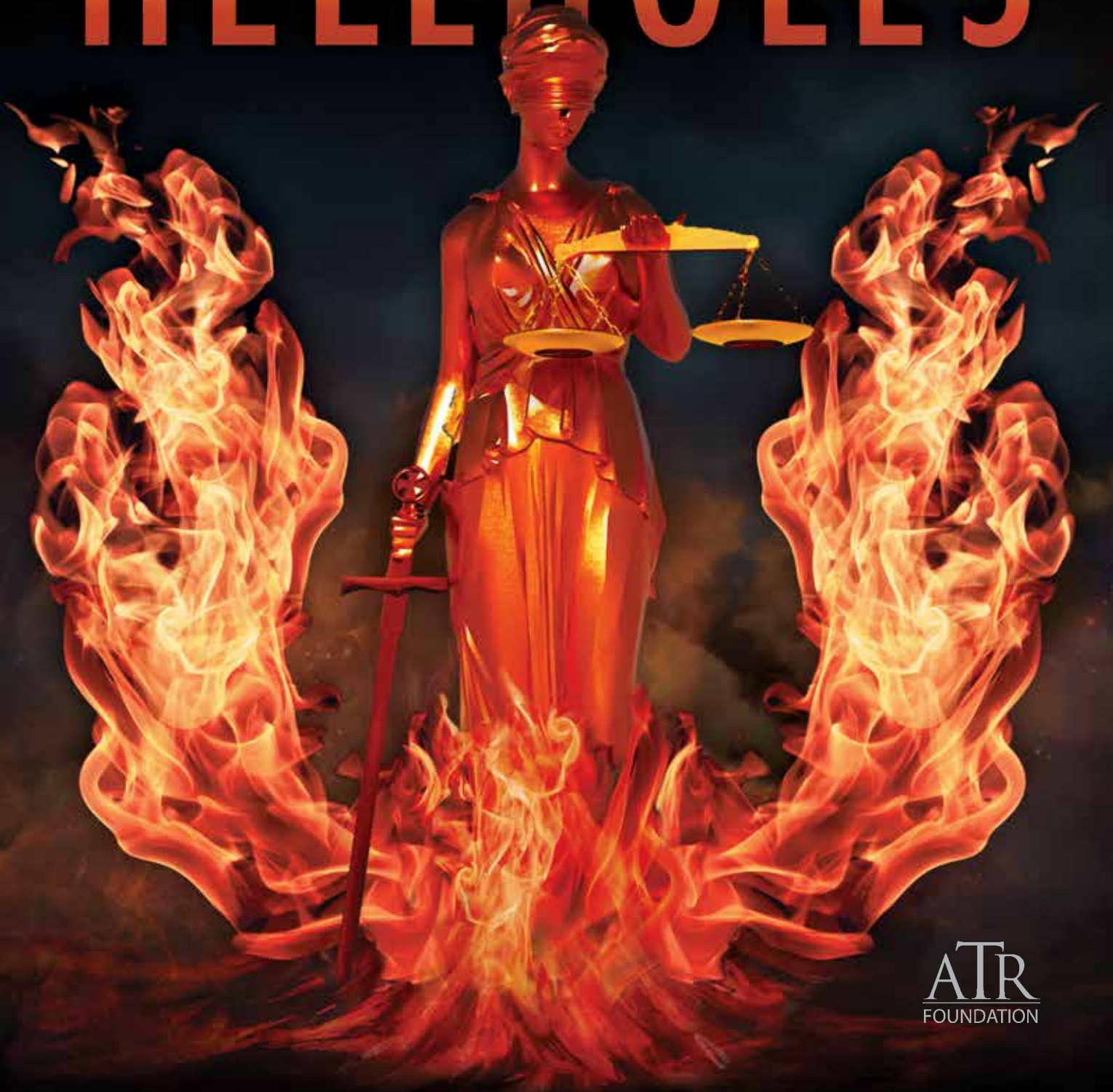


2015-2016

# JUDICIAL HELLHOLES



ATR  
FOUNDATION

***“The trial lawyers are the single most powerful political force in Albany. That’s the short answer. It’s also the long answer.”***

—New York Governor Andrew Cuomo, [explaining](#) prior to the indictment and conviction of long-time Assembly Speaker Sheldon Silver why efforts to reform the state’s antiquated, growth hindering “scaffold law” have been thwarted (Apr. 23, 2014).

***“In reviewing the attorney-fee award, it is important to understand what this case is about and what it is not about. . . . It is not about attorneys acting as private attorneys general protecting the social good; it is about attorneys acting with a business plan. It is not about righting a constitutional wrong, it is not about protecting Jetta owners from bodily injury or death, and it is not about protecting the public policy of this state. It is about 310 pieces of decorative plastic.”***

—Oklahoma Justice Steven W. Taylor, concurring in *Hess v. Volkswagen of Am., Inc.* (Okla. Dec. 16, 2014), which [threw out](#) a Pottawatomie County trial court’s award of \$7.2 million in fees to lawyers who recovered less than \$50,000 through a nationwide class action settlement involving Jetta spoilers.

***“It is one thing to stand alone in the world of science, advancing a hypothesis that others do not accept. It is quite another thing to advance a hypothesis that can only be supported by disregarding valid scientific research.”***

—Judge Nelson C. Johnson, [excluding](#) the slanted “conclusion-driven testimony” of expert witnesses who claimed Accutane causes inflammatory bowel disease because their theory disregarded sound scientific research in *In re Accutane Litig.* (N.J. Super. Ct., Law Div., Feb. 20, 2015), and showing the significant difference a judge can make in a former Judicial Hellhole.

***“[T]he court finds that the current state of [the New York City Asbestos Litigation (NYCAL)] is not so rampantly unfair as to warrant suspending the trials, or preparation for trials, of hundreds of cases where the plaintiffs have a mortal illness. However, the court agrees that the defendants have raised important issues that warrant a complete re-examination of the [Case Management Order].”***

—Judge Peter H. Moulton, who recently replaced a retiring judge with a reputation for favoring plaintiffs, [ruling](#) on a request to stay asbestos litigation for 60 days to allow for meaningful negotiations on a new order governing pre-trial proceedings replaces one that is “systemically unfair” to defendants in *In re New York City Asbestos Litig.* (Sup. Ct., N.Y. Co. Aug. 28, 2015)

***“The majority’s ruling permitting criminal plaintiffs to maintain these civil lawsuits ignores common sense and will encourage other criminals to file similar lawsuits in an attempt to profit from their criminal behavior.”***

—West Virginia Justice Menis Ketchum II, [dissenting](#) in *Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo County* (W. Va. 2015), which allowed people who criminally obtained, used, and sold prescription painkillers to sue pharmacies that filled some of their prescriptions.

# PREFACE

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Since 2002, the American Tort Reform Foundation's (ATRF) Judicial Hellholes® program has identified and documented problems in jurisdictions **where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner**, generally to the disadvantage of defendants. More recently, as the lawsuit industry began aggressively seeking expansions of civil liability not only from the judicial branch but from the legislative and executive (regulatory) branches of government, too, the Judicial Hellholes report has evolved to include such law- and rule-making activity, much of which can significantly affect the fairness of civil litigation.

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

Though entire states are occasionally cited as Hellholes, specific counties or courts in a given state more typically warrant such citations. Importantly, civil court jurisdictions singled out by Judicial Hellholes reporting are not the *only* unfair jurisdictions in the United States; they are simply among the *worst*. The goal of the program is to shine a light on imbalances in the courts and thereby encourage positive reforms by judges themselves and, when needed, through legislative action or the ballot box.

## ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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# EXECUTIVE SUMMARY

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The 2015-2016 **Judicial Hellholes** report shines its brightest spotlight on nine courts or jurisdictions that have developed reputations as Judicial Hellholes.

## JUDICIAL HELLHOLES

**#1 CALIFORNIA.** California is the epicenter for lawyers trolling to bring disability access lawsuits against small businesses and ridiculous class action lawsuits against food and beverage companies. Certain areas of the state are also a hotbed for asbestos litigation. Local district attorneys and government agencies have taken it upon themselves to partner with private contingency fee lawyers, leading them to bring novel claims against makers of paint and prescription drugs. One such case, which resulted in a \$1.15 billion judgment pinning responsibility for remediating lead paint across the state on three companies, remains on appeal. Another case, seeking to blame drug makers for painkiller abuse, was recently dismissed by an Orange County trial judge who recognized that addressing such problems should fall to experts and policymakers at the FDA, not local courts.

**#2 NEW YORK CITY ASBESTOS LITIGATION.** For years this report had raised concerns about recently convicted former New York State Assembly Speaker Sheldon Silver's moonlighting at a plaintiffs' asbestos law firm. Now, with Silver perhaps headed to prison and the pro-plaintiff judge who headed New York City's asbestos court replaced, the Big Apple may begin to bob up from the bottom of the barrel. The new judge recently declined to put the city's asbestos litigation on hold while the parties develop a more balanced process for handling the lawsuits, calling the system "not so rampantly unfair." Just mostly unfair — given consolidation of trials, reintroduction of punitive damages, imposition of liability on one product manufacturer for the asbestos-containing parts attached by another, application of unwarranted joint liability, and the flipping of the burden of proof onto defendants.

**#3 FLORIDA.** Those who do business, practice medicine or are otherwise unfortunate enough to be hit with a lawsuit in Florida are, by now, sadly familiar with the cycle. The Florida Supreme Court issues a liability-expanding ruling that is out of sync with courts in the rest of the country. Even when the state legislature, which is heavily influenced by trial lawyers, manages to enact reforms, the state's high court nullifies them in favor of boundless liability in the Sunshine State. In 2015 the court kept a vague, plaintiff-friendly standard for assessing whether a



product is defective, permitted inflated awards for future medical expenses, and placed liability on landlords for the acts of criminals. The Florida Bar's recent vote to recommend that the high court reject the legislature's adoption of federal and most state courts' higher standard for evaluating the reliability of expert testimony shows to what discouraging extent plaintiffs' lawyers dominate bar proceedings.

**#4 MISSOURI.** The "Show Me Your Lawsuits State" has a reputation for a judicial nominating process hijacked by the plaintiffs' bar, a state high court that issues outlier decisions and strikes down civil justice reforms, and a lax standard for admission of expert testimony that allows "junk science" into courts. The City of St. Louis is an area of particular concern. It is viewed by plaintiffs' lawyers as a favorable venue for asbestos litigation with the potential for excessive damage awards.

**#5 MADISON COUNTY, ILLINOIS.** Asbestos litigation is an industry in Madison County, which handles about a third of all such lawsuits in the nation. Most of these cases have no connection to Illinois, much less Madison County. Hundreds of cases are set for trial in a single day, a tactic used to pressure defendants into settlements. Local plaintiffs' law firms have significant sway with the county's judiciary, getting their colleagues appointed to the bench. And the county's past as a perennial Judicial Hellhole is the present and future as plaintiffs' lawyers continue their attempt to resurrect a \$10.1 billion judgment stemming from a class action against the tobacco industry that the state's high court threw out a decade ago.

**#6 LOUISIANA.** Louisiana has long been known for its colorful plaintiffs' lawyers. Come January 2016, it will be led by one. The election of John Bel Edwards – a trial lawyer who as a state lawmaker for eight years consistently opposed every civil justice reform proposal and whose campaign was funded by the plaintiffs' bar – poses significant challenges to future fairness in state courts. As is, Louisiana's high threshold for obtaining a trial by jury makes its locally elected judges very powerful, and the state's lax venue law lets plaintiffs' lawyers choose their favorite courts and judges. Furthermore, plaintiffs lawyers, sometimes working with local governments, have a history of attempting to siphon money from the state's major employer, the oil and gas industry. The good news is that voters sent incumbent Attorney General James "Buddy" Caldwell packing after hearing too often of his too cozy relationships with trial lawyers.

**#7 HIDALGO COUNTY, TEXAS.** Seeking to profit from historic hail storms that caused millions of dollars in damage in 2012 and 2013, plaintiffs' lawyers have filed more than 10,000 lawsuits targeting insurers in this rural Texas county. Local judges are known for handling cases in a manner that puts defendants at a disadvantage. Plaintiffs' lawyers have made hundreds of millions of dollars in fees from property damage lawsuits in recent years while policyholders have struggled with the resulting doubling of insurance premiums.

**#8 NEWPORT NEWS, VIRGINIA.** Plaintiffs' lawyers bringing asbestos claims in the Circuit Court for the City of Newport News have the highest win rate in the country. They are aided by a uniquely low causation standard. Juries are instructed to impose liability as long as the resulting exposure to a defendant's product was not "imaginary." Plaintiffs' lawyers manipulate the system by waiting to get a court judgment against a solvent defendant before making administrative claims against trust funds established by bankrupt companies, a practice known as double-dipping. It's no wonder that Newport News has become a magnet for asbestos litigation, hosting 7 of every 10 cases filed in Virginia.

**#9 U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.** This jurisdiction, the only federal court included in the Judicial Hellholes report, is the nation's leading forum for patent litigation. Most of the lawsuits are filed by patent trolls – entities that do not innovate, but exist only to sue. This year concerns expanded beyond patent cases when the court imposed a record \$663 million judgment against a maker of highway guardrails. A judge imposed triple damages, additional civil fines, and attorneys' fees against the company that stood accused of nominally modifying the design of the rails purchased by the government, even as a federal agency's repeated testing finds the product compliant with safety standards.

## WATCH LIST

Beyond the Judicial Hellholes, this report calls attention to four additional jurisdictions that bear watching due to their histories of abusive litigation or troubling developments. **Watch List** jurisdictions fall on the cusp – they may drop into the Hellholes abyss or rise to the promise of Equal Justice Under Law.

**WEST VIRGINIA.** In an encouraging move that may yet stall, perennial Judicial Hellhole West Virginia has dramatically managed to drop to the Watch List. The change results from the legislature’s enactment of several significant civil justice reforms in 2015, following the voters’ Election Day 2014 choice to demote the legislature’s trial lawyer-led majority to the minority. Voters’ earlier choice to replace former Attorney General Darrell McGraw, Jr. with reform-minded

Patrick Morrissey also helped move the dial. But the West Virginia Supreme Court of Appeals, the state’s sole appellate court, continues to issue liability-expanding rulings, some of which the legislature laudably overturned this year. The high court’s latest travesty allows individuals who illegally obtain, use and sell painkillers to sue doctors and pharmacies that allegedly filled their prescriptions.

**PHILADELPHIA, PENNSYLVANIA.** The Philadelphia Court of Common Pleas hosts one of the largest mass tort dockets in the nation. The court effectively withdrew its invitation to lawsuits from around the country with the adoption of procedural reforms in 2012, but the jurisdiction is again experiencing a rise in out-of-state pharmaceutical claims. Changes on the high court that could favor plaintiffs, the state’s embattled activist attorney general’s alliance with private plaintiffs’ lawyers, and a doubling of disability access lawsuits are additional reasons for concern in the Keystone State.

**NEW JERSEY.** New Jersey’s substantial mass tort docket, primarily targeting the state’s pharmaceutical industry, changed in 2014 when a judge known for favoring plaintiffs was promoted to the appellate division. Atlantic County’s new judge has shown signs of fairness. Concern remains, however, given the state high court’s disfavoring of arbitration, a plaintiff-friendly consumer protection law, and the excessive liability faced by doctors and healthcare providers. Observers are closely watching how appellate courts rule on a case that could unfairly require defendants who choose to go to trial to pay an entire damages award – even the portion of settling parties.

**POTTAWATOMIE COUNTY, OKLAHOMA.** A newcomer to the Judicial Hellholes report, this small county has developed an outsized reputation for plaintiff-friendly rulings. Plaintiffs’ lawyers have chosen this county as a place to file mass tort claims against medical device makers. And a local judge rewarded plaintiffs’ attorneys with \$7.2 million in fees for bringing a class action that recovered less than \$50,000 for drivers whose decorative front-end spoilers were easily damaged by curbs. The Oklahoma Supreme Court wisely threw out that fee award this year with a concurring justice observing that the lawsuit was never about protecting consumers and all about “attorneys acting with a business plan.” But a local judge this year gutted the workers’ compensation system by recognizing an exception so broad that it will allow many lawsuits against employers outside the no-fault program.

**WEST VIRGINIA**

**PHILADELPHIA, PENNSYLVANIA**

**NEW JERSEY**

**POTTAWATOMIE COUNTY, OKLAHOMA**

## DISHONORABLE MENTIONS

Dishonorable Mentions, which annually highlight singularly unsound court decisions, go this year to the Supreme Courts of Colorado, Indiana, Nevada, New Hampshire and South Carolina; an appellate court in Maryland, and a trial court in Tennessee.

## POINTS OF LIGHT

This report also enthusiastically emphasizes *good* news from some of the Judicial Hellholes and other jurisdictions across the country. **Points of Light** are examples of, among other things, fair and balanced judicial decisions that adhere to the rule of law and respect the policy-making authority of the legislative and executive branches.

This year's highlights include helpful media investigations in Louisiana; positive court decisions in Delaware, Nevada, Ohio, Texas, Kentucky, Florida and Texas; and positive civil justice reform enactments in 15 states.

West Virginia undertook the most significant statutory reform in 2015, facilitating its drop from this report's ranking of Judicial Hellholes to the less onerous Watch List. Other notable reforms include greater transparency between the tort and trust fund systems for asbestos claims in Arizona, Texas and the aforementioned West Virginia; good-government safeguards when the state hires outside lawyers in Arkansas, Nevada, Ohio and Utah; and protections against expansions of property owner liability to trespassers in Nevada, South Carolina and Wyoming.

## CLOSER LOOKS

Two special sections of the report examine **federal multidistrict litigation** (MDL) and the influence of the **American Law Institute** (ALI). MDLs can be an efficient mechanism for managing mass torts, but critics say plaintiffs' lawyers' misleading advertising has inflated dockets and increased pressure on judges to push settlements, even in meritless cases. Observers are closely watching the ALI, too, with its ongoing projects addressing consumer contracts, data privacy, and liability insurance, all of which have the potential to alter the direction of state law, for better or worse.



# JUDICIAL HELLHOLES

## #1 CALIFORNIA

Specific California cities and counties have regularly been cited for their civil justice system imbalances by the Judicial Hellholes report since its inaugural edition in [2002](#). But rather than use that constructive criticism as intended and undertake reforms, things have only tended to get worse throughout much of the state. So much so that all of California was ranked #1 among the nation's Judicial Hellholes in both [2012](#) and [2013](#). And some believed that the costly, never-ending madness in its clogged civil courts had earned a third straight #1 ranking in 2014. But monumentally egregious corruption in [New York City's asbestos court](#), which has since led to the related [arrest](#) and [conviction](#) of the Empire State's once most powerful legislator demanded that California be relegated to #2 last year.

Since then the Big Apple has a new top asbestos judge and he has signaled a new opening for fairness there. So California is back on top as #1 – the worst of the worst – in 2015. And though a lengthy book could be written each year about the state's irrepressibly plaintiff-friendly lawmakers and judges, and its often preposterous lawsuits and sometimes incredible court decisions that only encourage still more litigation, readers are asked to understand that space limitations afford only a relatively brief discussion of particularly troubling issues.



## TOO MANY LAWS

Just after the California State Legislature's regular session mercifully came to a close in 2015, a [Sacramento Business Journal](#) recap of the action rendered these figures: 2,300 bills had been proposed, 941 made it to the governor's desk, and 808 were actually signed into law. That isn't a misprint. A legislature hugely influenced by plaintiffs' lawyers and checked only by an occasionally practical governor saw fit to create 808 new laws, many of which, by design, will lead to still more litigation and related costs that for many years have helped [drive businesses](#), along with their jobs and tax revenues, out of the once Golden State and into the arms of less litigious jurisdictions around the country and across the globe.

## NEW LAWS SINCE 2010

Year	#of New Laws
2010:	733
2011:	745
2012:	876
2013:	800
2014:	931
2015:	808
Total	4,893
Annual Average	816

Lest readers of this report mistakenly conclude that 808 new laws in one year is a cherry picked anomaly used for ideological ax-grinding, all are invited to view annual new-law tallies since 2010 on the state legislature's [official website](#).

So, in a state where citizens and businesses can't possibly be expected to stay abreast of the many hundreds of new statutes and attendant rules churned out by hyperactive lawmakers and regulators each year, it's no wonder that the latest data available from the [Court Statistics Project](#) of the [National Center for State Courts](#) show that more than a million new lawsuits are being filed annually in California's state courts alone. [Tens of thousands more](#) are filed in federal courts there.



## IT ALL STARTS AT THE TOP

As suggested above, there are times when **Governor Jerry Brown** seems to understand that, in order for California to someday make good on the obligations of its [unfunded trillion-dollar](#) government pension system and [hundreds of billions](#) in additional debt, his state has to grow its tax base by becoming less [hostile to business](#) and more skeptical of a politically powerful lawsuit industry that parasitically works to erode that base.

The governor won [kudos](#) from the business community in 2015 when he vetoed a bill that, contrary to nearly 90-year old [federal law](#), would have [banned mandatory employee arbitration agreements](#) and [another](#) that would have expanded employee eligibility for unpaid time off of up to 12 weeks.

But Brown also was cheered by trial lawyers and organized labor for signing into law measures that, among other things, guarantee grocery workers [90 days of job protection](#) after an ownership change and [remove the right of corporate chains to fire franchisees](#) unless franchisees substantially breach their contract.

Meanwhile, California **Attorney General Kamala Harris**, from whom the state's armies of public and private sector attorneys take many cues, was ranked in 2015 as the nation's [fourth worst](#) attorney general in a periodic report by the free-market oriented Competitive Enterprise Institute, a Washington-based think tank. The report said she has disregarded repeated court warnings of [prosecutorial misconduct](#), misleadingly rewritten the wording of ballot measures in order to sway voting outcomes, and thwarted mergers that would have saved struggling hospitals as a political favor to unions.

The same federal judge who in [open court reamed](#) Harris's office for prosecutorial misconduct (in a criminal case) also implicitly criticized state judges when he said, "It's a little disconcerting when the state puts on evidence, the evidence turns out to be fabricated, [and yet] nothing happens to the lawyer and nothing happens to the witness." The same criticism could be leveled at California judges presiding over civil matters insofar as they rarely if ever sanction plaintiffs' lawyers for comparable misconduct. And that phenomenon really sets the table for so many of the imbalances plaguing California's civil justice system.



## DISABILITY ACCESS LAWSUITS KEEP ON ROLLIN'

As this report has chronicled for many years, California is to disability access litigation what Madison County, Illinois, is to asbestos litigation: the [nation's epicenter](#). [NPR reported last year](#) that more than 40% of the nation's disability access lawsuits are brought in California. And though lawmakers in Sacramento have made a few wan reform efforts during the past several years, such lawsuits continue to surge.

The principal reason the claims are so prevalent in California is that they can be brought by plaintiffs with various alleged disabilities under a combination of both the federal Americans with Disabilities Act (ADA) and state civil rights law, which allows for damages and attorney's fees. Because these claims can make real money for a certain class of plaintiffs' attorneys with lots of time, limited integrity and a specialized willingness to browbeat [small business owners](#) – particularly [minorities and recent immigrants](#) who are unable or unwilling to fight back – this malevolent practice has boomed as a cottage industry.

To be clear, plaintiffs rarely seek renovations and actual access to an allegedly ADA-noncompliant restaurant, convenience store, nail salon or auto garage. They just want to get paid and are happy to settle out of court, whether or not the ramp's angle is adjusted by a few degrees or the men's room sink is ever [lowered](#) by an inch-and-a-half. It's simply off to the next small business target for another drive-by fleecing. An NBC Bay Area television investigation revealed that just [31 serial plaintiffs account for roughly 56%](#) of the more than 7,000 ADA claims filed in the state since 2005.

This largely wheelchair-centric racket has united California's small business community in demanding reform. So when Governor Brown this year vetoed [Senate Bill 251](#), saying in a [veto message](#) that it contained a modest tax credit for premises renovations that would "make balancing the state's budget even more difficult," business leaders were

stunned.

Knowing that balancing the state's budget will be even more difficult if small businesses are hounded out of operation by bogus lawsuits, the NFIB's executive director in California, Tom Scott, said dryly, "If [the governor] had a problem with the tax credit, I wish someone would have said something months ago" when lawmakers could have "just taken it out."

But lawmakers are part of the problem, too. So small business owners and others have now decided to take matters into their own hands. An [effort led by a San Diego area lawyer](#) is underway to place on the November 2016 ballot an initiative that would require would-be ADA plaintiffs to provide prospective defendants with notice of their intent to sue and 120 days to fix the premises' problem(s) beforehand. Of course, before Californians get to vote on a ballot initiative it has to go through the attorney general's office. And as noted above, Kamala Harris, a true political ally of the plaintiffs' bar, is known for altering the wording of such initiatives to influence outcomes per her partisan preference.

Nonetheless, there's hope that enough signatures can be gathered to place the measure before voters and that AG Harris will choose not to cravenly alter its originally [proposed language](#).

## FOOD & BEVERAGE SUITS

Both state and federal judges in California in recent years have been fairly evenhanded in dealing with the hundreds of consumer class actions filed there, alleging that labels on a multitude of food and beverage products are misleading or deceptive. Some judges have even sharply rebuked the often preposterous allegations of deception, such as "my clients were led to believe almond milk was a real dairy product."

But with easily exploited state consumer protection law as their bases, the food advertising and labeling suits just keep on coming. "There's been a large rise in these cases about food and food labels ... cases about tea, cereal, snack foods and other packaged, processed foods and whether their labels are telling the whole story," Indiana University law professor and food researcher Diana Winters told the [Sacramento Bee](#) in August 2015. And as Fresno County farmer Paul Betancourt observed in an [op-ed in the Fresno Bee](#) the following month, "consumers – who are purportedly the 'victims' in these cases – receive coupons or mere pennies while lawyers walk away with millions of dollars."

Despite a 2013 [dismissal](#) of a proposed class-action lawsuit against a maker of almond milk, wherein **U.S. District Judge Samuel Conti** said, "It is simply implausible that a reasonable consumer would mistake a product like soy milk or almond milk with dairy milk from a cow," lawyers have merely tweaked their allegations and shamelessly continue this line of litigation. And with the insidious rise of pretentious hipsters have come corresponding rises in both "artisanal" product lines the hipsters favor and new class actions alleging that label references to "handmade" or "craft" products are deceptive and thus worth millions to the crafty lawyers driving them.



Recent examples of this evolving line of food labeling litigation include [Parent v. MillerCoors LLC](#) filed in San Diego County Superior Court in April 2015, alleging that labeling on Blue Moon beer tricks consumers into believing it is a craft beer, even though [the only](#) reference on any of its many regulator-approved labels in the [past 20 years](#) that even comes close asserts in microscopic print that a particular Belgian-style ale is "artfully crafted." Two [federal lawsuits](#) also filed in San Diego in November claim that Tito's Vodka labeling uses the word "handmade" to deceive consumers.

And with its early December 2015 ruling in [Quesada v. Herb Thyme Farms Inc.](#), California's Supreme Court blessed yet another line of comparable litigation over labels' use of the word "organic." Lower courts had dismissed the claim, saying it was [preempted by federal law](#) that establishes standards for and regulates the marketing of organic products.



## PUBLIC NUISANCE NONSENSE



**Lead Paint.** This report has consistently kept an eye on state attorneys general and, more recently, county and city prosecutors who, often with help from private-sector plaintiffs' lawyers, pursue deep-pocket corporate defendants with lawsuits that seek to substitute public nuisance law, with its lower standard of proof, for products liability law and its more exacting standard.

Though public nuisance lawsuits against companies that stopped making lead paint decades ago had failed in seven other jurisdictions, the scheme to force those defendants to pay for the abatement of peeling and chipping paint won a key [2013 victory](#) with help from **Santa Clara Superior Court Judge James Kleinberg.**

During the bench trial, defense counsel adduced [plenty of evidence](#) that showed the paint companies had stopped selling lead paint once science demonstrated its threats to health and child development, and before the federal government ordered a halt to such sales in 1978. They also showed that California suffers [no appreciable lead exposure problems](#), at least not relative to the national average. But that made no difference to the intransigent Judge Kleinberg, and in January 2014, after entertaining post-verdict motions, he ordered three defendant companies to pay [\\$1.15 billion](#), to be shared among Alameda, Los Angeles, Monterey, San Mateo, Santa Clara, Solano and Ventura counties, and the cities of Oakland, San Diego and San Francisco.

The defendants have [appealed](#) and now await scheduling of oral arguments. Meanwhile, in a November 2015 *Daily News* op-ed, "[Why Lead Paint Lawsuits Are a Dud for California Cities, Counties](#)," former Los Angeles City Attorney Carmen Trutanich warned that the verdict, if upheld, "labels 'every' painted residential building, constructed prior to 1981, as a 'public nuisance.'"

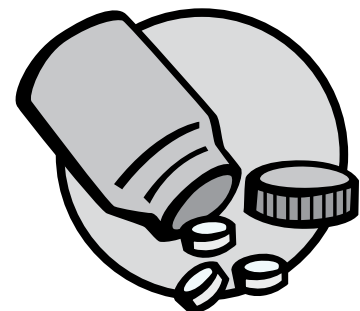
This label will remain with the structure, Trutanich instructs, until it is inspected, lead paint is removed or abated as necessary, and the structure passes a re-inspection. "In essence, the findings transfer the stigma of lead paint to every single private property owner," whether their paint is in disrepair and poses a hazard or not, "in exchange for money to the cities, counties, and of course, the lawyers."

Trutanich asks: Who will actually end up paying for all these inspections, abatements and re-inspections? How will owners of structures labeled a "public nuisance" react to "drastic declines" in their property values? And how will governments cope when corresponding property tax revenues fall off?

"Perhaps most importantly, a lawsuit like this can create a dangerous negative precedent for our state" when it tries "to attract new manufacturers and other employers," and it can "create problems in retaining established businesses," Trutanich concluded.

**'Son of Lead Paint' or the 'Attack of the Nuisance Opioids.'** The seeming success of the lead-paint-as-public-nuisance case before Judge Kleinberg inspired comparable litigation in which prosecutors from Santa Clara and Orange counties teamed up with a [host](#) of private-sector contingency-fee lawyers in May 2014 to [sue five drug makers](#), alleging they have caused a deadly epidemic of addiction to potent painkillers with a "campaign of deception" designed to promote sales and boost profits. And again, rather than pursue the litigation under products liability law, county prosecutors and their hired guns relied on California's sprawling and always easily exploited false advertising and unfair competition law, as well as the more adaptable law of public nuisance.

Leaving aside the pesky facts that the painkillers in question have been approved by the Food and Drug Administration and require a prescription from a licensed and not readily deceived physician to obtain them, plaintiffs [explained](#) that making sure people understand the risks and benefits of drugs like OxyContin and Percocet before taking them is the lawsuit's "primary goal." That must mean that extracting hundreds of millions of dollars from drug makers to be poured into county coffers and the personal bank accounts of multimillionaire personal injury lawyers who'll likely support the prosecutors' future political campaigns is only a secondary goal.



In any case, in late August 2015 **Orange County Superior Court Judge Robert J. Moss** struck a rare blow for common sense in California civil courts when he [dismissed the counties' case](#). According to the *Los Angeles Times*, the judge was clearly swayed by a defense attorney's argument "that having a single point of oversight served the public interest because it was efficient, relied upon regulators' specialized expertise and avoided confusion."

In announcing his decision to dismiss, Judge Moss said he would put the case on hold indefinitely to allow the FDA to complete a pending inquiry into the safety and efficacy of painkillers. But he also firmly rebuked prosecutors, saying:

*Not one case cited by plaintiff involved, and indicated the propriety of, a court immersing itself in the convoluted, exacting, expertise-driven, issue-expanded, nuanced action which is involved here. The patients, potential patients, and the medical community deserve more. This action could lead to inconsistencies with the FDA's findings, inconsistencies among the States, a lack of uniformity, and a potential chilling effect on the prescription of these drugs for those who need them most. The proposed ongoing role of the court in this litigation, and in the monitoring of any decision it makes, is a monumental endeavor. The court does not shrink from its responsibilities to handle complex, convoluted litigation; it handles such matters every day of the week. It does, however, take pause at involving itself in an area which is best left to agencies such as the FDA who are designed to address such issues.*

This case, and its dismissal, show why local governments should be loath to get wrapped up with private-sector plaintiffs' lawyers seeking to maximize their profits instead of justice in the public interest.

#### **EVERYBODY WANTS TO GET INTO THE ACT**



More evidence that the late, great entertainer Jimmy Durante was right [when he said](#), "Everybody wants ta get into the act" comes with yet another government body in California – the Orange County Water District (OCWD) – jumping into bed with profit-, not justice-seeking plaintiffs' lawyers and having little to show for it.

[Granted hefty powers](#) to pursue litigation against those it accuses of polluting water in the area, the OCWD has the authority to recover pollution remediation costs along with all courts costs and attorney's fees. And while a secretive contingency-fee arrangement with outside law firm Miller, Axline & Sawyer seems to be benefitting the firm, observers say the OCWD in recent years has produced very limited benefits by way of actual remediation.

Critics of the litigious OCWD have called its trial lawyer-driven lawsuits [shakedowns](#), according to ongoing coverage by the *Orange County Register*. Based on an "informal accounting by the water district" two years ago, the Register reports, \$22.4 million of the \$30 million in settlement money then collected by the OCWD went to pay legal costs and attorneys' fees. "Toss in the water district's costs for investigation, designing remedies, hiring an outside lawyer to oversee the contingency lawyers, and, well . . . '[w]e're probably close to breaking even' on litigation expenses, said **Roy Herndon**, OCWD's chief hydrogeologist."

Squeezing settlement money out of those defendants who can afford it and just want to move on is one thing. But the OCWD has had a tougher time proving in court that a threat to drinking water actually exists or that a particular defendant had anything to do with specific allegations of pollution. The lawsuits persist nonetheless, adding to the state's dispiriting litigation climate and surely helping to convince some defendant companies to consider relocating their operations, jobs and tax revenues to other states.

Meanwhile, the OCWD's track record for remediation of groundwater contamination has been so spotty that the U.S. Environmental Protection Agency [announced](#) in September 2015 that it is stepping in to take the lead in clean-up with "assistance" from the OCWD "as needed." So it's fair for Orange County taxpayers and voters to ask why local water authorities have gone to such great lengths to increase private-sector lawyers' wealth while doing so little to increase water quality.

## ASBESTOS

A perennial issue in several California jurisdictions for many years now has been the steady flow of asbestos lawsuits, often filed by out-of-state plaintiffs. Although preliminary data on new-case filings from the state's major asbestos courts (63 in Alameda and 85 in San Francisco through November, and 121 in Los Angeles through August) suggest 2015's year-end totals may come in slightly lower than 2014's, large asbestos verdicts have not abated.

A Los Angeles County verdict in April 2015 awarded \$13 million, including \$12.5 million for noneconomic damages, to be paid by defendant Colgate-Palmolive. After a two week trial before **Judge Randy Rhodes**, the jury found the defendant 95% liable for the plaintiff's mesothelioma which was allegedly caused by her use of talcum powder. The parties [settled the case](#) before the punitive damages phase of the trial.

Another [multimillion-dollar verdict](#) was reached in November 2015 against a non-traditional defendant, Union Pacific Railroad Co., this time in Alameda County. Following a five week trial presided over by **Judge Brad Seligman**, the plaintiff was awarded \$7 million, \$6.5 million of which were for noneconomic damages. As the claims were against a railroad company, they were governed by the Federal Employers Liability Act, which prompts application of a causation standard different and less readily challenged than one used in most asbestos cases.

But sunny California's continually dreary cloud of asbestos litigation did offer a silver lining in 2015. In a breakthrough [bankruptcy trust order](#) in May, **Judge Emilie Elias** entered a Case Management Order in Los Angeles County to be applied in all asbestos cases, requiring the disclosure of bankruptcy trust claims. Among other things, the order requires plaintiffs to disclose "all facts relating to all of their alleged exposures to asbestos ... regardless of whether those facts have been, or ever will be, included in a claim to a third party for the purpose of obtaining compensation for an asbestos-related injury." It remains to be seen whether other counties will follow this important lead.

Importantly, the California Supreme Court is poised to hear [Kesner v. Superior Court \(Pneumo Abex\)](#) and [Haver v. BNSF Railway](#), which came to different conclusions about whether an asbestos manufacturer owes a duty of care to members of an employee's household allegedly exposed to asbestos brought home on the employee's clothing. Other appellate developments worth watching are [Melendrez v. Ameron International](#), a case revolving around workers' compensation exclusivity, and [Greenberg](#) and [Sherman v. Hennessy Industries](#) which allege strict liability for harm caused by another manufacturer's product.



Judge Elias

## THE NEVER ENDING JCCP

Modeled after federal courts' multidistrict litigation that coordinates and manages mass torts before a single judge (take a Closer Look at MDLs on p. 52), California has established a Judicial Council Coordinated Proceedings (JCCP) to manage thousands of products liability and personal injury claims against the makers of Type 2 diabetes drug Avandia. Lawsuits initially filed in San Francisco in 2007 were later moved to the JCCP in already [overburdened](#) Los Angeles Superior Court and are now overseen there by **Judge Elihu Berle**.

The overwhelming majority of these cases have little or no connection to California. Few of the plaintiffs reside in the state or allege their injuries occurred there. The primary defendant, GlaxoSmithKline (GSK), is a Delaware corporation and maintains its principal place of business there. Furthermore, GSK never designed, manufactured or worked on Avandia safety labeling within the state of California.

But to sidestep the pesky fact that few of these cases belong in California, the lawsuits have tended to include as an afterthought another defendant, the San Francisco-based McKesson Corporation, a drug distributor. Other [Avandia lawsuits](#) filed elsewhere around the country, both in [state](#) and [federal](#) courts, do not name McKesson as a defendant or even mention the distributor in pleadings. So this secondary defendant's inclusion in the JCCP is plainly a means by which to keep GSK trapped in California's plaintiff-friendly courts. Plaintiffs' lawyers know that naming a local business as a defendant typically precludes federal courts from hearing the case.

GSK has filed numerous petitions to remove cases to more appropriate jurisdictions, all of which have been denied. And its petitions seeking review by the Court of Appeal and the California Supreme Court were both denied without guidance.

Meanwhile the JCCP has been stuck in a never ending pattern. Individual plaintiffs have withdrawn, settled or won judgments in their various cases. But whenever the whole thing appears to be winding down, a new flock of migrating plaintiffs swoops in. From a peak of 4,400 plaintiffs in 2010, remaining cases had dwindled to 120 by 2012. But then an additional 673 plaintiffs, [94% of whom are not Californians](#), filed to attach themselves to the JCCP. So with cases now scheduled for trial dates well into 2016 and no telling whether more plaintiffs may look to get in on the action, the JCCP seems poised to continue benefitting out-of-state plaintiffs and their lawyers at the expense of California taxpayers, who provide finite court resources, and many in-state litigants, whose days in court are invariably being delayed.

## SAVING THE GOOD NEWS FOR LAST

Good news from California's civil justice system isn't always easy to find but, to be fair, this report tries mightily each year to close with a few encouraging notes:

- *Sacramento Bee* editorial writers in August 2015 [reacted to an audit](#) that found the State Bar of California had, in order to reduce its backlog of thousands of disciplinary cases, “allowed some attorneys whom it otherwise might have disciplined more severely – or even disbarred – to continue practicing law, placing the public at risk.” The audit also found that the bar, which relies on state lawmakers for annual authorization to collect dues from its members, had bought and renovated a downtown Los Angeles office building at a cost of \$76.6 million – \$50 million *more* than what it told lawmakers the building would cost. The *Bee* supported [reform legislation](#) seeking to bring more transparency to bar operations, and Governor Brown signed it into law in October.
- The *San Francisco Chronicle* reported in October 2015 that, after a flurry of opportunistically technical lawsuits began [targeting public schools](#) and taxpayers in San Francisco, Oakland, Los Angeles and scores of other school districts last year, alleging that students were not getting the lawful minimum requirement of physical education, state lawmakers unanimously passed urgent legislation also signed by Governor Brown in October. The new law creates an administrative complaint process for those wishing to challenge a district's adherence to the law regarding physical education, deferring or eliminating costly lawsuits.
- And finally, the *Wall Street Journal* reported in November 2015 on a case now before the California Supreme Court that “[could fundamentally change the way class-action attorneys are paid](#).” A heroic attorney from Berkeley has waged a decades-long crusade to eliminate contingency fees of, on average, 25% of awards for damages and replace them with by-the-hour fees, arguing that contingency fees can reward attorneys too generously at the expense of their clients. California's high court is not known for a healthy skepticism when it comes to class-action lawyers, but maybe the justices are finally ready to begin discouraging some of the speculative, no-injury class-action filings that help clog California courts.

## #2 NYCAL

Just five weeks after last year's Judicial Hellholes report was released and ranked the [New York City Asbestos Litigation](#) court (NYCAL) as the least fair civil court jurisdiction in the nation; and several year's since ATRA had begun to raise questions about troubling ties between then-New York Assembly Speaker **Sheldon Silver** and the plaintiffs' law firm for which he moonlighted, Silver was [arrested](#) and arraigned on several federal corruption charges, stemming in part from taxpayer-funded research grants Silver directed to a physician who in turn referred patients with asbestos-related illnesses to Silver's firm. On December 1, 2015, a federal jury in Manhattan found Silver [guilty on all counts](#).





For those lucrative referrals to the asbestos litigation specialists at **Weitz & Luxenberg**, prosecutors demonstrated that Silver had been paid millions. Of course, [other critics](#) of Silver's relationship with the law firm that has for years dominated proceedings at NYCAL are certain he had also been rewarded for dependably thwarting any and every bipartisan tort reform bill reasonably aimed at limiting civil liability in the crumbling former Empire State.

But with Silver's conviction, continuing investigations of asbestos claims, and the appointment of a new top judge at NYCAL, there is reason to hope. Reflecting that hope, New York's infamous asbestos court slides to a #2 ranking this year.

**WILL NEW TOP JUDGE BRING GREATER FAIRNESS?**

Regular Judicial Hellholes readers will remember [past discussion](#) of former Speaker Silver's [influence](#) over a state panel for judicial appointments and of the longtime manager of the NYCAL docket, **Justice Sherry Klein Heitler**. Heitler, who was replaced in early 2015, had [reportedly](#) fast-tracked asbestos cases litigated by Silver's Weitz & Luxenberg firm and otherwise seemed deferential to plaintiffs' counsel. For example, it was Heitler in April 2014 who [ordered](#) the end to a nearly two-decade long deferral of punitive damages after the firm had sought their reinstatement as a means to more easily threaten and force asbestos defendants into settlements before trial.



Justice Heitler

A former manager of the NYCAL docket, **Justice Helen Freedman**, had deferred "all punitive damages indefinitely" in the Case Management Order (CMO) because it "seemed like the fair thing to do for a number of reasons."

*"First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate [future] injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong."*



Justice Moulton

In any case, Justice Heitler has now been replaced by **Justice Peter Moulton**, and he has shown thus far a willingness to deal more evenhandedly with the mounting concerns of NYCAL defendants, including punitive damages. He has begun a [process](#) to negotiate a new CMO after defense counsel [moved](#) at the end of March 2015 for an emergency 60-day stay of all asbestos cases. But Justice Moulton did not grant their motion, [finding in August](#) that current NYCAL procedures are "not so rampantly unfair as to warrant" such a stay.

Not "rampantly unfair," only mostly unfair. The justice sounded a bit like Billy Crystal's character "Miracle Max" in the 1987 hit film "[The Princess Bride](#)" (20<sup>th</sup> Century Fox) when he finds Cary Elwes's "Westley" to be "only mostly dead." Understandably then, NYCAL defense counsel are not yet convinced they'll get any help storming the castle. But they remain hopeful that as CMO negotiations take shape in early 2016, Justice Moulton will insist on both sides participating in good faith to resolve longstanding problems fairly.



**'PERVASIVELY PREJUDICIAL' CONSOLIDATIONS**

Among those longstanding problems facing NYCAL defendants has been the willingness of trial judges to consolidate often dissimilar cases. And a July 2014 [appellate court ruling](#) was deferential to judges' whims and thus arguably imposes no standard at all.



This now routine consolidation of NYCAL cases is [contrary to a clear nationwide trend](#) and makes it difficult for defendants to receive a fair trial, raising due process concerns. According to a [recently published empirical study](#), “NYCAL data suggest that consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts.”

The report found that “from 2010 through 2014, NYCAL jury awards in consolidated trials have totaled a staggering \$324.5 million across 14 plaintiffs for an average of more than \$23 million per case. These consolidated verdicts are 250% more per plaintiff than NYCAL awards in individual trial settings over that same span, and 315% more per plaintiff than the national average award.”

Furthermore, the jury bias caused by consolidation has increased the frequency of plaintiff verdicts at trial. “Since 2010, 88% of plaintiffs (14 of 16) in NYCAL consolidated verdicts received jury awards, as compared to 50% of plaintiffs (4 of 8) in NYCAL individual trials, and approximately 60% nationwide.”

Beyond this recent study, one knowledgeable observer [has noted](#) that small scale consolidations, such as those in NYCAL, “significantly improve outcomes for plaintiffs.” Another [says](#) that, “Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case.” A “[maelstrom of facts, figures and witnesses](#)” is created that juries cannot keep straight. “[T]here is a higher probability that at least one defendant will appear callous, and this benefits all plaintiffs.”

Rather than rationally accept the evidence that shows consolidations to be both unfair to defendants and even inefficient for courts in the long run as defendants seek reconsideration of lopsided verdicts, Weitz & Luxenberg has decided instead to [attack the messenger](#) by serving a subpoena in October 2015 on the economic consulting firm that authored the [empirical study](#) critical of NYCAL consolidation. Showing that it’s more interested in getting its way than negotiating a just and workable CMO, Weitz & Luxenberg says it will drop its efforts to depose the study’s authors with questions about who paid for their bullet-proof research if defense counsel will stop using the study’s data in CMO negotiations with Justice Moulton.

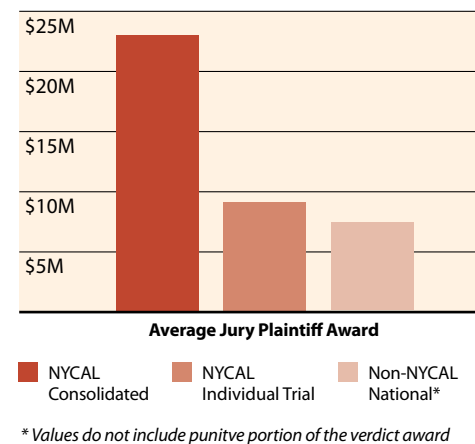
Of course consolidation is among the [key issues](#) in the negotiation, and it will be up to Justice Moulton to see to it that plaintiffs’ intimidation tactics are shut down. Meanwhile, the state’s highest court is poised to review in 2016 the 2014 appellate decision that has effectively allowed consolidation of just about any NYCAL cases based on the most general of similarities.

### THIRD-PARTY LIABILITY

The [clear majority rule](#) nationwide is that a manufacturer of a given product is not legally responsible for asbestos-containing materials made and sold by third-parties simply because it may have been foreseeable that such materials would be used near or in conjunction with the manufacturer’s product post-sale. For example, the California Supreme Court has [held](#) that “a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer’s product unless the defendant’s own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products.”

Federal courts have found that [New York law](#) is in harmony with this clear majority rule, and have refused to impose legal responsibility upon a manufacturer for an allegedly injurious product that the manufacturer did not make, sell or otherwise place in the stream or commerce. New York’s highest court has [ruled](#) in a non-asbestos case that, in a combined use scenario, a manufacturer can only be held liable for a harm caused by an injurious defective product made or sold by a third-party when the manufacturer: 1) controlled the production of the injury-producing product, 2) derived a benefit from the sale of the injury-producing product, or 3) placed the

### NYCAL MESOTHELIOMA JURY AWARDS (2010-2014)



injury-producing product in the [stream of commerce](#). And New York's Fourth Department appellate court has even [applied this rule](#) and followed the majority approach in an asbestos case.

Yet various New York state judges – primarily in NYCAL cases – rely on “a one-paragraph [memorandum] opinion with [no clear holding](#)” to provide a rule that an equipment manufacturer has a legal duty to warn for every asbestos-containing product that could have (in hindsight) had a foreseeable use in conjunction with that equipment, even though the opinion stands for no such proposition.

The New York Court of Appeals, the state's highest court, has an [opportunity](#) in two cases presently under review to confirm that New York law is in harmony with the clear majority rule nationwide. In both cases, plaintiffs received [significant awards](#) against a valve manufacturer even though it did not make, supply or place into the stream of commerce any of the asbestos-containing products to which exposure was alleged.

## TRUST CLAIM GAMES

[Recent data](#), including NYCAL data, highlight a case that gained nationwide attention early in 2014 and makes clear the need for transparent, comprehensive monitoring of asbestos claims both administered by asbestos bankruptcy trusts and adjudicated by the tort system. As discussed in last year's report, a North Carolina federal bankruptcy judge [found](#) that Garlock Sealing Technologies' settlements of mesothelioma claims in the tort system were “[infected by the manipulation](#) of exposure evidence by plaintiffs and their lawyers.” The judge explained:



*Beginning in early 2000s, the remaining large thermal insulation defendants filed bankruptcy cases and were no longer participants in the tort system. As the focus of plaintiffs' attention turned more to Garlock as a remaining solvent defendant, evidence of plaintiffs' exposure to other asbestos products often disappeared. Certain plaintiffs' law firms used this control over the evidence to drive up the settlements demanded of Garlock.*

The judge described a [NYCAL case](#) that Garlock had settled during trial for \$250,000. “The plaintiff had denied any exposure to insulation products,” according to the court. After the case settled, however, the plaintiff's lawyers filed 23 trust claims on the plaintiff's behalf, including 8 trust claims that were filed within 24 hours of completing the settlement with Garlock.

The NYCAL case management order has language that should address this problem. A 2003 amendment to the CMO, when the NYCAL docket was managed by Justice Freedman, [provides](#) that “[a]ny plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated [for trial], except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial.”

In 2012 Weitz & Luxenberg filed a motion to vacate the proof-of-claim element of the CMO. Justice Heitler appeared to reject the request, [explaining](#) that to strike “this particular clause . . . would diminish the effectiveness of the CMO as a whole.” But by adding, “The CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within certain time limitations, not claims they may not *anticipate* filing,” she knowingly or foolishly provided a loophole that NYCAL plaintiffs' lawyers contend allows them to delay the filing of bankruptcy trust claims and thus continue to withhold from juries critical exposure evidence that would weigh in defendants' favor.

## ‘DEEP POCKET’ LIABILITY

Another manner in which the law is applied unfairly in NYCAL cases involves joint and several liability. [New York law](#) generally provides for fair-share liability for noneconomic damages among defendants that are determined to be 50% or less at fault for the plaintiff's harm. This reform was enacted to eliminate the unfairness of holding a defendant liable for damages far out of proportion to its share of fault for an injury. An [exception](#) allows the imposition of full “deep pocket” liability on a minimally at-fault defendant that is found to have “acted with reckless disregard for the safety of others.”

This narrow statutory exception, applicable only to truly “reckless” defendants, has been exploited by NYCAL judges and effectively allowed to subvert the general rule of limited liability altogether. Plaintiffs’ lawyers now routinely seek – and NYCAL judges routinely provide – jury instructions to find recklessness in situations that fall far below the [high bar set](#) by the New York Court of Appeals. As a result, juries find the exception applicable in virtually every NYCAL case, even though that was clearly not the legislature’s intent. This should be another important element of the new NYCAL CMO now being [negotiated](#).

### **FLIPPING THE BURDEN OF PROOF**

One last issue this report will put on Justice Moulton’s radar screen as he seeks to navigate a new CMO that will lead to fairness and due process for defendants in the notoriously plaintiff-friendly NYCAL stems from a 2014 appellate decision [affirming](#) yet another incredibly biased order by Justice Heitler. That order effectively flipped the burden of proof, requiring NYCAL defendants to prove unequivocally, even when plaintiffs do not know for certain, that the plaintiffs were *not* exposed to their products. This Kafkaesque rule lifts the plaintiff’s traditional burden of proof and seeks to crush the defendant.

### **BEYOND NYCAL**

Whether Sheldon Silver ever spends a day in jail for his corruption conviction, and whether federal prosecutors indict others for corrupting the civil justice system in New York, one thing’s for sure: the former assembly speaker can no longer strangle civil justice reform bills in their cradle in Albany. This means that lawmakers can finally move to reform New York’s antiquated “[scaffold law](#),” which continues to add [hundreds of millions of dollars](#) annually to the costs of taxpayer-funded public works projects while discouraging privately funded development projects that could otherwise provide jobs and tax revenues. It also means that lawmakers could act to rein in medical liability payouts in the state – [the highest in the nation](#).

Of course, with tort claims against the taxpayers of New York City alone [expected to rise](#) by 17.5% to more than \$800 million annually by the 2018-19 fiscal year, and with all such claims – many of them nuisance claims – driven by parasitic plaintiffs’ lawyers who take some of their cues from New York Attorney General Eric Schneiderman, a man recently ranked among the nation’s [six worst attorneys general](#), it’s difficult to be particularly optimistic about the State of “Sue” York.

## **#3 FLORIDA**

The Sunshine State is characterized by a state high court that [continually expands](#) the liability exposure of those who live and do business there. That trend continued in 2015 with three more rulings impacting property owners, manufacturers and retailers, and insurers. South Florida, especially Miami Dade and Broward counties, is known for its particularly plaintiff-friendly courts. The state’s plaintiffs’ bar is aggressive in its recruitment of clients and politically [influential](#) with legislators in both parties. And plaintiffs’ lawyers and others game the system to bring unwarranted lawsuits against insurers, raising the price of insurance for all Florida residents.



### **MEDICAL LIABILITY CONCERNS RISE**

Observers are still reeling from the Florida Supreme Court’s 2014 [decision](#) striking down the state’s statutory limit on subjective pain and suffering awards against healthcare providers. The way it did so was [astonishing](#). Two members of the court found that the state’s elected legislature, despite numerous hearings and an extensive record, had no rational basis to believe that a limit on noneconomic damages would help address the state’s medical malpractice crisis, or that there was ever a crisis at all. Three other justices, who completed the plurality decision, found that even if there was a rational basis for the legislature to enact the law in 2003, any such crisis had passed and the law

was no longer needed. Apparently lost on these judges was the obvious fact that Florida's medical liability system improved precisely because of this and other reforms.

The Florida Supreme Court's invalidation of the pain and suffering limit was technically limited to wrongful death cases involving multiple claimants. But in July 2015 a Florida appellate court [extended](#) the high court's troubling reasoning to all medical liability cases. Other Florida courts are likely to follow.

As one doctor writing in [Emergency Physicians Monthly](#) put it, "While Florida has repeatedly tried to improve its medical liability system with reforms such as caps and expert witness reform, the state's doctors actually pay some of the highest premiums in the country. . . . It all boils down to state culture. . . . When a region, such as South Florida, evolves in this way, it is practically impossible to roll it back. The Florida trial lawyer lobby is simply too powerful, and any laws serving to protect physicians will be perpetually under fire."

The Florida Medical Association (FMA) and other [observers](#) have expressed concern that, as a result of the invalidation of the statutory limit, the stabilization of Florida's medical liability insurance rates that has occurred in recent years is in jeopardy. The FMA is also worried that the state's liability system will go further backward, as the plaintiffs' bar pushes the legislature to expand wrongful death actions in medical liability cases. If enacted, FMA says such legislation "would [prompt double-digit increases](#) in already unaffordable medical liability insurance premiums and lead to an immediate access-to-care crisis in our state."

### THREE MORE EXPANSIONS OF LIABILITY BY THE FLORIDA SUPREME COURT

**Double Murder? Blame the Landlord.** In February 2015, Florida's high court reinstated a case that pinned liability for a double murder on an apartment owner solely because the complex's security gate was inoperable at the time. Two young adult siblings were shot inside their apartment with no sign of forced entry or witnesses. Police reportedly believe the victims knew their killers, and the case remains unsolved. There had never been a murder, stabbing, shooting or rape at the complex before, just occasional crimes of opportunity.



But after a Broward County judge denied a directed verdict to the defendant, a jury found the apartment complex owner 40% negligent, awarding \$1.8 million in damages. A unanimous three-judge panel of the Fourth District Court of Appeals [threw out](#) the judgment, reaching the reasonable conclusion that the plaintiffs could not show that the apartment gate's condition played any role in the murders without evidence of how the killers gained entry to the apartment. Nonetheless, in a 5-2 ruling in [Sanders v. ERP Operating Limited Partnership](#), the Florida Supreme Court disagreed. It found a jury *could* reasonably find that the broken gate *could* have made it easier for the assailants to gain access to the complex.

Imposing liability without evidence of responsibility sends a message that Florida property owners are subject to near strict liability for a crime that occurs on their property. It would seem that all a plaintiff needs to do to collect damages in Florida is identify some security measure that could have, theoretically, played a part, to shift responsibility for a criminal's act to a landlord.

**Excessive Damages for Future Medical Expenses.** Inflated and exaggerated damages for future medical expenses were already a concern in Florida when its high court issued a decision in October 2015 making the problem worse.

A divided high court kept juries from knowing that the plaintiff will receive Medicare benefits to pay future medical expenses. The majority reached its ruling in [Joerg v. State Farm](#) based on the collateral source rule, which generally precludes introduction of evidence of payments made by third parties to the plaintiff to compensate for an injury when the plaintiff paid for those benefits or otherwise secured them through his or her own diligence. In so doing, the high court reversed an intermediate appellate court ruling that found the collateral source rule did not apply because the plaintiff had not contributed to the financing of the Medicare program.

As Justices Polston and Canady noted in dissent, the majority’s ruling was contrary to a [Florida law](#) recognizing that “[g]overnmental or charitable benefits available to all citizens, regardless of wealth or status, should be admissible for the jury to consider in determining the reasonable cost of necessary future care.” As a result of this ruling, businesses and insurers sued in personal injury claims in Florida will be [on the hook](#) for future medical expenses that are already covered by taxpayers through Medicare.

**Florida Keeps Plaintiff-Friendly Test for Product Defect Cases.** Also in October, and with broad ramifications, the Florida Supreme Court reinstated a \$6.6 million verdict in an asbestos case, [Aubin v. Union Carbide Corporation](#).

In reaching its decision, the court rejected a test for evaluating product defects that instructs the jury to consider both the benefits and risks of a product’s design. Most state courts follow such an approach, which the influential American Law Institute (take a Closer Look at the ALI on p. 54) viewed as the majority approach since publishing its Restatement Third, Products Liability, in 1998. A risk-utility test focuses the jury on science, technology, the overall safety of the product, the cost of a suggested modification, and consumer needs in deciding whether a manufacturer should have adopted an alternative design for a product. Instead, a divided Florida Supreme Court applied a vague test based on “consumer expectations” of the safety of a product, which provides no guidance to a jury and can lead to unsound results in cases involving complex products. [Plaintiffs’ law firms](#) are already using the *Aubin* decision to recruit clients.

The high court also reinstated the judgment even as it recognized the trial court had improperly failed to instruct the jury that the responsibility of a supplier of raw materials (asbestos) is to warn the purchaser of foreseeable risks. The law does not expect raw material suppliers to directly warn end users of the completed product. This is known as the learned intermediary doctrine. The dissenting justices observed that defendants are now left to wonder which “magic words” are required to secure from trial judges a proper jury instruction.

### **IF AT FIRST YOU DON’T SUCCEED, VOTE, VOTE, VOTE AGAIN**

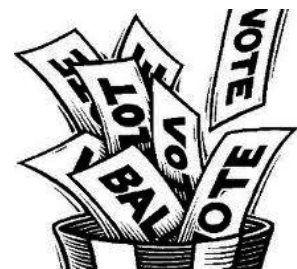
For the past two years, after enactment of a reform statute, Florida trial courts have applied the same standard for expert testimony used by federal courts and most other state courts, known as *Daubert*. Now, the plaintiffs’ bar, working through the Florida Bar, may be on the verge of overturning it.

The *Daubert* standard expects trial court judges to act as gatekeepers over the reliability of expert testimony, carefully evaluating whether such testimony is based on sound scientific principles or is simply bought-and-paid-for “junk science.” The move to the federal standard was hard fought. It came only after a seven-year legislative effort and in the face of Florida Supreme Court decisions that had [adopted](#) one of the nation’s most lax standards for admissibility of purported expert testimony.

The question of whether Florida trial courts will be allowed to continue following the sounder, more exacting standard is slowly moving up to the state’s high court. Whenever a law touches on the workings of the judiciary in the Sunshine State, the Florida Supreme Court has the final say on whether it will be followed. The court can decide to adopt the law “to the extent it is procedural” or opt not to follow it, essentially vetoing it.

The Florida Bar plays a role in this process, and the way it has handled the expert testimony issue exemplifies the disadvantage civil defendants have become accustomed to in the state. Here is how the process for considering the *Daubert* law played out within the Florida Bar’s Code and Rules of Evidence Committee (CREC) and Board of Governors.

In the summer and fall of 2013, soon after enactment of the new law, the CREC solicited comments from members of the Florida bar. Those who filed comments at that time split evenly between supporting and opposing *Daubert*. Then, after a full year of the new law working effectively, another round of comments indicated universal support for *Daubert*. Despite the mountain of public input already received in 2013 and 2014, the Board of Governors [announced](#) in October 2015 that it would accept yet another round of comments before voting on the issue. In this latest round, about two-thirds of respondents were [plaintiffs’ lawyers](#) and, unsurprisingly, they [opposed](#) strengthening standards for admission



of expert testimony. Only 19% of comments in this third round came from civil defense lawyers as some may have assumed the issue was settled, or perhaps they had suffered *Daubert* fatigue.

A similar pattern occurred as the Florida Bar voted on the issue. A September 2013 straw poll of CREC members supported the *Daubert* standard 28-21. Another CREC vote later that year again supported *Daubert* by a wider margin. Then the Committee's membership changed in July 2014, adding several prominent members of Florida's plaintiffs' bar just in time for a final vote. In that vote, the CREC narrowly opposed *Daubert* 16-14. And with a December 2015 [vote of 33-9](#), showing the influence of plaintiffs' lawyers at the bar's highest level, the Board of Governors ultimately recommended that the Florida Supreme Court disregard the legislature and revert to Florida's anything-goes standard for expert testimony.

This issue should reach the Florida Supreme Court in 2016, when the Bar is expected to send its recommendation along with other rule change proposals to the court. While the high court could revert to the lower standard for admission of expert testimony, it should recognize that the current system is working and disregard the advice of a Bar that has plainly been captured by plaintiffs' lawyers.

### **BOGUS 'BAD FAITH' LAWSUITS A LINGERING HEADACHE FOR INSURERS**

For years the Florida Legislature has failed to adopt reforms to address clear abuses of the state's "bad faith" insurance laws. These laws were originally intended to protect insureds and the public from misconduct by insurers, but they have since been transformed by plaintiffs' attorneys into a [litigation tool](#) for extracting money from insurers that act responsibly and in good faith while trying to settle claims fairly and efficiently. Plaintiffs' attorneys often resort to legal gamesmanship and "gotcha" tactics designed to frustrate insurers' claims handling processes in order to trigger a technical statutory violation and turn a modest policy claim into a multimillion-dollar bad faith lawsuit against an insurer.

This problem is especially acute in the context of so-called "[third-party](#)" bad faith. Florida is one of only a handful of states that permits a person who is not a direct party to an insurance contract to sue someone else's insurer for allegedly acting in bad faith by failing to settle a claim. A



third-party claimant can bring a lawsuit under either state common law or statute, which may potentially provide claimants with a second chance to revive a failed lawsuit. Further, state statutes impose strict time periods in which an insurer must handle a claim or risk triggering a bad faith lawsuit. Such requirements create an incentive for plaintiffs' attorneys to delay the claims handling process in order to trigger some minor violation by the insurer and establish a basis for a subsequent bad faith lawsuit seeking broad tort damages, including punitive damages. Common "gotcha" tactics used by Florida plaintiffs' attorneys to manufacture a bad faith lawsuit on behalf of a third-party claimant include making an indefinite payment demand such that the insurer is uncertain what payment will actually settle the claim, or a multi-conditional demand tying any payment demand to unreasonable settlement conditions such that the claimant can later allege bad faith even if the insurer tries to tender payment in full.

These abusive tactics by plaintiffs' attorneys continue to take a toll on Florida's insurance system. In the context of auto insurance alone, third-party bad faith litigation abuse is estimated to add more than [\\$800 million annually](#) to costs statewide. These increased costs adversely impact both the affordability and availability of insurance in Florida. They are costs ultimately borne by individuals, small businesses and other insurance consumers onto whom higher premiums are passed. The continued failure of state lawmakers to enact modest reforms may result in pricing many insureds out of the insurance market altogether and cause insurers to discontinue or substantially curtail their insurance services, further harming consumers through less competition and fewer choices.

### **ABUSES IN ASSIGNMENT OF BENEFITS CLAIMS**

Florida residents also pay high insurance rates due to a growing number of instances in which Florida lawyers partner with service providers, such as auto glass shops, roofers, or water damage remediation firms, to bring excessive or fraudulent claims against insurers.

As documented in a new [report](#) published by the Florida Justice Reform Institute (FJRI), this scheme involves a service provider asking an insurance policyholder to assign his or her insurance benefits to the provider as a condition of making repairs at no cost. A plaintiffs' law firm, which has an arrangement with the provider, then demands that the insurer pay inflated or unnecessary charges, typically within a short time frame. The insurer either pays the claim, or it gets sued. This [video](#) by the Florida Chamber illustrates how it works.

When a lawsuit is successful, the service provider gets inflated damages and the plaintiff's lawyer is entitled to collect attorney's fees (which may dwarf the value of the repair). For example, a lawyer may receive over a thousand dollars in attorney's fees for pursuing a chipped windshield repair claim. As a result, insurers settle such claims at inflated rates that reflect their liability exposure to paying attorneys' fees.

According to the FJRI study, the number of lawsuits involving assignment of insurance benefits has exploded in Florida. Filings increased a mind-boggling 16,000% since 2000 (from 281 to 45,490 filings in 2014). Some repair shops have offered gift cards, steaks and cash in exchange for a car owner's right to file an insurance claim for a "free" windshield replacement, suggesting that some of the lawsuits behind a recent surge in auto-glass claims may be fraudulent. Assignment of benefits claims now constitute about 1 in 3 lawsuits in Florida against insurers. This scheme contributes to the high insurance rates paid by Floridians, who already pay some of the highest rates in the nation. The report has led to renewed [calls](#) for legislative reform.

## CONSUMER CLASS ACTIONS

Florida is among a handful of states with a reputation for attracting consumer class actions. The problem is the state's plaintiff-friendly consumer law. These multi-state class actions are often filed in a Florida state court and then removed to federal court. In the past year, several juice makers, snack food companies, supermarkets and retailers were hit with such lawsuits in not-so sunny Florida.

Distillers largely prevailed in class actions alleging that consumers are owed money because [Tito's Handmade Vodka](#) and [Maker's Mark](#) are not actually made strictly by hand. But other questionable cases settled. Kashi coughed up [\\$4 million](#) to settle a case alleging its cereals are not "all natural" because they may contain genetically modified ingredients. Tom's of Maine agreed to pay [\\$4.5 million](#) to get rid of a lawsuit alleging its toothpaste was not "natural" because it includes processed ingredients. And attorneys who brought a lawsuit alleging that Anheuser-Busch misled consumers into believing Beck's beer is a German import will get [\\$3.5 million](#) in fees while class members can request partial refunds.

## 1-800-SUE-IN-FL!

Anyone who visits Florida immediately notices the ubiquitous "have you been injured" billboards plastered along the state's highways, along with television and radio jingles promoting lawsuits as a winning way of life. This lawsuit industry advertising contributes to the state's sue-at-the-drop-of-a-flip-flop culture.

While the Florida Supreme Court has a history of liability-expanding rulings and nullification of reasonable tort reforms, it deserves credit for addressing abuses in lawsuit advertising. In September 2015 the court adopted a rule change that precludes lawyers from accepting referrals from services that also refer callers to other professional services, such as medical clinics.

A Special Committee on Lawyer Referral Services established by then Florida Bar President Mayanne Downs recommended this rule when an [investigation](#) revealed "convincing evidence of professional misconduct among lawyers, health care providers and other individuals" relating to the explosive increase in advertising by for-profit lawyer referral services, many of which target car accident victims. The committee found that most for-profit referral services are owned by persons or entities other than lawyers, mainly [chiropractors](#) who own clinics that treat accident victims. Not coincidentally, those who called these services for legal help are referred to an associated clinic.

Here's how it works. Even when callers seek only medical treatment, they are sent to clinics where they are met by attorneys or paralegals who push them to bring a lawsuit. Money available from Florida's no-fault insurance



coverage, which provides up to \$10,000 in medical expenses stemming from an accident, goes to the clinics for questionable medical treatments and inflated charges. Settlement proceeds then go to the clinic to cover additional clinic charges and lawyers' fees. These ads and services particularly target minorities, a [newspaper investigation](#) has found.

And now the Florida Supreme Court has [found](#) that the Bar's special committee investigation demonstrates a significant risk to the public posed by these practices. The court accepted the committee's recommendation and overrode the Bar's Board of Governors, which had ignored the Committee's recommendation, in finding that Bar leadership had "disregarded the potential harm to the public that non-lawyer-owned, for-profit referral services present." The Court concluded:

*[I]t is absolutely necessary to protect the public from referral services that improperly utilize lawyers to direct clients to undesired, unnecessary, or even harmful treatment or services. Our action today will also prevent conflicts of interest, such as where a lawyer feels compelled or pressured to refer a client to another business operated or controlled by the owner of the referral service so that the lawyer may continue to receive referrals from that service.*

The lawyer referral rule is a significant step forward, but there was also a step back in addressing Florida's lawsuit advertising. In December 2014, a federal judge [prohibited](#) the Florida Bar from enforcing new guidelines that addressed lawyer advertising of past results. The Florida Bar had found that saying, for example, "we recovered \$50 million in 2014" has a [particularly high risk](#) of misleading consumers because such advertisements aggregate recoveries and do not convey what an individual is likely to receive. The Bar also found that needed disclaimers cannot be effectively communicated on a billboard or 30-second TV or radio ads. **U.S. District Court Judge Beth Bloom**, however, prohibited enforcement of the rule, finding that the restriction violated the First Amendment.

## NO RECENT PROGRESS

While the Florida Legislature has occasionally pushed back against expansions of liability and restored traditional rules, it has not enacted needed reforms over the past two sessions. [Bills](#) to reduce both the evidence [manipulation](#) that allows plaintiffs to collect "[phantom damages](#)" awards that exceed their actual medical expenses and the gamesmanship in "[bad faith](#)" insurance litigation [did not advance](#).



## #4 MISSOURI

Problems with the civil justice system in the "Show Me Your Lawsuits State," mostly at the state supreme court level, were documented in [last year's](#) Judicial Hellholes report and have seemingly trickled down to lower courts now hurrying to get in on the act.

### EXPERT TESTIMONY

Missouri is one of the holdout states that have not yet adopted the *Daubert* standard used by federal courts and most state courts for the admission of expert witness testimony. Instead, Missouri has adopted a flexible standard for admitting scientific or technical testimony based largely on a purported expert's paper credentials, not on his or her methods.

Companion bills introduced in the state [Senate](#) and [House](#) during the 2015 legislative session would have brought Missouri law into line with that of more than 30 other states where *Daubert* has been adopted to ensure the reliability and relevance of expert testimony. Not surprisingly, the plaintiffs' bar strongly opposes the adoption of this standard, preferring to mislead juries with "junk science."



In preparing to oppose reform legislation, plaintiffs' lawyers and firms made substantial campaign contributions before and during the 2015 session to two state Senators opposed to reform. **Senator Kurt Schaeffer** (R) recently elected Majority Caucus Leader, and **Senator Eric Schmitt** (R) went so far as to filibuster the bill, effectively killing it in



Sen. Schmitt

March. The senators made a mockery of the legislative process by reading Chinese food menus into the record during the filibuster. [Schmitt](#) has received over \$260,000 in campaign contributions from trial lawyers since 2007 and [Schaefer](#) has received over \$136,000 since 2009, with a majority of the donations being made in the time leading up to the 2015 legislative session.



Sen. Schaeffer

True to Missouri's growing reputation as a Judicial Hellhole, judges there also played a vocal role in opposition to raising the bar for expert testimony. Missouri Circuit Judges' Association president **Judge Lisa Page** led the lobbying efforts against the bill in the state capital and represented the unanimous support of all circuit judges in the state. All of this culminated with a nonsense request by the Missouri Bar Executive Committee to "study" the issue of whether rules already used in Federal courts and more than 30 states would be appropriate for Missouri.

Further demonstrating the close ties between the plaintiffs' bar and Missouri judges is the fact that they have shared the same state capital lobbyists for years. [Former State Senator David Klarich](#) has lobbied for the Missouri Association of Trial Attorneys since 2007 and the Missouri Circuit Judges Association since 2009. [LuAnn Madsen](#) left the Missouri Bar in 2000 to lobby for both the Missouri Association of Trial Attorneys and the Missouri Associate Circuit Judge Voluntary Fund.



Judge Page

### 'MISSOURI PLAN' STILL BENEFITTING PLAINTIFFS' ATTORNEYS



Missouri circuit court judges did not oppose the *Daubert* legislation for reasons of policy or principle. Their opposition was aimed at currying favor with the plaintiffs' bar which, as discussed in [last year's Judicial Hellholes report](#), exercises disproportionate influence within the system that appoints Missouri judges to the bench at all levels. This so-called Missouri Plan was adopted in 1940 and functioned more or less evenhandedly until about 30 years ago. Since then the system has been captured by plaintiffs' lawyers with predictable results.

Missouri's appellate judges are appointed by a seven-member panel. The [Appellate Judicial Commission's](#) membership is set by the [Missouri Constitution](#). It includes three non-lawyers appointed by the governor, three lawyers elected by the Missouri Bar Association, and the chief justice of the Missouri Supreme Court, each of whom serves a staggered six-year term. In practice, this purportedly "nonpartisan" court appointment plan ensures that the liability-expanding interests of plaintiffs' lawyers are disproportionately represented.

The political makeup of the committee is largely the same as it was in 2014. The three lawyers currently serving on the committee comprise two personal injury lawyers and one specializing in criminal defense. Two non-lawyers appointed by **Governor Jay Nixon** (D) are a union representative and a Democratic Party staffer, both of whom consistently seek to appoint liability-expanding judges. The lone newcomer for 2015 is a nurse and former paralegal at a plaintiffs' firm. She replaced the committee's only businessman who consistently supported judicial candidates favoring reasonable limits on liability.

### PUNITIVE DAMAGES

When the [Missouri Supreme Court struck down](#) the state's statutory limits on punitive damages last year, the Judicial Hellholes report forecast trouble, noting that even the U.S. Supreme Court has [recognized](#) the need for courts to

“ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” That principle was reflected in the Missouri statute the high court rejected. And in the year since, punitive damage awards in the state have already begun to soar beyond reason.

For example, in May 2015 a Kansas City jury awarded \$251,000 in compensatory damages to a woman who was wrongfully sued by a debt collector for \$1,130. This award exceeded by more than [222 times](#) the sum for which she had initially been sued. And on top of that, she also received a wholly irrational [punitive damages award of \\$82.99 million](#) – roughly half of the defendant company’s net income for 2014. The verdict is on appeal but, if upheld, the plaintiff’s attorneys will take home more than \$20 million as their share of a jackpot no riverboat gambler in Mark Twain’s time could have ever imagined.



Another example of an unreasonable and disproportionate punitive damages award was blessed by the Missouri Court of Appeals, in July 2015. In [Ellison v. O’Reilly Automotive Stores, Inc.](#), the court upheld a [\\$2 million punitive damages](#) award against an employer in a disability discrimination case brought under the state’s Human Rights Act. While \$2 million may not seem extraordinary, the case revolved around a mere demotion, not a firing. And this award for punitive damages was 10 times higher than that for compensatory damages (\$200,000), making for a double-digit ratio exceeding the single-digit limit suggested by the U.S. Supreme Court in [State Farm v. Campbell](#) and [BMW v. Gore](#).

## IS ST. LOUIS THE NEXT MADISON COUNTY?



Plaintiffs’ lawyers specializing in asbestos lawsuits are finding increasingly generous verdicts and helpful judges in St. Louis, just across the Mississippi River from Illinois’ perennial Judicial Hellhole, Madison County. In [Poage v. Crane Co.](#), for example, the plaintiff was awarded \$1.5 million in compensatory damages despite having stipulated before trial that such damages were worth only \$822,250. Another \$10 million was tacked on for punitive damages – that’s six times the compensatory award. The defendant is seeking a ruling in its favor, a new trial or a reduction of the award. It is likely to appeal if the court denies its motion.

In addition to generous, plaintiff-friendly verdicts, St. Louis also has at least one judge willing to ignore [U.S. Supreme Court precedent](#) requiring a defendant to have a business presence in a given state in order to be subject to lawsuits there. In an August 2015 order **22nd Circuit Court Judge David Dowd** refused to dismiss a case in which the defendant did not maintain its headquarters or a principal place of business in Missouri and the plaintiff was not exposed to the defendant’s products within the state.

Judge Dowd disagreed with both the defendant’s motion to dismiss and the nation’s highest court on the flimsiest of bases, finding the company “consented” to jurisdiction in St. Louis by virtue of complying with state law requiring it to designate a registered agent in Missouri. Even more astonishing than Judge Dowd’s order were subsequent rejections of the defendant’s desired appeals by both the Missouri Court of Appeals and, in October 2015, the increasingly rogue Missouri Supreme Court, which last year ranked [#6 among Judicial Hellholes nationwide](#).



Judge Dowd

So with asbestos dockets as clogged as they are in Southwestern Illinois, might plaintiff-favoring judges in Missouri invite a growing migration of asbestos cases across the river to St. Louis? Some observers say that [migration is already underway](#).



## #5 MADISON COUNTY, ILLINOIS

Largely rural Madison County in Southwestern Illinois continues to be a popular venue for personal injury lawyers, particularly those specializing in asbestos litigation. Though the [Madison Record](#) reports that new asbestos case filings there have edged down from their record peak of 1,678 in 2013, as plaintiffs' lawyers have begun to take cases across the Mississippi to St. Louis and other plaintiff-friendly jurisdictions, they are still on pace to exceed 1,000 in 2015, based on a mid-year figure of 588.

Astoundingly, Madison County is still home to about [a third](#) of all asbestos lawsuits brought in the entire United States. And that more than 90% of these cases brought in the county come from out-of-state plaintiffs – some from as far away as Puerto Rico – it stands to reason that plaintiffs' lawyers believe they have a significant advantage there.

Of course, being the nation's epicenter for asbestos litigation is but a symptom of Madison County's more serious disease – a culture of bias wherein local judges and plaintiffs' lawyers seem to agree that it's perfectly okay to stack the deck against and fleece out-of-state defendants, even if that may sometimes require willful end runs around judicial election law and the will of voters.

### FLOODING THE ZONE

Like a crack NFL offense sending too many receivers for defenders to cover into a particular part of the field, plaintiffs' lawyers' employ a comparable "flooding the zone" technique with their asbestos cases in Madison County. So insane and untenable is the "rocket docket" presided over by **Circuit Judge Stephen Stobbs** that [316 asbestos cases](#) were actually set for trial on a single day in August 2015, as though defense counsel could possibly prepare for so many trials without compromising their clients' right to due process.

In fact, by mid-October 2014 Judge Stobbs had already [set 1,074 asbestos cases for trial](#) in 2015. And though it pales in comparison to the 316-trials-set-for-a-single-day record on August 10, he had previously crammed 209 trials into the [first week of March](#).

Beyond using docket manipulation as a means to encourage asbestos defendants to settle cases before trial, Judge Stobbs consistently ignores [Illinois Supreme Court precedent](#) by [denying](#) defense motions to dismiss cases that have no connection whatsoever to Madison County, much less Illinois. For example, of the 316 cases set for trial on August 10, 24 plaintiffs were from Illinois, and only seven resided in Madison County. In the 209 trials set for the first week in March, only 19 plaintiffs were Illinois residents. Thus one could be forgiven for believing the judge may be complicit in an effort to coerce quick settlements from asbestos defendants.

Further context on the county's zeal to accommodate and advantage asbestos plaintiffs was offered by the nonprofit [Illinois Civil Justice League](#) in April 2015 when it published the third of its periodic reports on [Litigation Imbalance](#) in the state. The latest report notes that, on a per capita basis, Madison County's asbestos case load is a whopping 168 times higher than that of Cook County, Illinois, home to major metropolis Chicago. And it adds:

*There is great secrecy surrounding the wealth exchanging hands through this docket, but with an estimated outcome of \$2 million per case, the Madison County asbestos "rocket docket" could be worth more than \$1.74 billion annually – larger than the GDP of Belize – and could produce nearly \$600 million annually in contingency fees for plaintiffs' attorneys.*

So it's fair to ask, when will the Illinois Supreme Court and lawmakers in Springfield finally act to rebalance the scales of justice in Madison County?



## CORRUPTIBLE JUDICIAL APPOINTMENTS AND ELECTIONS

The [influence of plaintiffs' bar campaign contributions](#) on judges' conduct in Madison and neighboring St. Clair counties has long raised questions about corruption and corruptibility. For example, Madison County Circuit Judge Barbara Crowder was barred by then-Chief Judge Ann Callis from presiding over the asbestos docket in late 2011 when it was [revealed](#) that plaintiffs' attorneys who had given generously to her reelection campaign had also, not coincidentally, been granted choice trial slots.

Fast forward four years, and asbestos lawyers are still backing their favorite judicial candidates with campaign cash, as is their First Amendment right. But they also look to cut voters out of the equation when they can by simply asking friendly circuit judges to *appoint* their young law firm colleagues to associate judgeships. After all, winning a lawsuit is a lot easier when your former employee presides over the case, right?

So imagine how happy the asbestos litigation specialists at the [Simmons Hanly Conroy Law Firm](#) must have been earlier in 2015 when 3<sup>rd</sup> Judicial Circuit judges appointed their 32-year-old colleague Jennifer Hightower to the bench, just [six years out of law school](#). She had spent those six years ginning up and arguing asbestos and other personal injury cases for the Simmons firm. And upon being sworn in in early September, the newly minted judge [said](#) that work had "given [her] a great opportunity to gain experience with a wide variety of clients" – all plaintiffs. So will defense counsel arguing their cases before Judge Hightower in the future get a fair shake, or might she favor the plaintiffs' lawyers who made her meteoric rise to the bench possible?

Another strategy for gaming Illinois law governing the appointment and election of judges is [playing out](#) next door in St. Clair County, a once and future Judicial Hellhole in its own right.

Seeking to avoid the 60% threshold of voter approval necessary to hold their seats on the bench in a retention election, three St. Clair County Circuit Court judges will in 2016 [sidestep](#) the spirit of [Article VI, Section 12\(d\)](#) of the Illinois Constitution. Because the constitution says that previously elected circuit and appellate court judges "may" seek retention, not "shall" seek retention in nonpartisan elections, clever Judges John Baricevic, Robert Haida and Robert LeChien have opted instead to run – likely unopposed – in 2016's partisan primary and general elections wherein they can better [capitalize on their Democratic Party affiliation](#) and need only a simple plurality of votes to stay on the bench.

Rattled somewhat by the fact that their traditional Democratic stronghold of St. Clair County [went Republican in 2014's gubernatorial election](#), Judges Baricevic, Haida and LeChien may be feeling vulnerable were a "no to retention" campaign to be waged against them.

Ann M. Lousin, a professor at The John Marshall Law School and expert on the state constitution told the [Chicago Law Bulletin](#) that recent controversial retention fights in Illinois — such as the one Supreme Court Justice Lloyd A. Karmeier faced in 2014 — have made some circuit judges more likely to opt for general elections instead. "It certainly is getting around things, that's for sure," she said. "You might say it violates the spirit of the constitution." But she insists what the judges are doing is lawful.

## RETIRED JUDGE WHO STARTED IT ALL SHOWS SOLIDARITY WITH PERSONAL INJURY LAWYERS

The now retired judge most [credited](#) for originally leading Madison County into Judicial Hellholes infamy is the Hon. Nicholas G. Byron. It was on his watch many years ago that first class actions and then asbestos litigation exploded. Now 85, Byron left the bench in 2008 but has kept his hand in the law. He has joined a small [plaintiffs' law firm](#) with offices in Edwardsville, Illinois, and has otherwise tried to show continuing solidarity with personal injury lawyers.



Hon. Byron

In September 2015 Judge Byron filed [a defamation lawsuit](#) against the *Madison Record*, one of its reporters, and a law professor she had quoted in a September 2014 news story suggesting that Byron's administration of civil justice in Madison County back in the day had been corrupted by his relationship with the plaintiffs' lawyers practicing there. Considering that this opinion is one not unreasonably held by at least several thousand people with knowledge of the relevant history, and that judges are by definition public figures with a bigger burden of proof in such cases, Byron's suit

may face an uphill fight – even on his home turf in Madison County.

But not to worry because Judge Byron wisely hedged his bet by filing a second potentially lucrative lawsuit for himself just a month later. In October 2015, he [sued Wal-Mart Stores, Inc.](#), alleging injuries to his ribs and tailbone after falling from a saddle stool he purchased pre-assembled from a store in Glen Carbon, Illinois. He claims he incurred significant medical costs and suffered “severe pain, disfigurement and loss of a normal life.”

Of course, filing lawsuits seems to be part of a normal life for retired Madison County judges, so this case may be a little tricky to prove, too. But don’t bet against Judge Byron unless the respective defendants he’s targeted manage to have the litigation removed to more neutral jurisdictions (and good luck with that).



### THE UNDEAD CLASS ACTION

This report has [previously covered](#) the saga of [Price v. Phillip Morris](#), an original Madison County class-action lawsuit that refuses to die. With a vampire’s determination to avoid the light, plaintiffs’ counsel has tried repeatedly for more than a decade to revive a monstrous initial judgment of \$10.1 billion, leading to a uniquely disturbing procedural history.

Originally brought in 2003, the litigation sought damages on behalf of all Illinois residents who had purchased “light” cigarettes since their introduction in 1971. After a three-month bench trial presided over by Judge Byron himself, the defendant appealed and in 2005 convinced the Illinois Supreme Court to [overturn](#) Byron’s ruling, successfully arguing that because the Federal Trade Commission allowed the marketing of “low tar” and “light” cigarettes it was not liable under the state’s Consumer Fraud Act. End of story? Not quite.

Beginning in 2008, plaintiffs’ counsel seized on a U.S. Supreme Court [ruling](#) about a distinctly different question of whether subsequent federal law that regulated cigarette advertising preempted Maine’s consumer protection law. Twice plaintiffs’ petitioned the trial court in Madison County to reinstate the judgment and, incredibly, they twice won favorable rulings from Judge Byron’s replacement, **Circuit Court Judge Dennis Ruth**. The Fifth Appellate District [reversed](#) Judge Ruth and dismissed the first petition attempt but, on the second, [affirmed](#) and took the unusual step of reinstating the by then decade-old \$10.1 billion verdict.



Skipping ahead, Illinois’ Supreme Court again heard [oral arguments](#) in the case in May 2015, and in early November it [overruled](#) both the appellate and circuit courts’ reinstatement. The high court effectively said that plaintiffs can only revive their undead case by bringing a motion directly with it – the last appellate court to have heard the case.

So while the plaintiffs’ attorneys driving this case may or may not see their reflections in a mirror, they’ll almost certainly be seen back before the state high court, trying to convince the justices that, even though they lost fair and square under existing law long ago, they should now be granted a win and allowed to take a nearly \$2 billion contingency-fee bite out of the original other-worldly damages award.



## #6 LOUISIANA

Despite some modest reforms in recent years, the perception that Louisiana has one of the worst legal climates in the country persists today. The state is tarnished by elected district judges with close ties to the plaintiffs' bar, forum shopping, and never-ending lawsuits targeting the state's principal employer, the oil and gas industry. The plaintiffs' bar dominates state politics. The recent gubernatorial election of **John Bel Edwards**, a plaintiffs' lawyer himself and nemesis of civil justice reform, has dimmed prospects for progress. But voters also chose wisely to replace ethically-challenged incumbent **Attorney General James "Buddy" Caldwell**, known for his close alliance with contingency fee lawyers.

### **PLAINTIFFS' LAWYERS GET THEIR MAN (ELECTED GOVERNOR)**

John Bel Edwards has pledged to be a governor for all Louisianans, but those targeted by often meritless lawsuit are skeptical. Plaintiffs' lawyers invested record amounts this year to put allies in the governor's mansion and state legislature. Their targeted campaign spending — fueled by proceeds from the BP oil spill settlement and environmental lawsuits against energy producers — was instrumental in electing Edwards and legislative candidates who favor expansions of civil liability.

Edwards benefitted from more than \$4 million spent by his [trial lawyer patrons](#), including \$1.1 million in direct campaign contributions and \$3 million in spending through [super PACs](#). A trial lawyer himself, Edwards [repeatedly blocked](#) efforts to reform Louisiana's civil justice system during his eight years as a state representative. In fact, he consistently supported bills to increase lawsuits and legal fees benefitting the plaintiffs' bar. Here are just a few examples:

- Edwards supported legislation in 2010 allowing trial lawyers working on contingency fee contracts to siphon millions of dollars out of Louisiana's settlement with BP over the Gulf oil spill.
- Edwards opposed a 2012 compromise bill that put environmental remediation ahead of plaintiffs' lawyers' profits in environmental contamination lawsuits.
- And Edwards in 2014 led the opposition to every lawsuit fairness bill, including bills that would have eliminated Louisiana's \$50,000 jury trial threshold, reformed the state's lax venue requirements, and prevented abusive "double dipping" with asbestos claims that erode bankruptcy trust funds set aside for veterans and others with meritorious claims. Edwards also fought attempts to increase transparency and accountability in the attorney general's office and stood by Caldwell, even after it was revealed that the AG routinely handed out lucrative legal work to top campaign contributors.

Governor-elect Edwards's legislative record suggests he will veto civil justice reform legislation and work to expand liability on behalf of the plaintiffs' lawyers who have supported him.

In addition to winning the Louisiana governor's mansion, plaintiffs' lawyers also have successfully focused on the state legislature, spending more than \$8.5 million on campaign contributions and lobbying efforts since 2008. A recent [study](#) found trial lawyer spending [far outpaced](#) political contributions by every other industry. None of this is good news for businesses trying to create jobs and promote economic development in the Pelican State. Observers [predict](#) that "[t]he consequences for Louisiana taxpayers and the state's economic competitiveness in the coming years could be dire."

### **GOOD NEWS: THE 'BUDDY SYSTEM' IS OVER**

Voters chose not to reelect incumbent state Attorney General James "Buddy" Caldwell. Caldwell's much criticized "Buddy System" functioned as a textbook pay-to-play operation wherein he'd hire [contingency-fee lawyers](#) to sue

deep-pocket corporations on behalf of the state and, in turn, they'd contribute to his campaign coffers. For example, 8 of the 11 law firms working for Caldwell on the state's case against BP were among his [top campaign contributors](#).

This practice continued despite a [law passed in 2014](#) to end it. Campaign finance reports [show](#) 5 of the 7 outside law firms hired by Caldwell in December 2014 to pursue a lawsuit filed against drug manufacturer GlaxoSmithKline donated to his campaign. Caldwell also hired [9 private law firms](#) along with 17 private attorneys working for those firms to pursue state-sponsored litigation against another pharmaceutical firm, AstraZeneca. That lawsuit was [filed](#) in March 2015. His spokesperson claimed the contract was entered prior to the new law taking effect. Among the regularly hired firms was Usry, Weeks & Mathews.

Together, Caldwell's former campaign manager **T. Allen Usry** and his former campaign treasurer, **E. Wade Shows**, benefited from more than [30 separate, highly lucrative contracts](#) with the attorney general's office since 2008, according to research of campaign finance records conducted by Louisiana Lawsuit Abuse Watch. In addition, the *New York Times* reported that outside plaintiffs' firms partnering with Caldwell made [more than \\$54 million](#) in legal fees since 2011.

Caldwell reportedly spent "[\\$38.5 million on nearly a dozen law firms](#)" he'd hired to negotiate a settlement with BP for damages inflicted on the state by the 2010 Deepwater Horizon disaster in the Gulf of Mexico. Critics again questioned the size of the payday relative to the amount of work performed.

In any case, expectations are running high for Caldwell's successor, former **Congressman Jeff Landry**, who will move into the AG's office in 2016. Landry has [pledged](#) to end Caldwell's unethical, anti-growth, anti-jobs racket. But with an incoming governor committed to expanding civil liability on behalf of his wealthy trial lawyer backers, Louisiana's unemployed and underemployed shouldn't get their hopes up.

## LOUISIANA'S CONTINUING CHALLENGES

**Jury trial threshold.** Louisiana has an [excessively high](#) threshold – \$50,000 – for litigants to receive a jury trial. The national average is under \$2,000, with most states even allowing jury trials in cases where no money is sought. This barrier for obtaining a jury trial puts a lot of [power](#) in the hands of Louisiana's elected judges, who receive substantial campaign donations from plaintiffs' attorneys. They decide the outcome of most smaller civil lawsuits while citizens are cut out of the process. In fact, studies [show less than 2%](#) of all civil lawsuits result in a jury trial in Louisiana today.

**Lax venue laws.** Louisiana's lax venue laws allow for "forum shopping," a tactic often used by plaintiffs' lawyers to have their cases heard by the friendliest judges. For years defense attorneys have expressed concerns about Orleans Parish Civil District Court for the outsized role it plays in civil litigation, particularly in cases involving alleged exposure to asbestos and silica. Plaintiffs' lawyers flock to Orleans Parish seeking plaintiff-friendly judges and rulings that often allow meritless claims to proceed and result in excessive awards. Meanwhile, defendants find themselves dragged to a distant, inconvenient and expensive forum that often has little or no connection to the dispute.

**Legacy lawsuits.** For more than a decade this booming [litigation racket](#) has put millions of dollars into the pockets of aggressive lawyers and landowners who lodge environmental contamination complaints, many of which are unsubstantiated, against Louisiana oil and gas producers for activity that took place decades and sometimes a century ago. Prior to 2003, Louisiana landowners had filed just seven legacy lawsuits alleging environmental damage to their property. Nearly 10 years later, in 2012, the Department of Natural Resources reported 271 such cases had been filed. Today, more than 400 legacy lawsuits with nearly 3,000 named defendants have been filed against oil and gas producers in Louisiana.

Economists estimate this niche sector of environmental litigation, which is unique to Louisiana, has cost the state [thousands of jobs and billions in foregone investment](#). The legislature passed a series of bills to



improve the regulatory process for handling these lawsuits and discouraging the filing of meritless claims, but challenges remain as the latest data reveal that legacy lawsuits are still on the rise.

**Local governments hire out.** It is not just outgoing AG Caldwell that developed the habit of hiring private-sector law firms to bring unwarranted litigation. Local government bodies have also gotten into the act. **John Carmouche** with the Baton Rouge-based law firm, Talbot, Carmouche and Marcello, which is responsible for filing more than half of all the legacy lawsuit cases in Louisiana, is working on behalf of Plaquemines Parish to file so-called coastal lawsuits.

Meanwhile, personal injury lawyers benefitting from the back-room contingency-fee deal that drove the Southeast Louisiana Flood Protection Authority's misguided lawsuit against 88 oil and gas companies over alleged damage to the New Orleans area's system of levees won't take no for an answer. Though a federal judge [dismissed](#) the lawsuit in February 2015, finding [no viable claim](#), lawyers representing the authority filed a May [appeal](#) in the U.S. Court of Appeals for the Fifth Circuit. If they manage to win a reversal and their suit is ultimately successful, the lawyers will get millions of dollars in fees and establish a template for similarly lucrative future lawsuits against employers across the state.

### GETTING TO FUTURE VOTERS EARLY

As noted above, Louisiana's personal injury lawyers have exercised their First Amendment rights by directly spending millions during the past several campaign cycles, supporting candidates likely to expand civil liability and help grow the lawsuit industry. But as anyone who watches television, listens to the radio or occasionally glances at a roadside billboard in the Pelican State will attest, those same lawyers have spent millions more advertising themselves and a litigation lifestyle to residents of all ages.

So no one should be surprised that perfectly adorable 2-year-old Grayson Dobra was so influenced by the ubiquitous and noisy TV ads run by New Orleans personal injury lawyer **Morris Bart** that he became obsessed with "Bart! My Bart!," according to his mom. And when it was time to plan the toddler's 2015 birthday party, reported [People Magazine](#), Grayson's mom felt her little boy would be most pleased with a Morris Bart-themed celebration. She was right (moms always are).

Morris Bart himself could not make an appearance at Grayson's party, but a cardboard cutout, tee-shirt, autographed photo and a delicious cake with the lawyer's image sufficed as a collective stand-in, and the beautiful birthday boy was happy as can be. Nonetheless, paranoid conspiracy theorists can't help but wonder if the trial bar's incessant ad campaigns are as much about controlling the hearts and minds of future voters as they are about trolling for clients in the here and now.



## #7 HIDALGO COUNTY, TEXAS

Storm-chasing trial lawyers have swept through Texas litigation for years, seeking to profit from the damage and devastation caused by natural disasters. Typically it is hurricane destruction that draws personal injury lawyers' attention. But in 2012 and 2013, two historic hailstorms hit the state, causing millions of dollars in damage. True to form, trial lawyers jumped at the chance to profit. While hailstorm cases have been filed in 41 counties in Texas, Hidalgo County is at the eye of this storm. As of May 2015, [11,000](#) out of 21,000 cases had been filed there.



## **TRIAL LAWYERS' 'PERFECT STORM'**

Hidalgo County has historically been a plaintiff-friendly jurisdiction. With little regard to proportionality or relevance, elected judges there are often quite amenable to the discovery requests of the plaintiffs' lawyers who helped fund their campaigns. Add to these already dangerous conditions some damaging hail, and you get a perfect storm.

On average, 2% of insurance claims become lawsuits in Texas, but after the [McAllen hailstorm](#) in Hidalgo County, that number jumped to 22%. Texas insurance authorities blamed the storm for [\\$260 million in physical damage](#), but the [subsequent lawsuits](#) have driven that cost up to \$600 million and counting. Insurance companies paid out [over \\$550 million in homeowner claims](#) and another \$47 million to vehicle owners for damage from two storms combined. But the trial lawyers and lawsuits are still raining down.

"This whole process is not about ensuring that people get their hail-damaged roofs paid for," an attorney for commercial property insurers told the [Insurance Journal](#). "It's about people making money and pocketing money at the expense of the insurance industry." Most of the lawsuits are over claims that have been settled and paid, he added.

The hailstorm litigation pending in Hidalgo County shows just why the jurisdiction has earned its plaintiff-friendly reputation. In February of 2013 all the hailstorm cases against the main defendant, insurer National Lloyds, were consolidated into the county's three district courts for the purpose of handling all pretrial matters for both [residential](#) and [commercial property](#) claims. Over the course of 2014, the courts made a series of pretrial discovery rulings that can only be described as overly broad, irrelevant and unduly burdensome to the defendant.

## **DIGITAL FISHING EXPEDITION**

The "Revised Master Discovery" order crushingly required National Lloyds to [hand over all documents](#), in native format, reflecting summaries of total payments paid out for all hailstorm claims; all documents regarding generalized assessment, review, and evaluation of the claims; and any other general documents which applied to the hailstorm claims, including emails, charts and any other internal files. The discovery order even obligated the defendant to provide irrelevant reports that included information about other types of claims. The court gave the defendant the option of going claim by claim to redact any information not pertaining to Hidalgo – a monstrously time-consuming and costly exercise – or produce the files as they were.

This demand was nearly impossible to meet because most companies no longer retain historical documents in native format once they have been scanned and stored as digital files. Furthermore, large plaintiffs firms are buying technology that makes it easy to search large digital files in order to mine the information and collect every small detail that might be used to file additional claims. Discovery rules have not yet caught up to the realities of these eDiscovery fishing expeditions, and judges have wide discretion when making such rulings.

National Lloyds filed a series of motions and oppositions, but ultimately the [order was upheld](#) by the Court of Appeals for the Thirteenth District of Texas in May 2015. Adding injury to insult, the district court spitefully ordered National Lloyds to pay nearly \$16,000 in related attorneys fees because it effectively failed to comply promptly with the initial order and had the audacity to appeal. No wonder plaintiffs' attorneys flood Hidalgo County's courts.

## **ATTORNEYS' FEES COST CONSUMERS**

While hailstorm litigation is making some trial lawyers richer, many Hidalgo County residents are feeling poorer. The trial bar has danced in a downpour of more than [\\$800 million in attorneys' fees](#) from property damage lawsuits there in recent years, but policy-holding consumers have been drowning under fast-rising insurance premiums, some of which have gone up more than 100%, from [\\$500 to more than \\$1,200 annually](#). And at least [10,000 former policyholders](#) have lost their coverage altogether as three insurance carriers have simply stopped writing policies in notoriously litigious Hidalgo County.

These lawsuits are particularly attractive to plaintiffs' lawyers because Texas law requires mandatory attorney-fee awards and an [18% penalty interest](#) if an insurance company is just a day late or a dollar short in paying a claim. Allowance for attorneys' fees in simple breach of contract cases is unique to Texas. Most states have a heightened requirement, such as a showing of bad faith, before a court may award attorneys' fees. So attorneys' fees that are higher than the amount of the claim itself are not uncommon in the Lone Star State.

## 'HURRICANE STEVE'

No single plaintiff's lawyer has more aggressively manipulated and successfully exploited the legal system as has Houston-based multi-millionaire **Steve Mostyn**. From January of 2013 through May of 2014, after the twin hailstorms, Mostyn filed [719 cases](#) against insurance companies. Each of these cases alleged that insurers had engaged in deceptive trade practices. In addition to the 719 cases with Mostyn's name on them, 893 more cases have been filed by other attorneys from Mostyn's law firm. Of the more than [6,700 hail-storm cases](#) filed in Hidalgo County since 2013, Mostyn's firm has had a hand in more than a quarter of them.



Even more troubling than the sheer number of storm case filings was their timing. Nearly half came in the [two-month period](#) between March and April 2014, just as the relevant statute of limitations was about to expire. Plaintiffs' lawyers targeted area residents with their own man-made storm of TV commercials, road signs, mailings, phone calls and even door-to-door solicitations, hoping to maximize the number of lawsuits before the deadline.

It should be noted that the timing and sheer numbers involved in this new-filings surge had prompted an investigation of possible trial lawyer fraud by the Texas Department of Insurance. Since the department has reported that administrative complaints against home and auto insurers have actually [declined over the past five years](#), one can fairly question why the number of lawsuits would rise dramatically.



Alarmed by the impact these lawsuits were having on his constituents' ability to find affordable insurance, Texas **Senator Larry Taylor** (R) introduced reform [legislation](#) in 2015 that, among other things, would have required policyholders to notify an insurer of a claim before filing a lawsuit and clarified when the two-year statute of limitations actually begins. And though the politically powerful lawsuit industry managed to kill the bill in the House, lawmakers are expected to try again.

To end on a positive note, Steve Mostyn's firm suffered an [important defeat](#) in the first hailstorm case to go to trial in March 2015. The jury found that National Lloyds had not engaged in deceptive trade practices and complied with the terms of the policy.

While this is a positive sign, rejection of one of these many claims is far from a trend, and judges need to continue disposing of these meritless claims if Hidalgo County's reputation as a Judicial Hellhole is to be mitigated.

## #8 NEWPORT NEWS, VIRGINIA

Virginia generally enjoys a reputation for having a fair legal climate, but that cannot be said for asbestos cases in the Circuit Court for the City of Newport News. Newport News judges routinely issue legal and evidentiary rulings that lower the bar for plaintiffs while tying defendants' hands. These rulings have helped plaintiffs achieve the nation's [highest win rate](#) at trial, 85%, a fact proudly acknowledged by local personal injury lawyers. Furthermore, multi-million-dollar verdicts are common against the few defendants willing to go to trial in a place where the deck seems plainly stacked against them. Not surprisingly, this magnet court experienced over 500 asbestos filings from January 2013 through April 2015 – [7 of every 10](#) asbestos cases filed in all of Virginia.



### JURY INSTRUCTION ON CAUSATION

The instruction Newport News judges give to juries on causation is an example of the imbalance that occurs in that jurisdiction and a key reason that asbestos plaintiffs do well there. Ship repair cases such as those in Newport News are generally governed by maritime law, which requires a plaintiff to show that exposure to the defendant's product was a "[substantial factor](#)" in causing the plaintiff's harm. In Newport News, however, juries are told that any

## OUTCOME OF ASBESTOS CASES REACHING VERDICT (2004-2014)

State	Plaintiff Verdict	Defense Verdict
VA	85%	15%
NY	81%	19%
MD	76%	24%
PA	70%	30%
TX	64%	36%
CA	59%	41%
All other jurisdictions	52%	48%

asbestos found in thermal insulation. Newport News defendants are allowed to offer testimony about the general differences in potency between gaskets and pipe covering, but are not permitted to quantify the difference to make it real to the jury. Defendants are also categorically prohibited from presenting dose reconstruction evidence to show that their low-dose products were not dangerous, so no warning was required. To justify this patently unfair exclusion, Newport News judges rely on Virginia case law that excludes the opinions of car accident reconstruction experts, a [very different situation](#).

There do not appear to be jurisdictions outside of Newport News that consistently exclude all dose reconstruction evidence; instead, the admissibility of such evidence in other jurisdictions turns on its [reliability](#). What's more, the ban on defendants' introduction of dose reconstruction evidence seems entirely one-sided since Newport News judges allow frequent witness stand appearances by a particular plaintiffs' expert who testifies about comparable ["work practice studies"](#).

### AMISSIBILITY OF EVIDENCE

Because of the lax causation standard in Newport News and the limitations placed on asbestos defendants, the critical evidence often comes down to the testimony and documentations about the products and materials to which the plaintiff was allegedly exposed. Defendants rely upon third-party (often government) documents, as well as expert testimony, either to call into question whether their product was present at a plaintiff's worksite or to prove the presence of alternative and more potent sources of exposure, such as amphibole-containing thermal insulation. In a typical case involving a former sailor in other jurisdictions, such evidence includes Navy ship drawings, specifications, and other government documents presented by a well-qualified Navy expert to demonstrate the vast amount of asbestos-containing insulation throughout the vessel. In Newport News, however, the admissibility of this evidence has been subject to an absurdly exacting requirement of direct proof that these other asbestos-containing products were being used in the plaintiff's workspace while the plaintiff was working in that compartment – proof that decades later [simply does not exist](#).

Newport News is also an outlier in its categorical ban against the admissibility of Navy/employer knowledge of asbestos hazards. The circuit court prohibits such evidence for purposes of a ["sophisticated purchaser"](#) defense, although the issue is debatable as a matter of Virginia law. Other courts have allowed defendants to argue that the Navy was the [sole cause of a harm](#) (e.g., enlisted men had to use the products regardless). The information is also relevant to issues for which it should be admissible, such as the ["state of the art"](#).

exposure qualifies as long as it "was not an imaginary or [possible factor](#) or having only an insignificant connection with the harm." [Decisions in other jurisdictions](#) make clear that Newport News is outside the mainstream in defining ["substantial factor"](#) exposure to be any exposure that was not imaginary.

Only if a Newport News defendant can prove that the plaintiff's disease was "solely caused" by exposure to another's product(s) can a defendant escape joint liability for a multimillion-dollar verdict. But that task is made all but impossible by virtually insurmountable evidentiary burdens and inequitable rulings that favor plaintiffs.

For example, as the science of asbestos disease has evolved, it is now known that some forms of asbestos are much more potent than others. Many of today's defendants sold products that were encapsulated and contained the least potent type of asbestos (chrysotile), rather than the far more toxic and friable amphibole



In addition, Newport News asbestos cases lack transparency with respect to alternative sources of exposure. The ATRF examined Newport News practices in light of *In re Garlock Sealing Technologies, LLC* a watershed opinion by a North Carolina federal bankruptcy judge. There, the court found that Garlock's participation in the tort system "was infected by the manipulation of exposure evidence by plaintiffs and their lawyers." The judge said that "it was a regular practice by many plaintiffs' firms to delay filing trust claims for their clients so that the remaining tort system defendants would not have that information." The "withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock." Publicly available data indicate that millions of dollars of asbestos bankruptcy trust payments have been recovered post-verdict by asbestos plaintiffs in Newport News.



## #9 U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

Few jurisdictions in the country are as synonymous with an entire subject area of litigation as the U.S. District Court for the Eastern District of Texas is with respect to patent litigation. As commentators have appreciated, plaintiffs are [not flocking to the Eastern District of Texas for the BBQ](#). They head there because of the federal district court's "plaintiff-friendly" reputation.

Now, the concerns extend beyond patent litigation as the Eastern District recently entered the largest False Claims Act judgment in history in a lawsuit against a highway guardrail maker alleged to have defrauded the government – despite the fact that a federal agency has repeatedly found the guardrails to be fully compliant with applicable safety standards.

### TOP OF THE PATENT LITIGATION HEAP

As patent litigation has increased dramatically across the country over the past several years, the U.S. District Court for the Eastern District of Texas, where a storied "[rocket docket](#)" of expedited trials keeps defendants on their heels, continues to be the hot spot it has been [for decades](#). In fact, despite growing dockets elsewhere, it has managed to increase its market share. In 2009, there were roughly 2,500 new patent cases filed nationally. That number ballooned to over [6,000 in 2013](#), and the Eastern District of Texas was home to nearly 1 in 4. And that percentage has only increased. Of the more than 5,000 new patent case filings nationwide in 2014, this single court attracted 1,436 of them or [nearly 29%](#). In 2015, the court appears to have maintained its [dominant position](#) as the place to bring a patent lawsuit, and may even [gain ground](#) with respect to its percentage of all new patent cases filed. In fact, in 2015, the court [overtook the federal government's Patent Trial and Appeal Board \(PTAB\)](#) as the top venue for adjudicating patent disputes.

Today, the court's popularity among patent plaintiffs has less to do with its system for quickly adjudicating cases than it does with its [reputation](#) for higher plaintiff win rates and awards for damages than other courts. Plaintiffs also love the court's routinely reliable denials of defendants' motions to transfer cases to other venues. And the court is viewed as favorable to so-called "patent trolls" by refusing to dismiss meritless claims early in litigation, thereby providing claimants with greater settlement leverage.

Additionally, defense attorneys have been given clear notice that Eastern District judges do not look kindly on either motions seeking to impose sanctions on plaintiffs who file [frivolous lawsuits](#) or the U.S. Supreme Court's ruling that courts have broad discretion to award attorneys' fees to prevailing defendants.

Claimants also have a good idea of who will be selected to preside over their case. One of the court's judges, **Judge Rodney Gilstrap**, presides over about 17% of all patent cases in the United States.



Judge Gilstrap

Perhaps encouragingly, in September 2015 Judge Gilstrap suddenly moved to [eliminate](#) 10% of his patent docket. He dismissed 168 cases filed by a serial patent troll, eDekka, the [modus operandi](#) of which is attempting to extort small settlements from numerous companies. Judge Gilstrap found eDekka's claim to a patent governing the storage and labeling of information was too abstract. But in his four years on the bench Judge Gilstrap has *never* awarded a prevailing patent defendant its attorneys' fees.

### **DISTORTION OF FALSE CLAIMS ACT RESULTS IN RECORD VERDICT**

Although the Eastern District of Texas's spot on this year's Judicial Hellholes list is rooted significantly in its reputation for plaintiff-friendly adjudication of patent claims, at least as alarming is its wholly lopsided handling of a federal False Claims Act (FCA) case that resulted in a [record](#) verdict of [\\$663 million](#) against a maker of highway guardrails, which the Federal Highway Administration (FHWA) has repeatedly found safe and effective in reducing the severity of automobile crashes.

The manufacturer, Trinity Industries, was sued by an individual who operated a competing business. The plaintiff [claimed](#) that, in 2005, Trinity improperly modified the design of its ET Plus guardrail end terminal system – by changing a 5-inch wide guide channel to a 4-inch wide guide channel – without informing the FHWA. The competitor brought the lawsuit under the FCA on behalf of the United States, alleging that Trinity had effectively defrauded the government by not reporting the design modifications. As a purported FCA “whistleblower,” the competitor sought to recover a share of the government funds spent on the guardrail purchases.

Trinity defended the claim on the basis that the one-inch design modification was recommended by engineers at the Texas A&M Transportation Institute who developed the guardrail *to improve the product*, and that, regardless, it was a minor modification that did not need to be disclosed. Trinity also pointed out that the FHWA had previously investigated for a potential FCA violation and promptly affirmed that the modified ET Plus product was [compliant](#) with the agency's standards. Accordingly, the federal government declined to join the plaintiff's FCA lawsuit.

Nevertheless, Judge Gilstrap – yes, *that* Judge Gilstrap – curiously allowed the case to proceed to a jury, which returned a verdict of [\\$175 million](#) against Trinity. In June 2015, Judge Gilstrap, who apparently took a break from his heavy patent docket to preside over this case, [tripled the verdict](#) pursuant to the FCA. He awarded additional civil penalties in the amount of \$138 million, ordering Trinity to pay a grand total of \$663 million. For bringing the lawsuit, the court awarded the claimant a \$199 million portion of the judgment (a 30% bounty) and more than \$18 million in attorneys' fees and expenses.

During the litigation, the FHWA released test results again [confirming](#) that Trinity guardrails passed crash tests and complied with government standards, prompting the company to make a still-pending request for a new trial.

Meanwhile, in August 2015 Trinity filed a notice of [appeal](#) with the U.S. Court of Appeals for the Fifth Circuit in an effort to overturn this unfounded verdict and restore the reputation of its guardrail safety product.

Arguably beyond restoration is Judge Gilstrap's reputation for having presided over this disgraceful distortion of the FCA and a seemingly willful attempt to destroy an upstanding company that provides a reliable and affordable product protecting Americans all along our nation's roads and highways.



# WATCH LIST

The Judicial Hellholes project calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from Hellholes status as their respective litigation climates degrade or improve. By correcting imbalances, judges and policymakers can avoid having their jurisdictions designated as Judicial Hellholes.



## WEST VIRGINIA

Despite the fact that the latest ranking of Judicial Hellholes features ongoing madness in California courts and a historic corruption conviction with connections to New York City's asbestos court, the biggest headline from this year's report may be: **West Virginia Is No Longer a Judicial Hellhole!**

Most jurisdictions, much less an entire state, would not celebrate a Watch List citation, either. But such a designation for the Mountain State, a perennial Judicial Hellhole for [many years](#), represents a significant, even joyous achievement owed to [historic legal reforms](#) enacted by state lawmakers in 2015.

Of course, with the state's high court notoriously inclined to expand liability, and with no intermediate level appellate court, the long-term impact of these reforms remains to be seen as legal challenges are likely. But an uncertain future should not mute in the near-term well-deserved congratulations for a bipartisan majority of West Virginia lawmakers and a governor who decided to put the needs of jobseekers and job creators ahead of the job destroyers of the plaintiffs' bar.

### REFORM FINALLY COMES TO THE MOUNTAIN STATE

For many years, civil justice reform could not be achieved in West Virginia because of the power and influence wielded by plaintiffs' lawyers serving in the legislature. But after voters on Election Day in 2014 decided to make a [political course correction](#), the legislature, under strong leadership by [Senate President Bill Cole](#) and [House Speaker Tim Armstead](#), made adoption of meaningful reforms a top priority in 2015. The legislature ended its session with several major achievements addressing areas that were sources of concern, including:



Sen. Pres. Cole



Speaker Armstead

- **Fairly allocating fault.** The legislature [abolished](#) the state's antiquated and unfair rule of joint liability, which had required defendants that were 30% or more at fault for an injury to potentially pay 100% of a plaintiff's damages. Now, individuals and businesses sued in West Virginia will typically pay damages in proportion to their level of responsibility for an injury. The law also ensures that juries can consider the responsibility of all parties that may have contributed to an injury, not just those named in a lawsuit.
- **Reducing the potential for excessive punitive damage awards.** The legislature [limited punitive damages](#) to the greater of four times the amount of compensatory damages or \$500,000. The new law also requires "clear and convincing evidence" of "actual malice toward the plaintiff or a conscious, reckless and outrageous indif-

ference to the health, safety and welfare of others” to support an award of punitive damages, and it permits a defendant to request that the jury separately consider liability and punitive damages.

- **Reasonably limiting medical liability.** Lawmakers [required](#) courts to reduce damage awards in medical liability cases to reflect compensation the plaintiff has or will receive for the same injury from others such as private insurers and Medicaid, tightened expert witness requirements, tied the state’s limit on noneconomic damages to inflation, and included additional healthcare professionals and facilities within the noneconomic damage limits.
- **Cracking down on abuses in asbestos litigation:** The legislature required plaintiffs’ lawyers suing solvent companies in the tort system to [disclose](#) any claims also filed with asbestos bankruptcy trusts on behalf of the same client. This newly established transparency will prevent plaintiffs’ lawyers from hiding evidence that their client’s injury was caused by sources other than the companies they name as defendants and reduce the potential for fraud. The legislature also precluded individuals who allege exposure to asbestos or silica from proceeding with a lawsuit unless they develop a medically-recognized condition. This law will preserve limited resources for those who actually become sick and prevent questionable claims generated through mass screenings and [fraud](#).
- **Bringing rationality to the state’s consumer protection law.** The legislature [amended](#) the law to require a plaintiff to show that a violation caused an actual out-of-pocket loss. The law also avoids inconsistency and over-regulation by excluding from coverage any act or practice permitted or regulated by a federal or state agency, and provides any party with the right to a jury trial.
- **Overturing an obvious expansion of liability.** The legislature [restored](#) the longstanding rule that property owners are not subject to liability for “open and obvious” dangers after a 2013 high court [decision](#), highlighted in a previous edition of this report, abolished the commonsense rule. A separate [law](#) preserved the rule that landowners have no duty to protect those who trespass on their property.
- **Preserving workers’ compensation for on-the-job injuries.** The legislature [tightened](#) requirements for workers to sue employers outside the no-fault workers’ compensation system, which ordinarily provides compensation for work-related injuries. West Virginia courts had [broadened](#) the standard for “deliberate intent,” which, when shown, subjects employers to lengthy litigation.

There is still more work to be done in the legislature. An important [bill](#) that would have codified West Virginia Attorney General Patrick Morrissey’s sound [transparency policy](#) with respect to his office’s hiring of outside counsel passed the Senate with significant bipartisan support, but the session ended before it could be considered in the House of Delegates. Unless these reforms are placed into law, the AG’s office, under future office holders, is at [risk](#) of again using no-bid pay-to-play contracting to employ an [army of plaintiffs’ lawyers](#). The legislature also had not addressed other outlier rulings. Examples include a court decision allowing cash awards to uninjured people who bring speculative medical monitoring claims and another ruling that rejected the widely accepted principle that drug companies have an obligation to educate doctors, not directly warn patients, of potential side effects of their products. The Legislature should consider reforms to ensure damage awards in personal injury cases are commensurate with actual medical costs incurred, and do not allow awards of inflated [phantom damages](#). Concern also persists that litigants in West Virginia do not have the degree of [appellate review](#) that is available in other states.

## HIGH COURT STILL EXPANDING LIABILITY

Despite recent legislative achievements, the liability-expanding decisions of the state’s high court continue to exert a drag on the [state’s economy](#) (though not as severe as the [coal industry’s collapse](#)). Last year’s [Judicial Hellholes report](#) focused on a series of unsound rulings by the West Virginia Supreme Court of Appeals. As noted above, the legislature has since overturned one of those rulings by restoring the open and obvious danger doctrine.

While the legislature worked hard to fix the unfairness created by the state high court’s past rulings, the court kept doing what it’s known to do. In May 2015, it [allowed](#) individuals who become addicted to pain killers to sue the

doctors who prescribed the drug and the pharmacies that distributed it. In so doing, the court rejected the principle that a person who engages in criminal conduct, such as fraud, forgery and deception in obtaining narcotics from doctors, cannot recover damages. Instead, the court found that such unlawful conduct may only reduce the plaintiff's recovery. As Justice Ketchum wrote in dissent, "The majority's ruling permitting criminal plaintiffs to maintain these civil lawsuits ignores common sense and will encourage other criminals to file similar lawsuits in an attempt to profit from their criminal behavior."

### WEST VIRGINIA MESH MDL UPDATE

A special section on page 52 of [last year's Judicial Hellholes report](#) provided extensive coverage of the rise of pelvic mesh litigation and the trial lawyer marketing that helps drive it. West Virginia also happens to be home to seven related federal multidistrict litigation (MDL) actions, which pull cases from federal districts across the nation for pre-trial procedures. (The MDL method of case management is more fully discussed in a Closer Look on p. 54.)

Last year we reported that more than "60,000 of these [pelvic mesh] claims are pending before **Judge Joseph R. Goodwin** of the U.S. District Court for the Southern District of West Virginia." That number this year has climbed above [83,000](#) total cases transferred to or filed within the seven pelvic mesh MDLs. Judge Goodwin has effectively closed 11,353 of these cases, but more than 72,000 are still pending.

### KEEPING A CLOSE WATCH

As noted above, West Virginia's move this year from the ranks of Judicial Hellholes to the less onerous Watch List is a welcomed development given its civil justice system's troubled past. But numerous challenges and problems persist, even as the state moves in the right direction. **Senate President Bill Cole**, who was so instrumental in driving 2015's round of legislative tort reforms, has announced a run for governor in 2016 and has already won support from many there who hope to modernize the state's economy and make it more welcoming to business.

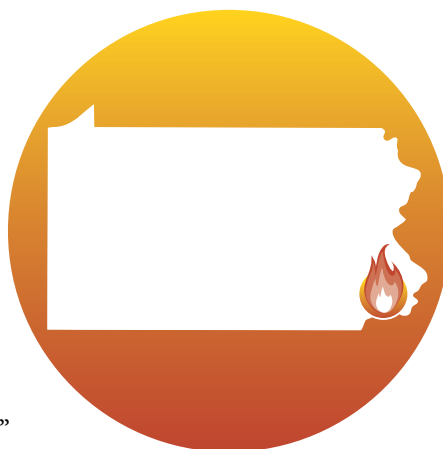
Similarly, Morgantown attorney **Beth Walker** has [announced her candidacy](#) for the only seat on the state's high court that will be contested in 2016. Incumbent **Justice Brent Benjamin** hopes to hold off Walker's bid and win another 12-year term. But because Benjamin's [often sided](#) with the high court's liability-expanding majority, Walker has created early buzz and has begun to draw support.

Finally, lawmakers are already ambitiously preparing more civil justice reform bills for 2016's legislative agenda. Among other measures, they are expected to consider establishment of a much needed intermediate level appellate court. Currently, because the state's high court can choose not to hear a case, West Virginia litigants are the only ones in the country without an absolute right of appeal. Of course, the wealthy trial lawyers who profit by chasing jobs and tax revenue out of West Virginia [still deny](#) the state has ever had a lawsuit problem, and they can be counted on to fight additional reforms tooth and nail.

## PHILADELPHIA, PENNSYLVANIA (AND BEYOND)

In early 2012 Philadelphia Court of Common Pleas **Chief Administrative Judge John Herron** acknowledged an explosion of mass tort cases hosted by the court's Complex Litigation Center (CLC). By instituting [significant procedural reforms](#), he effectively withdrew the CLC's open invitation to out-of-state plaintiffs. As a result, new mass tort filings fell 70%, from 2,690 in 2011 to 813 in 2013, and Philly dropped from its #1 Judicial Hellholes ranking to the Watch List, where it remains.

But new mass tort filings have ticked up in "[The City of Unbrotherly Torts](#)" and, along with newly elected state supreme court justices who were favored by the plaintiffs' bar, a disgraced attorney general facing criminal charges and disbarment, the spread of plainly contrived





disability-access lawsuits, and a reportedly growing bias against asbestos defendants in Allegheny County, the whole Keystone State may be heading for a hellhole.

## PHARMACEUTICAL CLAIMS

Pharmaceutical claims continue to dominate the [mass tort docket](#) of Philadelphia's CLC. There are more than 4,500 such claims currently pending there, along with additional medical device and asbestos claims.

This rising number of pharmaceutical claims is driven in part by the [Risperdal](#) and [Xarelto](#) dockets, accounting for more than 2,000 claims. And not surprising to anyone familiar with the CLC's history, the [Pennsylvania Record](#) reported that as of August 2015, nearly 9 out of 10 pharmaceutical claimants there are not Pennsylvania residents.

The CLC also handles pelvic mesh cases with a specific docket created in February 2014. After **Judge Arnold New** denied defendants' various motions to dismiss for lack of personal jurisdiction in March 2015, [182 mesh cases remain](#).

It's too soon to know if Philadelphia's mass tort docket's recent growth spurt is a coincidence of maturing litigation or a harbinger of a return to the bad old days when the jurisdiction held the #1 Judicial Hellholes ranking for two consecutive years in 2010 and 2011.



Chief Justice Saylor

## CHANGES ON THE HIGH COURT

The Pennsylvania Supreme Court has a new leader. Per the [Pennsylvania Constitution's](#) Article V, Section 10(d), **Chief Justice Thomas G. Saylor**, as the court's most senior justice, [took the helm in January 2015](#). He is well regarded as a thoughtful and fair-minded jurist by Pennsylvanians across the political spectrum.

But 2015 elections for three vacant seats on the high court all went to candidates favored by the plaintiffs' bar. According to [BallotPedia.org](#), new **Justices Kevin Dougherty, David Wecht and Christine Donohue** are expected to change "the partisan balance of the court: where the court previously had three Republicans, two Democrats and two vacancies, it now has five Democratic justices and two Republicans."

The [Pittsburgh Post-Gazette](#) reported that "total spending in the primary and general elections topped \$15.8 million, setting a national record for spending on a court race." And "for Democrats, and allies that included unions and trial lawyers," the paper's analysis concluded, "that investment seems to have paid off."

## UNDULY PARTISAN AG FACING CRIMINAL CHARGES, DISBARMENT

As chronicled in an October 2015 [Judicial Hellholes blog post](#), "**Kathleen Kane**, Pennsylvania's attorney general and a politician national Democrats had hoped might someday win a U.S. Senate seat, continue[s] . . . her embarrassing and desperate descent toward likely disbarment and a self-imposed political death sentence."

As of October 22<sup>nd</sup>, she is the only attorney general in the country without a law license after her [suspension from the bar](#) by the state supreme court for ethical violations. Another senior judge has [called her](#) "the most corrupt, dishonest, deceptive, politically motivated public servant" he'd encountered in his career on the bench.

Kane's troubles [can be traced back to her apparently false and misleading testimony given in November 2014](#) to a grand jury investigating the April 2014 leak of a previous grand jury investigation into alleged misappropriation of state grant money by a Philadelphia non-profit with ties to the NAACP's leader in Philadelphia. That case resulted in [two guilty pleas by employees of the non-profit](#), with no further investigation into the NAACP. The grand jury investigating the April 2014 leak found her testimony to be false, and [recommended that she be criminally charged](#).

In early August 2015 Kane was [arraigned and charged initially](#) with felony perjury, misdemeanor false swearing, multiple counts of misdemeanor obstruction of justice, and multiple counts of misdemeanor oppression/denial of rights. She was [arraigned a second time](#) on additional charges in early October.

Observers say Kane chose to leak the 2009 grand jury information in an effort to embarrass two Pennsylvania prosecutors and political opponents she blamed for providing information for a March 2014 *Philadelphia*



AG Kane



*Inquirer* story that was [critical of her decision to end a corruption probe](#) of various Philadelphia Democrats caught accepting cash on videotape. As a response to the criticism that followed, she eventually handed off the probe to a Philadelphia prosecutor who reopened the case, [got four guilty pleas, and has two trials pending](#).

Would it be piling on to note that AG Kane was and probably remains a favorite of the plaintiffs' bar, elements of which, reported an [Inquirer editorial](#), she rewarded with "several secretive no-bid contracts" in return for "more than \$350,000 in campaign contributions"?

In any case, as this sad story of an ethically challenged and seemingly lawless state attorney general drags on, Pennsylvanians must be mortified as they wonder who is looking out for their rights. Speaking of rights, Judicial Hellholes reporters hear rumors that **Sandra Bullock**, Oscar-winner and *People Magazine's* "Most Beautiful Woman of 2015," is interested in optioning the rights to a screenplay based on the attorney general's dramatic rise and fall.

### ADA LAWSUITS ON A ROLL

California is still [ground zero](#) for the exploitation of the Americans with Disabilities Act (ADA) by plaintiffs' lawyers and their often wheelchair-bound clients who aggressively target mostly small businesses. But such claims are on a roll and picking up speed in Pennsylvania, so watch out!

According to the [Pennsylvania Record](#), some 290 non-employment ADA lawsuits were filed in state district courts between July 1, 2012 and Jan. 1, 2015, nearly doubling the total for the previous 30-month period. And two attorneys – **R. Bruce Carlson** of Carlson Lynch in Pittsburgh and solo-practitioner **John F. Ward** in Royersford, Pa. – are behind much of this recent surge. Among the [eight most active plaintiffs](#) frequently represented by these two is Florida resident Owen Harty who somehow managed to have his rights violated in a Philadelphia area Toys R Us.

### ALLEGHENY ASBESTOS ACTION

And finally, moving to the Western end of the Keystone State, a defense attorney spoke for clients and fellow counsel when recently telling Judicial Hellholes reporters that "we are all horrified and dismayed" by unfair procedural trends facing asbestos defendants in Pittsburgh ([Allegheny County](#)).

There, leading plaintiffs' counsel **Michael J. Gallucci**, from the [politically influential](#) law firm of [Savinis, D'Amico & Kane LLC](#), has seemingly charmed District **Judges Ronald Folino, Michael Della Vecchia** and **Michael Marmo**, in particular. The judges reportedly allow the Savinis firm and others to name scores of defendants in a single asbestos lawsuit and, often contrary to well-established state law, deny virtually every defense motion for summary judgment. And because interlocutory appeals are not permitted under Pennsylvania law, defendants are trapped.

Then the scheduling of trials and conciliation proceedings are frequently changed at the last minute, too, making it difficult and sometimes impossible for defense counsel to be in more than one place at any given moment. If one didn't know better, one might think these Fifth District judges were favoring asbestos plaintiffs at the expense of defendants' due process rights.

### NEW JERSEY

New Jersey's litigation environment has drawn attention in past years, particularly the state's mass tort docket. Concern continues to center on the state's abundance of product liability and consumer lawsuits. There also is alarm that a recent ruling will lead to the invalidation of many agreements to arbitrate, rather than litigate, disputes. Other court decisions this year will also impact liability—some for better, some for worse.



## DRUG AND MEDICAL DEVICE LITIGATION IS A CONTINUING CONCERN

Superior Court Judge Carol Higbee's reassignment to the appellate division in 2014 led the state's judiciary to [disperse](#) pharmaceutical and medical device lawsuits from Atlantic County, where they were concentrated, to counties such as [Middlesex and Bergen](#). New Jersey's mass tort litigation may no longer be centered in Atlantic County, but there is still a lot of it. According to the latest court statistics, New Jersey's multi-county litigation (MCL), which is primarily composed of pharmaceutical and medical device lawsuits, includes [23,669](#) active pending cases as of July 2015. This is a 7% decline over the prior year, but more than [triple](#) the number of mass tort cases pending in New Jersey five years ago. Many of the lawsuits against pharmaceutical makers – 9 out of 10, one [study](#) found – are filed in New Jersey by lawyers representing people who live in other states.

One reason plaintiffs' lawyers prefer the Garden State is its courts' lax standard for admitting [expert evidence](#), which sometimes allows them to introduce novel theories of liability. Generally, judges in federal courts and most other state courts more carefully assess the reliability of expert testimony before admitting it. As a result, New Jersey courts attract cases that rely on junk science that most other courts would dismiss.

But there is still hope. Early this year the judge that now presides over what mass tort litigation remains in Atlantic County, **Nelson C. Johnson**, [excluded](#) the testimony of two expert witnesses who planned to support claims that Accutane, an acne medication, could cause Crohn's disease. Judge Johnson found the plaintiffs' experts were "[cherry picking evidence](#)" and had presented theories in a court room that would not withstand scrutiny in the scientific community. "It is one thing to stand alone in the world of science, advancing a hypothesis that others do not accept," Judge Johnson wrote in a [February 20 order](#). "It is quite another thing to advance a hypothesis that can only be supported by disregarding valid scientific research." The ruling led to the [dismissal](#) of about 2,000 cases, about one third of the Accutane litigation in the state.



## FAVORING LAWSUITS OVER ARBITRATION

Arbitration provides a faster, less expensive, and less adversarial means of resolving disputes than litigation. Congress and the U.S. Supreme Court have long recognized a "liberal federal policy favoring arbitration" and precluded states from erecting barriers to its use. In direct contravention of this, New Jersey courts have recently issued rulings that disfavor arbitration agreements, implying arbitration is inferior to traditional court proceedings. As a result of this trend, New Jersey has become "a [more attractive venue](#) for the filing of [consumer] class actions."

The New Jersey Supreme Court delivered a blow to arbitration in late 2014. In [Atalese v. U.S. Legal Services Group](#), the court found that an arbitration provision in a contract for debt adjustment services was unenforceable. The provision stated that "any claim or dispute . . . shall be submitted to binding arbitration." That language may seem clear to Judicial Hellholes readers, but the state's high court found that a special warning is required because an "average member of the public may not know" that arbitration is a substitute for going to court. In June 2015, the U.S. Supreme Court opted [not](#) to review the [case](#), leaving New Jersey's heightened notice requirement in place for the foreseeable future.

Courts across the state are [striking down](#) arbitration agreements in light of the *Atalese* ruling, and this may be just the tip of the iceberg. The New Jersey Supreme Court recently heard another [arbitration case](#), and it was clear from oral argument that members of the court are willing to extend their reasoning in *Atalese* to cover additional arbitration-related disputes. A ruling in the most recent case is expected in 2016.

## LAWSUIT-GENERATING CONSUMER LAWS

New Jersey's consumer protection law is a [magnet for lawsuit abuse](#). A recent ATRF-commissioned [study](#) by Emory University School of Law Professor **Joanna Shepherd** found that New Jersey Consumer Fraud Act (CFA) decisions increased 447% from 2000 to 2009. This increase is staggering, but Shepherd suggests it, "probably understates the growth of consumer protection litigation" in the state since many such cases are settled well before they are filed in

court and enter her dataset. Professor Shepherd concludes that “while the New Jersey CFA was initially celebrated as empowering consumers, the expansion in the original legislation has tipped the balance from protecting consumers to encouraging excessive consumer litigation.”

It is no surprise that after an [Australian](#) man posted a photo on Facebook showing a Subway “footlong” sandwich falling short of 12 inches, plaintiffs’ lawyers rushed to bring their class actions in [New Jersey](#). That case, which was consolidated with others filed around the country, [reached a settlement](#) in October 2015 in which plaintiffs’ lawyers will share [\\$525,000](#) among themselves and consumers (aside from nine class representatives) will not get a cent. New Jersey law is favored for these types of ridiculous lawsuits due to its automatic tripling of damages and attorneys’ fees, favoring of class action certification, and no requirement that plaintiffs show they relied on the allegedly deceptive ad or practice in making a purchase. Sometimes common sense prevails, however, as it did in August 2015 when a federal judge in New Jersey [tossed](#) lawsuits that vaguely alleged that supermarkets Wegmans, Whole Foods, and Acme violated the CFA by posting signs touting “fresh” bread when the bread had been baked off premises.

The CFA is not the only consumer protection law being abused by the Garden State’s gang of greedy trial lawyers. A separate New Jersey law, the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA), is suddenly generating an [unprecedented](#) number of claims, as well. The TCCWNA permits plaintiffs’ lawyers to file lawsuits against New Jersey businesses if they sell a product with a poorly drafted warranty, or a less than perfect contract, regardless of whether a consumer experienced an actual loss, [even if the seller acted in good faith](#). The law awards \$100 per violation, which perhaps seemed reasonable until New Jersey courts began allowing these cases to be filed as class actions and settlements offered class members pennies on the dollar while their attorneys raked in handsome fees. In some cases, plaintiffs’ lawyers are claiming that violations of technical [regulations](#) automatically violate the TCCWNA so that they can collect statutory damages and fees.

## MEDICAL LIABILITY CONCERNS



According to a [2015 Medical Malpractice Payout Analysis](#) by Diederich Healthcare, New Jersey pays more money per capita to resolve medical malpractice claims than almost any other state. The state’s medical malpractice payouts totaled \$264.5 million in 2014, a 6% increase over the prior year. The American College of Emergency Physicians’ (ACEP) gave the state an F for its [medical liability environment](#) in its most recent [report card](#). According to ACEP, New Jersey doctors pay medical liability insurance premiums that are well above average compared with other states and the state has seen a tripling of the number of malpractice award payments since the organization last conducted its study five years earlier. ACEP also [observed](#) that “New Jersey lacks pretrial screening panels, periodic payments, and medical liability caps on noneconomic damages, all of which would contribute to lessening the burden on physicians and increasing access to care.” New Jersey also has one of the nation’s lowest number of family doctors per capita, thanks to its “[toxic](#)” legal environment.

## DEFENDANTS MAY BE ON HOOK FOR ACTS OF OTHERS

New Jersey’s appellate division is considering whether a jury can allocate fault only among defendants in a lawsuit or also among those that have previously settled with a plaintiff. If New Jersey appellate courts embrace the former reading of the law, an [unfair and disproportionate burden](#) could be placed on defendants who have the least responsibility for a plaintiff’s injury and punish those who defend themselves in court.

The practical impact of this issue is illustrated in a recent Middlesex County case. **Judge Ana Viscomi**, who [manages](#) the state’s asbestos litigation, properly allowed a defendant, Pecora Corporation, to introduce deposition testimony and responses to interrogatories obtained during discovery from other defendants showing the plaintiff was exposed to asbestos from the products of others. Given that evidence, the jury found that Pecora was only 2% responsible for the plaintiff’s injury. The settling defendants, the jury found, were 98% responsible.

The plaintiffs' lawyers, however, challenged the result, urging the appellate division to adopt a definition of "party" that would preclude the jury from hearing evidence of a settling party's responsibility. New Jersey, unlike many other states, already precludes juries from allocating fault to nonparties (such as bankrupt defendants). If the state's appellate courts also place barriers on the jury's consideration of the responsibility of settling parties, then plaintiffs will receive double compensation for their injuries. Solvent companies that had little to do with a plaintiff's injuries will be forced to pay the entire damage award even when a plaintiff was fully compensated by other defendants and asbestos trusts established by companies that declared bankruptcy.

### **OTHER STATE HIGH COURT RULINGS IN 2015 WERE A MIXED BAG**

Several New Jersey Supreme Court rulings this year addressed civil liability issues of importance to those who live and work in the state. These court decisions could lead to more [whistleblower lawsuits](#), [wage-and-hour](#) class actions, and lawsuits against [insurers](#).

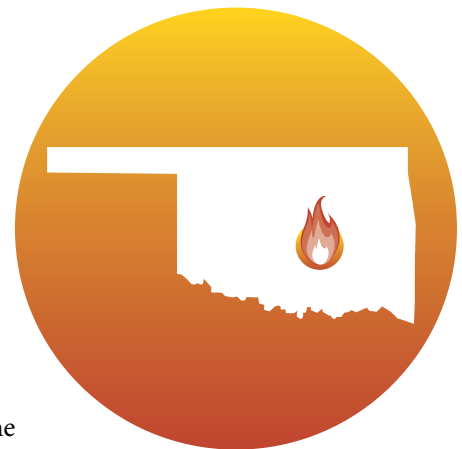
In other cases, however, the New Jersey Supreme Court held the line, rejecting invitations to expand liability. It recognized that employers can protect themselves from lawsuits by adopting [well-defined sexual harassment](#) policies, refused to extend the state's [statute of repose](#) for construction defect claims, and [declined](#) to adopt a more permissive standard for bad faith lawsuits against insurers.

## **POTTAWATOMIE COUNTY, OKLAHOMA**

Pottawatomie County, Oklahoma, is a small county with a population of about 71,000 and just [one district court judge, John G. Canavan, Jr.](#) Yet, Pottawatomie County is developing an outsized reputation for plaintiffs' friendly rulings.

### **A JURISDICTION OF CHOICE FOR PLAINTIFFS' LAWYERS**

As noted in last year's report, when plaintiffs' lawyers filed nearly identical product liability lawsuits against medical device makers involving 650 plaintiffs from 26 different states, they chose the Pottawatomie County District Court. To make it difficult for the defendants to transfer (remove) the cases to a neutral federal court, the plaintiffs' lawyers packaged these cases into eleven groups, each including less than 100 plaintiffs. The plaintiffs' lawyers also claimed that they were consolidating the cases for pre-trial purposes, not trial. This gamesmanship worked. It avoided federal court jurisdiction over "mass actions" under the Class Action Fairness Act (CAFA). The U.S. Court of Appeals for the Tenth Circuit [ruled](#) that so long as the plaintiffs did not request a joint trial, the cases would be sent back to Pottawatomie County.



### **GENEROUS TREATMENT OF CLASS-ACTION LAWYERS**

It's no wonder why lawyers prefer to file in Pottawatomie County, considering Judge Canavan's award of \$7.2 million in attorneys' fees to lawyers who obtained less than \$45,000 (about \$140 each) for their purported clients.

The fees request resulted from settlement of a nationwide class action against Volkswagen, alleging the Jetta's front spoiler was prone to damage when parking. The case settled after the court certified the class. But only 310 valid claims were filed seeking compensation and none was filed on behalf of an Oklahoma resident.

The plaintiffs' attorneys incredibly sought fees and expenses totaling more than \$15 million. Judge Canavan initially awarded them over \$3.6 million, but the plaintiffs filed a motion for reconsideration based on a Missouri court ruling in a similar case that had doubled the actual fees. The judge then applied a 1.9 multiplier to boost the attorneys' fee award to more than \$7.3 million.



The Supreme Court of Oklahoma [reversed](#) the fee award in December 2014. It concluded that Judge Canavan abused his discretion applying this multiplier to the attorneys' fees when recovery was "minuscule" and the enhancement was not based on the time or risk involved in the case before the court. The high court also found the Pottawatomie court improperly awarded fees that included work on a similar but failed case in Florida.

Justice Taylor, joined by Justice Winchester, had harsh words in concurring with his colleagues:

*In reviewing the attorney-fee award, it is important to understand what this case is about and what it is not about. It is about a \$140.00 replacement, including parts and labor, of a piece of decorative plastic on a Volkswagen Jetta. It is not about attorneys acting as private attorneys general protecting the social good; it is about attorneys acting with a business plan. It is not about righting a constitutional wrong, it is not about protecting Jetta owners from bodily injury or death, and it is not about protecting the public policy of this state. It is about 310 pieces of decorative plastic.*

They urged the trial court to "act with a wise and courageous sword" on remand to reach a fee award consistent with the "minimal and paltry recovery."

On remand, however, Judge Canavan stubbornly awarded attorneys' fees and costs in [excess of \\$1.1 million](#). Once again, the defendants are appealing this nonsense to the state's high court.

### **CONVERTING WORKERS' COMP CLAIMS INTO LAWSUITS**

Judge Canavan also gained notoriety this year when he issued "a surprising decision that could turn Oklahoma workers' compensation law upside down," [The Oklahoman](#) reported. Observers [say](#) the ruling has the potential to open the dam to a flood of lawsuits against employers unless the state's high court or legislature acts.

The workers' compensation system was established to provide workers' with efficient and fair recovery for medical expenses stemming from accidental workplace injuries through an administrative system without the need to prove fault. Judge Canavan ruled, however, that workers can sue their employers for negligence whenever the injury is "foreseeable."

The case arose from a typical workplace injury, in which a tire worker was hurt as he tried to loosen a bolt on a wheel. Since the plaintiff's lawyer told [The Oklahoman](#) that "reasonably predictable" accidents account for about "98 percent of [all workplace] accidental injuries," many such cases could be shifted to district courts, exposing employers to lawsuits and unpredictable liability.

Employers in the state are hoping the Oklahoma Supreme Court, which is considering the case and others like it, will follow the lead of Washington State's high court. In 2014 that court [upheld](#) the traditional interpretation of workers' compensation law by permitting lawsuits outside the administrative system only in cases where there is evidence that an employer knew an injury was certain to occur.

# DISHONORABLE MENTIONS

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“Dishonorable Mentions” generally comprise singularly unsound court decisions, abusive practices, legislation or other actions that erode the fairness of a state’s civil justice system but aren’t otherwise detailed in other sections of the Judicial Hellholes report. Included among others this year are actions by the high courts of Colorado, Indiana, Nevada, New Hampshire, South Carolina and Tennessee, and an intermediate appellate court in Maryland.

## COLORADO SUPREME COURT DISALLOWS ‘LONE PINE’ ORDERS

In April 2015 the Colorado Supreme Court [ruled](#) that state law does not allow for so-called *Lone Pine* orders that require plaintiffs in dubious toxic tort and complicated products cases to provide evidence of an injury and exposure before proceeding.

The high court held that Colorado’s Rules of Civil Procedure were violated when the trial judge dismissed the plaintiffs’ lawsuit after issuing a *Lone Pine* order that required some evidence of alleged injuries. The Court stated that the Colorado rules do not provide a trial court with the authority to “fashion its own summary judgment-like filter” and dismiss cases at the early stages of litigation.

The en banc panel decision will [drastically increase](#) the discovery burden on defendants and will require them to exert a large amount of time and resources defending against these types of lawsuits. Federal law allows for *Lone Pine* orders, as do other states, so plaintiffs will now likely flood the Colorado court system for the obvious advantage this ruling provides. The increased expense associated with discovery and the sheer volume of filings will place even more pressure on defendants to settle, and Colorado taxpayers will provide court resources for more out-of-state plaintiffs.

## INDIANA SUPREME COURT DECLINES TO HEAR ‘VICARIOUS LIABILITY’ APPEAL

In May 2015 the otherwise well-regarded Indiana Supreme Court allowed significant expansion of “vicarious” liability for employers when employees disobey in-house policies or relevant law.

By declining to hear defendant Walgreen’s appeal of an intermediary appellate court decision that [upheld](#) a plaintiff’s verdict at trial, Indiana’s high court effectively subjected all employers to strict liability for any actions taken by any employee who’s on the clock – no matter how unlawful or contrary to the employer’s own policies those actions were.

In 2013 an Indiana jury found Walgreen’s pharmacist Audra Withers liable for damages resulting from a disclosure of plaintiff Abigail Hinchy’s prescription history to Davion Peterson – a man who had a prior relationship with Ms. Hinchy but who subsequently became engaged to Ms. Withers. Walgreens, Ms. Withers’ deep-pocket employer, also was sued and held liable through the theory of *respondeat superior*.

Walgreen’s clearly had no knowledge of its rogue pharmacist’s selfish and childish flouting of privacy law and its own in-house policies protecting the confidentiality of customers. And it certainly did not stand to benefit in any way from its pharmacist’s actions. Nonetheless, this will cost the drugstore chain and its customers [\\$1.44 million](#) plus legal fees.



In refusing to hear Walgreen's appeal, Indiana's high court forsook its own jurisprudence on so-called *respondeat superior*, which had previously required a plaintiff to show that a defendant employer benefitted or stood to benefit from an employee's negligent or reckless conduct. Now Indiana employers may face costly lawsuits every time an employee commits even unforeseeable and thus unpreventable acts during any given workday. That won't be good for employers, and it won't be good for consumers who'll end up footing the bills for such litigation.

Indiana's decision looks even worse in light of a recent decision in this year's #1 Hellhole California. The [facts were quite similar](#) – a romantic rival released plaintiff Norma Lozano's medical records to a former boyfriend without authorization. Lozano claimed she was due \$1.25 million for emotional harm caused by the breach, but the jury disagreed. In a commonsense decision, jurors concluded that since her employer, UCLA Health Systems, did not itself release the medical records, it did not owe damages for emotional harm.

## MARYLAND APPELLATE COURT DISREGARDS 'ACTUAL MALICE' STANDARD FOR PUNITIVE DAMAGES

The Maryland Court of Special Appeals took it upon itself to [drastically change](#) long-established law requiring actual, not implied, malice for an award of punitive damages in cases involving intentional torts. The outlandish decision was appealed to the state's highest court, which heard [oral argument](#) in September 2015.

The case stemmed from a police car chase that ended with the police officer crashing into the suspect's motorcycle, killing the suspect. The chase lasted for several miles on one of the busiest highways in Baltimore. As the two crossed over the city/county line, the officer was told to stand down until back up arrived. He continued to follow the suspect onto an exit ramp where the accident occurred. The court found the officer liable for committing the intentional tort of battery, thus supporting an award of punitive damages.

The court stated the vocabulary in tort law has evolved and the term "actual malice" is no longer needed for intentional torts. The three-judge panel decided that until a reason for use of the actual malice standard "reveals itself... we will resolutely avoid the phrase." This notion that lower courts can negate certain portions of long-standing precedent on a whim is dangerous, and the high court should send a strong signal to lower courts that doing so is unacceptable. And if the high court ultimately aligns itself with this lower court decision, no one should be shocked when Maryland jurisdictions begin sliding precipitously toward futures as Judicial Hellholes.

## NEVADA SUPREME COURT ALLOWS MEDICAL MONITORING WITH NO EVIDENCE OF INJURY

At the end of December 2014 the Nevada Supreme Court overturned its own precedent and allowed a class action to seek medical monitoring as a remedy, regardless of whether the plaintiffs had a present physical injury. It effectively eliminated the traditional tort-law requirement that a plaintiff plead an actual injury in order to state a claim for negligence. This decision opens the Nevada courthouse doors to anyone who merely alleges that they *might* eventually be harmed because they *might* have come into contact with a dangerous product or substance.

The case, [Sadler v. PacifiCare of Nevada](#), alleged that the defendant HMO should have better screened its providers in the wake of a hepatitis outbreak. As a result of this decision, patients who had so far tested negative for hepatitis or who had yet to be tested, were allowed to claim negligence based on the need to undergo medical monitoring, despite showing no signs of injury.

In *Sadler* the Court limited its discussion only to the causation of injury and stated that the plaintiff's exposure to a toxic element and the increased risk of future injury were things the plaintiff would not have experienced *but for* the negligence of PacifiCare. The Court held that there is no requirement for the need for physical injury in such cases. [It concluded](#) that an individual has an interest in avoiding harmful exposures and in avoiding ongoing medical examinations, and that an intrusion upon that interest should be compensable.



## SOUTH CAROLINA SUPREME COURT UPHOLDS HUGE CONSUMER PROTECTION AWARD WITHOUT EVIDENCE OF ACTUAL DECEPTION

In February 2015 Ortho-McNeil-Janssen Pharmaceuticals, Inc., a Johnson & Johnson subsidiary formerly known as Janssen Pharmaceuticals, largely lost its appeal of a massive judgment stemming from its marketing of an anti-psychotic drug, Risperdal.

At trial in 2011 **Spartanburg County Circuit Judge Roger Couch** ordered the drug maker to pay \$327 million, saying it deceptively minimized links between Risperdal and diabetes and improperly claimed the drug was safer than competing medications. He assessed a \$300 penalty for every sample box of the drug that had been distributed, and he added a \$4,000 penalty for every educational “Dear Doctor” letter Janssen had sent and for each follow up call made to physicians.

The South Carolina Supreme Court recognized that the representations challenged by the state’s attorney general “likely had little impact on the community of prescribing physicians” and that there was an “absence of significant harm” to the public. Nonetheless, the court [held that](#), “although the State had the burden of proving Janssen’s representations had a tendency to deceive, the State was not required to show actual deception or that those representations caused any appreciable injury-in-fact...”

Citing a statute of limitations on civil penalties, the high court did reduce by half some of the penalties levied against the defendant. The court also lowered the per-box and per-call penalties substantially. But the remaining \$124 million award is still the largest penalty ever for violations of the South Carolina Unfair Trade Practices Act.

## TENNESSEE CIRCUIT COURT STRIKES DOWN LIMIT ON NONECONOMIC DAMAGES

In March 2015 **Hamilton County Circuit Court Judge W. Neil Thomas III** found unconstitutional the Tennessee Civil Justice Act of 2011’s limit on noneconomic damages. In [Clark v. Cain](#), Donald and Beverly Clark sought from Aimee Cain and AT&T compensatory damages, including \$22.5 million for “pain and suffering,” after being injured in a car accident. AT&T moved for partial summary judgment to dismiss any noneconomic damages in excess of \$750,000, per the statutory limit.

But Judge Thomas denied the defense motion and found the limit on noneconomic damages to be an unconstitutional violation of a plaintiff’s right to a jury trial. Only a handful of other states have found such commonsense statutory limits unconstitutional.

In October 2015 Tennessee’s Supreme Court [vacated](#) Judge Thomas’s decision, ruling he acted prematurely. The constitutionality issue is not “ripe” for consideration, the high court said, because a final award for noneconomic damages has yet to be determined. So the case will now continue at the trial court level with legal observers from across the country keeping close watch. Will Judge Thomas reconsider the desire of Volunteer State voters, as expressed through their elected lawmakers, to reasonably limit liability? Or will he still insist on imposing his judgment over the will of the people and force the high court to decide the matter on appeal?

## NEW HAMPSHIRE SUPREME COURT UPHOLDS RECORD VERDICT SCAPEGOATING DEEP-POCKETED ‘MTBE’ DEFENDANT

In October 2015 the New Hampshire Supreme Court [upheld a trial court](#) in scapegoating a deep-pocketed out-of-state defendant for alleged pollution that can only be fairly blamed on in-state businesses.

The case, *New Hampshire v. Exxon Mobil*, was [previously covered](#) by this report in 2013 when **Superior Court Judge Peter Fauver** repeatedly made [prejudicial rulings](#) in a trial that lasted more than three months. Tellingly, the



jury came back in [less than 90 minutes](#) with an astronomical [\\$236 million](#) verdict – the largest in the state’s history and one of the largest in the nation that year.

The defendant was found liable for groundwater contamination when gasoline that included a federally mandated gasoline additive known as MTBE (methyl tertiary-butyl ether) allegedly leaked from some local gas station owners’ underground storage tanks. But rather than pursue a case against station owners with relatively shallow pockets and the right to vote in the

Granite State, successive state attorneys general pursued the deep pockets of Exxon Mobil with help from private-sector plaintiffs’ lawyers who also supported the AGs politically.

Leaving aside the fact that state environmental authorities continually insist that drinking water throughout the state is safe, the high court nonetheless decided that the federal Clean Air Act’s mandate for gasoline additives and station owners’ responsibility to maintain their storage tanks were “irrelevant.”

Exxon Mobil is appealing to the U.S. Supreme Court.

# POINTS OF LIGHT

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

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

In its “Points of Light” section, the Judicial Hellholes report commends actions taken by judges, lawmakers, voters and even the media to stem abuses of the civil justice system not detailed elsewhere in the report. This year’s report highlights helpful media investigations in Louisiana; positive court decisions in Delaware, Nevada, Ohio, Texas, Kentucky, Florida and Texas; and positive civil justice reform enactments in 15 states.

## IN THE MEDIA

### LOUISIANA MEDIA HELP SHOW TRIAL LAWYERS’ ‘BUDDY’ THE DOOR

One of Louisiana’s top investigative journalists, **David Hammer** of WWL-TV in New Orleans, had in recent years consistently posed discomfiting questions to state **Attorney General James “Buddy” Caldwell**, [exposing](#) Caldwell’s notorious “Buddy System” for what it was – a cozy pay-to-play system wherein the AG doled out no-bid contracts worth many millions of dollars to some of his top campaign contributors” hired to run often speculative lawsuits that targeted deep-pocketed out-of-state defendants.



[The Advocate](#) newspaper of Baton Rouge and online news and commentary outlet [The Hayride](#) also deserve credit for following the trail of Caldwell and his trial lawyer buddies as closely as the bloodhounds chasing Sidney Poitier and Tony Curtis in “[The Defiant Ones](#)” (United Artists, 1958).

Louisiana voters exposed to the media’s Caldwell coverage, much of which was fed by [Louisiana Lawsuit Abuse Watch](#)’s original campaign finance research, chose not to reelect the incumbent in November 2015. Instead they elected challenger **Jeff Landry**, who has [committed](#) to running the attorney general’s office in a transparent fashion of which all Louisianans can be proud.

## IN THE COURTS

### DELAWARE SUPREME COURT REJECTS PHANTOM DAMAGES

In a [unanimous ruling](#) issued in June 2015 the Delaware Supreme Court prevented plaintiffs' lawyers and their clients from receiving windfalls generated by the allowance of "phantom damages." The court held that a plaintiff's recovery of medical expenses should be limited to the amount actually paid, not the amount initially billed. The portion of the claim written off by healthcare providers is not recoverable because the plaintiff was never required to pay it; therefore it cannot be considered part of the plaintiff's economic loss. The court noted that by calculating damages based on the billed amount, a plaintiff would receive compensation for harm that did not occur and would contradict general tort law principles.

Delaware joins several states that have rejected phantom damages either by statute or common law.

### FLORIDA JUDGE'S DISMISSAL SOBERS CLASS OF 'UNREASONABLE' CONSUMERS

In May 2015 the U.S. District Court for the Northern District of Florida produced an important win for Maker's Mark Whisky in a much watched consumer class action. Plaintiffs laughably alleged the brand's marketing and label references to "handmade" bourbon had misled them into believing no modern machinery was used in the distilling and bottling, and thus they were enticed to buy a product they would not have bought if they had known mechanized processes were involved.

Judge Robert Hinkle did not order breath tests for the lead plaintiffs and their lawyers, but he did soberly [refuse to entertain](#) their seemingly inebriated claim. He granted the Maker's Mark motion to dismiss, [stating](#): "[N]o reasonable person would understand 'handmade' in this context to mean literally made by hand. No reasonable person would understand 'handmade' in this context to mean substantial equipment was not used."

Judge Hinkle found all of the plaintiffs' claims unreasonable and likened the use of the word "handmade" to "smooth" in the context of marketing spirits. The words are mere puffery and any reasonable consumer understands that.



### KENTUCKY JUDGE CALLS PLAINTIFFS' LAWYERS 'DISINGENOUS, DISTURBING'

At a hearing in July 2015 Jefferson County Circuit Court Judge Judith McDonald-Burkman called out plaintiffs' lawyers from the Louisville-based firm of [Satterley & Kelley](#) for [failing to produce a claim](#) filed with an asbestos trust. In doing so, the judge called their actions "disingenuous" and "disturbing." The plaintiff's counsel involved in a lung cancer lawsuit continually denied having ever filed a claim with an asbestos trust. After over a year of litigation, the defendants became aware of such a claim and forced the issue.

In [declaring a mistrial](#), this real-life Judge Judy reprimanded the plaintiffs' attorneys for their deceitful ways, [saying](#), "You know, you're pregnant or you're not. You submitted a claim or you didn't." The judge found that the defendants had been harmed by the obvious deception and ordered a new trial to take place in early 2016.



With mounting revelations about [manipulation of exposure evidence](#) by plaintiffs' lawyers specializing in asbestos claims, it is imperative that judges, like the one in this case, continue cracking down on those who would corrupt our civil justice system and deny defendants a fair trial.

### KENTUCKY APPELLATE COURT: 'COFFEE IS HOT, AND HOT THINGS CAUSE BURNS'

In September 2015 the Kentucky Court of Appeals [affirmed the dismissal](#) of yet another dubious "hot coffee" lawsuit brought by a pro se litigant against McDonald's.

The customer (and litigant) in this case had ordered three drinks – two iced coffees and a hot coffee, making certain to order a "hot" coffee. After the McDonald's

employee placed the lid securely on all three drinks and placed the drinks in a carrier for our customer, she left the McDonald's to begin her day. Inexplicably, she tripped while carrying her coffees to her car, suffering burns to her right side. The sidewalk and the curb were in well-maintained conditions, with no cracks or lips on the sidewalk, curb or parking lot. Our customer admitted that the fall was entirely her fault, but alleged that McDonald's was negligent in keeping the hot coffee too hot.

The franchisee operating the McDonald's moved for summary judgment in the case, which the trial court granted. In affirming this dismissal, the Court of Appeals sensibly reminded the customer that "hot coffee is hot, and hot things cause burns." We're lovin' it.

### NEVADA SUPREME COURT UPHOLDS NONECONOMIC DAMAGES LIMIT

In October 2015 the Nevada Supreme Court [unanimously upheld](#) as constitutional the state's [\\$350,000 limit](#) on awards for noneconomic damages in medical malpractice or professional negligence lawsuits. The limit was first approved by referendum in 2004 when, according to the [Las Vegas Review Journal](#), voters "overwhelmingly approved the measure amid fears doctors would flee from the state because of high medical malpractice insurance costs." The law was since amended by the legislature to make the \$350,000 limit firm, "regardless of the number of plaintiffs, defendants or theories upon which liability may be based."

But responding to pre-trial motions in a wrongful death claim that alleged professional negligence and medical malpractice, a seemingly willful **Clark County District Judge Jerry Wiese** was determined to subject straightforward statutory language to his enlightened interpretation and ultimately find it unconstitutional as a denial of the right to a jury trial.

Thankfully, for the sake of access to affordable healthcare throughout the Silver State, the high court disagreed with all of Judge Wiese's reasoning, ordering his opinion vacated in its entirety. And leaving no wiggle room when the case goes to trial, the justices ordered that any eventual award for noneconomic damages be expressly limited in its entirety to \$350,000.

### OHIO SUPREME COURT REJECTS 'EMPTY SUIT' CONSUMER CLASS ACTIONS

In August 2015 the Ohio Supreme Court [ruled](#) that courts cannot certify class actions that include uninjured members, holding that "all members of a plaintiff class alleging violations of the Ohio Consumer Sales Practices Act . . . must have suffered injuries as a result of the conduct challenged in the suit."

The decision reversed a trial court's certification of a class action that included all purchasers of motor vehicles from a group of dealerships that used contracts containing an unenforceable arbitration provision. The plaintiff, who had a financing dispute with the dealership originally brought an individual lawsuit, but then expanded the claim into a massive class action. Although there was no evidence that other consumers had a dispute with the dealership or experienced a loss, the trial court found it had "discretion" to arbitrarily award people who were happily driving their cars \$200 each – a result at odds with Ohio's consumer protection law, which authorizes statutory damages only for individual claims.

After an intermediate appellate court affirmed the trial court's ruling, a 6-1 majority at the high court firmly reversed. The opinion by **Chief Justice Maureen O'Connor** quoted a Brooklyn Law Review article, [The Rise of 'Empty Suit' Litigation. Where Should Tort Law Draw the Line?](#), by ATRA General Counsel Victor Schwartz and his colleague Cary Silverman. It recognized that "[p]erhaps the most basic requirement to bring a lawsuit is that the plaintiff must suffer some injury. Apart from a showing of wrongful conduct and causation, proof of actual harm to the plaintiff has been an indispensable part of civil actions." For that reason, the court concluded, "all members of a class in class action litigation alleging violations of the [state's consumer protection law] must have suffered injury as a result of the conduct challenged in the suit." Hear, hear!



## TEXAS SUPREME COURT RETIRES OUTDATED 'SEATBELT RULE'

The Texas Supreme Court issued a [unanimous opinion](#) that reversed 40 years of bad precedent and dramatically affected the defense of vehicular personal injury lawsuits. Specifically, the court decided to end the outdated “seat belt rule,” which had precluded defendants from adducing evidence at trial that showed plaintiffs failed to use seatbelts and thus contributed to their own injuries. Now, after decades of widespread public education about the virtues of seatbelt use and laws mandating their use, such evidence will be appropriately admissible in Texas courts.

**Justice Jeff Brown** delivered the court’s opinion, writing that because seat belts have become an unquestioned part of daily life, “our prohibition on seat-belt evidence [is] an anachronism. The rule may have been appropriate in its time, but today it is a vestige of a bygone legal system and an oddity in light of modern societal norms.”



## TEXAS TRIAL COURT PROMPTLY APPLIES ASBESTOS TRUST TRANSPARENCY LAW



In June 2015 Texas **Governor Greg Abbott** signed into law [H.B. 1492](#), requiring transparency of asbestos bankruptcy trusts. The law went into effect on September 1 and, just three days later, **Judge Mark Davidson**, of the 11th Judicial District in Harris County, immediately applied the law in a pretrial hearing. When discussing applications made by the plaintiff to other asbestos bankruptcy trusts, he stated that he would not allow the plaintiff to file an application to a product’s trust when he does not know what product his client might have used. He stated, “while he can probably pick a product and get some money, I’m not going to encourage fraudulent bankruptcy trust findings because of the new statute.”

A still small but growing number of states have enacted similar laws, and a federal bill known as the [Furthering Asbestos Claim Transparency \(FACT\) Act of 2015](#) was passed by a 19-9 vote of the Judiciary Committee of the U.S. House of Representatives in May 2015.

## IN THE LEGISLATURES

Fifteen states adopted significant, positive civil justice reforms during their 2015 legislative sessions. Below, in alphabetical order, is a state-by-state listing of some of these new laws:

**Alabama** lawmakers overturned the state supreme court’s terrible “innovator liability” decision in *Wyeth v. Weeks*, making clear that a manufacturer is not liable, under any theory, for damages resulting from a product not designed, manufactured, sold or leased by the by that manufacturer ([S.B. 80](#)).

**Arizona** passed three reforms: One prevents a person found guilty of intentionally causing the death of an individual from wrongful death benefits ([H.B. 2374](#)); another strengthens notice and transparency requirements in asbestos claims ([H.B. 2603](#)); and finally, if a plaintiff has been granted a filing fee deferral or waiver and is later deemed a vexatious litigant, the court shall order the plaintiff to pay the fees and costs ([S.B. 1048](#)).

**Arkansas** passed two reforms: One places safeguards on state hiring of private lawyers on a contingency-fee basis ([S.B. 204](#)); and the other places the lawsuit lending industry under the state’s usury laws ([S.B. 882](#)).

**Indiana** passed three reforms: One codifies a landowner’s duty to trespassers to only refrain from causing willful or wanton injury ([S.B. 306](#)); another limits the recovery of an uninsured motorist for noneconomic damages to instances where the liable driver was convicted of a crime ([H.B. 1192](#)).

**Maryland** limited the appeal bond amount a defendant is required to pay to secure an appeal to \$100 million ([H.B. 164](#)).

**Missouri** replaced common law medical malpractice causes of action with statutory medical malpractice causes of action, and limited noneconomic damages to \$400,000 or \$700,000 in catastrophic cases and wrongful death cases. ([S.B. 239](#)).

**Nevada** passed three reforms: One places safeguards on state hiring of private lawyers on a contingency-fee basis ([S.B. 244](#)); another limits the appeal bond amount a defendant is required to pay to secure an appeal to the lesser of the judgment amount or \$50 million, with a small business exception of \$1 million or the judgment amount ([S.B. 134](#)); and the third restores and codifies the traditional common law duty of limited care for landowners towards trespassers ([S.B. 160](#)).

**Ohio** placed safeguards on state hiring of private lawyers on a contingency-fee basis ([S.B. 38](#)).

**Oklahoma** enacted a law providing for the admissibility of the full amount paid as the full amount in question regarding medical bills for damages calculations ([S.B. 789](#)).

**South Carolina** codified a landowner's duty to trespassers to only refrain from causing willful or wanton injury ([H.B. 3266](#)).

**Texas** passed two reforms: One strengthens notice and transparency requirements in asbestos claims ([H.B. 1492](#)); and the other limits forum shopping ([H.B. 1692](#)).



**Utah** passed two reforms: One limits the amount of damages recoverable in a personal injury action when the plaintiff dies from unrelated causes prior to judgment or settlement ([H.B. 34](#)); and the other places safeguards on state hiring of private lawyers on a contingency basis ([S.B. 233](#)).

**West Virginia** lawmakers, after a historic shift in political control of both the Senate and House, passed many meaningful civil justice reforms, all of which are covered in some detail in the Watch List section of this report on p. 34.

**Wisconsin** repealed its False Claims for Medical Assistance Act. ([S.B. 21](#)).

**Wyoming** codified its common law duties of landowners to trespassers. ([H.B. 108](#)).

# CLOSER LOOKS

## FEDERAL MULTIDISTRICT LITIGATION

Congress enacted [28 U.S. Code § 1407](#) to allow for the consolidation of state and federal cases involving common issues of fact. [This provision](#), multidistrict litigation (MDL), was intended to be a tool of judicial economy by allowing a single U.S. District Court judge to handle pretrial proceedings for matters such as when multiple plaintiffs sue over similar injuries alleged to have been caused by a single product or when numerous claims are brought arising from a single catastrophic event. As intended, MDL judges would handle matters such as fact and expert discovery, pleading motions, summary judgment and pretrial settlement. When a single judge handles these matters, the overall burden on the civil justice system is reduced, and uniformity in these matters increases, as well. For the process to work properly, however, all pretrial matters must be fully resolved before a trial commences. (Certain states such as California and New York also have set up MDL-like mechanisms to handle state specific issues, as referenced in earlier sections in the report.)

MDL judges are selected by a panel of seven judges appointed by the Chief Justice of the United States. Other judges can transfer what they believe to be appropriate cases to a MDL judge. Upon completion of the MDL process, cases are expected to return to the “transferor” judge for trial or other resolution.

While the overall number of civil cases pending in U.S. federal courts has remained relatively constant during the last 15 years, the share of cases included in MDLs has grown rapidly. From 2002 through 2014, the percentage of all federal civil cases included in MDLs more than doubled, from [16% to 36%](#). And after [removing prisoner and Social Security](#) cases, MDLs now account for [nearly half](#) of all federal civil cases.

### PRESSURE TO SETTLE CASES

The statute establishing the MDL process directs MDL judges to return transferred cases to the transferor court for trial or other resolution. There are exceptions, such as when the case originated in the MDL court, the parties agree to trial before the MDL judge or where the MDL judge applies for an inter-circuit assignment. But recent data indicate that cases most often terminate in the MDL court. Some believe that MDL judges are inclined to push for settlement of all cases. Settlement in many instances may be appropriate, but these data strongly suggest that the MDL process has strayed from the purpose articulated in the statute, particularly when judges allow meritless cases to be “lumped in” with meritorious cases for settlement purposes.

What some might refer to as the “[settlement culture](#)” of MDLs can be traced to a frequent tactic of the personal injury bar: flooding an established MDL with many additional claims in order to increase the judge’s docket substantially. Note also that there is no “[gatekeeper](#)” function in this process. Cases that are strong candidates for significant awards are mixed in with weak cases. For the plaintiffs’ lawyer, there truly is “strength in numbers” as judges always want to keep their caseload numbers moving in a downward direction. The sheer volume of a judge’s caseload can be a powerful incentive to settle cases, regardless of the merits or where a matter is in the litigation lifecycle

### PLAINTIFF LAWYER ADVERTISING AND LEAD GENERATORS



The number of claims that become part of an MDL can be inflated through online and TV advertising by “[lead Generators](#)” and personal injury law firms. Data from X-Ante demonstrate that significant sums are expended for this purpose. For example, firms and entities generating claims against GlaxoSmithKline’s Zofran, an anti-nausea medication, spent [more than \\$13 million](#) on advertising between January 1 and October 15 of 2015. These ads ran



despite the fact that there has been very little litigation involving this product, which was approved by the FDA in 1991, and the FDA just recently rejected a “citizen petition” calling for changes in the product’s carefully regulated label. Thus one can see that, in this instance, the real objective of the trial bar is to “pump up” the number of cases involving the drug, regardless of the merit. Again, the higher the number of cases climbs, the greater the pressure to settle them.

GSK’s experience is similar to one chronicled in this [report last year](#). In litigation involving [pelvic mesh claims](#), lawyers’ advertising expenditures were higher than those for the most heavily marketed video game in 2015. Also noted last year was information about fraud in lead generation. In one particularly egregious case, [a registered nurse](#) allegedly told a phone solicitor that she had not even had mesh implant surgery, but the response was, shockingly, encouragement to lie about her own situation so she could collect “\$30,000 to \$40,000”.

### ‘BELLWETHER’ PROCESS

When the MDL process is concluded, judges often follow a practice of selecting “bellwether” claimants for trial. The selection process can take many forms, including allowing each side to identify cases for trial. In some instances, however, plaintiffs’ lawyers will simply dismiss the cases chosen by the defendant (or even cases selected by plaintiffs themselves) on the theory that they will be the weakest with respect to success on the merits. The plaintiffs’ lawyers sometimes select what they perceive to be their “best” cases as bellwethers, and when judges have not performed any sort of gatekeeping function, neither they nor the parties are in a position to know whether the bellwethers are truly representative of other claimants in the pool.

A recent example of this type of process involved Johnson & Johnson in the Northern District of Texas. With over [8,000 cases](#) on the docket, **Judge Ed Kinkeade** ordered both sides to identify 10 cases each as bellwethers. When the defendant [won the first](#) of these cases at the end of last year, the judge [amended his case management order](#) to cut the list of cases down to six. It has been suggested that some rulings by Judge Kinkeade were unfair to the defendant, including his [rejection of a motion](#) to disqualify a family physician as an expert testifying on the marketing of orthopedic devices, ignoring applicable federal evidentiary standards.

### THE GOOD WITH THE BAD...

Not all MDL procedures lead to the kinds of problems and challenges described above. As an example, **Judge Eduardo Robreno** of the U.S. District Court for the Eastern District of Pennsylvania oversaw a [massive asbestos MDL](#). Judge Robreno performed the necessary [gatekeeper](#) function to ensure that valid and strong claims went forward without letting plaintiffs’ lawyers inflate the docket with weak cases. The judge [stated](#), “The lawyers knew I wasn’t there to clean house or pressure defendants to settle cases en masse, but to get the litigation moving again and let the lawyers themselves make decisions in the best interest of their clients.” At the end of his MDL process, Judge Robreno remanded most of the 2,000 remaining cases (out of an original 180,000) back to the transferor courts.

In a similar situation, **Judge Kathleen M. O’Malley** of the U.S. District Court for the Northern District of Ohio managed the [MDL involving welding fumes](#). As Judge Robreno had in Pennsylvania, Judge O’Malley issued [Lone Pine orders](#), which required each plaintiff to prove both exposure to the product at issue and proof of diagnosis by an independent physician. By doing this, both judges ensured that legitimate claims moved forward and defendants were treated fairly.

### CONCLUSION

The MDL as a procedure is not a problem, but the abuse of it is. Judges must recognize that, as with individual cases, this procedure does not alter their responsibility to perform the gatekeeper function for individual claims. The *Lone Pine* order can go a long way to ensuring that legitimate claims move forward while those that are meritless do not. The following are examples of [additional procedures](#) that are necessary to ensure that MDL cases are fully reviewed and appropriate to go to trial:

- Direct judicial involvement in the overall discovery process and, in particular, discovery disputes;
- Arbitration or mediation processes that represent balanced efforts to resolve disputes without the expense or delay of a trial (helping to reduce judicial dockets); and

- Full resolution of all key pretrial issues including summary judgment and review of disclosures required for expert witnesses.

To accomplish MDLs’ intended purpose, judges should treat all claims before them as individual cases, not as matters to be lumped together with “one size fits all” procedures. Defendants’ rights should be fully protected so that they can exercise them as they see fit while legitimate claims that have been appropriately scrutinized move forward to a fair resolution. This must be the only priority for judges, even as they confront ballooning dockets due to massive expenditures for advertising and marketing by personal injury lawyers.

## AMERICAN LAW INSTITUTE

The [American Law Institute](#) (ALI) was established in 1923 “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” These are certainly worthy objectives, and the membership of the organization, carefully selected from the elite leadership of the legal profession – judges, lawyers, law professors, and law school deans – has historically provided guidance for the profession and development of the law.

The ALI publishes treatises, known as [Restatements](#), with the [intent](#) to “clarify, modernize, and otherwise improve the law.” The Restatements summarize state common law and the legal principles articulated in judicial opinions from around the country. Judges often look to these Restatements when making decisions and accord them great deference, as though they had the force of statute or precedent. Some of the ALI’s most famous Restatements, including the Restatement (Second) of Torts; Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm; Restatement Third, Torts: Products Liability; and Restatement (Second) of Contracts have had a significant influence on matters of interest to the ATRF. The ALI also publishes [Principles of the Law](#), which are meant to influence legislators and guide them when drafting legislation.

The ALI has long been held out as the gold standard for positive guiding developments in the law. But recently the Institute has at times deviated in a troubling way from its traditional approach. Rather than simply restating and summarizing the law, it has proposed dramatic changes in key, long established areas that have stood the test of time. The rationale for such substantive changes is currently the subject of speculation. Is the type of solid legal grounding that served as the basis for past Restatements giving way to new agendas for dramatic change?

### TRESPASS

Consider, for example, the [ALI’s Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm](#), which was approved in 2012. This Restatement included a new section pertaining to the liability of land possessors with respect to trespassers. Section 51 of the new Restatement upended the longstanding common law approach by recommending that courts impose a duty on land possessors to exercise reasonable care for all entrants on their land, including unwanted trespassers. This was a drastic change from settled law and the previous Restatement, which exempted land possessors from liability for injuries suffered by a trespasser except in limited circumstances. The new Restatement contains an exception for harms to “flagrant trespassers,” but no definition was provided for that ambiguous term. It is worth noting that the ALI reporter for this project co-authored an article with a leading member of the personal injury bar highlighting this development, as well as other liability-expanding provisions in the Restatement, in the leading publication of the trial bar. See Michael D. Green & Larry S. Stewart, *The New Restatement’s Top 10 Tort Tools*, Trial, April 2010.

As extraordinary as this proposal was, however, the response to it by state legislatures has been equally dramatic and unprecedented. Rather than waiting for the appellate courts in their states to adopt this provision, legislators in 21 states (and counting) have stepped in and codified current law to prevent courts from doing what they have done for nearly a century: adopting a provision of a new Restatement when the opportunity presented itself.



Instead, legislators and governors used their authority to reject Section 51. It is the first time in the history of the ALI that state lawmakers have taken affirmative steps to prevent the adoption of an ALI Restatement standard.

## INTENTIONAL TORTS

Another example of the ALI publishing a dramatic change in settled law took place in May 2014 when ALI membership tentatively approved (by a very slight margin) a [substantial change](#) to the traditional definition of the intentional tort of assault and battery. This is part of a new ongoing ALI project, the Restatement of the Law Third, Torts: Intentional Torts to Persons. According to the new Restatement, battery should be defined as any contact with another person that “offends a reasonable sense of personal dignity” or – the new subjective element – contact that is highly offensive to another person’s “unusually sensitive sense of personal dignity...”

So once again, pending a final vote when the entire project is completed, the ALI may approve a liability-expanding Restatement. In this instance, such an expansion would have far-reaching effects, including in the area of workers’ compensation. The traditional rule is that employees alleging intentional torts in the workplace can seek a remedy outside of workers’ compensation and sue their employer under tort law. With a new and far broader definition for assault and battery, however, the ability of employees to do just that will expand significantly. And with the prevalence of “micro-aggressions” and “trigger warnings” now on our nation’s campuses, one can imagine this theory being used as a basis for expanding liability of colleges and universities.

As they did with trespass law, state lawmakers may feel pressure to preempt the ALI on intentional torts were its members ultimately to endorse with a final vote the expansion being contemplated. Enactment of statutes will directly ensure that courts will not have the chance to adopt this proposal.

## NEW PROJECTS

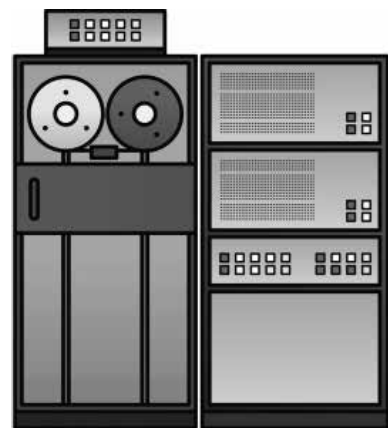
The ALI is currently working on [three new projects](#) of interest – a Restatement of Consumer Contracts, a Principles of the Law project on Data Privacy, and a Restatement of the Law of Liability Insurance.

The Restatement of Consumer Contracts raises particular concerns because, as the title suggests, the ALI is looking to create a separate set of laws for contracts made with consumers. Historically, contracts law has been unitary with rules making no distinctions based on the entities or individuals involved unless otherwise specified. Further, at this stage the project is relying more on statutes, such as Unfair and Deceptive Trade Practices Acts, than on case law. To create an entirely new area of law raises many concerns.

The Data Privacy project will establish an important guide for legislators at all levels of government and, if successful, help provide reasoned balance in this rapidly changing area of our lives. No other organization has undertaken this type of work nor has the power and influence of the ALI. This Principles project will be very influential. Thus, it is essential that it is completed in a fair and balanced way.

The Restatement of the Law of Liability Insurance project is raising concerns about the development of legal rules that are not adequately supported in existing case law. In several respects the project appears aimed toward subjecting insurers to increased liability and diluting duties owed by policyholders, so it warrants close watching and efforts to tie proposals to existing case law.

The ALI can and should help to shape the law in a positive way that serves the broader interests of justice. It does so when it follows its traditional path of truly *restating* existing law and articulating reasonable ways by which the law can change incrementally. The recent developments with regard to trespass and battery, however, raise significant concern. The ATRF and others will be monitoring the work product of the ALI to determine whether it follows the approach dating back over 90 years, which made its work the “gold standard” for modernizing and improving the law, or continues to deviate from that approach by serving as an agenda-driven advocate for expansion of civil liability.



# THE MAKING OF A JUDICIAL HELLHOLE:

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**QUESTION:** What makes a jurisdiction a Judicial Hellhole?  
**ANSWER:** The judges.

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

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

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

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

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

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

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

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

## PRETRIAL RULINGS

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

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

### DECISIONS DURING TRIAL

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

### UNREASONABLE EXPANSIONS OF LIABILITY

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

### JUDICIAL INTEGRITY

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







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

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