judges and juries against the industry so as to keep them from receiving a fair trial. Thus far, federal courts in Mississippi have declined to take Attorney General Hood’s invitation to invalidate clear language in insurance contracts that excludes claims for damage caused by flooding. But the attorney general is fighting hard to keep the case before a local court in Hinds County.
- **St. Louis, Missouri.** “Conventional wisdom holds that the circuit court in the city of St. Louis is plaintiff-friendly. It’s considered a good place to file a lawsuit.”³⁴⁰

- Jefferson and Choctaw Counties, Alabama
- Alameda County, California
- Eastern Kentucky
- Baltimore, Maryland
- Mississippi
- St. Louis, Missouri
- New Mexico Appellate Courts
- Oklahoma
- Marion County, Indiana
- New York City

- **New Mexico Appellate Courts.** New Mexico appellate courts earned Dishonorable Mentions in both 2003 and 2004 for egregious rulings and made the Watch List in last year’s Judicial Hellholes report. Court observers tell us that the situation has not improved.
- **Oklahoma.** After Texas enacted tort reforms, Oklahoma attorney Stratton Taylor sent a letter to Texas lawyers saying, “With recent events that have occurred in Texas, you may be looking to file cases in Oklahoma.” The state has been on the Watch List ever since for signs of burgeoning Judicial Hellhole activity. Also, despite some encouraging talk, serious tort reforms have yet to be enacted.
- **Marion County, Indiana.** While Marion County has an “unofficial” inactive docket for asbestos litigation, it has been imposing onerous discovery requirements on defendants and sanctioning those who do not comply.
- **New York City.** ATRF has received reports that some judges have ruled against defendant motions while admitting that they have not even read the filings. Also, while New York State has tried to guarantee more representative juries, such as by removing professional exemptions, local courts are dismissing jurors for such things as owning any stock in a defendant company. This practice makes it difficult to get a representative jury in Manhattan, the financial capital of the world, in cases where there are multiple defendants.

ATRF will continue to monitor developments in these areas to determine whether they should be included in future reports.

DISHONORABLE MENTIONS

ATRF metes out “Dishonorable Mentions” in recognition of a particularly abusive, if somewhat isolated, practice or unsound court decision. This year, events in Rhode Island, Massachusetts, Louisiana, New Jersey, Nebraska, and California have earned this distinction.

PROVIDENCE, RHODE ISLAND

BIRTH OF A HELLHOLE?

A Providence court gave a huge boost to efforts by some state attorneys general and personal injury lawyers to convert the tort of public nuisance into Super Tort, capable of holding product manufacturers liable for any societal ill that may be caused by their products, regardless of fault.³⁴¹ In a lawsuit involving allegations against the former manufacturers of lead paint and pigment, the court stripped the traditional elements from public nuisance law to do an end-run around product liability law and thereby create a defenseless lawsuit. The decision may well have given birth to a new Judicial Hellhole, as future personal injury lawyers may choose to mimic the lead paint case and file comparable public nuisance claims in Providence.

In the so-called “lead paint lawsuit,” personal injury lawyers teamed with the Rhode Island attorney general to hold the companies that sold lead paint and pigment more than a half century ago liable for hazards caused by lead paint today. In the early part of the 20th century, lead-based paint was widely used in residential communities. Starting in the late 1930s, replacements for lead pigment had begun to gain popularity and, in 1955, considering potential health concerns, the industry voluntarily adopted standards to significantly reduce the amount of lead in paint.³⁴² Congress officially banned lead paint for residential use in 1978.³⁴³

Until the 1980s, most litigation over lead poisoning from ill-maintained lead paint was properly aimed at individual landlords and property owners who allowed their properties to fall into disrepair. Litigation against the lead paint and pigment companies themselves began in the mid-1980s,³⁴⁴ but it failed to meet the basic standards of product liability law.³⁴⁵ To get around product liability law, the personal injury law firm of Motley Rice in 1999 convinced the state attorney general to partner with them in bringing a government public nuisance action against

the paint and pigment companies; the case would be brought on a contingency fee basis.³⁴⁶ Deputized with the power of the state, Mr. Motley sought the costs of removing lead paint from every building in Rhode Island that contained it, regardless of whether it actually posed harm to anyone in its current condition.³⁴⁷

While the first trial ended in deadlock with four of six jurors voting against the state’s public nuisance claim, the court gave the state a boost in the second trial. It redefined the key elements of public nuisance law and, in so doing, created a defenseless lawsuit.³⁴⁸ One look at the jury instructions will show how the defendants’ fate was sealed the moment the instructions were given:

- First, the court shoe-horned this lawsuit into public nuisance theory when it never belonged there in the first place. Public nuisance law is only to be used when there is an interference with a public right. In contrast, the judge told the jury that it could find that public nuisance injury exists due to “the cumulative presence of lead pigment in paints and coatings in [or] on buildings in the state of Rhode Island.”³⁴⁹ In the hundreds of years that public nuisance law has been used, ATRF is not aware of any court that has allowed the aggregation of private rights to equal a public right. Under this theory, almost any product could be deemed a public nuisance.
- Second, the court did not require the defendants to have engaged in any wrongdoing or unreasonable conduct.³⁵⁰ It told the jury that it should find “unreasonable interference” so long as the children “ought not to have to bear” the injury of lead poisoning.³⁵¹
- Third, the court did not require the defendants to be the cause-in-fact of any alleged injury. It instructed the jury that it did not have to find that the manufacturers produced any of the lead pigment present in the properties at issue.³⁵² In fact, the court did not even require any evidence that any defendant actually sold lead paint or pigment in the state.³⁵³

Remarkably, even with this stacked deck, the jury initially reported that it was deadlocked in favor of the defendants. Jurors have since stated that when they went back into the jury room and worked through the judge's instructions letter-by-letter, they had little choice but to find against the defendants.³⁵⁴ As one juror put it, the court "didn't give the paint companies much of a window to crawl through."³⁵⁵

If this precedent stands, enterprising personal injury lawyers and a complicit attorney general could sue a product manufacturer for almost any societal ill. Jurors, hoping to raise money for government programs without having their taxes raised, could find defendants liable for millions or billions of dollars. Rhode Island's current attorney general has already signed on to an eight-state lawsuit against certain companies for their alleged contribution to global warming.

Other signs that Providence may become a Judicial Hellhole:

- One judge holds "settlement week" in December to pressure insurers to "clear their books" for the upcoming year.³⁵⁶ As Duke University Law School professor and mass tort expert Francis McGovern has cautioned, courts that pressure for settlement can create an inviting environment for more cases: "If you build a superhighway, there will be a traffic jam."³⁵⁷
- The local trial bar hosts a how-to-sue program for local residents.³⁵⁸
- There is a 12-percent accrual rate of interest on settlement amounts beginning when the action arises, not when filed. As one local defense counsel observed, "if the plaintiffs' lawyer waits three years to file a lawsuit, the plaintiff will have racked up 36 percent in interest charges before the defendant even has an opportunity to answer the case."³⁵⁹
- The American Medical Association calls the jurisdiction an area in "crisis." Rhode Island internists are paying "more than three times as much in medical liability premiums in 2005 as they were in 2001."³⁶⁰

MASSACHUSETTS SUPREME COURT

LAWSUITS WITHOUT INJURY

The Massachusetts Supreme Judicial Court has expansively interpreted the state's consumer protection statute, making the state fertile ground for massive class action lawsuits in which class members may not have even heard or seen the representation at issue and experienced no financial loss resulting from the complained-of conduct.

As the state's high court recently stated, in a sharply divided decision:

"A successful [Massachusetts] action based on deceptive acts or practices does not require proof that a plaintiff relied on the representation, or that the defendant intended to deceive the plaintiff, or even knowledge on the part of the defendant that the representation was false. Although our cases offer no static definition of the term 'deceptive,' we have stated that a practice is 'deceptive,' ... if it could reasonably be found to have caused a person to act differently from the way he or she otherwise would have acted. In the same vein, we have stated that conduct is deceptive if it possesses 'a tendency to deceive.'"³⁶¹

Accordingly, personal injury lawyers have now teamed up with advocacy groups to set their sites on "Big Soda" and "Big Food," claiming that their marketing practices are responsible for a rise in childhood obesity. Of course, they avoid mention of the lack of physical activity, increased television watching or video game playing prevalent today, or a lack of parental responsibility in monitoring children's eating habits. Instead, they argue parents are unable to resist their children's pleadings for breakfast cereals bearing the likeness of characters such as SpongeBob SquarePants.³⁶² An understated editorial in the *Washington Post* characterized the threatened lawsuits as "an unusual new legal approach."³⁶³ That approach also prompted *Advertising Age* to ask, is "Tony the Tiger on Death Row?"³⁶⁴ Massachusetts is reportedly the probable battleground for these lawsuits due to its reputation for easy class certification of consumer protection lawsuits.³⁶⁵

Consumer protection lawsuits also claim that fast food makers should label their products with nutritional information, even though federal and state regulations exempt non-packaged food products, such as those served in restaurants, from such requirements.³⁶⁶ However, the problem with such regulation is that any given menu item in a restaurant may vary somewhat in portion-size and even ingredients from day-to-day, and menus can change regularly.

Recently, soft drink companies, attempting to avoid a threatened lawsuit, agreed to stop selling soda to schools, despite the fact that school officials in many areas have already responsibly adopted policies that regulate the sale of soda and snacks to their students.³⁶⁷ Instead, student choice will be limited to water, juice, low-calorie sports drinks, or diet soda.³⁶⁸ Such action takes nutritional policy and choices away from legislators, school officials, parents and students. It also allows lawyers and interest groups to dictate what people can eat and drink.

The tobacco industry itself remains in the sights of the plaintiffs' bar, and it is finding unfriendly courts in Massachusetts. Rather than allege their clients suffered a personal injury from cigarette smoking, plaintiffs' lawyers have focused new energy on lawsuits that claim the marketing of cigarettes as "light" misleads consumers into thinking they are healthier than ordinary cigarettes.³⁶⁹ These lawsuits are filed despite the fact that light cigarettes contain the same federally mandated warnings as regular cigarettes, light cigarettes cost the same amount as regular cigarettes, and most smokers who claim they were misled by the marketing practice would have either smoked regular cigarettes or continued

to smoke light cigarettes regardless. Most state courts have rejected similar class actions, but not Massachusetts. Under the court's broad construction of the state's consumer protection law, smokers who bought light cigarettes in the state are poised to collect \$25 each.³⁷⁰ If successful, their lawyers will receive a percentage of the \$25 multiplied by the entire number of smokers in the state as per their contingency fee arrangement. It is easy to see who benefits from this system.

LOUISIANA SUPREME COURT DUPLICATIVE 'HEDONIC DAMAGES'

On July 10, 2006, the Louisiana Supreme Court, in a 5 to 2 decision, held that it would permit recovery for the lost enjoyment of life, also known as "hedonic damages."³⁷¹ While some states permit the jury to consider lost enjoyment of life when determining compensation for pain and suffering or a physical disability, Louisiana has gone further – allowing juries to provide a separate, additional award on top of general damages.

The problem with allowing a separate award for "hedonic damages" is that it creates confusion for the jury and there is great potential for overlapping or duplicative awards. It is difficult to make a principled distinction between an award intended to compensate for "pain" and one that is meant to compensate for "lost enjoyment." When a jury is presented with a verdict form with a blank line for both such categories, human nature and sympathy are likely to lead them to place a dollar figure for each category. The result is that a defendant may be forced to pay twice for the same injury, promoting a general inflation of compensatory awards. Such "windfall" double recoveries undermine the tort system's goal of fairly compensating injured persons and raise litigation-related costs for civil defendants. These costs are then passed on to Louisianans in the form of higher prices for goods and services.

The court did not address the admissibility of expert testimony on valuing lost enjoyment of life, a practice that is almost uniformly rejected as too unreliable for admission in court³⁷² but nonetheless allowed by some Louisiana judges. Such testimony is highly speculative and often based on statistics and other factors that have little to do with the plaintiff's actual life. But a small, intrepid group of experts has created a cottage industry that supports hedonic damages. Without exception, these experts recommend additional multimillion-dollar awards for lost enjoyment of life.³⁷³ In the future, the Louisiana Supreme Court will have an opportunity to reject such expert testimony and allow jurors to decide an appropriate amount based on their own experience and the trial testimony related to the plaintiff's life.

NEW JERSEY 'NEW JERSEY & LAWSUITS, PERFECT TOGETHER'

To boost tourism in New Jersey, the state government ran advertisements in the 1980s with the slogan "New Jersey & You, Perfect Together." But within the past year, New Jersey courts have revived the campaign with a new twist. Their substantive changes in state tort law have now made the Garden State one of the top litigation tourism destinations in the country. The likely hot spot is Atlantic County where courts compete with neighboring Atlantic City casinos in doling out jackpots. Recent intermediate appellate court rulings reflect the willingness of New Jersey courts to embrace new theories of liability as well as welcome out-of-state plaintiffs, and the state's supreme court could broaden the impact of these rulings next year to spread litigation tourism throughout the Garden State.

Toxic Torts Travelers

One of the hallmarks of a Judicial Hellhole is a local court changing the law in order either to find against an unpopular defendant or help a sympathetic plaintiff. The latter seems to have happened when the New Jersey Supreme Court heard an appeal of an asbestos case in which a family member alleged exposure from residue brought home on work clothes. New York, Georgia, and Texas courts have all upheld traditional tort law in this area,³⁷⁴ stating that third-party liability is unmanageable, results in unsound public policies, and gives spouses greater rights to sue than employees. (Worker exposure cases are typically handled under the workers' compensation system.) Undeterred by such logic, the Supreme Court of New Jersey, extended third-party liability to employers,³⁷⁵ and "New Jersey retain[ed] its reputation as a plaintiff-friendly forum."³⁷⁶ While injuries to third parties may be heart-wrenching, courts are supposed to uphold the rule of law, which in this instance states that the worker's employer is not responsible; the plaintiff is to sue more appropriate defendants, such as the asbestos or end-product manufacturer.

Red Rover, Red Rover, Let Michigan Residents Come Over

Already, it has been reported that 90 percent of plaintiffs filing pharmaceutical mass tort cases in New Jersey are non-residents.³⁷⁷ A recent appellate decision³⁷⁸ "exacerbate[d] the existing problem of forum shopping in New Jersey"³⁷⁹ by holding that the state's product liability law for prescription drugs, which is more plaintiff-friendly than Michigan's, will govern the lawsuit even though the plaintiff lived in Michigan; was prescribed, bought and took the medication in question in Michigan; alleged an injury occurred in Michigan; and the drug had been approved for use by the federal Food and Drug Administration.

The New Jersey court stated that it does not believe the Michigan legislature's decision to give drug companies a government compliance defense should apply to defendants in New Jersey.³⁸⁰ Because "the drug industry has a major presence in New

Jersey,³⁸¹ this ruling essentially nullifies the Michigan tort reform statute and made the New Jersey judiciary the official drug court for Michigan residents.

Give Us Your Poor, Your Tired, Your Muddled Class Actions

This year, an Atlantic County judge and the appeals court that affirmed her decision paved the way for national class actions against any business in the state under New Jersey's plaintiff-friendly consumer protection laws.³⁸² This particular suit alleges that Merck violated state law by advertising Vioxx as safe without fully disclosing its risks.³⁸³ This was not a typical consumer protection case brought by an average citizen who felt he was duped by an advertisement. No, the court actually allowed insurance companies and health maintenance organizations who are sophisticated businesses, to take advantage of the state's consumer fraud act.

The appellate court also took the remarkable step of applying New Jersey's consumer fraud law to plaintiffs from across the country simply because Merck, like many pharmaceutical companies, is incorporated in New Jersey. The courts paid no heed to the fact that other states' consumer laws have very different elements, standards, and recovery than New Jersey. In glossing over these differences, the appeals court suggested that "[a]ll consumer fraud laws in the nation are designed to protect consumers to some degree."³⁸⁴ The decision is yet another that regulates trade practices and liability in other states, undermining those states' ability to regulate conduct within their own borders.³⁸⁵

The same Atlantic County judge also set aside a verdict for the defense in a Vioxx personal injury case based on supposedly new evidence and has otherwise made several blatantly pro-plaintiff rulings in Vioxx cases.³⁸⁶ For example, the judge has indicated that she will consolidate the cases of eight different plaintiffs from different states with different medical histories in the same trial, which is scheduled to occur in January 2007.

Public Nuisance Elements? Fuhgetaboutit!

Another New Jersey appellate court became one of the few courts in the country to allow public nuisance law to be used against product manufacturers. In a recent case, twenty-six government entities jointly sued the former manufacturers of lead paint and pigment for governmental costs associated with detecting and removing lead paint, providing medical care to lead-poisoned residents, and developing related educational programs.³⁸⁷ In allowing the case to proceed, the court, without clear explanations, relaxed the elements of control and proximate causation and defined the public nuisance as the "very presence of lead paint." Thus, it appears that little if any wrongful conduct will be required at trial. In addition, the appellate court has allowed the government to pursue "their own, unique damages" even though under traditional public nuisance law, governments may not seek money damages, just an injunction or abatement.

NEBRASKA SUPREME COURT

PUBLIC PARKS AND POOLS AT RISK

For a quarter of a century, Nebraska courts interpreted the state's Recreation Liability Act to extend immunity to the state and local governments when they operated parks, pools and other recreational facilities – not anymore.

The state legislature passed the law in 1965 to encourage individuals and organizations to open recreational facilities to the public at no charge by offering them limited liability protection from accidents that occur on their property.³⁸⁸ The law fairly provided that the owner would face liability if an injury occurred as a result of a willful or malicious failure to guard or warn against the danger, but not for ordinary accidents.³⁸⁹ In 1981, the Nebraska Supreme Court reasonably ruled that protection applied to government entities as well as private landlords.³⁹⁰ On several occasions since its initial ruling, the court explicitly reaffirmed the law's applicability to state and local governments.³⁹¹ After all, nothing in the statute makes a distinction between public and private owners of property. Suddenly in 2006, the court's interpretation drastically changed, even though the language of the statute had not.³⁹²

Even if many judges before them had repeatedly made a mistake, a foundational legal principle known as "*stare decisis*" (Latin for "to stand by that which is decided") would weigh heavily against abandoning previous decisions.³⁹³ *Stare decisis* provides predictability, consistency and fairness by assuring that decisions are based on the law and not on the policy preferences of individual judges. In other words, litigants today are to be treated the same under the law as litigants yesterday wherein they had rationally depended on the prior ruling.

For many years, that liability protection was no doubt a factor in encouraging cities and counties to invest public funds in constructing parks, pools and recreation centers. If the court had it wrong twenty-five years ago, then the state legislature could have simply amended the law to exclude government entities from its coverage and provide a reasoned phase-in of municipal liability that would apply only to future injuries. But the Nebraska Supreme Court's sharp reversal took effect immediately. It applies to any action brought, even if the injury occurred during the time that government entities were assured by the court that they were not liable.

Already, ATRF has learned from a representative of Nebraska municipalities that calls are coming in from city officials across the state, saying they are now considering shutdowns of their parks and pools.

CALIFORNIA LEGISLATURE

LET'S USE PUNITIVE DAMAGES TO FUND THE STATE BUDGET!

In August 2006, the California legislature tried to extend a hastily-enacted 2004 law that required 75 percent of any punitive damages award to be directed to state coffers through July 1, 2011.³⁹⁴ When originally enacted as part of an appropriations bill to help the state address a budgetary crisis, the act was characterized as a “uniquely extraordinary legislative action” that is to form no policy or precedent for the future.³⁹⁵ Yet, predictably, the incentive for the state to continue taking a portion of a plaintiff’s punitive damages award into a Public Benefit Trust Fund beyond the law’s expiration date was too difficult for the legislature to resist. What is particularly troublesome is that while the injured person gets 25 percent of the award, his or her attorney draws a contingency fee based on 100 percent.

In general theory, laws requiring a successful plaintiff to share his or her punitive damages award with the state may be superficially attractive to state legislators and the business community. Some may view the approach as a way to lower the economic incentive for plaintiffs’ lawyers to pursue punitive damages, while providing the state with a convenient additional source of revenue to address public needs. But in specific practice, as was the case in California, legislation is invariably crafted to let plaintiffs’ lawyers take their cut based on the entire recovery.

Directing punitive damages to the state raises serious problems, too, including the potential to make punitive damages exposure even worse than it is today.³⁹⁶ Jurors may be more likely to award punitive damages – and in larger amounts – if the money is to go toward the “public good” rather than to a single “windfall plaintiff.” Jurors also might be influenced by their charitable instinct to fulfill a social good, or their own self-interest in reducing their tax burden or supporting state programs that will help them, their family or their community. The problem of potential juror bias is especially likely to occur when the defendant is an out-of-state corporation.

The California law has now expired. An attempt to renew it was vetoed by Governor Arnold Schwarzenegger on the grounds that it was retroactive and no hearings had been held to scrutinize its potential impact over time. Sacramento insiders report that supporters of the initiative are determined to bring it back for another try. But if it is not defeated or vetoed again, the Golden State will immediately risk melting into the notorious ranks of Judicial Hellholes.

POINTS OF LIGHT

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

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

In its “Points of Light” section, this report highlights jurisdictions where judges, legislators, the electorate and the media intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the desultory depths of a Hellhole, or keep itself from sinking to those depths in the first place.

ILLINOIS SUPREME COURT AGAIN CURBS ‘REGULATION THROUGH LITIGATION’

The Illinois Supreme Court continues to send a strong message that consumer protection acts should not be used by personal injury lawyers or judges to pursue their own political or public policy agendas. Its decisions are authoritative condemnations of “regulation through litigation.”³⁹⁷

Last year, this report recognized as a Point of Light, the Illinois high court’s decision in *Avery v. State Farm Mutual Automobile Insurance Co.*, in which it overturned a \$1.2 billion judge-issued verdict, including \$600 million in punitive damages.³⁹⁸ *Avery* was a nationwide class action brought under the state’s consumer protection law, alleging that the insurer acted deceptively by specifying use of generic auto replacement parts, rather than the brand name manufacturer parts. The court rejected class certification because the lawsuit included out-of-state plaintiffs and repairs that occurred outside of Illinois. It also questioned how selling a product that is not the highest quality relative to the competition could be illegal since State Farm’s disclosures to consumers complied with the state insurance code.

Soon after publication of the 2005 Judicial Hellholes report, the Illinois Supreme Court rendered its long-awaited ruling in *Price v. Philip Morris, Inc.*, vacating the largest judgment in Illinois history – a \$10.1 billion verdict.³⁹⁹ The judgment resulted from a bench trial in Madison County, Illinois, in which the plaintiffs claimed that Philip Morris’s advertising and packaging of light cigarettes was unfair and deceptive. The class certified by the trial court included all consumers (estimated by the court at over one million) who purchased light cigarettes in Illinois during a 30-year period. On March 21, 2003, Judge Nicholas G. Byron rendered a \$10.1 billion judgment, including \$7.1 billion in compensatory damages, \$1.77 billion of which was allocated for payment of attorneys’ fees, and \$3 billion in punitive damages paid to the State of Illinois.⁴⁰⁰ The Illinois Supreme Court vacated the award based on the Federal Trade Commission’s (FTC) extensive regulation of the advertising and promotion of light cigarettes or low tar or nicotine cigarettes since the 1970s.⁴⁰¹ The court also indicated

that individual plaintiffs must have been deceived by the allegedly fraudulent representation and suffered actual damages as a result of relying on that misrepresentation.⁴⁰² In 2006, the United States Supreme Court denied certiorari in the *Price* case, suggesting an additional caution against bringing such suits.

The *Price* decision emphasizes the importance of exemptions from consumer protection laws when the conduct in question is already regulated by state or federal agencies. Approximately two thirds of state consumer protection statutes reasonably include an exemption similar to the one contained in the Illinois law.⁴⁰³

CALIFORNIA COURTS UPHOLD VOTER INTENT TO REIN IN ‘SHAKEDOWN LAWSUITS’

In November 2004, California voters overwhelmingly passed Proposition 64, an initiative that put a stop to what one judge called “shakedown lawsuits” over obscure regulatory violations under the state’s notorious Unfair Competition Law (UCL), particularly when no one had been injured or suffered a financial loss.⁴⁰⁴ Many of these lawsuits benefited only the lawyers who brought them, as the statute provided for recovery of attorneys’ fees. As detailed in previous Judicial Hellholes reports, a lawsuit industry had emerged to victimize small businesses and damage the state’s economy. Proposition 64 restored balance. It provided that only those who suffered an injury or experienced a loss of money or property could bring a claim.⁴⁰⁵ It also subjected such lawsuits, when brought on behalf of numerous individuals, to ordinary class action safeguards that protect due process. Since that time, California courts have rejected attempts to undermine voter intent, while not affecting the ability of the state attorney general to stop deceptive practices before someone is harmed.

First, in July 2006, a unanimous panel of a California appellate court firmly rejected an effort to revive the types of abusive lawsuits that Californians voted to kill with passage of Proposition 64.⁴⁰⁶ The decision reversed a November 2005 ruling by a trial court in Los Angeles, a former Judicial Hellhole that remains on this year’s Watch List. The trial court had certified a class action, including all people who bought Listerine during a six-month period in 2004. Citing advertisements suggesting that use of Listerine is as good as flossing in reducing plaque and gingivitis, lawyers claimed that all people in the state who purchased Listerine should get a refund. The class included everyone and anyone who purchased the product, even if they had not seen the advertisements, purchased Listerine for completely unrelated reasons (e.g., brand loyalty or to freshen breath) or never experienced a related dental problem. As an affront to Proposition 64, the trial court certified the claim and ruled that only the named class representative, not each

member of the class, has to claim an actual injury by the alleged misrepresentation.

The three-judge appeals panel vacated the trial court’s certification of the class, reaffirming that Proposition 64 requires each and every person who brings a lawsuit claiming an unfair business practice to show that he or she has suffered an injury or lost money or property resulting from that practice. Significantly, the court found that Proposition 64 requires each plaintiff to show that he or she actually relied on the representation in question – that they saw or heard a false advertisement and bought the product as a result.⁴⁰⁷ A trial court that allows such lawsuits by those who did not rely on the claimed misrepresentation, the appellate court found, “substitute[s] its judgment for that of the voters.”⁴⁰⁸ The California Supreme Court recently granted review to another case raising this same issue. Presumably, California voters want the high court to take their side against these types of shakedown lawsuits.⁴⁰⁹

Also in July 2006, the California Supreme Court settled a debate between lower courts as to whether Proposition 64’s requirements applied to cases pending at the time the initiative was passed.⁴¹⁰ Its ruling reversed an intermediate appellate court that had refused to apply Proposition 64’s requirements for actual injury and damages to a previously pending claim. The case was originally brought on behalf of no specific person and alleged that the aisles in a department store were too narrow to comfortably fit people with mobility aids. Attorney’s fees were also sought. The high court also reasonably permitted plaintiffs with pending cases to amend their complaints to meet Proposition 64’s new requirements by adding a plaintiff who experienced an injury and a loss of money or property as a result of defendant’s alleged practices, so long as they did not substantively alter their claims.⁴¹¹ These decisions ensured that shakedown lawsuits would no longer proliferate, while treating those with pending cases fairly if an individual experienced an actual injury. The decision will do away with pending lawsuits such as one brought by a man who owned neither a Visa nor a MasterCard, but sued both those companies for allegedly failing to disclose foreign currency fees.⁴¹²

FLORIDA LEGISLATURE BRINGS FAIRNESS TO COURTS

The Florida legislature in 2006 took three significant steps toward restoring a fair and predictable civil justice system in the state.

In April, the legislature stemmed the flow of out-of-state lawyers bringing class action claims to pro-plaintiff Florida courts.⁴¹³ According to a study by the Federalist Society for Law and Public Policy Studies, filings of class action lawsuits in Florida courts increased tenfold during the 1990s.⁴¹⁴ In the future, class action lawsuits brought in Florida will be limited to Florida residents

unless the basis of the claim occurred or emanated from within Florida. The new law will also ensure that if a lawsuit seeks compensatory damages, each class member must show they suffered an actual loss for the litigation to proceed.

Governor Jeb Bush also signed legislation in April repealing the unfair doctrine of joint and several liability.⁴¹⁵ He had called for the repeal in his State of the State address earlier in the year. The new law fairly provides that a defendant is responsible only for his or her share of responsibility, not more, not less. Defendants will not be made to pay more than their fair share of awards if other defendants responsible are unable to pay. As state Senator Burt Saunders recognized, “There is nothing inherently fair about a defendant who is 10 percent at fault paying 100 percent of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.”⁴¹⁶

Finally, Florida lawmakers took action to ensure a civil defendant’s right to appeal an extraordinary award. Until enactment of the new law, a defendant was required to post a bond in an amount covering the judgment, costs and interest in order to stay collection of the judgment during an appeal.⁴¹⁷ Such a requirement could bankrupt a company and lead to lost jobs before a defendant even had an opportunity to have the case heard on appeal. For example, in order to protect the defendant’s right to appeal an unprecedented \$145 billion award against the tobacco industry in then-Judicial Hellhole Miami-Dade County in 2000,⁴¹⁸ legislators intervened.⁴¹⁹ Indeed, in a decisive ruling in May 2003, a Florida appellate court scrapped the award based on a laundry list of egregious errors, and the Florida Supreme Court recently affirmed its vacating of the award.⁴²⁰ The 2006 law protects the rights to appeal of all civil defendants in Florida by providing that the amount of the bond necessary to obtain an automatic stay of execution of a judgment during the course of an appeal may not exceed \$50 million.⁴²¹

These reforms follow on the heels of Florida’s 2005 enactment of the Asbestos and Silica Compensation Act, which established strict medical criteria to determine whether individuals truly suffer from asbestos-related claims, and modest reforms in 2003 to protect the availability of health care.⁴²²

As the *Jacksonville Business Journal* recognized, a state’s legal environment has become an important criterion for larger companies to consider in connection to relocation or expansion. Florida’s neighbors, including Georgia, Mississippi and Louisiana had already completely eliminated joint and several liability.⁴²³ Florida Senator Jim King understands that such tort reforms are “certainly another arrow in the quiver of economic recruiters.”⁴²⁴

STATES FAIRLY AND EFFECTIVELY ADDRESS ASBESTOS AND SILICA CLAIMS

Courts and state legislatures have adopted reforms that are making a difference in the overall asbestos and silica litigation environment. The *American Lawyer* magazine has declared that “Thanks to state tort reform, judicial rulings, and public scrutiny, the asbestos docket has dropped dramatically.”⁴²⁵

Recent studies have shown that up to 90 percent of asbestos claimants today are not sick.⁴²⁶ These claimants “are diagnosed largely through plaintiff-lawyer arranged mass screening programs targeting possibly exposed asbestos-workers that attract potential claimants through the mass media.”⁴²⁷ Those that are truly sick face a depleted pool of assets as asbestos lawsuits have bankrupted at least 78 companies. Plaintiffs’ lawyers have responded by dragging many small and medium-size companies into the litigation. In many instances, plaintiffs’ lawyers have filed claims against both asbestos and silica defendants, although leading medical experts agree that it is a medical rarity for someone to have both asbestos-related and silica-related impairment.⁴²⁸ In 2005, the manager of the federal silica multi-district litigation, U.S. District Judge Janis Graham Jack of the Southern District of Texas, recommended that all but one of the 10,000 claims on the silica docket should be dismissed on remand because the plaintiffs’ diagnoses were fraudulently prepared.⁴²⁹

Since 2004, Florida, Georgia, Kansas, Ohio, South Carolina and Texas have enacted laws requiring plaintiffs to present credible and objective evidence of impairment in order to bring or maintain an asbestos or silica action.⁴³⁰ Tennessee enacted a silica medical criteria law this year. Early indications are that these laws are working to focus resources on the truly sick by filtering out and preserving the claims of the unimpaired, and by discouraging frivolous litigation. For example, Bryan Blevins of Provost & Umphrey, a national plaintiffs’ practice based in Beaumont, Texas, told the *National Law Journal* that since Texas enacted its 2005 medical criteria law, “[t]he only cases getting filed now are cancer cases, which are 12 to 15 percent of the cases being filed nationwide. I think we are going to see dramatic, dramatic changes. . . .”⁴³¹ An Ohio lawyer who chairs his firm’s national toxic tort defense litigation practice has said that Ohio’s medical criteria law “dramatically cut the number of new case filings by 90 percent.”⁴³²

State courts also deserve credit for helping to re-focus the litigation on the needs of the truly sick. For example, a growing number of state courts now require asbestos claimants to demonstrate impairment in order to proceed to trial. The claims of the unimpaired are put on an inactive docket, where they are exempt from discovery and do not age. Since 2002, inactive asbestos dockets have been adopted by many state courts, including Judicial

Hellholes Madison and St. Clair counties in Illinois.⁴³³ A RAND Corporation study has called the “reemergence” of inactive dockets “one of the most significant developments” in asbestos litigation.⁴³⁴ In addition, courts in Arizona, Delaware, Maine and Pennsylvania have held that the unimpaired do not have a legal claim.⁴³⁵

Experts observe that “[a]fter thirty years of a downward spiral, recent actions by state courts and legislatures in key jurisdictions that have experienced large numbers of asbestos filings provide hope that a major fuel behind the recent explosion in the litigation – mass filings by the non-sick – may be waning.”⁴³⁶ According to Jennifer Biggs, who chairs the mass torts subcommittee of the American Academy of Actuaries, “A lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level.”⁴³⁷ In a 2006 paper, Frederick Dunbar, a senior vice president of NERA Economic Consulting, concluded that 2004 asbestos claims had dropped from peak levels of the previous three years for each of the eighteen large asbestos defendants.⁴³⁸ Ten companies saw claims fall by more than half between 2003 and 2004.⁴³⁹

OREGON TRIAL COURT HOLDS THE LINE ON COMPANIONSHIP DAMAGES FOR LOSS OF PETS

Oregon Circuit Judge Eve Miller was one of the many trial judges this year who stood up for the rule of law in the face of plaintiff lawyers’ attempts to change fundamental tenets in tort law. She earned this report’s Point of Light distinction by spotlighting the recent and concerted effort to introduce, for the first time in American jurisprudence, significant amounts of non-economic damages, such as pain and suffering and loss of companionship damages, in cases involving injury or death to animals.⁴⁴⁰

The case before Judge Miller provided particularly disturbing facts that would pull on anyone’s heart strings. The plaintiffs’ neighbor was charged with running over the plaintiffs’ family dog several times in front of several family members.⁴⁴¹ The plaintiff’s attorney, who has acknowledged that he is looking for cases with which to seek emotional distress damages, sought \$1.6 million in economic and noneconomic damages.⁴⁴² Judge Miller, who properly held that non-economic damages were not permitted in the case, ultimately awarded the owners \$56,000 in economic and punitive damages.⁴⁴³ In separate proceedings, the defendant was convicted of animal cruelty.

As these civil and criminal outcomes show, the current legal system deters animal abuse and allows owners to be made financially whole in animal injury and death cases. If the owners were awarded the \$1.6 million, including loss of companionship damages as that their lawyer sought, longstanding precedent in Oregon and other states would have been thrown to the wolves.

Both the Counsel of State Governments and the American Legislative Exchange Council have passed resolutions against the introduction of non-economic damages in animal cases.⁴⁴⁴ They have recognized that the current system for animal liability protects the special relationship people have with their pets. It balances an owner’s right to recover losses with the need to keep animal care accessible and affordable.

Studies show that owners only have so much money to spend on their pets’ care.⁴⁴⁵ If non-economic damages were allowed in animal injury and death cases, the resulting cost to pet care providers and product manufacturers would be spread among all pet owners. The cost of veterinary care would likely require pet owners to carry health insurance for their animals just to afford basic services. Many owners might forgo special treatments, such as the replacement of a mature dog’s arthritic hip, that allow pets to live longer, healthier lives. Moreover, letting pets go untreated or having them put to sleep because of liability costs would not be in the best interests of animals or their owners.

ADDRESSING PROBLEMS IN HELLHOLES

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

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

STOP ‘LITIGATION TOURISM’

As the Judicial Hellholes report demonstrates, certain areas in a state may be perceived by plaintiffs’ attorneys as an advantageous place to have a trial. As a result, plaintiffs’ attorneys become the “travel agents” for the “litigation tourist” industry, filing claims in jurisdictions with little or no connection to their clients’ claims. Fair venue reform would require plaintiffs’ lawyers to file cases in the county in which the plaintiffs live or were injured, or where the defendant’s principal place of business is located. *Forum non conveniens*, a related concept, allows a court to refuse to hear a case if it is a more closely connected to another state, rather than in a different area of the same state.⁴⁴⁶ *Forum non conveniens* reform would oust a case brought in one jurisdiction when the plaintiff lives elsewhere, the injury arose elsewhere and the facts of the case and witnesses are located elsewhere. By strengthening the rules governing venue and *forum non conveniens*, both legislatures and

courts can ensure that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff. In addition to state reform, the federal Lawsuit Abuse Reduction Act (LARA), H.R. 420, 109th Cong, 1st Session, would provide a nationwide solution to unjust and unreasonable forum shopping.

RESTORE CONSEQUENCES FOR BRINGING FRIVOLOUS LAWSUITS

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

As officers of the court, personal injury lawyers should be accountable to higher standards of basic fairness, and they should be sanctioned if they abuse the legal system with frivolous claims. Accordingly, LARA would eliminate the “safe harbor” for those who bring frivolous lawsuits and restore mandatory federal sanctions. LARA passed the House of Representatives by a vote of 228-184 in October 2005,⁴⁴⁷ which marked the second time the House passed the bill, having approved it by a similar margin in the closing days of Congress’ 2004 session. The bill has yet to make it through the Senate but, with renewed talk of bipartisan cooperation among members of the incoming 110th Congress, perhaps new opportunities will arise.

PROVIDE PROTECTION FOR REAL CONSUMERS

As many of the examples in this report illustrate, private lawsuits under state consumer protection acts (CPAs) have strayed far from their originally intended purpose of providing a means for ordinary consumers who purchase a product based on the misrepresentation of a shady business to be reimbursed. Instead, such claims are now routinely generated by personal injury lawyers as a means to easy profits, or by interest groups as a means to achieve regulatory goals that they could not otherwise achieve through democratic legislative processes. Such claims are often brought on behalf of individuals who have never seen, heard or relied upon the representation at issue.

Judges should apply commonsense interpretations to CPAs that recognize the fundamental requirements of private claims while discouraging forum shopping and extraterritorial application. If courts find that statutory language impedes sound public policy or fails to distinguish between public regulation and private claims, state legislators should intervene. As Ted Frank, a fellow at the American Enterprise Institute, wrote in the *Washington Post*, “Consumer-fraud laws need to be rewritten so that they are helping consumers rather than attorneys.”⁴⁴⁸ The American Legislative Exchange Council (ALEC) has adopted model legislation, the Model Act on Private Enforcement of Consumer Protection Statutes, to address the problems associated with private actions under state CPAs. The model act restores fair, rational tort law requirements in private lawsuits under CPAs without interfering with the ability of a person who has suffered an actual financial loss to obtain recovery, or with the state’s authority to quickly end unfair or deceptive practices.

USE PAIN AND SUFFERING AWARDS TO COMPENSATE PLAINTIFFS, NOT PUNITIVELY STRIP DEFENDANTS OF CONSTITUTIONAL PROTECTIONS

In recent years, there has been an explosion in the size of pain and suffering awards, and there is concern that they are being sought as a means to evade statutory and constitutional limits on excessive

punitive damage awards.⁴⁴⁹ Given the lack of standards in determining fair compensation for something as amorphous as pain and suffering, it is imperative that judges properly instruct juries that these awards serve a compensatory purpose and may not be used to punish a defendant or deter future bad conduct. When a jury reaches an extraordinary compensatory damages award, both trial and appellate level judges should closely review the decision to ensure that it was not inflated due to the consideration of inappropriate evidence. This would include evidence based on a defendant’s “fault” as contrasted with plaintiff’s harm, and also prejudicial evidence. ALEC has developed a model “Full and Fair Noneconomic Damages Act” that would preclude the improper use of “guilt” evidence and enhance meaningful judicial review of pain and suffering awards. Ohio became the first state to adopt such legislation in 2005.⁴⁵⁰

STRENGTHEN RULES TO PRESERVE SOUND SCIENCE

Junk science pushed by pseudo “experts” has tainted tort litigation for decades. For example, only this year did the Food and Drug Administration lift its fourteen year ban on silicone breast implants. The FDA put the ban in place as a result of allegations contained in class action lawsuits that had no basis in science, yet the lawsuits bankrupted companies and took away an option for breast cancer victims.⁴⁵¹ The more complex the science becomes, the more juries tend to be influenced by their personal likes and dislikes of expert witnesses as opposed to the soundness of the testimony. Ten years ago, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom.⁴⁵² The *Daubert* standard provides that, in determining reliability, the court must engage in a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.”⁴⁵³ There is evidence that following adoption of *Daubert*, judges more closely scrutinize the reliability of expert testimony and are more likely to hold pretrial hearings regarding admissibility of expert testimony.⁴⁵⁴ Nevertheless, at least twenty states have not adopted anything close to the *Daubert* principles.⁴⁵⁵ Even in courts where *Daubert* governs, some judges are not effectively fulfilling their gatekeeper role.⁴⁵⁶ By adopting *Daubert*, taking their gatekeeper roles seriously and seeking competent, independent scientific experts, judges can better control their courts and properly return to plaintiffs in tort cases the fundamental burden of proving causation.

ENSURE ACCESS TO HEALTH CARE WITH REASONABLE MEDICAL LIABILITY REFORMS

The inequities and inefficiencies of the medical liability system have negatively affected the cost and quality of health care, as well as access to adequate health care for many Americans. Increasing

medical liability claims have forced doctors to retire early, stop performing high-risk procedures or move out of states with unfair laws. Consequently, in some areas of the country, certain medical specialists simply are not available. According to the American Medical Association, there are only seven states nationwide that are not experiencing an access-to-health care crisis or at least dealing with some related problems.⁴⁵⁷ Things are likely to worsen with the costly practice of “defensive medicine” becoming ever more pervasive. Commonsense medical liability reforms can help stabilize the system. These include: (1) a reasonable limit on noneconomic damages; (2) a sliding scale for attorneys’ contingency fees; (3) periodic payment of future costs; and (4) abolition of the collateral source rule, so that juries may consider compensation that a plaintiff receives from sources other than the defendant for his or her injury in determining damages. Medical liability reform can be achieved state-by-state, though congressional action certainly would be the most sweeping and effective vehicle for reform.

PRIORITIZE THE CLAIMS OF THOSE WHO ARE TRULY SICK IN ASBESTOS AND SILICA CASES

Forum shopping, mass consolidations, expedited trials, multiple punitive damages awards against defendants for the same conduct, and the overall lack of due process afforded to defendants were issues repeatedly raised relative to asbestos litigation by survey respondents in preparation of this report. The heart of the problem is that, according to recent studies, as much as 90 percent of new asbestos-related claims are filed by plaintiffs who have no impairment.⁴⁵⁸ To date, Congress has been unable to reach the consensus needed to enact a comprehensive solution.⁴⁵⁹ Increasingly, state courts are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Meanwhile, state legislatures are providing medical criteria that protect the ability of those who are injured to receive compensation, while preserving the rights of those who have been exposed but are not sick now to bring lawsuits later should they become sick. Therefore, state judicial and legislative actions can and have helped significantly reduce litigation abuse.

CONCLUSION

The United States includes more than 3,000 counties and 30,000 incorporated cities. In the vast majority of these jurisdictions, diligent and impartial judges apply the law fairly. The American Tort Reform Foundation's 2006 *Judicial Hellholes*® report shines the harshest spotlight on six of those jurisdictions. In these jurisdictions judges systematically make decisions that unfairly skew personal injury litigation against out-of-state companies and in favor of local plaintiffs. This year's report also lists six jurisdictions on its "Watch List" and adds another six "Dishonorable Mentions," decisions by courts or legislatures that have unreasonably expanded liability. (Six, six, six. Coincidence? Perhaps.)

In issuing its annual Judicial Hellholes report, ATRF works to restore the scales of justice to a balanced, neutral position. In that spirit, the report includes a guide to reasonable measures that, if applied or enacted, might help salvage even-handed justice in some parts of the country. As Florida and other states have shown during this past year, legislatures can fix some problems in Judicial Hellholes. But, the Gulf Coast of Texas has repeatedly resisted reasonable tort reforms passed at the state level, proving that such reforms themselves cannot guarantee improvements at the local level. Judges have significant autonomy when it comes to administering cases before them and can create mischief under any system. Conversely, Madison County, Illinois, demonstrates that individual judges can go a long way in cleaning up a Judicial Hellhole, with or without changes in the law. Judges must simply apply existing laws and procedures in a fair and unbiased manner. Ultimately, it is the responsibility of judges to ensure that all civil litigants, not just the ones they may personally favor, receive "Equal Justice Under Law."

ENDNOTES

- 1 Asbestos for Lunch, *Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference* (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York), June 11, 2002, at 5 (transcript of comments of Richard Scruggs).
- 2 MSNBC, Abrams Report, Jan. 23, 2003.
- 3 Richard Neely, *The Product Liability Mess: How Business Can be Rescued From the Politics of State Courts* 4 (1998).
- 4 Martin Kasindorf, *Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limits*, USA Today, Mar. 8, 2004, available at http://www.usatoday.com/news/nation/2004-03-07-tort-lawsuits_x.htm.
- 5 AEI-Brookings Joint Center for Regulatory Studies, *Judicial Education Program: Critical Issues in Toxic Tort Litigation*, Washington, D.C., April 28-29, 2004.
- 6 Paul Hampel, *Madison County: Where Asbestos Rules Court Here Is a Magnet for Litigation*, St. Louis Post-Dispatch, Sept. 19, 2004, at A1.
- 7 Editorial, *Can We Escape 'Tort Hell'?*, The State Journal, June 8, 2006, available at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=11469>.
- 8 See American Tort Reform Found., *Judicial Hellholes* 30 (2005).
- 9 See, e.g., Neely, *supra* note 3, at 4.
- 10 *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 17 Mealey's Litigation Reporter: Asbestos, Mar. 1, 2002 at 1, 6.
- 11 See Asbestos for Lunch, *supra* note 1 (transcript of comments of Richard Scruggs).
- 12 *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).
- 13 Editorial, *Getting Politics Out of Courts*, Business Week, Sept. 27, 2004, at 140.
- 14 John Thain, Chief Executive Officer, New York Stock Exchange Group, Speech at Investment Company Institute Conference (Sept. 28, 2006).
- 15 *Id.*
- 16 Transcript, *Jackpot Justice*, 60 Minutes, Nov. 25, 2002.
- 17 See Mark Behrens & Cary Silverman, *Now Open for Business: The Transformation of Mississippi's Legal Climate*, 24 Mississippi College Law Review 393, 415 (2005).
- 18 See *id.* at 410.
- 19 See *id.* at 403.
- 20 See *id.* at 420.
- 21 See H.B. 393, 93rd Gen. Assem. (Mo. 2005); see also Jonathon Wilson, *Missouri Tort Reforms Bring 'Flood' of Lawsuits*, PointofLaw.com, Aug. 29, 2005, available at <http://www.pointoflaw.com/archives/001517.php>.
- 22 See Gail Appleson, *Companies Like Missouri's Tort Reforms*, St. Louis Post-Dispatch, Mar. 28, 2006, at C1.
- 23 See 2005 Judicial Hellholes Report at 34; see also David M. Studdert, et al., *Defensive Medicine Among High-Risk Specialist Physicians in a Volatile Malpractice Environment*, Journal of the American Medical Association, June 1, 2005.
- 24 See *id.* at 35; see also Asher Hawkins *Verdict's in on Big Awards: Large Jury Grants Down*, Legal Intelligencer, Sept. 21, 2005, at 1 (citing Philadelphia Court of Common Pleas statistics).
- 25 See H.B. 3008, 116th Sess. (S.C. 2005).
- 26 See *Whaley v. CSX Transportation, Inc.*, 609 S.E.2d 286 (S.C. 2005).
- 27 See American Tort Reform Found., *Judicial Hellholes* 11 (2005).
- 28 See Mark Behrens & Barry Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Texas Review of Law and Policy 137, 146 (2001).
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- 33 See Bob Yates, *Class Action Fairness Act, More Than a Year Later*, Chicago Lawyer, Dec. 2006, at 54.
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- 37 See Emma Schwartz, *ATLA Conjures a New Reality*, Legal Times, Feb. 9, 2005, available at <http://www.law.com/jsp/article.jsp?id=1107783325092> and Jeffrey H. Birnbaum, *Trial Lawyers Group Names New Chief*, Washington Post, Jan. 29, 2005, at A13 (discussing the impressive public relations experience of Mr. Haber).
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- 39 See Carmel Sileo, *A New Century for ATLA*, Trial, July 2006, at 16.
- 40 See *id.*
- 41 See Carl Jones, *Gables Lawyer Eidson Takes Over National Group*, Miami Daily Business Review, July 21, 2006, at 2.
- 42 See *id.*
- 43 See Bill Straub, *The Gloves are Off*, Trial, July 2006, at 24.
- 44 *Id.*
- 45 See Sileo, *supra* note 39.

- 46 See Richard S. Dunham, *Washington Outlook: Trial Lawyers Will Take Their Case to the People*, Business Week Online, Mar. 7, 2005, available at http://www.businessweek.com/magazine/content/0510/c3923068_mz013.htm.
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- 48 See generally Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kansas L. Rev. 1 (2006).
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- 52 See Caroline E. Mayer, *Two Consumer Groups Announce A New Way to Fight Junk-Food Ads*, Washington Post, Jan. 19, 2006.
- 53 See Plaintiffs’ Class Action Complaint, *Mills v. Giant of Maryland*, Civ. Action No. 05-0008054, at 1-4 (D.C. Sup. Ct., filed Oct. 6, 2005).
- 54 See Complaint, *Physicians Comm. for Responsible Med. v. Kraft Foods, Inc.*, Ch. No. 05-00-2179 (Va. Cir. Ct., City of Alexandria, filed June 28, 2005); Complaint, *Physicians Comm. for Responsible Med. v. Int’l Dairy Foods Ass’n*, At Law No. 05-0013-20 (Va. Cir. Ct., City of Alexandria, filed June 28, 2005).
- 55 See Pelman ex rel. *Pelman v. McDonald’s Corp.*, 237 F. Supp.2d 512 (S.D.N.Y. 2003), vacated in part and remanded, 396 F.3d 508 (2d Cir. 2005).
- 56 See Caroline E. Mayer, *Lawyers Ready Suit Over Soda*, Washington Post, Dec. 2, 2005, at D4.
- 57 See Bruce Mohl, *Nutrition Group Seeks Warning Labels for Olestra But State Law May Help Frito-Lay if Lawsuit is Filed*, Boston Globe, Jan. 5, 2006, at E3.
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- 60 *Int’l Union*, *supra* note 58.
- 61 *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).
- 62 *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993).
- 63 Other types of public nuisance actions include interfering with public health and safety. See *Friends of the Sakonnet v. Dutra*, 738 F. Supp. 623 (D.R.I. 1990). Examples include storing explosives within the city, interfering with reasonable noise levels at night, or interfering with breathable air, such as through emitting noxious odors into the public domain. See Restatement (Second) of Torts, § 821B cmt. b (1979).
- 64 *Hydro-Mfg., Inc. v. Kayser-Roth Corp.*, 640 A.2d 950, 958 (R.I. 1994) (emphasis added) (citations omitted). This notion of a specific type of injury for a specific cause of action is not uncommon in American law. For example, to bring a suit in antitrust law, a plaintiff “must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.” *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).
- 65 See Restatement (Second) of Torts § 821B(1) (1979). As with most elements of public nuisance law, some cases have significantly strayed from these core elements. See, e.g., *Wood v. Picillo*, 443 A.2d 1244, 1247 (R.I. 1982) (stating that public “nuisance [law] is predicated upon unreasonable injury, [not] unreasonable conduct”).
- 66 See *Friends of Sakonnet v. Dutra*, 738 F. Supp. 623, 633-34 (D.R.I. 1990).
- 67 See Restatement (Second) of Torts, § 821B cmt. a (1979); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 University of Cincinnati Law Review. 741, 745-46 (2003) (“Historically, public nuisance most often was not regarded as a tort, but instead as a basis for public officials to pursue criminal prosecutions or seek injunctive relief to abate harmful conduct. Only in limited circumstances was a tort remedy available to an individual, and apparently never to the state or municipality.”).
- 68 W. Page Keeton et al., *Prosser & Keeton On Torts* 616 (5th ed. 1984); see also F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949) (calling public nuisance a “mongrel” tort for being “intractable to definition” and stating that “[t]he prime cause of this difficulty is that the boundaries of the tort of nuisance are blurred”).
- 69 See *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 977 (Sup. Ct. 1983) (noting that the harmful nature of the pollution, which occurred in the 1950s and 1960s, was “[b]elatedly” discovered).
- 70 *Id.* (adhering to the expansive definition of “nuisance” as “no more than harm, injury, inconvenience, or annoyance” (quoting *Copart Indus. v. Consolidated Edison Co.*, 362 N.E.2d 968, 970 (N.Y. 1977))).
- 71 *County of Johnson v. U.S. Gypsum Co.*, 580 F. Supp. 284, 294 (E.D. Tenn. 1984).
- 72 *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (App. Div. 2003).
- 73 See *Morris v. Crown Equipment Corp.*, 633 S.E.2d 292 (W. Va. 2006).
- 74 See Justin D. Anderson, *Justices at Odds with Attorney’s Fee Request*, Charleston Daily Mail, Aug. 1, 2006, at 5D (reporting on sexual harassment case in which a jury awarded the plaintiff \$12,300, but her attorney sought \$43,085 in fees). The trial court awarded \$8,617, an amount that was reversed by the West Virginia Supreme Court of Appeals and remanded for further consideration. See *Heldreth v. Rahimian*, No. 32779, 2006 WL 385784 (W. Va. Feb. 21, 2006).
- 75 See Juliet A. Terry, *Lawyers in Dr. King Case Still Battling*, The State Journal, July 20, 2006, at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=12444>.
- 76 Randy Coleman, Editorial, *Lawsuit Abuse State Needs to Change Jackpot Justice Culture*, Charleston Daily Mail, Sept. 26, 2005, at 5A.
- 77 See Bill Bissett, *Let’s Pursue Further Civil Justice Reform*, Charleston Daily Mail, May 27, 2005, at 4A.

- 78 AEI-Brookings Joint Center for Regulatory Studies, Judicial Education Program: Critical Issues In Toxic Tort Litigation, Washington, D.C., April 28-29, 2004.
- 79 Editorial, *Can We Escape 'Tort Hell'?*, The State Journal, June 8, 2006, available at <http://www.statejournal.com/story.cfm?func=viewstory&storyid=11469>.
- 80 See *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999) (allowing cash awards for medical monitoring without limiting use of the award to health care purposes). To its credit, the West Virginia Supreme Court of Appeals limited its potential damage in December of 2004 by essentially ruling that trial lawyers cannot use the class action device as a way to export West Virginia's liberal medical monitoring standard to nonresidents living and injured in states where medical monitoring has not been adopted or is applied in a more restrictive manner. See *Chemtall, Inc. v. Madden*, 607 S.E.2d 772 (W. Va. 2004).
- 81 In 2005, the West Virginia took a modest step forward in this area when it enacted S.B. 421, which eliminated joint and several liability for defendants thirty percent or less at fault. In such situations, defendants pay only percentage of fault as determined by the jury. If a claimant has not been paid after six months of the judgment, however, defendants ten percent or more responsible are subject to reallocation of uncollected amount. Defendants less than ten percent at fault or whose fault is equal to or less than the claimant's percentage of fault are not subject to reallocation.
- 82 See previous Judicial Hellholes reports. In fact, newspapers have recently commented that Attorney General McGraw, who has hired private lawyers to sue in the name of the state more than twenty five times in the past three years, has turned his office into a "class action factory." See Chris Dickerson, *McGraw Has Banked on Outside Counsel in Recent Years*, West Virginia Record, Aug. 25, 2006, available at <http://www.wvrecord.com/news/newview.asp?c=183470>; Editorial, *Legislators Should End This; Attorney General Should Not be Operating a Tort Law Firm*, Charleston Daily Mail, Mar. 17, 2006, at 4A. Virtually all of the private lawyers, who hired without open bidding or legislative oversight, contributed to Attorney General McGraw's campaign. See Editorial, Darrell McGraw's \$64,000 Question, West Virginia Record, Sept. 21, 2006, available at <http://www.wvrecord.com/news/newview.asp?c=184517>.
- 83 See Chris Dickerson, *Attorney Says Contribution Didn't Land Him AG Work*, West Virginia Record, Sept. 1, 2006, available at <http://www.wvrecord.com/news/newview.asp?c=183807>.
- 84 Editorial, *Frivolous Suits; Former Supreme Court Justice McGraw Joins the Crowd*, Register-Herald, May 8, 2006.
- 85 See *id.*
- 86 See, e.g., *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W.Va. 2002), where a consolidation was upheld even though it involved "thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs." *Id.* at 331 (Maynard, J., concurring).
- 87 See, e.g., Chris Dickerson, *Attorneys File 16 Joint Asbestos Suits*, West Virginia Record, July 5, 2006, available at <http://wvrecord.com/news/newview.asp?c=181238> (noting the filing of a lawsuit on behalf of sixteen plaintiffs from Ohio, Kentucky, Pennsylvania, Indiana, Illinois, and West Virginia against 143 defendants in Kanawha County Circuit Court).
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- 445 See Richard L. Cupp, *Barking Up the Wrong Tree Justice: Awarding Emotional Distress Damages to Pet Owners Whose Animals Are Harmed Is a Dog of an Idea*, L.A. Times, June 22, 1998, at B5.
- 446 See *Black's Law Dictionary* 680 (8th ed. 2004).
- 447 See Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (1st Sess. 2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00420:@@R>.
- 448 Ted Frank, *End Open-Ended Litigation*, Washington Post, Sept. 7, 2006.

- 449 See Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation Into "Punishment,"* 54 South Carolina Law Review 47 (2002), also printed in 52 Defense Law Journal 737 (2003); *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004); Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Center Piece of Our Tort System*, 93 University of Virginia Law Review 1401 (2004).
- 450 See Ohio Rev. Code Ann. § 2315.19.
- 451 See Editorial, *Implants and Science*, Wall Street Journal, Nov. 20, 2006, at A16.
- 452 See *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).
- 453 *Id.* at 600.
- 454 See Molly T. Johnson et al., *Expert Testimony in Federal Civil Trials: A Preliminary Analysis* 1 (Fed. Jud. Ctr. 2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/\\$file/ExpTesti.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf).
- 455 See Defense Research Inst., *Frye/Daubert: A State Reference Guide 3-4* (2006). Some of these states, such as California, Florida, and Illinois, continue to apply the less rigorous *Frye* "general acceptance" test, which the federal courts abandoned with the adoption of the *Daubert* standard in 1993. *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Donaldson v. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002). Other states apply their own standard to determine the admissibility of expert testimony. See, e.g., *In re Robert R.*, 531 S.E.2d 301, 303 (S.C. 2000).
- 456 See Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, – Hofstra Law Review – (forthcoming 2007).
- 457 See Medical Liability Crisis Map, American Medical Association, <http://www.ama-assn.org/ama/noindex/category/11871.html>.
- 458 See Behrens & Cruz-Alvarez, *supra* note 428.
- 459 For the past three years, Congress has considered various versions of the Fairness in Asbestos Injury Resolution (FAIR) Act. See S. 852, 109th Cong. (2005). That bill would establish a trust fund financed by contributions from insurers and defendant companies, and would pay compensation to claimants who meet certain medical criteria. Lengthy discussions among Democrats and Republicans, insurers and corporate defendants, labor and the trial bar, however, did not yield a compromise bill with the support necessary for Senate approval this year. Other lawmakers have introduced a bill with a more narrow approach that would provide that courts must dismiss asbestos claims of those who do not meet a set of objective medical criteria until such time as they meet the standards provided in the legislation. H.R. 1957, 109th Cong. (2005). Both approaches have merit and would greatly help curb out-of-control asbestos litigation, but neither has gained traction in Congress.



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