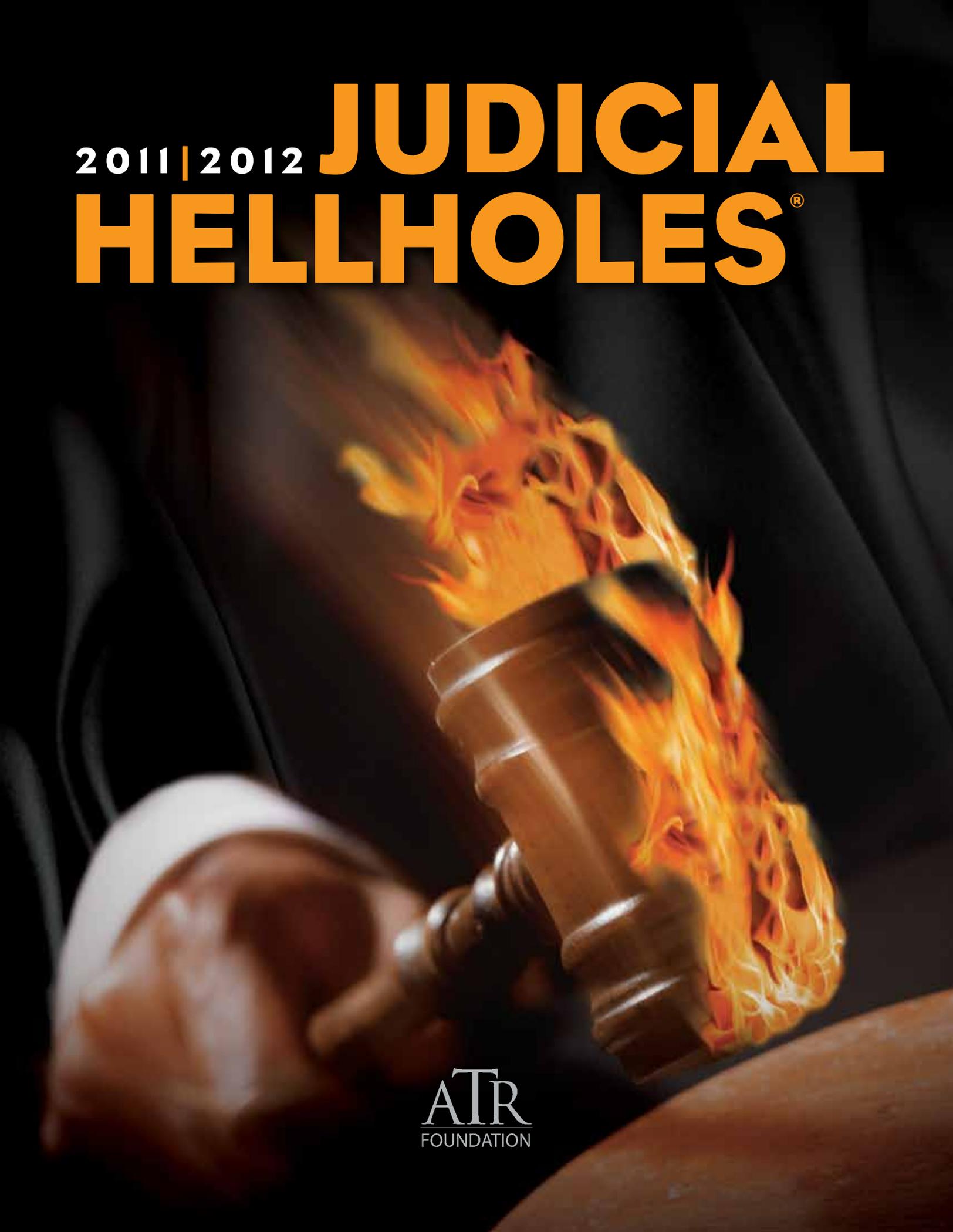


2011 | 2012 **JUDICIAL  
HELLHOLES<sup>®</sup>**



ATR  
FOUNDATION

*“What I call the ‘magic jurisdiction,’ [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges ... and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. ... Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or law is.”*

—Richard “Dickie” Scruggs, legendary Mississippi trial lawyer who built an empire of influence suing tobacco companies, HMOs and asbestos-related companies, but who has since been disbarred and sentenced to federal prison after pleading guilty to conspiracy in an attempt to bribe a judge.

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# PREFACE

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Since its inception in 2002, the American Tort Reform Foundation's *Judicial Hellholes*<sup>®</sup> program has documented in annually published reports various abuses within the civil justice system, focusing primarily on jurisdictions where courts are radically out of balance.

Traditionally, **Judicial Hellholes have been considered places where judges systematically apply laws and court procedures in an unfair and unbalanced manner**, generally against defendants in civil lawsuits. More recently, the lawsuit industry has begun aggressively lobbying for *legislative* and *regulatory* expansions of liability, as well, so Judicial Hellholes reporting has evolved to include such law- and rule-making activity, much of which can affect the fairness of a state's lawsuit climate as readily as judicial actions.

In fact, as the nation's economic troubles continued and state lawmakers and governors across the country sought to make their respective states more competitive and attractive to employers, 2011 proved to be a banner year for positive, liability-limiting tort reforms. Accordingly, this year's Judicial Hellholes report offers much credit to such policymakers in an unusually sizeable "Points of Light" section.

Turning back to the judicial branch, most judges do a diligent and fair job for modest pay. Even in Judicial Hellholes jurisdictions, including some that have received national attention, the clear majority of judges are fair, and the negative publicity can be blamed on a few bad apples. Because judges generally set the rules in personal injury lawsuits, and those rulings weigh so heavily on the outcomes of individual cases, it may only take one or two judges who stray from the law to sully the reputation of an entire jurisdiction.

Though entire states may occasionally be cited as Hellholes, it is usually only specific counties or courts in a given state that warrant this citation. And, importantly, jurisdictions discussed in this report and online at [www.judicialhellholes.org](http://www.judicialhellholes.org) are not the *only* Judicial Hellholes in the United States; they are simply among the *worst*.

This annual Judicial Hellholes report compiles the most significant court rulings and legislative actions over the course of the year as documented in real-time online. The report also reflects feedback gathered from American Tort Reform Association (ATRA) members and others with firsthand experience in these jurisdictions. Because the program has become widely known, ATRA also continually receives information provided by a variety of additional sources through its Judicial Hellholes website and other means. After interviewing such sources, Judicial Hellholes reporters work to confirm the information with independent research of publicly-available court documents, judicial branch statistics, press accounts, and various studies.

To the extent possible, this report specifically explains how and why particular courts, laws or regulations can produce unfair civil justice outcomes in the jurisdictions cited. These cities, counties or judicial districts are frequently identified by ATRA members and other individuals familiar with the litigation. But because sources for Judicial Hellholes information may fear lawsuits or other retaliation in these jurisdictions, they sometimes prefer to have their names and cases kept out of the program's reporting.

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

## ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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

# EXECUTIVE SUMMARY

## 2011 | 2012 JUDICIAL HELLHOLES®

- 1 PHILADELPHIA
- 2 CALIFORNIA
- 3 WEST VIRGINIA
- 4 SOUTH FLORIDA
- 5 MADISON AND ST. CLAIR COUNTIES, ILLINOIS
- 6 NEW YORK CITY AND ALBANY, NEW YORK
- 7 CLARK COUNTY, NEVADA
- 8 MCLEAN COUNTY, ILLINOIS

## JUDICIAL HELLHOLES 2011/2012

The 2011-2012 report shines the spotlight on eight areas of the country that have developed reputations as **Judicial Hellholes**:

**1 | PHILADELPHIA.** Philadelphia hosts a disproportionate share of Pennsylvania's lawsuits and, as demonstrated by this report, forum shopping for plaintiff-friendly courts within the state is primarily a "Philly phenomenon." Of greatest concern is the Complex Litigation Center (CLC) in Philadelphia, where judges have actively sought to attract personal injury lawyers from across the state and the country. Plaintiff-friendly law, expedited procedures, a reputation for a high plaintiff-win rate and generous awards contribute to Philadelphia's status as a venue of choice. Success in addressing the flow of medical liability cases to Philadelphia and the legislature's recent limiting of a defendant's liability to its share of fault provide some hope for the future.

**2 | CALIFORNIA.** While Los Angeles historically earned a reputation as the most plaintiff-friendly jurisdiction in the Golden State, small business-destroying

lawsuits filed by professional plaintiffs have spread throughout California. These individuals have filed thousands of extortionate claims against popular family-owned restaurants, book stores and salons, demanding thousands of dollars to settle allegations of technical violations of disabled access standards, and California's courts have enabled the extortion. Recent court decisions demonstrate that California remains friendly to consumer lawsuits (even after voters attempted to rein in abuse), class actions, and high awards. The California Supreme Court deserves praise for its recent rejection of "phantom damages," but the adverse effect of its late 2010 decision allowing local government officials to hire private contingency-fee lawyers to enforce state law is now becoming evident.

**3 | WEST VIRGINIA.** West Virginia's high court reached well-reasoned decisions this year when interpreting its consumer protection law and upholding the limit on subjective pain and suffering damages in lawsuits against healthcare providers. Such rulings, while helpful, do not address core problems in West Virginia's civil justice system, such as its lack of full appellate review, liability rules that are out of the mainstream, and excessive awards. West Virginia continues to be a haven for weak lawsuits by plaintiffs from other states. The state's attorney general remains under fire for running his office as if it were a private personal injury law firm and distributing litigation settlements to programs and organizations of his choosing, rather than the state and its taxpayers.

**4 | SOUTH FLORIDA.** South Florida, known for its aggressive personal injury bar, is the national epicenter of excessive and fraudulent automobile insurance litigation and tobacco lawsuits. The state's insufficiently rigorous standard for admission of expert testimony contributes to its reputation as a Judicial Hellhole. While the state legislature has made steady progress in reasonably limiting liability in certain areas, the Florida Supreme Court's record of striking down such legislative efforts leaves observers cautiously optimistic at best.

**5 | MADISON AND ST. CLAIR COUNTIES, ILLINOIS.** These two counties in the Metro East have come a long way since hitting rock bottom, but there are concerns of a relapse. For instance, this year the Illinois Supreme Court reversed a Madison County ruling that, after a one-sided trial that favored the plaintiff, would have imposed new liability on manufacturers. Mid-level appellate courts threw out two class actions certified by Madison County judges. And a tobacco lawsuit that had resulted in a \$10.1 billion verdict may be back on the Madison County docket. Similarly, after significantly culling its asbestos docket in recent years, Madison County is again the national epicenter for such lawsuits. Only about 1 in 10 asbestos claims have any connection to the area. Neighboring St. Clair County has also emerged as a magnet for mesothelioma claims and hosts lawsuits against pharmaceutical companies from around the country.

**6 | NEW YORK CITY AND ALBANY, NEW YORK.** The mayor of the Big Apple and its chief legal officer plead for reforms that would reduce the massive liability payouts that cost taxpayers over \$500 million annually, but state legislators in Albany remain wedded to the plaintiffs' bar. The same expansive liability that burdens the city also takes its toll on New York's businesses, such as the photography studio being sued by a groom who was not satisfied with his wedding album and sought to re-create the wedding after a divorce, or the White Castle patron who brought a federal case against the restaurant when, at 290 pounds, he could no longer comfortably fit into its booths. Offering a minor dose of sanity, New York's highest court upheld dismissal of a lawsuit, featured in the 2010-2011 report, wherein one golf pal sued another after being struck by a bad shot.

**7 | CLARK COUNTY, NEVADA.** Since Clark County's May 2010 verdict that pinned a half-billion dollars in liability for an endoscopy clinic's unsanitary, illegal practices on a drug maker, the hits just keep on coming. Even as separate state and federal criminal prosecutions proceed against the clinic's owner, Clark County juries returned two more multimillion-dollar awards against the company under the theory that it should have offered a widely-used anesthetic solely in smaller vials to limit the potential for reuse, despite a clear warning on the label against use for multiple patients. Some Clark County judges have kept jurors from learning the full scope of the clinic's role in the resulting Hepatitis outbreak when considering the drug maker's responsibility.

**8 | MCLEAN COUNTY, ILLINOIS.** After a year of observation on the "Watch List," McLean County advances to a Judicial Hellhole due to its unique practice of allowing lawsuits that seek compensation for asbestos-related injuries, even when the plaintiff did not come in contact with the named defendant's products. These "civil conspiracy" lawsuits target deep-pocket companies with allegations that they had some role in concealing the dangers of asbestos from the public decades ago. One such McLean case recently resulted in a stunning \$90 million verdict.

## WATCH LIST

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

- ▶ The **Eastern District of Texas** is known for its growing, costly patent litigation. It is rare for this report, which traditionally focuses on state courts, to include a federal district court.
- ▶ **Cook County, Illinois** falls from the Judicial Hellholes list due to a relatively quiet year with respect to the types of unsound rulings and extraordinary verdicts that have cemented its Hellholes reputation in the past.

**EASTERN DISTRICT OF TEXAS**

**COOK COUNTY, ILLINOIS**

**SOUTHERN NEW JERSEY**

**ATLANTIC COUNTY, NEW JERSEY**

**FRANKLIN COUNTY, ALABAMA**

**SMITH COUNTY, MISSISSIPPI**

**LOUISIANA**

- ▶ **Southern New Jersey** joins the Watch List this year, thanks in part to local employers' fears of lawsuits there.
- ▶ **Atlantic County, New Jersey**, a magnet for massive lawsuits against the very drug makers that form the state's economic backbone, drops from a full Judicial Hellhole to the Watch List, given a number of defense verdicts suggesting that defendants' previously miniscule chances of winning may have improved somewhat.
- ▶ **Franklin County, Alabama's** \$61 million verdict in favor of a local manufacturer against an out-of-state software company is reason to closely watch this rural jurisdiction.
- ▶ **Smith County, Mississippi** awarded the largest single-plaintiff asbestos verdict in U.S. history, a \$322 million award that the defendant has challenged on the basis that the presiding judge did not disclose that his parents had previously settled asbestos claims with one of the defendant companies, and his father had a pending claim in a nearby court.
- ▶ **Louisiana** has developed a cottage industry of lawsuits against energy companies, replete with unsubstantiated claims of environmental contamination. Over 250 of these lawsuits have impacted about 1,500 companies with many choosing to settle rather than risk unpredictable and financially devastating jury verdicts in local courts.

## DISHONORABLE MENTIONS

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The report awards **Dishonorable Mentions** to the **Mississippi Supreme Court** for an unsound ruling that abandons a core principle of product liability law, and to the **Arkansas Supreme Court** for striking down the state's perfectly reasonable statutory limit on punitive damages enacted in 2003. An appellate court and the **Missouri Supreme Court** are also criticized for letting stand a shameless class-action coupon settlement.

## POINTS OF LIGHT

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

- ▶ **State legislatures enacted nearly 50 civil justice reforms in 2011.** These included comprehensive tort reform packages in Wisconsin, Tennessee, Alabama, and North Carolina, and more targeted reforms in Arizona, Florida, Indiana, Kentucky, Missouri, North and South Dakota, Oregon, Pennsylvania, South Carolina, and Texas. Examples of such reforms include strengthening standards that guard against junk science in the courts, ensuring that courts do not broaden liability of landowners to those who are injured while trespassing on their property, limiting the amount or interest rates on pre- and post-judgment bonds, and requiring state officials to make certain disclosures when hiring private lawyers to represent the state.
- ▶ Sound rulings by several courts, some of which are located in states that otherwise have reputations as inhospitable to civil defendants, are particularly worthy of note.
  - The **California Supreme Court** rejected inflated damages for the costs of medical treatment.
  - The **District of Columbia's** highest local court found that, despite the broad language of the city's consumer protection law, the basic principle that a person must be harmed before bringing a lawsuit applies.
  - The **Illinois Supreme Court** threw out a Madison County ruling that established a new and costly duty for manufacturers to warn consumers of remote risks of injury long after their purchase of the product.
  - The **West Virginia Supreme Court of Appeal** upheld the state's limit on subjective pain and suffering awards in cases brought against healthcare providers and facilities.
  - The **U.S. Court of Appeals for the Fourth Circuit** reinstated a suit against a personal injury law firm alleging that attorneys engaged in a scheme to file in West Virginia courts fabricated asbestos claims with no factual basis.

# JUDICIAL HELLHOLES

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## PHILADELPHIA, PENNSYLVANIA

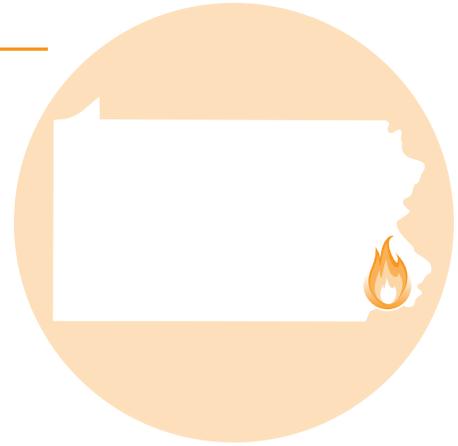
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Plaintiffs' attorneys are drawn to Philadelphia courts because they believe their clients will receive favorable treatment in the way the laws are administered, essentially getting a better deal there than they would likely get at home in front of their local judges and juries.

### FORUM SHOPPING: THE PHILLY PHENOMENON

Pennsylvania law provides significant flexibility to plaintiffs' lawyers as to where to file their cases. For example, Pennsylvania law permits claims against businesses anywhere in the state that they conduct more than incidental or isolated business activity. In a 2009 ruling, a Pennsylvania court [candidly acknowledged](#) that "Pennsylvania does not forbid 'forum shopping' per se – to the contrary, our venue rules give plaintiffs various choices of different possible venues, and plaintiffs are generally free to 'shop' among those forums and choose the one they prefer." While courts can transfer or dismiss cases "for the convenience of parties and witnesses," Pennsylvania judges place a [heavy burden](#) on the defendant to present detailed information proving that the plaintiff's choice of court is "oppressive or vexatious." Such requests are often [denied](#), even when there is little or no connection between the lawsuit and the county in which it is filed.

Philadelphia is clearly the plaintiffs' choice – it has nearly twice the litigation per capita of other Pennsylvania counties, according to [court statistics](#) and census data. While there are a handful of other counties that have a disproportionately high number of lawsuits relative to their populations, forum shopping in Pennsylvania appears to be primarily, if not exclusively, a Philadelphia phenomenon. One might write this discrepancy off to cities' higher concentration of lawyers and businesses, being more convenient for litigating claims, or arguably more plaintiff-friendly jury pools. Statistics suggest, however, that Philadelphia's disproportionately large civil docket is not necessarily an urban versus rural/suburban issue. When excluding Philadelphia, Pennsylvania's urban counties averaged about the same amount of civil cases docketed per capita as [rural areas](#). Lancaster, the least favored of the urban counties, had one-third the per capita caseload of Philadelphia.



### PLAINTIFFS' LAWYERS EXPECT MORE FAVORABLE TRIAL OUTCOMES

Plaintiffs' lawyers in Philadelphia courts act differently than those in other areas of Pennsylvania and in other states. According to a recent study, "[Are Plaintiffs Drawn to Philadelphia's Civil Courts? An Empirical Examination](#)," published by the [International Center for Law & Economics](#), Philadelphia courts host an especially large number of cases and have a larger docket than expected. Furthermore, the report indicates, Philadelphia plaintiffs are less likely to settle their cases before trial than are non-Philadelphia plaintiffs, and they are disproportionately likely to prefer jury trials. These findings are consistent with a conclusion that Philadelphia courts demonstrate a marked and meaningful preference for plaintiffs.

A [legislative effort](#) to reduce litigation tourism to Philadelphia and elsewhere in the state stalled in the Pennsylvania General Assembly this year but is expected to be renewed in 2012.

### THE COMPLEX LITIGATION CENTER: EFFICIENCY OVER FAIRNESS?

As highlighted in the 2010/2011 Judicial Hellholes report, the court's Complex Litigation Center (CLC) is also a major factor in the flow of cases to Philadelphia. Touted by some as a "[national model](#) for mass torts litigation,"

the CLC handles mass tort litigation, such as pharmaceutical and asbestos cases. A rigid mandate to bring mass tort cases to [trial within two years](#) of filing may contribute to the attractiveness of the CLC to plaintiffs from across the country. Philadelphia Common Pleas Judge Sandra Mazer Moss has said that nonresident plaintiffs file in Philadelphia “because they know they can get a trial in 18 months to two years.” Philadelphia Common Pleas Judge William J. Manfredi, supervising judge of the civil section of the trial division, has [similarly observed](#) that “[m]ass tort cases are being filed here because the parties are interested in coming to Philadelphia once again. It comes back to our case management system.”



A sophisticated litigation center like the CLC provides some efficiencies and advantages. The problem occurs when too much emphasis is placed on efficiency and fairness takes a back seat. Those who are sued must have adequate time to fully assess and defend numerous claims, otherwise undue pressure is created to settle regardless of the merits. Efficiency is important, but fairness must be the top priority.



“Marketing” of the CLC by the Philadelphia judiciary has contributed to the concern of those who might be named as defendants. Soon after Judge Moss replaced Judge Allan Tereshko as coordinating judge of the mass tort program in 2009, she [declared](#) that “a new day” had arrived at the CLC. This new day was reflected by Common Pleas President Judge Pamela Pryor Dembe, who [undertook](#) a “public campaign to lay out the welcome mat for increased mass torts filings.” Judge Dembe has expressed a desire to make the CLC even more attractive to attorneys, “so we’re [taking away business](#) from other courts.” Some may question whether the goal of fairness is paramount in this environment. For instance, Jim Copland of the Manhattan Institute calls the Philadelphia court system a “[profit center](#)” given the amount of filing fees it takes in from out-of-state cases.

The court’s strategy for drawing more lawsuits to Philadelphia seems to be working. There were [13,631 mass tort cases](#) in the CLC in 2006. After [settlement](#) of thousands of Fen-Phen cases, the court’s docket shrank to 2,498 cases in the spring of 2007. But it is growing again. In 2010, CLC’s Mass Tort Program [docket was up](#) 22 percent – from 4,288 to 5,244 pending cases – largely due to four new pharmaceutical mass tort consolidations.

## A STATEWIDE ANTI-BUSINESS LITIGATION CLIMATE

Lawyers from other states may be lured to Pennsylvania and decide to file in Philadelphia, due to the state’s plaintiff-friendly environment. Pennsylvania is one of a handful of states that continues to follow an insufficiently rigorous [standard for admissibility of expert testimony](#), which federal courts and most state courts have abandoned. It also is in the minority of states that have not placed a limit on damages for subjective pain and suffering applicable either in medical liability cases or all personal injury cases. Nor has Pennsylvania joined the majority of states that have placed statutory limits on the size of awards for punitive damages. Meanwhile, a growing number of states have enacted comprehensive tort reform legislation. The litigation environment in Texas and Mississippi, formerly homes to multiple Judicial Hellholes, was transformed by such legislation. More recently, states such as Tennessee and Wisconsin have adopted significant reform packages (*see* Points of Light, p. 38). Pennsylvania, however, has taken little action in recent years to address excesses in its civil justice system, with two notable exceptions – its adoption of medical liability reforms in 2002 and “fair share” liability this year, as discussed below.

## AN ABOUT FACE IN MEDICAL MALPRACTICE CLAIMS

Philadelphia forum shopping and the impacts of lawsuit abuse initially surfaced in the context of medical malpractice litigation, which significantly contributed to the city’s development of a Judicial Hellholes reputation. In 2002 [nearly half](#) of all medical liability claims filed in Pennsylvania landed in Philadelphia’s Court of Common Pleas. The reasons plaintiffs’ lawyers chose Philadelphia as the hot spot for such claims are likely some of the same reasons

they continue to choose Philadelphia for other personal injury actions today. [Pre-reform data](#) indicated that plaintiffs in Philadelphia were more than twice as likely to win jury trials relative to the national average, and over half of these medical liability awards were for \$1 million or more. The [National Center for State Courts](#) documented a 40 percent win rate for plaintiffs in Philadelphia medical trials in 2001, three times the plaintiff win rate in Allegheny County (Pittsburgh). NCSC also found that Philadelphia trials were four times more likely to be appealed than those tried in Pittsburgh. And according to a study funded by the Pew Charitable Trusts, the number of medical liability verdicts that exceeded \$1 million in Philadelphia [rivaled](#) all of those in the entire state of California during this period.

In response to the adverse impact of tort litigation on access to affordable health care, the General Assembly and Pennsylvania Supreme Court took action, addressing venue among other areas. The [Medical Care Availability and Reduction of Error Act](#) (MCARE) of 2002 directed plaintiffs to file medical liability claims “only in a county in which the cause of action arose.” Soon thereafter, the Pennsylvania Supreme Court incorporated this [provision](#) into the Rules of Civil Procedure. The year after the venue reform went into effect, medical liability claims filed in Philadelphia [plummeted](#) from 1,365 to 577, a decline of 58 percent.

The Pennsylvania Supreme Court’s [data](#) on medical liability filings and verdicts for 2010 show a shifting of medical cases since enactment of the 2003 liability reforms. Court statistics show that while medical liability lawsuits filed in Pennsylvania have declined by an impressive 45 percent from the three-year average before the 2003 reforms, the decline in Philadelphia has been a staggering 68 percent, down to just 381 in 2010. Now, medical liability lawsuits are more evenly dispersed throughout the state. As Pennsylvania Supreme Court **Chief Justice Ronald D. Castille** [observed](#), “Most importantly, justice for our citizens is still being delivered where patients are truly injured by medical mistakes.”

### **THIRD TIME IS A CHARM: PENNSYLVANIA ADOPTS ‘FAIR SHARE’**

Pennsylvania lawmakers deserve credit for its move into the mainstream this year by limiting its application of joint and several liability. Until this year, Pennsylvania was among a shrinking minority of states still operating under so-called “joint and several” liability law wherein a civil defendant can be made to pay 100 percent of a jury award even if he is only 1 percent liable for the injury suffered by a plaintiff. Under its new “Fair Share” [law](#), when a defendant is less than 60 percent responsible for an individual’s injuries, that defendant pays only its share of liability, with certain exceptions. When a defendant’s responsibility equals or exceeds 60 percent, joint liability continues to apply and that defendant is potentially liable for all of the plaintiff’s damages if recovery from other responsible parties is not possible.

This law is a major tort reform victory, as it represented the third attempt to pass such a bill. In 2002, the General Assembly passed a Fair Share Act, but the legislation was [struck down](#) for procedural reasons. A subsequent session of the General Assembly passed corrective legislation, which former **Gov. Ed Rendell** [unexpectedly](#) vetoed in 2006.

Enactment of the Fair Share Act may mark the beginning of meaningful civil justice reform in Pennsylvania. As noted above, the House Judiciary Committee held a hearing in October on a venue reform [bill](#) that would require plaintiffs to file civil cases in the county where the claim arose, an approach consistent with that which has proved successful when applied to medical malpractice claims. The General Assembly and judiciary should support such moderate efforts to improve Pennsylvania’s legal and business environment.

**Editor’s Note:** Evenhandedness requires the passing along of one very positive report offered by defense counsel in a major products liability case in Philadelphia’s Court of Common Pleas. It commended the “patience, careful legal analysis and practical judgment, tempered by an appropriate level of humor and humility” demonstrated by **Judge Marlene F. Lachman**, who, “[w]ithout ever betraying her view of the merits,” fairly afforded all lawyers in the case “the same level of respect.”

## CALIFORNIA

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Corporate chief executives deem the once Golden State the [very worst](#) state in America for business, and perhaps no other state more clearly illustrates the direct impact of excessive litigation on job creation and the ability of businesses to survive and thrive. Unlike legislatures in most other states, California's General Assembly rarely acts to limit lawsuit abuse. For instance, California, like Florida, is among the few states that continue to apply an insufficiently rigorous standard for the admission of purported expert testimony and, as discussed below, despite a critical need to do so, its courts are powerless to stop "vexatious" litigants. With the nation's second highest state unemployment rate (as of this report's production deadline), evidence suggests that California may be [losing jobs](#) to tort-reforming Texas, which has promoted a pro-business environment with tort reform and other policies. Though voters have occasionally taken matters into their own hands, directly passing reform referenda at the ballot box, the effectiveness of such reforms is sometimes eroded by periodic waves of liability-expansion that emanate from the California Supreme Court. While Los Angeles County historically has been the most lawsuit-loving jurisdiction, this job-killing embrace of litigiousness is steadily spreading to tarnish much of the once Golden State.



### ADA 'FREQUENT FILERS' DESTROY MORE SMALL BUSINESSES

During the past few years, a small group of lawyers has combined federal disability access standards embodied in the Americans with Disabilities Act (ADA), which does not provide a private right of action for damages, with a California law that has led to thousands of lawsuits for minute technical violations. Such "violations" include faded paint on a disabled parking space or a bathroom mirror or support bar installed an inch too high or low. There is no opportunity for the defendant to cure the violation. Rather, the actions often state a claim for injunctive relief under the federal ADA and tack on the state claim for damages so they may be brought in federal or state court.

Professional *pro se* plaintiffs and a cadre of personal injury lawyers file thousands of these claims against restaurant owners, shops and other small businesses. These lawsuits often target business owners who are English-as-second-language immigrants or otherwise lack understanding of their legal rights; and the plaintiffs' demand letters typically encourage the owner to settle the case for about \$3,000 to \$5,000, considerably less than what it would cost to go to court. Even if the business owner promptly addresses the alleged violation and incurs substantial costs doing so, he or she must pay to settle the case or otherwise spend thousands more going to court.

One individual alone, [Scott Johnson](#), is responsible for over 1,500 of these suits since 2003. He filed more this year against a popular burger joint in [Davis](#), Redrum Burger, and five restaurants and salons at a strip mall in [Rosemont](#). In [Auburn](#), where Johnson sued Machado Orchards over "worn out" disabled parking, and also filed ADA claims against a restaurant and a smoke shop, Mayor Bill Kirby has said Johnson borders on being a "domestic terrorist."

Another frequent filer, a West Sacramento man dubbed "[Litigious Louie](#)," branched out in 2011 to areas of California that had not experienced such extortionate litigation before. He has raised the ante by suing not only small businesses, but even two of California's largest cities, Stockton and [Lodi](#), alleging certain sidewalks are not fully accessible to those with disabilities. Local taxpayers will pick up the tab.

Since publication of last year's Judicial Hellholes report, the [Sacramento Bee](#) has documented how an ADA lawsuit shut down a local bookstore, Thidwick Books. In the spring, a columnist [shined a light](#) on how ADA abuse shut down Donner Lake Kitchen, a family-owned and operated restaurant that had been pleasing customers for 17 years. The couple that owns Barney's Coffee Shop in [Pico River](#), working long hours because they cannot afford to hire a hostess, took out a home equity loan to cover the thousands of dollars they spent on a settlement, lawyer's fees and renovations to their modest restaurant. And this summer, an ABC-affiliated TV station [caught](#)



[a serial plaintiff](#) out for his daily hike even though the scores of ADA lawsuits he's filed against small businesses claim he has "end-stage emphysema" and is largely confined to a wheelchair.

Despite such media attention, the California Senate Judiciary Committee in May [rejected legislation](#) that would have made clear the ability of California judges to declare such serial plaintiffs "vexatious litigants" and require them to obtain permission from the court before suing.

More recently, **U.S. Rep. Dan Lungren** (CA 3rd), a former state attorney general, introduced [federal legislation](#) that would reasonably address this excessive and unnecessary litigation. He has the support of local business owner Travis Hausauer of the [Squeeze Inn](#), who was squeezed out of his original restaurant location after a lawsuit complained that the structure's tiny size discriminated against the disabled. "Too often these lawsuits are filed and the accuser takes the settlement money and moves on down the road," said Lungren, as [reported](#) by the *Auburn Journal*. "Access for the disabled does not get fixed because the business owner has spent his money on the lawsuit." The bill would require an individual who experiences a problem with access to an establishment due to an alleged violation of ADA guidelines to provide notice and an opportunity for the business to explain what steps it will take to address the issue within 90 days, and 120 days to complete the work, before a lawsuit could be filed.

## LAWSUIT WITH ZERO-PERCENT MERIT

This year legal observers were treated to an epic battle between Taco Bell and out-of-state personal injury lawyers hoping to capitalize on California's easily exploited consumer protection law and appetite for ridiculous class actions. Ultimately, their lawsuit wilted faster than shredded lettuce under a heat lamp and the lawyers ran for the border.

Alabama-based Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. teamed up with a San Diego law firm to sue the fast-food chain on behalf of every person in the United States that purchased a Taco Bell product advertised as containing beef. Taco Bell's "seasoned ground beef," the lawyers alleged, should have been advertised as "taco meat filling" since a "substantial majority" of the filling comprised substances other than beef, according to the lawyers' "independent" testing.

Like CSX in a West Virginia asbestos fraud case (*see p. 14*), Taco Bell, to its credit, responded aggressively to the Beasley lawsuit, not in the more typically muted style of many corporate defendants. It went on the [offensive](#) with a slew of newspaper ads, television spots and YouTube [videos](#), defending its product with generous portions of good [humor](#). Taco Bell reportedly spent between [\\$3 and \\$4 million](#) to tell its customers that its taco filling consists of "88 percent premium ground beef and 12 percent signature recipe." The signature recipe includes spices and fillers for texture. Obviously, any taco dish will have [ingredients other than beef](#), such as seasonings, tomato sauce, water, oil, and, yes, when it is fast food, some fillers and preservatives.

In April, Beasley Allen withdrew the lawsuit, claiming it did so after Taco Bell made changes to its marketing and disclosure practices. [Not so, said Taco Bell](#), which, rather than stand down and declare victory, [ran full page ads](#) in newspapers across the country asking, "Would it kill you to say you're sorry?"

## OTHER NEWS OUT OF CALIFORNIA

- ▶ **Million, billion.** Flashback to the first Judicial Hellholes report when, in 2002, a Los Angeles County jury [awarded](#) the family of a smoker \$850,000 for medical expenses and pain and suffering, plus \$28 billion in punitive damages, the largest individual verdict in the nation's history at the time. The trial court cut the punitive award from \$28 billion to \$28 million. That amount was further reduced to \$13.8 million when the punitive damages portion of the case was re-tried after the U.S. Supreme Court placed new safeguards prohibiting introduction of evidence unconnected to the plaintiff. This past August, the Second District Court of Appeal in Los Angeles [upheld](#) the award. **Justice Patti Kitching**, however, dissented, noting that the punitive damages

award was still 16 times the substantial compensatory damages awarded, making it disproportionately high under the constitutional standards set by the high court. She would have reduced the award to \$7.65 million.

- ▶ **Court chips away at proposition aimed at ending shakedown lawsuits.** Early in the year, a California Supreme Court [decision](#) disrespected the will of voters who had overwhelmingly approved Proposition 64 in 2004. That measure limited “shakedown lawsuits” brought under the state’s consumer law by requiring those who claim they were misled by a deceptive advertisement or business practice to show they had suffered an actual loss of money or property. The Court’s 5-2 ruling allowed plaintiffs to sue Kwikset on the basis that its locks were advertised as “Made in the U.S.A.” when a few of the components, such as screws, were produced abroad. As dissenting **Justice Ming Chin** recognized, there was no allegation that the locks were overpriced or defective, or that the plaintiffs had actually lost any money or property, but the claim was based on the subjective motivations of some consumers to purchase the lock. In fact, as Justice Chin noted, the Kwikset case was used as an example of a shakedown lawsuit in advocating for Prop 64.
- ▶ **California hosts first Wal-Mart mini-class action.** After the U.S. Supreme Court [ruled](#) that the largest class action in history, brought against Wal-Mart, could not proceed, where did the plaintiffs’ lawyer turn? California. The high court had found that the nationwide class action had no glue holding it together since the 1.5 million past and present employees had little in common and alleged no uniform policy or practice that discriminated against them. The [new lawsuit](#) was filed on behalf of just under 100,000 women employed in California stores. Plaintiffs’ lawyers filed the lawsuit in San Francisco, and it is believed to be the first of an “armada of cases” around the nation.
- ▶ **D.A. pushes “sudden acceleration” case forward.** As reported in the 2010/11 Judicial Hellholes report, in July 2010, the California Supreme Court took a major step backward by [allowing](#) state and local officials to hire private lawyers on a contingency-fee basis to represent the public. Here is an example of the types of claims that result in California. Orange County **District Attorney Tony Rackauckas** is the [only D.A. in the nation](#) to sue Toyota in connection with the alleged “sudden acceleration” of its vehicles, and he’s hired Mark Robinson, an attorney in a plaintiffs’ product liability law firm, to do so through a no-bid contract. Rackauckas refused to release the agreement to the public for months, doing so in August after a [threatened lawsuit](#) by the Civil Justice Association of California. The lawsuit does not claim that people were hurt or lost money due to the claimed defect, but that the company is deceiving consumers by claiming that sudden acceleration is a mechanical issue related to driver error rather than an electronic issue. That’s not what the National Highway Traffic Safety Administration, with the help of trained engineers from [NASA said](#), but hey, who are we to argue with a D.A./personal injury lawyer team?
- ▶ **Hot-air lawsuit deflates balloonists.** A dozen hot-air balloon tour companies went out of business or stopped flying in eastern Coachella Valley due to a lawsuit filed by JCM Farming, which claimed the balloons flew too low over their olive farm compound, invading the privacy of its residents. When the Federal Aviation Administration said otherwise, twice, it too was sued. One small business spent \$177,000 to fight the suit until a Palm Desert law firm, Guralnick and Gilliland, [offered to represent](#) the balloonists pro bono. After over two years of litigation, JCM abruptly dropped its lawsuit this past summer.
- ▶ **No penalty for fraudulent lawsuit.** The State Bar of California [declined to discipline](#) Los Angeles attorney Juan Domingez, whose ads grace city buses. Domingez was [referred](#) to the bar by Superior Court **Judge Victoria G. Chaney**, who found that he had “designed, executed and funded a fraud upon the court” as a central player in a scheme to recruit fake plaintiffs in Nicaragua, coach them to lie about being exposed to pesticides on [Dole](#)-affiliated banana farms, and fabricate evidence. Domingez responded that he felt “unjustly framed.” Last year, ATRF reported that the U.S. Court of Appeals for the Ninth Circuit had [imposed](#) sanctions on several



California lawyers and [suspended](#) an attorney after they submitted allegedly fraudulent materials in an effort to collect a \$489 million default judgment entered by a Nicaraguan court in similar litigation.

- ▶ **More fraud?** In August, California **Attorney General Kamala D. Harris** [announced](#) that her office has filed actions against four California lawyers who allegedly defrauded thousands of distressed owners of millions of dollars by luring them to pay upfront fees of between \$4,000 and \$10,000 to collect on a settlement that did not exist. “Consumers are led to believe that joining these lawsuits will stay foreclosures, reduce their loan balances, entitle them to monetary benefits and potentially get them their homes free and clear of their mortgage,” said the attorney general’s suit, filed in Los Angeles County Superior Court.
- ▶ **Some good news.** As discussed among this year’s Points of Light (*see* p. 39), the California Supreme Court made a sound ruling this year that prohibited collection of damages based on medical bills that no one ever paid. Also, in a rare act of legislative intervention, the General Assembly passed, and **Gov. Jerry Brown** signed, a bill preventing any lawsuits against gas stations that collect ZIP codes as a means of consumer fraud protection. A slew of class actions had resulted from a California Supreme Court [ruling](#) in February that held that ZIP codes are [personally identifiable information](#), allowing a class action lawsuit against Williams-Sonoma by a customer who was offended that the retailer collected such information to add her to its mailing list. Speaking of Sonoma, Superior Court **Judge Mark Tansil** there showed there is still some sanity in California law when he [ruled](#) that an overly exuberant drunk who falls on someone while showing off his “Cossack dance” moves at a school fundraiser does not act with “an evil intent” worthy of punitive damages.

On a grim closing note that does not bode well for economic growth or access to healthcare, to say nothing of the once prominent concept of personal responsibility, the new president of the Consumer Attorneys of California, Niall McCarthy, recently [told the state’s leading legal journal](#) that his group in the last 10 years has managed to “[wipe] out a lot of tort reform bills. What we’re going to do this year is bring some impact legislation to affirmatively improve the civil justice system.” And by “improve” the civil justice system, of course, McCarthy means to expand liability and make the litigation industry that much more profitable for his group’s dues-paying members.

One of McCarthy’s top legislative goals, he says, is to “attack” California’s pioneering Medical Injury Compensation Reform Act, which has been reasonably limiting the liability of healthcare providers since 1975. “Changes to MICRA will come,” he promises. “The only question is when.”

## WEST VIRGINIA

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While there are occasional sparks of hope that West Virginia will overcome its reputation as a Judicial Hellhole, in many ways, each year seems like déjà vu: stunning verdicts, a lack of appellate due process, an attorney general’s office that is almost indistinguishable from a private personal injury law firm, law that is out of the mainstream, and frivolous or fraudulent claims. A review of the past year again shows each of these elements. But let’s start with the good news.

### GOOD NEWS

The West Virginia Supreme Court of Appeals, the state’s only appellate court, deserves recognition for reaching two particularly well-reasoned decisions. First, soon after publication of the last Judicial Hellholes report, the court issued a ruling that reined in abusive consumer protection claims. In [White v. Wyeth](#), the court recognized the basic principle that an individual who sues under a consumer protection statute must show that he or she actually relied on the allegedly deceptive advertisement or practice to recover damages. In other words, those who sue need to show not only that an advertisement or practice *could* have misled them or



others, but that it actually *did*. The court also found that the private cause of action authorized by West Virginia's consumer protection law does *not* extend to prescription drug purchases because the federal government already tightly regulates medicines to protect consumers. Local defense lawyers [hailed](#) the decision as "an indication [West Virginia is] coming back in line" with other states and "a good step forward." The ruling should help assure that West Virginia does not become a magnet for lawyer-driven claims brought on behalf of consumers who purchased a product but experienced no financial loss or physical injury as a result of the purchase.

Second, legal observers were relieved when the high court [upheld](#) the state's limit on subjective noneconomic damages in medical liability cases in June. The court had [rejected](#) a constitutional challenge to the law in 1991, but the court was asked to revisit the issue after the legislature in 2003 reduced the limit to address further problems faced by West Virginians seeking access to healthcare. The court's decision is detailed among this year's Points of Light (*see* p. 40).

## LACK OF APPELLATE REVIEW

While the West Virginia Supreme Court deserves significant credit for these two decisions, the state is still reeling from its rejection last year of an independent commission's [proposal](#) to establish an intermediate appellate court for the state and thus guarantee the right to an appeal. It was the second such [recommendation](#) from an independent commission in roughly a decade. Instead, the high court took the marginally positive step of [expanding](#) its own appellate review of cases. Nevertheless, West Virginia remains the only state that lacks both an intermediate appellate court and full appellate review as a matter of right. Its sole appellate court can only consider a [small number](#) of the thousands of cases in which there is an appeal filed. As has occurred in the past, a defendant that is hit with an unjust multimillion-dollar verdict may quickly find that it has nowhere else to turn but to the U.S. Supreme Court. The West Virginia Senate in March 2011 passed [overwhelmingly](#) a bill that would have created an intermediate appellate court. Editorial boards [called](#) the move "a step in the right direction."

Ironically, a personal injury lawyer group that calls itself the West Virginia Association for *Justice* (emphasis added) opposed providing a full right to appeal. In [desperate-sounding](#) attacks, its representative argued not only that appellate review would drag out civil cases for its members who file personal injury suits, but that guaranteeing review would give "every convicted criminal in West Virginia a chance to get off on a technicality" and create more work for police officers, prosecutors and the judiciary. The plaintiffs' lawyers had the [political clout](#) to kill the bill without it even getting on the agenda in the House of Delegates. Apparently, the public's interest in justice comes second to the group members' financial interests in shielding bad rulings and excessive verdicts from post-trial scrutiny.

## MEDICAL MONITORING AND OTHER DEPARTURES FROM THE MAINSTREAM

In several areas West Virginia law is more favorable to plaintiffs than that of other states. Aside from its lack of appellate review, it is known for [several deviations](#) from mainstream law, both in terms of procedure and substance. For instance, West Virginia is known for [mass consolidation](#) of claims and occasionally permitting juries to decide defendants' [punishment before establishing their responsibility](#) for plaintiffs' injuries. West Virginia courts stand alone in [whole-sale rejection](#) of the "learned intermediary" doctrine, which says that a drug manufacturer is responsible for providing information on risks of a drug to doctors, rather than directly to their patients. Its courts have also permitted employees who are injured at work to circumvent the no-fault workers compensation system and bring lawsuits.

Perhaps the most noted departure from traditional legal principles is that West Virginia law permits individuals to seek cash awards for [medical monitoring](#) before they develop an injury. That area is back in the news this year, with the distribution of checks stemming from what was initially a [\\$380 million award](#) against DuPont for contamination that emanated from a zinc smelter in Spelter, West Virginia. DuPont operated the plant from 1928 to 1950, decades before the lawsuit. The Harrison County award included a \$55 million cleanup plan, a \$130 million medical monitoring program, and \$196 million in punitive damages.

After the state supreme court upheld most of the verdict but returned the case to the trial court for further consideration of whether the plaintiffs' claims were timely, **Judge Thomas Bedell** approved a \$70 million [settle-](#)

[ment](#). The settlement included a [medical monitoring program](#) for those who feared eventual disease as a result of heavy-metal levels, including free blood and urine tests over a 30-year period at six area clinics, four hospitals, and a laboratory. About 6,700 people who lived near the plant submitted claim forms to receive a \$400 cash payment, but only about 3,500 enrolled in the medical monitoring program. “Apparently,” said DuPont spokesman Dan Turner, “many people are submitting the forms but declining the medical monitoring.” As the *Charleston Daily Mail* [observed](#), “they are taking their \$400 and running,” showing again why West Virginia’s treatment of medical monitoring claims “puts another black mark on the state.”

## FIGHTING ASBESTOS FRAUD

An appellate court this year [reinstated](#) a [federal lawsuit](#) brought in West Virginia against a Pittsburgh-based personal injury firm for allegedly engaging in a scheme designed to generate fraudulent asbestos claims. (The American Tort Reform Association had filed an [amicus brief](#), urging the court to weigh in.)

As described in the [2009/2010 Judicial Hellholes report](#), after being hit with one too many questionable claims in the Mountain State, CSX Transportation filed its own lawsuit against Robert Peirce & Associates, P.C. and a physician, alleging that they knowingly conspired to file fraudulent asbestos claims. CSX documented a “fraudulent entrepreneurial model” whereby lawyers paid doctors who spent virtually all their time working on litigation to find asbestosis in a certain percentage of screened cases. According to CSX, the screening companies intentionally produced low-quality x-rays that would show more white marks in the lungs, which a doctor could then rely upon to make inaccurate diagnoses. Lawyers also allegedly altered questionnaires filled out by clients without the clients’ knowledge in order to suggest asbestos exposure resulted because of the defendant’s operations. Ray Harron, M.D., the physician relied upon by the lawyers to supply diagnoses for the lawsuits, was [exposed](#) by a federal judge in 2005 as part of a virtual litigation machine. After Harron was [discredited](#), the lawyers hired another doctor and paid him over a million dollars to rubber stamp Harron’s prior findings, which he did 90 percent of the time, according to CSX.

U.S. District Court **Judge Frederick Stamp** initially dismissed CSX’s claims against the law firm as untimely. Rather than find that the company should have been on notice that the asbestos claims were fraudulent when filed, the U.S. Court of Appeals for the Fourth Circuit [found](#) that only later could the company have known of the alleged fraud. In October, the U.S. Supreme Court [opted not to review](#) that decision, leading the district court to lift a stay that placed the case on hold. As should be expected, the law firm is putting up a fight. It has filed a counterclaim against CSX and [unsuccessfully](#) attempted to [prevent](#) CSX from speaking to the firm’s former clients. Though this case is not likely to go to trial until late next year, CSX’s aggressive response to fraudulent litigation should serve as a model for asbestos defendants everywhere. Like schoolyard bullies who routinely steal others’ lunch money, those who engage in fraudulent asbestos litigation will keep doing what they’re doing until someone stands up to them.

## ATTORNEY GENERAL CONE ROGUE



Five-term West Virginia **Attorney General Darrell McGraw** has frequently come under fire for frequently teaming up with private personal injury law firms and using settlement money collected on behalf of the public to fund his own pet projects. A [recent report](#) by the Manhattan Institute called McGraw a “pioneer in suing pharmaceutical companies” and noted that he has “courted an army of ‘special assistant’ attorneys general,” i.e., private personal injury lawyers, who take a significant share of any recovery, along with a considerable interest in McGraw’s reelections.

West Virginians are paying the price. A federal appellate court in July [ruled](#) that the federal government may withhold Medicaid funds from West Virginia because McGraw owed the feds \$446,607 from a 2004 settlement as reimbursement for amounts the federal government spent on Medicaid in the state that year. Rather than put the settlement funds toward healthcare funding, McGraw gave the bulk of the money collected in a settlement with a pharmaceutical firm to the Public Employees

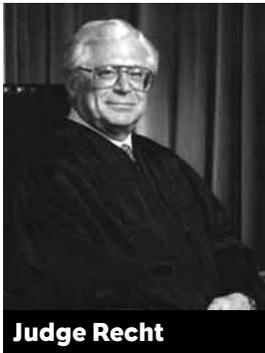
Insurance Agency and retained a portion in his office's consumer protection fund. The ruling is expected to have a similar effect on a pending claim by the federal government that McGraw shortchanged them \$2.7 million from a [\\$10 million settlement](#) he reached with another drug company for "aggressively marketing" Oxycontin. McGraw unilaterally decided to donate those funds to substance-abuse programs around the state and to the University of Charleston for a pharmacy school. In both instances, McGraw avoided giving the money to the state's Department of Health and Human Resources in an attempt to prevent the federal Medicaid program from collecting mandated reimbursements.

Handpicked personal injury lawyers hired to represent the state received substantial fees in both cases. For instance, as the Manhattan Institute [documents](#), McGraw hired four private firms that had given \$47,500 to his campaigns to handle one such case. These firms collected \$3 million in fees from the state's recovery.

## WEST VIRGINIA-STYLE JUSTICE

Quicken Loans wants to know: How is it possible that a plaintiff who attempted to refinance a house she did not even own, stopped making payments during the refinancing process, obtained a loan that significantly reduced her monthly payments by \$300 and lowered her interest rate, received cash back to buy a new car, rated her experience highly, and then defaulted within 60 days of closing can receive approximately \$3.7 million in damages on a \$144,800 mortgage?

The company, which describes the case in detail on its [website](#), was initially puzzled as to why the appraisal firm, which also was sued, would settle for the astronomically high amount of \$700,000, five times the loan amount, given the facts of the case. Needless to say, Quicken Loans learned about West Virginia justice the hard way.



**Judge Recht**

After trying the case without a jury in October 2009, **Judge Arthur Recht** of the First Judicial Circuit Court, on whom this report has previously heaped praise, not only gave the plaintiff \$18,000 in restitution for her costs, he relieved her of the obligation to pay back her \$144,800 mortgage, effectively giving her the house upon finding the loan to be based on an inflated appraisal. In February 2011 Judge Recht awarded an astounding \$596,199.89 in attorneys' fees to the local West Virginia [plaintiff's firm](#) and \$2.2 million in punitive damages. Among many troubling aspects of this case is Judge Recht's inflation of the compensatory damages award to justify a punitive damages award that otherwise would be deemed unconstitutionally disproportionate. The only item that meets the traditional understanding of "compensatory" is the original \$18,000 in restitution. Cancellation of the mortgage was itself significant punishment for the lender. And already inflated attorneys' fees are typically not considered compensatory in nature. So by counting the attorneys' fees and value of the previously cancelled loan as compensatory, Judge Recht was able to boost the award for punitive damages into a windfall bonanza for the plaintiff and her lawyer. Quicken has appealed to the West Virginia Supreme Court, saying the verdict "makes [absolutely no sense](#)." The court has granted review. A ruling is anticipated in 2012.

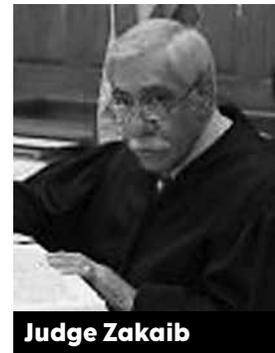
## WEST VIRGINIA JACKPOT

While the Quicken case is shocking, legal observers are crying "Hellhole" after a jaw-dropping \$91.5 million verdict against a nursing home in October 2011. After a two-week trial, the jury [found](#) that the nursing home failed to provide an 87-year-old woman with proper hydration during her three weeks at the facility, leading to her death. The award included \$11.5 million in compensatory damages and \$80 million in punitive damages.

Even when a defendant's conduct may be wrong and inexcusable, compensation for a death is invariably challenging. But it is important to recognize that such an [astronomically high](#) award does not solely affect that losing defendant company. The [danger](#) in awarding sums approaching \$100 million is that it will result in higher insurance rates for nursing homes across the state, which in turn will make long-term care less affordable for all West Virginians, driving some facilities to relocate to other states and others simply to shut down altogether. This case is not a class action with damages distributed to thousands of people – it's a single case. Such extraordinary verdicts

encourage more litigation, too, as personal injury lawyers representing those allegedly injured may reject reasonable settlements and instead gamble on hitting a West Virginia jackpot at trial.

With a whopping eight-figure jury verdict such as this one, most legal observers would expect the trial judge to find it excessive and reduce it, even before an appeal. Well, Kanawha County Circuit **Judge Paul Zakaib Jr.** did so, [reducing](#) the total award by a little more than \$400,000. The court has [not yet determined](#) whether West Virginia's limit on medical liability damages applies to nursing homes as well as hospitals, and the defendant [asked the judge](#) "to grant a new trial, reduce the award substantially, or drop the case completely based on the errors."



## IF YOU CAN'T WIN AT HOME, BRING YOUR CASE TO WEST VIRGINIA

Like many other Judicial Hellholes, West Virginia is a litigation tourist destination for plaintiffs and their lawyers from across the country. The West Virginia legislature in 2003 strengthened the state's venue law by barring from West Virginia courts lawsuits by those who do not live in West Virginia unless a "substantial part" of the acts or omissions giving rise to the claim occurred in the state or the plaintiff was unable to sue in another state. West Virginia's high court [struck down](#) the law in 2006, however, and state legislators reacted by adopting a more flexible approach that provided judges with significant discretion in deciding whether to permit out-of-state claims.

The weakness of that reform measure was apparent in a pair of cases, decided by the state's high court, that allow blatant forum shopping. In the first case, a North Carolina doctor prescribed a patch for pain management to a North Carolina resident, who used the patch in North Carolina and died, allegedly from the toxicity of the patch, in North Carolina. Since the deadline for filing this claim in North Carolina had expired, his estate's lawyer filed in West Virginia, which, unlike North Carolina, commences the time period for filing suit from the discovery of the injury. Although a Monongalia County judge dismissed the claim because it had no connection to West Virginia, the state's high court [reversed](#), finding that since the case was barred by North Carolina's time limit, West Virginia courts must hear it.

In the second case, a Kanawha County judge had rejected the drug manufacturers' request to dismiss cases from plaintiffs hailing from Wisconsin and Georgia. The defendants argued that they would have difficulty securing the testimony of witnesses and compelling production of documents from other states in West Virginia. Nevertheless, the trial court held, and the high court [affirmed](#), that a plaintiff may bring a lawsuit in West Virginia, even when all of the underlying conduct occurred in another state, if the company sued is incorporated in West Virginia. This was the case even though Wisconsin plaintiffs candidly admitted that they were suing in West Virginia because they could not win some of their claims under their home state's substantive law.

Through these decisions, West Virginia's high court has sent a message loud and clear to the plaintiffs' lawyers nationwide: If you can't win your cases at home, bring them to Wild, Wonderful West Virginia. But as **Justice Menis Ketchum** wrote in [dissent](#), "WEST VIRGINIA CANNOT AFFORD TO BE A DUMPING GROUND FOR FOREIGN LAWSUITS" (the choice of all-caps was his). "We should protect West Virginia residents from defective products and let North Carolina deal with injuries suffered by North Carolina residents that occur in North Carolina," said Justice Ketchum.

## SOUTH FLORIDA

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Aside from sun and sand, South Florida is known for its aggressive personal injury bar. It remains an epicenter for excessive and fraudulent auto insurance litigation and tobacco lawsuits. Florida lawmakers have made recent progress in addressing the excessive liability exposure to slip-and-fall, automobile "crashworthiness," and medical liability claims that contributed to South Florida's reputation as a Judicial Hellhole. Yet much more needs to be done, particularly in ridding the state of a rule that does not subject junk science to judicial scrutiny.

## AUTO INSURANCE FRAUD, MASSIVE ATTORNEYS' FEES ON THE RISE AND SPREADING FROM SOUTH FLORIDA

Florida drivers pay extraordinarily high insurance rates and one of the reasons is a “personal injury protection” (PIP) system that encourages litigation, permits high attorneys’ fees, and allows rampant fraud. South Florida was the original epicenter for such fraud, which has now spread to the Tampa and Orlando areas, according to the [National Insurance Crime Bureau](#) (NICB). In fact, NICB respectively [ranks](#) South Florida (Palm Beach, Broward and Miami-Dade counties) and Tampa Bay as the second worst and worst PIP-fraud regions nationwide.

While PIP coverage was intended to lead to quick no-fault recovery of up to \$10,000 for basic medical expenses without litigation, it has morphed into quite the opposite. There are several reasons why.

The first reason is excessive attorneys’ fees that dwarf medical expenses. When a medical clinic that treats a person with a PIP claim does not receive full compensation for its bill from an insurer within 30 days, lawyers send a demand letter to the insurer demanding that they pay within an additional 30 days. Then they sue. Especially in South Florida, lawyers fight over amounts as small as \$1, and then are entitled to collect [thousands of dollars](#) in legal fees. If an insurer is suspicious about the validity of charges and fails to pay, it risks such a lawsuit. Some unscrupulous Florida personal injury lawyers have reportedly [submitted inflated bills](#) for 26-hour days, meetings with the dead, or meetings that otherwise never took place. Meanwhile, patients may not even know that a lawsuit was filed.

Many of the clinics involved have close [alliances](#) with personal injury attorneys. There are reportedly thousands of fly-by-night healthcare clinics operating in Florida with no government oversight, providing a means to perpetrate fraudulent records of medical procedures that [never occurred](#) or for injuries that are greatly exaggerated. Some have called these clinics “[PIP mills](#).” Attorneys specializing in accident cases refer their clients to these clinics. As **John Askins**, director of Florida’s Division of Insurance Fraud, has [observed](#), “[b]ehind every clinic are the lawyers.”

NICB [lists](#) Florida as the number one state for staged accidents, with nearly the [combined](#) total of the next two highest states, New York and California. Three of the top five cities for staged auto accidents are in [Florida](#) – Tampa, Miami, and Orlando. The basic scam involves a fake crash in which a number of people, who may or may not have been in the car, are supposedly injured. The accident “victims” go to clinics that are complicit in the fraud.



They fill out paperwork indicating the individuals received treatment for their injuries, even if they did not. Those who are [recruited](#) to take part as fake victims may be the unemployed, recent immigrants and others in need of money. They sign over their legal rights to the clinic to collect the medical expenses on their behalf. In other cases, a clinic may simply demand that an insurer pay for diagnostic tests that were unnecessary or [never performed](#).

Unsuspecting Floridians also get caught up in this racket. As last year’s Judicial Hellholes report went to press, the *Miami New Times* provided an [expose](#) on the case of a Trinidad immigrant, Ganesh Sohan, who called “411-PAIN,” after television commercials suggested he was entitled to \$10,000 for his car accident-related injuries. But he says he ended up with unnecessary tests, treatment, legal fees and debt.

Insurers have [called](#) PIP “the driving factor” behind rate increases “due to both worsening loss trends and increased



fraud activity.” Government officials agree. Insurance regulators [attribute](#) Florida’s skyrocketing auto insurance premiums to “the large number of PIP lawsuits and resulting expenses...” State **Chief Financial Officer Jeff Atwater** has [observed](#) that auto insurance fraud costs the average Florida family an additional \$400 per year. [Regulators say “the filing of \[PIP\] lawsuits is out of control.”](#) In April, the Florida Office of Insurance Regulation issued the latest [report](#) offering renewed confirmation that this costly auto accident [fraud](#) is on the rise in Florida. **Robin Westcott**, the Office of Insurance Regulation’s director of Property and Casualty Financial Oversight, has [predicted](#) that “you will see carriers leave the state,” if the abuse continues unchecked. Lawmakers in Tallahassee have [acknowledged](#) the growing problem but have not yet taken action.

## NO CLASS

This summer, a Florida appellate court [threw out](#) a class action certified by a Miami-Dade Circuit Court **Judge Thomas S. Wilson, Jr.** The action was brought on behalf of those who live in the county, as well as individuals throughout Florida, who were charged a small shop fee when using a coupon for auto repair services at Tire Kingdom. The fee, which was about \$2 or \$3, is meant to cover items such as rags, is authorized by Florida law, and disclosed to customers. The fee, however, was not mentioned on the coupon and the plaintiffs claimed to not have noticed several prominent posted signs or that the written estimates they signed included the fees. The appellate court recognized that “[c]lass certification is a serious decision, often the defining moment in a lawsuit (for it may sound the ‘death knell’ of litigation on the part of plaintiffs, or create unwarranted pressure to settle non-meritorious claims on the part of defendants).” In ordering decertification of the class, the Third District reasoned that the class members’ claim depended on the particular language of the advertisement he or she saw and the details of his or her discussions with staff members.

## TOBACCO CENTRAL

Since the Florida Supreme Court’s 2006 decision in the case known as *Engle*, Florida has become a hotbed for tobacco litigation or, as a [St. Petersburg Times](#) editorial headline called it, the “center of [the] tobacco litigation universe.” The reason? The *Engle* decision preserved findings in a class action lawsuit that place two strikes against defendants, leaving juries in individual-smoker cases to consider only whether smoking actually caused the plaintiff’s illness, comparative fault, and damages.

While tobacco trials are not representative of other types of lawsuits, the outcome of such suits gives a sense of an unpopular civil defendant’s chances in Florida courts. As of mid-November 2011, Philip Morris won [nine of the past thirteen](#) *Engle* cases that went to trial. Overall, plaintiffs have [won](#) two-thirds of the 53 post-*Engle* trials, and the recent tobacco-defendant victories reverse a trend started just two years ago when defendants [lost](#) thirteen cases in a row. This year, cigarette makers won cases in [Miami-Dade](#), [Palm Beach](#), [Clay](#) and [Lee](#) counties, among others. They do not appear to be faring as well in Broward County, where one recent verdict came back with a relatively small [\\$86,000](#) sum, but where a 2009 case resulted in a stunning [\\$300 million](#) award (it was later [reduced](#) to about \$38 million). Whether this record reflects the location of the court, the facts of the individual case, the luck of draw, or the skill of the lawyers is not yet fully evident.



Also this year, the Fourth District Court of Appeals, which oversees South Florida courts, [questioned](#) the constitutionality of the structure of a post-*Engle* trial. **Chief Judge Melanie G. May** issued a stinging concurrence, which questioned whether *Engle* can be applied as written without violating due process. “[A] lurking constitutional issue hovers over the poker game [in which trial courts must play the cards *Engle* has dealt them]: To what extent does the preclusive effect of the *Engle* findings violate the manufacturer’s due process rights?” she asked.

Unless a court intervenes or the parties settle, these suits will continue on for the foreseeable future. One source estimates that it will take approximately [250 years](#) for Florida courts to get through the lawsuits even if just 5,000 of the over 8,000 lawsuits filed go to trial at the current rate.

## STEADY PROGRESS

On the bright side, and as noted above and in the Points of Light section, the Florida Legislature took [several positive steps](#) this year to address areas where liability exposure in the state was out of the mainstream. Most significantly, legislators [overturned](#) a 2001 Florida Supreme Court [decision](#) that [prevented juries](#) from learning, in cases in which a plaintiff alleged that a car did not sufficiently protect him or her during an accident, that the driver was under the influence of drugs or alcohol or asleep at the wheel. This victory adds to 2010 gains in which the legislature addressed excessive slip-and-fall liability, government hiring of private lawyers to enforce state law on a contingency-fee basis, and the authority of parents to sign waivers allowing their children to participate in activities with inherent risks.

A [bill](#) that would have added Florida to the vast majority of states that have adopted standards for the admissibility of expert testimony on par with the federal courts passed the House, but stalled in the Senate. Another bill, to rein in excessive PIP car accident litigation and fraudulent PIP claims also failed. Legislators are expected to take another crack at these necessary but still outstanding reforms in 2012.

Of course, even when common sense tort reforms are enacted in Florida, they remain subject to a “veto” by the Florida Supreme Court, which has sometimes viewed them as legislative intrusions into the judicial domain. For instance, this year the court [ruled](#) that a law requiring those who bring asbestos or silica claims to show an existing physical injury before bringing a lawsuit could not constitutionally apply to those who received an often [questionable](#) diagnosis before the law took effect. So long as a plaintiff can show evidence of exposure in the lungs, the court found, earlier plaintiffs could sue



even when there is no impact on day-to-day life. The law addressed the fact that up to [90 percent](#) of recent asbestos plaintiffs have no physical impairment that affects their daily activities. Many of these claims have been generated through [unreliable mass screenings](#). The preponderance of the non-sick on court dockets and in settlement negotiations diverts legal attention and resources away from the claimants with severe disabilities.

Observers are also closely watching for the state high court’s ruling on a challenge to a [law](#) enacted in 2003 that limited damages for pain and suffering in medical liability cases to \$500,000 in most cases and \$1 million in cases of catastrophic injury or death. Such laws are aimed at increasing access to affordable healthcare by ensuring that those who are harmed by medical errors receive full compensation for their medical expenses and a reasonable amount for pain and suffering, without imposing excessive liability on health care providers. While most state courts have upheld such limits, the Florida Supreme Court struck down a similar law, along with a package of other reforms, in 1987.

## OTHER POSITIVE SIGNS

Also this year, an appellate court [affirmed](#) Miami-Dade Circuit Court **Judge Gerald D. Hubbard**’s decision to dismiss a lawsuit filed by a California resident who booked a vacation through a Washington-based company and claimed she was assaulted during a trip to Mexico. In that instance, the trial court had properly found that the plaintiff was able to receive a remedy in Mexican courts, where the evidence and witnesses are located. More importantly with respect to future cases, the appellate court found that since the plaintiff was not a Florida resident, her choice to sue there was not entitled to substantial deference. Such rulings can help discourage plaintiffs from all over the country from suing in what many personal injury lawyers view as Florida’s favorable courts.

In addition, a Florida Supreme Court action on a disciplinary matter this year may lead lawyers to pause before engaging in unethical conduct. Last year, we reported that the Florida Supreme Court temporarily [suspended](#)

the law license of Hank Adorno in connection with an alleged violation of rules governing attorney conduct as it considered his case. The court's action followed the [finding](#) of Broward Circuit **Judge Jack Tuter** that Adorno orchestrated a \$7 million class-action settlement that [benefited only seven people](#), rather than all the Miami taxpayers he claimed to represent. In the case, which challenged a city fire fee, seven plaintiffs split \$5 million and the lawyers took \$2 million instead of providing a refund to thousands of property owners. Adorno's law firm, which [dropped](#) the co-founding partner's name from its letterhead, returned \$1.6 million in fees collected, but kept about \$400,000. This April, the Florida Supreme Court, [ruled](#) that Adorno was guilty of ethical breaches, [suspended](#) him from practicing law for three years and ordered him to close out his practice. In so doing, the court rejected a recommendation that Adorno receive only a "public reprimand," as well as the Florida Bar's suggestion that he receive a six-month suspension, and adopted the most severe sanction short of disbarment.

## MADISON AND ST. CLAIR COUNTIES, ILLINOIS

### MADISON COUNTY

After Madison County judges undertook reforms to stem forum shopping in 2006, Madison County managed to work its way off the Judicial Hellholes list. Overall, the fairness of the Madison County courts has significantly improved. But progress has seemingly stalled, and the jurisdiction's truly troubled past may be poised to repeat itself.

Certainly, Madison County's days as the "class action capital" of the United States appear to be over, as such lawsuits there [fell](#) from 106 class action filings in 2004 to just 8 in 2010. Congress's enactment of the Class Action Fairness Act (CAFA) in 2005, which expanded the jurisdiction of the federal courts to hear multistate class actions, has much to do with that progress. Local attorneys, such as the Lakin Law Firm know this, which is why they filed a rush of class action complaints in Madison County as the new

law took effect. Those hurriedly-filed cases are still trickling through the county's courts. Earlier this year, an appellate court [reversed](#) rulings by Madison County Circuit Court **Judges Daniel Stack** and **Barbara Crowder** to certify two class actions in [2008](#) and [2009](#), respectively.



test results on the plaintiff's voicemail and taken the returned call. In September, an appellate court [reversed](#) this ruling, recognizing that "[a] rule of law that allowed personal jurisdiction over a physician on the basis of a single phone call would effectively ensure that no physician ever delivered instructions over the telephone, or via email, for that physician could never know with certainty where they might eventually be hauled into court as a result of those instructions."

Even the \$10.1 billion (with a "b") Madison County verdict imposed on Philip Morris for marketing Marlboro cigarettes as "light," known as the "Price" case for the name of the lead plaintiff, [is back](#). The class action award was reversed by the Illinois Supreme Court in 2005, but then kept alive on the grounds of a U.S. Supreme Court decision that found, in another case three years later, that the Federal Trade Commission had not explicitly



authorized use of such terms, undermining the basis of the decision to dismiss the Price case. The case is on its way back to Madison County, which could [reopen](#) the case.

In more positive news, this year, the Illinois Supreme Court threw out a \$43 million Madison County verdict against Ford. As explained in the Points of Light section (*see* p. 40), Judge Matoesian allowed highly prejudicial and misleading evidence against Ford, while preventing the jury from considering evidence supporting the auto maker. Had the high court not intervened, the outcome would have imposed unprecedented new liability on product manufacturers.

## THE LARGEST ASBESTOS DOCKET IN AMERICA

In other areas, particularly with respect to asbestos litigation, the county seems to have suffered a full relapse.

Madison County was and again has become the [epicenter](#) for national asbestos litigation. In 2003, asbestos filings in the county peaked at 953. After Judicial Hellholes reporting spurred public scrutiny of the magnet jurisdiction, judges became more serious about transferring cases that belonged in other areas. By 2006, asbestos filings in Madison County reached a low point of 325. Since then, however, the number of such filings has increased each year to 455 in 2007, 639 in 2008, 814 in 2009, and 840 in 2010, as [documented](#) by Illinois Lawsuit Abuse Watch (I-LAW). Only about 1 in 10 of Madison County's asbestos cases are filed by people who actually live or work there, or have any other connection to the area, according to an Illinois Civil Justice League [study](#). According to one local defense lawyer, asbestos claims account for [nearly 60 percent](#) of Madison County suits seeking more than \$50,000, eclipsing the claims of local residents.

Defendant companies and other legal observers note that plaintiffs' lawyers flock to Madison County because the court sets aside about [500 trial dates](#) for asbestos cases. The trial dates provide a steady stream of business for [favored local law firms](#), with whom out-of-state lawyers must work to pursue their cases. Defendants are placed at a disadvantage given the expedited treatment of cases and the power given to plaintiffs' lawyers to set the trial schedule. Because defendants may not know which cases will go to trial until the [last minute](#), they often prepare for multiple cases simultaneously, pay for expert reports they do not need, and must travel across the United States to take depositions.

Last year, Judge Crowder inherited the largest asbestos docket of any state court in the nation. Thus far, nothing seems to have changed, even if she appears willing to listen. Defendants recently [asked](#) the judge to replace this unfair system and [proposed changes](#) to the county's procedures governing the pre-trial process for asbestos cases. As of press time, that system has not changed, nor has the rising tide of out-of-state asbestos claims in Madison County begun to ebb. In the first quarter of 2011, only [19 of 154](#) asbestos claims thus far filed in Madison County were made by Illinois residents. At the mid-point of the year, Madison County was again [on pace](#) for about 800 asbestos filings.

## TAKING THE CONTINGENCY OUT OF CONTINGENCY FEE

Asbestos cases are not the only reason for concern in Madison County. Circuit Court Judge Dennis Ruth appears to have taken the "contingency" out of contingency fee in [approving](#) a \$175,548 fee award on a \$58,878.53 judgment against a nursing home. The local plaintiffs' lawyers had demanded \$850,000 to settle and asked jurors to award \$1 million, but jurors awarded only medical expenses. Judge Ruth found, and an appellate court affirmed, that the lawyers should get more than the \$23,200 fee to which they were entitled under their 40 percent contingency-fee contract, and instead receive the equivalent of a full-time lawyer's annual salary. Inflationary rulings such as this invariably encourage lawyers to make unreasonable settlement demands and take weak cases to trial.



## ST. CLAIR COUNTY

As with Madison County, “litigation tourists” eagerly flock to neighboring St. Clair County from all over the country. In fact, it was Madison County’s stemming of abuses in the mid-2000s that prompted local personal injury lawyers to look for an alternative forum where they could hold sway, making St. Clair a Judicial Hellholes contender.

The county’s asbestos docket is growing, so much so that the appellate courts are considering whether St. Clair has inappropriately become a “[national magnet for mesothelioma suits](#),” as Madison County had been for some time. Before Circuit **Judge Patrick Young** retired in December 2010, he accepted cases on behalf of plaintiffs who lived and worked in Indiana, Missouri, Pennsylvania and Wisconsin, none of whom had a connection to St. Clair County. The lawsuits continue to flow in from places such as [Ohio](#) and [South Carolina](#). These lawsuits often take a shotgun approach, in which it is not out of the ordinary for a single lawsuit to name [41 defendant companies](#), or even [68 companies](#), as responsible for causing the plaintiff’s injury. The number of asbestos cases filed in St. Clair County [jumped](#) from just four in 2009 to over 50 in 2010. To put this jump in context, plaintiff’s lawyers filed no asbestos cases in St. Clair in 2008, and just 61 asbestos cases in the combined [four years](#) between 2004 and 2007. While 50 cases may be small potatoes compared to Madison County’s docket, the increase in St. Clair lawsuits is significant. Associate **Judge Andrew Gleeson**, who took over the asbestos docket following Judge Young’s retirement, to his credit, has [dismissed](#) at least a few cases with no relation to the county upon the defendants’ request.

St. Clair County also hosts significant pharmaceutical litigation from across the country. This year, [more than 600 plaintiffs](#) – the vast majority from outside of Illinois – have filed lawsuits in St. Clair against New Jersey-based Johnson & Johnson, and its subsidiary, Ortho-McNeil, alleging that the antibiotic Levaquin caused them tendon problems. The plaintiffs hail from [New York](#), [California](#), Pennsylvania, Kentucky, Maryland, [Ohio](#), Oklahoma,

[Michigan](#), [South Carolina](#), [Rhode Island](#), Texas, [Wisconsin](#), and even [Alaska](#).



Also making headlines this year was the [retirement](#) of long-time St. Clair County **Judge Lloyd Cueto**, who handled many of the county’s medical malpractice, major civil, and class action lawsuits. Before he left, Judge Cueto gave plaintiffs’ lawyers the type of gift that helps promote St. Clair County’s reputation as a Judicial Hellhole. In a class action brought on behalf of all Illinois residents who’d bought CVS’s version of the popular immune system supplement Airborne, the court approved a [settlement](#) that would provide class members who kept their original receipt or the product packaging with a store credit for [\\$5.99 each](#) while class lawyers would share just under \$1 million in fees and costs, which is nothing to sneeze at.

## NEW YORK CITY AND ALBANY, NEW YORK

In a cry for help that will almost certainly be ignored by state lawmakers in Albany, a significant number of whom [moonlight for personal injury law firms](#) or are otherwise indebted to the political patronage of the plaintiffs’ bar, New York City **Corporation Counsel Michael Cardozo** last September called for tort reform, characterizing the “huge” dollar amount his city paid out in tort lawsuits this fiscal year as “an unacceptable tradeoff in favor of individual plaintiffs at the expense of providing services to New Yorkers.”

In a [speech](#) to a nonprofit group focused on city and state finances, Cardozo said that the city paid out \$561 million in tort and related cases in the 2011 fiscal year, compared to \$21.4 million in 1978, according to [Thomson Reuters](#).

By capping pain-and-suffering damages at \$250,000, changing the state’s antiquated and anti-competitive joint-and-several liability rule, and undertaking additional reforms, Cardozo said the city would save \$100 million a year. “The tort laws must be changed to even the playing field,” he said.



**Michael Bloomberg**, the mayor of “Sue” York City, had earlier made a similar plea, as he [worried aloud](#) about doctors and businesses, fearing meritless lawsuits, leaving the hellholish environs of the shrinking Empire State. In a January 2011 [speech to the New York State Bar Association](#), Bloomberg urged its members to support reasonable tort reform measures, likening civil litigation against his city in particular to a “lottery” that costs taxpayers roughly a half-billion dollars annually. He then pleaded: “Help us to make the law fairer to litigants and taxpayers.”

But as regular readers of this report know, enactment of reasonable tort reforms in Albany is about as likely as a Bronx slushball’s survival in a hellhole – especially considering that past bar association president Stephen Younger suggested after the mayor’s remarks that his members would only back “tort reform when it is supported by data.”



How much more data do you need Mr. Younger?! New York is to lose seats in the U.S. House of Representatives as [2010 U.S. Census data](#) show the populations of many counties in the central and western parts of the state shriveling like grapes on a forgotten vine. Many [New York doctors are moving to low-tort Texas](#), and the latest [annual survey of CEOs](#) deems New York second only to fellow Judicial Hellhole California as the very worst state in the Union for businesses. Educated young people [are heading to competing states in the south and west](#), searching for brighter career futures. And when your state lawmakers aren’t filing outrageous [slip-and-fall lawsuits against their own constituents](#), they’re following the lead of personal injury lawyer and **Assembly Speaker Sheldon Silver**, arguably the most costly state lawmaker in America, in scurrying to block every reasonable tort reform bill that comes down the pike, as they did with **Gov. Andrew Cuomo**’s modest medical liability reform proposal earlier this year, which sought, among other things, a \$250,000 limit on noneconomic damages.

Though Mr. Younger and other New Yorkers may be reluctant to inhale, the corrosive stench of lawsuit abuse is all around them.

## WEDDING PIX DO-OVER

Speaking of lawsuit abuse, the *New York Times* reported in November (“[Years Later, Lawsuit Seeks to Recreate a Wedding](#)”) that former bridegroom Todd J. Remis of Manhattan is suing his wedding photographer because he is dissatisfied with, among other things, the fact that the photographers missed the last dance and bouquet toss.

“Not only has Mr. Remis demanded to be repaid the \$4,100 cost of the photography, he also wants \$48,000 to recreate the entire wedding and fly the principals to New York so the celebration can be re-shot by another photographer,” according to the Times.

But here’s the rub: The wedding was in 2003, Remis and his wife separated in 2008, they divorced in 2010, and she’s believed to be living somewhere in Latvia with no interest in recreating a wedding photo shoot.

The decision by [Justice Doris Ling-Cohan](#) of the State Supreme Court in Manhattan to sanction even partially this absurdly shameless lawsuit speaks to why the civil justice system costs New York taxpayers millions of dollars more than it should each year. It also speaks to why businesses big and small continue to flee the hyper-litigious jurisdiction, taking their jobs with them to competing states. Judges such as Ling-Cohan should be held to account.

## SUPER-SIZE ME

Another shameless lawsuit, illustrative of too many New Yorkers’ litigious mind-set, is the lawsuit that, pardon the bun, er, pun, “grew” out of one man’s love for White Castle hamburgers. Sixty-something stockbroker Martin Kessman enjoyed the little sliders so much that he grew to 290 lbs. and could no longer fit into the booths at his favorite White Castle location in Nanuet, New York. And rather than exercise a little self-discipline with a renewed commitment to dieting and the treadmill, Kessman instead [chose to sue](#) the hamburger chain. He says he’d been made to feel like something other than a “normal person.” Well, Marty, if the XXXL sweatpants fit, wear ‘em.



## NO RISK, NO FUN ALLOWED

Of course, adults aren't the only ones who eat too much and fail to get enough exercise. But even when it's children who are overweight, lawsuit-loving adults are often the ones to blame.

A July science story in the [New York Times](#) rightly blames today's "boring" playgrounds on personal injury lawyers and their parasitic, opportunistic [lawsuits](#) that have, during the past few decades, managed to take most of the challenge and practically all of the fun out of jungle gyms and slides.

"Even if children do suffer fewer physical injuries – and the evidence for that is debatable," the Times article reports, "the critics say that [newer, supposedly safer] playgrounds may stunt emotional development, leaving children with anxieties and fears that are ultimately worse than a broken bone."

Add stunted emotional development to a well-documented epidemic of childhood obesity, and the real danger of trial lawyers becomes that much more apparent. Our world cannot possibly be risk-proofed entirely, no matter how many lawsuits taxpayers and consumers are obliged to finance.

## ON A BRIGHTER NOTE

Still pending when this report went to press last year was an appeal before New York's highest court regarding alleged liability for a bad golf shot. Just before Christmas in 2010, the court affirmed an appellate decision that was a gift to bad golfers everywhere. It [affirmed](#) dismissal of a case brought by one golf buddy against another. The case stemmed from an accident at a Long Island course wherein a "shanked" shot by Dr. Anoop Kapoor hit his frequent golf partner, Dr. Azad Anand, partially blinding Anand in one eye. Although Kapoor claimed that he yelled "fore" to warn his friend, Anand, who was searching for his ball nearby did not hear the warning call.

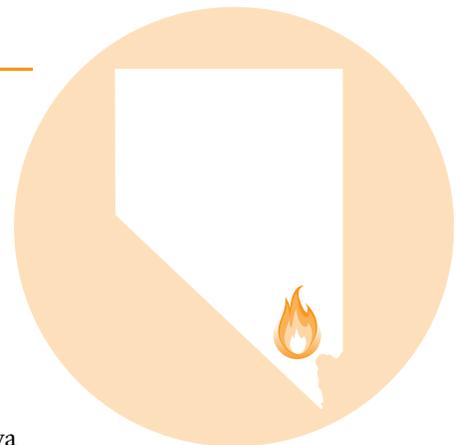
"A person who chooses to participate in a sport or recreational activity consents to certain risks that are inherent in and arise out of the nature of the sport generally and flow from such participation," the Court of Appeals recognized. It found that the nature of the accident reflected a commonly appreciated risk of golf. Had the Court of Appeals reached a different result, New York would have opened the door to more lawsuits stemming from the inherent risks of sporting and other recreational activities.

And finally, with so little good news coming out of New York these days, it was nice to read a September [Buffalo News editorial](#) that reported favorably on an experiment with a specialized medical malpractice court in Erie County. The court moves meritorious claims expeditiously toward fair and more predictable settlements, the editorial says, saving years' worth of litigation costs. Such "costs are among the factors that not only drive up the costs of health care in New York but also drive out doctors," and "[a]nything that lowers those costs could also . . . slow the outflow of medical talent."

## CLARK COUNTY, NEVADA

Clark County, Nevada quickly moved from the Watch List to the #6 position in the Judicial Hellholes report last year upon the announcement of an insane [half-billion dollar](#) verdict. And as Casey Kasem, formerly of America's Top 40 might have said, "the hits just keep on coming...."

As readers may recall, the [\\$500 million verdict](#) in May 2010 stemmed from the unsanitary practices at the Desert Shadow Endoscopy Center, which used vials of the anesthetic Propofol for multiple colonoscopy or endoscopy patients, ignoring the federally approved label warning against such practice. The verdict, however, placed much of the responsibility for a resulting outbreak of Hepatitis C on the drug's manufacturer, Teva Pharmaceutical Industries, and its distributor, Baxter Healthcare Services. They were left holding the bag when the [criminally indicted](#) and bankrupt owner of the clinic, Dr. Dipak Desai, settled with the husband-and-wife plaintiffs a few weeks before trial.





The targeted “deep pockets” were held liable simply because they sold Propofol in a 50ml vial, in addition to 10ml and 20ml sizes, when typical procedures require 20ml or less. [Reportedly biased rulings](#) of District Judge **Jessie Walsh** kept jurors from learning about the allegedly criminal conduct of clinic staff and the fact that the drug’s warning label could not have been changed without FDA approval. This effectively [stripped](#) the companies of their defenses. Perhaps not coincidentally, finance records show that, just months before she was randomly assigned the case, Judge Walsh’s reelection campaign [received \\$40,000](#) from the plaintiffs’ lawyer and others at his firm. The Nevada Supreme Court has not yet ruled on the defendants’ pending [appeal](#).

Early in the year, two similar cases heading to trial were [put on hold](#) by the state’s high court after Clark County Judge **Kathleen Delaney** ruled that the companies could introduce evidence of the clinic’s systematic misconduct, while her colleague, Judge **Timothy Williams**, would have kept from the jury some of the key facts surrounding the case.

Then came a whirlwind week in October that included two more massive verdicts, cementing Clark County’s Judicial Hellholes status.

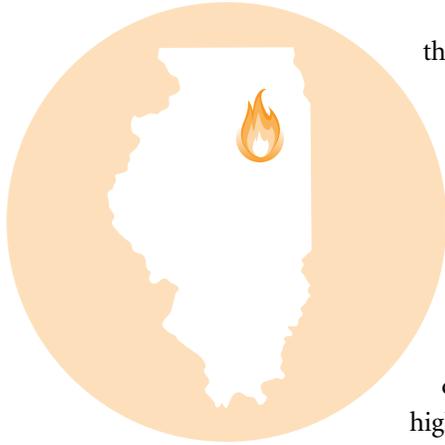
- ▶ **Thursday, October 6:** The same law firm that won the \$500 million aimed higher, asking a jury that had already awarded \$20.1 million in compensatory damages to three clinic patients and two spouses to award an additional [\\$739 million](#) in punitive damages against the pharmaceutical companies.
- ▶ **Monday, October 10:** The jury returned a [\\$162 million](#) punitive damages award. (But in the go-for-broke, casino-like mindset of certain Clark County personal injury lawyers, one must wonder if this gigantic add-on award was at least a little disappointing.)
- ▶ **Tuesday, October 11:** Dr. Desai and his lawyers [challenged](#) his competency to face the criminal charges brought by the state against him. Earlier in the year, the former clinic owner was ordered admitted to the state’s mental hospital after a court-appointed psychiatrist and psychologist found him [mentally incompetent](#). Six months later, doctors found him competent, concluding he was [exaggerating](#) the effects of two strokes he had suffered in 2007 and 2008. Prosecutors said Dr. Desai’s behavior was [an act](#). Dr. Desai is tentatively [scheduled](#) to face state criminal charges next March.
- ▶ **Wednesday, October 12:** Another clinic patient and his wife received a [\\$104 million](#) award, including \$90 million in punitive damages and \$14 million in compensatory damages, against Teva and Baxter.
- ▶ **Thursday, October 13:** Dr. Desai [pleaded not guilty](#) to federal charges stemming from the hepatitis C outbreak. A separate federal trial for conspiracy and health care [fraud](#) is scheduled for May 22, 2012. He remains free on \$1 million bail.

Though it claims it did so for manufacturing reasons unrelated to the Clark County award, Teva [ceased production of Propofol](#) just three weeks after the \$500 million verdict last year. Propofol is the most common intravenous anesthetic in the United States, used for general anesthesia and for sedation because, when used properly, patients wake up quickly and side effects are rare. With Teva leaving the market, and no other U.S. production of the sedative, there are concerns about continued [shortages](#) like those that have already been reported.



## MCLEAN COUNTY, ILLINOIS

Last year’s Judicial Hellholes report for the first time placed central Illinois’ McLean County on the “Watch List.” Those who have watched McLean’s civil justice system work over the past year are not pleased with what they have seen. By and large, however, the jurisdiction’s problems stem from a single type of case – a [McLean County phenomenon](#) in which lawyers [do not present evidence](#) that their clients worked for any of the employers named in

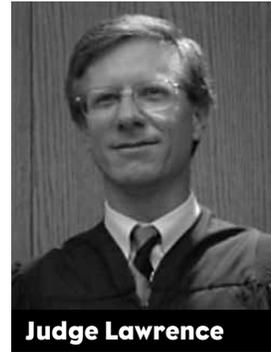


the lawsuit, or that their clients were exposed to asbestos from any of the named defendants' products. Every case is allowed to go to trial and any case resulting in a plaintiffs' verdict ultimately gets reversed. Between the legal expenses and the potential for massive punitive damages verdicts, however, those defending such cases have a strong incentive to settle.

In fact, just after last year's report was published, a McLean County trial before Circuit **Judge Scott Drazewski** resulted in a near [\\$90 million verdict](#) for Charles Gillenwater, who worked as a pipefitter in the 1970s and later developed mesothelioma. The award included \$9.6 million in compensatory damages and \$80 million in punitive damages. It is believed to be the second highest verdict of all time for a single mesothelioma plaintiff.

Lawyers in such cases claim that companies or their predecessors engaged in "parallel conduct" and conspired to suppress the dangers of asbestos decades ago – a charge defendants [deny](#). This strategy lets lawyers [circumvent](#) the need to show a connection between their client's injury and the defendant's products, and gives them a deep-pocket employer to sue when the companies that may actually be responsible for a plaintiff's exposure have already declared bankruptcy under the weight of lawsuits. In such cases McLean judges take a let-it-all-in approach to expert testimony of [questionable relevance and reliability](#). One local lawyer, James Wylder, has won a string of such trials, culminating in the \$90 million award.

But why even bother with trials? In April 2011, **Judge Paul Lawrence** barred Honeywell from presenting a defense, directed a verdict for the plaintiff, and had the jury deliberate only on damages. Stripping away Honeywell's defenses was an action Judge Lawrence said he did not undertake "lightly," but that it nonetheless was "the appropriate thing to do." His reason? Citing his age and need to remain with family, an elderly Honeywell consultant living in New Jersey was not prepared to travel again to central Illinois to offer the same testimony for the [23rd time](#), as plaintiffs' lawyers have sought to relitigate the same basic facts in order to wear down the defense.



The Fourth District Appellate Court has repeatedly [reversed](#) these multimillion-dollar verdicts, and this year [found](#) a lack of evidence of a conspiracy. For instance, plaintiffs have desperately relied on defendants' mutual membership in a trade association, a board member shared by two defendants, one defendant's assistance of another in drafting a position paper on the dangers of asbestos, and an allegation that the defendant companies suppressed results of a study on eight or nine mice that lacked scientific significance. Nevertheless, trial courts continue to allow these cases to go to the jury.



The situation has led legal observers to exclaim "[Move over, Madison County](#)" and note that "McLean County seems to be descending [deeper and deeper](#) into Hellhole status." An eye-popping award, application of what has been described in this report as the "civil death penalty," junk science, and allowing plaintiffs to recover with no direct link to the companies they sue place McLean County tentatively in the ranks of Judicial Hellholes for 2011/2012. Perhaps trial and appellate judges, whose souls have thus far appeared



# WATCH LIST

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The Judicial Hellholes project calls attention to several additional jurisdictions that bear watching, whether or not they have been cited previously as Judicial Hellholes. Watch List jurisdictions may be moving closer to or further away from the Hellholes as their respective litigation climates improve or degenerate.

## EASTERN DISTRICT OF TEXAS

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### CENTER OF THE PATENT LITIGATION UNIVERSE

The Judicial Hellholes report has rarely found it necessary to shine its spotlight on federal courts. But continuing practices in the U.S. District Court for the Eastern District of Texas (ED Texas), which have driven an ongoing surge of patent litigation there, demand special consideration this year.

The U.S. Supreme Court has now heard seven major patent cases in the past six years, most recently [ruling](#) in *Microsoft v. i4i*. The frequency of such cases signals that patent law is complex and seems subject to varying interpretations by different federal courts. In any case, patent litigation is a [growing business](#) (and costly to consumers), and nowhere is that business growing faster than in the ED Texas.

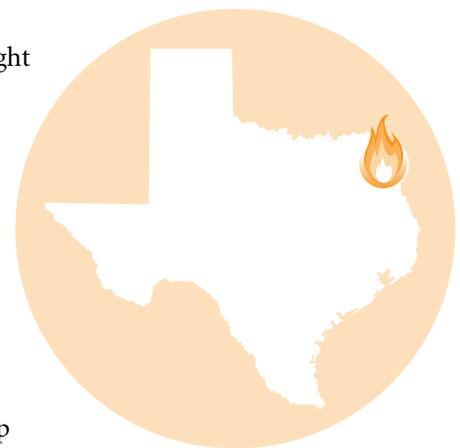
During the past several years, so-called patent trolls – those who buy up patents, not to incorporate them in competitive new products and services that help expand the economy, but simply for the purpose of filing nettlesome infringement lawsuits – have become the biggest players in patent law. Their litigation results in billions of dollars in settlements and verdicts, and threatens some of America’s most innovative job creators and financial service providers. And their favorite venue is the ED Texas.

Intellectual property lawyer [James Pistorino](#) reported in an [April 2011 article](#) that, excluding so-called “false marking” cases, the rural ED Texas in 2010 experienced a 20 percent increase in new patent lawsuit filings over the previous year. Since 2002, when just 32 patent cases were filed there, the district experienced a nearly ten-fold increase, attracting 299 such filings in 2010. That was more than all other federal court districts, respectively, including the corporate headquarter-rich District of Delaware (255) and Southern District of New York (102), and even the Northern District of California (180), home to Silicon Valley technology leaders.

In all, 3,879 defendants were named last year in new patent case filings in the ED Texas, a 70 percent increase from 2009 and more than four times the next highest number for new defendants, 884, in the District of Delaware. Troubling and perhaps most telling is the fact that more than 25 percent of all defendants sued in new patent cases nationwide in 2010 were sued in the ED Texas.

So what is going on in the ED Texas that has, within less than a decade (only 14 patent cases were filed there in 2003), made it the center of the patent litigation universe? And are there problems in Texas that are similar to those identified in Philadelphia, where that jurisdiction’s top judge publicly invited out-of-state personal injury lawyers to bring cases in her court?

Privately, many defense attorneys who are critical of the jurisdiction point to local rule changes initiated years ago by former Chief **Judge T. John Ward** (Marshall Division), and embraced by **Judge Leonard Davis** (Tyler Division) and current Chief **Judge David Folsom** (Texarkana Division). These problematic rules in the ED Texas





**Judge Ward**

have served to speed up trials, largely to the advantage of patent plaintiffs who enjoy both a rate of success and average award for damages there that are among the highest of all federal court districts.

“I would say that this is, historically anyway, a plaintiffs-oriented district,” Judge Ward conceded to the [New York Times](#) in 2006.

For example, in most federal court districts, patent defendants are more frequently granted stays pending a reexamination of a patent’s validity by the U.S. Patent and Trademark Office than they are in the ED Texas. Similarly, patent defendants in the ED Texas find it all but impossible to have flimsy claims against them dismissed on summary judgment, meaning they must undertake the significant expense of preparing for trial or, fearing the risk of gigantic jury verdicts, engage in invariably costly settlement negotiations.

To be fair to ED Texas judges, many patent plaintiffs’ attorneys say the court understands very well the complicated law underlying their litigation. And, plaintiffs argue, because the district is remote and otherwise enjoys a docket that is not packed with criminal cases, judges there have ample opportunity to immerse themselves in complex patent cases and render just decisions that are fair to all parties. The ED Texas, say patent plaintiffs, is a model of efficiency – and on this final point, defendants would hardly disagree.

In any case, it remains to be seen how recent appellate court decisions and Section 18 of the new patent reform law signed by President Barack Obama in 2011 will affect the goings on in the ED Texas. But meanwhile, Judge Ward has [retired from the bench and joined a patent law practice](#) based in Longview, Texas.

Fair-minded Americans agree that intellectual property rights must be enforced if the nation’s unique brand of entrepreneurial capitalism is to thrive in an increasingly competitive 21st century global economy. But Congress cannot allow patent trolls to abuse the civil justice system in a manner that hamstringing our most promising innovators and job creators while waiting and hoping for a silver-bullet Supreme Court decision.

## COOK COUNTY, ILLINOIS

Cook County’s fall this year from Judicial Hellholes rankings to the Watch List is the result of a relatively quiet year there. Nevertheless, no substantive civil justice reforms have been undertaken in Illinois, and Chicagoland maintains its reputation as one of the most plaintiff-friendly areas in the United States. That reputation, in part, explains why a recent [survey of CEOs](#) cited Illinois as the third worst state in which to do business.

Take, for instance, the case of Dominic Choate, who, while hanging out with his teenage friends, decided to [impress his girlfriend](#) by jumping on a moving freight train. He ignored posted warning signs and made not one, but three attempts to jump onboard the train – ultimately losing his leg below the knee when he slipped. He had been caught on the tracks before and warned by his mother to stay away from trains or he could get seriously hurt. So who is at fault? The Cook County Circuit Court initially made the correct decision by dismissing the case in favor of the railroad on the grounds that jumping on a train was an “open and obvious danger,” but later reversed itself and allowed the case to proceed to a jury. A jury returned a \$6.5 million verdict against the railroad, which was reduced to \$3.9 million to reflect the plaintiff’s apparent 40 percent share of responsibility. This summer, the First District Appellate Court [upheld](#) the verdict and, in doing so, relied on the figures of an expert for the plaintiff who vastly underestimated the cost of surrounding thousands of feet of track with a chain-link fence and placing an overpass above the tracks, as well as the likely ineffectiveness of such measures. Unless the Illinois Supreme Court overturns the trial and appellate courts, this case will signal all property owners in the state that they can ultimately be left on the hook for trespassers’ injuries, even when evidence shows trespassers appreciated the risks and made poor decisions.

But there may be reason for some optimism. Two years ago, when Cook County [clinched](#) the #3 Judicial



Hellhole spot, this report noted an absurd case in which an emergency siren manufacturer was hit with a \$425,000 verdict because its sirens were defectively loud. While such cases had been dismissed in other states, a Cook County jury, with less than two hours of deliberation, found that Federal Signal was responsible for the hearing loss of firefighters riding to emergencies. Obviously it is essential that sirens are loud both for the protection of the firefighters and the public. The 2009 verdict is still on appeal, but since that time the company has won 16 of the 17 similar trials in Pennsylvania. This November another such lawsuit went to trial in Cook County and ended in a [defense verdict](#).

The lack of faith in Cook County’s civil justice system may stem, in part, from the Chicago-style party politics used to select its judges. In Cook County, getting “[slated](#)” for a judgeship is really about whom you know and whether you have paid your dues to the dominant Democratic Party there. The process undoubtedly results in some well-qualified judges, but it is clear that the candidates’ legal credentials are secondary to party loyalty in the nominating process. Even when voters have rejected judges at the ballot, the practice of the Illinois Supreme Court for many years has been to reappoint them to the Cook County Circuit Court bench – by recalling “retired” judges. This year the state’s high court [pledged](#) to discontinue this practice.

## SOUTHERN NEW JERSEY

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A [study](#) by the Eagleton Institute at Rutgers University prepared for the New Jersey Lawsuit Reform Alliance found that 40 percent of South Jersey businesses surveyed say they were threatened with litigation in the past five years, while statewide it was only 24 percent. A quarter of South Jersey businesses were actually sued during that period. So it’s no surprise that more than 4 out of 5 small-business owners statewide rate their Garden State’s legal climate as “fair” or “poor” and want the legislature to prioritize tort reform. A survey of CEOs from larger companies nationwide found the state to be the [fourth worst](#) in the Union for business. And yet another [study](#), conducted by NERA Economic Consulting for the U.S. Institute for Legal Reform, found that New Jersey tort costs are 21.5 percent higher than they should be and could be reduced by nearly \$2 billion through adopting the types of legal reforms enacted in other states.



## ATLANTIC COUNTY, NEW JERSEY

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Atlantic County, previously featured in this report as a Judicial Hellhole, also remains a jurisdiction of concern, particularly as a magnet for [mass tort](#) litigation against one of the state’s primary employers, the pharmaceutical industry. Thousands of claims, [more than 90 percent](#) of which are made by out-of-state plaintiffs, involving several prescription medicines are before **Judge Carol E. Higbee** in Atlantic County. Though some trial results noted below suggest that defendants will occasionally get a fair shake, informed sources say defendants remain very concerned. In the first Fosamax case to go to trial, the jury returned a defense verdict for [Merck](#), finding that the osteoporosis drug was not responsible for the Pennsylvania woman’s jaw deterioration. There are 300 Fosamax lawsuits before Judge Higbee.



**Judge Higbee**

Later in the year, the first trial in Atlantic County’s Levaquin mass tort litigation ended in a defense verdict for [Johnson & Johnson](#). The jury considered claims brought by two men ages 67 and 72, who had experienced ruptured Achilles tendons. It found that the company adequately warned that the drug could cause tendon problems, particularly in patients over 60. There are over 1,700 Levaquin cases pending in Atlantic County – more than half of such cases pending nationwide. With respect to the acne drug Accutane, one jury awarded a plaintiff \$2.1 million, finding that the drug was a substantial factor in causing her inflammatory bowel disease (IBD). The same jury, however, ruled for the manufacturer, [Hoffman-La Roche](#), in two other cases in which the plaintiffs



alleged the drug caused them to develop other health problems. But Judge Higbee also [upheld a \\$25.2 million](#) verdict after a retrial of an Accutane IBD case – a 2007 verdict in the same case was much smaller but reversed upon challenge because the judge did not permit the jury to learn the total number of Accutane users. That’s the risk companies take in trying a case in Atlantic County.

It seems there also is considerable risk for county taxpayers. “Every city gets sued a lot. But few, we suspect, get sued more than Atlantic City,” began a recent [editorial in the \*Press of Atlantic City\*](#). “Slips and falls, sexual harassment, discrimination, reverse discrimination, wrongful termination ... it never stops. Some lawyers have based their entire careers on winning judgments against the city or settling cases for big bucks.

“It would almost be comical - if these lawsuits and settlements weren’t taking money out of taxpayers’ pockets,” the editorial continued. But things may be changing for the better. **City Solicitor Bruce Ward** has vowed to “attack this litigious culture . . . by taking every lawsuit to trial,” a tactic that has begun to show positive results in other frequently sued jurisdictions.

## FRANKLIN COUNTY, ALABAMA

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### JUDGE DEMPSEY’S HOME-COOKIN’ SERVES LOCAL EMPLOYER WELL

With his ham-fisted, home-job handling this past spring of a specious lawsuit brought by a local manufacturer against an out-of-state software company, Franklin County Circuit Court **Judge Terry Dempsey** appeared singlehandedly determined to qualify his rural Alabama jurisdiction as the next notorious Judicial Hellhole.

The plain language of an enterprise software licensing agreement signed in 2005 by plaintiff Sunshine Mills (a pet food maker and one of Franklin County’s larger employers) and defendant Ross Systems of Atlanta, Georgia, specified that any subsequent disputes arising from the agreement would be adjudicated by Georgia law. But Judge Dempsey ignored that agreement and allowed the case to go all the way to trial before requiring the plaintiff to spell out its vague allegation of fraud.

Judge Dempsey also repeatedly allowed plaintiffs’ counsel to make [thinly veiled xenophobic references](#) to the defendant’s parent company based in China in an apparent effort to appeal to the lesser angels of the jurors’ nature. And after Judge Dempsey allowed a never-before-recognized-in-Alabama-courts rationale for calculating Sunshine Mills supposed damages (based on projected profits not realized), those jurors ultimately came back with a whopping **\$61 million verdict** – including \$45 million in punitive damages – for the hometown favorite. It should be noted that Ross Systems’ was valued at just \$58 million at the time of the verdict.

It should also be noted that, as reported by the [Birmingham News](#), the software system in question only cost Sunshine Mills \$235,000, and was used for years without complaint before the suit was filed just days before the statute-of-limitations was to run out. In fact, according to Ross Systems in a [motion to reverse](#) the jury’s verdict in Alabama, an appeal to the Alabama Supreme Court, and a countersuit in Georgia, Sunshine Mills continued to use the software *without a license*, purchased additional products from Ross, paid for ongoing customer support during the trial, and consistently gave Ross high marks for its service in feedback surveys.

It would take a mind reader to know if Judge Dempsey deliberately strung out the post-trial process in Franklin County so as to assist Sunshine Mills attorneys in putting the squeeze on Ross Systems. Though the Alabama legislature, to its credit (*see* Points of Light, p. 35), has since significantly lowered the state’s rate of post-judgment interest, it was an absurdly high 12 percent at the



time, and that put about \$20,000 per day's worth of pressure on Ross as it pursued its appeals and otherwise negotiated with Sunshine Mills toward a settlement figure less than \$61 million.

Such a bankruptcy-preventing settlement was eventually reached by the parties in September, obligating the defendant to pay the plaintiff about \$9.5 million. In any case, despite the moderating efforts of the state legislature and supreme court, this textbook example of backwoods justice establishes Franklin County as a worrisome Watch List jurisdiction, the likes of which should concern all Alabama policymakers and citizens hoping to build a stronger state economy.

## SMITH COUNTY, MISSISSIPPI

### CONFLICTED JUDGE ENABLES RECORD ASBESTOS VERDICT

Like Franklin County, Alabama, rural Smith County, Mississippi, by virtue of a single verdict, has vaulted into the uncomfortably hot Judicial Hellholes spotlight. According to the local [Laurel Leader Call](#) newspaper, the jury in the case last May “awarded a 48-year-old Brookhaven man the single largest plaintiff’s asbestos verdict in United States history.” The verdict included \$22 million in compensatory damages and an astounding \$300 million in punitive damages.

“In a case against Chevron Phillips Chemical ... and Union Carbide Corporation,” the paper went on to report, “Thomas ‘Tony’ Brown Jr., was awarded \$322 million dollars for future medical expenses, pain and suffering, and punitive damages.”

No one begrudges Mr. Brown or any other truly sickened asbestos plaintiff fair and just compensation. But a verdict this gigantic, for *one* plaintiff, would be as funny as “[My Cousin Vinny](#)” if it weren’t for its terribly negative impact on the Magnolia State’s efforts to compete in attracting businesses and jobs.

Thankfully, Mississippi’s Supreme Court in July ordered a stop to all proceedings in the case, responding to a motion from the defendants, which, as reported by the *Clarion Ledger* in Jackson, Mississippi, argued that Smith County Circuit Court **Judge Eddie H. Bowen**’s “bias and prejudice against Union Carbide and Chevron Phillips ... were evidenced in his rulings, comments in front of the jury, and his coaching of Brown’s attorneys in questioning witnesses.”



Turns out that Judge Bowen failed to disclose before trial that both of his parents had previously settled asbestos claims with one of the defendant companies, and that one of his father’s two asbestos lawsuits is still pending in neighboring Jasper County.

In October the high court unanimously ordered Judge Bowen to recuse himself from all future proceedings and stayed the case until a new judge can preside. According to [Law360.com](#), a spokesman for one of the defendant companies said: “This \$322 million verdict . . . was outrageous and completely unsupported by the facts and applicable law.”



## LOUISIANA

### ANOTHER 'LEGACY' OF 'SMALL-TOWN' JUSTICE

The landscape in Louisiana, like that of Texas, Mississippi and other “oil patch” states is dotted with drilling rigs, long a symbol of revenue for landowners, jobs for local citizens, and economic potential for local business communities. The difference between the oil rigs in the Pelican State compared to those in other states, however, is that many of them are idle or otherwise [in decline](#). Why? Because a booming cottage industry has developed to pursue what are known as “legacy” lawsuits, which have brought onshore energy exploration and production to



its knees in Louisiana. Though such litigation purports to be about funding for environmental clean-up, [local observers](#) say the only ones cleaning up are the plaintiffs' lawyers.

Here's how it works: A lawsuit is filed in a rural parish courthouse, claiming millions or even billions in damages for alleged environmental harm as a result of drilling activity. A case can remain unresolved for years, sometimes a decade, without any hard evidence of contamination being proffered or cleanup undertaken. Rather than eventually risk a runaway jury verdict, the defendant or defendants often choose to be extorted, that is, to settle out of court. And though a 2006 reform law sought to obligate a significant portion of such settlement funds to environmental remediation, cagey Bayou plaintiffs' lawyers often manage, with blessings

from both parish and appellate judges, to use the law unfairly for their own gain.

More than one out of every two barrels of crude pumped from Louisiana's oilfields are produced by a [lawsuit defendant company](#). Energy producers large and small have been affected – [more than 1,500 companies in all](#) – with some 250 suits filed over the past five years. And amazingly enough, more than half of the lawsuits involve the plaintiffs' firm of Talbot Carmouche & Marcello, according to case listings by Louisiana's Department of Natural Resources.

## **BLOW YOURSELF UP, WIN \$15 MILLION**

As if the spiraling costs of legacy lawsuits weren't enough to crush the energy industry and kill jobs, Louisiana's courts also appear inclined to go after utility companies.

In May 2011, the Third Circuit Court of Appeals upheld a St. Landry jury's \$15 million verdict in a case of an explosion that occurred when a man turned the natural gas on at his house after it was cut off [due to non-payment](#). Carl Jones Sr., of Opelousas, broke the lock installed by the gas company with a wrench and restored fugitive services. The home exploded the next day. Despite the fact that the gas provider, Centerpoint Energy, had turned off and locked the gas service, and its actions were not the legal cause of the accident, a jury found the utility to be 50 percent responsible and awarded the Jones family \$15 million.

# DISHONORABLE MENTIONS

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Dishonorable Mentions recognize particularly abusive practices, unsound court decisions or other actions that erode the fairness of a state’s civil justice system.

## MISSISSIPPI SUPREME COURT CONJURES LIABILITY FOR COMPANIES THAT NEITHER MADE NOR SOLD ALLEGEDLY DEFECTIVE PRODUCTS

In Mississippi, if you design a product but never make or sell it, you still may be liable if someone else ultimately puts the product on the market, according to a recent Mississippi Supreme Court ruling.

Pamela Lynn Lawson claimed her seatbelt unbuckled when she lost control of her Jeep Cherokee, veered off the highway, and rolled several times before coming to a stop. She sued Chrysler, but it had declared bankruptcy. She also sued the company that actually manufactured her seatbelt buckle for Chrysler, Key Safety Systems, which paid her an undisclosed sum. But her lawyer found a deep pocket to sue, Honeywell International, Inc. The lawsuit claimed that Honeywell merged with a company, AlliedSignal, which originally designed the seatbelt. The trial court dismissed the lawsuit, properly recognizing that Honeywell could not be liable for Ms. Lawson’s injury since it did not make or sell the seatbelt at issue.

Astoundingly, however, the Mississippi Supreme Court [reversed](#) the trial court’s decision and reinstated the lawsuit. It found that although the plaintiff could not bring a product liability claim against Honeywell, she could assert that the company was negligent in designing the seatbelt.

The case will now go back to the trial court, which could (and should) dismiss the negligence claim on the ground that a nonmanufacturing, nonselling designer owes no duty to a consumer like Lawson. As Scott R. Dayton of the law firm Weil, Gotshal & Manges [observed](#), “[a] contrary ruling might provide a new field of defendants for plaintiffs in products-liability cases, especially plaintiffs, like Lawson, whose primary deep-pocket defendant has gone bankrupt.”

There is a reason that product liability law places responsibility for injuries on those who make or sell products. Manufacturers presumably have control over, and the best knowledge of, their own products. They can warn consumers regarding hazards and make safety changes to address risks. Sellers profit from product sales and have the ability to incorporate the cost of liability insurance into the price. The Mississippi Supreme Court’s decision now inappropriately places companies on the hook, regardless of whether they had control over or profited from the sale of the product. Mississippi has made great strides in leaving its Judicial Hellholes history in the past, and this decision can be fairly viewed as an aberration. But it does present lawmakers in the Magnolia State with an opportunity to clarify liability law there in 2012, and they should seize it.



## ARKANSAS SUPREME COURT STRIKES DOWN REASONABLE LIMIT ON PUNITIVE DAMAGES

As the Judicial Hellholes report went to press, the Arkansas Supreme Court [struck down](#) a 2003 law that limited awards for punitive damages.

The court’s ruling is outside of the mainstream. Courts around the nation recognize that there is no right for an individual to collect punitive damages, which exercise the state’s prerogative to impose punishment and do not provide compensation for an injury. Over the past decade, courts in Alabama, Alaska, North Carolina, Ohio and

Texas have upheld such limits. The Alabama Supreme Court, which may be the only other state high court to find a punitive damages limit unconstitutional when it did so in 1993, overruled that opinion 10 years ago. Aside from Arkansas, 23 states have statutory limits on punitive damages. Six states generally do not permit such awards to begin with.

Nonetheless, the Arkansas judiciary gave short shrift to the legislature's policy judgment that awards for punitive damages have run wild and needed rational bounds. Circuit Court **Judge Phillip T. Whitaker** of Lonoke County proclaimed the statute unconstitutional from the bench, without so much as issuing a written ruling with his reasoning. The state's highest court affirmed, citing language in its state constitution intended to preclude limits on recovery of compensatory damages for personal injuries or property damage.

The Arkansas law had limited punitive damages to the greater of \$250,000 or three times compensatory damages (not to exceed \$1 million), periodically increased the limit for inflation, and did not apply it in cases where a defendant intentionally harmed the plaintiff.

The Arkansas Supreme Court, apparently determined to be known for its proclivity toward judicial activism, has now struck down three tort reform laws in four years. In 2009 it [invalidated](#) the legislature's attempts to allocate fault more accurately among parties and determine compensation for medical care and, two years earlier, [threw out](#) a law requiring plaintiffs to submit a certificate of merit from a physician to support allegations made in medical malpractice cases.



## MISSOURI APPELLATE COURTS LET SHAMELESS 'COUPON SETTLEMENT' STAND



Readers of this report last year will remember the egregious class-action coupon [settlement blessed by St. Louis](#) Circuit Court **Judge Angela T. Quigless**, despite [objections](#). The plaintiffs' lawyers who sued mutual fund A.G. Edwards (now Wells Fargo) were to share [\\$21 million in fees](#) plus about \$600,000 in expenses, while each of their presumptive clients would get only [about \\$20](#) cash and three unlikely-to-be-redeemed [coupons worth \\$8.22 each](#).

This past spring an [intermediate appellate court signed off](#) on the shameless settlement, and in late summer the Missouri Supreme Court refused to take up the case, affirming the settlement without ever addressing the Center for Class Action Fairness's argument about the appropriate legal means for valuing coupons. "[I'm appalled](#)," wrote the CCAF's Ted Frank on the PointOfLaw.com blog, "but thankfully, the Class Action Fairness Act will keep most future out-of-state class members from being ripped off by self-serving attorneys operating in Missouri state courts."



# POINTS OF LIGHT

**There are five ways to douse the flames in Judicial Hellholes and help out-of-balance jurisdictions to 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 can enact statutory reforms; and**
- 5 Voters can reject litigation-loving judges or enact ballot referenda to address particular problems.**

**In its "Points of Light" section, the Judicial Hellholes report highlights jurisdictions in which judges, legislators, the electorate and/or the media have intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the depths of a Hellhole or otherwise keep itself from sinking to those depths in the first place. This year's report focuses on legislative and judicial actions.**

## IN THE LEGISLATURES

As anemic economic growth and high unemployment continued to plague much of the country throughout the past year, many governors and state legislators were determined to make their states more competitive and attractive to employers. Thus enactment of a variety of tort reform measures figured prominently in these policymakers' pro-growth, job-creation agendas.

In fact, with nearly 50 new affirmative civil justice reforms signed into law, 2011 produced more legislative Points of Light (POLs) than any other year in recent memory.

Beginning with legislative achievements before moving on to the courts, below is a less-than-comprehensive list of statutory tort reforms enacted in 2011, offered in alphabetical order of the states.

**ALABAMA** | The Yellowhammer State changed the rate of interest on judgments from 12 percent to 7.5 percent. Prior to the enactment of [S.B. 207](#), a defendant who lost a lawsuit and chose to appeal had to begin paying 12 percent post-judgment interest on the amount the court or jury awarded the plaintiff, creating a significant financial deterrent to appealing an unjust verdict (*see* p. 30).

The state also prohibited "forum shopping" of wrongful death actions ([S.B. 212](#)), adopted the *Daubert* standard for admitting scientific expert testimony ([S.B. 187](#)), and protected innocent sellers from products liability litigation ([S.B. 184](#)). This innocent seller protection law does allow, however, the naming of a retailer or distributor in a claim when the manufacturer of a product is unknown and reasonable discovery is needed to identify the manufacturer so the suit can then proceed against the manufacturer.

**ARIZONA** | With enactment of [S.B. 1212](#), the Grand Canyon State limited appeal bonds to the lesser of the total amount of damages awarded (excluding punitive damages), 50 percent of the appellant's net worth, or \$25 million.

Arizona also barred state agencies and officials from entering into contingency-fee contracts with private law firms unless the state attorney general first makes a written determination that the contingency-fee representation is both cost effective and in the public interest ([H.B. 2423](#)). The contract must be posted on the attorney general's website for at least 365 days, and the legislation limits the amount of aggregate contingency fees that the attorney may receive to no more than 25 percent of any recovery less than \$10 million, 20 percent of any recovery between

\$10 million and \$15 million, 15 percent of any recovery between \$15 million and \$20 million, 10 percent of any recovery between \$20 million and \$25 million, and 5 percent of any recovery greater than \$25 million.

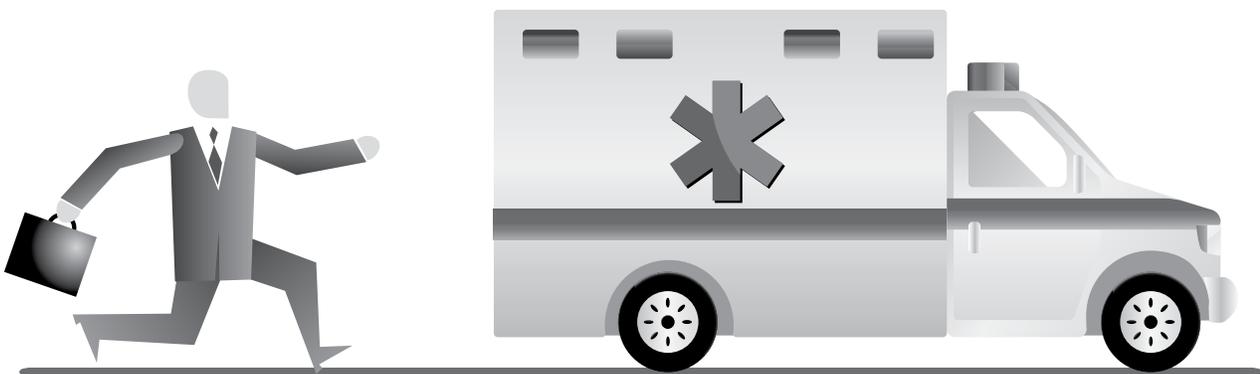
**FLORIDA** | Though notorious for auto accident litigation, the Sunshine State failed to pass much needed antifraud legislation earlier in the year, but a fresh effort is expected to begin in January. Meanwhile, Florida’s antiquated crash-worthiness doctrine in cases brought against automobile manufacturers for alleged vehicle malfunctions in accidents was successfully repealed ([S.B. 142](#)). Under the new law, defendants will be allowed to present evidence that the plaintiff was driving while intoxicated or using illegal substances and juries can apportion responsibility accordingly. Florida also passed sinkhole reform legislation ([S.B. 408](#)), limiting lawsuits and losses for property insurers stemming from sinkhole claims, while allowing policyholders with legitimate claims to be compensated.

In addition to judgment interest rate reform ([H.B. 567](#)), Florida undertook significant medical liability reform ([H.B. 479](#)) that, among other things, requires a doctor licensed in another state to obtain an expert witness certificate before providing expert testimony in Florida. The new law also gives state Boards of Medicine, Osteopathic Medicine, and Dentistry authority to discipline any expert witness, both those licensed in state and those with an expert witness certificate, who provides deceptive or fraudulent expert witness testimony. Expert witnesses who submit pre-suit verified medical opinions are no longer immune from discipline. Furthermore, this medical liability statute creates a new pre-suit form – an “authorization for release of protected health information – that will make it easier for a physician to obtain the plaintiff’s full health care information in a malpractice suit.

Finally, the medical liability reform immunizes physicians who volunteer at school athletic events against lawsuits arising out of the rendering of care, and it requires both the Board of Medicine and the Board of Osteopathic Medicine to create a standard informed consent form that sets forth the recognized risks related to cataract surgery to preclude “adverse incident” claims involving recognized specific risks.

**INDIANA** | [With enactment of S.B. 214](#), the Hoosier State now requires the attorney general to make certain determinations before entering into a contingency-fee contract with a private attorney, and requires the attorney general to publish certain information concerning contingency-fee contracts on the attorney general’s website.

**KENTUCKY** | Some in the Bluegrass State called [H.B. 382](#) an anti-ambulance chaser bill because it now prohibits, during the first 30 days after a motor vehicle accident, any person from directly soliciting or knowingly permitting another person to directly solicit an individual, or relative of an individual, involved in a motor vehicle accident for the provision of any service related to the accident.



**MISSOURI** | The Show Me State will now preclude its attorney general from entering into contingency-fee contracts with private attorneys unless he or she shows the public written findings that justify such contracts ([S.B. 59](#), Sections 34.376, 34.378, and 34.380). The new law requires the AG to seek written proposals from private attorneys and ultimately choose the best bid. A private attorney representing the state on a contingency-fee basis must now maintain expense records for at least four years after the contract terminates, and the AG’s office must respond to public requests for these records under the sunshine law. Similarly, the AG’s office must post certain information about contingency-fee arrangements on its website and prepare an annual report on the use of such arrangements.



Gov. Perdue

**NORTH CAROLINA** | Tar Heel State lawmakers overrode Gov. Beverly Perdue’s veto to enact a medical liability reform bill ([S.B. 33](#)) that limits awards for noneconomic damages to \$500,000. They also managed to win her signature on [H.B. 542](#), a package of other significant tort reforms including: a requirement that lawyers present juries with accurate information about the plaintiff’s actual medical expenses, stronger requirements for expert witness testimony that are consistent with federal court standards and those of most other states, deterrence of frivolous lawsuits, encouragement for parties in small cases to negotiate reasonable settlements, and codification of state common law to make clear that landowners are not liable for harm to trespassers on their property.

**NORTH & SOUTH DAKOTA** | Lawmakers in both the Peace Garden and Mount Rushmore states also saw fit to codify the immunization of landowners from trespassers’ claims ([H.B. 1452](#) and [H.B. 1087](#), respectively). The bills each include exceptions for certain circumstances involving children.

**OKLAHOMA** | For the second year in a row, Sooner State legislators acted on an ambitious tort reform agenda, which included class action reform ([S.B. 704](#)) that requires plaintiffs to provide more specificity in their lawsuits and adds a new requirement that petitions for class certification contain factual allegations sufficient to demonstrate a plausible claim for relief.

[H.B. 2023](#) eliminates the potential for awards of damages for medical expenses that significantly exceed the amounts actually paid for treatment, while [H.B. 2128](#) reduces from \$400,000 to \$350,000 the limit on awards for noneconomic damages arising from claims of bodily injury, with exceptions made for cases involving gross negligence, reckless disregard, intentional actions, or malicious conduct.

Additionally, Oklahoma eliminated joint and several liability ([S.B. 862](#)), except when the state is the plaintiff. The legislature also codified the generally accepted rule that landowners have no duty to trespassers, except under very narrow circumstances ([S.B. 494](#)).

[S.B. 865](#) requires jury instructions in civil cases to note that no part of a damages award for personal injury or wrongful death is subject to federal or state income taxes. And [H.B. 2024](#) requires a court, upon request of a party, to order that medical, health care, or custodial services awarded in an action be paid in whole or in part in periodic payments rather than a lump-sum. Also, upon request of a party, the court may order that future damages other than medical, health care, or custodial services awarded in a health care liability action be paid in periodic payments rather than a lump-sum when the present value of the award equals or exceeds \$100,000.

**OREGON** | [H.B. 3034](#) makes jury service less onerous for citizens who must take leave from work to serve. [H.B. 2217](#) disallows the award of punitive damages against professional counselors or licensed marriage and family therapists if they were acting in the scope of their practice. And [H.B. 2312](#) eliminates liability for charitable corporations when providing eyeglasses, hearing aids or other medical devices without charge.



Gov. Corbett

**PENNSYLVANIA** | With election of pro-tort reform Gov. Tom Corbett, Keystone State lawmakers were emboldened to push through long overdue joint and several liability reform ([S.B. 1131](#)). It bars the application of joint liability in the recovery of all damages, except when a defendant is found liable for: 1) intentional fraud or tort, 2) more than 60 percent of total liability, 3) environmental hazards, or 4) drunk driving. (And as noted above, with an eye on troubling litigation tourism to Philadelphia, lawmakers are to push venue reform legislation in 2012.)

**SOUTH CAROLINA** | Palmetto State legislators passed a useful package of modest reforms ([H. 3775](#)) that limits punitive damages; protects the right to appeal an adverse



verdict by limiting the amount of the bond needed to stop collection of the judgment to \$25 million for businesses with 50 or more employees and gross revenue of over \$5 million, and \$1 million for all other entities; shortens the period for bringing cases alleging a construction defect; requires the attorney general to approve civil actions by circuit solicitors; and requires disclosure of insurance policy limits for personal auto policies in accident cases.

**TENNESSEE** | The Volunteer State passed its first significant package of civil justice reforms ([H.B. 2008/S.B. 1522](#)) that, among other things, limits venue shopping; lowers the maximum amount a defendant can be required to pay to appeal a decision from \$75 million to \$25 million, never exceeding 125 percent of the judgment; limits noneconomic damages to \$750,000 per occurrence in medical liability actions, and a limit of \$1 million if the injury or loss is catastrophic in nature; limits punitive damages to two times compensatory damages or \$500,000, whichever is greater; prohibits the award of punitive damages against innocent sellers of products and drug or device manufacturers when the product was manufactured in accordance with relevant federal law; provides for interlocutory appeal of class certifications; and prohibits class actions under the consumer fraud statute, and otherwise positively reforms that consumer fraud statute.



**TEXAS** | Though their Rangers fell short of a World Series championship this past season, Lone Star State legislators and **Gov. Rick Perry** were inspired to rally for more tort reforms.

Though [H.B. 274](#) is often referenced as a “loser pays” reform, legal observers [express concern](#) that the new law will simply provide courts with a tool to award fees to plaintiffs’ attorneys who avoid early dismissal of their claims, and may lead risk-averse defendants not to seek dismissal.

Like reforms passed in other states and noted above, [S.B. 1160](#) codifies the traditional common law rule that a landowner owes no duty of care to a trespasser and prevents courts from adopting the new radical standard recommended in the American

Law Institute’s [Restatement of the Law Third \(Torts\)](#).

[S.B. 1716](#) protects accident victims from improper solicitations from lawyers, known as an anti-barratry law. The law allows a client to bring an action to void any contract for legal services that was procured as a result of an improper solicitation. The client is entitled to receive all fees and damages paid to that person under any voided contract, actual damages caused by the prohibited conduct and reasonable attorney’s fees and the attorney at fault shall pay a civil penalty of \$5,000.

**WISCONSIN** | Though union protesters drew national media attention to the Badger State later in 2011 with their opposition to civil service reforms, **Gov. Scott Walker** signed [S.B. 1](#), a comprehensive civil justice reform package, into law weeks earlier.

Among other things, the new law requires proof of a “reasonable alternative design” to an allegedly defective product’s design, moving Wisconsin away from the broad “consumer expectation” test. It also overturns a Wisconsin Supreme Court [decision](#), recognized with a [Dishonorable Mention](#) in 2005, that permitted lawsuits against entire industries without the need to show that a particular company caused the plaintiff’s injury. In addition, the new law adopts the *Daubert* standards for expert testimony in Wisconsin courts, assuring that such testimony is based on sufficient facts or data and is the product of reliable principles and methods. [S.B. 1](#) also limits punitive damages to \$200,000 or two times compensatory damages, whichever is greater.

Other issues addressed in the bill include sanctions on frivolous lawsuits and limits on noneconomic damages for long-term care providers. And in a special session late this year, productive Wisconsin policymakers added three more important reforms that reduce a very high pre- and post-judgment 12 percent interest rate ([S.B. 14](#)), limit property owners’ liability to trespassers ([S.B. 22](#)), and limit attorneys fees ([S.B. 12](#)).



## IN THE COURTS

**CALIFORNIA AND TEXAS SAY NO TO 'PHANTOM DAMAGES'** | In personal injury litigation, a responsible defendant pays for the plaintiff's medical care. The goal is for the plaintiff to be reimbursed for all of his or her reasonable and necessary expenses. In most cases, however, defendants have to pay more, often several times what the plaintiff or his or her insurer ever had to pay, for the plaintiffs' medical care. Such overpayments are called "phantom damages." Phantom damages are the difference between the amount of medical expenses *billed* by a doctor (the "sticker price") and the amount that the plaintiff and her insurer actually paid. Nobody ever paid these damages. The plaintiffs' insurer, Medicare or Medicaid negotiates rates with health care providers. For example, a hospital may charge \$1,500 for an MRI, but the actual amount paid for that MRI might be \$500. The plaintiff may have paid a \$25 co-pay and the insurer paid the remaining \$475. Yet, in litigation, the defendant is often required to pay the full \$1,500 to the plaintiff – \$1,000 more than anyone ever paid – simply because that amount was printed on the original bill. As mentioned above, this year, state legislatures in [North Carolina](#) and [Oklahoma](#) acted to prohibit introduction of evidence of billed medical expenses when they do not reflect the price actually paid for treatment. As a ruling out of the [California Supreme Court](#) shows, state courts can also act to clarify that a plaintiff is not entitled to such damages "for the simple reason that the injured plaintiff did not suffer an economic loss in that amount." In that case, the plaintiff claimed damages based on \$190,000 in medical bills even as her insurer [settled the bills](#) for less than \$60,000. Even when states have [laws](#) that prohibit phantom damages, courts may need to act to ensure that the law is properly applied to stop the misleading of juries with inflated bills, a July 2011 [Texas Supreme Court ruling](#) shows.

**DC COURT OF APPEALS SAYS PEOPLE CANNOT SUE IF THEY WERE NOT HARMED** | In January, the District of Columbia's highest court [rejected two claims](#) that threatened to make the nation's capital a magnet for consumer lawsuit abuse. The absurd cases earned the District of Columbia [a spot](#) on last year's Judicial Hellholes "Watch List." One involved Alan Grayson, a former member of Congress from *Florida*, who sued AT&T and others, supposedly on behalf of *D.C. residents* and the city, claiming that phone card companies somehow misled consumers by not turning over leftover balances on calling cards (referred to as "breakage") to the city as "unclaimed property." In the other, Paul Breakman, a District resident, sued AOL for offering better deals to new members than current members for the same basic internet service. Mr. Breakman, however, was not even an AOL member himself, yet he sought actual damages, treble damages, punitive damages, an injunction, and reasonable attorneys fees against AOL for each individual D.C. subscriber. The court dismissed both claims. It found that while Mr. Grayson at least alleged that he bought a calling card in the District, he failed to identify anything the company said that misled consumers about the obvious nature of calling cards that would make them think the city or a charity would receive any leftover balance. Mr. Breakman, the Court found, lacked standing to bring a suit. In other words, he had not made even a rudimentary showing that he suffered an injury. The broader message of these decisions is that a person or organization that sues for the generous damages and attorneys' fees authorized by the District's consumer protection statute must show "concrete injury-in-fact to himself." The alternative, the court recognized, "would open our courts to any person from anywhere who decides to lodge a complaint labeled as a 'representative action' under the CPPA, even though that person has suffered no injury-in-fact related to a District of Columbia merchant's unlawful trade practice." Such rampant lawsuit abuse occurred in California until voters finally intervened by [passing Proposition 64](#) in 2004. Fortunately, the D.C. Court of Appeals' decision will preclude such bogus, extortionate claims in the nation's capital.

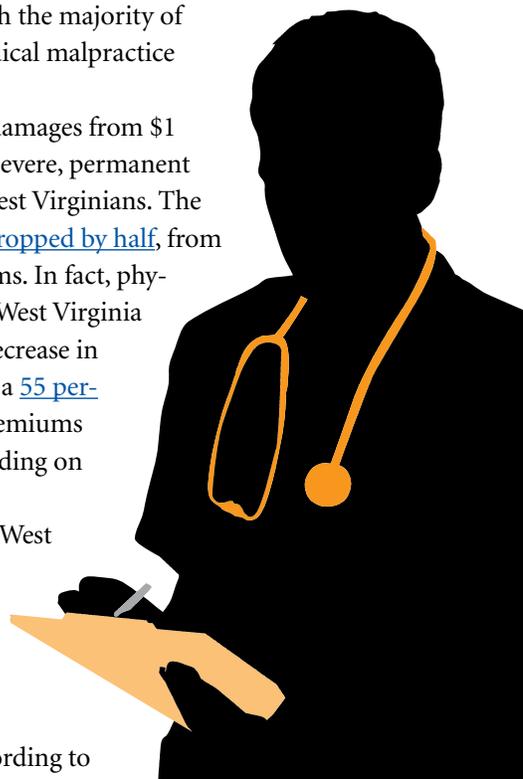


**ILLINOIS SUPREME COURT REJECTS MADISON COUNTY-STYLE JUSTICE** | This year, a unanimous Illinois Supreme Court ruling put the brakes on a liability-expanding ruling out of Madison County. The decision arose from a \$43 million verdict against Ford stemming from an [accident](#) in which the plaintiffs' 1993 Lincoln Town Car was hit from behind by a distracted driver at 55-65 mph while sitting in traffic at a construction zone. The plaintiffs alleged that Ford should have warned them that trunk contents could puncture the gas tank in such a high-speed collision because the auto maker had given similar warnings to police officers who drove the Crown Victoria. The trial had the classic characteristics of litigation in Judicial Hellholes. Madison County Circuit **Judge Andy Matoesian** permitted the plaintiffs to provide lists of "substantially similar" incidents to the jury, even when the products and circumstances had little in common with the case. Although involving different cars, different decades, different standards, different fuel tank locations, and different accident circumstances, the circuit court admitted 416 accidents involving Ford vehicles simply because the vehicles had aft-of-axle fuel tanks. The trial court also permitted the jury to consider the manufacturer's efforts to improve the safety of its police fleet, even though evidentiary law typically does not allow use of a manufacturer's efforts to make products safer against it. Defendants did not enjoy such lax evidentiary rules. For instance, the trial court did not permit the jury to learn that the vehicle not only met current safety standards, but it actually met government safety standards adopted years later – standards that were almost twice as stringent as those when the product was made. Fortunately, the Illinois Supreme Court [rejected](#) the plaintiffs' invitation to require manufacturers to track down and warn owners about extremely remote risks decades after the sale of a product. It also found the plaintiffs failed to present sufficient evidence that Ford's conduct was unreasonable or that Ford could have designed the car in a way that would have protected the plaintiffs from harm.

**WEST VIRGINIA UPHOLDS NONECONOMIC DAMAGES LIMIT** | Joining a growing majority of state high courts that have done so, West Virginia's Supreme Court of Appeals [reaffirmed](#) the constitutionality of the state's reasonable limit on inherently subjective awards for pain and suffering in medical liability lawsuits. As the Court's [June 22, 2011 ruling](#) recognized, "[w]hile there was a fairly even split among jurisdictions that had considered the constitutionality of caps on noneconomic damages at the time [the Court's previous ruling upholding a noneconomic damage limit] was decided, now only a few states have declared such caps unconstitutional. . . . Our decision today places West Virginia squarely with the majority of jurisdictions in holding that caps on noneconomic damages in medical malpractice cases are constitutional."

The legislature's 2003 reduction of the limit on noneconomic damages from \$1 million to \$250,000 in most cases, and \$500,000 in cases involving severe, permanent injuries, has significantly improved accessibility to healthcare for West Virginians. The average medical liability insurance premium per physician nearly [dropped by half](#), from about \$40,000 to \$21,000 within five years of adoption of the reforms. In fact, physicians insured with the state's largest medical-malpractice insurer, West Virginia Mutual Insurance Company, have experienced an overall average decrease in premiums of 32 percent with many specialists receiving as much as a [55 percent reduction](#) since the insurer formed in 2004. In other words, premiums are one-third to one-half the amount that they were in 2004, depending on the area of practice.

Given the drop in the cost of medical malpractice insurance in West Virginia following adoption of the 2003 reforms, it comes as no surprise that the state now has more doctors today than it did prior to that time. In fact, after stagnating for five years, the number of actively licensed physicians practicing in West Virginia [increased](#) steadily from 3,532 in 2004 to 3,864 in 2010. In addition, more new doctors are locating their practices in West Virginia. According to



Board of Medicine [statistics](#), from the mid-1990s to 2002 there was a decline in the number of new licenses issued, demonstrating that West Virginia was not an attractive place to practice medicine. Then beginning in 2001, and continuing steadily since 2003 through recent years, the number of new licenses increased. The increase in new licenses has translated into improved physician recruitment and retention. Hospitals are reporting that physicians are expressing more interest in practicing at facilities throughout the state in light of advances in medical liability reform. Physicians are no longer leaving the state or taking early retirement as was the case prior to the 2003 law.

### **FEDERAL DISTRICT COURT REINSTATES FRAUD CASE AGAINST WEST VIRGINIA ASBESTOS ATTORNEYS**

A federal appellate court [reinstated](#) a lawsuit brought against a Pittsburgh personal injury firm for allegedly engaging in a scheme designed to generate fraudulent asbestos claims. CSX contends the lawyers procured medical diagnoses for their clients through intentionally unreliable mass screenings, deliberately hired doctors known to give diagnoses to support their litigation without regard for the truth, and manufactured claims with no basis in fact. ATRA had filed an [amicus](#) brief, [urging](#) the court to take such action, and featured the lawsuit in the [2009-10 Judicial Hellholes report](#). A federal trial court in West Virginia, however, had earlier dismissed CSX Transportations' claims against the law firm, Peirce Raimond & Coulter, as untimely. Rather than find that the company should have immediately known that the asbestos claims were fraudulent when they were filed, the U.S. Court of Appeals for the Fourth Circuit recognized that it was only later that the company could have discovered the alleged fraud. The Fourth Circuit ruling clears the way for the case to [move forward](#).



# 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, 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. Product identification and causation become "irrelevant because [they know] the jury will return a verdict in favor of the plaintiff." 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 named, not because they may be culpable, but because they have deep pockets or will be forced to settle at the threat of being subject to the jurisdiction. Local defendants may also be named simply to keep cases out of federal courts. Extraordinary verdicts are upheld, even when they are unsupported by the evidence and may be in violation of constitutional standards. And judges often allow cases to proceed even if the plaintiff, defendant and witnesses have no connection to the Hellhole jurisdiction and events in question.

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 a prior Judicial Hellhole Madison County was named the worst Judicial Hellhole in the nation, 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 involve parties from across the country, can result in excessive awards that wrongfully bankrupt businesses and destroy jobs, and can leave a local judge to regulate an entire industry.

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

## PRETRIAL RULINGS

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

- ▶ **Novel Legal Theories.** Judges allow suits not supported by existing law to go forward. Instead of dismissing these suits, Hellholes judges adopt new and retroactive legal theories, which often have inappropriate national ramifications.
- ▶ **Discovery Abuse.** Judges allow unnecessarily broad, invasive and expensive discovery requests to increase the burden of litigation on defendants. Judges also may apply discovery rules in an unbalanced manner, denying defendants their fundamental right to learn about the plaintiff's case.
- ▶ **Consolidation & Joinder.** Judges join claims together into mass actions that do not have common facts and circumstances. In one notorious example, West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. In situations where there are so many plaintiffs and defendants, individual parties are deprived of their rights to have their cases fully and fairly heard by a jury.
- ▶ **Improper Class Action Certification.** Judges certify classes without sufficiently common sets of facts or law. These classes can confuse juries and make the cases difficult to defend. In states where class certification cannot be appealed until after a trial, improper class certification can force a company into a large, unfair settlement.
- ▶ **Unfair Case Scheduling.** Judges schedule cases in ways that are unfair or overly burdensome. For example, judges in Judicial Hellholes have scheduled numerous cases against a defendant to start on the same day or given defendants short notice before a trial begins.

## DECISIONS DURING TRIAL

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

## UNREASONABLE EXPANSIONS OF LIABILITY

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

## JUDICIAL INTEGRITY

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





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