

# JUDICIAL HELLHOLES

2016–2017

ATR  
FOUNDATION

***“Hundreds of plaintiffs with product liability claims . . . have been flocking to downtown St. Louis to a venue that over the past three years has developed a reputation for fast trials, favorable rulings, and big awards.”***

—[Bloomberg Businessweek](#), Sept. 29, 2016

***“By weakening the relatedness requirement, the majority’s decision threatens to subject companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California, extending jurisdiction over claims of liability well beyond our state’s legitimate regulatory interest. . . . Such an aggressive assertion of personal jurisdiction is inconsistent with the limits set by due process.”***

—California Supreme Court Justice Kathryn M. Werdegar, dissenting from decision in [Bristol-Myers Squibb Co. v. Super. Ct. \(Anderson\)](#), Aug. 29, 2016, which allowed hundreds of nonresidents to sue an out-of-state manufacturer in a Golden State court.

***“The proliferation of case consolidations as the judicial response to burgeoning caseloads in [New York City Asbestos Litigation (“NYCAL”)], with an emphasis on expediency and case management, has led to inequitable outcomes, which in turn have raised concerns over violations of defendant due process. . . . [C]onsolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts.”***

—Peggy L. Ableman, Peter R. Kelso & Marc C. Scarcella, [The Consolidation Effect: New York City Asbestos Verdicts, Due Process And Judicial Efficiency](#), Mealey’s Litig. Rep.: Asbestos (Apr. 2015).

***“[T]he majority assumes—without any reasoned explanation—that due process requires a particular definition of ‘reasonableness’ in the award of statutory attorney’s fees. The definition assumed by the majority categorically precludes the legislative policy requiring a reasonable relationship between the amount of a fee award and the amount of the recovery obtained by the efforts of the attorney. Certainly, this legislative policy may be subject to criticism. But there is no basis in our precedents or federal law for declaring it unconstitutional.”***

—Florida Supreme Court Justice Charles T. Canady, dissenting from the court’s decision invalidating a fee schedule established for workers’ compensation cases in [Castellanos v. Next Door Co.](#), Apr. 28, 2016

***“We apply our evidence rules and our court rules and that attracts plaintiffs here. They like our evidence rules, they like our expert witness rules. . . .”***

—New Jersey Supreme Court Justice Barry T. Albin, [Oral Argument](#), *McCarrell v. Hoffmann-La Roche Inc.*, Oct. 13, 2016

***“It is no surprise that Madison County, IL, continues to be the epicenter for asbestos filings. Madison County makes up 29% of total filings and 48% of total mesothelioma filings for 2016 thus far. This is a 10% increase in total filings from the first half of 2015, and it accounts for the majority of the increase in 2016 mesothelioma filings to date.”***

—[Asbestos Litigation: Mid-Year Report 2016](#), a report prepared by KCIC, a consulting firm evaluates product liability risks.

# PREFACE

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

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

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

## ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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# EXECUTIVE SUMMARY

The 2016-2017 Judicial Hellholes report shines its brightest spotlight on nine courts or areas of the country that have developed reputations as **Judicial Hellholes**.

## JUDICIAL HELLHOLES

**#1 CITY OF ST. LOUIS, MISSOURI.** The City of St. Louis is a magnet for product liability lawsuits and consumer class actions. The local trial court hosted three gigantic verdicts this year, totaling \$197 million, in cases asserting that talcum powder causes ovarian cancer, plus other multimillion-dollar awards. The recipients of these awards, and most of the individuals filing these types of lawsuits, are not from St. Louis, or even Missouri. They travel from across the country to sue in St. Louis. Why? The state's weak venue law and a lenient standard for expert testimony that allows "junk science." Plaintiffs' law firms have tainted the jury pool by inundating St. Louis residents with constant television advertising.

**#2 CALIFORNIA.** The Golden State is indeed that for personal injury lawyers seeking riches at the expense of employers, consumers and taxpayers. Lawmakers, prosecutors and judges have long aided and abetted this massive redistribution of wealth. By enacting more than 800 new laws every year, legislators and the governor make it all but impossible for California residents and businesses to stay current and thus avoid being targeted by the nearly 1 million new lawsuits filed there annually. And when the state's highest court effectively invites out-of-state plaintiffs to sue out-of-state defendants over alleged out-of-state injuries in California courts at state taxpayers' expense, no one can be surprised that often preposterous lawsuits over workplace rules, pay-stub formatting, food and beverage labels, imaginary environmental hazards, disability access and novel public nuisance theories proliferate and act inexorably to expand civil liability.

**#3 NEW YORK CITY ASBESTOS LITIGATION.** The conviction of former New York Assembly Speaker Sheldon Silver, who moonlighted at an asbestos law firm, and the replacement of Justice Sherry Klein Heitler, who was known to give "red-carpet treatment" to the plaintiffs' bar should have begun the process of restoring fairness to the Big Apple's asbestos court. It hasn't. Defendants are presumed guilty unless proven innocent. They face liability beyond their level of responsibility. And judges combine multiple lawsuits into a single trial, blending evidence, confusing jurors and driving up awards. Parties await a new case management order, but defendants expect the worst, including the reintroduction of punitive damages long sought by plaintiffs' lawyers.

## JUDICIAL HELLHOLES 2016-2017

- 1 CITY OF ST. LOUIS, MISSOURI
- 2 CALIFORNIA
- 3 NEW YORK CITY  
ASBESTOS LITIGATION
- 4 FLORIDA SUPREME COURT  
AND SOUTH FLORIDA
- 5 NEW JERSEY
- 6 COOK, MADISON AND ST. CLAIR  
COUNTIES, ILLINOIS
- 7 LOUISIANA
- 8 NEWPORT NEWS, VIRGINIA
- 9 HIDALGO COUNTY, TEXAS

**#4 FLORIDA SUPREME COURT AND SOUTH FLORIDA.** The Sunshine State's highest court continues a long record of liability-expanding rulings and decisions that rewrite and invalidate laws that do not fit the policy preferences of a majority of the court's members. This year's decisions increase workers' compensation costs and subject to new liability employers, state agencies and even those who call police for help. South Florida, in particular, is known for its aggressive personal injury and consumer litigation bar, and troubling alliances between lawyers, shady medical clinics and service providers that run up expenses for lawsuits.

**#5 NEW JERSEY.** The Garden State's high court has declared war on the use of arbitration as an alternative to lawsuits and issued liability-expanding rulings. While Atlantic County is no longer the draw it once was for product liability claims, the state's lax standard for expert testimony still leads plaintiffs' lawyers to bring many drug and medical device cases there on behalf of people from other states. In addition, the state's vague and complicated consumer protection laws have set off a feeding frenzy for plaintiffs' lawyers.

**#6 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS.** These three Illinois counties have long been go-to places for filing lawsuits. Whether it is medical malpractice, product liability or disability access lawsuits, Chicago is the wrong place to defend a case. Meanwhile, largely rural Madison County is still the nation's epicenter for asbestos lawsuits. That it is the place of choice for plaintiffs' firms is unsurprising given the close relationship between the judiciary and local lawyers, and a deck that is stacked against defendants. Its troublesome neighbor St. Clair County also hosts more than its fair share of litigation. Its judges have manipulated the judicial selection system to remain on the bench. The state's expansive liability laws and the influence wealthy plaintiffs' lawyers exert on state politics further concern defendants.

**#7 LOUISIANA.** Louisiana has a reputation for plaintiff-friendly venue laws, permissive judges, double-dipping asbestos lawsuits and trust claims, the highest jury threshold in the nation, abuse of consumer protection laws and excessive jury verdicts. But it is the governor's attempt to hire campaign contributors to run multibillion-dollar coastal erosion litigation against the state's key energy industry that ensured the Pelican State's ranking among Judicial Hellholes this year.

**#8 NEWPORT NEWS, VIRGINIA.** This shipbuilding town stands out in a state that is otherwise viewed as having a balanced litigation climate. The court's plaintiff-win rate in asbestos cases is the highest of any jurisdiction in the U.S., thanks to broad interpretations of maritime law and one-sided evidentiary rulings that make it difficult to mount a defense.

**#9 HIDALGO COUNTY, TEXAS.** It's hailing lawsuits in this agricultural county along the Rio Grande, as plaintiffs' lawyers file thousands of lawsuits accusing insurers of not paying up for storm damage. As a result, insurers are leaving and premiums are climbing. Judges are wising up to the game and beginning to call out lawyers for bringing groundless cases, and lawmakers are poised to enact much-needed reforms.

## WATCH LIST

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

**GEORGIA SUPREME COURT.** Georgia's motto, "Wisdom, Justice, and Moderation" may need some editing. After several liability-expanding decisions last year, the state's high court was back at it this year, allowing duplicative damages in nuisance lawsuits,



issuing a blow to arbitration and encouraging forum shopping. Well-reasoned decisions in cases involving damages when a pet is injured and asbestos liability keep the court off the Hellholes list.

**MCLEAN COUNTY, ILLINOIS.** Bloomington has a history of lopsided rulings and resultantly questionable verdicts for asbestos plaintiffs that are frequently reversed on appeal.

**MONTANA SUPREME COURT.** The Montana Supreme Court is known for its record of activism, lack of adherence to precedent and defiance of the Supreme Court of the United States. This year the court thumbed its nose at the SCOTUS by finding its courts could hear a case brought by out-of-state railroad workers injured outside Montana against a business that was not incorporated or headquartered in the state. After excessive awards, defendants are also on edge about whether the high court will uphold a state law that reasonably constrains punitive damages.

**NORTHERN DISTRICT OF TEXAS.** In 2015 another federal district court in Texas presided over the largest False Claims Act judgment in history. Its neighbor to the north in 2016 topped that with “unusual” evidentiary rulings in multidistrict litigation bellwether cases that produced a \$498 million verdict and a \$1.04 billion verdict against a medical device manufacturer. This court is keeping the Fifth Circuit Court of Appeals very busy.

**PENNSYLVANIA SUPREME COURT.**

The Commonwealth’s high court has gone through a series of turbulent scandals, judicial resignations and a flip in the composition of the court. There is great uncertainty as to whether the new court will take a balanced and sound approach to deciding liability issues or begin catering to Philadelphia’s personal injury bar. Two appeals before the court may point the way to its future course.

**PHILADELPHIA COURT OF COMMON PLEAS.**

A recovering Judicial Hellhole, Philadelphia has significantly improved its litigation environment but continues to serve as a national hub for mass tort litigation. While only a few years ago 9 out of 10 pharmaceutical cases filed in the City of Brotherly Love came from other states, that proportion is now down to 65%. Still, when a case goes to trial, it often results in a whopper of a verdict. A recent rewrite of the jury instructions for product liability claims may further tilt the scales for the plaintiffs’ bar.

**PITTSBURGH (ALLEGHENY COUNTY), PENNSYLVANIA.** The Allegheny County courthouse has developed a reputation for rulings that favor plaintiffs in asbestos cases. For instance, after one judge issued a ruling that would have limited the defendant’s damages, the case was reassigned to a second judge who subjected the defendant to expansive liability. In addition, Pittsburgh’s federal court has seen a spike in extortionate lawsuits against businesses of all sizes alleging that they have not provided the vision-impaired with sufficient access to their websites.

**WEST VIRGINIA.** This once perennial Judicial Hellhole has made significant progress in restoring balance to its civil justice system over the past two years. On the heels of major reforms in 2015, the legislature took several more positive steps in 2016. Voters also elected a moderate to their state high court and reelected their reform-minded attorney general. Still, after decades of trial-lawyer control over Mountain State courts and policymakers, the formidable task of undoing the damage isn’t quite complete.

GEORGIA SUPREME COURT  
MCLEAN COUNTY, ILLINOIS  
MONTANA SUPREME COURT  
NORTHERN DISTRICT OF TEXAS  
PENNSYLVANIA SUPREME COURT  
PHILADELPHIA COURT  
OF COMMON PLEAS  
PITTSBURGH (ALLEGHENY COUNTY),  
PENNSYLVANIA  
WEST VIRGINIA

## DISHONORABLE MENTIONS

**Dishonorable Mentions**, which annually highlight singularly unsound court decisions, go this year to the high courts of **Arkansas, Indiana, and Maryland**.

## POINTS OF LIGHT

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

This year's highlights include positive court rulings from eleven states. These courts made it easier to dismiss groundless claims, tougher to bring junk science into court, gave juries a more accurate understanding of how injuries occurred in auto accident cases, and reduced the potential for inflated damage awards. Courts also confirmed that a state attorney general can dismiss meritless cases brought on behalf of the state, but can't hand the state's law enforcement power to private contingency fee lawyers.

In addition to these significant court rulings, legislatures in five states enacted significant, positive civil justice reforms.

## CLOSER LOOK

This section of the report examines litigation under the federal False Claims Act's "qui tam" provision, which allows private individuals to sue on behalf of the federal government and obtain a "bounty" if successful. As a result of a series of legislative expansions and judicial rulings, this law, originally enacted to battle fraud in contracting during wartime, has morphed into a plaintiff lawyers' dream. While the penalties available under the Act have increased, the requirements for bringing qui tam lawsuits have become significantly more lenient. Enticed by a promise of additional federal funds, states have enacted similarly problematic laws. And a recent U.S. Supreme Court decision, upholding an award for a whistleblower who flagrantly violated the law's 60-day seal requirement, will likely encourage more questionable claims. But an appeal pending before the U.S. Court of Appeals for the Fifth Circuit could yet begin to move "Lincoln's Law" back toward its original, commonsense purpose.



# JUDICIAL HELLHOLES

## #1 CITY OF ST. LOUIS, MISSOURI

As regular readers of this report know, it hasn't been easy in recent years to knock incorrigibly litigious and civil liability-expanding California off the top of the Judicial Hellholes list. But with plenty of help from the Show Me Your Lawsuits State's highest court, the City of St. Louis has managed the feat this year.

Bloomberg Businessweek [reports](#) that the city has become notorious for “fast trials, favorable rulings, and big awards”—so big that four of the top six product liability verdicts in the United States this year came out of St. Louis's Circuit Court. It's now being flooded with such claims from out-of-state plaintiffs eager to take advantage of Missouri's [lax standard for expert testimony](#) and laws allowing easy forum shopping. It's also fast becoming one of the personal injury bar's favorite jurisdictions for asbestos claims and consumer class actions.



### TRAP, TRASH & TRICK

Using what some defense counsel have come to call “trap, trash and trick” tactics, plaintiffs' lawyers through the summer of 2016 had engineered about 2,100 individual claims, grouped in roughly 260 separate lawsuits nationwide, alleging with no scientifically sound evidence that talcum powder causes ovarian cancer. Noteworthy is the fact that [two thirds](#) of these claims have been filed in the City of St. Louis Circuit Court. And three gigantic talc verdicts there this year, totaling \$197 million, were for plaintiffs from Alabama, South Dakota and California.



**Trap.** Among other reasons, plaintiffs' lawyers are eager to trap talc defendants in St. Louis because Missouri is one of a shrinking minority of holdout states that have yet to adopt the more exacting [Daubert](#) standard for expert testimony. Named for a 1993 Supreme Court precedent, *Daubert* is the standard now used in all federal courts and about 40 state court systems. It effectively requires judges to act as gatekeepers in reviewing the substance of expert testimony before it is presented to a jury in order to weed out fanciful evidentiary theories that haven't passed peer-review muster.

Plaintiffs' bar efforts to trap talc cases in St. Louis are aided by the state's rather pliable venue law, which allows lawsuits to be filed in any county where at least one individual claimant—among the scores comprising a typical talc lawsuit—resided when her alleged injury occurred.

A circuit-splitting [2010 decision](#) by the U.S. Court of Appeals for the Eighth Circuit also makes it harder for a Missouri defendant to remove a case to federal court when a local anchor-claimant has been added only to keep the litigation in state court. And by keeping the number of claimants in their respective talc lawsuits under 100, plaintiffs' lawyers also cleverly avoid the federal Class Action Fairness Act's threshold for removal to federal court.

**Trash.** Before, during and after they've managed to trap their lawsuits in St. Louis, personal injury law firms make sizeable investments in local television advertising to trash defendants and their products with wholly unfounded claims. Ostensibly packaged as client solicitations, the incessant ads more practically function as a



means to influence potential jurors. To wit, talc defendants filed a [motion in late July](#) seeking to have a trial moved “outside the St. Louis media market and at least 100 miles away in order to minimize the jury taint” from such ads.

The motion offered extensive analysis of plaintiff firm ad-buys, noting that, from July 2015 through June 2016, more talcum powder litigation ads were aired in the St. Louis media market than in any other market nationwide. In March 2016 alone, 23% of all talcum

powder litigation ads airing across the country aired in St. Louis, even though that market comprises just 1% of the national television audience. Furthermore, a survey of potential St. Louis jurors revealed that more than 6 in 10 recall being exposed to ads linking talcum powder use to ovarian cancer, and that a sizeable majority of those who recalled the ads had formed an “unfavorable” opinion about talcum powder.

**Trick.** With their trashing phase complete, plaintiffs’ lawyers then work to trick preconditioned jurors into believing their expert witnesses’ testimony alleging a causal relationship between talcum powder use and ovarian cancer. Never mind that the scientific, medical and regulatory communities are united in saying that [no such relationship exists](#). Even in generally plaintiff-friendly New Jersey a judge in September 2016 [dismissed](#) two talc cases scheduled for trial after deciding that the plaintiffs’ experts who’d testified in St. Louis are not qualified to testify in the Garden State.

Nevertheless, defendants’ pleadings to have those so-called experts excluded from St. Louis trials fall on deaf ears. Judges there invariably allow the introduction of this junk science and, with visibly ill women or their surviving loved ones as sympathetic clients, practiced personal injury lawyers then pluck jurors’ heartstrings and persuade them to come back with outlier verdicts that fly in the face of genuine science.

A similarly shameless trick was played on Missourians in late June when lame-duck **Governor Jay Nixon**, a grateful [past recipient](#) of generous campaign contributions from trial lawyers, vetoed a [legislation](#) that would have finally adopted the more exacting *Daubert* standard for expert evidence and thus made the state less hostile to defendant companies and the economic growth and job creation they provide. But lawmakers are expected to try again in 2017, and with a newly elected governor who’s less dependent on plaintiffs’ bar cash, hope springs eternal.



## STILL MORE ‘JUNK SCIENCE’

The City of St. Louis Circuit Court’s welcoming embrace of junk science has extended well beyond talcum powder cases. A growing range of businesses are feeling the pain of litigation there.

In May 2016 Monsanto was hit with a [\\$46.5 million](#) verdict in a case alleging that three plaintiffs developed non-Hodgkin lymphoma by eating foods contaminated with PCBs. The award included \$17.5 million in compensatory damages and \$29 million in punitive damages. The plaintiffs in this case resided not in St. Louis but in Alaska, Michigan and Oklahoma—states that have adopted stronger standards for expert testimony than Missouri. Nearly 100 plaintiffs have similar claims pending in St. Louis. Only three are from Missouri, including one from St. Louis. The American Cancer Society [recognizes](#) that most forms of non-Hodgkin lymphoma have no known cause, and that lymphomas most often develop as people age. In fact, four earlier trials, three in California and one in St. Louis, resulted in defense verdicts.

Another example of Missouri’s weak expert-testimony standard came in 2015, when Abbott Laboratories suffered a [\\$38 million judgment](#) in St. Louis for allegedly causing birth defects after an expectant mother had taken its anti-epileptic drug Depakote. Abbott contested venue in St. Louis, but the court allowed the suit to proceed. Despite flimsy evidence of the drugmaker’s alleged failure to properly warn of possible side-effects, a Missouri appellate court [affirmed](#) the trial court’s rulings in November 2016. Meanwhile, by way of contrast, an Ohio jury this year reached a [defense verdict](#) in a similar case after a federal judge prevented four plaintiffs’ experts from speculating on the stand about federal Food and Drug Administration labeling regulations.

## HIGH COURT BOOSTS LITIGATION TOURISM

As if its lax standard for scientific evidence and existing law that makes it difficult for defendants to remove their cases to federal court weren't enough to make the Show Me Your Lawsuits State a litigation tourism [hot spot](#), a unanimous October 2016 [decision](#) by the Supreme Court of Missouri effectively rolls out a welcome mat for out-of-state plaintiffs suing out-of-state defendants over alleged out-of-state injuries.

The state's notoriously weak venue law has long allowed plaintiffs' lawyers to shop their cases readily to the friendliest state courts. And as reported by [Missouri Lawyers Weekly](#), the high court has firmly cemented that law in place. Now, without legislative and executive intervention, there is virtually nothing stopping plaintiff's lawyers from picking their preferred judge and jury.

In this recently decided case, a Kansas title company had sued a Kansas lawyer in Missouri state court for malpractice stemming from a Kansas bankruptcy case that had been adjudicated, of course, in a Kansas federal court. But instead of narrowly limiting its holdings to the unique facts of the case, wherein the defendant, by default, had effectively consented to personal jurisdiction, Missouri's Supreme Court interpreted the applicable venue statute in the broadest terms imaginable. It adopted the plaintiff's argument that, as long as personal jurisdiction is not improper, and the state venue statute doesn't dictate a particular forum for the lawsuit, a plaintiff's lawyer can pursue the case anywhere he chooses.

Sadly, this case will only serve to attract ever larger flocks of vultures, er, out-of-state plaintiffs' lawyers to Missouri's comfortably accommodating courts.

## A GROWING ASBESTOS DOCKET

Just across the river from Madison County, Illinois—a perennial Judicial Hellhole and the nation's epicenter for asbestos litigation—St. Louis is now competing to build its own reputation as a jurisdiction hospitable to asbestos claims. Plaintiffs' lawyers filed just 67 asbestos-related lawsuits there in 2010. That rate has since quadrupled.

In 2014 and 2015, St. Louis hosted the [fifth largest](#) asbestos docket in the country, with about 230 claims filed each year. During the first half of 2016, St. Louis inched up to fourth place, with 133 new asbestos lawsuits filed through June 30. Consulting firm KCIC [called](#) that a “significant” 23% increase relative to 2015.

St. Louis is increasingly [attractive](#) to asbestos claimants for many of the same reasons it attracts other product liability litigation—a lax expert testimony standard, laws allowing forum shopping and the potential for excessive awards, thanks in part to a 2014 [state high court decision](#) striking down a reform statute that reasonably limited punitive damages. So not surprisingly, St. Louis hosted several multimillion-dollar asbestos verdicts in 2016, including a [\\$4.1 million](#) award in January and, in July, an [\\$11.5 million](#) award, \$10 million of which were punitive damages.



But just as the city's always competitive Cardinals don't make the playoffs every year, asbestos plaintiffs in St. Louis don't win every case, either. For example, in September 2016 a jury reached a [defense verdict](#) after a month-long trial against automakers alleging that the plaintiff had developed mesothelioma as a result of inhaling asbestos dust from the work clothing of her husband, a mechanic. In that instance, the plaintiff had [sought](#) \$3.5 million in compensatory damages, plus \$26 million in punitive damages.

## MERITLESS CONSUMER CLASS ACTIONS

But even as St. Louis courts occasionally follow the facts and render sound judgments, the Missouri Merchandising Practices Act (MMPA), the state's consumer protection law, actively “invites potential abuses through socially valueless lawsuits and unnecessary consumer litigation,” according to a [report](#) by [Joanna Shepherd](#), a professor of law at Emory University.

Shepherd finds that local lawyers repeatedly use the MMPA to file meritless class actions in state court, typically in St. Louis, hoping to avoid potentially less sympathetic federal courts by seeking less than \$5 million in damages—the amount triggering federal jurisdiction under the [Class Action Fairness Act](#).



Joanna Shepherd

These are not serious cases, Shepherd says. They are a money-making enterprise for plaintiffs' lawyers like those at the [Armstrong Law Firm LLC](#). It has filed class action lawsuits in St. Louis alleging various products, including [peppermint candies](#), [donuts](#), "[Toastees](#)," and [bread](#), [biscuit](#), [cupcake](#), and [coffee cake](#) mixes are misleadingly labeled. Over the course of one week in November 2016, the same firm filed 10 more lawsuits in St. Louis that targeted products listing "evaporated cane juice" as an ingredient instead of using the word "sugar."

Observers say that the St. Louis Circuit Court, and Missouri state courts generally, are much less likely than their federal counterparts to dismiss such meritless claims, more typically taking a let-the-jury decide approach which, as readers of this report well know, exerts great pressure on defendants to settle cases before they go to trial.



Even in the rare case when a St. Louis court soundly dismisses a dubious class action, it risks reversal on appeal. For example, in January 2016 **Circuit Court Judge Joan L. Moriarty** [ruled](#) that a defendant did not engage in deceptive conduct when its "all natural" cupcakes contained a commonly-used leavening agent, which was disclosed to consumers on package labeling. But in November, the Missouri Court of Appeals [held](#) that the plaintiffs had made sufficient allegations to survive a motion to dismiss, essentially finding that reasonable consumers can't be expected to read labels. The ruling, which will govern future food class actions filed in St. Louis, effectively throws open the pantry door for even more meritless claims.

## PERHAPS ALL IS NOT LOST

Once a jurisdiction is ranked as the nation's #1 Judicial Hellhole, there are basically two ways to escape the discomfiting spotlight's hot glare: policymakers can actively work to enact reforms, or they can do nothing and simply hope that another jurisdiction's lawsuit abuses become so egregious that theirs will be knocked out of the top spot. Recent examples of the former include Philadelphia's Center for Complex Litigation, where a reform-minded judge [issued sweeping rules changes](#) in 2012; and West Virginia, where new legislative majorities in 2015 worked in a bipartisan fashion with the governor to [enact](#) a number of much needed civil justice reforms. An ongoing example of the latter is [California](#), where voters continue electing trial lawyer-friendly lawmakers, and judges seem perfectly willing to expand liability at the drop of a hat. As noted above, the principal reason the once Golden State lost is top ranking this year is because of what's happening in Missouri.

But there may be reasons for hope in St. Louis. After previously striking down legislated limits on noneconomic and punitive damages applied to common law claims, the Missouri Supreme Court [upheld](#) in April 2016 the state's statutory limit on noneconomic damages for wrongful death claims. The ruling found that wrongful death claims are a creation of the legislature, not common law, and that lawmakers have the authority to limit damages in causes of action it creates.

Speaking of lawmakers, healthy majorities in Jefferson City in 2016 came together to pass two sound tort reform measures: one [would have modernized](#) and aligned Missouri's standard for expert testimony with that of all federal courts and 80% of other state courts; and another [would have kept](#) plaintiffs' lawyers from unduly inflating claims for their clients' medical care costs. But, as noted above, Governor Nixon, largely owned and operated by the personal injury bar, saw fit to [veto both bills](#), and legislators could not muster enough votes to override those vetoes.

But 2017 brings fresh possibilities. A newly elected governor—former Navy SEAL, author and nonprofit CEO [Eric Greitens](#)—will have significant reform-minded majorities in both bodies of the legislature. And legislative leaders are [hopeful](#) he'll support their robust civil justice reform agenda.

The incoming governor also has [expressed interest](#) in reforming the so-called [Missouri Plan](#) for selecting judges, in use since 1940, which he and many other critics believe gives plaintiffs' lawyers too much control of supposedly nonpartisan commissions that recommend to the governor candidates for appointment to the various courts. Plainly, many of Missouri's judges seem to favor plaintiffs, so critics of the status quo are on solid ground.

So if the new governor and legislators act boldly on civil justice reforms, like their counterparts in West Virginia have, there's hope that the Show Me Your Lawsuits State





may revert back to the healthy skepticism of the Show Me State—at least when it comes to meritless lawsuits and the out-of-state plaintiffs who are now burdening Missouri taxpayers, consumers and employers with a very bad Judicial Hellholes reputation.

## #2 CALIFORNIA

It takes a civil justice system shock analogous to San Francisco's [1906 earthquake](#) to dislodge California from its typically ignominious perch atop the annual Judicial Hellholes rankings. In [2014](#), for example, it was rampant corruption of New York City's asbestos court that prominently featured the crumbling former Empire State's then-most powerful politician (who has since been [arrested](#), [convicted](#) and [sentenced](#), pending a desperate appeal). This year it's an utter disdain for sound science in the Show Me Your Lawsuits State of Missouri, particularly in St. Louis, and the wholly meritless lawsuits there fleecing defendants and driving consumer prices higher.

But as this report notes regularly, a lengthy book could be written every year about the inexorable expansion of civil liability in the once Golden State. Here collected are merely a few highlights (or lowlights, as it were). And as parasitic elements of the plaintiffs' bar seek further liability expansions from state lawmakers, regulators and judges each year, no reasonable observer can believe that California's litigation climate is going to improve anytime soon.



### MORE LAWS MEAN MORE LAWSUITS

From 2010 through 2015, lawmakers in Sacramento managed to tack onto the books an annual average of more than [800 new laws](#). In 2016, they added another [893](#), at least some of which (see [SB 859](#), [SB 1063](#), [SB 1130](#), [SB 1150](#) and [SB 1241](#)) were designed primarily to foment still more litigation and related costs that for many years have helped [drive businesses](#), along with their jobs and tax revenues, into the arms of less litigious states across the country and around the globe.

#### NEW LAWS SINCE 2010

Year	#of New Laws
2010:	733
2011:	745
2012:	876
2013:	800
2014:	931
2015:	808
2016:	893
Total	5,786
Annual Average	~827

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

More troubling is the fact that California judges and lawmakers seem perfectly happy to host tens of thousands of out-of-state plaintiffs in courts paid for by California taxpayers. Just a snapshot of this phenomenon can be found in [data collected](#) for the [Civil Justice Association of California](#) on 2,919 product liability cases filed against pharmaceutical companies in Los Angeles and San Francisco between January 2010 and May 2016.

These mass torts, which group multiple claims into one case, comprised 25,503 individual plaintiffs, of which 22,935 (89.9%) resided outside California. More than two-thirds of these cases included not a single Californian.

Though California courts are already plagued with budget issues that have resulted in clogged dockets, courthouse construction projects being put on hold, and unfunded but needed judgeships, according to CJAC, the state's judiciary continues incomprehensibly to roll out the red carpet for still more out-of-state plaintiffs—even those suing out-of-state defendants for alleged injuries that occurred outside California.

## SEEMINGLY 'CLUELESS'

So check it: California was already a perennial [top-ranked Judicial Hellhole](#) and a nationwide magnet for often meritless, no-injury consumer class actions. And the state's always [precarious finances](#) had forced dramatic court-spending cuts in recent years, which prompted the state's chief justice and her lower court colleagues to speak out about the need for more court funding.

So why in an August 2016 [decision](#) did the chief justice and a majority of her high court colleagues, like, further throw open the doors to the state's already overburdened courthouses to out-of-state plaintiffs with products liability (and other) claims against national defendants, discarding due process and effectively ignoring several U.S. Supreme Court opinions?

In *Bristol-Myers Squibb v. Superior Court*, the [4-3 majority](#) ruled that state courts may decide cases against businesses that are not headquartered or incorporated in California, even when the plaintiffs live and were allegedly injured out of state. The court found that when a defendant company has significant sales of a product in California (as any national business does, given the state's size), it becomes subject to lawsuits there. There does not need to be any more of a connection between the individual plaintiff's claim and the state. In other words, as long as **Cherilyn** and **Dionne** have a claim against the makers of Noxema in California, so will **Tai**.



**Californians Dionne, Cherilyn and foreign student Tai (L-R), from *Clueless* (Paramount 1995)**



**Justice Werdegarr**

With a proverbial “as if,” **Justice Kathryn Werdegarr**, wrote a commonsense dissent, saying: “By weakening the relatedness requirement, the majority’s decision threatens to subject companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California, extending jurisdiction over claims of liability well beyond our state’s legitimate regulatory interest. ... Such an aggressive assertion of personal jurisdiction is inconsistent with the limits set by due process.”

**Chief Justice Tani G. Cantil-Sakauye**, who has inveighed against court budget cuts and ever-growing docket backlogs, seems to have missed the irony when writing the majority’s poorly reasoned invitation to an unknowable number of out-of-state plaintiffs who’ll now add to those backlogs with new lawsuit filings and thus deplete recently [boosted but still finite budgetary resources](#).

It all boils down to one inevitable conclusion: California’s high court majority is, like, totally [clueless](#), for sure.



**Chief Justice Cantil-Sakauye**

## SITTING DOWN ON THE JOB

California’s high court in April 2016 administered another kick to employers’ collective rear end, forcing many of them to let employees sit down on the job. (And some economists wonder why [productivity growth has stalled](#).) In a case certified to it by the Ninth Circuit, a unanimous court [ruled](#) that Goldbrick State law entitles employees to sit in a chair at work on a task-by-task and location-by-location basis.

Cashiers at CVS and tellers at Chase Bank brought suit in federal court against their employers, alleging they



were entitled to sit down at their jobs if each discrete task “reasonably permits the use of seats.” Notably, the lawsuit argued, employers found in violation are liable for civil penalties to each employee or class member for each separate instance, perhaps totaling well into the many millions of dollars.

The defendant employers sensibly argued that seating rules should be left to them as they consider the nature of employees’ work, the entire range of tasks performed, and whether or not the work can be

*properly* performed while seated. For example, can a customer be properly greeted or helped with a transaction from a seated position? Or, as with the ultimately sleeping store security guard on whom well-intentioned *Seinfeld* character **George Costanza** imposed a chair, can shoplifters be adequately detected from a seated position?

The court acknowledged that a business's judgment is a factor, but added that it is neither dispositive nor worthy of deference.

## FOOD & BEVERAGE SUITS

California law encourages specious, often no-injury consumer fraud and false advertising lawsuits. Many of these suits against the makers and sellers of foods and beverages can be downright laughable, such as when Starbucks is sued for [putting too much ice](#) in its iced coffees.

As [Food Navigator-USA.com](#) reported in late November 2016, “There have been hundreds of class actions lawsuits directed at food and beverage companies in recent years” over everything from whether the phrase “[evaporated cane juice](#)” on a product's label fraudulently misleads consumers about sugar content to allegations that products marketed as “natural” may contain [genetically modified ingredients](#).

Many of these class actions are filed in California [state courts](#) or federal courts located there. The federal Northern District of California has been derisively referred to as the “Food Court” as these cases piled up.

“As to what happens to most [of these] false advertising cases once they are filed,” Food Navigator observed, “it depends on a multitude of technical factors, many of which seem to the casual observer to have little to do with the actual merits (e.g., is this label actually deceptive?). Few are thrown out completely after a motion to dismiss, and many drag on for years as plaintiffs are given the opportunity to amend their complaints and tweak their arguments.”

A [defense attorney](#) explained to Food Navigator that since many of these food and beverage lawsuits eventually show up in court records as “voluntarily dismissed,” it's likely that parties often come to a private settlement. So “we don't know how much money is changing hands, but the fact that so many of these cases are still being filed suggests that the plaintiffs' attorneys think it's worth it.”



**Judge Alsup**

There are occasional espresso shots of sanity. Raise your glasses to **U.S. District Court Judge Percy Anderson** of the Central District of California, who [dismissed](#) the iced coffee lawsuit, observing that, “If children have figured out that including ice in a cold beverage decreases the amount of liquid they will receive, the court has no difficulty concluding that a reasonable consumer would not be deceived” when purchasing an iced beverage. Cheers also to **U.S. District Court Judge William Alsup** of the Northern District of California for [dismissing](#) the claim of a plaintiff who repeatedly sued companies with products containing trans fats. The judge said the serial plaintiff “is not a typical consumer but is a self-appointed inspector general roving the aisles of our supermarkets.”

But until more California courts follow the lead of Judge Anderson and Judge Alsup and become decidedly less welcoming to these lawsuits—suits that effectively ask courts to believe that consumers are imbeciles—the plaintiffs' attorneys who cook them up will continue to take their chances at getting rich as the rest of us pay higher food and drink prices.

## PROP 65

In addition to the food and beverage class actions brought under California's easily exploited consumer protection laws, many are served with a special twist. The [private attorney-enforced](#) Prop 65 became law as a voter-passed referendum in 1986, requiring ominous warning signs in [various businesses](#) and other public accommodations where even the slightest, non-threatening trace amounts of some [800 different chemicals](#) may be present.



**Judge Anderson**

In large enough doses, these chemicals are “known to the state of California to cause cancer, birth defects or reproductive harm,” but the now ubiquitous and thus generally ignored signs serve only as an invitation for personal injury lawyers and their favorite lead plaintiffs to bring more lawsuits. Prop 65 claims produce [hundreds](#) of settlements each year, and such settlements can be fattened up when consumer protection laws sweeten the mix.

In litigation first [reported here](#) two years ago, defendant Goya Foods Inc. continues to fight back against a serial plaintiff and her bogus, no-injury claim that seeks to exploit Prop 65 labeling requirements. According to [Law360](#), Goya in early 2016 sought to block a bid for class certification by professional plaintiff **Thamar Cortina** and her attorney, [Jack Fitzgerald](#). Their lawsuit alleges that trace amounts of a

certain food coloring byproduct in some Goya beverages poses a cancer risk, even though the U.S. Food and Drug Administration and health authorities in Canada and Europe say such amounts pose no danger to human health.

In addition to questioning the meritless and often inconsistent elements of Ms. Cortina’s claim (did she even purchase the product?), Goya’s [opposition to class certification](#) pointed out that she and her attorney cannot keep their arguments straight in their frequent filings and subsequent bungling of similar would-be class actions: “In sum, Ms. Cortina has proven she is incapable of monitoring her cases or her counsel’s conduct. She cannot handle the responsibilities of a class representative,” Goya argues.

Goya has since filed a motion questioning the fact that plaintiffs have yet to offer any feasible model by which to calculate damages. The court has yet to decide whether this typically specious yet costly-to-defend Prop 65 case can move forward. It certainly should not.



### UNINTENDED ‘CONCEQANCES’

According to the state’s Department of Fish and Wildlife, the [California Environmental Quality Act](#), known as CEQA, “is California’s broadest environmental law,” helping to “guide the Department during issuance of permits and approval of projects. Courts have interpreted CEQA to afford the fullest protection of the environment within the reasonable scope of the statutes. CEQA applies to all discretionary projects proposed to be conducted or approved by a California public agency, including private projects requiring discretionary government approval.”

Of course, lawmakers who write well-intentioned statutes only rarely consider unintended consequences or, in this case, “conCEQAnces.” Thus, according to detailed coverage by the [San Francisco Chronicle](#), CEQA has for the past 30 years been increasingly used as “Not In My Back Yard” types’ “tool of choice” to bludgeon—which is to say “challenge, block, delay or kill construction projects across the state.” Protection of the environment is barely a consideration as wealthy plaintiffs, concerned more about the protection of their property values, level lawsuits which, observes the Chronicle, are a significant factor in the state’s chronic shortage of affordable housing.

Among others, a [thorough study](#) of CEQA abuse by the law firm **Holland & Knight** offered these key findings:

- Nearly half of CEQA lawsuits target taxpayer-funded projects, frequently those designed to advance California’s environmental policy objectives.
- CEQA’s most frequently targeted private sector project: housing—with the most frequently challenged type of housing project being higher density urban projects such as transit-oriented development and multi-family (including affordable) housing.
- Despite claims by special interests that defend CEQA litigation as a means to combat urban sprawl, 80% of CEQA lawsuits target projects in established communities rather than those on undeveloped or agricultural lands outside established communities.
- CEQA litigation is overwhelmingly used in cities. Special interest CEQA lawsuits often target core urban services such as parks, schools, libraries and even senior housing.



- CEQA litigation abuse is primarily the domain of NIMBY opponents . . . to gain leverage against business competitors, negotiate union agreements, or stop neighborhood-scale changes required to meet new state mandates such as greenhouse gas reductions or to improve critical local services and facilities such as schools and parks.

## MORE PUBLIC NUISANCE NONSENSE

If those private citizens and interest groups flooding California courts with the CEQA litigation discussed above were to justify or rationalize their behavior, perhaps they might point to government attorneys' efforts to misuse and sidestep the law in comparable pursuits of their own political ends.

Last year's [report](#) updated readers on the misuse of public nuisance law. With a lower standard of proof relative to products liability law, public nuisance law had been seized by various government prosecutors' and politically connected private-sector contingency-fee lawyers whose lawsuits tag-teamed defendants that made lead-based paints decades ago and today's makers of opioid painkillers prescribed by physicians. This year's defendant is Monsanto, which had made polychlorinated biphenyls (PCBs) through the 1970s, primarily for use by electric power-generating utilities.

Several California cities, including San Diego, San Jose, Oakland and Berkeley have [sued Monsanto](#) for PCB pollution of public waterways. But by partnering with the plaintiffs' lawyers who pitched these lawsuits to the cities, the cities can leave the expense of investigating and prosecuting the cases to those lawyers. Of course, these partnerships are "ethically suspect" since such lawyers also are well known for giving generously to city politicians' campaigns.

"Until now," wrote Civil Justice League of California president **Kim Stone** in a June 2016 [San Diego Union Tribune](#) op-ed, "courts in other states have sided with Monsanto and understood that the company is not responsible for how other parties handled its products. But [the] trial lawyers have come to California and are trying to expand" liability, "which is a far stretch in legal doctrine..."

In August 2016 **U.S. District Judge Edward J. Davila** appeared to agree with Stone in [dismissing](#) the consolidated cases on behalf of Berkeley, Oakland and San Jose, saying the plaintiffs have thus far failed to show a necessary "property interest" in the allegedly contaminated water that flowed through city pipes and into public waterways. But the judge has invited the plaintiffs to amend their complaint, and another judge presiding over San Diego's similar lawsuit is waiting to see how things develop up north. Meanwhile, lawmakers quickly passed and Governor Brown signed [SB 859](#) in September, granting local governments standing to pursue such questionable lawsuits in the future.



**Judge Davila**



**Judge Elias**

## 'TAKE HOME' ASBESTOS

For years this report has [documented](#) the steady flow of out-of-state-based asbestos lawsuits into several California jurisdictions, most notably Alameda and Los Angeles counties. Generally high verdicts and questionable judicial rulings on the admission of evidence and applicable law continue to worry defendants. But a 2015 [bankruptcy trust order](#) entered by **Los Angeles County Superior Court Judge Emilie Elias** in the asbestos Case Management Order required disclosure of bankruptcy trust claims.

Among other things, the order appropriately requires plaintiffs to disclose "all facts relating to all of their alleged exposures to asbestos ... regardless of whether those facts have been, or ever will be, included in a claim to a third party for the purpose of obtaining compensation for an asbestos-related injury." It should be a model for CMOs in all California counties and other notorious Judicial Hellholes known for attracting asbestos claims.

But for every judicial ruling in California that reasonably limits liability, there seem to be three or four more that go the other way. Such was the case with a [December 2016 decision](#) by the California Supreme Court that,

in resolving an appellate court split, found “the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers” where it is “reasonably foreseeable” that workers “will act as vectors carrying asbestos from the premises to household members.”

These “secondary” or “take home” asbestos exposure cases considered by the high court originated in [Alameda](#) and [Los Angeles](#) counties, respectively. Both trial courts adhered to a 2012 [appellate court precedent](#) and the defendants won both cases. But ensuing decisions by different appellate courts disagreed about that precedent’s implications, and a high court hearing became necessary.

Despite well-reasoned amicus briefs submitted for each case by ATRA arguing against take home asbestos liability (see [here](#) and [here](#)), the high court embraced such liability. Its decision prompted the Los Angeles-based law firm [Poole Shaffery to warn](#) that “a litany of actions by family members claiming take-home exposure may flood the courts, increasing the likelihood of liability for various employers.” And though the court also held that an employer’s duty of care “extends only to members of a worker’s household,” New Jersey’s high court did more or less the same thing 10 years ago only to reverse itself this year by effectively inviting virtually any Tom, Dick or Harriet with whom an asbestos worker may have ever come in contact to pursue litigation. So California asbestos defendants probably haven’t seen the last of liability expansion.

## INNOVATOR LIABILITY

Crafted primarily by personal injury lawyers desperate to get around longstanding federal law that shields generic drugmakers from lawsuits over the substance of their medications’ warning labels, the novel theory of “innovator liability” effectively seeks to turn products liability law on its head. Fortunately, the argument that original brand-name drugmakers should be held liable for injuries allegedly arising from generic drugs manufactured, marketed and sold by third-party drugmakers has been widely [rejected](#) by courts across the country.

But when faced with rejection of their novel liability theories elsewhere, plaintiffs’ lawyers often turn to California as a last resort (see [lead paint as a public nuisance](#) ). In *T.H. v. Novartis Pharmaceuticals Corporation*, twins seek to hold Novartis liable for injuries they suffered in utero after their mother took a generic version of an asthma medication—even though Novartis manufactured only the name-brand version of the drug, and even though it had [sold its interest](#) in that drug six years *before* it was prescribed to the mother.

Reasonably then, **San Diego County Superior Court Judge Joan M. Lewis** sustained Novartis’s demurrer of the complaint (effectively dismissing it), but the twins appealed her decision. And in March 2016 a three judge panel of the Fourth Appellate District [unanimously reversed](#) Judge Lewis, ordering the case remanded and inviting plaintiffs to amend their complaint. In doing so, the panel relied on a since discredited California appellate decision, *Conte v. Wyeth* (2008), which was the first to recognize “innovator liability.” Nonetheless, the doctrine has been rejected in [more than 100 cases](#) nationwide by courts with enough sense to understand that holding one manufacturer liable for alleged injuries from a product made by another manufacturer is both ludicrous and bad public policy.

Thus many observers are watching and hoping that the California Supreme Court, which in June granted Novartis’s petition for review, will put an end to innovator liability nonsense in the state once and for all.

## ‘ADA’ LAWSUITS STILL ROLLIN’ ALONG

This report has routinely documented California’s ongoing run as the [nation’s ground zero](#) for disability access lawsuits. Brought under both the federal Americans with Disabilities Act (ADA) and state civil rights law, which allows for [damages and attorney’s fees](#), these claims can make real money for a certain class of plaintiffs’ attorney with lots of time, limited integrity and a specialized willingness to browbeat [small business owners](#)—particularly [minorities and recent immigrants](#) who are unable or unwilling to fight back.



To be clear, plaintiffs rarely seek renovations and actual access to an allegedly ADA-noncompliant restaurant, convenience store, nail salon or auto garage. They just want to get paid and are happy to settle out of court, whether or not the ramp's angle is adjusted by a few degrees or the ladies' room sink is ever [lowered](#) by an inch-and-a-half.

This still wheelchair-centric racket has recently sought to expand its turf, [targeting retailers' websites](#), for



Rep. McNerney

example, with allegations that they're not accessible to the visually impaired.

Thankfully, in May 2016 state lawmakers took a dutiful if tentative step toward curing California's ADA litigation epidemic when **Governor Jerry Brown** signed into law [SB 269](#), providing some protection to California small businesses from predatory plaintiff's lawyers. The bill allows small businesses time to cure certain technical violations without penalty. If a small business hires a Certified Access Specialist to inspect the premises for potential ADA violations, then the business may fix any alleged violation before a suit can be filed. And **U.S. Rep. Jerry McNerney**, representing California's 9<sup>th</sup> congressional district, has introduced legislation in Washington intended to [stop the nationwide abuse](#) of the ADA.

### 'PAGA' IS A FOUR-LETTER WORD

California's [Private Attorneys General Act](#) (PAGA) authorizes aggrieved employees to file lawsuits seeking civil penalties on behalf of themselves, other employees and the State of California for labor code violations. Not surprisingly, it generates many lawsuits.

Based on the pretense that employees are bringing these claims on behalf of the state, 75% of the penalties wrung from non-compliant employers goes to the state's Labor and Workforce Development Agency (LWDA) while only 25% goes to the "aggrieved employees." So this very blue state's policymakers have found a way to expand government spending without per se raising taxes. Never mind that many PAGA lawsuits revolve around technical nitpicks, such as an employer's failure to list on an employee's pay stub the inclusive dates of the pay period, or an employer's failure to print its address on the employee's pay stub, even though that address is printed on the paycheck itself.

To say that California workers must be some of the most easily aggrieved in the world would be an understatement. But to be fair, it's the lawyers who gin up PAGA complaints who are most to blame. According to **Jeffrey D. Polsky** of **Fox Rothschild**, such lawyers and their employee clients are [eager to settle cases](#) with employers because "the parties can decide what part of the settlement to designate as PAGA penalties and what part goes directly to the employees. Invariably, plaintiffs want more to go to them directly because they and their attorneys get all of that." Employers will go along if they're to be let off the hook a little more easily.

But expansive [PAGA amendments](#) were signed into law in June 2016, empowering the state to jealously guard its interest in settlements and keep more cash for itself. Polsky says: "More money going to PAGA penalties, means less going to plaintiffs directly. Since employees see just a fraction of those penalties, it will be more expensive for employers to settle lawsuits that include PAGA claims. You can add that to our ever growing list of reasons why, for employers and their counsel, 'PAGA' is a four-letter word."

### GOOD NEWS

Since most of the civil justice news from California is so grim and depressing, this report goes out of its way each year to note at least a couple of bright spots. Here were two in 2016:

- *Appeals Court Reverses itself on Arbitration Clauses and Reasonable Word Usage*

In light of a subsequent state high court decision in January 2016, a California appeals court [reversed itself](#) and upheld the enforceability of an arbitration provision within an automobile sales contract. [A class action](#) brought by a car buyer alleged that such a clause included in the sales contracts of El Cajon Mitsubishi was "unconscionable." Incredibly enough, the trial court had agreed, deemed the clause unenforceable, and was initially upheld on appeal.





But then, in [Sanchez v. Valencia Holding Co., LLC](#), the California Supreme Court reached a more reasonable conclusion—one that respects the *real* meaning of words. The high court found that a bad bargain was not necessarily an unconscionable bargain in finding a similar arbitration provision enforceable. So here's hoping the high court's guidance slows the hysterical misuse of previously well-defined words in so many lower California courts. ISIS beheadings are unconscionable. Used car sales contracts are not.

- *Federal Judge Thwarts State AG's Efforts to Intimidate, Muzzle Political Opponents*

In the latest defeat for government officials using the awesome power of the state to suppress political speech with which they disagree, a federal judge in April 2016 [permanently blocked](#) outgoing **California Attorney General Kamala Harris's** efforts to “out” the supporters of a free-market-minded nonprofit.

Central District of California **Judge Manuel Real**, a 90-something liberal appointed to the federal bench by **Lyndon Johnson** in 1966, said that he's old enough to remember the violence perpetrated against supporters of the NAACP in the Deep South during his formative years.



“[A]lthough the Attorney General correctly points out that” the abuses and threats against donors thus far in this case “are not as violent or pervasive as those encountered in [NAACP v. Alabama](#) or other cases from that era, this Court is not prepared to wait until an ... opponent [of the nonprofit] carries out one of the numerous death threats made against its members.”



**Judge Real**

### #3 NEW YORK CITY ASBESTOS LITIGATION (NYCAL)

In addition to graduating from law school, the justices presiding over New York City's Asbestos Litigation (NYCAL) court also seem to be rather well educated in the corrupting politics of the crumbling former Empire State. They've been taught that trial judges aspiring to appellate court appointments dare not displease certain members of the plaintiffs' bar, such as **Arthur Luxenberg** of Manhattan-based **Weitz & Luxenberg**, who exercise significant influence over judicial appointments through their involvement in judicial screening and departmental disciplinary committees. In fact, New York Governor Andrew Cuomo himself has sheepishly [conceded](#) that “[t]he trial lawyers are the single most powerful political force in Albany.”

So no one should interpret this year's third-place Judicial Hellholes ranking for NYCAL to mean that anything has improved there since it was ranked #1 two years ago. To the contrary, things have only gotten worse. And were it not for monumentally egregious civil court imbalances in Missouri and California, NYCAL could well have earned another top ranking this year.



#### INNOCENCE LOST

The state's political establishment in Albany was shaken to its core in 2015 with the [conviction](#) on federal corruption charges of former **Assembly Speaker Sheldon Silver**. In addition to killing every reasonably crafted tort reform bill in the legislature for more than 20 years, Silver moonlighted for the asbestos lawsuit specialists at





Weitz & Luxenberg. The charges against Silver partly related to millions of dollars in referral fees he earned for the firm by using public money to [steer asbestos cases](#) to it.

As the Silver investigation unfolded, some changes occurred when the long-time manager of the NYCAL docket, **Justice Sherry Klein Heitler**, was replaced amidst reports that she gave “[red-carpet treatment](#)” to asbestos cases filed by Weitz & Luxenberg attorneys. For example, Justice Heitler granted their request to lift NYCAL’s longstanding ban on [punitive damages](#) in asbestos cases. She was replaced in March 2015 by **Justice Peter Moulton**.

Initially there was hope among asbestos defendants that Justice Moulton would end, or at least reduce, NYCAL’s brazen favoring of the plaintiffs’ bar. Unfortunately, that hopeful innocence was quickly lost as Justice Moulton’s rulings proved to be even more anti-defendant than those of his predecessors.

Furthermore, notoriously plaintiff-friendly **Justice Martin Shulman** is still presiding over NYCAL cases. Noteworthy is the fact that he is a former president of Sheldon Silver’s synagogue, and the two are [neighbors](#). Justice Shulman presided over many of the tax-reduction claims brought by the **Goldberg & Iryami** law firm that, according to federal prosecutors, resulted in hundreds of thousands of dollars in “[kickbacks](#)” to Silver. Justice Shulman was never directly implicated in any wrongdoing, but neither has he shown since any inclination to give NYCAL defendants an even shake.



**Justices Moulton & Heitler**

## PRESUMED GUILTY UNLESS PROVEN INNOCENT

Justice Moulton and his chambers have made it abundantly clear that NYCAL defendants can never obtain [summary judgment](#). He has effectively lifted the plaintiffs’ initial burden of establishing their case and has instead imposed on defendants the virtually impossible-to-bear burden of proving a negative—namely that their product was *not* present at a claimants’ worksite when alleged exposure to asbestos occurred. In doing so, Moulton has established a standard unique to NYCAL, where plaintiffs need only make blanket, vague allegations of exposure in order to defeat summary judgment. Not a single defendant implicated by a plaintiff’s exposure allegations has ever been granted summary judgment in Justice Moulton’s courtroom, and the resulting threat of jury trials increases pressure on defendants to settle beforehand.

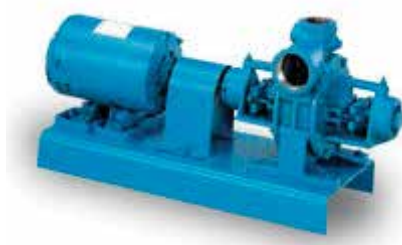
For example, Justice Moulton in March 2016 issued two troubling (and virtually identical) decisions against Utica Boilers, Inc. and Fulton Boiler Works, Inc. Mark Ricci, a mesothelioma claimant, alleged he was exposed to asbestos brought home on his father’s clothing. During a deposition, his father, Aldo Ricci, generally recalled observing contractors removing asbestos-containing insulation from the exterior of boilers when he worked as a draftsman engineer. On cross examination, Aldo did not remember observing anyone working on a Fulton or Utica boiler. When specifically asked whether he believed he came into contact with asbestos from a Fulton or Utica boiler, Aldo answered “No.” Nevertheless, Judge Moulton refused to dismiss the cases against those two companies.

Although Justice Moulton cited and claimed to rely on a prior New York court decision that held [speculation and conjecture](#) cannot defeat a motion for summary judgment, both of the *Ricci* opinions effectively do the opposite. Because both companies manufactured asbestos-containing boilers, Moulton considered Aldo’s testimony regarding his lack of exposure to asbestos from the defendants’ products to be a credibility issue for a jury’s evaluation. The court simply assumed that someone working as a mechanical engineer for many years “might reasonably be expected to come in contact” with asbestos-containing boilers made by Fulton and Utica, among others.

Two months later Justice Moulton reiterated in [Koulermos v. A.O. Smith Water Products Co.](#) that “[s]ummary judgment is properly denied even where the plaintiff does not believe the product contained asbestos.”

Most recently, in October 2016 Justice Moulton again denied summary judgment in [DeMartino v. Aurora Pump. Co.](#) Misstating one of the core concepts of a plaintiff’s burden in asbestos litigation, he proclaimed that “it

is not plaintiff's burden to make a *prima facie* showing that plaintiff was exposed to asbestos-containing products manufactured, sold, or specified by Aurora." This short statement itself implies that merely suing a business not only permits a trial against that company, but also would allow a jury to find the company liable unless it can "prove the negative" by showing its product could not have contributed to the plaintiff's injury.



In the same case Justice Moulton ruled that an affidavit submitted by a witness designated as the company's "person most knowledgeable" about the product at issue may not be creditable if that witness's employment did not overlap with the plaintiff's alleged asbestos exposure. Since Justice Moulton refused to acknowledge the company's witness with regard to product information pre-dating his employment, the defendant could not demonstrate that its pumps "could not have contributed" to plaintiff's injuries.

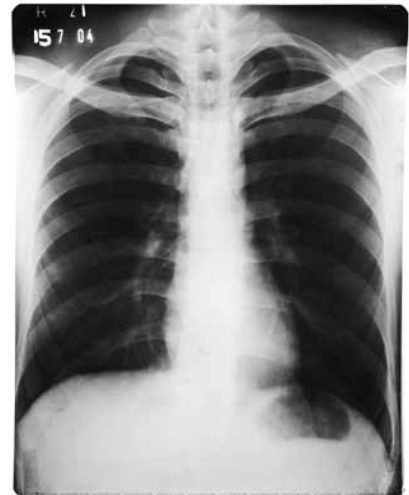
The additional irony, besides the blatant disregard of the facts and evidence, is Justice Moulton has denied numerous motions for summary judgment on the very basis that the defendant did not provide an affidavit from the company's "person most knowledgeable." Given the latency period involved in asbestos related injuries, Moulton's court has for all intents and purposes disregarded New York law and shut down summary judgment as a remedy afforded to NYCAL asbestos defendants.

### SETTLE, GET SUED AGAIN

A ruling by Justice Moulton in early 2016 opens the door to asbestos defendants getting sued a second time by the same plaintiff, even after entering a settlement that fully releases them from liability.

In [\*South v. Chevron Corp.\*](#), Justice Moulton found that a settlement of a 1997 asbestos case brought by The Maritime Asbestosis Legal Clinic did not block a mesothelioma lawsuit later filed by the **Motley Rice** firm. In the signed release, the plaintiff "forever discharge[d] and release[d]" the defendant from "any and all actions ... for the injuries, sickness and/or disease allegedly caused as a result of the exposure to asbestos." The plaintiff admitted he understood that by entering into settlement, he was "giving up the right to bring an action ... in the future for any new or different diagnosis" stemming from the long term effects of exposure to asbestos.

Despite this clear and unequivocal language, Justice Moulton nevertheless allowed a subsequent suit to proceed, reasoning that the release did not specifically mention cancer or mesothelioma. He also reasoned that mariners are "almost ready to sign any instrument that may be proposed to them," so apparently they cannot be expected to be bound to contracts they sign. This type of omnipotent, divine reasoning from the court erodes any confidence a defendant's settlement is a full release from liability.



### PREJUDICIAL CONSOLIDATIONS

Court data make clear that consolidation of cases for trial, even on a small scale, continues to "[significantly improve\[s\] outcomes for plaintiffs](#)." But when New York's highest court, the Court of Appeals, had an opportunity in 2016 to make NYCAL conform to the national trend in asbestos practice (and the practice in New York outside the asbestos context), it failed to show leadership.

The court had accepted review of a [decision](#) by the First Department allowing virtually any NYCAL cases to be consolidated based on the most general similarities. And most disappointingly, the high court [found](#) in *Konstantin v. Tishman Liquidating Corp.* that the consolidation issue had not been preserved for appeal. As a result, NYCAL continues to consolidate cases, routinely denying defendants' their right to due process.

### LIABILITY FOR PRODUCTS SOLD BY THIRD-PARTIES

Unlike most other jurisdictions, businesses facing lawsuits in NYCAL face liability even when they did not make or sell the asbestos to which a plaintiff claims exposure.

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

But in 2016 New York's highest court issued another plaintiff-favoring [opinion](#), perhaps the most permissive of any court on the subject. The court found that "the manufacturer of a product has a duty to warn of the danger arising from the known and reasonably foreseeable use of its product in combination with a third-party product which, as a matter of design, mechanics or economic necessity, is necessary to enable the manufacturer's product to function as intended." The court's opinion will have a [particular impact](#) in [NYCAL](#).

## TRUST CLAIM GAMES

Those who claim injury from exposure to asbestos have two routes to obtain recovery—traditional litigation against solvent companies and filing claims with trusts established by companies that filed for bankruptcy as a result of asbestos liability. Of course, plaintiffs' lawyers pursue both avenues, but some hide evidence of the true sources of their clients' exposure by waiting to file trust claims until after litigation concludes, keeping the beneficial information from defendants and manipulating the value of the civil court cases by only allowing a small portion of a plaintiffs' total asbestos exposure to be shared with a jury. [Recent data](#), including NYCAL data, make clear the need for greater transparency to address the disparities between the asbestos bankruptcy trust and civil personal injury systems that allows this gamesmanship to occur.

As noted in past Judicial Hellholes reports, a North Carolina federal bankruptcy judge in [In re Garlock Sealing Technologies, LLC](#) found that a gasket and packing manufacturer's settlements of mesothelioma claims in the tort system were "infected by the manipulation of exposure evidence by plaintiffs and their lawyers." The bankruptcy judge noted a NYCAL case Garlock had settled for \$250,000. The plaintiff in that case had denied any exposure to insulation products, implying that only Garlock's sealing gaskets could have been the source of his alleged exposure. But once the case settled, that plaintiff's lawyers filed 23 claims with trusts (some associated with insulation products) on the plaintiff's behalf, including eight trust claims that were filed within 24 hours of completing the settlement with Garlock.



A more [recent analysis](#) of the discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. showed "a similar pattern of systemic suppression of trust disclosures." The study discussed a NYCAL case—the Gerald Moors case - as an example. Mr. Moors testified at his deposition that "he never worked with asbestos containing products from 11 now-bankrupt companies," including Owens Corning. At trial, Moors' attorneys successfully moved to prevent defense counsel from mentioning Owens Corning's asbestos insulation product just prior to opening statements, arguing that Moors never said he was exposed to the product. But Garlock discovery data showed that the asbestos specialists at the **Belluck & Fox** plaintiffs' firm filed 26 trust claims on Mr. Moors' behalf, "despite Moors' sworn testimony that he did not work with the products from those (now bankrupt) companies," including Owens Corning.

The trust claims filed in the Moors case also reveal site exposure inconsistencies. In his tort case, Moors denied being exposed to asbestos at the Ravenswood Powerhouse. In [trust filings](#), however, Belluck & Fox listed Ravenswood Powerhouse as a site where Moors was exposed to asbestos.

As one [commentator](#) has noted, "[o]pening the trusts to transparency would go a long way to ensure the funds are reserved for those who are legitimately injured as intended." This should be done either through [legislation](#) or in NYCAL's [new Case Management Order](#) (CMO), which Justice Moulton has been considering for nearly a year-and-a-half. If he were to require such transparency, he knows the plaintiffs' bar would hold it against him.

## 'DEEP POCKET' LIABILITY

Litigants face disproportionate liability in NYCAL cases. [New York law](#) generally provides that a defendant is responsible for paying noneconomic damages, such as pain and suffering, only in proportion to its level of responsibility for a plaintiff's underlying injury if that responsibility is 50% or less. An [exception](#) to this law, however, allows full "deep pocket" liability to be imposed on a business that is minimally at-fault for a plaintiff's injury if it is found to have "acted with reckless disregard for the safety of others."

This narrow statutory exception, applicable only to truly "reckless" defendants, has been exploited by plaintiffs' counsel with the blessing of NYCAL judges. It has effectively subverted the general rule of proportionate liability altogether. Plaintiffs' lawyers routinely seek—and NYCAL judges dutifully issue—jury instructions to find recklessness in situations that fall far below the [high bar](#) set by the New York Court of Appeals. As a result, juries find the exception applicable in virtually every NYCAL case, even though that was clearly not the legislature's intent.

## IS ANY EXPOSURE ENOUGH TO IMPOSE LIABILITY?

In any lawsuit alleging an injury from exposure to a toxic substance, the level of exposure (actual dose) is a [critical component](#) of proving that a defendant's conduct caused the plaintiff's alleged harm. But NYCAL judges have inconsistently applied this principle in asbestos cases.

For example, **Justice Barbara Jaffe** properly threw out a plaintiff's verdict where an expert testified that cumulative exposure to asbestos, no matter how small and without any quantification, made a defendant's products a substantial contributing factor to the plaintiff's development of mesothelioma. That decision in [Juni v. A.O. Smith Water Products Co.](#) is now before the First Department appellate court.

On the other hand, **Justice Cynthia Kern** in [Hillyer v. A.O. Smith Water Products Co.](#) allowed a plaintiff's verdict to stand after an expert testified that any exposure to an asbestos-containing product made or sold by a defendant contributed to his cumulative risk of developing mesothelioma.

## HARASSING SUBPOENA ALLOWED

An insight into the willingness of some NYCAL justices to aid and abet the plaintiffs' bar in cowing defense counsel and their clients can be found in an episode revolving around the due process-denying practice of consolidation discussed above.

After the release of 2015 [empirical study](#) showing, among other things, that NYCAL's "consolidated trial settings create administrative and jury biases that result in an artificially inflated frequency of plaintiff verdicts at abnormally large amounts," Weitz & Luxenberg lawyers issued a [subpoena](#) to one of the study's authors, demanding that he produce information on who funded the study, how it was conducted, early drafts, and any comments and criticism received.



Kristal

The subpoena was not related to an active case. And the NYCAL verdict data upon which the study was based are publicly available. So it appears the main intent of the subpoena was to harass the author and dissuade defendants from funding research that could help publicize the NYCAL injustices that work to make plaintiffs' lawyers rich.

More troubling is the fact that, prior to the subpoenaed deposition taking place, Weitz & Luxenberg lawyer **Jerry Kristal** leveled a blistering attack at the consolidation study, its authors and their methodology during an asbestos litigation conference. In attendance were many NYCAL justices and various counsel. Yet Justice Moulton in January 2016 [denied](#) the study author's motion to quash the subpoena and thus injudiciously sanctioned such plaintiffs' bar bullying.

## THE RETURN OF PUNITIVE DAMAGES

For nearly two decades, NYCAL plaintiffs were not permitted to pursue punitive damages because judges had wisely recognized that depleting resources through jackpot awards [hurts](#) those who develop asbestos-related diseases in the future, and that repeatedly punishing companies for the same conduct serves no purpose. But in April 2014 Justice Heitler [lifted](#) this longstanding ban at the request of the plaintiffs' bar. An appellate court [upheld](#) Justice Heitler's



authority to modify NYCAL's Case Management Order (CMO), which had precluded claims for punitive damages. But, the appeals court said, defendants were entitled to more notice and discovery if such claims were to be allowed. It remanded the matter to Heitler's successor, Justice Moulton, to determine whether punitive damages claims *should* be allowed and, if so, what procedural protocols were necessary to ensure that defendants' due process rights are protected.

Justice Moulton has not yet finalized his much anticipated update of NYCAL's CMO, nor has he otherwise issued a written decision reinstating punitive damages. In fact, he hasn't even deigned, even informally, to explain why he believes punitive damages in today's asbestos litigation are even justified. After all, such damages are intended to [deter future conduct](#) or punish [moral turpitude or wanton dishonesty](#). And today's asbestos defendants cannot be further "deterred" from conduct that occurred decades ago nor be justly "punished" for conduct that was perfectly legal at the time. Nonetheless, Justice Moulton has made unequivocally clear that punitive damages *will* return to NYCAL, much to the delight of the plaintiffs' lawyers who'll have the chance to win even bigger verdicts and get [richer still](#).

### CMO WILL LIKELY DO FURTHER HARM TO DEFENDANTS

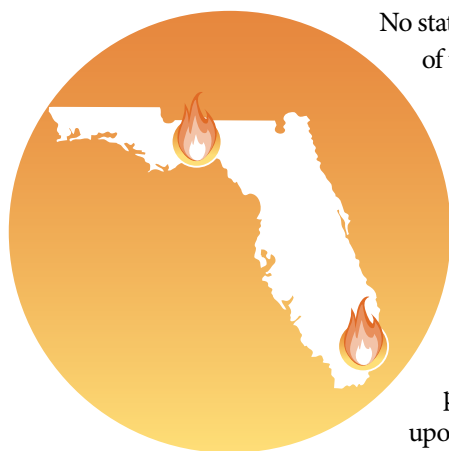
Any illusions that asbestos defendants may have once had about Justice Moulton's desire to balance NYCAL proceedings more fairly in the name of justice are gone. Everyone now understands that his new, if still pending CMO will, in addition to reinstating punitive damages, likely abridge asbestos defendants' capacity to stave off the consolidation of their cases and continue to prevent a jury from being told the real story of plaintiffs' complete, and at times extensive, alternative asbestos exposure, to the detriment of still solvent businesses targeted by litigation today.

In one example, NYCAL has acknowledged that the eight so-called [Malcolm](#) factors or criteria should be considered in determining whether asbestos cases are sufficiently similar to be consolidated. Yet in a draft CMO circulated by Justice Moulton, he permits plaintiffs to pick and choose which two or three should apply when they seek the inherent advantage that consolidation gives them over defendants. The required meeting of *all* Malcolm factors is appropriate under the law, so how can a CMO that will let plaintiffs cherry-pick but a few of them be considered fair and impartial?

The fact is that NYCAL continues to be anything but fair and impartial. Politically powerful plaintiffs' lawyers will continue to exert their influence. And if NYCAL justices remain completely unwilling to consider defendants' legally sound motions for summary judgment, those defendants may be left with no choice but to hire **Snake Plissken** to mastermind an alternative [Escape from New York](#) (Embassy Pictures, 1981). Of course, Mr. Plissken would then almost certainly be subpoenaed and deposed.



## #4 FLORIDA SUPREME COURT AND SOUTH FLORIDA



No state high court [in recent years](#) has been more brazenly inclined to disregard the will of the legislative and executive branches of government, and thus disregard the will of the voters who elect those lawmakers, than has the Florida Supreme Court. A relentlessly liability-expanding majority of the high court's justices show no compunction whatsoever when it comes to rewriting duly enacted statutes to suit their own political and ideological preferences. This clouding of the constitutionally prescribed separation of powers further darkened Sunshine State's skies in 2016, as the court invalidated two laws intended to control surging workers' compensation costs. It also subjected to new civil liability employers, state agencies and even those who call police for help. And it is in South Florida, in particular, where aggressive personal injury lawyers wait like hungry gators to seize upon the litigation opportunities the high court so predictably provides.

## THE LATEST EXPANSIONS OF LIABILITY BY THE FLORIDA SUPREME COURT

As detailed in this report [last year](#), the Florida Supreme Court preserved a plaintiff-friendly test for product liability claims that most other courts have abandoned, imposed liability on a landlord for an unsolved double murder, and allowed plaintiffs in personal injury cases to recover damages for future medical costs that would be picked up by taxpayers through Medicare. Its decisions were just as bad or worse in 2016.

**Workers' Compensation Havoc.** Two recent Florida Supreme Court decisions are [causing](#) workers' compensation insurance rates to skyrocket in Florida, with [small businesses](#) and other employers facing a [nearly 20% rate hike](#). Some experts predict that rates could ultimately [soar](#) as much as 35%.

Plaintiffs' lawyers who file low-dollar workers' compensation claims can now receive lucrative fees, thanks to the high court's April 2016 ruling in [Castellanos v. Next Door Co.](#) There the court threw out a sliding scale for attorney's fees that the Florida Legislature established in 2009 in pursuit of consistency. The court found that the fee schedule unconstitutionally denied an attorney a "reasonable" fee when the lawyer sought \$36,818 in fees for spending 170 hours of time to chase \$823 in benefits. As **Justice Charles Canady** noted in his dissent, the lawyer's fee was nearly 45 times the amount of the client's recovery. While the court could have limited its ruling to the particular case before the court, it issued a far-reaching decision that nullified the fee schedule. Legal observers [predict](#) the decision will result in higher fee awards and an increase in workers' compensation claims.



Justice Canady

In June 2016, the high court [doubled down](#) in [Westphal v. City of St. Petersburg](#), invalidating a state law that reasonably limited "temporary" disability benefits to two years and instead revived a prior law allowing such workers' compensation payments to continue for up to five years. The two-year period is designed to compensate workers while they heal and return to work or become eligible for permanent benefits. In the case before the court there was a coverage gap—the time to recover temporary benefits for an injured firefighter had expired, but a workers' compensation judge found the plaintiff did not yet qualify for permanent benefits because his condition might improve.

The court could have found that the law, as written, did not permit benefits, which likely would have prompted legislative action. Alternatively, the majority could have found, as the dissenters believed and an intermediate appellate court ruled, that there actually was no coverage gap because the firefighter qualified for permanent benefits. But again the majority instead chose to rewrite the law.

Is there any wonder that workers' compensation costs are projected to rise dramatically when a temporary injury can result in five years of payments and attorneys can receive huge fees in small disputes? And in such an environment, can anyone be surprised that a plaintiffs' lawyer, presumably with his eye on a new yacht or vacation home, had the nerve to file a [lawsuit](#) seeking to prevent the State Office of Insurance Regulation from conducting a public hearing into these rising costs?

**Call 911!... Then Pay \$3.3 Million.** Incredibly, Florida's Supreme Court also ruled in June 2016 that a bank faces liability after a teller, mistakenly believing that a customer fit the description of a suspected robber depicted in an e-mail disseminated that morning, triggered a silent alarm.

Although the teller made an honest error, the court found that Bank of America could be held responsible for injuries resulting from the police response. A Miami-Dade County trial court [awarded](#) the plaintiff \$2.6 million in compensatory damages, primarily for pain and suffering, plus an additional \$700,000 in punitive damages. A mid-level appellate court rationally threw out the preposterous award, applying the longstanding rule that a person who contacts law enforcement in good faith to report criminal activity cannot be liable for negligence.

But the usual 5-2 majority on the high court reversed that appellate decision and sent the case back for a new trial. The court ruled in [Valladares v. Bank of America](#) that a person or business is subject for liability when making



an erroneous police report not only if done maliciously, as is the traditional approach, but also if the report is made [recklessly](#). Apparently, “if you see something, say something” has been replaced in Florida with “think twice, and maybe three times, before calling police for help.”

**More Liability for the State.** Private-sector businesses, such as banks, aren’t the only ones affected by the Florida Supreme Court’s liability-expanding rulings. The state and its taxpayers also are on the hook. In [Board of Trustees, Jacksonville Police & Fire Pension Fund v. Lee](#), the high court ruled that when a state agency incorrectly denies a person’s request for access to public records, his or her attorney is entitled to recover attorney’s fees even when the agency acted in good faith. In this case, the board of trustees managing Jacksonville’s police and fire pension funds incorrectly told a person who requested access to documents that he would have to pay for the time of an employee to monitor him as he read through public records in the office.

As a result, the board may have to pay [\\$75,000](#) to the requestor’s lawyer, in addition to its own legal expenses. As the dissenting justices observed, the court’s 5-2 majority rewrote the statute, which requires an agency’s custodian of records to respond to requests for public records “in good faith” and allows an award of attorney’s fees only when the agency “unlawfully refused” a request. Legal observers note that the court’s ruling leaves no room for error, imposing a form of strict liability in a “[costly precedent](#)” for state agencies.

**Fee Challenges Made More Onerous.** What happens if a defendant complains that a plaintiff’s attorney fee request is excessive? In March 2016 Florida’s high court answered that question in the context of allegations that an insurer improperly failed to pay such a request in full. Its 4-3 decision in [Paton v. Geico General Insurance Co.](#) ruled that if a defendant contests the attorney’s fee sought, the insurer must produce its own attorneys’ time records, invoices, and retainer agreement as evidence.

The insurer argued that its attorneys’ work on the case was both privileged and irrelevant to the disputed fee. Observers note that the decision “marks a [dramatic change](#) in the discoverability of billing records.” Florida courts had rarely required an opponent to disclose such information. Now, plaintiffs’ attorneys will have more leverage when seeking fees, as they can require defendants to gather and release sensitive information regarding legal representation.

**Arbitration Agreements Unenforceable.** Nursing home residents can no longer be bound to arbitration by an agreement entered into by a family member on their behalf, ruled the Florida Supreme Court in September 2016. In a case out of Miami-Dade County, the high court found that such an agreement could not prevent a resident’s son from bringing a lawsuit on behalf of his father who’d contracted an eye infection, even though it was the same son who signed, and fully understood, the contract he entered! By sending timely and efficient arbitration off to die, the court’s ruling in [Mendez v. Hampton Nursing Center, LLC](#) will invariably lead to more costly lawsuits and still higher prices for nursing home care in South Florida and elsewhere throughout this [steadily aging](#) state.

**More Fuel for Tobacco Lawsuits.** Florida’s storied tobacco litigation shows no signs of burning down after 2016’s [back-to-back](#) Florida Supreme Court rulings expanding liability. Since the state high court lowered evidentiary requirements in tobacco lawsuits a decade ago in [Engle v. Liggett](#), state courts have been working their way through thousands of trials. In March 2016, the high court made it easier to recover [punitive damage awards](#). Then it [lowered the bar](#) for individuals to be included in the class that is entitled to special advantages when suing tobacco companies.

## WILL JUNK SCIENCE AND UNLIMITED MED MAL AWARDS RETURN?

Those who are concerned about Florida’s litigation environment are closely watching how the Florida Supreme Court addresses two matters in the year ahead.

**A Return to Junk Science?** Since enactment of overdue reform legislation three years ago, Florida trial courts have applied the same [Daubert](#) standard for expert testimony that’s applied by federal courts and most other states’ courts. They have done so routinely and without any of the sky-will-fall consequences predicted by the plaintiffs’ bar, which naturally would prefer a return to the previous, more lax standard.

Florida’s appellate courts are also applying the new standard, finding that trial court judges [abuse their discretion](#) when they do not “affirmatively prevent imprecise, untested scientific opinion from being admitted.”

Nevertheless, in February 2016 the Florida Bar, after [flip-flopping and some apparent committee-stacking](#), [recommended](#) that the Florida Supreme Court effectively overrule lawmakers yet again and abandon the new approach that deputizes judges as gatekeepers to ensure proposed expert testimony is based on reliable science.

As a Florida practitioner [commented](#), “[i]t would seem impractical, inefficient and nonsensical” and a “preposterous result” to discard three years of litigation and precedent to return to an archaic standard for admission of expert testimony. There is nevertheless a significant chance that the high court will do just that, given its penchant for nullifying the legislature’s attempts to improve Florida’s litigation environment and its prior rejection of *Daubert*. But since the high court has typically adopted legislative changes to the rules of evidence, there is hope that it will put aside its policy predispositions and keep the new standard in place.

**Will Limit on Noneconomic Damages Survive?** Speaking of policy predispositions, the Florida Supreme Court’s also considering a case that will determine if its prior ruling, which invalidated the state’s statutory limit on pain and suffering awards in medical malpractice cases, applies *only* in wrongful death cases with multiple claimants or if the entire law should be thrown out.

The legislature limited noneconomic damage awards in 2003 as part of a reform package intended to alleviate a medical malpractice insurance crisis in the state. As the Judicial Hellholes report has [explored in depth](#), in *Estate of McCall v. United States* (2014), the high court found the law unconstitutional as applied in that case because it disagreed with the legislature’s finding that there was a crisis when the law was enacted. Even if some members of the court were willing to concede that a crisis once existed, they astonishingly argued the crisis had passed and the law was no longer needed.



As this report predicted [two years ago](#), “[w]hile, technically, the court’s decision only invalidated the law when applied in wrongful death cases involving multiple claimants, Florida courts will likely cite its reasoning to find the law inapplicable in any medical negligence case.” To the cheers of personal injury lawyers in July 2015, that was the result in *North Broward Hospital District v. Kalitan* as the Fourth District Court of Appeals found the cap broadly unconstitutional. With this report poised for publication, Florida’s high court is considering the case, having heard [oral arguments](#) in June 2016. Since then, a second appellate court reached an outcome [identical](#) to the Fourth District’s ruling.

If the high court allows wholly subjective awards for pain and suffering to float unconstrained in all medical malpractice cases, Florida could see a resurgence of the problems that plagued its healthcare system more than a decade ago. (In a separate case, the Florida Supreme Court is [considering](#) whether the legislature may constitutionally limit the amount of fees a law firm may take from a client’s recovery in a medical malpractice case.)

## **SOUTH FLORIDA REMAINS A HOTBED FOR LAWSUIT ABUSE**

It’s been no secret for some time that the Sunshine State, particularly South Florida, is a leading hotspot for lawsuit abuse.

Florida lawyers bluntly label the Florida Deceptive and Unfair Trade Practices Act “[a pro-plaintiff protection act](#).” Observers point to South Florida’s sophisticated plaintiffs’ lawyers who specialize in class action litigation. These lawyers know that if their cases avoid early dismissal and win class certification by a trial judge, defendant companies will feel great pressure to settle. With apparently little shame or sense of irony, the plaintiffs’ lawyers seek a chance to get rich beyond their wildest dreams at consumers’ expense insofar as litigation costs are always passed on in the form of higher prices for goods and services. Yet Miami-area judges in particular seem unwilling to disabuse these lawyers of their misperception about the purpose of consumer protection law.

Like other consumers, Florida drivers also pay [higher auto insurance rates](#) as a result of lawsuits in which personal injury lawyers claim that the insurer whose policyholder caused the accident later acted in bad faith to delay or avoid paying a claim. These so-called “third-party [bad faith lawsuits](#)” are filed even when insurers promptly offer to pay a policy’s limit. In concocting such claims, plaintiffs’ lawyers often engage in “gotcha” tactics, such as ducking



claims adjusters' phone calls or coaching their clients to avoid meetings until the bad-faith deadline has passed without a settlement of the claim. Many states do not authorize third-party bad faith lawsuits against insurers, but the Florida Supreme Court has allowed such claims and permitted lawyers to manipulate the system.

As detailed in [last year's](#) Judicial Hellholes report, some personal injury attorneys in Florida maintain close relationships with unscrupulous medical clinics to which they refer clients for phony diagnoses, unnecessary procedures and, ultimately, grossly inflated bills that can fatten a lawsuit's payoff. In 2015 a trial court ruled, and a mid-level appellate court encouragingly [affirmed](#), that defendants in slip-and-fall and other lawsuits can require plaintiffs' attorneys to disclose referral relationships. The Florida Supreme Court is now [considering](#) that case, *Worley v. Central Florida Young Men's Christian Association*. And though the case is from Central Florida, an affirmation by the high court in *Worley* could constructively discourage abuses in South Florida and throughout the state.

Another rising area of abuse in Florida involves "assignment of benefits claims," in which plaintiffs' lawyers partner with service providers, such as auto glass shops, roofers or water damage remediation firms to bring excessive or fraudulent claims against insurers. In these schemes a service provider asks an insurance policyholder to assign his or her insurance benefits to the provider as a condition for making repairs at "no cost." A plaintiffs' law firm, which has an arrangement with the provider, then demands that the insurer pay inflated or unnecessary charges, typically within a short time frame. The insurer either pays the claim or it gets sued.

Lawsuits alleging that homes experienced water damage are an assignment-of-benefits-abuse favorite of South Florida plaintiffs' lawyers. Water damage claims have [jumped](#) 46% since 2010, in a period of relatively calm weather. Thankfully Florida has suffered no major storms or hurricanes these past six years, but water damage claims are raging in South Florida and threaten to swamp the rest of the state.

## NO PROGRESS IN 2016, PUSH FOR REFORM WILL CONTINUE NEXT YEAR

In some past years, even in the face of heavy resistance from the plaintiffs' bar, Florida lawmakers have admirably responded to lawsuit abuse and courts' willingness to expand liability with statutory reforms. Not so in 2016. But the [Florida Civil Justice Reform Institute](#) says it will continue to push needed reforms in 2017, [focusing](#) on assignment of benefits abuse, ensuring that damages for medical costs reflect actual expenses, and addressing excessive bad-faith liability. Personal injury lawyers reportedly invested [\\$6.2 million](#) on political contributions to elect pro-liability lawmakers in the 2014-16 election cycle, however. So an [uphill battle](#) may remain for the state's tort reformers.

## #5 NEW JERSEY

The last time New Jersey was recognized as a full-blown Judicial Hellhole and not simply cited among this report's Watch List jurisdictions, it was because a single judge in Atlantic County was wreaking havoc on the state's court system. That problem was fixed when the bad judge was kicked upstairs to an appellate court, but now there are new weeds growing and choking Garden State courts. The New Jersey Supreme Court has made a number of shocking decisions over the past few years, and the lower courts are following along in lock step.

### GOING ROGUE ON ARBITRATION

The New Jersey Supreme Court took its first swipe at arbitration in late 2014 when it announced in [U.S. Legal Services Group, L.P. v. Atalese](#) that it will no longer consider arbitration agreements valid unless their text goes so far as to explain what arbitration is, how it is different from a proceeding in a court of law, and that parties are waiving their right to bring a lawsuit.

The United States Supreme Court chose not to hear an appeal of the *Atalese* decision but, in deciding a similar case from California, [warned states](#) in 2015 that arbitration contracts must be placed "on equal footing with all other contracts." New Jersey failed to take the hint.



In [Morgan v. Sanford Brown Inst.](#), New Jersey’s high court again thumbed its nose at both the 91-year-old and frequently upheld Federal Arbitration Act *and* the highest court in the land. The New Jersey justices held that a contract’s arbitration clause, and the delegation clause that made it enforceable, where in fact unenforceable. The parties had agreed to arbitrate but had not additionally specified that they were agreeing not to have a trial by jury, and thus had failed to meet the standard announced in *Atalese*. Even as New Jersey’s high court acknowledged its obligation under the FAA to place arbitration agreements “on an equal footing” with other contracts and insisted that “no magical language is required to accomplish a waiver of rights in an arbitration agreement,” it nevertheless maintained that it is not sufficient to agree to arbitrate. An agreement must also explain what the parties are agreeing *not* to do. (We were scratching our heads, too.)

Unfortunately, New Jersey’s lower courts may now be confused, too, because some are effectively demanding “magical language.” In [Defina v. Go Ahead and Jump 1, LLC](#), an appellate court struck down an arbitration clause that read as follows:

*I on behalf of myself and/or my child(ren) hereby waive any right I and/or my child(ren) may have to a trial and agree that such dispute shall be brought within one year of the date of this Agreement and will be determined by binding arbitration before one arbitrator to be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures.*

The court noted that the clause plainly waived the signer’s right to a “trial.” But because it didn’t include the word “court” nor explain that arbitration conducted by one arbitrator does not constitute a jury, it was condemned as unenforceable. Seriously?

In [Anthony v. Eleison Pharmaceuticals, LLC](#), a different appeals court held that an arbitration agreement in a high-level employee contract was insufficiently clear because it “included no reference to a waiver of plaintiff’s statutory rights or a jury trial.”

So if Garden State courts are not insisting on the inclusion of certain magic words in arbitration agreements before they’ll see fit to enforce such agreements, what *are* they doing? It’s hard to know. But if they continue wandering down this dark path, businesses will have no way to know whether their arbitration agreements will be honored, and some may consider relocating to states with courts that are willing to set clear standards and stick to them.

## CONTRACT, SHMONTRACT

Believe it or not, the New Jersey Supreme Court’s disdain for seemingly lawful contracts makes its displeasure with arbitration clauses look mild by comparison. For example, in [Rodriguez v. Raymours Furniture Co.](#) the court unanimously invalidated an employment contract that set its own time limit for bringing lawsuits, substituting the court’s own policy preferences for those agreed to by the parties in the case.



This unprecedented decision flies in the face of [prior New Jersey case law](#), and even makes the Judicial Hellhole across the Hudson River look good by comparison. Because when the exact same contract provision was challenged in New York, [it was upheld](#). And if New Jersey’s justices persist in their disdain for businesses and individuals whose incomes rely on their contracts being honored as written and freely entered into, the Garden State may need a heckuva lot more than traffic cones to slow the pos-

sible exodus of commerce and tax revenue fleeing the state.

## INVITING EXPERIMENTATION

If the decisions detailed above lead one to believe that New Jersey’s high court is unwilling to set, much less stick to, bright-line rules, its 2016 decision in [Schwartz v. Accuratus Corp.](#), a take-home toxic torts case, should confirm that belief.

Ten years ago when the court addressed the issue of claims involving exposure to toxic substances allegedly

brought home from work on employees' clothes, it [suggested](#) it was setting a bright-line rule. The court dismissed concerns that expanding the law to cover take-home claims would lead to open-ended liability saying:

*Although [the defendant fears] limitless exposure to liability based on a theory of foreseeability built on contact with [the plaintiff's] asbestos-contaminated clothing, such fears are overstated. The duty we recognize in these circumstances is focused on the particularized foreseeability of harm to plaintiff's wife.*

Fast forward to 2016 when the U.S. Court of Appeals for the Third Circuit asked, in a certified question, whether a girlfriend, who would sometimes washed her boyfriend's work clothes when she stayed overnight at his apartment, could seek compensation under the state's existing standard.

Garden State justices might simply have said "yes." But their mind-numbing answer instead has served to make take-home liability virtually limitless. Writing for a unanimous court (!), **Justice Jaynee LaVecchia** said:

*The Court cannot define the contours of the duty owed to others in a take-home toxic-tort action through a certified question of law. While there may be situations in which household members are in contact with toxins brought home on clothing, a refined analysis for particularized risk, foreseeability, and fairness requires a case-by-case assessment in toxic-tort settings. Although the Court cannot predict the direction in which the common law will evolve, the Court identifies certain factors that will be important as such cases present themselves. In sum, the duty of care recognized in [2006] may extend, in appropriate circumstances, to a plaintiff who is not a spouse. The assessment should take into account a weighing of the factors identified herein to determine whether the foreseeability, fairness, and predictability concerns ... should lead to the conclusion that a duty of care should be recognized under common law.*



The court may as well have ordered the erection of two giant, flashing neon signs—one at the eastern end of the Delaware Memorial Bridge and one at the western end of the George Washington Memorial Bridge—inviting all friends, neighbors, drinking buddies, softball teammates, lovers, drycleaners and all other known acquaintances of anyone ever exposed to potentially

toxic dust or fibers in a workplace to "SUE HERE!"

By refusing to set reasonable limits on take-home liability and announcing that it "cannot predict the direction in which the common law will evolve," the high court is irresponsibly welcoming trial lawyers' experiments. Their test subjects will be New Jersey businesses, which now have no way of knowing what sort of liability they may face, as well as deserving plaintiffs, whose recoveries will necessarily be reduced as the pie of available compensation funding is sliced into ever smaller pieces.

### OUT-OF-STATE PLAINTIFFS STILL DRAWN BY LAX EXPERT EVIDENCE STANDARD

New Jersey is the proud [home to many](#) of the nation's leading pharmaceutical and medical device companies. So it is not surprising that a lot of drug and device lawsuits are filed there. What is surprising is the sheer number of drug and device suits filed in New Jersey state court, and the percentage of those cases that are filed by out-of-state plaintiffs who would generally be expected to bring such claims in federal court.

Nothing better illustrates just how many drug and device lawsuits are working their way through the New Jersey courts than a quick look at the state's [multicounty litigation \(MCL\) system](#). As of late November 2016, there were 24,798 cases pending in 15 different drug and device related MCLs.

Drug MCLs	13,687 cases
Device MCLs:	11,111 cases

The most recent study done on all multicounty litigation, including cases that don't involve drugs or devices, found that [9 out of 10](#) are filed by out-of-state plaintiffs. While New Jersey's high court [may not find this disturbing](#),

many others, including the New Jersey taxpayers who provide finite court resources, do.

One reason litigants prefer New Jersey is the state's standard for expert testimony. New Jersey Supreme Court **Justice Barry T. Albin** affirmed this during recent oral arguments in the *Accutane* litigation (see [video transcript](#) at the 1:25:10 mark), saying, "We apply our evidence rules and our court rules and that attracts plaintiffs here. They like our evidence rules, they like our expert witness rules," as though becoming a destination for litigation tourists were something to aspire to.

The reason plaintiffs like the Garden State's expert witness rules is because [they are unique](#). Unlike the majority of all the other states and the federal court system, which rely on the time and trial-tested *Daubert* standard, New Jersey has its own standard. The problem with this is that a lack of case law on the subject leaves judges free to interpret and apply the standard as they see fit, leading to [inconsistent rulings](#).

Plaintiffs are more willing to roll the dice on borderline cases when they think they may be able to adduce "junk science" evidence that other state courts would not allow. The New Jersey Supreme Court could put a stop to this abuse if it were willing to update New Jersey's rules to mirror the federal rules and case law, but it has repeatedly refused to do so.

Of course, fairness compels this report to acknowledge that some New Jersey judges have fulfilled their gate-keeping responsibility when considering the admissibility of expert testimony. In September 2016 **Atlantic County Judge Nelson C. Johnson** properly [dismissed two cases](#) that alleged talcum powder use caused the plaintiffs' ovarian cancer. Judge Nelson noted the "narrowness and shallowness" of the plaintiffs' experts' evidence, which "their peers in the scientific community would not rely upon." Of course those same talc-causes-cancer "experts" have been welcome by judges with open arms in the Show Me Your Lawsuits State of Missouri, this year's #1 Judicial Hellhole. They're ringing up multimillion-dollar verdicts there faster than Turnpike traffic north of Exit 6.



Justice Albin



Schwartz

## LAWSUIT-GENERATING CONSUMER LAWS

Based on the leadership the New Jersey Supreme Court is providing (Not!), another legal storm may be brewing. For the past several years this report has warned the New Jersey court system that its embrace of consumer litigation would overload its already bulging dockets. If these suits were helping consumers, it would be one thing. But the majority of such suits are a classic example of what ATRA general counsel and renowned tort law expert **Victor E. Schwartz** calls ["empty suit"](#) litigation. No one has experienced a true injury in these lawsuits, but the claims persist because they are money-makers for the self-interested lawyers who shamelessly gin them up.

Part of the reason attorneys have been able to exploit New Jersey's consumer protection laws is the fact that they are poorly drafted. New Jersey's non-partisan Law Revision Commission, which has been tasked with cleaning up the state's Kafkaesque Consumer Fraud Act (CFA), admits the law is "infirm" and ["one of the state's most complicated statutes"](#). Its confusing nature and ever-expanding boundaries have aided attorneys eager to expand their practice or get an upper hand in negotiations since no business owner wants to be branded a fraudster. And there is no telling how often consumer fraud lawsuits are merely threatened in pursuit of a make-this-go-away payoff before a lawsuit is filed.

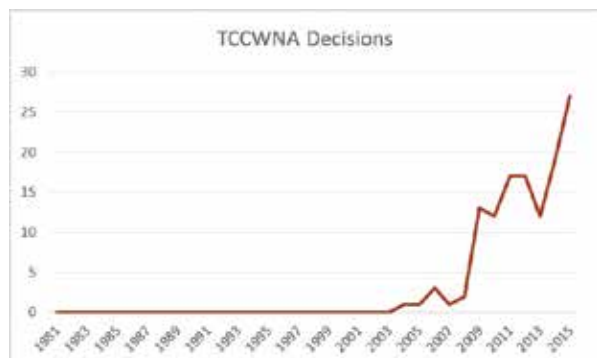
But an ATRF-commissioned [study](#) found that CFA lawsuits actually decided by courts increased 447% from 2000 to 2009. So New Jersey policymakers have obviously known for some time that there are problems with the states principal consumer protection law. Still they've done nothing to solve those problems.

Meanwhile, a previously obscure statute known as the Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA) has rapidly become a choice weapon that plaintiffs' lawyers can wield against virtually any merchant ["looking to sell in the Garden State"](#). Many of the [key terms](#) of this ["gotcha" statute](#) are undefined, leading to lawsuits over [drink prices on menus](#), the [definition of hardwood flooring](#), the phrase ["void where prohibited"](#) and the [terms of service agreements](#) on scores of websites. It truly is ["a feeding frenzy \[for\] plaintiffs' lawyers,"](#) or as



The Economist suggested, “[class-action lawyers... may have struck gold.](#)”

Nonetheless, policymakers and jurists have again been slow to react. In fact, as of this report’s publication, the New Jersey Attorney General’s Division of Consumer Affairs, the state agency tasked with enforcing consumer protection laws, doesn’t even mention TCCWNA on its [website](#) except in a copy of a [consent agreement](#) for a case in which TCCWNA claims were not central to the outcome.



Lawmakers are more to blame than courts when problematic statutes become a struggle to adjudicate. But the courts cannot and should not be let off the hook for the ongoing litigation boom. Whenever there has been an opportunity for the courts to crack down on victimless consumer lawsuits they have declined to do so. A unanimous New Jersey high court in 2013 went so far as to [effectively declare](#) that consumer protection statutes are remedial and thus should be read liberally, and that judges should take pride in expanding their application.

And from that point on, as the nearby chart shows, TCCWNA litigation has soared.

As with arbitration and contract law, if New Jersey policymakers don’t find a fair and balanced way to protect both consumers *and* sellers of goods and services without inviting excessive and unnecessary litigation, they will risk future economic job growth and job creation, to say nothing of being made the butt of late-night comedians’ jokes every time someone files a lawsuit because his [sandwich was a bit too short](#) or because [Super Bowl tickets are expensive](#) (duh!).

## HOPE FLOATS

If there is any room for hope in this sad tale, it may be found in the fact that New Jersey’s courts are plainly led from the top. While that may seem counter-intuitive, consider this: For the first time in years [New Jersey has no empty seats on its high court](#), and lower court vacancies are being filled. A full bench statewide should bring stability and take some pressure off the high court, whose justices may find time to take a breath and perhaps assess the overall health of the system they lead. The New Jersey Supreme Court has the power and the political capital to right the state’s precariously listing ship of civil litigation. It only needs the will to do so.

## #6 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS



Illinois’ quintessentially urban Cook County and largely rural Madison and St. Clair counties are at opposite ends of the state. But as jurisdictions that almost always draw this annual report’s discomfiting spotlight, all three are jurisdictions where no civil defendant wants to face a lawsuit. And in a state long dominated by plaintiffs’ lawyers and the politicians they control, none of these counties is likely to escape the spotlight anytime soon.

### COOK COUNTY (CHICAGO)

Cook County [hosts](#) roughly two-thirds of Illinois’ major civil litigation, even though only about 40% of the state’s population lives there.

Observers consistently tell ATRA that the scales of civil justice have been out of balance there for decades, and no one is holding their breath while waiting for those scales to be leveled.

Cook County’s litigation problems are more diverse than Madison County’s



asbestos-focused docket. Though Cook County did place [seventh](#) nationwide among jurisdictions with the most asbestos lawsuits in 2015, its handling of medical malpractice cases also has many concerned. Deiderich Healthcare's [latest annual data](#) on medical liability payouts show that Illinois again led its Midwest neighbors with \$258 million in 2015. That's \$49.7 million more than 2014's total. So even as the overall number of new claims got smaller, verdicts and settlements are getting bigger, led by what is thought to be the biggest Cook County medical liability verdict in history—[for \\$53 million](#)—against the University of Chicago Medical Center in June 2016 in a case involving a child's cerebral palsy.

Cook County has also experienced a spike in [drive-by lawsuits](#), often against small businesses, claiming minor technical violations of disability access requirements. Americans with Disabilities Act lawsuits filed in Chicago's federal court [more than doubled](#) from 44 in 2014 to 94 in 2015, with no signs of slowing down this year. Rather than pay the \$10,000 to \$20,000 it would cost to fight the lawsuit, real victims like Fabiola Tyrawa, who prides herself on knowing customers at her Chicago coffee shop by name, pay the \$5,000 that the lawyers demand to make the lawsuit go away.

After this year's [election](#), Cook County will have a state's attorney who did legal consulting work for a personal injury law firm that has filed numerous lawsuits against the county government she will now defend. During **Kim Foxx's** campaign, the Chicago Tribune [exposed](#) the arrangement Foxx had with the firm **Power Rogers & Smith** and found she received \$18,500 in contributions from its lawyers. Now, when the firm files slip-and-falls and other lawsuits against the city, she'll be [negotiating](#) the settlements. Foxx has refused to acknowledge the obvious conflict of interest and vowed not to recuse herself from cases involving the firm, claiming she helped them with medical malpractice and personal injury cases, not lawsuits against the county. And there may be other personal injury firms she worked for, but Foxx [ain't sayin'](#).

There also has been well-publicized concern about the quality of judges in Cook County. For example, Cook County judges deemed unqualified by the bar have nonetheless been retained in elections [again](#) and [again](#). Voters even returned a judge to the bench who was declared [legally insane](#) in 2012 (she was later [removed](#) by a court commission). Rarely [if ever](#) does a Cook County judge not win retention. As the [Chicago Tribune](#) asked rhetorically in 2014, "Does this signal that Cook County's court system has a blue-ribbon bench? No, the court system has some deep-seated problems."



But as usual, in [2014](#) and [2015](#) all Cook County judges were retained, including those found unqualified. The latest major [embarrassment](#) came this past Election Day when county voters elected **Rhonda Crawford** to the bench. Crawford is under indictment for posing as a judge and presiding over traffic cases while she was employed as a law clerk. Her license to practice law has been suspended. Yet Crawford still defeated a sitting judge who launched a write-in campaign. While Crawford was the certified winner of the election, the state supreme court has barred her from taking the bench.

With such poorly qualified judges, ATRA's Windy City sources say it is no surprise that many of the expert witnesses allowed to testify there are even worse. Judges perform little to no gatekeeping, and juries are often intentionally misled by litigants.

The City of Chicago also has had a hand in poisoning the legal environment with its hiring of out-of-state personal injury lawyers on a contingency-fee basis to run a shakedown lawsuit that's trying to pin the cost of painkiller abuse on prescription drug manufacturers. Initially filed in 2014, the case was dismissed in May 2015 by a federal judge who found the city had failed to explain how the drug companies allegedly misled the public. But the city was allowed to file an amended complaint and did so in November 2015. While a court has stayed a similar lawsuit in California as the FDA considers how to address concerns about opioid addiction, the Chicago case remains [pending](#).

On a positive note, rare courage recently ended some Cook County home cooking. **Cook County Judge Daniel J. Lynch** took the rare step of throwing out a \$25 million personal injury settlement in 2016 after a courthouse intern (then a law student) reported that she'd overheard a law clerk [tipping off](#) a plaintiffs' lawyer about the contents of a jury note. The note suggested jurors were poised to come back with a defense verdict, and the intern said she [heard](#) a clerk for the

judge presiding over the case tell one of the plaintiffs' lawyers what the note said. The clerk waited 27-minutes before informing defense counsel about the jury note, and by that time a fat settlement had been struck between plaintiffs' attorneys and the defendant's insurer.

Shortly afterward, the jury did return [a defense verdict](#), but the presiding judge found it moot in light of the settlement. The intern reported to Judge Lynch that the presiding judge's clerk later told her that she likes to give an advantage to plaintiffs, raising this troubling question: How many other clerks, and even judges, in Cook County like giving advantages to plaintiffs? One can't help but get the sense that this sentiment is not rare among court staff in Cook County. But what is rare, as Judge Lynch pointed out after he kyboshed the tainted settlement, is the "[courage and candor](#)" of the young intern, **Ms. Brook Reynolds**, who came forward. ATRA wishes this brave young woman all the best in her law career.



Reynolds



Incidentally, ATRA finds interesting the fact that in its [October 2016 ratings](#) of judges facing November retention votes, the **Chicago Council of Lawyers** found Judge Lynch "not qualified." Even though the council said Judge Lynch is "widely respected for his knowledge of the law and procedure" and "considered to be well prepared and ... adept at handling long, complex trials," concerns remain:

*Judge Lynch on several occasions has reached beyond his immediate role as judge in a particular matter to engage in legal acts that seem to be outside his normal course of deciding a case before him. These matters include seeking or having sought to have the attorneys prosecuted for fraud or obstruction. In another matter, the judge unsuccessfully sought to have the Cook County State's Attorney prosecute one of the parties before him. These unorthodox uses of judicial discretion, including criminal contempt charges, are troubling to the Council.*

Imagine that, sleazy lawyers don't like an "unorthodox" judge who acts against and seeks prosecutions of those who perpetrate fraud on our civil justice system. If only more judges behaved so admirably. In any case, voters who share Judge Lynch's position on lying, cheating and defrauding the courts overwhelmingly returned him to the bench.

## MADISON COUNTY—THE ASBESTOS LAWSUIT CAPITAL

Madison County continues to function as a powerful [magnet](#), attracting asbestos plaintiffs and their lawyers from all across the country and [around the world](#). In fact, nearly [one third](#) of all asbestos-related lawsuits in the United States, and one half of mesothelioma claims, are filed there, earning it a reputation as our nation's "[ground zero](#)" for asbestos litigation.

Asbestos lawsuits accounted for [72%](#) of the civil cases filed in Madison County's courthouse in 2015. And, in the first half of 2016, asbestos lawsuit filings were [up 10%](#) from the same period one year earlier. The next busiest jurisdictions are New York City and Baltimore, Maryland, both with considerably larger populations than Madison County but with about [one-third](#) the number of asbestos lawsuits.

Most of the lawsuits filed in the Madison County Circuit Court have no connection to the county or to the State of Illinois for that matter. Illinois residents filed only 75 of Madison County's 1,224 asbestos cases in 2015. Just six of the claims were filed on behalf of Madison County residents, comprising a mere 0.5% of the court's asbestos docket. The rest were litigation tourists from around the country, seeking an advantage over defendants in this plaintiff-friendly court.



Judge Flack

Why is Madison County so appealing? One reason is the close ties between the local plaintiffs' bar and the judges who preside over their cases. In 2016 **Associate Judge Donald Flack**, a former plaintiffs' [asbestos attorney](#) himself, took some flak when he [disclosed relationships](#) with two national asbestos law firms that had developed after he'd become a judge. His wife reportedly works part time for a local personal injury law firm. His son spent a summer working for a firm that specializes in bringing class actions. And Judge Flack continued to file lawsuits in Madison County after the announcement of his appointment to

the bench, according to the [Madison-St. Clair Record](#), which reports that at least 30 cases he filed are active today. But it's just one of many [controversial](#) examples of [ties](#) between judges and the plaintiffs' bar in Madison County.

A fresh breeze of reform may have begun to blow in August 2016, however, when **Judge Stephen Stobbs**, who handles Madison County's asbestos docket, [revised the case management order](#) governing those claims. It is the first significant change in more than five years. The order limits the number of cases that will be set for trial each year (still extraordinarily high at 780 cases). It also requires plaintiffs to show proof of an asbestos-related injury and provide certain information before a case is set for trial. And by increasing scrutiny for cases alleging that asbestos exposure caused lung cancers often associated with smoking or other sources, the order expedites the handling of mesothelioma claims and creates a "special closed" docket for cases not ready for trial.



These are welcome changes that could increase fairness in asbestos litigation and reduce the incentive for plaintiffs' lawyers from across the country to pile into Madison County. Most changes will take effect in 2017, but some plaintiffs' lawyers have already suggested it may be time to seek greener asbestos pastures [elsewhere](#), such as those across the river in St. Louis (see p. 7). We'll believe in the exodus if and when it happens.

## ST. CLAIR COUNTY—MADISON'S TROUBLESOME NEIGHBOR

Meanwhile, neighboring St. Clair County continues to host much [more than its share](#) of litigation compared with any other area of the state aside from Cook and Madison counties. It was America's [second-fastest growing](#) asbestos jurisdiction between 2014 and 2015, and sees some dubious cases, like a [recent lawsuit](#) attributing stomach and colon cancer to asbestos exposure. Not surprisingly, the courthouse in this [relatively small](#) county is the [largest government office](#).

Concerned that voters would not return them to office, three St. Clair trial judges [manipulated](#) the judicial election system. Rather than face a retention vote that required them to get 60% approval from voters, three St. Clair judges **John Baricevic**, **Robert Haida** and **Robert LeChien** submitted letters of resignation that were not effective until December 4, 2016, but then ran in the March 2016 Democratic primary to fill the vacancies created by their own resignations. The gambit paid off for Judge LeChien, who squeaked through with a 51% win—enough to beat his challenger even if it wouldn't have been enough for retention. It also worked for Judge Haida, who ran unopposed. But even these shenanigans [did not return](#) Chief Judge Baricevic to the bench, and he will be [replaced](#) by **Ron Duebbert**.



It is not only businesses and their employees that are hurt by runaway litigiousness in the Metro-East counties of Madison and St. Clair. The county governments themselves, which is to say their taxpayers, are frequent litigation targets. According to a recent study conducted by Illinois Lawsuit Abuse Watch, Madison and St. Clair counties spent a combined [\\$17.1 million](#) defending themselves against lawsuits between 2010 and 2014, while neighboring counties spent [nothing](#). Live by the sword, die by the sword.

## IS JUSTICE FOR SALE IN ILLINOIS?

Even though no-nonsense Judge Lynch survived his retention vote in Cook County, no one should believe that wealthy plaintiffs' lawyers don't wield incredible political power throughout the Land of Lincoln. In fact, among other findings in a [recent report](#) by the [Illinois Civil Justice League](#) were these:

- While the Illinois Trial Lawyers Association claims more than 2,000 members throughout the state, its PAC received all of its major contributions from lawyers and law firms in the greater Chicago, Madison County, and St. Clair County areas.
- Plaintiffs' lawyers have donated \$35.25 million to Illinois politicians over the past 15 years, including state legislators, executive branch candidates, individuals running for local offices, and judges. The top personal injury law firms gave more than \$7 million to Illinois judicial candidates alone.



- Judicial race spending in Cook, Madison and St. Clair counties was significantly higher than in other areas of the state. Plaintiff-lawyer contributions to county officials' campaigns also were heaviest in these three counties.

"When the three counties with the highest concentration of civil litigation are also the three counties that draw the biggest campaign contributions by trial lawyers," the ICJL says it's fair to ask: "Is Justice for Sale in Illinois?"

It sure seems so. And given such spending, it is no surprise that these plaintiff-friendly jurisdictions consistently warrant attention from this report and other civil justice reformers. More broadly, it's similarly unsurprising that Illinois' legislature tends to favor expansions of civil liability over reasonable limits like those enacted in other states. For example, Illinois is one of a shrinking minority of states that has not adopted the [Daubert](#) standard for expert evidence, which works to head off junk science before it reaches a jury.

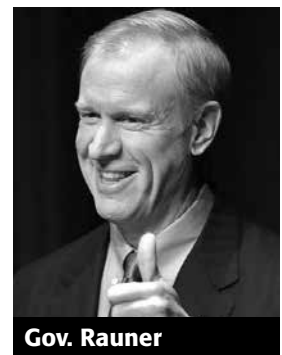
Illinois also is one of only a few states with joint liability, meaning in its case that a defendant who is only 25% responsible for a plaintiff's injury can nonetheless be required to pay 100% of the damages. Illinois allows for unconstrained pain and suffering awards, too, and does not have a statutory limit on punitive damages, unlike most other states. And, of course, state law has allowed plaintiffs' lawyers to bring cases in their favorite county courthouses, even when those cases have no connection to the county or the state.

If there's the slightest of silver linings in the dark cloud that is plaintiffs' bar domination of Illinois politics, it may be found in the latest election results. In addition to Judge Lynch surviving retention in Cook County, as noted above, the trial lawyers' generous campaign contributions didn't seem to have their usual effect—especially in some key appellate court races.

Asbestos personal injury lawyers poured a million dollars into a PAC, "Fair Courts Now," which [sent](#) deceptive mailers to voters attacking judicial candidates not wedded to the plaintiffs' bar. The candidates they attacked, **John Barberis** and **James Moore**, both [won](#) their elections and will sit on the Fifth District Appellate Court, which considers appeals from Madison County. The outcome will give that court a Republican majority for the first time since Illinois began electing appellate court judges in the 1960s.

### CHANCE FOR CHANGE?

Illinois **Governor Bruce Rauner** has consistently advocated civil justice reforms, including limits on forum shopping, strengthening the reliability of expert testimony, reducing the opportunity for fraud and double-dipping in asbestos litigation, and providing jurors with more information to ensure that damage awards accurately reflect a plaintiff's medical expenses. But the governor remains in a long-running stalemate with legislative leaders of the opposing party. And legislation relating to lawsuit reform [rarely gets a hearing](#) or becomes law. This less than enthusiastic approach to reform may stem in part from past experience when, last decade, lawmakers did enact meaningful measures only to have them [struck down](#) by the Illinois Supreme Court. So the road to needed reforms still appears to be decidedly uphill.



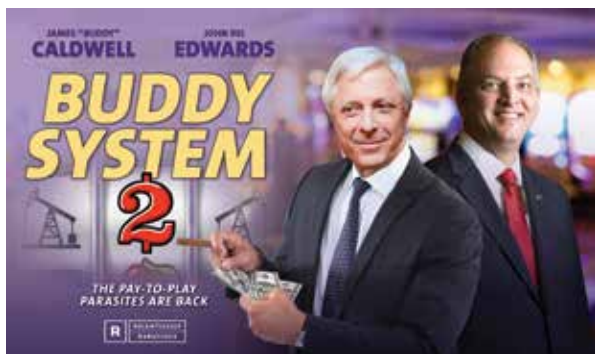
## #7 LOUISIANA

Over decades Louisiana has developed a Judicial Hellholes reputation for plaintiff-friendly [venue shopping](#), permissive judges, double-dipping asbestos lawsuits and trust claims, the highest jury-trial threshold in the nation, easily abused consumer protection laws and excessive jury verdicts.

But with the long-running scandal of plaintiffs' bar corruption and greed that was the BP oil spill litigation largely behind it, and with a lifelong trial lawyer-turned governor failing in 2016 to advance any of his liability-expanding agenda in the legislature, many observers of Louisiana's storied litigation environment thought that perhaps this year's Judicial Hellholes

report might recognize the relative calm by moving the state to its less severe Watch List. Then **Governor John Bel Edwards** announced his administration's intentions to muscle in on various parish lawsuits and pursue multibillion-dollar litigation over coastal erosion against the state's (and the nation's) critical oil and gas industry.

The governor has unilaterally and, according to some [critics](#), unlawfully [sought to hire](#) some of the state's wealthiest plaintiffs' lawyers to run the energy industry-targeting litigation. That these same private-sector lawyers also contributed generously to the governor's campaign smells of the same pay-to-play cronyism that brought down the state's previous attorney general. In any case, environmental experts say the Army Corps of Engineers' decades-old levee system, not oil and gas production, has been most to blame for the Pelican State's steady loss of wetlands. But no one ever got rich suing the Army Corps of Engineers.



### 'BUDDY SYSTEM 2'

"Shameless pay-to-play politics seems to be a recurring, bipartisan tradition in Louisiana," [observed](#) ATRA president **Tiger Joyce** in October 2016, noting that Governor Edwards, a Democrat, in hiring his wealthy campaign donors to run potentially lucrative litigation for the state, is behaving just as former state attorney general **James "Buddy" Caldwell**, a Republican, had in operating his notorious "[buddy system](#)"—at least until he lost his reelection bid in 2015.

Edwards seems to be ignoring the message Louisiana voters sent to Caldwell, however, picking up right where the former AG left off. In fact, the governor and his trial lawyer pals have raised the stakes exponentially with their multibillion-dollar play against one of his state's most important employers and sources of tax revenue.

The governor may believe that squeezing billions from energy producers with the mother of all [legacy lawsuits](#) will somehow solve Louisiana's chronic budget problems and secure generous campaign support from trial lawyers for the rest of his political career. But his high-rolling bet may come up snake-eyes if energy companies and other industries decide that expanding in or relocating to Louisiana isn't worth the risk. Job creation and economic growth could suffer, budget problems could worsen, and Louisiana's voters could come to regret recent election results.

In addition to the economic problems the governor's trial lawyer-led litigation may cause for the state, the coastal-erosion claims themselves may face significant legal hurdles, especially in light of the Army Corps of Engineers' history of managing the lower Mississippi River. That levee-dependent management, many [experts say](#), has been the principal factor in Louisiana's steady loss of wetlands. In fact, a September 2016 [letter](#) to Governor Edwards from U.S. Rep. **Garret Graves** (6th Dist.-LA) criticized the litigation as a political "tool to enrich friends and supporters." The congressman urged the governor instead to use his "oft-cited close relationship with President Obama to hold the Corps of Engineers accountable for trashing" Louisiana's coast.

But Edwards doesn't seem inclined to heed the counsel of Congressman Graves, Louisiana's reform-minded **Attorney General Jeff Landry** or [others](#) advising against litigation run by his political patrons. He instead appears determined to star in "Buddy System 2" and thus guarantee Louisiana a leading role in Judicial Hellholes reports for the foreseeable future.

### TRIAL LAWYERS PLAY IN JUDICIAL RACES, TOO

In addition to helping one of their own win the governor's mansion in 2015, trial lawyers opened their checkbooks in 2016 to influence a state supreme court race. Spending more than \$2 million, trial lawyers contributed both directly to their candidate's campaign and to supportive political action committees. Aided by that support, **Judge Jimmy Genovese** surged late in the campaign and [defeated](#) a business-friendly moderate for the high court vacancy.

Not surprisingly, much of the campaign cash that lifted Judge Genovese to the Louisiana Supreme Court came from the very same lawyers and law firms that had



generously supported Governor Edwards' election a year earlier. Not that they don't have every right to support the candidates of their choice. But in light of the giant-sized litigation against oil and gas producers that the governor's political patrons are running—litigation that will likely end up before the high court—many are raising fair [questions](#) about Judge Genovese's potential conflict of interest.

[Louisiana Lawsuit Abuse Watch](#) executive director **Melissa Landry** told the [Louisiana Record](#) in late-November 2016, "These suits are potentially worth billions of dollars and will almost certainly end up before the Louisiana Supreme Court. What do you think the lawyers who spent millions to help Genovese get elected will expect in return? Would you have a lot of confidence in the outcome of a football game if one team was paying the officials?"

But veteran Louisiana political observer **Jim Harris**, of the [Coalition for Common Sense](#), is more sanguine. Though he supported Judge Genovese's opponent in the high court race, he says "Genovese is a good man and hopefully will make decisions based on the law. I wish him success and hope he does a good job."

## MOPPING UP

As noted above, the thoroughly corrupted litigation that flowed for years after the 2010 Gulf oil spill no longer commands front page headlines. But some important mopping up continues as at least some of the personal injury lawyers who went to brazen lengths in ginning up phony claims have more recently been subjected to [criminal charges](#) and [punishment](#) for their self-interested conduct.

Meanwhile, new problems still bubble up from the bottom of the bayou's civil justice system. Imported from California and Florida, [disabilities-access lawsuits](#) have begun to roll over small business owners, as out-of-state asbestos plaintiffs are exploring the state's lax venue laws for a toehold. The state's [excessively high](#) threshold of \$50,000 for litigants to receive a jury trial (the national average is about \$2,000) continues to give plaintiff-friendly local judges too much [power](#) over lawsuit outcomes. And with a judgment interest system that starts the clock on the day a new lawsuit is filed and judges willing to let plaintiffs continually amend their complaints, sometimes dragging out litigation for many years, ATRA will be busy watching and reporting on civil justice developments in Louisiana civil courts for years.

## #8 NEWPORT NEWS, VIRGINIA

Prior versions of this report have noted the generally positive reputation enjoyed by Virginia for its civil litigation climate. Those same reports have outlined why the same can hardly be said for asbestos cases prosecuted in Circuit Court for the City of Newport News, Virginia, in which legal and evidentiary rulings tilt strongly in favor of plaintiffs. The record in [George Parker v. John Crane Inc.](#), tried in Newport News in 2016, offers a case study in the difficulties faced by defendants there, and why it is that plaintiffs' [85% win-rate](#) is the highest of any jurisdiction hearing asbestos claims in the United States. The deck plainly lists against any company brave enough to defend itself at trial in this waterside, shipbuilding town.



## EVIDENTIARY DOUBLE STANDARDS

Early asbestos litigation decades ago focused on companies that made [amphibole asbestos](#), most notably used in insulation products, that is particularly dangerous when inhaled. Most of those companies went bankrupt as a result of the litigation. Now, lawsuits target companies that make a different, less hazardous form of asbestos, [chrysotile](#), which is used in gaskets and boilers aboard ships, among other products, such as auto brake pads.

The manufacturers of these products typically did not keep a trove of documents from a half century ago that would allow it to refute a plaintiff's assertion that its product was present at a particular jobsite. They also have practical challenges in finding co-workers from decades ago that can show a plaintiff did or did not work with a

given product. So defendants must rely on third-party (often government) documents, as well as expert testimony, to call into question whether their product was present at the worksite or at least show that alternative and more potent sources of exposure were there.

Frequently a well-qualified Navy expert provides such evidence, including official Navy ship drawings, specifications and other government documents demonstrating the vast amount of asbestos-containing insulation throughout the vessel. But in Newport News, the court has unrealistically and unfairly required defendants to show direct proof that other asbestos-containing products were used in the plaintiff's workspace at the precise time the plaintiff worked in that compartment—proof that, decades later, simply does not exist. Such challenges are exemplified by the rulings in the *Parker* case.

*Parker* involved a claim by a former shipyard worker against a gasket and packing company, alleging that exposure to its products caused his mesothelioma. As noted, these are chrysotile-containing products. As is frequently the case in other jurisdictions when a plaintiff sues a supplier of chrysotile-containing products, the defendant sought to prove that the plaintiff's exposure to amphibole products caused his disease, not the gasket and packing products supplied by the defendant. Evidence from the plaintiff's lungs was consistent with exposure to amphibole fibers found in asbestos insulation.

The defendant sought to introduce evidence of the brand names of amphibole insulation products to which the plaintiff clearly would have been exposed over his many years of working on ships at the shipyard. It had expert testimony and documentary evidence regarding the brands of insulation installed during the construction of ships on which the plaintiff performed [maintenance work](#). In some instances, that work was performed only a few years after a ship's initial construction was complete, making it highly unlikely that asbestos-containing materials had worn sufficiently to pose a hazard.



Judge Fisher

Such evidence had been used by the same plaintiffs' lawyer just a few years earlier in the same court in a case against Exxon (see [transcript](#) at pp. 81-83). Because the claimant in the earlier case sued Exxon due to pipe insulation and other materials found aboard its ships, he put into evidence work-ticket orders reflecting the insulation products installed onboard. According to the plaintiff, these documents provided circumstantial evidence of what was onboard the ships when he worked on them.

Though the same judge who heard the Exxon case also presided over the *Parker* trial, he would not allow the defendant to use similar evidence for similar purposes as he'd allowed the plaintiff in the Exxon lawsuit. Instead, **Newport News Circuit Court Judge Timothy S. Fisher** significantly curtailed the testimony that the defendant's Navy expert was allowed to offer, thereby depriving the jury of a full picture regarding the scope of the plaintiff's exposure to insulation products.

## INCORRECT LEGAL RULINGS

The defendant at trial in *Parker* was not the only company sued for allegedly causing the plaintiff's mesothelioma. In fact, he claimed that nearly two dozen additional companies contributed to causing his mesothelioma. Many of these companies settled out of court, choosing not to face the hurdles that bias trials against asbestos defendants in Newport News.

Mesothelioma cases that go to trial in Newport News are not governed by Virginia's more mainstream substantive law. Instead, those cases are controlled by [maritime law](#). Under maritime law, a defendant in a mesothelioma case can be held liable if its products are a "[substantial contributing factor](#)" in causing a plaintiff's disease. While that may sound like a high standard, as explained below, it is not. There can be more than one substantial contributing factor. For that reason, a defendant that goes to trial can ask the jury to apportion fault among all of the defendants that may have contributed to causing the injury, including those that have settled. This has the effect of fairly limiting the trial defendant's responsibility to that percentage of fault assigned to it by the jury.

For this reason, the defendant in *Parker* established at trial that the plaintiff and his coworkers frequently worked with many asbestos-containing products. Yet when the defendant sought to add all of the settling defendants that made these products to the verdict form, Judge Fisher initially denied the request, effectively ignoring



both the plaintiffs' testimony and precluding the company's defense that it was only one of many contributors of asbestos products to the plaintiff's past work environment.

Only after negotiations between the attorneys did Judge Fisher allow one additional company, with a name very similar to that of the defendant, to appear on the [verdict form](#). So it's not surprising that the jury returned a verdict with 100% liability against the trial defendant. And it certainly isn't hard to believe that if many more and varying names had appeared on the form, the jurors likely would have seen things differently.

## #9 HIDALGO COUNTY, TEXAS

The American Tort Reform Association has issued a "Hailstorm Lawsuit Warning" for Hidalgo County, Texas, that may be extended to similarly plaintiff-friendly jurisdictions elsewhere across the Lone Star State where [several thousand hail damage lawsuits](#) are now being filed annually, according to [Steven Badger](#) of Dallas-based Zelle LLP.

Property Casualty 360 [reported](#) in April 2016, when "severe storms and extensive damage come to [Texas], so do the contractors, public adjusters and lawyers who use questionable solicitation and business tactics to insert themselves into the insurance claims settlement process. They hijack the process by seeking claims that are beyond the actual losses and taking legal actions that delay settlements and generate large legal fees. Heavy filings, many groundless, pose a danger to business."



### EYE OF THE STORM

Bad weather happens, especially in Texas and other Gulf Coast states. Often it's hurricanes that cause most of the damage in this region. But with the hurricane front relatively quiet since Ike in 2008, knock wood, the flood of storm claims more recently has been driven largely by alleged [hailstorm damage](#). And Hidalgo County [remains](#) at the eye this storm. More than half of the roughly 21,000 hailstorm suits filed in Texas between 2012 and 2015 were filed in this largely agricultural county at Texas's southern tip along the Rio Grande. And in 2016 it remained a favorite jurisdiction for hailstorm plaintiffs' lawyers, particularly for **Steve Mostyn** and his associates at the Houston-based **Mostyn Law Firm**.



A self-described pit-bull, Mostyn persists in his hailstorm practice even as insurers have begun to fight back and some judges have become sufficiently critical of his co-counsel's conduct to begin issuing sanctions. But as regular readers of this report have learned, many personal injury lawyers have come to believe that they don't need to win *every* case, they only need to win often enough to get rich. And certainly the multimillionaire Mostyn has won often enough to get rich. His wealth has enabled him to become quite the generous [contributor to the campaigns](#) of lawsuit loving politicians and judges.

But we digress.

Although Mostyn is arguably the creator of the mass-tort litigation model following natural disasters, he is far from the only Texas-based plaintiff's attorney to take part in this scheme. The State Bar of Texas recently [suspended](#) trial attorney **Kent Livesay** for one year for engaging in illegal case running related to hail claims, and Texas-based firm **Speights & Worrich** is essentially dissolving in the face of a class action [barratry suit](#) against it for hail-related litigation activities.

### FIGHTING BACK, DEFENDANTS GET HELP FROM FEDERAL JUDGES

In something of a pleasant surprise in March and April of 2016 a federal judge with a lifetime appointment to the bench and no need to curry political favor with the likes of Mr. Mostyn dismissed several of his firm's storm suits against insurance company defendants.

U.S. District Judge Micaela Alvarez sharply [criticized](#) his many meritless complaints' glaring lack of evidence, writing, "The court notes that this case, like many storm related insurance breach of contract cases filed by the Mostyn Law firm, is factually unsupported. In particular, it appears that between August 2012 and April 2014, no factual issues developed that support the claims ...."

Judge Alvarez also ordered Mostyn to attend a "show cause" hearing in May, during which he tried to persuade her against leveling sanctions against him and his firm. She



Judge Hinojosa

[admonished him](#) for bringing groundless cases and urged him to warn his junior associates sternly against doing so. He said he would, and she did not order sanctions immediately, saying she would further consider the matter.

But in late July 2016, U.S. District Judge Ricardo Hinojosa was less equivocal. He [dismissed](#) another 17 hailstorm cases, all originally filed in Hidalgo County by Mostyn or his associates. Three of those dismissed were filed in the name of Mostyn serial plaintiffs **Mark and Kelly Dizdar**. One of their cookie-cutter suits were among those dismissed earlier by Judge Alvarez. And Judge Hinojosa went a step further by [sanctioning](#) Mostyn's co-counsel in two of the cases he threw out.



Judge Alvarez

## INSURANCE LESS AFFORDABLE IF AVAILABLE AT ALL

Thankfully, there have been a number of additional court defeats for Mostyn and other storm-chasing lawyers in 2016. But defendant insurance companies certainly can't win them all, and all their litigation costs must ultimately be passed onto their policyholders across the state in the form of higher premiums. Some of those annual premiums have gone up more than [100% in recent years](#) while [thousands of former policyholders](#) have lost their coverage altogether as at least three insurance carriers have simply stopped writing policies altogether in litigious Hidalgo County.

Attorney **Steven Badger**, cited above, wrote candidly of storm-related litigation for the [Claims Journal in April 2016](#):

*No one disputes that insurance companies should promptly and fully pay to repair building components damaged by hail consistent with the terms of their policies. Insureds should be brought back to their pre-loss condition with materials of like kind and quality.... And when insurance companies knowingly fail to meet these fundamental obligations, they should face penalties....*

*Conversely, insurance companies ... should only be obligated to pay claims consistent with the terms of their policies. They should not be asked to pay for roofs simply because they are old. They should not be asked to pay for damage that occurred long before their policies inception. They should not fund vacations or new cars by paying for building components, like fences and bricks, that are not damaged and that the insured had no intention of ever replacing. And, most critically, they should not be forced into the untenable position of settling meritless lawsuits—lawsuits often filed without their insureds even knowing they are plaintiffs—simply to avoid the cost of litigation.*



Badger

## LAWMAKERS TO THE RESCUE?

A week later, Badger wrote again in the Claims Journal, this time laying out a thoughtful and well received [blue-print for reforming](#) a system that simply lets too many unscrupulous parasites profit at the expense of honest, hardworking homeowners and premium payers.

Among other things, Badger call for:

- Disallowing the manipulative naming of individual insurance adjusters in lawsuits as a plaintiffs' means to "destroy diversity jurisdiction and stay out of Federal Court"
- Allowing insurers to obtain a release when a claim is resolved amicably so plaintiffs' firm canvassers can't step in afterwards and induce the property to pursue litigation
- Dismissing lawsuits with "new damage components" that weren't mentioned during the claims adjustment process
- Establishing a deadline for damage claims one year after the relevant storm event
- Eliminating plaintiffs' pursuit of "duplicative remedies" under various statutes by making Chapters 541 and 542 of the Texas Insurance Code the exclusive remedy for insurance-related claims
- Establishing consumer protection law that regulates insurance restoration contractors, requires ethical conduct and bans the waiving of deductibles

There's more to Badger's comprehensive blueprint, and it's unclear how much (or any) of it Texas lawmakers in January 2017 will be inclined to consider. But Texas **Lieutenant Governor Dan Patrick** has already made stopping hailstorm lawsuit abuse a priority item for the upcoming legislative session. And ATRA's sources in Austin say a strong coalition of lawmakers is gearing up to move a storm lawsuit reform measure. In the interests of both justice and affordable insurance, here's hoping they can push sound legislation over the goal line.



**Lt. Gov. Patrick**

# WATCH LIST

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The Judicial Hellholes project calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from Hellholes status as their respective litigation climates degrade or improve. By correcting imbalances, judges and policymakers can avoid their jurisdiction's designation as a Judicial Hellhole. Unlike the reasoned ranking of Judicial Hellholes, jurisdictions on the Watch List are simply presented alphabetically.



## GEORGIA SUPREME COURT

In each of the past three years, the Georgia Supreme Court has acted to expand civil liability significantly. Its increasingly stunning decisions have ushered in a new litigiousness as court dockets across the state begin to show strain.

### **2016 BRINGS INFLATED DAMAGES, LESS ARBITRATION, MORE FORUM SHOPPING**

Once is chance. Twice is a coincidence. But three times is a Hellhole in the making. And the Peach Tree State's high court continued its recently troubling trend in 2016 with just such a trifecta.

In June, the high court ruled that a person who brings a nuisance claim against a nearby property owner can recover damages for both their discomfort and annoyance, *and* for the diminution in property value attributable to the discomfort and annoyance. In [Toyo Tire v. Davis](#) the court found these measures of damages do not provide a double recovery, instead distinguishing between the former's focus on the past from the latter's focus on the future. The plaintiffs had sued a tire production factory that operated across the road and employed more than a 1,000 people, complaining about its noise, light, odors, dust, increased traffic and general unsightliness. The ruling effectively allows individuals to inflate their settlement demands against thriving, job-producing members of the commercial community. This may have something to do with the fact that Georgia's unemployment rate [ranks 33rd](#) among the 50 states and the District of Columbia and has remained stubbornly higher than the national rate.

One month later, the court struck a blow against the use of arbitration to resolve disputes. In [Bickerstaff v. SunTrust](#) the bank's deposit agreement with its customers provided that, unless a customer rejected arbitration within a certain time period, arbitration would be used to resolve all disputes. Nevertheless, the Georgia Supreme Court ruled that an individual depositor who viewed overdraft fees as excessive could file a lawsuit even though he hadn't formally rejected arbitration per the deposit agreement. More incredible still was the court's greenlighting of a class action on behalf of all [other bank depositors](#)—whether they thought overdraft fees were excessive or not, and whether they'd rejected arbitration or not. In taking this action, the high court revived a class action that had been thrown out by the trial and appellate courts below.

Finally, in October the state's high court gutted the ability of an out-of-state business that is sued in a Georgia court to transfer the case to the county in Georgia where it maintains its main office in the state. In [Pandora Franchising LLC v. Kingdom Retail Group LLP](#), the high court said the phrase "principal place of business" in the state's venue law, which heretofore had plainly been accepted to reference a location within the state for the purpose of doing business within the state, instead referred to a single principal place of doing business nationally. In



other words, the court found, if the defendant's headquarters is outside of Georgia, its right to transfer the case is [not applicable](#). As a result of the ruling, plaintiffs' lawyers can pick the friendliest forum in which to sue any and all defendant companies with headquarters out-of-state.

These three rulings follow other decisions that increased liability exposure. Last year, the Georgia Supreme Court required defendants to be clairvoyant and preserve evidence when a possible lawsuit is "foreseeable." Typically, a business's duty to preserve evidence is not triggered until it receives notice of a possible claim, a bright-



line standard. But in [Philips v. Harmon](#), the court ruled that after a hospital conducted an internal investigation of a complicated birth and referred the incident to its insurer, it had a duty to preserve electronic fetal monitoring strips, which are routinely destroyed 30 days post-delivery and are not part of the official medical record. The change from actual notice to a foreseeability standard has "[profound consequences](#)." Businesses will face uncertainty over whether they must preserve documents and other materials, just in case someone later decides to sue. Defendants, especially healthcare providers, will be under pressure to over-preserve records, with increasing costs and risks to patient confi-

dentiality. If a healthcare provider does not maintain records and a patient later sues, then trial judges may instruct jurors to assume that the discarded evidence would support liability.

The high court has also opened the door to more shareholder lawsuits against businesses. In [FDIC v. Loudermilk](#) the directors of a bank that became insolvent during the economic recession in 2009 were sued individually for ordinary negligence. But in such lawsuits, what is known as the "business judgment rule" allows officers and directors to make corporate decisions without the threat of personal liability, unless plaintiffs can show they were *grossly* negligent. Georgia's 2014 ruling lowered that bar, accommodating mere claims of ordinary negligence. The change invites shareholders—and more specifically, the plaintiffs' lawyers who'll recruit them—to second-guess corporate executives practically at will.

### GEORGIA'S LOWER COURTS JOINING THE ACT

As in most states, the high court sets the scene. And in Georgia, lower courts are dutifully taking their cues from on high, even as the state's civil justice environment sinks ever lower toward a Judicial Hellhole.

In July 2015 the Court of Appeals, Georgia's intermediate appellate court, allowed plaintiffs to proceed with a nuisance claim against a power plant that was filed seven years *after* the plant went into operation. In [Forrister v. Oglethorpe Power](#), the court allowed the plaintiff to skirt the statute of limitations by alleging they heard new noises coming from the plant that were not present before that statute expired. The Supreme Court declined to review the questionable case.

And in 2016 a trial court in Decatur County hosted the largest wrongful death and pain-and-suffering verdict in Georgia history, totaling a whopping \$150 million. The award in [Walden v. Chrysler Group](#) stemmed from a tragic accident in which a driver recklessly exceeding 30 mph rear-ended a family in their Jeep Grand Cherokee as they sat at a stoplight. The impact exploded the gas tank, causing a fire which took the life of a child. At trial the judge allowed the plaintiffs' attorney to concentrate his fire on the income of Chrysler's CEO and otherwise suggest that company executives should go to prison instead of the driver who caused the accident. A predictably enflamed jury found that driver to be 1% at fault and Chrysler to be 99% at fault. Incredibly, an appellate panel in November 2016 [upheld](#) the verdict. Though that verdict had been lowered significantly by the trial judge before the defendant's appeal was decided, the appellate panel said they'd have upheld the initial award.

### THREE SOUND HIGH COURT DECISIONS KEEP GEORGIA OUT OF HELLHOLE, FOR NOW

While a series of liability-expanding decisions has led ATRA to keep a close watch on the Georgia Supreme Court, three recently well-reasoned decisions have spared it from the full Judicial Hellholes rankings for the time being.

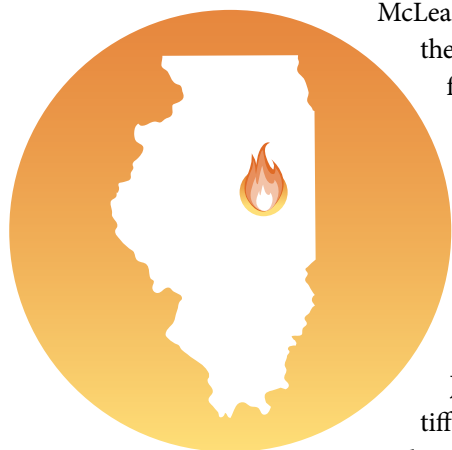
The court declined to recognize a new category of damages—damages for sentimental loss—in cases involving injuries to pets. Had the court ruled otherwise, allowing open-ended damages for emotional loss, the costs of every pet's health care, pet products and other pet services would go up. Instead, a unanimous court in [Barking Hound Village, LLC](#)

[v. Monyak](#) reasonably concluded that when a pet is injured as a result of negligent conduct (a mix up of medications at a kennel in this instance), the owner can recover both the animal's fair market value at the time and any medical or other expenses incurred to treat the animal. The court's June 2016 decision allows juries to consider many factors in determining the fair market value of a pet, particularly when the pet was adopted, such as breed, age, training, temperament and use. But plaintiffs cannot receive damages for the pet's subjective sentimental value to them.

The high court also provided a victory for science in July in [Scapa Dryer Fabrics, Inc. v. Knight](#) when it rejected the oft-attempted "any exposure" theory of liability pushed by asbestos plaintiffs attorneys. This theory, when permitted by courts, allows plaintiffs to name the maker or seller of any asbestos-containing product with which the plaintiff allegedly came in contact, even if his exposure was insufficient to have caused an asbestos-related disease. The court reaffirmed that "a de minimis contribution to an injury is not sufficient to establish legal causation under Georgia law." The ruling is consistent with other courts throughout the country.

And finally, the high court once again refused to find liability based on "take home exposure" in asbestos cases. In late November, in [Certainteed Corp. v. Fletcher](#), the court held that in addition to employers, product manufacturers also do not owe a duty of care to third parties exposed to asbestos workers or their clothes. According to the court, it is unreasonable to impose such a duty on a manufacturer to warn all individuals who might come in contact with an employee because the "scope of such warnings would be endless." ATRA filed an [amicus brief](#) in this case urging the court to adopt this common sense approach.

## McLEAN COUNTY, ILLINOIS



McLean County (Bloomington) in Illinois is not a first-timer on these pages. Located in the central part of the state, it has developed a reputation for lopsided rulings that favor plaintiffs in asbestos cases, as detailed in past Judicial Hellholes [reports](#).

The county gained the attention of plaintiffs' lawyers after it hosted a [\\$90 million](#) asbestos verdict against four businesses back in 2011.

McLean County verdicts ranging from hundreds of thousands to millions of dollars are often reversed by the Fourth District Court of Appeals. The appellate court has tossed out multiple McLean asbestos verdicts that [sensationally](#) assert [conspiracies](#) with no evidentiary support. In July 2015, an appellate court [reversed](#) a \$1.4 million award, finding that McLean County Judge Rebecca Foley [improperly barred](#) the jury from learning that the plaintiff had also worked for another employer, other than defendant, Illinois Central Railroad, at a job in which he was exposed to asbestos.

More recently, in June 2016, the Fourth District [threw out](#) a \$245,000 verdict, finding that the plaintiff in that trial, also presided over by Judge Foley, showed [no evidence](#) that he suffered from symptoms of an asbestos-related disease. In fact, the plaintiff's treating physician testified that 82-year-old **Joseph Sondag** had never complained of shortness of breath or chest pain and could climb two flights of stairs at a running pace without issue.

Observers say that McLean County is slowly gaining popularity as an asbestos docket in Illinois, though its caseload pales in comparison to Madison County and it has not yet inched into the top 15 asbestos magnet jurisdictions. The local law firm behind the no-injury Sondag case, the \$90 million verdict and other asbestos litigation in the county is [Wylder Corwin Kelley](#). With help from Judge Foley and others, the firm seems to have developed a dubious niche practice: filing asbestos lawsuits on behalf of people who have not developed asbestos-related cancer.

Will the Fourth District's ruling in Mr. Sondag's case, actually requiring plaintiffs to show evidence of an injury, serve to dull McLean County's shine in the eye of the plaintiffs' bar? Or will judges there and their friends at Wylder Corwin Kelley develop another means by which to shakedown deep-pocket defendants? Stay tuned.

## MONTANA SUPREME COURT



After an encouraging course correction last year, the **Montana Supreme Court** has once again veered onto the Watch List. It has long been dominated by plaintiffs' lawyers and thus has a penchant for expanding liability.

Well known is the Treasure State's high court for a record of [activism](#), [lack of adherence](#) to precedent, and [defiance](#) of the U.S. Supreme Court on [matters of federal law](#). It has invalidated basic legal reforms, such as those that raise the [threshold for liability](#), require a punitive damages verdict to be [unanimous](#), or permit juries to [allocate fault](#) among all who contribute to a plaintiff's injury. The court also has [allowed excessive](#) awards for punitive damages, made it [difficult](#) for insurers to obtain reimbursement for expenses paid on behalf of policyholders who subsequently win awards through litigation, and [thwarted](#) an attempt by Montana voters to refine the state's system of electing supreme court judges.

In May 2016 the Montana Supreme Court was up to its old tricks, finding in *Tyrrell v. BNSF Ry. Co.* that state trial courts *could* decide cases filed by out-of-state railroad workers allegedly injured outside Montana's borders. It refused to apply a 2014 U.S. Supreme Court [ruling](#) allowing state courts to hear out-of-state plaintiffs' claims for out-of-state injuries *only* when the defendant is incorporated or has its principal place of business in the state. Rather than adhere to that simple logic set forth by the highest court in the land, Montana's high court instead engaged in a strained reading of that precedent and limited its application to disputes arising abroad while exempting cases involving railroad workers.

The court deserves credit, however, for declining to create a new right to sue when the legislature did not intend to do so. In *Ibsen, Inc. v. Caring for Montanans, Inc.* the court found that plaintiffs cannot use the state's consumer protection law to bring an action alleging violations of the state's insurance code. It appropriately found that "a party is not entitled to obtain private enforcement of a regulatory statute that is not intended by the legislature to be enforceable by private parties."

But those forced to litigate in Montana courts remain [on edge](#), wondering whether the high court will eventually uphold or strike down a 2003 law that reasonably limits punitive damages to the lesser of \$10 million or 3% of a defendant's net worth. The state plaintiffs' bar hates this law and has [challenged](#) its constitutionality. The issue has gone before the Montana Supreme Court once in 2014 in a case involving a wildly disproportionate \$240 million punitive damages award against an automaker. That sum was [reduced](#) by the trial court judge to \$73 million, and the case then settled before a definitive ruling. And in 2015, when the Montana Supreme Court [overturned](#) a \$52 million verdict on other grounds, it avoided the need to rule on the law's constitutionality. So many are watching closely to see what may happen next.

## NORTHERN DISTRICT OF TEXAS

Last year this report for the very first time flagged a federal court as a stand-alone Judicial Hellhole. Largely because of **U.S. District Judge Rodney Gilstrap's** "seemingly willful" and "disgraceful distortion" of the False Claims Act as he presided over a meritless lawsuit that nonetheless resulted in the largest verdict of its kind in history, the [Eastern District of Texas](#) became infamous. A year later, as that preposterous FCA verdict is on appeal to the U.S. Fifth Circuit, one of Judge Gilstrap's federal trial court colleagues has singlehandedly managed to focus much negative attention on the Northern District of Texas.



## EVIDENTIARY RULINGS FAVOR PLAINTIFFS

Like those of Judge Gilstrap in the 2015 FCA lawsuit, **U.S. District Judge Ed Kinkeade's** plaintiff-friendly and highly prejudicial evidentiary rulings in a trial that began in January of 2016 led to a nearly half-billion dollar jury verdict in a bellwether case in multidistrict litigation (MDL) involving allegedly defective hip prosthetics.

As [reported by Law360](#), the \$498 million verdict—divided among five individual plaintiffs and their attorneys—includes about \$140 million in compensatory damages and \$360 million in punitive damages. The MDL comprises nearly 9,000 additional claims.

Judge Kinkeade's evidentiary rulings were politely characterized by defense counsel as “unusual.” To be less polite but more accurate, they were cravenly irresponsible as the judge effectively rubber-stamped plaintiffs' lawyers' requests to adduce so-called evidence about completely unrelated devices (pelvic mesh), past conduct by wholly separate business units of one defendant company, and a nearly-decade old non-prosecution agreement entered into by that defendant, none of which was remotely germane to the hip prosthetic allegations at hand.

It's clear from the jury form that introduction of such prejudicial evidence had the effect plaintiffs' counsel desired: it confused and ultimately inflamed jurors. For example, with respect to four of the five plaintiffs, the [jury specifically found](#) that one defendant had no prior knowledge of any purported defect in the devices yet, contrary to law, insisted it pay \$160 million in punitive damages.

The hip-prosthetic defendants [appealed to the Fifth Circuit](#), asking a three-judge appellate panel to delay additional MDL trials before Judge Kinkeade until it reached a decision on their appeal. But a [third hip-replacement bellwether trial](#) was allowed to get underway in September and, in early-December 2016, the jury reached a [record \\$1.04 billion](#) verdict, only \$30 million of which were for compensatory damages. The rest were punitive damages. But [Law360 reports](#) the defendants will not discuss a possible settlement of the MDL until the Fifth Circuit weighs in.



## PENNSYLVANIA SUPREME COURT

The composition of the Pennsylvania Supreme Court has dramatically changed over the past two years. As a result, litigants are concerned that the court, one that has generally been balanced in its rulings, could quickly become prone to expanding liability and nullifying reforms.



### AG SCANDAL DESTABILIZES HIGH COURT

The tumult on the high court began in the wake of the scandal that ultimately led to the conviction and resignation of former Pennsylvania Attorney General **Kathleen Kane**. The ethically-challenged Kane, [known](#) for hiring her sister and doling out [no-bid](#) contingency-fee contracts to lawyers who contributed to her campaigns, faced criminal charges for perjury and conspiracy for allegedly orchestrating and lying about a grand jury leak in an effort to discredit a political rival.

Kane had her [law license suspended](#), was [convicted](#) and forced to [resign](#) in disgrace. Her sad legacy includes retaliation against those she perceived as “enemies” after they'd cooperated with the investigation into her wrongdoing. In the tradition of the old East German secret police, Kane released compromising e-mails that eventually led to the resignations of two justices from the state's high court.

Following Kane's release of those sexually-explicit emails, which had apparently been shared among a group of friends, **Justice Seamus P. McCaffery** [stepped down](#) in October 2014. Then, in 2015 elections, trial lawyer-favored candidates [swept](#) three open seats left by McCaffery's resignation, another unrelated but also scandal-induced resignation, and the [retirement](#) of reform-minded stalwart **Chief Justice Ronald Castille**.





The new justices, **Christine Donohue**, **Kevin Dougherty** and **David Wecht**, will serve a decade before they face a retention vote. And in what had been the [most expensive](#) judicial race in U.S. history, they won with substantial support from [Philadelphia plaintiffs' lawyers](#) and other lawsuit-loving special interests. So the litigation industry now enjoys a 5-2 majority after six years in the wilderness and observers presume they'll look to take advantage of it.

Meanwhile, high-court hijinks continued to embarrass Pennsylvanians into 2016 when, in March, another high court [resignation](#), that of **Justice J. Michael Eakin**, came in the wake of yet more email revelations—these involving offensive jokes. The doomed Kane, like an injured and cornered animal desperately swinging claws and gnashing fangs, [released](#) these e-mails a week after Eakin voted with four other justices to revoke her law license. Since then **Governor Tom Wolf** [nominated](#), and state senators [approved](#), for the empty seat **Justice Sallie Mundy**. She'll hold it until 2017, when voters will elect a full replacement to a 10-year term.

All this tumult on the high court creates great uncertainty as to whether it will take a balanced and sound approach to deciding liability issues or, as suggested above, begin catering to Philadelphia's influential personal injury bar.

### ASBESTOS DECISION IS REASON FOR WORRY

An early and disquieting clue as to how Pennsylvania's newly constituted high court may lean came in November 2016 when, straining to look past two of its own precedents and a soundly reasoned amicus brief by [ATRA and others](#), the court loosened the standard for proving causation in asbestos cases and also seemed to shrug off the threat to defendants' due process rights inherent in the prejudicial consolidation of unrelated asbestos cases.

In [Rost v. Ford Motor Company](#), a case originally tried in Philadelphia's notorious Court of Common Pleas before a new reformist chief judge there in [2012 ended](#) consolidation of asbestos cases, the Pennsylvania Supreme Court addressed two issues: (1) whether the testimony of the plaintiff's expert concerning causation met the standards of its prior decisions in [Gregg](#) and [Betz](#) and (2) whether the consolidation of the case with unrelated cases was improper.

As to causation, the 4-2 majority, including the three newer justices elected with plaintiffs' bar support, essentially limited the holdings of *Gregg* and *Betz*, finding among other things that the plaintiff expert's discussion of "cumulative exposure" did not violate those past rulings' disallowance of the [discredited](#) and largely [rejected](#) "any exposure theory." The majority justified this conclusion by explaining that the expert responded to a hypothetical question and thus was free to opine that the plaintiff's actual exposures to Ford products over the course of three months, notwithstanding his other asbestos exposures for many years, was the cause of his disease.

On consolidation, the majority agreed that the case should not have been tried with others but refused to grant a new trial because, it said, the defendant was not demonstrably prejudiced.

In his dissent, which also lamented the majority's willingness to backslide on causation precedent, **Chief Justice Thomas G. Saylor** observed that "the majority recognizes that the trial court committed a blatant, structural error by consolidating unrelated complex, toxic tort cases" but is nonetheless willing to tolerate this "high potential for prejudice...."



### WILL NEW COURT TRY TO SLAY GOOD 'DRAGON'?

Another case being watched as a gauge of the high court's new membership addresses issues of concern to the business community is *Villani v. Seibert*. In this case the court [will decide](#) whether a state law providing a remedy to victims of lawsuit abuse is unconstitutional. The law, known as the [Dragonetti Act](#), provides that a person who is grossly negligent in filing a lawsuit, or who files a lawsuit for improper purposes, is on the hook for a defendant's actual losses, emotional distress, and attorneys' fees and costs resulting from the lawsuit, as well as punitive dam-

ages, after the case is dismissed. The law has been on the books since 1980, but in August 2015 **Chester County Court of Common Pleas Judge Edward Griffith** [found](#) it intruded on the Pennsylvania Supreme Court's sole authority to discipline lawyers.

Yes, most federal and state court rules provide that those who file “frivolous” lawsuits—those unsupported by law or facts—are subject to sanctions. But those rules also typically give lawyers a [free pass](#) to withdraw a lawsuit once it's challenged, handcuffing courts and making actual reimbursements to aggrieved parties rare. So if the Dragonetti Act is invalidated, then individuals and small businesses in the Keystone State will lose their only effective means of recovering expenses incurred as a result of lawsuit abuse. A ruling is [expected](#) in 2017.

### **MUST A BAD FAITH CLAIM SHOW ACTUAL 'BAD FAITH'?**

The Pennsylvania Supreme Court also will soon decide a case that could vastly expand insurers' exposure to bad faith claims in the state.

The [question](#) in *Rancosky v. Washington National Insurance Company* is whether an action against an insurer for bad faith in paying claims requires a plaintiff to show the insurer acted with a “motive of self-interest or ill-will.” A trial court dismissed the claim for lack of evidence showing such motivation, but an intermediate appellate court [ruled](#) that Pennsylvania law does not require such a showing. The ruling is contrary to state and federal court decisions that have [long required](#) a showing of actual bad faith, ill will, self-interest or malicious conduct. By diluting the evidence standard in bad faith actions, the appellate court's decision will both invite lawsuits over virtually any insurance dispute and even punish insurers for good-faith mistakes.

## **PHILADELPHIA COURT OF COMMON PLEAS**

While no longer ranked among Judicial Hellholes, mass tort litigation in Philadelphia still bears watching as evidence suggests personal injury lawyers continue to view its Court of Common Pleas as a friendly venue.

### **MASS TORTS IN PHILLY**

[The City of Unbrotherly Torts'](#) Complex Litigation Center (CLC) continues to be known as a national hub for mass tort litigation with packed, wide-ranging [dockets](#).

First the latest good news. Pharmaceutical cases filed in the CLC on behalf of out-of-state plaintiffs dropped to their [lowest level](#) in more than a decade in the first half of 2016. Not only were the overall number of cases down, but the percentage filed by out-of-state plaintiffs dropped from 81% to 65% since the same point in 2015. During the previous decade, that percentage had climbed to near 90%.

Of course, pharmaceutical firms still face an abundance of product liability litigation in Philadelphia. The CLC hosts about [1,800 Risperdal cases](#), which plaintiffs' lawyers have generated through massive spending on television [ads](#). Four of five cases that have gone to trial have resulted in plaintiffs' verdicts. The most [recent trial](#) resulted in a [\\$70 million](#) verdict, the largest thus far, showing the ongoing potential for jackpots in Philadelphia. The CLC also hosts [nearly 1,000](#) cases targeting the blood thinner Xarelto, a number that is expected to [rise](#). The first case is expected to go to trial as early as the [summer of 2017](#).

In 2016, however, **Judge Jacqueline F. Allen**, recently [appointed](#) as administrative judge of the First Judicial District (Philadelphia), put a damper on some new suits. She [rejected](#) attempts to create mass tort dockets for lawsuits claiming testosterone replacement therapy drugs can increase the risk of heart attacks and another for lawsuits targeting the antibiotic Levaquin.

Asbestos-related filings in the CLC are also down. As of mid-year, it was on pace to see its lowest level of asbestos claims filed since 2008. But there are still [approximately 600 pending asbestos cases](#) there, making up



about 10% of the court's overall caseload. That gives Philly the [6th largest](#) asbestos docket in the United States. Troublingly, the percentage of asbestos cases filed on behalf of out-of-state plaintiffs experienced an uptick in Philadelphia's CLC in 2016, increasing to 41% from 33% a year earlier. This stands in contrast to the pharmaceutical case data cited above but doesn't necessarily set off alarm bells just yet.

Pennsylvania's adoption of a "fair share" law that makes a defendant's liability consistent with its proportional share of responsibility in multi-defendant cases appears to have improved the litigation environment, particularly in asbestos cases. Under that 2011 reform law, a defendant that is 60% or more at fault for a plaintiff's injury remains subject to full joint liability. And there is still confusion as to how the law applies in practice given the absence of appellate rulings interpreting the law. But plaintiffs and defendants are on [equal footing](#) in that regard.

### BAR'S JURY INSTRUCTION REWRITE FAVORS PLAINTIFFS

This summer a subcommittee of the Pennsylvania Supreme Court Committee for Proposed Standard Jury Instructions [overhauled](#) the model instructions that state courts use in product liability litigation, much of which is centered in Philadelphia. Several aspects of the new instructions immediately came under heavy fire by defense lawyers, businesses and civil justice groups, including ATRA, as unsupported by Pennsylvania law and as an attempt to advantage plaintiffs.

The change to the model jury instructions, the first significant alteration in four decades, came after the Pennsylvania Supreme Court issued a [landmark](#) 138-page decision on product liability law in 2014. As the defense community's [letter](#) requesting that the subcommittee reconsider its work explains in detail, there are many areas where the instructions are contrary to the Supreme Court's ruling, veer into areas the court reversed for future judicial development, or address issues not covered by the ruling at all.

Of greatest concern is the new instruction's omission of the central requirement that a jury must find a product "unreasonably dangerous" if it is to be considered defective. What these changes have in common is that they open the door to significantly greater liability exposure for defendants in Pennsylvania courts than they would face in other courts across the country. If the new jury instructions are not revised evenhandedly and made acceptable to both plaintiffs and defendants as an accurate portrayal of the law, then the [battle](#) will continue in the courts.

### RIDING PA'S LAWSUIT RAILROAD

The Philadelphia Court of Common Pleas experiences forum shopping outside its mass tort dockets. In several instances the court has refused to dismiss cases brought by railroad workers who worked, lived and allege injuries that developed outside Pennsylvania. These plaintiffs hail from states such as Maryland, New York, Ohio and South Carolina. The witnesses, including the plaintiffs' treating physicians, and evidence in the case are all located in states other than Pennsylvania.

Businesses hauled into Philadelphia file "forum non conveniens" motions asking the court to dismiss such cases so they can be refiled in appropriate venues. But the Court of Common Pleas repeatedly denies these motions without any explanation of the court's reasoning. Pennsylvania appellate courts have routinely declined to review such orders ... until now.

In early-November 2016, the Superior Court of Pennsylvania agreed to hear an [interlocutory appeal](#) of one of these cases, *Hovatter v. CSX Transportation*. That case involves a Maryland resident who worked in Maryland, was allegedly injured in Maryland and received medical care in Maryland by a doctor who lives in Maryland. The defendant, CSX, is incorporated in Virginia and has its corporate headquarters in Florida. There was no connection whatsoever to Pennsylvania. The plaintiff could have brought a lawsuit in Maryland, yet he sued in the Philadelphia Court of Common Pleas, which apparently was happy to hear his case.



## PITTSBURGH (ALLEGHENY COUNTY), PENNSYLVANIA

Due west of Philadelphia is Pennsylvania's second largest city, Pittsburgh, also known as the "Steel City." Some personal injury lawyers there and from surrounding Allegheny County may privately refer to it as "Steal City," as the fairness of civil courts there is increasingly questioned by businesses named as defendants in asbestos cases and retailers targeted in shakedown lawsuits under the Americans with Disabilities Act (ADA).

As reported here [last year](#), it is common for the Allegheny County Court of Common Pleas to allow plaintiffs' lawyers to name scores of defendants in a single lawsuit and to deny every defense motion for summary judgment. These and other plaintiff-friendly tactics are intended to pressure defendants into settling cases quickly.

One particularly egregious example occurred recently in *Wojdylak v. A.O. Smith Corp.* There, a steelworker who was allegedly exposed to asbestos while living and working in Michigan, later moved to Pennsylvania. Since the plaintiff was injured in Michigan, the defendants (about 25 companies were named) asked the court to apply Michigan law. The choice of which state law to apply—Michigan or Pennsylvania—was significant because Michigan, unlike Pennsylvania, limits noneconomic damages and generally does not award punitive damages, among other reasons.



Judge Marmo

In July 2016 Allegheny County Court of Common Pleas **Judge Michael Marmo** agreed with the defendants, [finding Michigan law applied](#). He subsequently found that the plaintiff could only seek punitive damages to the limited extent permitted by Michigan law and reserved deciding whether Michigan's noneconomic damage cap applied until it was necessary to do so, should a jury reach an award exceeding the limit.

But rational, sound rulings for a defendant could not stand. As the case moved toward trial, it was reassigned. In September, on the eve of trial, **Judge W. Terrence O'Brien** contradicted his colleague, [ruling](#) that the court would subject the defendant to unlimited damages under Pennsylvania law and ignore the Michigan limits. Caps off, the defendant was pushed to settle and, thanks in part to this judicial switcheroo, at a higher value.

Also of concern is a wave of lawsuits against retailers, centered in Pittsburgh, alleging that their websites are not ADA compliant. These lawsuits often [assert](#) that retailers have not provided reasonable accommodations for blind and visually impaired customers to order online. Online shopping did not exist when Congress enacted the law 26 years ago. Businesses have no clarity on how a website can comply with a law that has focused on providing ramps, elevators and designated parking spaces.

Apparently, a single local law firm, **Carlson Lynch Sweet & Kilpela**, filed [about 100](#) ADA lawsuits targeting national businesses such as Brooks Brothers, the NBA and Toys "Я" Us between 2014 and 2015. [Other defendants](#) include Sprint Corp., J.C. Penney Co. and Home Depot Inc. In 2016 the firm [expanded](#) its targets to include realty and home building companies. Who knows how many extortionate demand letters have been sent, leading to make-it-go-away settlements? Most of the cases remain pending in the U.S. District Court for the Western District of Pennsylvania.



Judge Marmo



## WEST VIRGINIA

Once perennial Judicial Hellhole West Virginia this year makes what optimists hope will be its last appearance in this report for many years to come, if not forever. During the past two years Mountain State lawmakers have enacted several pieces of affirmative reform legislation that should, if not ultimately struck down by the state's still plaintiff-friendly high court, begin to appreciably improve fairness and predictability in civil courts.

Following an historic election in November 2014, the newly constituted legislature in [2015](#) achieved overwhelming success with the passage of several key reforms, including the abolition of joint liability, a limitation on punitive damages, the enactment of an asbestos trust transparency bill and consumer protection reform.

Lawmakers followed their successful 2015 session with still more civil justice reforms in 2016, including:

- Adoption of the learned intermediary doctrine, the widely accepted principle that drug companies have an obligation to educate doctors, not directly warn patients, of potential side effects of their products.
- Bringing transparency to the state attorney general's hiring of private attorneys on a contingency fee basis by placing guidelines and regulatory parameters on the practice.
- A wrongful conduct bill protecting defendants from liability for injuries that occurred when a potential plaintiff was committing a crime.

If less sweeping than those in 2014, 2016's election results are expected to improve still further Wild, Wonderful West Virginia's legal climate. Voters reelected reform-minded [Attorney General Patrick Morrissey](#), and they elected moderate candidate [Beth Walker](#) to the state's Supreme Court. Walker defeated Bill Wooton and former justice and longtime state AG Darrell McGraw, who for years almost singlehandedly kept West Virginia at or near the [top of annual Judicial Hellholes rankings](#).

ATRA's post-election sources in Charleston say legislative leaders are teeing up another robust tort reform agenda for 2017, hoping to ensure that economically-challenged West Virginia remains on the road to redemption, and that business executives from across the country and around the world can begin to invest confidently in the once decidedly litigious and anti-business state.

Several important issues should be tackled as part of 2017's legislative agenda, including:

- Judgment interest reform
- Limiting [phantom damages](#) so awards in personal injury cases reflect a plaintiff's actual medical costs, not those initially billed but never paid
- Allowing at trial admission of evidence showing a claimant did not use a seatbelt in car accident cases, and
- Innocent seller legislation protecting sellers from lawsuits over products they did not manufacture.

Concern also persists in West Virginia about the fact that litigants do not have the degree of [appellate review](#) that is available in other states. And perhaps most importantly, lawmakers should seek to end the state's uniquely troublesome practice of allowing medical monitoring claims. The West Virginia Supreme Court is the only court in the country that still permits [cash awards to uninjured people](#) who bring speculative medical monitoring claims.



# DISHONORABLE MENTIONS

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“Dishonorable Mentions” generally comprise singularly unsound court decisions, abusive practices, legislation or other actions that erode the fairness of a state’s civil justice system but aren’t otherwise discussed in other sections of the Judicial Hellholes report. This year’s report highlights rulings by the high courts of Arkansas, Indiana and Maryland.

## ARKANSAS SUPREME COURT: INVALIDATES BALLOT MEASURE LIMITING HEALTHCARE LIABILITY

After striking down many civil justice reforms enacted over the years, the Arkansas Supreme Court in October 2016 took yet another step in the wrong direction. In what one state senator dubbed the “state Supreme Court’s [October Surprise](#),” the court [invalidated](#) a ballot initiative that would have allowed voters to amend the state constitution so it would allow lawmakers to place reasonable limits on civil liability for those who provide medical care.

“Issue 4” would have directed the state legislature to set caps of at least \$250,000 on noneconomic damages in lawsuits against healthcare providers and limited an attorneys’ contingency fees in medical malpractice cases to one-third of the award after expenses. Arkansas **Attorney General Leslie Rutledge** approved the initiated constitutional amendment. Canvassers gathered more than [130,000 signatures](#), leading to certification of the issue for the November ballot.

While noneconomic damages are widely understood to include awards for pain and suffering, the Arkansas Supreme Court ruled that voters could not reach an informed decision on the initiative unless its language was more clearly defined. Never mind that it was the state attorney general’s office that had [suggested](#) placing the term “noneconomic damages” in the title of the initiative and didn’t feel the need to better define its plain meaning.

Although the issue appeared on the ballot, as a result of the high court’s decision, no votes were counted. While purportedly based on technical grounds, the ruling effectively ensured that voters could not override the court’s prior rulings and adopt laws in line with most other states. But members of the high court should understand that they can’t thwart the will of the People forever.

## INDIANA SUPREME COURT: NULLIFIES STATUTE OF REPOSE

In March 2016 a divided Indiana Supreme Court eliminated the statute of repose for asbestos lawsuits in the state. The law had required plaintiffs to file a lawsuit within 10 years of their last exposure to the product that allegedly caused their injury.

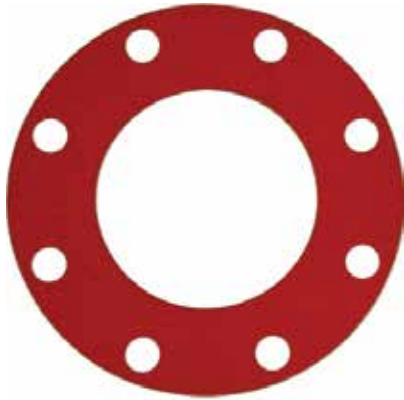
The high court found in [Myers v. Crouse-Hinds Division of Cooper Industries](#), that the Indiana Product Liability Act provides differing statutes of repose for claims by similarly situated plaintiffs. The Act distinguishes between entities that mined and sold raw asbestos and those that sold asbestos-containing products. This distinction, the court ruled, violates the Equal Privileges and Immunities Clause of the Indiana Constitution. In reaching its outcome, the Court [overturned](#) a prior decision.

This ruling effectively revives prior law, which did not close off claims involving asbestos-containing products after 10-years-from-last-exposure. Instead, plaintiffs may now bring such claims within two years of *discovering* disease and its cause, no matter how many years have elapsed. The change is expected to boost significantly asbestos lawsuit filings in the Hoosier State.

## MARYLAND COURT OF APPEALS: TWO LIABILITY-EXPANDING DECISIONS

Typically considered moderate, the Maryland Court of Appeals (the state's highest court) issued two liability-expanding decisions since publication of last year's Judicial Hellholes report.

Late in 2015 the high court found that manufacturers of products with asbestos-containing parts are subject to liability even when a claimant's alleged exposure was not to those original parts but to replacement parts made by others and installed much later by the claimant's employer. In [\*May v. Air & Liquid Systems Corp.\*](#), a machinist



sued companies that made steam-pumps for Navy ships, alleging that the manufacturers had a duty to warn him about the dangers of asbestos because they could foresee that asbestos-containing gaskets would need to be periodically replaced.

The court's ruling, which concentrates on foreseeability, leapfrogs the bedrock requirement that a company is responsible for injuries stemming from its own product, not those of others. It places Maryland in the minority of states on this issue.

Maryland's high court was at it again in July 2016, unanimously holding that a plaintiff's verdict in a personal injury action does not prevent a subsequent wrongful death action based on the same facts. Typically, a plaintiff must assert all claims for injury in a single lawsuit. But [\*Spangler v. McQuitty\*](#) allows plaintiffs in Maryland to bring initial lawsuits for personal injuries and then, if those plaintiffs later die (as we all eventually will), their loved ones are allowed to bring a second lawsuit. The court reasoned that wrongful death is an independent statutory cause of action. As the court itself recognized, its decision is contrary to the law of most other states, which views a wrongful death claim as derivative of the initial personal injury action and therefore cannot be brought if a person has already brought a personal injury claim.

The decision occurred in the context of a medical malpractice case brought against an obstetrician and primary care physician by the parents of a child born with cerebral palsy. Healthcare providers and others are concerned that the decision will lead to duplicative awards and raise the cost of medical malpractice insurance.

# POINTS OF LIGHT

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

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

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

## IN THE COURTS

### ARIZONA SUPREME COURT ADOPTS LEARNED INTERMEDIARY DOCTRINE

The learned intermediary doctrine recognizes that a pharmaceutical company’s duty to warn about the risks of a drug is fulfilled when it shares appropriate information with physicians. That way doctors can consider patients’ particular circumstances and, upon informing patients about the benefits and risks of treatment options, make the best prescription choices. [Nearly every state](#) has adopted this doctrine, and now the Grand Canyon State is among them.

The Arizona Supreme Court’s January 2016 [ruling](#) in *Watts v. Medicis Pharmaceutical Corporation* places the state firmly in the mainstream. While lower courts in Arizona were already applying the learned intermediary doctrine, the state’s high court had not addressed it.

But the high court also ruled that patients may bring claims challenging prescription drug marketing under the language of the state’s Consumer Fraud Act, reversing dismissal of a CFA claim. Other courts have held that, since the federal Food and Drug Administration approves prescription drugs and their labels, advertising and marketing issues can and should be addressed through the agency, not the courts.

### ARKANSAS SUPREME COURT UPHOLDS SEATBELT-USE ADMISSIBILITY LAW

Thanks to the Arkansas Supreme Court, jurors will now have a fuller understanding of how injuries occurred

in car accident cases. In April 2016 the court struck down as unconstitutional a state statute that prohibited juries from considering evidence that a plaintiff was not wearing a seatbelt at the time of a crash.

The court found in [Mendoza v. WIS International](#) that by prohibiting a trial court from admitting seatbelt evidence, the legislature had adopted a rule of evidence in violation of Arkansas’s separation of powers doctrine.

The principle applied in this ruling swings both ways, however. In reaching its ruling in *Mendoza*, the high court relied on a 2009 [decision](#) that struck down a law eliminating phantom damages. In that instance the court found that barring admission of inflated medical bills that do not reflect the amount a plaintiff or her insurer actually paid for medical care was also an impermissible legislative adoption of a rule of evidence. The court’s rigid interpretation of its separation of powers doctrine has made it difficult to enact reforms that implicate court pleadings, practice or procedure.

In this instance, however, the ruling will result in juries having critical information needed to reach fairer decisions.



## COLORADO SUPREME COURT ADOPTS ‘PLAUSIBILITY’ STANDARD

In June 2016 the Colorado Supreme Court adopted a standard that requires complaints to state a “plausible” claim.

The court’s ruling in [Warne v. Hall](#) brings Colorado state courts in line with the federal judiciary, which has followed the plausibility standard since a pair of U.S. Supreme Court decisions, [Twombly](#) (2007) and [Iqbal](#) (2009).

The plausibility standard requires a complaint to rely on more than speculation and unsupported assertions to survive a motion to dismiss. It replaced a prior standard that was far more deferential to the plaintiffs, allowing a court to dismiss claims only when it was beyond doubt that the plaintiff could prove no set of facts entitling him to relief.

Although not bound to do so, the state high court followed the U.S. Supreme Court’s lead due to the benefits of uniformity and consistency between federal and state law. The Centennial State’s justices found that maintaining consistency avoids the potential for different outcomes in similar cases and discourages forum shopping. They also recognized the significant costs of modern litigation, which makes it all the more important to “weed out groundless complaints” at an early stage. The plausibility standard, the court found, expedites the litigation process and avoids unnecessary expenses, especially with respect to discovery. Hear, hear!

## D.C. ADOPTS, NORTH CAROLINA CONFIRMS STRONGER EXPERT TESTIMONY STANDARD

The District of Columbia has admirably joined the growing number of state courts that have adopted the federal standard for expert testimony known as [Daubert](#), and North Carolina has confirmed that it too follows the higher standard. *Daubert* requires judges to play a gatekeeping role in evaluating the reliability of science that underlies such testimony.

The October 2016 [decision](#) by the D.C. Court of Appeals, the District’s highest local court, abandoned the 93-year-old [Frye](#) standard, and instead adopted *Daubert*. The more exacting *Daubert* standard focuses judges on the reliability of the principles and methods used by the expert. The court, sitting *en banc*, concluded in *Motorola Inc. v. Murray* that *Daubert* “is a decided advantage that will lead to better decision-making by juries and trial judges alike.”

The court reached its decision in the context of 13 lawsuits claiming that radiation emitted from cell phones causes brain tumors. The trial court found the plaintiffs’ expert testimony on causation would be admissible under the old *Frye* standard, but most of the testimony would likely be excluded under the *Daubert* test.

The D.C. Court of Appeals decision comes on the heels of a ruling by the North Carolina Supreme Court confirming that courts in the Tar Heel State now follow *Daubert*, as well. For years, the state’s high court had declined to adopt the federal standard for admission of expert testimony, but the General Assembly’s adoption of statutory language mirroring federal rules in 2011 made the change.

This ruling in [North Carolina v. McGrady](#), paired with the D.C. Court of Appeals adoption of *Daubert*, continues a healthy trend among state courts that recognize judges’ important gatekeeping role in ensuring that purported “expert” testimony is scientifically sound before it is presented to a jury.

Federal courts have applied *Daubert* since a U.S. Supreme Court decision by that name in 1993. Forty state court systems have since followed that lead. Now, D.C. and North Carolina’s highest courts have separated their states from the withering band of holdout jurisdictions such as Missouri, where, as discussed at the top of this report, junk science is allowed to trick juries into rendering gigantic if groundless verdicts that discourage economic investment there.

## FLORIDA’S 1ST DISTRICT COURT OF APPEALS SAYS AG CAN DISMISS ‘QUI TAM’ SUITS

Over the years, so-called “qui tam” lawsuits in which private plaintiffs who view themselves as whistleblowers bring actions on behalf of the federal or state government claiming that a contractor committed fraud, have proliferated (see False Claims Act “Closer Look,” p. 57). A recent Florida appellate court [ruling](#) reaffirmed the state attorney general’s authority to put a quick end to groundless qui tam claims.



These whistleblower claims are attractive to plaintiffs' lawyers because, if the claim leads to a settlement or judgment, the plaintiff is entitled to a share of the government's recovery—a bounty—that can be significant. When such cases are filed, the government can choose to intervene (*i.e.*, join and effectively take the lead) or sit back and let the private plaintiffs and their attorneys pursue the litigation without government involvement.

In February 2016 Florida's First District Court of Appeals ruled that the state attorney general has authority to unilaterally dismiss *qui tam* actions, regardless of whether the state formally intervened in the litigation. Looking to the plain language of the Florida False Claims Act as well as court decisions interpreting the similar federal FCA, the court ruled that, as the real party-in-interest, the attorney general has the power to dismiss a *qui tam* case she deems groundless.

The ruling should serve as a [reminder](#) to state attorneys general across the country that, when they find a whistleblower action lacks merit, they cannot only decline to intervene, but they can save both wrongly accused defendants and taxpayers time and money by dismissing the action outright.

### **NEW HAMPSHIRE SUPERIOR COURT, MERRIMACK COUNTY, SAYS STATE LACKS AUTHORITY TO HIRE CONTINGENCY-FEE LAWYERS**

The practice of state attorneys general hiring contingency-fee lawyers to bring law enforcement actions on behalf of the state is an increasingly [troubling practice](#), especially when the contingency-fee lawyers double as generous contributors to those AGs' political campaigns. These arrangements are rife with conflicts of interest and due-process concerns, to say nothing of the obvious questions they raise about pay-to-play corruption. So it is encouraging that a New Hampshire trial court judge in 2016 stood like a rock in telling the Granite State's AG he did not have the authority to delegate power to private lawyers.

In March 2016 Merrimack County Superior Court Judge Diane M. Nicolosi [invalidated](#) a retainer agreement between New Hampshire Attorney General Joseph Foster and Cohen Milstein Sellers & Toll which, as Pulitzer Prize-winning New York Times series [reported](#) in 2014, routinely pitches ideas for lawsuits to state attorneys general across the country. AG Foster hired the Washington, D.C.-based firm to bring lawsuits against five pharmaceutical companies, targeting their marketing of prescription painkiller medications. The firm planned to keep 27% of the state's possible recovery, plus expenses.

After the pharmaceutical companies [filed a motion](#) for a protective order and an injunction, Judge Nicolosi found that the attorney general was required to obtain approval from the legislature before hiring outside counsel on a contingency-fee basis. State law, the judge found, restricts the AG from hiring outside of its legislatively-approved appropriation and requires any money recovered for the state as a result of consumer protection lawsuits to be deposited in a state fund, not paid out to private lawyers.

The New Hampshire Supreme Court in April [granted review](#) of the case, *State of New Hampshire v. Actavis Pharma, Inc.*, and is expected to hear oral arguments in 2017.



**Judge Nicolosi**

### **OKLAHOMA, INDIANA & DELAWARE SUPREME COURTS REJECT 'PHANTOM' DAMAGES**

As anyone who has seen a doctor knows, there is often a significant difference in the charge for a medical service that initially appears on a bill and the amount that a patient or her insurer actually pays. Some courts, however, blindfold juries as to the amount actually accepted as payment for medical bills, misleading them by asking them to determine damages based on inflated rates that no one pays. Three state supreme courts took steps this year to reduce these "phantom" damages.

The Oklahoma Supreme Court, which has a record of nullifying tort reforms, made a welcome change this year when it [upheld](#) a 2011 statute that generally limits evidence of medical expenses admissible at trial to the "actual amount paid ... not the amounts billed."

The case, *Lee v. Bueno*, arose after a typical fender-bender. The plaintiff claimed about \$10,000 in medical expenses resulting from a car accident, but his insurer ultimately paid healthcare providers about a quarter of that

amount, \$2,845.11. Even before trial the plaintiff asked the trial court to find the 2011 statute unconstitutional. The trial court rejected the challenge and certified the issue for immediate appeal.

To its credit, the Oklahoma Supreme Court recognized that “[i]t is not the place of this Court, or any court, to concern itself with a statute’s propriety, desirability, wisdom, or its practicality” and it is bound to find a statute constitutional unless shown otherwise “beyond a reasonable doubt.” In its September 2016 ruling the court found the statute “neither arbitrary nor unreasonable.” It rejected the plaintiff’s suggestion that any statutory provision that might limit a jury’s award of damages somehow violates the Oklahoma Constitution, among a plethora of other constitutional challenges.

The following month, the Indiana Supreme Court reduced the potential for phantom damages in its courts. In [Patchett v. Lee](#) a person injured in a car accident introduced \$87,706.36 in medical bills, but fought to exclude the amount actually accepted by her healthcare providers through her government-sponsored health insurance, \$12,051.48—an 86% difference.

The court ruled that the amount accepted as full payment by a healthcare provider is admissible in court as evidence of the reasonable value of the medical services. The court emphasized that Indiana tort law “seeks to make injured parties whole,” not more than whole. It recognized that the amount accepted as payment may indicate the reasonable value of medical care, which is the touchstone for what a plaintiff can recoup. The ruling applies regardless of whether the bill was paid by a private insurer or government program.

A black and white photograph of a medical bill with a stethoscope resting on it. The bill lists various medical services and their charges. The stethoscope is positioned diagonally across the bill, with its chest piece on the left and its ear pieces on the right.

NON-INVASIVE CARDIO	3689.00
EEG/EMG	1259.00
RADIOLOGY-GENERAL	340.00
PHARMACY-MAIN	1795.35
EMERGENCY-HOSPITAL	2779.00
PRE HOSPITAL EMS	253.00
C.T. SCANNING	2714.00
MAGNETIC RESONANCE	6963.00
TOTAL CHARGES:	36027.35

The Indiana Supreme Court did not completely eliminate phantom damages by taking the Oklahoma approach, which allows a plaintiff to introduce only the amount actually paid for medical care, and which is also followed in states such as California, North Carolina and Texas. Rather, the Indiana ruling allows the jury to consider both the billed charges and the accepted amounts in determining damages. This “middle ground,” as the court viewed it, will reduce the potential for inflated damage awards.

The Delaware Supreme Court completed the trifecta in November with its ruling in [Smith v. Mahoney](#). It was another car accident case in which the plaintiff introduced at trial a \$22,911 doctor’s bill plus a \$2,000 charge for an MRI rather than the \$5,197.71 her physician later accepted as sufficient payment from Medicaid. The jury awarded the larger amount, in addition to other damages. But the trial judge reduced the award for medical expenses to the amount Medicaid actually paid.

The Delaware Supreme Court affirmed the trial court. It recognized that allowing the plaintiff “to recover amounts that are paid by no one” does not make an injured party whole. The court ruled that plaintiffs cannot collect more than the amount actually paid in cases in which Medicare or Medicaid paid an injured party’s expenses. These reduced rates, the court found, “directly benefit federal and state taxpayers, not the plaintiff.”

The court’s ruling does not extend to cases in which medical expenses are paid by private insurers, continuing to allow phantom damages in many cases. The court concluded its ruling, however, by extending an invitation to the legislature to debate whether, as a matter of public policy, Delaware should end the practice of awarding tort plaintiffs money they would never have received.

## OREGON SUPREME COURT UPHOLDS DAMAGE LIMIT

In May 2016 the Oregon Supreme Court [upheld](#) the constitutionality of a [law](#) limiting damages to \$3 million in personal injury lawsuits against the state and its employees. The ruling, which overruled precedent, suggests that the legislature may also constrain damages in other areas.

The difficult case was brought by the parents of a child who, when six-months old, developed a cancerous mass on his liver. During surgery, his doctors accidentally transected blood vessels, resulting in the need for a liver

transplant and additional surgeries. A Portland jury awarded more than \$12 million in damages. The state-funded hospital asked the court to lower the final judgment to \$3 million, the limit prescribed in the Oregon Tort Claims Act that had been adjusted significantly upward by the legislature in 2009. This law is intended to balance the need to compensate the injured with the public's need to access affordable, if high-risk, medical services, as well as other services funded by taxpayers.

The trial court reduced the hospital's share of the award to \$3 million but left a surgeon liable for the remaining \$9 million. The Oregon Supreme Court reversed, finding that the limit applied equally to the state hospital as well as the doctors working on behalf of the state while performing the surgery.

The high court's decision in [Horton v. Oregon Health & Science University](#) overruled prior decisions striking down damage limits as inconsistent with the history of the right to a remedy and the right to a jury trial. Most significantly, the court explicitly overruled its own 1999 decision in [Lakin v. Senco Products, Inc.](#), in which it had invalidated Oregon's \$500,000 noneconomic damages cap in personal injury cases. But it now recognizes that "legal limits on a jury's assessment of civil damages have been and remain an accepted feature of our law." The court also observed that 17 of 22 jurisdictions that have considered whether a limit on damages violates the right to jury trial have concluded that it does not.

Groups representing Oregon [doctors](#) view the decision as "start[ing] a new chapter in Oregon about the limits of tort liability."

## IN THE LEGISLATURES

Five states enacted legislation aimed at improving the civil justice system in 2016. An alphabetized list below does not include West Virginia, this year's legislative accomplishments of which are detailed in this report's Watch List section (see p. 49).

**Mississippi** passed two reforms: One limits the amount a defendant can be required to pay to secure the right to appeal to 50 percent of an appellant's net worth not to exceed \$35 million ([H.B. 1529](#)); and the other reasonably limits the duty of care owed by a land possessor to a trespasser ([H.B. 767](#)).

**New Mexico** reformed medical liability by prohibiting state courts from accepting lawsuits for medical treatment rendered out-of-state if the patient has consented to choice of law and jurisdiction ([H.B. 270](#)).

**Tennessee** lawmakers made asbestos bankruptcy trust claims transparent, required minimal medical criteria for asbestos plaintiffs, heightened causation standards while eliminating the duty to warn about asbestos products made by third parties, punitive damages and consolidation without consent of all parties in asbestos litigation ([S.B. 2062](#)).

**Utah** also enacted transparency requirements with respect to asbestos bankruptcy trust claims which, among other things, provides the parties with all trust claims materials after commencement of an asbestos lawsuit ([H.B. 403](#)).



# CLOSER LOOK: FALSE CLAIMS LITIGATION

The federal False Claims Act (FCA) has been expansively and inconsistently interpreted by courts in recent years. The FCA's "qui tam" provision, which allows private citizens known as "relators" to sue on behalf of the federal government, has become the dominant method for bringing FCA claims. FCA cases are supposed to be about fraud, but [lately](#) plaintiffs' lawyers have used them to land big bounties based on regulatory noncompliance, paperwork errors or even simple contract disputes.

## HISTORY OF THE FCA

The FCA was originally enacted in 1863. Known as "Lincoln's Law" or "The Informer's Act," it was the original whistleblower law, aimed at preventing unscrupulous sellers of shoddy goods or never-performed services from defrauding the government during the Civil War. The Act included several modern features including civil penalties for each false claim and damage multiples of the government's losses.

During the New Deal and pre-World War II military buildup, the U.S. Supreme Court expanded the statute's qui tam provision. That expansion invited opportunistic relators to bring civil qui tam actions by simply copying criminal indictments. So Congress shut down that racket in 1943 by requiring claims to rely on information that the government did not already possess.

While defense spending increased near the end of the Cold War, Congress revised the FCA yet again in response to reports that fraud was pervasive in defense contracts. And by the late 1990s the FCA had been interpreted to cover any payment made by Medicare and Medicaid. Congress expanded the FCA to include additional types of fraud after the financial crises of the 2000s.

As this steady expansion occurred, the means of enforcing the FCA fundamentally changed, too. For most of its history, FCA claims were primarily brought by the government. But since 1994, when government attorneys [brought](#) 280 new claims and private relators brought 218, relator actions have exceeded government actions each year, and the number of these qui tam lawsuits has since tripled.

In 2015 private lawyers filed 638 qui tam actions while the government initiated only 110 claims. The strong financial and tactical incentives provided to relators explain such a drastic shift in FCA litigation.

## THE MODERN FCA'S REQUIREMENTS

In qui tam actions the government remains the plaintiff, even as the private relator stands to win a sizeable portion of any possible settlement or verdict. By design, the FCA is sharply punitive and requires a defendant found liable to pay treble (triple) damages, steep "per-instance" civil fines, and the costs of pursuing the action.

A qui tam lawsuit is initially filed under protective seal—held by the court in confidence. But notice is given to the government through the Department of Justice, and the government has 60 days to decide if it should



intervene, let the relator take the lead, or ask for more time to decide. The law requires the action to remain sealed throughout this process.

If the government intervenes, it leads the lawsuit. If it declines to intervene, as it does in about 8 of 10 cases, then the relator may choose to continue the lawsuit on the government's behalf. In each case, if the action is successful, the relator may receive between 15% to 25% or even up to 30% of the award, plus the costs of pursuing the action.

To be successful in an FCA claim a plaintiff must prove that a person or business knowingly presented or caused to be presented a false claim for payment or approval, or knowingly made, used, or caused to be made or used, a false record or statement material to a false or fraudulent claim for payment to the government. The "knowingly" requirement may be satisfied through showing actual knowledge, acting with deliberate ignorance, or taking action with reckless disregard for the truth or falsity of the information.

## EXPANSION AND ABUSE

Traditionally, a qui tam plaintiff's lawsuit was to be based on information that was not already known to the government or otherwise publicly available—a requirement that theoretically limited opportunistic lawsuits. Today, however, actual fraud is no longer required. Nor is insider knowledge necessary.

Congress eliminated the longstanding requirement that a company intended to defraud the government in 2010. As a result, an inadvertent billing error once viewed as correctable may now give rise to a multimillion-dollar whistleblower claim.

The FCA also no longer requires that a contractor's action be directed at the government, and an actual payment by the government as a result of the claim may not even be needed. A dispute between a contractor and subcontractor, can give rise to an FCA violation. Even unintentionally accepting an overpayment from the government can violate the statute.

Congress and the courts have also softened the criteria for qualifying as a qui tam relator. Relators no longer need to bring new, firsthand information to the government. They can instead bring suit by materially adding to information already known to the public. Astoundingly, even a [federal auditor](#), whose already being paid to investigate fraud, can now serve as a relator.

The FCA is supposed to target fraud on government agencies, not serve as an alternative means of enforcing numerous federal regulations and contracting requirements. Five years ago the [Eighth Circuit](#) recognized that "[t]he FCA is not concerned with regulatory noncompliance. Instead, it serves a more specific function, protecting the federal fisc by imposing severe penalties on those whose false or fraudulent claims cause the government to pay money."

But attitudes are changing, arguably for the worse. Many of today's FCA claims are premised on minor technical issues or deviations from federal regulations that were not integral to fulfilling the contract. In fact, a series of FCA lawsuits known as "false certification" claims do not allege that a company defrauded the government or even that it did not fulfill the contract. Rather, these very technical, one might say "nitpicking," claims are based on provisions in some government contracts that require a contractor to pledge compliance with certain laws or regulations. Thus even a tangential compliance issue can be seized upon for the basis of a potentially crippling FCA claim.

In addition to treble damages, the FCA provides for steep "per incident" civil penalties. From 1999 until the end of July 2016, the FCA's civil penalties were set at not less than \$5,500 and not more than \$11,000 per incident, an amount that already produced sizable sums. But on August 1 these penalties [doubled](#) to between \$10,781 and

\$21,563 per claim, as a result Congress's November 2015 enactment of the Federal Civil Penalties Inflation Adjustment Act Improvements Act (no, that's not a typo; the word "Act" is actually used twice).

So for example, if the Acme Flu Vaccine Company were to sell 100,000 safe and effective doses of vaccine to the government for, say, \$1 million (\$10/dose), it might later find itself accused of "fraud" by a disgruntled former bookkeeper-turned-realtor who claims inside knowledge about minor billing errors in that sale and seeks more than



\$21 million (\$21,563 x 100,000) in a qui tam action on behalf of the government, which got what it paid for. As FCA civil penalties increase, self-interested relators and their lawyers are evermore motivated to make devastating accusations of fraudulent behavior where none occurred.

### TRICKLE DOWN TO THE STATES

Abusive FCA litigation is not only a problem in federal contracting. It is increasingly raising similar concerns at the state level.

Over the past several years states have adopted or broadened false claims laws modeled on the federal law. They have done so largely in response to a mandate included in the 2005 Federal Deficit Reduction Act. Under this law states [qualify](#) for an additional 10% of Medicaid fraud settlements if they pass laws with qui tam provisions that are “at least as effective” as the federal False Claims Act, have consistent liability provisions, and have penalties that are at least as high as the federal law.

Not surprisingly, approximately two-thirds of states and some cities now have their own FCA that authorizes relator suits. And as Congress and the courts lower proof thresholds and raise penalties for federal claims, states risk losing federal funds if they don’t keep pace. For instance, the U.S. Department of Health and Human Services Office of Inspector General, which is in charge of certifying whether a state law qualifies for a monetary incentive, has given states a [two-year grace period](#) to increase their penalty levels to reflect the doubling of the federal penalties this August.

### OPPORTUNITIES FOR CHANGE

In 2016 the U.S. Supreme Court took the opportunity to resolve circuit splits over the FCA on two occasions. The Court decided *Universal Health Services, Inc. v. United States ex rel. Escobar* on June 16 and *State Farm v. United States ex rel. Rigsby* on December 6.

In *Universal Health Services*, the high court considered whether a company, by submitting a claim to the government for payment on a contract, implicitly certifies that it has complied with every applicable statutory, regulatory and contractual provision. The court [found](#) that, under certain circumstances, this “implied false certification” theory can provide a basis for liability when the payee makes specific representations about the goods or services provided without disclosing any statutory, regulatory or contractual noncompliance.

In *Rigsby* the high court addressed whether there are any consequences for a qui tam relator who violates the statutory seal requirement by staging an extensive media campaign before the government decides to intervene or not.

In what was a very disappointing decision, the high court held that automatic dismissal is not required for a seal violation. In his opinion, **Justice Anthony Kennedy** stated that whether dismissal is appropriate is an issue left in the discretion of the district court, and that the Supreme Court could explore the factors relevant to the exercise of that discretion in later cases.

The high court rejected the argument that the seal requirement was a condition of filing such a suit, a position ATRA urged the court to take in its [amicus brief](#) filed with in August 2016.

An additional case to watch is in the U.S. Court of Appeals for the Fifth Circuit. It involves the largest FCA award in history. In *United States ex rel. Harman v. Trinity Industries*, the defendant manufacturer incrementally modified its highway guardrail endcaps in accordance with new safety recommendations from the designer, a leading transportation engineering institute, but did not fully inform the Federal Highway Administration of the changes initially. The FHWA subsequently reviewed and approved the changes as compliant with applicable federal standards. However, in January 2014 the U.S. District Court for the Eastern District of Texas found Trinity’s failure to notify the government of the change had violated the FCA, entering a mindboggling \$663 million judgment against the company.



Not unlike the Acme Flu Vaccine Company's disgruntled former bookkeeper with questionable motivations for pursuing a qui tam action hypothesized above, the real-life relator in this case is a business competitor of the defendant. Furthermore, the government, perfectly satisfied with the thoroughly tested and safety-improving guardrail endcaps it purchased, did not intervene.

As ATRA's [amicus brief](#) filed in March 2016 observes, under the district court's ruling, a company could receive authoritative assurances from the federal government that its product complies with federal regulations and *still* be found in violation of the FCA and subject to hundreds of millions of dollars in treble damages and penalties.

## CONCLUSION

The FCA has a long and important history of anti-fraud enforcement on behalf of the government. But recent court rulings and statutory changes have created a burdensome compliance regime for businesses that provide products and services to the government. It also is being corrupted by the self-interest of some private relators and their lawyers. Recent U.S. Supreme Court decisions seem to indicate the justices have few intentions of reigning in FCA abuses, but the pending *Trinity* appeal at the Fifth Circuit could help move "Lincoln's Law" back toward its original, commonsense purpose.





# THE MAKING OF A JUDICIAL HELLHOLE:

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

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

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

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

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

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

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

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

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

## PRETRIAL RULINGS

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

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

## DECISIONS DURING TRIAL

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

## UNREASONABLE EXPANSIONS OF LIABILITY

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

## JUDICIAL INTEGRITY

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





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

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