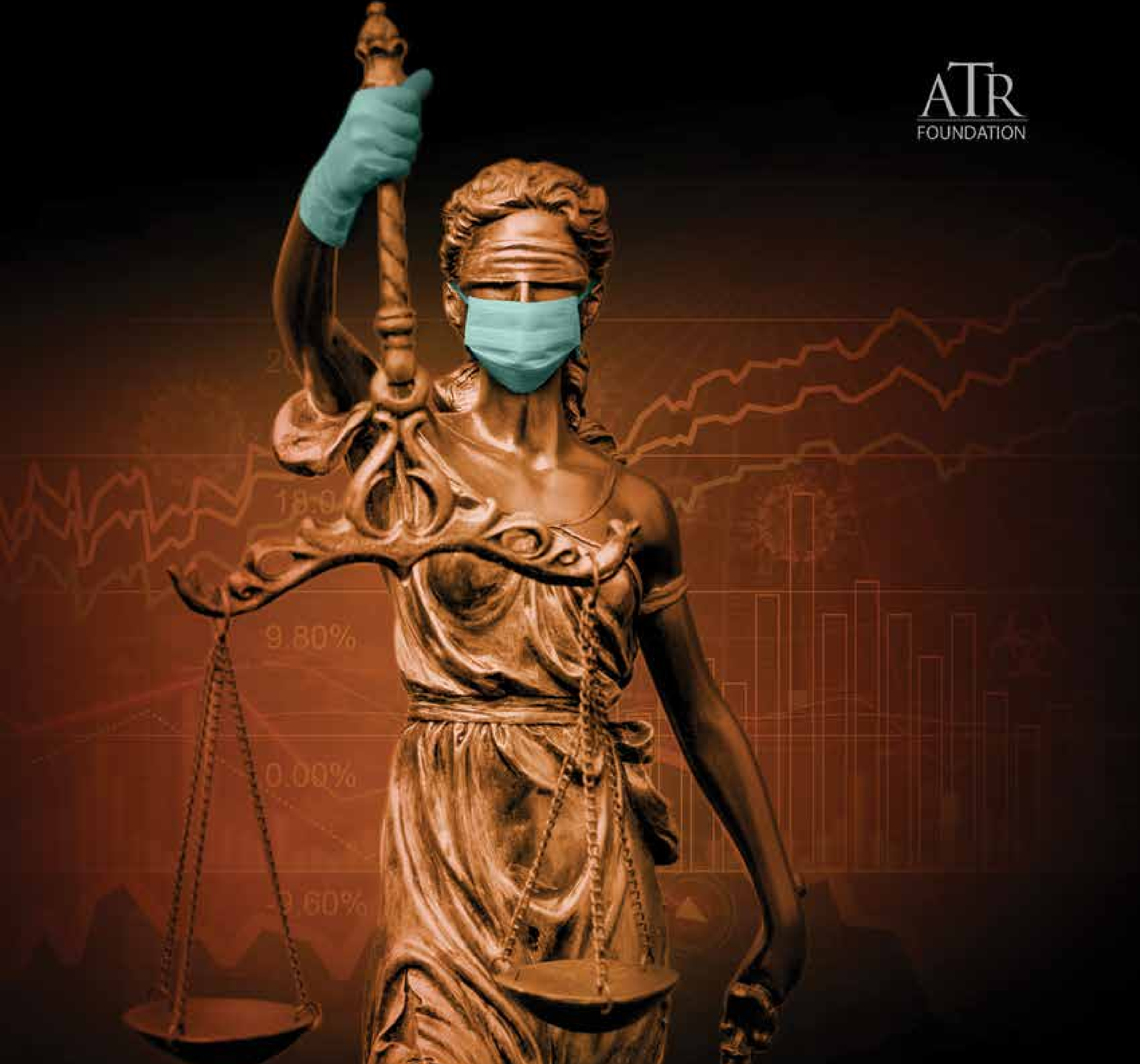
ATR FOUNDATION



JUDICIAL HELLHOLES® 2020/2021

"Since the Supreme Court of the United States is the highest authority as concerns federal constitutional questions such as the present one, I am unable to join an opinion of a state court that does not abide by its latest pronouncement."

– Supreme Court of Pennsylvania Chief Justice Thomas Saylor in his dissenting opinion in *Hammons v. Ethicon* (October 21, 2020).

"The current construction of PAGA by California courts [which have their own constitutional infirmities] gives rise to the following unconstitutional framework: valid and binding arbitration agreements are rendered unenforceable; private contingency-fee attorneys are permitted to litigate on behalf of the state without oversight or coordination with any state official; private attorneys are allowed to negotiate settlements that enrich themselves at the expense of everyone but themselves."

– California Business & Industry Alliance in its suit against the State of California alleging a lack of governmental oversight of PAGA litigation.

"The average New Yorker feels the pain too. Nuclear verdicts (and routinely excessive verdicts) drive insurers from the market and increase premiums. The twin pressures of decreasing competition and increased insurance costs are ultimately passed through to the consumer. This is the same consumer and taxpayer who was leaving New York at a higher rate than any of the 50 states even before COVID-19."

– The *New York Law Journal* writing about the economic impact of New York's legal climate and the rise in excessive verdicts.

"Welcome to St. Louis, the new hot spot for litigation tourists. The city's circuit court is known for fast trials and big awards."

– Margaret Cronin Fisk, Bloomberg News

"I talk to business owners and lobbyists who represent business owners and they would not come here for anything… I'm sorry I get flustered when I hear people say we are bringing in money. I'm sorry we are losing."

– Madison County Board member and Judiciary Chair Mike Walters talking about the "terrible drain" the infamous asbestos docket has been on the county's economy.

Louisiana has seen "a decrease of more than 2,000 employees across four occupations in the state's oil and gas industry, and these lost jobs equate to lost earnings of $70 million per year."

– "The Cost of Lawsuit Abuse: An Economic Analysis of Louisiana's Coastal Litigation" by the Pelican Institute for Public Policy

PREFACE

Since 2002, the American Tort Reform Foundation's (ATRF) Judicial Hellholes® program has identified and documented places **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 has aggressively lobbied for *legislative* and *regulatory* expansions of liability, as well, the Judicial Hellholes report has evolved to include such law- and rule-making activity, much of which can affect the fairness of any given jurisdiction's civil justice climate as readily as judicial actions.

The content of this report builds off the American Tort Reform Association's (ATRA) real-time monitoring of Judicial Hellhole activity year-round at 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 is then researched independently through publicly available court documents, judicial branch statistics, press accounts, scholarship and studies.

Though entire states are sometimes cited as Hellholes, specific counties or courts in a given state often warrant citations of their own. Importantly, jurisdictions singled out by Judicial Hellholes reporting are not the *only* Judicial Hellholes 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 changes by the judges themselves and, when needed, through legislative action or popular referenda.

ABOUT THE AMERICAN TORT REFORM FOUNDATION

The American Tort Reform Foundation (ATRF) is a District of Columbia nonprofit corporation founded in 1997. The primary purpose of the foundation is to educate the general public about how the 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.

CONTENTS

EXECUTIVE SUMMARY

The **2020-2021 Judicial Hellholes** report shines its brightest spotlight on 9 jurisdictions that have earned reputations as Judicial Hellholes. Some are known for allowing innovative lawsuits to proceed or for welcoming litigation tourism, and in all of them state leadership seems eager to expand civil liability at every given opportunity. While most states saw a decrease in litigation due to the COVID-19 pandemic, activity is expected to resume in 2021 with Judicial Hellholes leading the charge.

JUDICIAL HELLHOLES® 2020 / 2021

1. PHILADELPHIA COURT OF COMMON PLEAS & THE SUPREME COURT OF PENNSYLVANIA
2. NEW YORK CITY
3. CALIFORNIA
4. SOUTH CAROLINA ASBESTOS LITIGATION
5. LOUISIANA
6. GEORGIA
7. CITY OF ST. LOUIS, MISSOURI
8. COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS
9. MINNESOTA

JUDICIAL HELLHOLES

#1 PHILADELPHIA COURT OF COMMON PLEAS & THE SUPREME COURT OF PENNSYLVANIA Plaintiffs from across the country continue to flock to the Court of Common Pleas because of its reputation for excessive verdicts and its "open door" policy to out-of-state plaintiffs. It is a haven for mass tort litigation, particularly lawsuits targeting medications and medical devices. The Supreme Court made the state even more appealing with a ruling that solidified the state's low standard for expert witness testimony. It issued another ruling that openly defied the U.S. Supreme Court and will open the floodgates for filings from out-of-state plaintiffs. The high court also increased potential liability for asbestos defendants. No industry is safe as the courts look to expand liability for all defendants, including those in the essential health care industry.

#2 NEW YORK CITY New York City businesses face uphill battles on multiple fronts. The courts allow the entrepreneurial plaintiffs' bar to advance novel theories of liability under state and federal laws like New York's consumer protection statute and the Americans with Disability Act (ADA), while much-needed reforms continue to stall in the state legislature. New York also has overtaken California as the nation's top "food court" and abuses still riddle New York City's asbestos litigation. The activist state attorney general is attempting to regulate industries through litigation, and third-party litigation financing companies seek to profit off of the state's overly-litigious environment. The state also has seen a dramatic increase in excessive verdicts, also known as nuclear verdicts.

#3 CALIFORNIA A perennial Judicial Hellhole, California's fall to the No.3 spot in 2020 cannot be attributed to any improvement in the state's liability climate, but rather results from the severity of problems in Pennsylvania courts and New York City. Baseless Prop-65 litigation targets business and courts allow the plaintiffs' bar to exploit California's Lemon Law. Entrepreneurial plaintiffs' lawyers take advantage of unique California laws such as the Private Attorney General Act and the California Consumer Protection Act. The activist state attorney general is pushing an expansive view of public nuisance law, and small business continues to be targeted by Americans with Disability Act (ADA) lawsuit abuse. Arbitration also is under attack and employers face burdensome employment law liability.

#4 SOUTH CAROLINA ASBESTOS LITIGATION South Carolina asbestos litigation was included on the Watch List in 2019, thanks to its reputation for pro-plaintiff rulings and unfair treatment of defendants. A concerning pattern of discovery abuse, unwarranted sanctions, low evidentiary requirements, and multi-million-dollar verdicts solidified its position as a Judicial Hellhole in 2020.

#5 LOUISIANA Lawsuit abuse and insurance scams drive auto insurance rates higher and higher in the Bayou State. Abusive coastal litigation continues to bog down Louisiana's economy, and in-state lawyers are spending millions of dollars on lawsuit advertising. Louisiana took a step in the right direction when it enacted the "The Civil Justice Reform Act of 2020," but more work remains to be done.

#6 GEORGIA The "Peach State" once again finds itself on the Judicial Hellholes list thanks to a continued rise in nuclear verdicts, the increasing role of third-party litigation financing, and ever-expanding premise liability. The Georgia Supreme Court also attributed cybercriminal acts to law abiding businesses. Trial lawyers have spent millions of dollars on advertisements, publicizing their jackpot verdicts and looking for their next big pay day. And while the Georgia legislature seemed poised to address lawsuit abuse plaguing the state's judicial system, its efforts were derailed by the COVID-19 pandemic.

#7 CITY OF ST. LOUIS, MISSOURI The City of St. Louis Circuit Court is notorious for allowing blatant forum shopping and awarding excessive punitive damage awards. The court also fails to ensure that cases are guided by sound science. In 2020, the Missouri Legislature took great strides toward addressing lawsuit abuse that has plagued the "Show-Me-Your-Lawsuit" state for years. While the enactment of several reforms is encouraging for Missouri's future, the success is contingent on the St. Louis court's compliance with the new statutes. Some St. Louis judges have a history of ignoring both state law and U.S. Supreme Court precedent with regard to expert evidence standards, personal jurisdiction and venue, and damage awards.

#8 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS This trio of Illinois counties continues to be a preferred jurisdiction for plaintiffs' lawyers thanks to no-injury lawsuits, plaintiff-friendly rulings in asbestos litigation, and the promise of a liability-expanding legislative agenda each and every year. Illinois is ground zero for no-injury lawsuits, thanks in large part to its Biometric Information Privacy Act and the courts' expansive interpretation of the law.

#9 MINNESOTA The "Gopher State" once again finds itself on the Judicial Hellholes list thanks to Minnesota's activist attorney general, the Supreme Court's loose application of venue laws, and liability-expanding decisions by the Minnesota Supreme Court. The Minnesota Supreme Court swung the door open to third party litigation funding when it abolished the common law offense of champerty.

WATCH LIST

Beyond the Judicial Hellholes, this report calls attention to seven additional jurisdictions that bear watching due to their histories of abusive litigation or troubling developments. These jurisdictions may be moving closer to or further away from a designation as a Judicial Hellhole, and they are ranked accordingly.

FLORIDA A former No. 1 Judicial Hellhole, Florida continued to make progress towards improving its legal climate in 2020 as a direct result of Governor Ron DeSantis's (R) thoughtful and decisive leadership, as he continued to remake the Florida Supreme Court through two additional appointments. Florida appears to be a tale of two stories, though, as the legislature stalled in its efforts to pass long-sought, meaningful lawsuit reform. South Florida has developed a well-deserved reputation for its aggressive personal injury bar and fraudulent and abusive litigation practices. While the rest of the state has looked to curb litigation abuse, some South Florida judges have allowed it to run rampant. As a result, Florida remains on the Watch List and ATRF will continue to monitor the Sunshine State.

OKLAHOMA A newcomer to the Judicial Hellholes list in 2019, the "Sooner State" moved down to the Watch List in large part due to a lack of activity in the state because of the pandemic. State leadership did little to rectify Oklahoma's liability environment; however, the Oklahoma Supreme Court has a real opportunity to improve the state's litigation climate in 2021. Given the Supreme Court's recent propensity to expand liability, there is concern the Court will continue down the same path. All eyes will be on Oklahoma in the coming year.

NEW JERSEY The New Jersey legislature has been a breeding ground for problematic legislation. Every session, its members introduce and try to pass numerous liability-expanding bills. Several pieces of legislation would pin the burden of the COVID-19 pandemic on businesses that are struggling during the economic downturn. The New Jersey legislature leads in setting the tone for liability expansion, but the state's supreme court has started to keep up.

COLORADO The "Centennial State" had a troubling year with all three of its government's branches. The judicial branch expanded the liability of businesses and other organizations that operate in the state. The executive branch intertwined itself with moneyed interest groups, allowing them to influence the governor's office. Meanwhile, the legislature has refused to face the costs COVID-19 has brought to businesses.

MARYLAND The state provided a mixed bag this year. There have been some promising advances in the Baltimore courts on asbestos litigation, and there have been some disappointing opinions on expansion of liability. Healthcare providers in Maryland face a difficult legal climate that is affecting access to medical liability insurance and could prevent important patient care, which is especially important given the ongoing COVID-19 pandemic.

WEST VIRGINIA In the former and recovering perennial Judicial Hellhole West Virginia, there remains reason for concern. Asbestos litigation abuse continues, recent West Virginia Supreme Court of Appeals elections have led to the election of a judge sympathetic to plaintiffs and the state's Attorney General has started to play an activist role.

MONTANA SUPREME COURT Montana is an outlier in its approach to personal jurisdiction, which allows the state's courts to decide cases that lack a sufficient connection to Montana. The U.S. Supreme Court has stepped in to address the growing controversy. The Court also expanded asbestos liability, and continued to avoid addressing the constitutionality of the state's limit on punitive damages.

DISHONORABLE MENTIONS

Dishonorable Mentions comprise singularly unsound court decisions, abusive practices, legislation, or other actions that erode the fairness of a state's civil justice system and are not otherwise detailed in other sections of the report.

Included among this year's list is the Idaho Supreme Court's decision to allow 'phantom damages' and expand medical liability and judicial nullification of liability limits in Oregon. A Missouri appellate court restricted rights of defendants under '065 Agreements and a Wisconsin trial court allowed a jury to consider irrelevant evidence and 'junk science.' Lastly, the activist New Mexico attorney general seeks to expand liability under the state's public nuisance law.

POINTS OF LIGHT

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

Among the positive decisions, the Sixth Circuit reined in the judge overseeing federal opioid cases, the Maryland high court brought the state into the mainstream by adopting the expert evidence standard applied by most courts, and Tennessee upheld reasonable constraints on the subjective portion of damage awards in personal injury cases.

In addition to court actions, three state legislatures enacted significant, positive civil justice reforms in 2020, including 'phantom damages' reform in Iowa, "The Civil Justice Reform Act of 2020" in Louisiana, and consumer protection and punitive damage reforms in Missouri.

Additionally, 21 states and the District of Columbia enacted laws that limit the liability of healthcare providers, businesses, schools, manufacturers of personal protective equipment, and others during the COVID-19 pandemic. These laws strike a balance that protects public safety without jeopardizing the ability of businesses to operate, and reduce the threat that individuals and organizations that are providing vital medical care, products, and services during the pandemic will be rewarded with a lawsuit.

CLOSER LOOKS

THE COVID-19 LITIGATION SURGE & RESPONSE As the pandemic reached the United States, entrepreneurial personal injury lawyers saw the opportunity to bring a wide range of lawsuits. Even with the pandemic effectively shutting down many state legislatures and the virus arriving as legislative sessions concluded, twenty-one states and the District of Columbia enacted laws addressing liability concerns stemming from the pandemic.

AMERICAN LAW INSTITUTE – ACADEMICS OR ACTIVISTS? Once a stalwart of the American legal profession, it appears the American Law Institute has shifted its mission from its original purpose to promote the clarification and simplification of the law to that of an advocacy organization. What once was a scholarly institution that was safely above the fray, has now plainly shifted its focus to legal advocacy.

PHANTOM DAMAGES AND THE TRIAL BAR'S EFFORTS TO GAME THE SYSTEM Jury verdicts across the country continue to rise at alarming rates. A variety of civil justice abuses contribute to the growing litigation costs, none more so than judges permitting "phantom damages" to be introduced in their courtrooms. A troubling new trend in our civil justice system threatens to further bloat the system, as "phantom damages" grow larger due to an increased use of medical finance companies and "letters of protection."

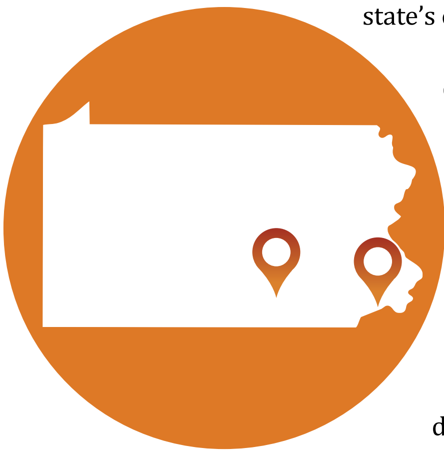
JUDICIAL HELLHOLES

#1 PHILADELPHIA COURT OF COMMON PLEAS & THE SUPREME COURT OF PENNSYLVANIA

TOP ISSUES

- **Preferred jurisdiction for mass tort plaintiffs**
- **Medical liability on the rise**
- **Low standard for expert evidence**
- **Loose application of venue laws**
- **Hotbed for asbestos litigation**

Last year's #1 Judicial Hellhole, the **Philadelphia Court of Common Pleas** once again stole the show in 2020, and this year, the **Supreme Court of Pennsylvania** was intent on joining the city at the top of the list. A pervasive liability-expanding approach has permeated through the state's civil justice system.



Plaintiffs from across the country continue to flock to the **Court of Common Pleas** because of its reputation for excessive verdicts and its "open door" policy to out-of-state plaintiffs. This policy clogs the courts, drains court resources, and drives businesses (and jobs) out of the state. The Supreme Court made the state even more appealing with a ruling that solidified the state's low standard for expert witness testimony. It issued another ruling that openly defied the U.S. Supreme Court and will open the floodgates for filings from out-of-state plaintiffs. The high court also increased potential liability for asbestos defendants.

No industry is safe as the courts look to expand liability for all defendants, including those in the essential health care industry.

MASS TORT LITIGATION IN THE COURT OF COMMON PLEAS

PELVIC MESH LITIGATION

In July 2020, **Judge Kenneth Powell**, a key driver behind Philadelphia securing the #1 spot in 2019, was once again in the news for biased behavior in another mass tort case pending in his court. The **Court of Common Pleas Complex Litigation Center** hosts litigation alleging that pelvic mesh implants, which are widely used to address stress urinary incontinence in women, are improperly designed despite FDA approval. Philadelphia juries have hammered Johnson & Johnson subsidiary Ethicon with more than $345 million in verdicts.

Judge Powell is overseeing pelvic mesh litigation against Ethicon, and it came to light that his mother also is suing J&J for other injuries. Ethicon requested that Judge Powell recuse himself, but he refused. Ethicon's lawyer argued, "When you have something that is going to pull at you in ways that you do not even know, which has to be the case when you are adjudicating issues that have to do with the same thing that you personally are experiencing with somebody as close to you as your mother, the appearance itself requires that you step aside."

Ethicon petitioned the **Supreme Court of Pennsylvania** to step in and remove the judge from the case, but it refused to do so. Ethicon faces more than 70 cases in Philadelphia, including one case where the trial court judge voided a jury's finding that the company was not liable for a plaintiff's injuries. This decision was upheld in April 2020 by an appellate court. As of Spring 2020, there had been eight verdicts for plaintiffs totaling $346 million in damages.

RISPERDAL LITIGATION

The **Philadelphia Court of Common Pleas** was propelled to the top of the 2019 Judicial Hellholes list by an outrageous $8 billion verdict against a Johnson & Johnson subsidiary, Janssen Pharmaceuticals, in a single-plaintiff Risperdal case. **Judge Powell** also oversaw this case and decreased the award to $6.8 million in early 2020. He found that the $8 billion award was largely disproportionate to other verdicts awarded to similarly situated plaintiffs, including a $680,000 compensatory damages award to a Maryland man.

Judge Powell engaged in questionable behavior throughout the trial leading up to the massive verdict. As Janssen stated in its motion for a new trial, "To a defendant who had sat through unbalanced ruling after unbalanced ruling … the message was clear: the jury had received and acted on the pro-plaintiff message that the judge had sent." Janssen asked that the judge recuse himself from the requested retrial, a request that was later denied. The motion alleged classic Judicial Hellhole-type conduct: Lopsided rulings that did not allow the company to present key evidence about the benefits and risks of the drug, the label, or the company's compliance with regulations, while allowing the plaintiffs' lawyers to present a case designed to punish the company on behalf of "the children of the world."

In September 2020, the **Supreme Court of Pennsylvania** refused to review a $70 million verdict awarded to a Tennessee plaintiff who chose to file his lawsuit in the Court of Common Pleas. Outsized verdicts like these reinforce the **Philadelphia Court of Common Pleas**' "open door" policy and encourage plaintiffs' lawyers across the country to flock to the court. Decisions such as these benefit out-of-state plaintiffs to the detriment of Pennsylvania citizens. The increased litigation clogs the courts and wastes taxpayer dollars.

MEDICAL LIABILITY ON THE RISE

In 2019, **Pennsylvania** paid out $30.79 per state resident in medical liability suits – a total of $394 million, placing it in the top five states with the highest payouts per capita and second only to **New York** for total payouts. By contrast, jurisdictions with the lowest payouts, such as **California, Wisconsin,** and **Texas** paid out between $4 and $6 per person. The number will most likely increase in 2020 due to last year's Pennsylvania Supreme Court decision striking down the state's seven-year time limit to bring medical liability claims.

A RETURN TO FORUM SHOPPING IN MEDICAL LIABILITY CASES?

Constraints that have prevented lawyers from picking the most plaintiff-friendly jurisdiction for filing medical liability actions are in jeopardy. This is yet another development that would contribute to a rise in medical liability payouts.

In late 2018, the **Supreme Court of Pennsylvania's Civil Procedure Rules Committee** proposed easing the court's 17-year-old restraints on medical liability lawsuits. At issue was a 2002 court rule that required plaintiffs to file medical malpractice lawsuits in the county where treatment occurred, not where a jury might view the claim most favorably. The purpose was to reduce forum shopping and create a more fair and balanced playing field. Forum shopping increases the number of meritless lawsuits and drives up doctors' insurance costs. It leads to increased costs for patients and reduces patients' ability to access doctors.

The Committee's new recommendation would allow attorneys to file suit for medical malpractice in jurisdictions not only where medical treatment took place, but also where the healthcare provider operates a hospital or office or where a physician lives, among other options. Of course, the state's personal injury bar, through the **Pennsylvania Association for Justice**, supports the change. Plaintiffs will flock to areas like Philadelphia, where juries are more willing to award higher verdicts in favor of plaintiffs.

In February 2020, the **Legislative Budget and Finance Committee**, a joint committee of the Pennsylvania General Assembly, released its highly anticipated report on the expected impact of the proposed rule change. The report was inconclusive and said the change may or may not worsen the situation. It said there was an insufficient amount of data to assess the effects of the rule; however, it did note that the insurance market for medical liability has been stable since the reform package was passed.

SUPREME COURT REINFORCES LOW STANDARD FOR EXPERT EVIDENCE

The **Supreme Court of Pennsylvania** re-established the state's low standard for expert evidence in its highly-anticipated decision in ***Walsh v. BASF Corp.*** The Court refused to recognize the role of a trial court judge as a gatekeeper over the reliability of expert testimony. Pennsylvania is one of the last remaining states to use the weaker *Frye* standard when evaluating expert evidence, and this decision further restricts a judge's ability to weed out "junk science" from Pennsylvania court rooms.

The issue arose in a wrongful death suit that attempted to connect a golf course groundskeeper's development of Acute Myelogenous Leukemia (AML) to his exposure to pesticides. In ***Walsh v. BASF Corp.***, the **Allegheny County Court of Common Pleas** excluded the plaintiff's causation experts' testimony, finding they failed to offer a study tying AML to the chemicals at issue. Their proposed testimony, the trial court found, was not supported under the *Frye* standard, which requires that experts follow methods generally accepted by the scientific community. However, the Superior Court reversed that decision, ruling that the trial court went beyond examining the expert's methods and improperly considered whether the studies supported the witnesses' conclusions.

> ***"[T]rial courts may not question the merits of the expert's scientific theories, techniques, or conclusions, and it is no part of the trial court's function to assess whether it considers those theories, techniques and/or conclusions to be accurate or reliable based upon the available facts and data."***
>
> **– Supreme Court of Pennsylvania**

In upholding the superior court's decision, the Supreme Court of Pennsylvania's majority stated, "[T]rial courts may not question the merits of the expert's scientific theories, techniques, or conclusions, and it is no part of the trial court's function to assess whether it considers those theories, techniques and/or conclusions to be accurate or reliable based upon the available facts and data." It continued, "The trial court may consider only whether the expert applied methodologies generally accepted in the relevant field, and may not go further to attempt to determine whether it agrees with the expert's application of those methodologies or whether the expert's conclusions have sufficient factual support. Those are questions for the jury to decide."

As a result, in Pennsylvania courts, an expert may use an acceptable methodology to gather and analyze information but then provide a conclusion that is completely unsupported. The trial court cannot exclude the scientifically unsound testimony because the trial court may only analyze the validity of the methodology. In federal courts and most other states, trial court judges have a duty to carefully scrutinize the reliability of proposed expert testimony and not permit unsupported theories to be presented in court.

LOOSE APPLICATION OF VENUE LAWS LEADS TO FORUM SHOPPING

Judges in the **Philadelphia Court of Common Pleas** have made a habit of swinging open the courtroom doors to out-of-state plaintiffs. This policy benefits plaintiffs but negatively impacts Pennsylvanians. It clogs courts, drains court resources, and drives businesses out of the state leading to job loss.

At the crux of the venue issues is the state's venue rule, which judges have interpreted very liberally. It permits venue in any "county where it [a corporate defendant] regularly conducts business," which allows cases to be filed in Philadelphia even when there is little to no connection between Philadelphia and the incident in question.

In addition, Pennsylvania courts have been slow to apply the U.S. Supreme Court's 2017 ruling instructing state courts to dismiss cases that have no connection to the state. In ***Bristol-Myers Squibb Co. v. Superior Court of California*** (*BMS*), the Court held that a state cannot exercise personal jurisdiction over a company that is not incorporated or headquartered in that state, when the plaintiffs do not live in the state, and events related to the alleged injury did not occur there.

In October, the **Supreme Court of Pennsylvania** openly defied the **U.S. Supreme Court** in ***Hammons v. Ethicon***, which was the state high court's first opportunity to apply the case to claims brought by out-of-state plaintiffs in Pennsylvania courts. In this instance, an Indiana resident claimed that Ethicon, a New Jersey company, made a defective pelvic mesh device. The plaintiff did not receive medical treatment in Pennsylvania, and all conduct relevant to her claim took place in Indiana or New Jersey.

The only connection between the parties and Pennsylvania was that Ethicon contracted with a Pennsylvania company, Secant, to provide the mesh and the plaintiffs' lawyer decided that Philadelphia would be a more favorable place to sue. Doing business with third parties, however, does not automatically subject an out-of-state business to personal jurisdiction where that company is located unless there is a specific connection between the forum and the injury. The **U.S. Supreme Court** in *BMS* held that the "bare" decision to contract with a California company to distribute the drug nationally did not provide a sufficient basis for jurisdiction in California. As in *BMS*, Ethicon's link to a Pennsylvania company should not have provided a sufficient basis for a Pennsylvania court to decide the case. Nevertheless, the lower courts allowed the Indiana resident's claim against a New Jersey company to proceed in Pennsylvania courts, which led to a $12.8 million judgment in Philadelphia's mass tort program.

ATRA filed a brief urging the **Supreme Court of Pennsylvania** to realign state law with U.S. Supreme Court precedent and end litigation tourism. The Court, however, went in the opposite direction. It ruled that Ethicon's connection to Secant allowed Pennsylvania courts to assert jurisdiction over Ethicon. Contrary to *BMS*, the **Supreme Court of Pennsylvania** viewed it sufficient for a plaintiff to show a tie between the state and the "underlying controversy," rather than the individual's claim, for a state court to decide the case.

This ruling clearly undercuts the majority ruling in *BMS* which sought to restrict out-of-state plaintiffs from suing in plaintiff-friendly jurisdictions. Oddly, the **Supreme Court of Pennsylvania** appeared to follow Justice Sotomayor's "forceful dissent" in *BMS* instead of the majority opinion. In fact, the **Supreme Court of Pennsylvania** invited review of its decision, stating that "absent further clarification from the High Court, we decline to restrict jurisdiction by focusing narrowly on the elements of plaintiff's specific legal claims." Only the state's chief justice refused to "join an opinion of a state court that does not abide by the [U.S. Supreme Court's] latest pronouncement."

CASES TO WATCH

A Pennsylvania Superior Court is considering whether 1 percent of national sales with no administrative locations in Philadelphia is enough to allow for venue when a man injured himself riding a Husqvarna lawn mower. The man lives in an adjacent county. After the three-judge panel of the court reversed a trial court's decision finding the case should be heard in Bucks County, the full appellate court opted to consider the issue.

PHILADELPHIA REMAINS A MAGNET FOR ASBESTOS LITIGATION, SUPREME COURT CONTINUES TO HELP PLAINTIFFS

In a year when total asbestos lawsuit filings are down 13 percent, Philadelphia is one of the few jurisdictions that saw an increase in filings through the first two quarters of 2020. There has been an 11.7 percent rise in asbestos litigation in Philadelphia through July of 2020. The city remains in the Top 4 most popular jurisdictions to file lawsuits claiming injuries from exposure to asbestos.

In February 2020, the **Supreme Court of Pennsylvania** issued its long-awaited ***Roverano*** decision on the application of Pennsylvania's **Fair Share Act** to strict liability asbestos actions. The court nullified the "Fair Share" concept in such cases by holding that allocation of liability shall be apportioned equally among responsible parties rather than by each party's specific percentage share of fault. Using mental gymnastics, the court said it is impossible to apportion a strict liability offense based on fault because strict liability is not fault-based. The impact of course is that minor players may be required to pay damages that are disproportionate to their actual percentage share of fault – contrary to the basic premise of fair share liability. The court accepted the plaintiffs' contention that illnesses caused by asbestos inhalation are "incapable of being apportioned in a rational manner because the individual contributions to the plaintiff's total dose of asbestos are impossible to determine." In dicta, the ***Roverano*** decision "also appears to point to an abrogation of the rule against 'each and every fiber' as a theory of causation."

In ***Roverano***, the Court also ruled that the **Fair Share Act** permits bankrupt entities to be listed on the verdict sheet, but only if the trusts have been joined as third-party defendants or entered into a release with the plaintiff. Thus, a plaintiff can easily evade having most bankrupt entities appear on the verdict form by simply delaying the filing of any available asbestos bankruptcy trust claims until after trial. Unlike many other states, Pennsylvania has not enacted asbestos bankruptcy trust transparency legislation to require plaintiffs to file their asbestos trust claims before trial. The ruling reinforces the need for asbestos trust transparency legislation in Pennsylvania to make sure that the tort system is able to fully account for asbestos exposures related to bankrupt entities.

END NOTES

- In other related news, Governor Tom Wolf (D), on Monday, November 30, vetoed legislation that would have provided much-needed COVID-19 liability protections for hospitals, nursing homes, child care centers and schools, and other businesses operating in the state. The veto came as businesses are struggling to stay afloat and fear limitless liability over potential COVID-19 exposure. Leaders in the state believed the bill would have provided reasonable protections for those facilities and businesses that follow proper health orders and government guidelines.

#2 NEW YORK CITY

TOP ISSUES

- **ADA abuse on the rise**
- **Frivolous consumer protection lawsuits target business**
- **Nuclear verdicts devastating state's economy**
- **Expansion of public nuisance law**
- **City moves toward legitimizing third-party litigation financing**

Life in **New York City** came to a screeching halt in 2020 due to the COVID-19 pandemic. The city was one of the hardest hit in the world, and businesses have struggled to regain their footing amid all the uncertainty. **Governor Andrew Cuomo (D)**, for his part, sent mixed signals to the business community – first, implementing strong protections for health care providers and others, and then repealing some of those protections in August 2020.

Governor Cuomo has long insisted that New York is a business-friendly state but the litigation and regulatory climate tells a very different story. Businesses face uphill battles on multiple fronts. The courts allow the entrepreneurial plaintiffs' bar to advance novel theories of liability under state and federal laws like New York's consumer protection statute and the **Americans with Disability Act (ADA)**, while much-needed reforms continue to stall in the state legislature. The activist state attorney general is attempting to regulate industries through litigation, and third-party litigation financing companies seek to profit off of the state's overly-litigious environment.

Lastly, the state has seen a dramatic increase in excessive verdicts, also known as nuclear verdicts. These multi-million-dollar awards are driving up the cost of doing business in the state and having a devastating impact on the state's economy. The New York Law Journal recently discussed the sense of urgency around reforming the state's civil justice system as "New York State buckles under the weight of increasing taxes, the highest tort costs per household, the exorbitant cost of living, the highest taxpayer exodus, and the devastating financial impact of COVID-19."

NEW YORK BUSINESS TARGETED BY BASELESS LITIGATION

NEW YORK CITY A HOT BED FOR ACCESSIBILITY LAWSUITS

Litigation targeting whether New York businesses fully complied with **Americans with Disabilities Act (ADA)** accessibility standards increased 300 percent in federal courts from January 2014 to June 2019. That year, New York (2,635) was second to only California (4,794) in the number of filings. Florida was a close third with over 1,800 cases, but the next closest state was Georgia with a mere 243 filings. While there have been fewer of these lawsuits due to the pandemic, as of mid-year, New York has kept its position in second place.

New York wins first prize, however, for lawsuits attacking businesses over their websites. These lawsuits claim that a business's website is not sufficiently accessible to individuals with disabilities because they lack technologies like screen readers. In 2019, New York's federal courts hosted 1,354 of these claims, which is more than all of the other top states combined.

As is common practice with this predatory litigation, no warning or customer complaint is given to the business about its noncompliance until the lawsuit is filed. The impacts of lawsuit abuse on unsuspecting small businesses are further compounded by the devastation caused by COVID-19. According to **Scott Piper**, a lawyer for several lawsuit victims, defendants feel "Disbelief and many times anger... They haven't made any money since mid-March and then they get hit with a lawsuit."

SERIAL PLAINTIFFS AND NOTABLE ATTORNEYS FIRMS

A handful of plaintiffs' firms file a majority of the ADA lawsuits in New York. Jermaine Deleston and his attorney Erik Bashian, for example, have sued at least 80 businesses together as of late 2019. Deborah Laufer, a Florida resident, has filed at least 47 lawsuits against different hotels in New York State. She dubs herself a "tester," enforcing the ADA on non-compliant businesses. Her suits allege accessibility issues with hotel booking websites. It is estimated that she has filed over 300 of these types of lawsuits in nine states.

In November 2019, one of New York's most notorious plaintiffs' lawyers, **Stuart Finkelstein**, was arrested after the State discovered he engaged in a massive scheme to shake down small mom-and-pop stores across the state. He filed multiple lawsuits on behalf of unknowing plaintiffs, threatening stores with additional litigation if they refused to immediately settle. He earned over $930,000 in attorney's fees. His behavior demonstrates how excessive lawsuit abuse, if not addressed, can quickly morph into criminal activity at the expense of small business.

BRAILLE GIFT CARDS

Between October 2019 and May 2020, four law firms **- Gottlieb & Associates, The Marks Law Firm PC, Zare Khorozian Law LLC,** and the **Law Office of Darryn G. Solotoff -** filed 243 claims on behalf of 13 plaintiffs against restaurants and retailers in New York federal courts. The plaintiffs claim that the ADA requires physical gift cards to have braille.

Despite the onslaught of litigation by enterprising plaintiffs' firms, **U.S. District Judge Gregory Howard Woods** of the **Southern District of New York** issued a significant win for defendants. In 2020, Judge Woods dismissed cases against several retailers, including Kohls and Banana Republic. In his opinion, Woods noted concerning litigation tactics targeting businesses. He highlighted that as a matter of law, braille gift card litigation fails because ADA regulates the location, not the items being sold. Gift cards are not a "public accommodation," and not having access to a gift card does not prevent full enjoyment of the premises.

In May 2020, following Judge Woods' decision, a magistrate judge recommended **District Judge Steward Aaron (SDNY)** dismiss a similar Braille gift card suit. Plaintiffs' lawyers are expected to appeal at least one of the cases before Judge Woods.

COVID-19 IMPACT ON ADA LITIGATION

A "first-of-its-kind" class action suit was filed in New York federal court against an adult assisted living facility following the COVID-19 outbreak. Plaintiffs are "seeking to hold a place of public accommodation liable under Title III or another federal law regarding accommodation of disabilities, Section 504, for not taking adequate measures, in the plaintiffs' estimation, to prevent or mitigate the spread of COVID-19."

FRIVOLOUS CONSUMER PROTECTION LAWSUITS

In 2019, **New York** overtook **California** as the premier jurisdiction for food and beverage lawsuits. More of the same is expected in 2020, as the two states are once again battling for this dubious distinction.

For example, a complaint filed in federal court in the **Southern District of New York** in late 2019 takes issue with whether reasonable consumers expect a Panera blueberry bagel purchased in Manhattan to have real blueberries, rather than what the complaint describes as "dyed lumps." More recently, New York federal judge **Katherine Polk Failla** allowed a suit to proceed over whether a product qualifies as "potato skin snacks" when it is made from potato starch and potato flakes. The plaintiff is represented by **Lee Litigation Group**, "a prolific class action firm in NYC."

THE "VANILLA VIGILANTE"

Infamous Long Island attorney **Spencer Sheehan** continues to prolifically file lawsuits specializing in product flavoring. Following a year in which he filed 27 food lawsuits claiming $135 million in damages, he earned the nickname "Vanilla Vigilante" in 2020. He has led a "crusade against fake vanilla." Among his long list of targets is Whole Foods, which he sued for its vanilla soy milk and ice cream bars. In recent months, Sheehan also has targeted Vanilla Coke, protein shakes, coconut and almond milk, coffee creamers, ice coffee drinks, yogurt, cake mix, and more.

While most of the vanilla cases are pending, a federal district court judge this year dismissed one of Sheehan's class actions targeting Wegman's vanilla ice cream. **Senior District Judge Louis Stanton** observed that a consumer who has questions on the origin of the ice cream's flavor can read the ingredients list, which does not indicate that the product contains vanilla beans or extract. "Where is the deception? What is misleading, or misrepresented?" Judge Stanton asks, when consumers want vanilla ice cream, that is precisely what they get. They are not "looking for a bowl of vanilla."

The vanilla lawsuits must have resulted in some lucrative confidential settlements because Mr. Sheehan has expanded these types of claims to other flavored products. His lawsuits take issue with, for example, whether flavored potato chip makers have misled consumers to believe they are made with real sour cream or cheddar, or consumers buy Lemon Biscotti cookies because they think they are flavored with lemon juice. One lawsuit actually contends that consumers are deprived of real carrots in carrot cake flavored donuts (and provides an interesting history of carrot cake dating back to the middle ages).

ASBESTOS AND TALC LITIGATION

New York City continues to be a preferred jurisdiction for asbestos litigation. The city ranked third in the country for most asbestos case filings in 2019 with a total of 314. It also ranked second for mesothelioma specific case filings in 2019, totaling 126. While asbestos lawsuit filings significantly fell nationwide in the first half of 2020, New York was one of a few jurisdictions in which litigation increased. Through the second quarter of 2020, New York City had a 7.2 percent increase in filings as compared to the same time last year.

According to an industry report by KCIC, "the number of New York City complaints not stating disease decreased by almost 70 percent in 2019, and the number of these complaints now alleging mesothelioma or lung cancer more than doubled." This is due to **Justice Manuel Mendez's** enforcement of the **2017 Case Management Order (CMO)** that increased the specificity needed in a pleading for it to be placed on the accelerated docket. **Justice Mendez** served as New York City Asbestos Litigation (NYCAL) Coordinating Judge until July 2020, when he was elevated to the appellate division and replaced with **Justice Adam Silvera**, a former plaintiffs' lawyer.

KCIC's industry report also cites **New York** and **California** as the "most dangerous" jurisdictions for asbestos litigation due to the prevalence of high value verdicts. Between 2017 and 2019, New York accounted for over 33 percent of all asbestos verdict dollars nationwide. **Illinois**, home to Madison County - the jurisdiction with the most asbestos lawsuit filings in 2019, only accounted for .2 percent of verdict dollars during the same time period.

TALC LITIGATION

In April of 2020, the **New York Appellate Division, First Department** became the first in the state to affirm a jury verdict finding that a plaintiff's peritoneal mesothelioma was caused by talcum powder. The court in

Nemeth v. Brenntag N. America "held that plaintiff's experts were not required to quantify precise levels of asbestos to which plaintiff would have been exposed in order to establish specific causation." The court instead accepted that "evidence that exposure to asbestos in excess of ambient air levels could cause various forms of mesothelioma in general was a legally sufficient 'quantification' of exposure to demonstrate specific causation." As one amicus brief points out, the appellate court's opinion "would effectively relieve plaintiffs of their burden to prove that they were exposed to sufficient levels of asbestos to cause their illness."

JUDGE LEAVES BENCH AND JOINS PLAINTIFFS' FIRM

A new employee at a New York asbestos and mesothelioma plaintiffs' firm is raising eyebrows. The law firm **Belluck & Fox** recruited retired **Fulton County Supreme Court Justice Richard Aulisi** after he had handled hundreds of asbestos cases over the course of more than 20 years on the bench. The hire has been criticized because it shows a "revolving door" between plaintiff firms and the judges who rule on the parties the firms represent.

In addition to the firm's close ties to the judiciary, it also has influence in regulating judicial conduct. **Joseph Belluck,** one of the firm's founding partners, was appointed by Governor Cuomo to chair the state's commission on judicial conduct, which has the power to discipline judges. He has been chairing the commission since 2016. Plaintiff attorney power over judges may influence the way cases are decided.

JUDICIAL NEWS

In July 2020, **Governor Andrew Cuomo (D)** appointed four judges to the **New York Appellate Division, First Department**, including two justices from the NYCAL court, **Manuel Mendez Olivero** and **Martin Shulman**. Justice Shulman has close ties to disgraced **Assembly speaker Sheldon Silver**. The promotions continue the historical trend of NYCAL judges who show a pro-plaintiff philosophy being placed in the pipeline for appointment to higher courts, following the elevations of former NYCAL managers, including **Justices Helen Friedman** and **Peter Moulton**.

Speaking of **Sheldon Silver**, in July 2020, he was resentenced to a six-and-a-half-year prison sentence, more than four years after his original 12-year sentence was handed down. In 2015, Silver was convicted of obtaining approximately $4 million in payments characterized as attorney referral fees solely through the corrupt use of his official position. The charges stemmed from the money Silver was paid by the state's most prolific asbestos law firm, **Weitz & Luxenberg**, and from another Manhattan law firm specializing in real estate tax work. The **Second Circuit** intervened and vacated his conviction in 2017, and in a new trial in 2018, he was reconvicted.

> ***"This was corruption, pure and simple."***
>
> **– Judge Valeria Caproni**

"This was corruption, pure and simple," presiding **Judge Valerie Caproni** said. "He abused his office, he did it for profit. He did it for at least 15 years, he did it in multiple ways and lied for years. The people of the state of New York were hurt greatly by what he did," **Assistant U.S. Attorney Daniel Richenthal** stated.

CONCERNING RISE IN NUCLEAR VERDICTS

New York is experiencing a surge of "**nuclear verdicts**" in cases ranging from premise liability to medical malpractice. These are awards that usually include an amount for pain and suffering that dwarfs prior verdicts and, at levels in the tens of millions of dollars, hardly serve a compensatory purpose. Rather, they result from improper tactics that inflame jurors and mislead them to believe that amounts at these levels are ordinary and acceptable in litigation.

In July 2020, the **New York Law Journal** published a three-part series titled, "Ahead to the Past: The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts." In this piece, the authors discuss how plaintiffs' attorneys employ a "how dare they defend" approach to litigation. This method allows for disproportionate compensation by fueling emotional outrage. They use specific language, such as "big corporations" and "hired guns" when speaking to the jury and encourage them to "send a message" to the defendants.

Tort law is meant to compensate, not to punish. As the authors observe, "Rather than provide just compensation, [nuclear verdicts] are thinly veiled efforts to punish the defendant that are nearly always awarded at the specific request of plaintiff's counsel."

"The average New Yorker feels the pain too. Nuclear verdicts (and routinely excessive verdicts) drive insurers from the market and increase premiums. The twin pressures of decreasing competition and increased insurance costs are ultimately passed through to the consumer. This is the same consumer and taxpayer who was leaving New York at a higher rate than any of the 50 states even before COVID-19." – New York Law Journal

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– New York Law Journal

THE "ANCHORING" TACTIC

Another tactic used by the plaintiffs' bar to secure nuclear verdicts is improper "anchoring." During summation, lawyers will suggest an unreasonably large award to the jury and that number becomes the starting point in a juror's mind.

Several cases are currently on appeal in New York in which anchoring led to record-setting pain and suffering awards.

For example, after a woman was hit with a shopping cart thrown off a mall's parking garage by two teenagers, her lawyers sued the retailers, security firm, and property owners. The plaintiff's lawyer asked the jury to award $58 million for her pain and suffering. The jury apparently felt this level – which would take the average New Yorker several lifetimes to earn – was too high, but still returned an extraordinary $45 million award, including $35 million in noneconomic damages. The trial court in that case, ***Hedges v. Planned Security Services***, then cut the noneconomic damage award in half to $17.5 million–still a record amount.

In another case, plaintiffs' lawyers asked a jury to award $85 million in noneconomic damages to a worker who fell while assembling a booth for an event at Jones Beach. The jury obliged with a $85.75 million pain and suffering award on top of $13.5 million for medical care and lost wages. The trial court lowered the pain and suffering award in that case, ***Perez v. Live Nation***, to $40.6 million – an amount wildly beyond that which New York courts have permitted. The New York Law Journal points to how the rise in nuclear verdicts is "turning the New York court system on its head" and is "contributing to the demise of New York state."

> **"At a high level, every improper anchor in our data set produced a runaway verdict of $15 million or more for pain and suffering with awards ranging as high as $90 million. The value of these pain and suffering awards totaled a staggering $1.5 billion, and this figure does not tell the full story."**

Unlike some other states, New York law does not set a hard cap on awards for a person's pain and suffering, which cannot be objectively measured. Instead, in New York, a verdict is "excessive or inadequate if it deviates materially from what would be reasonable compensation." Courts look to prior awards for comparable injuries, sustained on appeal, for guidance. Prior to the dramatic rise in nuclear verdicts, only two New York appellate cases surpassed $10 million in noneconomic damages. The article highlights specific data that demonstrates the impact anchoring has had on recent verdicts. According to the report, in 90 percent of all cases where a plaintiff's lawyer requests $20 million or more, the verdict is at least double the state's "de facto cap" for pain and suffering damages of $10 million. In almost two-thirds of all cases, the plaintiff receives at least $30 million, and finally, in almost 33 percent of all cases, improper anchoring results in a verdict of more than $50 million.

These nuclear verdicts directly impact all New Yorkers, as it leads to higher insurance rates, higher consumer goods costs, and fewer jobs. Since public entities, such as public schools and the transit authority, are subject to these types of awards, nuclear verdicts also place taxpayers on the hook and place city services at risk.

EXPANSION OF PUBLIC NUISANCE LIABILITY

Pushing an expansive view of public nuisance law, New York City lawyers and **Attorney General Letitia James (D)** are looking to shift costs associated with public crises to businesses. While litigation may fill government budget gaps and line the pockets of trial lawyers, it does little to help people or solve problems.

Historically, public nuisance law has been applied in cases involving land use and public spaces. A successful claim for public nuisance usually involves instances in which there is an unreasonable interference in a right that is common to the general public. Typical cases include manufacturing plants emitting noxious fumes or restaurants blaring loud music.

The new expansive view of public nuisance law exploits the vague definition of the tort and applies it to costs associated with products, sometimes long after they are made and sold. This trend is concerning to all industries and is likely to continue as state and local governments look for sources of funding for public health and other problems.

CLIMATE CHANGE LITIGATION

New York City continues to be on the forefront of regulation through litigation with respect to U.S. energy policy on climate change. NYC is currently suing energy producers alleging they should be penalized for selling oil, gas, and other energy products by paying for the City's costs for future infrastructure projects, including seawalls, to protect it from storms and rising waters. As the U.S. District Judge who dismissed the case explained, "the serious problems caused [by climate change] are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government." The City appealed the case to the **U.S. Court of Appeals for the Second Circuit**, which is deciding whether the City's state tort law claims can be so leveraged to circumvent Congress and federal agencies in this way. The City is arguing that state law applies because "there is no uniquely federal interest" in its ability to sue for local property damages. The energy producers countered that federal law applies because these cases invoke federal energy and emissions policies. As indicated, the District Judge sided with the energy companies, calling out the City as "hiding an emissions case in language meant to seem it was instead targeting the companies' production and sales operations" over local property damages. The Second Circuit panel heard arguments in the case in November 2019, and we are awaiting its ruling.

Overall, there are now about two dozen cases around the country seeking to subject energy producers to liability for marketing and selling oil, gas, and other fuels. Unlike NYC's lawsuit that was filed in federal court, many of them were filed in state court and then removed to federal court by the defendants. In many of those cases, the district and circuit courts remanded them back to state court despite the clear federal interests involved. In October 2020, the **United States Supreme Court** agreed to hear an appeal arising out of Baltimore's case that was remanded by the **Fourth Circuit**. The specific issue before the Supreme Court relates to the scope of appellate review when the **Federal Officer Removal Statute** is invoked, though most court watchers believe the high court will provide guidance on whether these lawsuits belong in state or federal court.

GOOD NEWS

In December 2019, Exxon successfully defended itself in a landmark bench trial over claims that Exxon Mobil "deceived its investors about climate change risks to its business." When the State Attorney General launched its probe, its office made broad accusations about the company's conduct. After several years, the State narrowed the case to a claim under the **Martin Act**, which requires the attorney general to prove that there were material misrepresentations to investors that would have altered a reasonable investor's investment decisions. The state judge hearing the case dismissed the claim, calling the allegations "hyperbolic."

OPIOID LITIGATION

New York Attorney General Letitia James (D) also is looking to improperly expand the state's public nuisance law in the context of the opioid litigation. She has filed a lawsuit on behalf of the state of New York and two Long Island counties against manufacturers and distributors. It claims that the companies created a public nuisance through the marketing of opioids. **Suffolk County Supreme Court Judge Jerry Garguilo** dismissed the public nuisance claims brought against pharmacy defendants as dispensers of the prescription medication but so far has allowed the claims asserted against manufacturers to proceed.

THIRD PARTY LITIGATION FINANCING

New York City has been at the epicenter of the huge surge in litigation financing that has occurred over the past decade. This predatory business practice increases the amount of litigation and provides benefits to plaintiffs' lawyers while preying on consumers. There have been reports of New York City third party litigation finance firms, which operate like payday lenders, encouraging vulnerable individuals to file lawsuits and then charging as high as a 124 percent interest rate.

Somewhat surprisingly in March 2020, the **New York City Bar Association's Litigation Funding Working Group** issued its long-awaited report and endorsed the predatorial practice. The group said plaintiffs would benefit from increasing access to litigation funding. The group rejected a proposal that would have at least required transparency and oversight of such arrangements by requiring disclosure of a third-party's interest in the litigation to the court and other parties.

The **New York City Bar Association** previously published a formal opinion concluding that lawyers may not enter into a litigation financing arrangement with a non-lawyer funder under which the funder is paid out of any recovery. Such arrangements, the NYCBA found, violate ethical rules that have long prohibited lawyers from partnering with or sharing fees with non-lawyers.

The **New York Court of Appeals** also will weigh in on the issue in the near future as the court has been asked to determine whether a litigation financing agreement is usurious in certain instances. The court will determine whether a specific litigation finance agreement constitutes a loan or a "cover for usury." This case involves "portfolio litigation funding" in which a funder advances money to the attorney to cover attorney's fees and to the client for his or her own use. In this case, the plaintiff provided funding for the defendant lawyer's lawsuit in exchange for proceeds from the case and attorney's fees in other unrelated cases. The **Ninth Circuit** certified the question to the **New York Court of Appeals** because "the result is likely to have wide-reaching implications" and because "[o]ther states that have addressed [the issue] have reached conflicting results."

SCAFFOLD LAW

New York City is home to the most expensive construction costs in the nation, thanks in no small part to its **"Scaffold Law."** The Scaffold Law was enacted to "protect workers who helped build New York's now-iconic skyline in the 19th century." Now, it is one of the main deterrents for real estate investors and builders from investing in the city and in construction site safety. New York created a risk through legislation that is becoming uninsurable.

Under this law, courts hold contractors and property owners liable for workers' "gravity-related injuries," whether that injury occurred due to a fall from a stepstool or New York's tallest tower. New York courts have found that liability under this law is "absolute," meaning that businesses must pay up regardless of whether the fall occurred due to the workers' carelessness or reckless conduct. No other state has such a law.

The absolute liability standard imposed by the Scaffold Law has led to a massive exodus of underwriting companies from the state, leading to higher premiums and an overall high cost of doing business. It is estimated that money wasted on the Scaffold Law could be spent to create 12,000 new jobs, boosting the state's economy by over $150 million.

In February 2020, the **New York Court of Appeals** stacked the deck further against defendants. The Court abandoned its "choice" standard, meaning if the employee simply chooses not to use safety measures, then the employer is not liable. In its place, it outlined four criteria that must be met in order to grant a defendant's motion for summary judgment. The criteria are as follows, "when plaintiffs: (1) had adequate safety devices available, (2) knew both that the safety devices were available and that [they were] expected to use them, (3) chose for no good reason not to do so, and (4) would not have been injured had they not made that choice."

In the case, the plaintiff observed his co-worker climb up several feet to a scaffold beam, unhook his safety belt, and enter a building through a window cut out. The plaintiff then attempted the same maneuvers but fell onto the scaffold platform. The plaintiff testified that he knew he was not supposed "to pass through there."

In denying the motion for summary judgment, the Court reasoned that the worker might not have known that he was expected to use the safety equipment because another worker had not followed safety protocol.

Some New York lawmakers have long sought to address excessive liability under the **Scaffold Law** but continue to come up short. Opposition from powerful special interests – especially the trial lawyers – has stymied efforts to have a more reasonable system that considers the actions of both employers and workers in determining liability.

LIABILITY-EXPANDING LEGISLATION

The **New York legislature** also introduced a bill that would potentially expand the state's long history of using the courts and the powers of the attorney general to shake down successful businesses. **State Senate Deputy Majority Leader Mike Gianaris (D)**, who is partially credited for scaring away the development of Amazon's HQ2, introduced a bill that would open any business with a "dominant position" in a market to private lawsuits. The so-called "**Twenty-First Century Anti-Trust Act**" would open up any innovative twenty-first century company to massive new liabilities. For example, as posited in the National Herald, the eventual creators of a COVID-19 vaccine would naturally have a "dominant position" and under this proposal would be subject to lawsuits from both private attorneys and the attorney general.

In their continuing quest to open up every sector of the economy to private rights of action, the **New York legislature** also introduced legislation to expand their **False Claims Act** to include private rights of action and eliminate the sticky issue of intent. Not content to allow the Tax Department to do its job, the proposal would allow any two-bit attorney to take a shot at any wealthy taxpayer, turning potentially valuable recoveries into useless attorney's fees. Further, with a ten-year statute of limitations, but a three-year window on regulatory audits, a tax filer could settle an audit, but still be unknowingly subject to lawsuits.

COVID-19 RESPONSE

After passing needed liability protections for healthcare providers treating patients during an unprecedented pandemic, the **New York legislature** rolled back that law.

When enacted in April 2020, the New York law provided that a doctor, hospital, or other healthcare provider would not be liable if the care provided was impacted by the COVID-19 pandemic. This liability protection would apply so long as the provider acted in good faith and did not harm a patient through gross negligence, recklessness, or intentional misconduct.

Just four months later, the legislature amended that law to only apply when a healthcare provider was treating a COVID-19 patient. The protection would no longer be available when the pandemic led a healthcare provider, for example, to delay a surgery or not admit a patient due to limited staff, medical equipment, or bed space.

While legislators resisted calls to eliminate the liability protection completely, the altered law places healthcare providers in jeopardy as the battle against COVID-19 continues.

#3 CALIFORNIA

In a year when many states saw a significant decrease in litigation, California plaintiffs' lawyers continued to target businesses, while the legislature and judiciary pursued innovative new ways to expand liability. Businesses, small and large, are struggling to stay afloat, yet California's leadership failed to ease unjust liability burdens and further stacked the deck against their survival. In fact, almost 60 percent of Californians believe that lawmakers are not doing enough to combat lawsuit abuse and over 90 percent believe that now is not the time to sue. Excessive tort costs in California lead to an annual estimated $15.1 billion lost in direct costs and 242,761 jobs according to **The Perryman Group**. This amounts to each Californian paying a $594.74 "tort tax."

TOP ISSUES

- **Baseless Prop-65 litigation targets business**
- **Plaintiffs' bar exploits California Lemon Law**
- **Activist Attorney General pushes expansive view of public nuisance law**
- **Small businesses continue to be targeted by ADA lawsuit abuse**
- **Arbitration under attack**
- **Burdensome employment law liability**

California's "fall" in the Judicial Hellholes ranking is not indicative of an improvement in the state's civil justice system, but rather results from the rapid deterioration occurring in Pennsylvania and New York City.

CALIFORNIA'S INNOVATIVE WAYS TO SUE BUSINESS

PROP-65

Proposition 65, the originally well-intentioned law enacted in 1986, is now one of the plaintiffs' bar's favorite tools to exploit. Baseless Prop-65 litigation unjustly burdens companies that do business in California. The money companies spend on compliance and litigation unnecessarily drives up the cost of goods for California consumers. **Prop-65** also subjects consumers to frivolous warnings declaring that everything from brass knobs to Disneyland causes cancer.

Under **Prop-65**, businesses are required to place ominous warning signs on products when tests reveal the presence of even the slightest, non-threatening trace of close to 1,000 listed chemicals that state environmental regulators deem carcinogenic or otherwise toxic. A troublesome part of the law allows private citizens, advocacy groups and attorneys to sue on behalf of the state and collect a portion of the monetary penalties and settlements, creating an incentive for the plaintiffs' bar to pursue these types of lawsuits. Each year, they send thousands of notices to companies threatening Prop-65 litigation and demanding a settlement. Food and beverage companies are among the prime targets.

Prop-65 also harms small businesses that do not have the in-house expertise or means to add the necessary warnings or handle litigation. Failure to comply can cost up to $2,500 per day in fines, and settlements could cost $60,000 to $80,000.

Prop-65 bounty hunter actions have nearly doubled since 2015 and quadrupled over the past decade.

According to the California Attorney General's office, businesses settled approximately 613 Prop-65 claims in 2019 totaling $12.7 million. Nearly 90 percent of this money ($11.2 million) went to the attorneys who brought the lawsuits to cover their fees and costs. There were an additional 283 judgments in 2019 that led to a total payout of $18.5 million, over $13 million of which was attorneys' fees.

Through the first ten months of 2020, businesses settled another 322 Prop-65 claims to the tune of $6.6 million. 85 percent of that amount ($5.6 million) went straight into the pockets of plaintiffs' lawyers for their fees. Prop-65 claims also resulted in 175 judgments totaling $9.4 million with $6 million going to the lawyers.

The **Office of Environmental Health Hazard Assessment (OEHHA)** issued two amendments to Prop-65 regulations in 2020. The first limits when a retailer is required to provide a Prop-65 warning. The other allows manufacturers and producers to decline to place warnings on packaging if they provide authorized notice to the in-state retailer. Businesses that sell in California are required to place Prop-65 warnings on products, even if they are not based in the state. Because of the liability associated with Prop-65 and additional costs to add warnings, some companies have limited their business in the state. These amendments should help ease some of the burden, but it remains to be seen how courts will interpret these changes.

While lawyers continue to file Prop-65 lawsuits at a rapid rate, 2020 brought about some positive developments in the litigation over two of the most targeted Prop-65 chemicals.

GLYPHOSATE

The most infamous Prop-65 case involves Bayer's Roundup® products. California added the popular weed killer's active ingredient, glyphosate, to the Prop-65 listing in July 2017; however, in June 2020, a federal judge pushed back against California's baseless warning requirement.

Regulators and scientists worldwide have deemed glyphosate safe, with the exception of the **International Agency for Research on Cancer (IARC)**, whose study was riddled with controversy. The single IARC report stating glyphosate is carcinogenic is in stark contrast to more than 800 studies submitted to the **U.S. Environmental Protection Agency**.

Federal Judge William Shubb ruled that California cannot require Bayer AG to label its glyphosate-based weedkiller Roundup as "known to the state of California to cause cancer." Judge Shubb stated "Notwithstanding the IARC's determination that glyphosate is a 'probable carcinogen,' the statement that glyphosate is 'known to the state of California to cause cancer' is misleading. Every regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does."

> ***"Notwithstanding the IARC's determination that glyphosate is a 'probable carcinogen,' the statement that glyphosate is 'known to the state of California to cause cancer' is misleading. Every regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does."***
>
> **– Judge William Shubb**

Aside from Prop-65 litigation involving glyphosate, there are also several personal injury lawsuits. California judges have allowed plaintiffs' lawyers to present and juries to rely on the rogue IARC report as the basis for multi-million-dollar and even multi-billion-dollar judgments in cases claiming Roundup caused a person's cancer.

Bayer was hit with a nearly $2.5 billion judgment in a California state court in May 2019, including $2 billion in punitive damages. In that lawsuit, a couple blamed Roundup® after they developed non-Hodgkin's lymphoma (NHL) (the cause of NHL is unknown and has many common risk factors). The judgment was reduced to $78.5 million and then reduced further by a California appeals court. In June 2020, Bayer, facing the cost and risk of defending approximately 125,000 lawsuits – many of which are in California state courts or federal multidistrict litigation in California – proposed an $11 billion settlement to cover about 75 percent of its Roundup® cases nationwide. Under the proposed agreement, plaintiffs' attorneys will receive 25-33 percent of the settlement cost, around $3 billion.

Bayer later withdrew its request for approval of $1.25 billion of the settlement to be allocated to future claims. The judge handling the case expressed skepticism and said he was inclined to reject this portion of the settlement because of the uncertainty surrounding future cases.

While the settlement is yet to be finalized, negotiations continue, as does the litigation.

ACRYLAMIDE

California businesses are fighting back against another Prop-65 labeling requirement for products that contain Acrylamide. Acrylamide is a chemical that can form in some foods during high-temperature cooking processes, such as frying, roasting, and baking. The chemical was added to the Prop-65 list in 1990 as a carcinogen and in 2011 as "causing reproductive and developmental effects."

In March 2020, the **California Chamber of Commerce** filed a lawsuit challenging enforcement of the state's requirement to provide a cancer warning on food and beverage products containing acrylamide. The complaint claims the cancer warning is highly misleading because acrylamide is not intentionally added to food products, but is instead formed naturally. Furthermore, there is no reliable scientific evidence to show that acrylamide is a human carcinogen. Thus, this requirement violates companies' First Amendment rights. Over 560 60-day notices have been filed for violation of Prop-65 related to acrylamide.

No government entity, including the **California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA)**, has identified acrylamide as a known human carcinogen. The OEHHA website explains that acrylamide may be formed when "[p]lant-based foods that are rich in carbohydrates... [are] baked, fried, or roasted," whether prior to selling the product or at home after purchasing the product. Acrylamide can be found in many products, from breads to cereals to potato chips. In 2019, OEHHA adopted a regulation that states, "exposure to chemicals known to cause cancer that are created during coffee bean roasting and brewing do not pose a significant risk of cancer."

In July 2020, a judge for the **Superior Court of Los Angeles County** ruled that Starbucks could use OEEHA's 2019 regulation to defend allegations it had violated Prop-65. Following this decision, the court dismissed the lawsuit. On August 25, 2020, the **Superior Court of Los Angeles County** granted summary judgment for several coffee roasters, holding that the plaintiff's lawsuit was barred by the regulation. The court further held that the defendants had met their burden of proof in showing that acrylamide does not cause cancer, and that Plaintiff could not show that the regulation was invalid.

LEMON LAW

An issue that continues to escalate is the plaintiffs' bar's abuse of California's **Song-Beverly Consumer Warranty Act**, otherwise known as the **California Lemon Law**. While problem rates with auto manufacturing have generally decreased since 2012, lemon lawsuits have increased. Suits doubled between 2015 and 2019. **Los Angeles Superior Court Judge Richard L. Fruin, Jr.** estimates that 10 percent of cases on an Independent Calendar (IC) judge's docket are Lemon Law claims.

The **Song-Beverly Consumer Warranty Act** clearly defines the obligations of consumer goods manufacturers. Under the law, a manufacturer guarantees that a product is in order when sold. Should a product fail in utility or performance, the manufacturer must repair or replace the product or make restitution to the buyer in the form of a purchase refund. The Act also limits punitive damages to no more than twice the amount of actual damages.

The intent of the law was to ensure manufacturers would repair, replace, or repurchase a consumer's defective vehicle as quickly as possible. However, plaintiffs' lawyers have learned to exploit loopholes in the law and create windfalls for themselves at the expense of a fair resolution for consumers. The law provides an incentive for attorneys to pursue litigation even when companies make a reasonable offer and consumers may be inclined to settle. This draws out the process for consumers and delays the time it takes to reach a fair resolution. The costly litigation also drives up the price of vehicles in the state. The true winners of the prolonged litigation are the plaintiffs' lawyers. By dragging out a case, they run up hefty legal fees on top of the statutory Lemon Law fee entitlement.

The most egregious example to date came out of the **San Diego County Superior Court** in August 2020. In this case, the plaintiff was awarded a mere one dollar in damages, but the plaintiff's attorneys in the case received over $680,000. The plaintiff's lawyers claimed they worked over 1,505 hours on what was a very straightforward Lemon Law case and initially requested over one million dollars.

In yet another example of abuse, a plaintiff sought to be reimbursed for her defective car, a new Dodge Avenger that she purchased for $25,749. FCA made several reasonable offers, and the plaintiff accepted the fifth amended offer of $75,000 plus reasonable costs, expenses and attorneys' fees. She then filed a motion requesting fees and costs totaling a whopping $163,205.60. FCA opposed the motion because the plaintiff's attorneys "apparently thwarted FCA's efforts to settle this case in early 2014 for no valid litigation objective."

The trial court greatly reduced these fees to those incurred prior to FCA's first settlement offer ($2,221.95), because it "had acted reasonably and in good faith in making its settlement offer." On appeal, the appellate court reversed, finding that the trial court had applied the incorrect legal standard in determining attorney's fees.

In another case, after the jury awarded the plaintiff $30,412, she requested $510,247.50 in attorney's fees for multiple firms and $46,852.09 in costs and expenses. The court in large part rejected the request because the defendant's settlement offer in 2017 was $37,106, greater than the jury award. Instead, the plaintiff was awarded attorney's fees incurred up until the settlement offer, totaling $5,510. The court also largely rejected the plaintiff's request for costs and expenses, awarding $1,159.18. While the court handed down a fair outcome, the requested attorneys' fees exemplifies perfectly the abuses taking place in California.

In July 2020, the **California Supreme Court** further expanded liability under the **Song-Beverly Warrant Act** by incorporating registration renewal and nonoperation fees as incidental fees that a buyer may recover in a suit. The plaintiff initially invoked the Lemon Law to return his car for a settlement, but the parties could not agree on an amount. At trial, the plaintiff was awarded $47,708.06, including the initial registration fee, but excluding registration renewal fees and a nonoperation fee. Defendant appealed, and the appellate court affirmed. The Supreme Court held that registration fees, including renewal nonoperation fees, may qualify as incidental damages for which the buyer may recover if the fees are incurred after the seller has failed to promptly provide the buyer with restitution.

CALIFORNIA'S "SUE YOUR BOSS LAW"

Enacted in 2004, California's **Private Attorneys General Act (PAGA)** has become known as the "Sue Your Boss" law. While its initial purpose was to protect workers, it has done little to help them. The plaintiffs' bar has been the true beneficiary. "PAGA lawsuits have made it more difficult for family-owned businesses like mine to be flexible with employees," says **Ken Monroe,** chairman of the Family Business Association of California and president of Holt of California.

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. Many PAGA lawsuits revolve around technical nitpicks, such as an employer's failure to print its address on employees' pay stubs, even though the address was printed on the paychecks themselves.

75 percent of the penalties paid by non-compliant employers go to the state's **Labor and Workforce Development Agency** while only 25 percent goes to the "aggrieved employees" and their lawyers who take a third or so of that. In some cases, the plaintiffs' lawyers receive even more.

California courts have allowed plaintiffs to circumvent arbitration clauses by refusing to enforce them with regard to PAGA claims. In May 2020, defendants attempted to compel arbitration of the plaintiff's multiple wage and hour claims under the employment contract provision. The appellate court compelled arbitration of all of the claims except the PAGA action for the initial employer because PAGA actions are brought on behalf of the state, who was not party to the original contract. According to California courts, because employees act as agents of the state when filing PAGA cases, pre-dispute arbitration provisions in employment contracts are invalid. The state is not a party to the employment contract, and therefore, PAGA litigation is not bound by the contract provisions.

A March 2020 California Supreme Court ruling will further expand liability under **PAGA**. In ***Kim v. Reins International California, Inc.***, the Court held that even after an employee settles his or her own labor claim with an employer, the employee can bring a PAGA lawsuit on behalf of others. Although both the trial and intermediate appellate court found the plaintiff was no longer "aggrieved" as a result of the settlement, the state high court disagreed. California lawyers have observed that the decision is "yet another example of judicial ingenuity coming to the aid of an employment plaintiff, while complicating efforts to resolve PAGA claims."

UNCERTAINTY SURROUNDS CALIFORNIA TRIAL LAWYERS' LATEST STATUTORY GOLD MINE – THE CALIFORNIA CONSUMER PRIVACY ACT

The **California Consumer Privacy Act (CCPA)** went into effect on January 1, 2020, and a cloud of uncertainty surrounds it. Enacted in 2018, the **CCPA** is considered the most radical privacy law in the country. The California attorney general has not clarified ambiguities (including key terms) in the CCPA, which leaves businesses to fend for themselves in interpreting the legislation and dealing with enforcement actions. Enforcement began on July 1, despite the ongoing COVID-19 pandemic. It is all but certain that the confusion around the statute will benefit the trial bar, as a flood of litigation is sure to follow. This places additional burdens and stresses on businesses in the state that are struggling to survive the economic fallout from COVID-19.

Consumers can sue for cash awards following a data breach without proving an actual injury, making it easy for trial lawyers to bring massive class actions. The law also provides for treble damages and attorneys' fees, creating a large incentive for the plaintiffs' bar to file lawsuits.

California voters weighed in on the CCPA in November, and increased its significant burden on businesses. The **California Privacy Rights and Enforcement Act (Prop 24)** passed on November 3. This Act will replace the CCPA and addresses some of the CCPA's ambiguities. It also eliminates a business' 30-day window to cure, grants new rights to consumers, and increases business's contractual obligations. It also creates the **California Privacy Protection Agency** to enforce the CCPA, which will fine businesses $2,500 for violations and $7,500 for intentional violations and those involving a minor. The Act takes effect in January 2023, but applies to data being collected from January 1, 2022.

OLD LAWS, NEW TRICKS

CALIFORNIA COURTS CONTINUE TO EXPAND LIABILITY UNDER PUBLIC NUISANCE LAW

Traditionally, a viable claim for public nuisance involved instances in which a property owner's activities unreasonably interfered in a right that is common to the public, usually affecting land use. Typical cases include blocking a public road or waterway or permitting illicit drug dealing or prostitution on one's property. The usual remedy in a public nuisance claim is to require the party engaged in the improper activity to "abate" or stop the nuisance. California is looking to expand public nuisance law through the courts, however, to extend to harm associated with public health crises and climate change.

CLIMATE CHANGE LITIGATION

The cities of **Oakland** and **San Francisco** filed a public nuisance lawsuit against BP for its role in causing climate change. The local governments are trying to make energy companies pay for climate-change-related infrastructure projects. The case had been transferred to federal court where **U.S. District Judge William Alsup** dismissed the suit in June 2018. "[O]ur industrial revolution and the development of our modern world has literally been fueled by oil and coal," he observed. "Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?"

"Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?"

– Judge William Alsup

Judge Alsup correctly recognized that the limited role of the judiciary is to solve disputes between parties before the court, not to develop national policy. It is the responsibility of the legislative and executive branches to create comprehensive public policy solutions for our nation's most pressing issues.

On appeal, the **Ninth Circuit** missed an opportunity to push back on activist attorneys' attempts to improperly expand public nuisance law. Unfortunately, the Court remanded the case to state court, reasoning that the cities' claims arose under state law, and therefore, federal courts did not have jurisdiction. Ultimately, the **U.S. Supreme Court** will decide whether these types of lawsuits belong in state or federal court, granting certiorari in a similar case in October 2020.

VAPING LITIGATION

Quick to capitalize on emerging public health crises, the trial bar turned its attention to e-Cigarettes. Plaintiffs' firms are urging school districts to sue Juul Labs and other e-Cigarette companies, alleging sale of their products creates a public nuisance. The suits claim Juul's marketing has led to a vaping epidemic that has harmed students and disrupted schools. Multiple California school districts have filed lawsuits against Juul Labs and multi-district litigation was created in the **U.S. District Court for the Northern District of California**.

OPIOID LITIGATION

In June 2019, California joined scores of others in suing drug companies for their role in the opioid crisis. In a lawsuit filed in **Los Angeles County**, **California Attorney General Xavier Becerra** claims manufacturers violated the state's public nuisance laws by expanding the market for opioids through deceptive marketing campaigns involving misrepresentations and omissions about its lawful, heavily-regulated, and non-defective products. Several other counties across the state have filed similar lawsuits against opioid manufacturers, which have been transferred to the massive multi-district litigation pending in federal court in Ohio.

AMERICANS WITH DISABILITIES ACT LAWSUIT ABUSE

Halfway through 2020, California hosts, by far, the most federal **Americans with Disabilities Act** accessibility lawsuits, 2,702. These are mostly lawsuits alleging that a restaurant, store, or its parking lot fails to meet any of numerous accessibility standards. The other states rounding out the top 10 jurisdictions for these claims – combined – had only 1,845 cases filed between January 1 and June 30, 2020.

California's 2020 ADA lawsuits are actually a brief respite from previous years, as a result of the general decrease in litigation (and operation) due to the pandemic. In 2019, California saw a meteoric rise in the number of lawsuits alleging that businesses violated accessibility standards. Plaintiffs' lawyers filed 4,794 federal Title III cases in 2019, over 500 more cases than California saw the prior year (4,249). The next highest state, with over 2,000 fewer cases, was New York (2,635).

In California, penalties for ADA violations are much higher due to the state's **Unruh Civil Rights Act,** which provides for a fine of $4,000 per violation, a fine other states do not have, plus attorneys' fees. Often these so-called "violations" are as minor as a mirror that is an inch too high or a sidewalk or parking lot that is angled one degree too much. Government officials and small business owners have started to fight this abuse.

For example, in April 2019, **Riverside County District Attorney Mike Hestrin** sued multiple attorneys, alleging they engaged in ADA "shakedowns" of small businesses. The complaint claims that the attorneys violated the **California Unfair Competition Law (UCL)** and false advertising laws. The lawyers sought to abuse the system by seeking out minor ADA violations to make easy money at the expense of small businesses. The Superior Court dismissed the case, holding that litigation privilege precludes this suit, but that ruling is being appealed.

The **Civil Justice Association of California** has filed an amicus brief in support of the State. **CJAC** argues that district attorneys have exclusive authority to bring UCL claims against those who file "shakedown" lawsuits. The complaints are "boilerplate," and individuals on whose behalf the claims were filed often did not use any of the architectural accommodations such as ramps, automatic doors, or handicapped parking spots. In most instances, plaintiffs did not even visit the business at issue in a suit.

ATTACK ON ARBITRATION

California courts and the legislature have restricted the availability of arbitration, ignoring clear instructions from the **U.S. Supreme Court** and federal law. The state is an outlier in its approach to arbitration clauses in employment contexts, finding California state laws are not preempted by the **Federal Arbitration Act (FAA)**, a decision that directly contradicts the U.S. Supreme Court's decision in ***AT&T Mobility LLC v. Concepcion*** (2011).

In fall 2019, **Governor Gavin Newsom (D)** signed into law **A.B. 51**, which "forbids employers from offering and entering into arbitration agreements with their workers, even if the workers may opt out of arbitration." In February 2020, the **U.S. Chamber of Commerce** sued the state to permanently enjoin A.B. 51 from going into effect, arguing it is preempted by the FAA. The judge granted a temporary restraining order and later granted a preliminary injunction. **U.S. District Judge Kimberly J. Mueller** found that the plaintiffs were likely to succeed on the merits of their claim. The state has filed an appeal.

ADOPTION OF "ABC" TEST OPENS FLOODGATES FOR LITIGATION TARGETING EMPLOYERS

In September 2019, the **California legislature** codified the California Supreme Court's adoption of what is known as the **"ABC Test"** for determining whether a person is an employee or independent contractor in **A.B. 5**. The bill revamps the law by presuming workers are employees unless the business can prove three elements. The law specifically targets the gig economy like Uber, Lyft and DoorDash that use digital platforms to connect workers with customers. It will serve as a goldmine for plaintiffs' lawyers and they will no longer be stymied by arbitration clauses when suing these companies for allegedly misclassifying workers as independent contractors, rather than employees.

The bill was set to go into effect on January 1, 2020, but businesses immediately challenged its enforcement. The blowback against the state was swift and powerful. On January 16, 2020, the **U.S. District Court for the Southern District of California** granted a preliminary injunction prohibiting enforcement of A.B. 5 against motor carriers operating in California. Also, the **American Society of Journalists and Authors** filed a lawsuit against the state over the law's provision that caps the number of articles a freelance journalist may write for a paper before they must be classified as an employee at 35. Plaintiffs contend that this low cap prevents journalists from continuing to write articles for any one organization, thus silencing them.

Ultimately, California enacted legislation that clarified some exceptions to worker misclassifications, allowing more individuals to work as independent contractors. These exceptions include music industry professionals, freelance writers and photographers, data aggregators, and performance artists.

In November, California voters delivered a huge a victory for Rideshare services like Uber and Lyft. **Prop 22** passed, which grants ride-hail and delivery companies an exemption from treating its drivers as employees.

'NO INJURY' LAWSUITS: FOOD COURT

California competes with **New York** for the most "no-injury" consumer class actions targeting the food and beverage industry. These are lawsuits often claim that some aspect of a product's packaging or marketing misleads consumers, even though it is likely to have made no difference to anyone's decision to buy a product.

In 2019, **California** came in second with 68 class actions filed against the food and beverage industry. New York had 74, and the next closest state, **Illinois**, had only six. Despite the pandemic, this type of litigation has not slowed. Through September 2020, California has had nearly 50 more food class actions filed, putting it on the same pace as the prior year and second again only to the Empire State. Significant factors behind the state's appeal include a plaintiff-friendly consumer law, a perception of a plaintiff-friendly and health-conscious jury pool, and California's size, which makes for large classes.

These are lawsuits over, for example, whether reasonable consumers are misled to believe Frosted Mini-Wheats is healthy and low sugar, contend they would not buy Crystal Light if they knew it contains synthetic malic acid, are concerned that Breyer's vanilla ice cream gets its flavoring primarily from substances other than vanilla plants, and are misled when Bigelow Tea markets itself as "Manufactured in the USA 100 percent Family Owned," but gets ingredients from overseas. Businesses often settle these nuisance lawsuits because they make the understandable judgment that it makes more sense to settle the case for a few thousand dollars than spend tens or hundreds of thousands of dollars on seeking dismissal, document production, and depositions. When companies choose to fight, they often win – eventually – but at significant cost.

For example, in October, a California federal judge tossed, after two years of litigation, a class action alleging that consumers would not view Mott's apple juice and applesauce as "natural" because tests allegedly detected pesticide at levels so low, they are permitted for organic products. No reasonable consumer, the court found, would expect a natural label to suggest that the product does not contain even a trace of pesticides.

Likewise, in June, another federal judge in California dismissed a lawsuit alleging that Nestle mislead consumers to believe "Premier White Morsels" contained white chocolate. The judge found that no reasonable consumer would be led to believe that the product contains white chocolate based on the use of the words "white" or "premier." That month, another judge tossed a suit alleging that consumers were tricked into thinking that granola bars were flavored only with real vanilla beans.

But when plaintiffs' lawyers win, they win big. In a lawsuit claiming ConAgra misled consumers by labeling its Wesson oil products as natural when they contained GMOs, the company entered a settlement after the court certified 11 classes. Under that deal, the lawyers who brought the case would receive $6.85 million in fees, while consumers received less than $1 million – paid as 15 cents in reimbursement for up to 30 purchases each. The fairness of that settlement is on appeal.

LIABILITY-EXPANDING LEGISLATION

The California legislature was poised to pass several "first-of-its-kind" liability-expanding bills in 2020 prior to the session being interrupted by the COVID-19 pandemic. Once the legislature reconvened in late summer 2020, the focus shifted to purely COVID-19 related legislation and the session adjourned before any of the problematic bills were passed. They are expected to be reintroduced in 2021. Among those bills:

- **A.B. 3262** would have created strict liability for internet marketplaces (I.e., Amazon) for damages proximately caused by defective products "to the same extent as a retailer that is not an electronic place or internet website."

END NOTES

- **Justice Ming Chin**, the most conservative justice on the California Supreme Court bench, retired on August 31, 2020. **Governor Gavin Newsom (D)** nominated **Justice Martin Jenkins** to replace Justice Chin in October. Notably, **Justice Jenkins** previously dismissed a lawsuit filed against automakers seeking to hold them responsible for climate change. In the opinion he stated, "injecting itself into the global warming thicket at this juncture would require an initial policy determination of the type reserved for the political branches of government."

- In June 2020, the **California Supreme Court** upheld a district attorney's authority to bring a case under California's **Unfair Competition Law** on behalf of the entire state of California. **Attorney General Xavier Becerra** expressed concerns about the potential grant of statewide authority because it would create conflicts of interest for local prosecutors, undermine the Attorney General's authority, and jeopardize cooperation and coordination between local and state prosecutors. The Court responded to these concerns, stating that more enforcement is better than none.

#4 SOUTH CAROLINA ASBESTOS LITIGATION

South Carolina asbestos litigation was included on the Watch List in 2019, thanks to its reputation for pro-plaintiff rulings and unfair treatment of defendants in the court overseeing these cases. A concerning pattern of discovery abuse, unwarranted sanctions, low evidentiary requirements, and multi-million-dollar verdicts solidified its position as a Judicial Hellhole.

Last year's Judicial Hellholes report warned that unless South Carolina addressed these issues and returned the handling of asbestos cases to the individual counties in ordinary course, plaintiffs would likely continue to exploit these troubling and inequitable practices. Unfortunately, that is just what has happened and the abuse has reached such levels as to elevate **South Carolina asbestos litigation** to near the top of the list.

TOP ISSUES

- **Discovery abuse**
- **Unwarranted sanctions against defendants**
- **Low evidentiary standards**
- **Improper consolidation of cases**

PRO-PLAINTIFF JUDGE OVERSEES DOCKET

Retired South Carolina Supreme Court Chief Justice Jean Hoefer Toal was appointed as the state's presiding asbestos judge in 2017. Since then, Judge Toal has built a record of broad pro-plaintiff rulings and has imposed severe and unwarranted discovery sanctions on defendants in almost every case she hears.

In March of 2019, Justice Beatty issued a surprise order that, without explanation, relieved Judge Toal of her oversight of asbestos cases.

Three months after that, on May 28, 2019 **Justice Donald Beatty** issued a third order indicating **Judge Toal** would be the **Chief Judge for Administrative Purposes** over asbestos cases in South Carolina, again without any explanation.

In several asbestos cases, **Judge Toal** has overturned or substantially modified jury verdicts she didn't agree with, inappropriately consolidated substantially different cases into one trial, and made the unusual move of naming insurance carriers as the "alter egos" of their insureds.

In May 2020, Zurich American Insurance Company asked the **South Carolina Supreme Court** to recuse **Judge Toal** from its litigation writing that her "factually unsubstantiated and procedurally irregular findings call into question Chief Justice Toal's impartiality and create an unacceptable risk of actual bias."

> *"Factually unsubstantiated and procedurally irregular findings call into question Chief Justice Toal's impartiality and create an unacceptable risk of actual bias."*
>
> **– Zurich American Insurance Company**

TEXAS PLAINTIFFS' FIRM FILES MOST SOUTH CAROLINA CASES

Those familiar with South Carolina asbestos litigation say **Judge Toal** almost always sides with plaintiffs' lawyers from the Dallas, Texas, Law Offices of Dean, Omar, Branham and Shirley and their local counsel Kassel McVey. Dean Omar started filing cases in South Carolina five years ago and now dominates the state's asbestos docket. KCIC Consulting reports that since 2018, a period when asbestos case filings nationally fell by nine percent, the Texas firm's asbestos filings in South Carolina increased by 250%.

Dean Omar Branham Shirley routinely demands overbroad discovery in conjunction with corporate defendant depositions, in which defendants are required to turn over what defendants believe are excessive, irrelevant, and often impossible to produce documents. When defendants can't comply, or **Dean Omar** just does not like the answers at the deposition, the firm seeks sanctions.

In just five recent cases, the firm filed at least 22 motions for discovery-related sanctions, including eight motions against defendant companies in just one case.

Those familiar with the history of asbestos litigation in South Carolina say they can't remember any sanctions motions being filed in the seven years before Judge Toal took over the asbestos docket from **Judge D. Garrison Hill**. He served as the state's top asbestos judge from 2011 until 2017, when he was elected to the **South Carolina Court of Appeals**.

RUBBER STAMPS PLAINTIFFS' SANCTIONS MOTIONS

Judge Toal grants the **Dean Omar** firm's motions for severe sanctions in the great majority of cases. The sanc tions she imposes often include an adverse instruction at the beginning of trial in which the Judge tells jurors that the plaintiff was exposed to the defendants' asbestos products, a crucial fact that should be decided by the jury based on the evidence.

In three cases involving long bankrupt defendant Covil Corporation, **Judge Toal** issued what is referred to as a "doomsday sanction" striking all of the insulation company's pleadings in three separate cases. In its appeal, Covil described the sanctions as a "hydrogen bomb" and wrote that the judge abused her discretion in imposing a punishment so disproportionate to the alleged litigation misconduct, which the company denied.

National asbestos attorneys say Judge Toal's discovery orders are more frequent, broader, and the sanctions more severe than in any other jurisdiction. In 2019, in response to a defense counsel's argument that a deposition notice was "Rare as hen's teeth."

OVERTURNED A DEFENSE VERDICT AND ADDED TO JURY AWARDS

Judge Toal has a record of overturning or modifying jury verdicts with which she disagrees.

For example, in a 2018 case, after Covil Corporation said it could not produce old documents because the papers had been destroyed in a fire, the court sanctioned or punished the company with an adverse instruction effectively telling the jurors to presume the company exposed the plaintiff to asbestos in his workplace.

The judge did this even though the plaintiff Jerry Crawford did not identify Covil in his deposition and a representative for another company, Daniel Construction, testified that it was a different company, not Covil, that had supplied all of the asbestos used in Mr. Crawford's workplace.

Despite the judge's instruction and after hearing all of the testimony, the jury found in favor of Covil Corporation.

Three months later, however, **Judge Toal** threw out the verdict by invoking South Carolina's **"thirteenth juror" doctrine**, effectively allowing the judge to become the 13th juror in the case, "hanging" the jury and requiring a new trial.

On at least two occasions, **Judge Toal** has increased the amounts of jury awards when she believed the jury did not award enough money to the plaintiff. In one case, she increased an award to a plaintiff and his wife by more than $1.6 million. In another case, without any explanation she increased a jury award by $400,000. Both cases are currently in front of the South Carolina Court of Appeals.

In another 2018 asbestos case in which the jury found for defendant Cleaver-Brooks, **Judge Toal** after the trial ordered the company to pay more than $300-thousand dollars for the plaintiff's legal fees, including charges for Ubers and taxicabs in Texas. The plaintiff's lawyers lost the case because the jury found that a surprise theory sprung by the lawyers during the trial turned out to be factually inaccurate. The jury also found that the plaintiff was not exposed to asbestos from a Cleaver-Brooks' product. The case is in front of the South Carolina Court of Appeals.

INSURERS QUESTION JUDGE TOAL'S IMPARTIALITY

On January 8, 2020, **Judge Toal** issued a sweeping contempt order ruling that Zurich, United States Fidelity and Guaranty Co. (USF&G) and other insurers essentially operated Covil Corporation as an "alter ego" controlling all its affairs. The judge's order allows plaintiffs to sue insurers as if they are companies that made or sold asbestos.

USF&G filed a writ with the **South Carolina Supreme Court** to stay the order, writing "even putting aside the due process, jurisdictional, and procedural defects of this purported finding, as a matter of public policy this alter ego theory would, if accepted, turn the insurance relationship on its head."

Zurich filed a writ of mandamus with the **South Carolina Supreme Court** writing that **Judge Toal** "has an obligation to recuse herself in order to safeguard Zurich's fundamental right under South Carolina law and federal due process to a 'fair trial in a fair tribunal.'"

Both the USF&G and Zurich writs were denied on procedural grounds.

IMPROPER CONSOLIDATION OF ASBESTOS TRIALS

On March 13, 2020, **Judge Toal** granted a motion to consolidate two vastly dissimilar cases into one trial in which the plaintiffs claimed they contracted cancer as a result of exposure to asbestos in Johnson & Johnson's Baby Powder.

One lawsuit involved a man who died at the age of 70 from pleural mesothelioma, a cancer of the lungs often associated with occupational asbestos exposure. Before this death, the plaintiff testified that he also worked with asbestos at a facility that manufactured products containing asbestos. J&J argued the man's cancer was more likely to have been caused by his occupational exposure.

The other case involved a young woman who was diagnosed at the age of 14 with peritoneal mesothelioma that is less strongly associated with asbestos. Studies, cited by J&J, show between 95 percent and 99 percent of that type of mesothelioma in women is the result of naturally occurring genetic errors during cell replications. The woman underwent surgery and chemotherapy and is currently cancer-free.

In its appeal of the consolidation order, J&J pointed out that South Carolina juries have heard three asbestos cases against the company and have yet to return a plaintiff's verdict. One case resulted in a defense verdict and two others resulted in hung juries. Plaintiffs wanted to combine the above two cases, the company said, to "tilt the scales of the trials in their favor."

The **South Carolina Supreme Court** agreed to an immediate review of Judge Toal's consolidation order, but the parties reached a settlement before the appellate court had an opportunity to rule.

JUDGE TOAL SAYS SHE MAY CONSOLIDATE OTHER CASES

On April 8, 2020, **Judge Toal** emailed businesses named as defendants in asbestos cases before her court and indicated that she was going to consolidate five cases into one September trial in **Richland County**. The five cases include plaintiffs with different diseases and occupations and involve 141 defendants from over 140 different worksites that span nineteen different states with different laws.

On May 15, 2020, after dozens of company defendants filed vehement objections to the consolidation, arguing that they had not even been given a chance to object to the motion before the court decided to consolidate the cases, **Judge Toal** reversed herself and denied the plaintiffs' motion to combine the cases. The judge, however, invited the plaintiffs to renew their consolidation motion after the facts of the cases are better developed and suggested consolidation may be needed to adapt to the COVID-19 pandemic.

#5 LOUISIANA

Louisiana is long known for lawsuit abuse, especially **New Orleans**. Following the 2019 elections, the Bayou State was poised to improve its civil justice system, despite the state's plaintiff-friendly governor, **John Bel Edwards (D)**. As with every other state, COVID-19 drastically impacted the 2020 legislative session; however, the state was still able to address the nation's second highest auto insurance rates in the country and place reasonable constraints on lawsuits related to the pandemic.

Louisiana is moving in the right direction, but much more work remains to be done. A recent Lawsuit Abuse Economic Impact Study conducted by **The Perryman Group** found the Louisiana economy experiences an estimated loss of $1.9 billion in annual output (gross product) due to excessive tort costs. This amounts to about 19,800 lost jobs and losses of $1.2 billion annually in personal income for hardworking Louisiana citizens. The resulting reduction in business activity due to civil justice costs leads to lower-than-expected gross product, which results in a hidden "tort tax" of more than $400 per person.

TOP ISSUES

- **Lawsuit abuse and scams drive auto insurance rates higher and higher**
- **Abusive coastal litigation continues to bog down state's economy**
- **In-state lawyers spend millions on lawsuit advertising**
- **Judicial misconduct reduces public trust in system**

SKY-HIGH AUTO INSURANCE RATES AND STAGED TRUCKING ACCIDENTS

Fueled by a climate of lawsuit abuse, the high cost of auto insurance plagues Louisiana families and businesses. Litigation plays a significant role in increasing insurance costs, leading to premium increases of 18.3 percent since 2015 for Louisiana drivers. Louisiana's auto insurance rates are second only to Michigan. Some insurance companies are no longer writing policies in the state, which reduces competition for consumers. Louisianans are feeling the effects on their pocketbooks, and some businesses are considering whether to relocate to less litigious states or close their doors.

Because of the highly litigious environment in Louisiana, insurers have had to pay for more labor to perform research and risk management. They also are building the risk of future litigation and settlements into their business/financial models. Increases in insurance costs vary, with low-risk carriers seeing an 8-10 percent increase and high-risk carriers seeing 35-40 percent rise annually.

SCAM TARGETING TRUCKING INDUSTRY

Several south Louisiana residents involved in an alleged scheme to fake crashes with 18-wheeler tractor trailers in the New Orleans area have pled guilty to conspiracy to commit wire fraud. The scheme involved the vehicle drivers connecting the passengers with a lawyer referred to in court documents as "Attorney A." The driver in each accident was paid $1,000 for every passenger involved. The driver was either paid by "Attorney A" in advance or soon after the accidents were staged. In total, trucking and insurance companies were defrauded of $277,500. The companies accrued these costs defending themselves against the baseless lawsuits.

In October 2020, "Attorney A" was identified as **Danny Patrick Keating Jr.** He was charged with conspiracy to commit mail and wire fraud. He allegedly hired **Damian Labeaud** to stage 31 accidents and then represented the 77 plaintiffs involved in those accidents.

The lawsuits typically involve multiple people in the claimant's vehicle, minimal (usually unnoticeable) damage to the claimant's vehicle, little to no damage to the insured truck, and a commercial driver that is unaware of an accident or disputes that a collision occurred. Many of these cases involve the same attorneys and doctors and allege serious bodily injury and negligence against the trucking company, seeking a big payout. Damages sought include medical expenses, mental anguish, loss of enjoyment of life, physical pain and suffering and inconvenience.

Many insurance companies settle these cases, rather than expend the time and resources involved in going to trial – and facing Louisiana's "hometown justice." The underlying issues in Louisiana's civil justice system and the prevalence of lucrative verdicts make it prime for such abuse. Some trucking companies, however, are fighting back. In fall 2020, Southeastern Motor Freight, Inc. filed a RICO lawsuit against one of the attorneys and two participants involved in staging the accidents.

COASTAL LITIGATION IS A DRAIN ON STATE'S ECONOMY

Coastal lawsuits targeting Louisiana's critical energy industry stretch the law far beyond its intent, ignore critical facts and involve private lawyers in a space meant for democratically elected decision makers who are accountable to the public. Coastal lawsuits attempt to outsource the enforcement of state-issued permits to local governing authorities. Even though energy companies provide thousands of quality jobs for hard-working Louisianans and millions in tax dollars for state coffers, these baseless lawsuits continue to move forward under Governor Edwards and his high-paid trial attorney friends. A 2020 report by the **Louisiana Mid-Continent Oil and Gas Association** found the oil and natural gas industry has contributed $73 billion to the state GDP and supported 249,800 jobs in 2019. The industry provided nearly $4.5 billion in state and local taxes, 14.6 percent of the state's total taxes.

According to a recent economic study by the **Pelican Institute for Public Policy**, Louisiana's coastal litigation leads to an economic loss of $44.4 million to $113 million each year. The increased risk of litigation for oil drilling companies has resulted in 53-74 fewer oil wells from 2014 to 2016. As a result, Louisiana has seen "a decrease of more than 2,000 employees across four occupations in the state's oil and gas industry, and these lost jobs equate to lost earnings of $70 million per year." These coastal lawsuits continue to move the state in the wrong direction and only serve as a burden on the state's economy as it looks to rebound from a difficult year.

> ***Louisiana has seen "a decrease of more than 2,000 employees across four occupations in the state's oil and gas industry, and these lost jobs equate to lost earnings of $70 million per year."***
>
> **– Pelican Institute for Public Policy**

As it stands now, seven parishes have filed more than 40 lawsuits. These lawsuits have yet to be heard, though the **U.S. Court of Appeals for the Fifth Circuit** in New Orleans recently affirmed a decision to keep two of these cases in their preferred forum, Louisiana state courts, which are viewed as more friendly to plaintiffs than neutral federal courts. While the initial decision only directly impacts two of the cases brought by the Plaquemines and Cameron Parishes, it sets the stage for the others.

To date, the oil and gas industry has funded over $230 million in "coastal building and protection projects." If the energy companies are unsuccessful defending themselves, they could be forced to pay billions of dollars. While the defendants are perceived as "Big Oil" companies, the majority of the over 200 defendants are small, independent operators. The litigation has so far failed to accomplish anything substantial, and while it's pending, the state is losing out on a minimum of $22.6 million each year in industry royalties.

In an effort to stop this unprecedented abuse of the **Coastal Zone Management Authority** (CZMA), legislation introduced during the 2020 Regular Legislative Session would have clarified and reaffirmed that authority of local government to bring enforcement action under the CZMA is limited to uses of local concern. The legislation would have further clarified that enforcement action for issues of state concern (i.e., state-issued permits) is limited to the **Secretary of the Department of Natural Resources** or the Attorney General, reinforcing that the state alone is vested with the authority to issue, regulate and bring enforcement action over coastal use permits. This legislation ultimately failed to pass.

POTENTIAL SETTLEMENT ON THE HORIZON?

Meanwhile, a reported settlement with **Freeport-McMoRan** announced in Fall 2019 has yet to come to fruition. **John Carmouche**, the coastal ligation's lead plaintiffs' attorney, negotiated the deal behind closed doors, and the exact terms of the agreement, including the lawyers' share of the settlement, still have not been revealed to the public.

However, according to news accounts published in 2019, the proposed deal could generate $23.5 million in cash payments to be directed into a yet-to-be-created state fund dedicated to coastal restoration. Reportedly, another $76.5 million in questionable income could be generated through the sale of ill-defined "environmental credits" created by settlement-mandated "restoration activities" to be carried out over a period of 22 years. There is no explanation of how this vague commitment would be enforced or what security backstops this long-term obligation.

Carmouche's attempt to pass legislation to effectuate the proposed settlement deal during the 2020 Regular Legislative Session was met with swift opposition and failed to make it out of even one committee. A broad coalition of opponents, including energy industry advocates, landowners, and dozens of business organizations across the state, successfully argued the flawed settlement framework designed by plaintiffs' lawyers would have: (1) diverted funds away from coastal restoration, (2) incentivized more meritless litigation targeting the energy industry, and (3) effectively allowed for the wholesale outsourcing of state coastal policy and regulatory enforcement authority. There is a clear lack of transparency. Policy, not trial lawyers, should drive solutions. Any settlement framework should also clearly outline the process for funding to flow directly to impacted areas specifically for coastal restoration.

JUDGE'S RECUSAL

Newly elected **Louisiana Supreme Court Justice Will Crain** was the subject of successful recusal motions by Carmouche, discussed in secret by the court, citing a campaign mailer mentioning Carmouche as proof of "actual bias."

TRIAL LAWYER ADVERTISING

Advertisements to file lawsuits are rampant in Louisiana. A recent study by the **American Tort Reform Association** found television viewers in Louisiana's three largest media markets were bombarded by more than 250,000 ads for lawyers, lawsuits and legal services on local television broadcasts over a six-month period. That translates into one legal services ad aired every minute on average in **New Orleans**, **Baton Rouge** and **Shreveport**, purchased at an estimated cost of $16 million.

One prominent Louisiana plaintiffs' attorney has 800 billboards up along Louisiana highways, and symbolizes the epitome of trial attorney advertising in Louisiana. The law firm spends about 35 percent of its budget on advertising. As a contingency-fee lawyer, he takes 32 percent of settlements, and even more if the case goes to trial and is successful.

Several proposals were introduced to regulate lawsuit advertising in 2020. The strongest of these measures (**S.B. 395**) by **Senator Heather Cloud (R)** would have allowed the Attorney General's office to regulate ads through its consumer protection authority. **Governor Edwards (D)** vetoed this legislation following passage in both chambers. A bill introduced by **Senator Patrick Connick (R)** (**S.B. 115**), which requires advertisements for legal services that mention settlements or jury awards to disclose the amount of attorney fees paid from a settlement, was signed into law. Additionally, a resolution (**SCR 57**) by **Senator Hewitt (R)** urging the **Louisiana Supreme Court** and the **Louisiana State Bar Association** to consider a "lawyer advertisement review recognition program" also passed the legislature and did not require the governor's signature. Civil justice leaders were pleased with the progress, but expect more to be done to address the problem.

JUDICIAL MISCONDUCT AND LACK OF TRANSPARENCY

Louisiana's judiciary has long maintained a reputation for a lack of transparency in dealing with judicial misconduct. Numerous recent scandals have contributed to both the public and legislature losing patience with the judicial branch's repeated promises to do better. Legislation was filed during the Regular Session to reduce the secrecy surrounding the discipline of judges. Due to the impacts of COVID-19, the legislation did not make it through the process.

In response to public pressure (including an investigative series by The Advocate/NOLA.com), the **Louisiana Supreme Court** announced in April that it would allow citizens to attend formerly private judicial misconduct hearings. However, it declined to eliminate a rule that prevents people who file complaints against judges from discussing those claims publicly.

FINANCIAL TRANSPARENCY

The **Louisiana Supreme Court** also began posting financial disclosure information on its newly-revamped website in May only after the private criminal watchdog organization **New Orleans Metropolitan Crime Commission** posted the same information on its website.

COVID-19'S IMPACT ON BAR EXAM

Stemming from COVID-19, the **Louisiana Supreme Court** voted to allow 2020 Louisiana law school graduates to forgo the bar exam. **Justice John Weimer** cast the deciding vote, without disclosing for the record that his daughter is a recent graduate who will benefit from this historic decision by the court. Those who registered for the August and October session of the exam will take an open-book test that they will submit via e-mail.

PASSAGE OF SIGNIFICANT LEGAL REFORM

This year marked the passage of the most significant legal reforms in Louisiana since the 1990s.

THE CIVIL JUSTICE REFORM ACT OF 2020

Louisiana enacted the **Civil Justice Reform Act of 2020** to address the state's auto insurance crisis. The new law will (1) reform direct action by limiting information provided about insurance coverage to jurors during trial, (2) repeal a rule that prevents jurors from learning whether a plaintiff wore his or her seatbelt , (3) lower the highest-in-the-nation jury trial threshold from $50,000 to $10,000, and (4) allow the jury to learn the amount that was actually paid for medical care (rather than inflated amounts that may appear on invoices before significant discounts) while allowing judges the discretion to award a maximum of 40 percent of the difference between the amount billed for medical expenses and the actual amount paid following the verdict. While these changes are not as comprehensive as reform advocates would like, these reforms are positive developments and more critical now as families and businesses work to rebuild Louisiana's struggling economy.

As a result of the enacted reforms, **Louisiana Commissioner of Insurance Jim Donelon** expects to see auto insurance premiums begin to drop. "I am cautiously optimistic that it will bring down rates. I know that's what the intent of the legislature has been. They have worked extremely hard to pass the reforms that would put us in step with almost every other state."

PASSAGE OF COVID-19 LIABILITY PROTECTIONS

Louisiana adopted a series of laws to reduce the liability concerns of individuals, businesses, schools, and manufacturers during the pandemic. This legislation generally provides that no person, business, or government entity is liable for an injury stemming from exposure to COVID-19 unless it failed to follow applicable public health guidance and operated in a grossly negligent manner. The Legislature also provided specific protections for schools, event planners, restaurants providing to-go service, and makers of personal protective equipment and other products to help in the COVID-19 response.

END NOTES

- The **Louisiana Supreme Court** has been asked to decide whether the state is barred from pursuing a claim under a new theory of liability where the injury at issue had already been settled in previous litigation. In ***Landry v. Astrazeneca LP***, the attorney general and pharmaceutical companies had settled litigation brought in **East Baton Rouge** over whether the state had paid too much for a drug, Toprol-XL, and related claims. The attorney general then filed a new suit in **Baton Rouge** over the same product and conduct. This time, the State alleged that the drug's price was inflated because the companies had "improperly manipulat[ed] patent filings to frustrate the market of generic equivalents." In July 2020, the intermediate court permitted the lawsuit, despite the prior settlement, because it found the State was complaining about different conduct than at issue in the first suit.

#6 GEORGIA

The "**Peach State**" once again finds itself on the Judicial Hellholes list thanks to a continued rise in nuclear verdicts, the increasing role of third-party litigation financing, and ever-expanding premise liability. Trial lawyers have spent millions of dollars on advertisements, publicizing their jackpot verdicts and looking for their next big pay day. And while the Georgia legislature seemed poised to address lawsuit abuse plaguing the state's judicial system, its efforts were derailed by the COVID-19 pandemic.

TOP ISSUES

- **Nuclear verdicts on the rise**
- **Trial lawyers spending millions of dollars on lawsuit advertising**
- **Third-party litigation financing industry driving litigation in the state**
- **Supreme Court attributes cybercriminal acts to law abiding businesses**
- **Courts expand premises liability**
- **Disappointing legislative session**

"NUCLEAR" VERDICTS ON THE RISE

Nuclear verdicts are multi-million-dollar awards, usually to compensate for a person's subjective and immeasurable pain and suffering that cannot be justified as compensating a person for an injury. These awards typically result from a plaintiffs' lawyer's urging the jury to return a specific, extraordinary amount and misleading them to think that level is the norm. It can also result from plaintiffs' lawyers' inflaming the jury to improperly punish a defendant for conduct that would not qualify for punitive damages.

TRUCKING INDUSTRY A MAIN TARGET

The trucking industry has been one of the hardest hit by nuclear verdicts in Georgia. The **American Transportation Research Institute** indicates that while there were only four cases in 2006 where the awards exceeded $1 million, there were 70 in 2013. From 2017 to 2018, the average size of a trucking jury verdict grew an astounding 483 percent.

As discussed in last year's report, a $280 million verdict was handed down in Columbus, Georgia, the largest verdict in the county's history. The **Muscogee County verdict** was delivered after a mere 45 minutes of jury deliberation. The plaintiffs' lawyers at **Butler, Wooten & Peak LLP** then advertised their success to solicit more business.

The case arose out of a tragic accident in which five people were killed after a tractor-trailer operated by a Schnitzer Southeast driver collided with their vehicle. The jury awarded an astounding $150 million for the value of the life of one passenger, $30 million for pain and suffering, plus $100 million in punitive damages and $65,000 in attorneys' fees. The jury expressed frustration over the company not apologizing for the accident;

however, the plaintiffs' attorney moved to exclude the mention of any apologies during the trial. The plaintiffs' attorney also accused the company of putting a fatigued driver on the road; however, the driver had been on vacation for four days and the morning of the accident was his first day back at work. Finally, local nightly news coverage contained "inflammatory inaccuracies" that may have impacted the jury.

Truckers point to the "reptile theory" in part for the large verdicts. This is a psychological trick that influences juries to believe they are personally threatened by the trucking company. It triggers the jury to believe it is in survival mode.

Because of the increasing nuclear verdicts, the insurance market is "brutally tough" for truckers. To make matters worse, the **Federal Motor Carrier Safety Administration** is considering raising the statutory minimum coverage limit from $750,000 to $2 million. Trucking insurance premiums rose 12 percent in 2018, and 42 percent from 2010 to 2018. Many truckers face 20 percent or even 30 percent increases in premiums. The median verdict rose from $23 million to $44 million over the second half of 2018 and all of 2019.

These verdicts have led to carrier bankruptcy and higher insurance premiums. Trucking insurance premiums, in part, have compelled Georgia based carrier CSS to shut down. After 38 years in business, when its insurance renewal for 2020 came around, the costs were just too high for them to continue operating. Many other midsize and large carriers also closed their doors in 2019 including Celadon, HVH Transportation, New England Motor Freight Inc., Falcon Transport, Stevens Tanker Division, GDS Express, and LME.

In February 2020, a plaintiff was awarded $21 million in Georgia federal court in a lawsuit against a tractor-trailer driver following an accident that killed a pedestrian. The driver suffered a sudden medical emergency while behind the wheel and was found unresponsive in the vehicle. The initial verdict was $15 million, but it was later increased to $21 million after the jury heard evidence that traces of opioids were found in his system. $6 million was added for litigation expenses.

OTHER NUCLEAR VERDICTS

These "nuclear verdicts" follow several extraordinary awards in 2019.

For example, a **Muscogee County jury** returned a $125 million verdict in a case in which the family of a 62-year-old steelworker who had significant health issues sued the owner and management of his apartment building for his death. The lawsuit blamed his death on the building's failure to fix the broken air conditioning in his room.

Lawsuits stemming from criminal attacks in a CVS and Kroger parking lots ended in verdicts of $43 million in **Fulton County** and $69.6 million in **DeKalb County**, respectively, in 2019. The businesses, not the criminals, were held liable for these extraordinary sums on the basis that they should have had more security.

In December 2019, the survivors of a stuntman, who died while jumping off a balcony on the set of "The Walking Dead", were awarded $8.6 million in a **Gwinnett County court**. In another case that month, a young man was awarded $15 million by a **Greene County cour**t after injuring his leg in a motocross accident. Despite the fact that the boy's father signed an "assumption of risk" waiver, the court still awarded $14.2 million to the rider and nearly $800,000 to the parents for medical expenses.

The prior year, a **Clayton County jury** issued a $1 billion verdict against a security company after an employee committed a sexual assault at an apartment complex. The plaintiff alleged that the company should not have hired the employee because he did not have a license to be an armed security guard.

As the mega-million verdicts become more prevalent in Georgia, mindsets have shifted. According to those on the ground, the largest verdicts in the state used to be around $20 million, "Now the benchmarks are $125 million and $280 million."

TRIAL LAWYER ADVERTISING

COVID RELIEF MONEY USED FOR ADVERTISING

Plaintiffs' lawyers are always looking for new ways to expand their business and this year was no different. Several plaintiffs' firms, including the powerhouse firm **Morgan & Morgan**, received millions of dollars from the COVID-19 federal **Paycheck Protection Program**. This money was meant to help struggling businesses cover operating expenses including rent and employee salaries and benefits, but at least some of the money was used by law firms to recruit potential plaintiffs for future litigation. **Morgan & Morgan** applied for and received $12 million to $27 million in relief from five different states. During this same time period, the firm increased its advertisement spending from $50,000 per day to $300,000 per day.

TRIAL LAWYER ADVERTISING DATA

Trial lawyers are aware of the increasing prevalence of nuclear verdicts and are looking to capitalize on the momentum in the state. During the third quarter of 2019, Georgia lawyers spent $10 million on advertisements on local television stations. In addition to these ads, Georgia viewers also saw $71 million worth of national legal advertisements.

In **Atlanta**, local legal ads are 9 times more frequent than those for clothing stores. In **Savannah**, local legal ads are 8 times more frequent than those for furniture stores.

In addition to the **Butler, Wooten and Peak LLP** firm's advertising of its $280 million nuclear verdict, **Morgan & Morgan** also plays a big role in advertising in Georgia. The firm looks to circumvent important procedural rules by including specific messaging on its website. At trial, evidence of insurance or issues relating to insurance coverage are not allowed to be introduced, but **Morgan & Morgan** skirts that policy by speaking about insurance prior to trial. On its website, the company explicitly talks about insurance and how it is recovering against insurance companies rather than the defendant.

This approach pays dividends even in the smallest cases. In 2019, the firm recovered $1.2 million in a dog bite case in Atlanta.

THIRD-PARTY LITIGATION FINANCING PLAYING AN INCREASING ROLE IN GEORGIA'S JUDICIAL SYSTEM

Georgia's third-party litigation funding (TPLF) industry is thriving. Funders are a quick Google search away, and a federal judge, in January 2020, ruled that litigation funding agreements are not subject to Georgia's statutory interest rate caps. The **Georgia Supreme Court** clarified that TPLF does not qualify as lending, and therefore, funders can charge any usurious rate they want. Instead of applying state lending laws, the Court asked the legislature to regulate the industry. Because the **Georgia Supreme Court** declined to restrict the industry it labeled "insidious," TPLF will likely continue to grow in the state.

TPLF may be propelling Georgia's excessive trucking litigation. Doctors and funders, in conjunction with plaintiffs' lawyers, are increasingly steering litigation. ProMed Capital and Spine Center Atlanta have engaged with numerous plaintiffs' attorneys in agreements where Spine Center Atlanta's founder, Dr. Chappuis, recruits plaintiffs and ProMed Capital pays their medical bills, which are up to 3.5 times the market rate. The plaintiff's attorney then recovers the enlarged medical bills against a trucker and its insurer, and rewards ProMed Capital for its role.

YET ANOTHER YEAR OF LIABILITY-EXPANDING DECISIONS IN PREMISES CASES

"MURDER KROGER"

In June 2020, a three-judge court of appeals reversed a lower court's dismissal of a suit against Kroger and its security company, finding that a jury should decide whether they should be held liable for a murder that occurred in the supermarket's parking lot.

In this case, a construction worker was shot in front of a store that was colloquially named the "murder Kroger" because of its reputation for violence outside of it. When the construction worker confronted a man who was attempting to break into his truck, the man shot him.

The deceased's spouse filed a suit against Kroger alleging it failed to properly secure its premise and "remediate a very long history of crime at this property." Kroger had contracted with a security company, Norred & Associates, to protect the store and customers.

The trial court granted the defendant's motion for summary judgment, finding the construction worker put himself in harm's way by confronting the man. The appellate court ruled, however, that the case should go to trial, allowing a jury to decide whether confronting the thief showed a lack of ordinary care.

As noted above, this follows a 2019 case in which a **DeKalb County** jury awarded $81 million to a plaintiff who was shot by carjackers in another Kroger Store parking lot. Despite a security presence, Kroger was responsible for paying $69.6 million of the award (just 14 percent of the fault was placed on the two attackers). The supermarket was located in a high-crime area and had a security guard at the store entrance but not in the parking lot.

OUTRAGEOUS 'SLIP-AND-FALL' VERDICT

In May 2020, a woman was awarded $1.2 million in a slip-and-fall case against a restaurant in **Gwinnett County**. Lisa Ruede was injured when she slipped down wet stairs caused by a leaky ceiling pipe. This award is exponentially larger than the national average for slip-and-fall settlements ($15,000-$45,000).

OTHER LIABILITY-EXPANDING DECISIONS BY GEORGIA SUPREME COURT

ATTRIBUTING CYBER CRIMINAL ACTS TO LAW ABIDING BUSINESSES

The **Georgia Supreme Court** has placed businesses that keep customer information on the hook for attacks by cyber criminals, even if the plaintiffs have not experienced any harm. The case arose after an anonymous hacker known as the "Dark Overlord" demanded ransom after accessing an orthopedic clinic's patient database, including their social security numbers and health insurance details, in 2016. The clinic refused to pay the ransom and notified patients of the data breach. Three current and former patients then filed a class action against the clinic. Both the trial court and intermediate appellate court ruled that Georgia law does not recognize a claim seeking damages for future, speculative harms. In December 2019, however, the **Georgia Supreme Court** reversed in ***Collins v. Athens Orthopedic Clinic***, finding this lawsuit could move forward even when the patients had not shown actual misuse of their information from the breach. Instead, the Court followed a "chain of inferences" to conclude that the risk of identity theft was "imminent and substantial" because at least one person's personal data had been offered for sale on the dark web. **Justice Nels Peterson**, who authored the Court's opinion, acknowledged that the decision allowed compensation for a "fairly new kind of injury." While he allowed the case to move forward even while acknowledging "traditional tort law is a rather blunt instrument for resolving all of the complex tradeoffs at issue in a case such as this" and that "tradeoffs that may well be better resolved by the legislative process."

EXPANSION OF WORKERS' COMPENSATION LIABILITY

In June 2020, the **Georgia Supreme Court** expanded coverage of workers' compensation policies to include coverage for injuries sustained while employees are on break. In **Frett v. State Farm**, an employee was on a scheduled break when he slipped and fell leaving the break room to go outside. The lower courts found that there was no coverage because break time is personal time. The Supreme Court reversed, finding break time constituted time incidental to employment.

DEFINITION OF "VICIOUS DOG"

The **Georgia Supreme Court** ruled that dogs that are not on leashes are considered legally vicious, and therefore, owners are subject to strict liability. In this case, a dog escaped its home at a towing yard and attacked the plaintiff and his dog. The Court recognized that this definition "departs from the common understanding of the term and as parsed out in the common law," but argued that this was the best interpretation in order to avoid future litigation over what constitutes "vicious."

CASES TO WATCH

STATUTORY LIMIT ON PUNITIVE DAMAGES UNDER FIRE

Additionally, trial lawyers are gearing up to challenge the constitutionality of the state's limit on punitive damages. A **Cobb County jury** awarded a plaintiff $5 million plus $50 million in punitive damages, which under the statute would be reduced to $250,000. The plaintiff's lawyer, **Naveen Ramachandrappa**, has stated that once the judge enters a final judgment, "We're going to ask the court to hold that the punitive damage cap cannot be constitutionally sound, because, under the Georgia Constitution, the issue of punitive damages is one for the jury to decide, not the Legislature."

2020 LEGISLATIVE SESSION

In early 2020, Georgia Republicans "renewed their push for tort reform in a big way." Unfortunately, their efforts were derailed by the COVID-19 pandemic, and they were unable to address the state's lawsuit abuse. The bills they were poised to consider would have addressed priorities from premises liability to damages based on compensation beyond the actual cost of medical care, as well as allowing juries to consider whether occupants of a vehicle were wearing seat belts in car accident cases.

COVID-19 LIABILITY LEGISLATION

Several states have enacted robust liability protections for businesses and health care providers from COVID-19 related lawsuits, and Georgia took a step in the right direction in addressing these concerns. On August 5, 2020, **Governor Brian Kemp (R)** signed a COVID-19 liability bill that raises the standard for a plaintiff to recover for a claim alleging that he or she was exposed to COVID-19 on any premise, a claim of injury from receiving medical care effected by the pandemic, or a claim that personal protective equipment made, sold, or donated in response to the pandemic is defective. The law also provides an assumption that a person assumed the risk of exposure to COVID-19 at a public gathering or premises if a warning is conveyed on a sign, receipt, ticket, or event wristband. A plaintiff can overcome these liability protections by claiming that a defendant was grossly negligent, reckless, or engaged in willful misconduct.

The Georgia COVID-19 Pandemic Business Safety Act will be active for less than a year: From August 5, 2020, to July 14, 2021. The law does not cover COVID-19 liability for acts or transmission prior to the bill's implementation, leaving businesses exposed when the disease was least understood and most unpredictable. The bill only protects against lawsuits "accruing" prior to July 14, 2020 but fails to define "accruing." So even if the virus is contracted during the bill's effective period, a court may allow the claim to proceed if the lawsuit was filed after the sunset period.

#7 CITY OF ST. LOUIS, MISSOURI

The **City of St. Louis Circuit Court** is notorious for allowing blatant forum shopping and awarding excessive punitive damage awards. The court also fails to ensure that cases are guided by sound science.

In 2020, the **Missouri Legislature** took great strides toward addressing lawsuit abuse that has plagued the "Show-Me-Your-Lawsuit" state for years. A recent study released by **The Perryman Group** estimates that excessive tort costs to the Missouri economy result in $2.0 billion in annual direct costs and $3.1 billion in annual output (gross product). Ultimately, this costs the state an estimated 32,205 jobs.

While the enactment of several reforms is encouraging for Missouri's future, the success is contingent on the St. Louis court's proper application of the new statutes. Some St. Louis judges have a history of ignoring

TOP ISSUES

- **Court allows blatant forum shopping**
- **"Junk science" introduced in courtrooms**

both state law and U.S. Supreme Court precedent regarding expert evidence standards, personal jurisdiction and venue, and damage awards.

ST. LOUIS IS THE PREMIER JURISDICTION FOR PLAINTIFFS' BAR

Personal injury lawyers flock to St. Louis to file their lawsuits to take advantage of the plaintiff-friendly judges. These "out-of-state" plaintiffs clog the city's courts, drain court resources, and drive businesses out of the state leading to job loss.

MISSOURI HIGH COURT ALLOWS OUTRAGEOUS ST. LOUIS TALC VERDICT TO STAND

St. Louis is home to the largest talc verdict to date. In July 2018, a **City of St. Louis** jury awarded $550 million in actual damages and $4.14 billion in punitive damages to a group of 22 plaintiffs. The women claimed that their ovarian cancer was caused by exposure to asbestos allegedly found in Johnson & Johnson's baby powder. Of the 22 women involved in the lawsuit, 17 had no connection to Missouri. Each was awarded the same amount of money, despite there being different facts for each, and differences in relevant law. After a six-week trial, jurors deliberated for less than a full day before reaching this astounding result.

In June 2020, an appellate court upheld the verdict but reduced the damages award from $4.69 billion to $2.12 billion – $500 million in actual damages and $1.62 billion in punitive damages.

In a very disappointing order in November 2020, the **Missouri Supreme Court** refused to review the verdict. **ATRA** had urged the state's high court to review the case and (1) limit the exercise of personal jurisdiction where the defendant and many plaintiffs have little to no connection to the forum state, (2) not allow the joinder of claims whose only commonality is alleging injury by the same product, and (3) address the constitutionality of the massive punitive damages award. The punitive damages award exceeds the level permissible under the guideposts set out by the **United States Supreme Court**. Johnson & Johnson plans to petition the high court for review.

JUNK SCIENCE IN THE COURTROOMS

Despite the legislature enacting expert evidence reform in 2017, St. Louis judges have allowed junk science to be heard in their courtrooms. Plaintiffs' experts, whose testimony has been determined to not be based in science by other state courts, have been permitted to testify in St. Louis courts.

TALC LITIGATION

Expert testimony plays a crucial role in talc cases. Plaintiffs' "experts" tell jurors that talcum powder causes ovarian cancer, even though the **American Cancer Society** has found that research regarding this link is "mixed" and potentially "biased," and that if there is an increased risk, the risk "is likely to be very small."

Nevertheless, defendants' pleas to have those so-called experts excluded from St. Louis trials have largely fallen on deaf ears.

ROUNDUP LITIGATION

St. Louis, along with fellow Judicial Hellhole **California**, is home to tens of thousands of lawsuits against Bayer AG involving Roundup® weedkiller. Facing mounting lawsuits generated by a barrage of lawsuit advertising, the cost and risk of trials, and harm to its business, in June 2020, Bayer proposed an $11 billion settlement to resolve about 75 percent of the 125,000 Roundup cases nationwide. Not surprisingly, plaintiffs' lawyers will walk away with about one third of each individual plaintiff's settlement in contingency fees, or about $3-4 billion.

Although the settlement is proceeding in the **Northern District of California**, much of the litigation is located in St. Louis. **James Onder**, a plaintiff's attorney in St. Louis, opted to keep his 24,000 cases out of the settlement after finding the settlement offer "insultingly low."

St. Louis Roundup trials have been delayed due to the settlement discussions; however, all one has to do is examine the trials in California to understand the plaintiffs' lawyers' playbook. The foundation of the litigation is a "junk science" report by the **International Agency for Research on Cancer (IARC)** that classified glyphosate, the active ingredient in the herbicide Roundup®, as "probably carcinogenic." IARC is a specialized cancer agency of the **World Health Organization**, known to be outmoded, heavily politicized, and sub-standard in the quality of its science. The IARC report was the basis for a San Francisco jury to enter a jury award of more than $289 million against Monsanto. IARC's classification is in stark contrast to more than 800 scientific studies as well as analyses by the **U.S. Environmental Protection Agency**, **Health Canada**, and the N**ational Institutes of Health**.

SIGNIFICANT REFORMS PASSED BY LEGISLATURE

The **Missouri legislature** took great strides toward addressing lawsuit abuse during the 2020 legislative session, following progress in adopting laws intended to prevent unreliable expert testimony and reduce litigation tourism. It remains to be seen whether these reforms will move the state off of the Judicial Hellholes list once and for all, but the ATRF remains hopeful and will keep a close eye on the state.

MISSOURI MERCHANDISING PRACTICES ACT (MMPA)

Lawyers have long abused the state's consumer law, the **Missouri Merchandising Practices Act (MMPA)**. They generate shakedown class action lawsuits alleging that product labels, advertisements, or other business practices are misleading where no reasonable consumer has been misled or lost money. They take advantage of a 2016 Missouri Court of Appeals decision that subjects companies to lengthy and expensive litigation, even for the most ridiculous of claims. The statute has become overstretched and expanded well beyond the intent of the drafters.

The **MMPA** is a popular vehicle for lawsuits because it provides for attorney's fees and punitive damages. This incentivizes the trial bar to include an MMPA claim when filing personal injury and other lawsuits. This poses a real threat, particularly for small businesses, because punitive damages are not covered by insurance policies. Businesses faced with MMPA claims often settle given the unwillingness of Missouri courts to dismiss meritless cases, the cost of lengthy litigation, and the liability exposure if the case goes to trial.

In July 2020, **Governor Mike Parson (R)** signed **S.B. 591** into law to help curb the significant lawsuit abuse occurring under the MMPA. Under this legislation, judges may dismiss a claim when no reasonable consumer would be misled by the advertising, labeling, or other practice challenged in the lawsuit, and there are defined requirements for class action proceedings. The legislation also clarifies that plaintiffs must establish that they have experienced a loss and its amount through objective evidence, including in class action litigation. The reform also should prevent plaintiffs' lawyers from misusing MMPA claims in personal injury lawsuits.

PUNITIVE DAMAGES REFORM

Missouri courts also have a history of awarding unwarranted and excessive punitive damage awards. **S.B. 591** addresses this abusive practice. The legislation provides that juries may award punitive damages when there is clear and convincing evidence that a defendant intentionally harmed a plaintiff or acted with a deliberate and flagrant disregard for the safety of others. It also specifies when punitive damages may be awarded against an entity for the acts of an agent, and lays out a process to determine that the burden of proof and standard of liability for punitive damages have been met.

8 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS

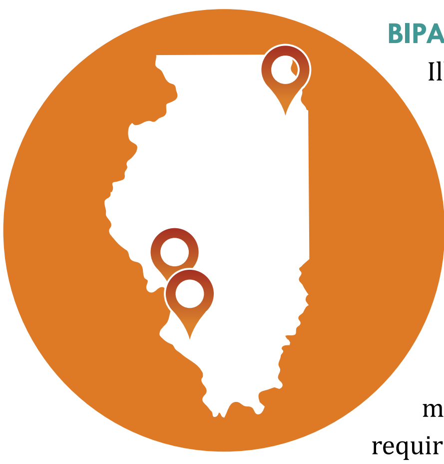
This trio of Illinois counties continues to be a preferred jurisdiction for plaintiffs' lawyers thanks to no-injury lawsuits, plaintiff-friendly rulings in asbestos litigation, and the promise of a liability-expanding legislative agenda each and every year. Illinois is ground zero for no-injury lawsuits, thanks in large part to its **Biometric Information Privacy Act** and the courts' expansive interpretation of the law. While 2020 did not bring the normal volume of litigation due to COVID-19 shutdowns, there is no reason to think it will not resume to normal levels once the pandemic has ended.

TOP ISSUES

- **"No-Injury" BIPA litigation continues to flourish**
- **Plaintiffs' bar's preferred jurisdictions for asbestos litigation**
- **Plaintiff-friendly legislature**

The **Illinois General Assembly** continues to look for innovative new ways to expand liability for businesses, increasing the financial burdens of doing business in the state. At a time when business is reeling from the economic impact of COVID-19, the legislature should consider enacting reforms to ease the economic burden caused by abuses of the state's civil justice system. A recent report by **The Perryman Group** estimates that excessive tort costs to the Illinois economy result in $5.7 billion in annual direct costs and 99,966 jobs when dynamic effects are considered. These excess costs result in a "tort tax" of $761.81 per person.

"NO-INJURY" LAWSUITS FLOOD ILLINOIS JUDICIAL SYSTEM



BIPA LITIGATION SPREADING

Illinois lawmakers enacted the **Biometric Information Privacy Act (BIPA)** in 2008, but it lied dormant until 2015 when plaintiffs' lawyers discovered its business potential. **BIPA** provides a private right of action to a person whose fingerprint, voiceprint, or hand or facial scan, or similar information is collected, used, sold, disseminated or stored in a manner that does not meet the law's requirements. The number of BIPA class actions surged from just 6 in 2015 to 161 in 2019.

BIPA requires companies to inform an individual in writing and receive a written release prior to obtaining or retaining his or her biometric data. If a company fails to follow this procedure or meet other requirements, then any "aggrieved" person can seek the greater of $1,000 or actual damages for each negligent violation, and the greater of $5,000 or actual damages for each violation they allege was recklessly or intentionally committed.

Following BIPA's enactment, class action lawyers immediately sought to cash in by targeting businesses that use iris scans, fingerprints and facial recognition data that are used increasingly to keep physical workplaces and sophisticated communications and cyber systems safe. These lawsuits do not allege any harm from collection of the information (which is encrypted) but seek substantial civil penalties along with attorneys' fees and litigation costs.

In January 2019, the **Illinois Supreme Court** issued its long-awaited decision in ***Rosenbach v. Six Flags Entertainment***. The Court found that a plaintiff does not need to have suffered actual harm to maintain and win a lawsuit filed under BIPA. As a result of this decision, BIPA lawsuits, which were already flooding Illinois courts, surged.

Facebook, in January 2020, agreed to pay out a $550 million settlement of a BIPA lawsuit brought back in 2015. The class action alleged that Facebook violated BIPA by collecting facial recognition data of its users without disclosure. In 2019, the **Ninth Circuit** allowed the action to proceed, concluding that "the development of face template[s] using facial recognition technology... invades an individual's private affairs and concrete interests."

Since the settlement, similar suits are popping up – a class action complaint filed in July directs a similar facial recognition suit toward Microsoft.

In another example from 2020, a franchise owner of several Illinois McDonald's was hit with a class action alleging its locations required employees to provide fingerprint scans to clock in and out and keep track of hours in violation of BIPA. The complaint, filed in **Cook County Circuit Court**, alleges the McDonald's franchise failed to inform its employees why and how it was storing their biometric data, and did not get the employees' statutorily-required informed consent to collect the data.

In another 2020 case, an employee filed a class action lawsuit under BIPA against Chicago's Trump Tower Hotel in **Cook County Circuit Court**. Included in the complaint are allegations that the hotel did not obtain written consent for biometric scanning from its staff and did not publish a policy about collection, retention, use and dissemination of information. The workers also claim the hotel disseminated biometric information to third parties for "timekeeping, data storage, and payroll purposes."

BIPA CLAIMS NOT PREEMPTED BY ILLINOIS' WORKERS' COMPENSATION LAWS

An Illinois appellate court ruled that claims for actual injury under BIPA are not preempted by the **Illinois Workers' Compensation Act (IWCA)**. Employees are not required to file a grievance through the workers' compensation process, and can pursue litigation against their employer.

As one litigator correctly pointed out, "The statute is largely shaping up to be, for all intents and purposes, largely a strict liability statute." And given the significance of the decision, the **Illinois Supreme Court** is likely to hear an appeal and deliver the final word. Illinois' BIPA litigation has immense economic consequences for employers, and if liability continues to expand, it will ultimately drive even more businesses out of the state.

> *"The statute is largely shaping up to be, for all intents and purposes, largely a strict liability statute."*
>
> **– An Illinois litigator**

CASE TO WATCH

The **Illinois Supreme Court** also is considering another line of "no-injury" litigation that could impact future BIPA cases. In ***Soto v. Great America LLC***, a consumer brought a class action suit against an amusement park alleging a violation of the federal **Fair and Accurate Credit Transaction Act** (because more than five digits of her credit card number appeared on her receipt). The trial court dismissed the case for lack of standing. The appellate court reversed, however, finding that plaintiffs could bring the case because the statute provides for a private right of action for statutory damages where an individual willfully fails to comply. Accordingly, the Sotos were not required to even claim that they experienced an actual injury because they had sufficiently alleged that the amusement park had willfully failed to comply with FACTA's truncation requirement. Despite FACTA being a federal statute, the **Illinois Supreme Court** will decide whether a willful violation (which the appellate court viewed as simply failing to follow a requirement that a company knew or should have known of), without actual injury, is sufficient to bring a lawsuit.

ILLINOIS COUNTIES ARE A HOTBED FOR ASBESTOS LITIGATION

Madison County remains the preferred jurisdiction in the United States for plaintiffs' lawyers to bring asbestos claims with 1,150 filings in 2019, a five percent increase from 2018 (1,095 filings). This represents 28.3 percent of all filings nationwide. Through the first half of 2020, 32.2 percent of new asbestos cases were filed in **Madison County**.

St. Clair County comes in at number two with 359 filings, a 35 percent increase from 266 filings in 2018. Rounding out the top 10 is **Cook County**, which ranked as the eighth highest jurisdiction with 132 filings. Plaintiffs flock to these county courthouses due to their plaintiff-friendly reputation, low evidentiary standards, and judges' willingness to allow meritless claims to survive.

PLAINTIFF-FRIENDLY LEGISLATIVE AGENDA

Prior to adjourning due to the COVID-19 pandemic, the **Illinois legislature** was poised to consider bills that would expand the **Biometric Information Privacy Act** and increase data privacy litigation. These issues are expected to be considered again once the legislature resumes normal activity.

COVID 19 INFORMATION

Governor J.B. Pritzker (D) issued a series of executive orders throughout 2020 to provide liability protections for health care professionals, facilities and volunteers as they fought the COVID-19 epidemic. The protections remain in effect for the duration of the **Gubernatorial Disaster Proclamations**.

OTHER NEWS

In other legislative news, the Chicago Tribune has reported that **Illinois House Speaker Michael Madigan**, a longtime plaintiffs' bar ally, is linked to a federal investigation of political corruption. **U.S. Attorney John Lausch** has charged ComEd, a utility company, with bribery for attempting to influence an unnamed Illinois legislator, fitting Madigan's description, through the provision of "financial benefits." The bribery scheme allegedly began in 2011 and lasted through 2019. Prosecutors estimate at least $150 million in "anticipated" legislative benefits were conferred. As part of a deferred prosecution agreement, ComEd has agreed to pay a $200 million fine. The federal investigation continues and Illinois Republican legislators created a special House committee to investigate Madigan's activities.

Madigan has raked in hundreds of thousands of dollars in campaign contributions over the years from the **Illinois Trial Lawyers Association PAC**, and has served as an effective roadblock to civil justice reforms. The Illinois plaintiffs' bar is one of the most powerful in the country, donating millions to the campaigns of Illinois office seekers. For example, between 2001 and 2016, the Illinois Trial Lawyers Association's legislative political action committee contributed $6 million to Illinois candidates, while the top 25 largest Illinois plaintiffs' firms, their lawyers, friends and family contributed $29 million.

SOME GOOD NEWS FROM THE ILLINOIS SUPREME COURT

The **Illinois Supreme Court** rendered a blow against litigation tourism that leads to Judicial Hellholes in its June 2020 ruling in ***Rios v. Bayer Corp. & Hamby v. Bayer Corp***. In each of these cases a Madison County resident joined with scores of out-of-state plaintiffs to sue Bayer in **Madison County** over the safety of Essure, a permanent birth control product. The **Illinois Supreme Court** dismissed the claims of the out-of-state plaintiffs for lack of jurisdiction because Bayer is not located in Illinois and does limited business there, the product was not manufactured in Illinois, and the plaintiffs experienced their injuries outside of Illinois. The Court recognized that Illinois had no interest in resolving these claims, and the nonresidents had failed to explain why Illinois was a convenient location for their litigation "when they were not implanted with their devices here and have identified no other activity that would connect their specific claims to Illinois."

#9 MINNESOTA

The **"Gopher State"** once again finds itself on the Judicial Hellholes list thanks to liability expanding decisions by the **Minnesota Supreme Court**, the courts' loose application of jurisdiction laws, and Minnesota's activist attorney general.

TOP ISSUES

- **Minnesota Supreme Court legitimizes third party litigation funding**
- **Courts' loose application of personal jurisdiction rules**
- **Activist AG seeking to regulate energy industry through litigation**

LIABILITY-EXPANDING DECISIONS BY MINNESOTA SUPREME COURT

MEDICAL LIABILITY

Minneapolis, Minnesota continues to be the most expensive city for primary care visits in the country. While this can be attributed to a variety of factors, the state's civil justice system plays a large role. According to the Medical Malpractice Center, "Minnesota's medical malpractice statutes are friendlier to injured patients than the national average. Moreover, the state's courts recognize a broader range of theories under which an injured party can recover damages regarding claims cases emanating from medical malpractice-related damages." One specific statute that is more plaintiff friendly than most is Minnesota's four-year statute of limitations for medical liability cases. A majority of states allow for a case to be filed within two years. Further, while many states place a reasonable limit on damages for pain and suffering in medical liability cases to protect the affordability of healthcare, Minnesota does not have such a law.

While 2020 did not bring about any newsworthy medical liability verdicts – in large part due to the COVID-19 shutdowns, the state is still coming to terms with last year's Minnesota Supreme Court decision that drastically increases liability for doctors practicing in the state. In ***Warren v. Dinter***, the Supreme Court found that a doctor can face a medical liability suit even when no traditional physician-patient relationship exists. The **Minnesota Medical Association** fears that "this expansion of liability has the potential to curtail physician collaboration and informal consultation, and will ultimately result in harming patients." This decision places the state outside the mainstream, with a majority of states requiring a patient-physician relationship.

"Minnesota's medical malpractice statutes are friendlier to injured patients than the national average."

– Medical Malpractice Center

THIRD-PARTY LITIGATION FINANCING

In June 2020, the **Minnesota Supreme Court** unanimously abolished the common law offence of champerty. Champerty prevented a third party from sharing in a lawsuit's winnings. This ruling opens the doors to third-party litigation funding in Minnesota. It will lead to more lawsuits and leave Minnesota consumers unprotected from lenders' predatory practices. For example, that case, ***Maslowski v. Prospect Funding Partners LLC***, arose after a woman injured in a car accident was offered an advance on her winnings by a financial services firm and she failed to repay her advance plus the 30 percent interest rate and applicable fees.

DISREGARDING U.S. SUPREME COURT PRECEDENT

The **U.S. Supreme Court** is currently examining a Minnesota Supreme Court decision that allowed a trial court to exercise jurisdiction over a business located in another state that had no connection to the plaintiff or product involved in the lawsuit. The Court agreed to hear the case in early 2020, and a decision is expected in 2021. This decision places Minnesota outside the mainstream and is contrary to U.S. Supreme Court precedent.

In ***Bandemer v. Ford Motor Corp.***, a Minnesota resident injured in a car accident sued Ford Motor Company, alleging the vehicle's airbag did not properly deploy. The **U.S. Supreme Court** has instructed, however, that due process permits a state court to consider a lawsuit against an out-of-state business only when the lawsuit relates to the business's conduct in that state. There must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State," the high court said. Ford asked the court to dismiss the lawsuit because the car involved in the accident was not designed, manufactured, or originally sold in Minnesota. Despite this lack of connection to the state, the **Minnesota Supreme Court** upheld the trial court's finding that it could exercise jurisdiction because Ford had "target[ed] Minnesota for sales of passenger vehicles, including the type of vehicle at issue." The Court held that due process requirements are met as long as a defendant can "relate to" a claim. As the dissent observed, however, all of Ford's conduct alleged by the plaintiff – i.e., negligently designing and warning about the car and placing it into commerce – took place outside Minnesota.

ATRA urges the U.S. Supreme Court to consider fairness to the defendant by protecting against unpredictable assertions of state authority. There is no substantial connection between Minnesota and the injury, and the state does not have a legitimate interest in this litigation. Allowing Minnesota to have jurisdiction over this case infringes on the sovereignty of other states that are more closely connected to the accident.

REJECTION OF A GATEKEEPING ROLE

More than two thirds of states now follow the standard for admission of expert testimony applied in federal courts. That standard, known as ***Daubert***, empowers judges to serve as gatekeepers that ensure that the theories offered a reliable and backed by sound science. Five jurisdictions– **Florida, Maryland, Missouri, New Jersey**, and the **District of Columbia** –- have transitioned to this approach over the past four years. Yet, in late 2018, the **Minnesota Supreme Court** rejected its own advisory committee's recommendation that it amend the state's rules of evidence to effectively follow the *Daubert* standard. Instead, Minnesota remains an outlier. It is among a half dozen jurisdictions that continue to apply a more lenient approach that can be misused to allow junk science.

ACTIVIST ATTORNEY GENERAL TARGETING INDUSTRIES ACROSS THE STATE

Activist state attorneys general, like **Keith Ellison**, are seizing the opportunity to use current "hot-button" issues to propel their careers and generate campaign dollars for future political aspirations. Litigation does little to address societal ills and is not the proper solution. It may fill government budgetary gaps and line the pockets of trial lawyers, but it fails to effectively address policy concerns or provide relief to those in need.

CLIMATE CHANGE LITIGATION

Climate change is a vital issue for all Americans that should be addressed by our elected officials and duly appointed expert regulators. It is their responsibility to develop and execute appropriate public policy that serves the public interest. Courts are appropriate for settling legal disputes, not setting environmental policy that has a profound impact on countless aspects of our daily lives and the continuing prospects for a strong and vibrant economy.

In June 2020, however, **Attorney General Keith Ellison (D)** announced a lawsuit against several oil companies claiming they misled Minnesotans about climate change. The lawsuits were brought under statutes that tackle consumer fraud, deceptive trade practices, and false advertising. Attorney generals in fellow Judicial Hellhole **New York, Rhode Island**, and **Massachusetts** have filed similar lawsuits.

The complaint, which was filed in the **Ramsey County District Court** in **St. Paul**, seeks to require the energy companies to use "wrongfully-obtained profits" to pay for the effects of climate change. The lawsuit requests that companies disgorge profits to "fund a corrective public education campaign in Minnesota relating to the issue of climate change, administered and controlled by an independent third party," and that defendants "disclose, disseminate, and publish all research previously conducted directly or indirectly . . . that relates to the issue of climate change." The complaint was signed by **Leigh Currie** and **Peter Surdo**, who are not regular members of the attorney general's staff, as "Special Assistant Attorneys General." They are reportedly paid, not by the taxpayers as accountable public employees, but through the **New York University School of Law** by **Bloomberg Philanthropies**, which placed them in AG Ellison's office at his request.

The State Energy & Environmental Impact Center at New York University School of Law (the Center) pioneered the new practice of embedding staffers to advance litigation. The Center was established and initially funded in 2017 with a $6 million grant from **Bloomberg Philanthropies**. Its mission is to "support state attorneys general in defending and promoting clean energy, climate and environmental laws and policies," including through "direct legal assistance to interested attorneys general on specific administrative, judicial or legislative matters…" As the Center touts, it is "[w]orking with interested attorneys general to identify and hire NYU Law Fellows who serve as special assistant attorneys general in state attorney general offices, focusing on clean energy, climate and environmental matters." In other words, the fellowship program is designed to wage war on energy companies by placing lawyers funded by the Center in the offices of friendly attorneys general across the country, empowering them to bring climate change litigation with the powers and authority of the state.

The Center has fellows embedded within the offices of attorneys general in at least ten jurisdictions in 2020, including Minnesota. **The Center**, through NYU, fully funds these legal positions, meaning attorneys general use outside dollars for this work. The effort is aided by the Center's communications arm, which aims to promote and defend the legal strategy of supportive state attorneys general in the media.

The Center's fellows are far from student interns or junior lawyers. To be considered for the program, an applicant must have between five and ten years of experience with climate change, clean energy, and environmental issues, as well as litigation and/or regulatory experience. If accepted, a lawyer must make a minimum two-year commitment to the state attorney general office in which he or she is placed.

Functionally, the program places these lawyers into the offices of state attorneys general by initially pitching the program to either the targeted state official or a top aide. Assuming there is interest, the state attorney general's office then makes a formal request to the Center outlining its needs. Should all go according to plan, the program then farms out the lawyers to the state attorney general office that made the request.

In July 2020, the non-profit organization **Government Accountability & Oversight (GAO)**, not to be confused with the U.S. Government Accountability Office, filed a lawsuit requesting access to records detailing the attorney general's use of outside attorneys, who were charged with bringing the state's litigation against energy companies. GAO's lawyer, **Chris Horner**, pointed out that these types of arrangements violate the obligations of attorneys general to taxpayers, and restrictions on release of public information about the lawsuit undermines open records laws.

WATCH LIST

The Judicial Hellholes report also calls attention to several additional jurisdictions that bear watching. These jurisdictions may be moving closer to or further away from a designation as a Judicial Hellhole, and they are ranked accordingly.

FLORIDA

Florida continued to make progress towards improving its legal climate in 2020 as a direct result of **Governor Ron DeSantis's (R**) thoughtful and decisive leadership, as he continued to remake the **Florida Supreme Court** through two additional appointments. Florida appears to be a tale of two stories, though, as the legislature stalled in its efforts to pass long-sought, meaningful lawsuit reform. As a result, Florida remains on the Watch List and ATRF will continue to monitor the Sunshine State.

FLORIDA'S SUPREME COURT CONTINUES TO TAKE SHAPE

In January, 2019, **Governor Ron DeSantis (R)** replaced three retiring activist justices with three textualists, **Barbara Lagoa**, **Robert Luck**, and **Carlos Muñiz**. They joined historically conservative justices Charles Canady, Ricky Polston, and Alan Lawson, leading political observers to call the Court the "most conservative Florida Supreme Court in decades."

In September of last year, though, **President Trump** elevated **Justices Lagoa** and **Luck** to the **U.S. Court of Appeals for the Eleventh Circuit**, giving **Governor DeSantis** two more opportunities to change the face of Florida jurisprudence. The Governor telegraphed his intentions in his 2020 State of the State address, remarking that Florida's legal system is supposed to address real injuries and disputes, and not to be used as a game.

Sure enough, **Governor DeSantis** hit two home runs with the Supreme Court appointments of **John Couriel** and **Jamie Grosshans**, two justices who have proven to be restrained in their approach to their role as a judge. Based on his phenomenal selections thus far, reformers can no doubt look forward to more stalwart appointments throughout the judiciary as they become available.

THE FLORIDA LEGISLATURE STALLS IN ITS EFFORTS TO PASS LONG-SOUGHT REFORMS TO THE PERSISTENT LAWSUIT ABUSES

Having finally enacted several reforms in 2019 like assignment of benefits reform and narrowing the dangerous instrumentality doctrine, the legislature stumbled in 2020, failing to make much progress on top priority issues.

ONE BRIGHT SPOT ON VICARIOUS LIABILITY

In the one notable victory of the session, the legislature unanimously passed HB 977 to shield motor vehicle dealers from vicarious liability when they provide temporary replacement vehicles, i.e., service loaners. In other words, an auto dealership cannot be sued as a deep pocket when a customer gets into an accident simply because he or she was driving a loaner. While only a small improvement to the overall legal climate, in Florida, every little bit counts.

REFORMS STILL NEEDED

BAD FAITH ON BAD FAITH

Bad faith lawsuits targeting insurers continue to be fertile ground for trial lawyers looking to game the system, but the **Florida legislature** continued to avoid addressing the larger issues at play for yet another year. This is especially disappointing as more than 80 percent of Floridians think it is unfair that insurance rates rise due to excessive lawsuits and inaccurate claims against insurance companies.

Currently, most often in situations where there is clear liability, substantial damages, and low policy limits, trial lawyers use delay tactics and multi-pronged, impossible-to-satisfy demands to set insurers up for a bad faith action. Legislation introduced in 2020 would have established a "reckless disregard" standard for third-party bad faith lawsuits, and procedures for settling claims with multiple claimants in order to avoid bad faith.

Bad faith lawsuits can result in eye-popping numbers. In just one notable bad faith action, ***Harvey v. GEICO***, the insurer tendered the full $100,000 policy limits nine days after the accident, but was ultimately hit with an $8.47 million judgment. Legislators must address the process that leads to these distorted results or risk jeopardizing the judicial system's legitimacy.

MULTIPLYING ATTORNEY'S FEES

Attorney fee awards in ordinary insurance disputes are calculated under a so-called "lodestar" fee of the number of hours reasonably expended by the attorney multiplied by his or her hourly rate. Attorneys may also qualify for a "contingency risk multiplier" designed for rare and exceptional circumstances where the lodestar figure does not adequately compensate for a particularly difficult case, or one where it's hard to obtain capable and willing counsel.

Unfortunately, as the result of the Florida Supreme Court's decision three years ago in ***Joyce v. Federated National Insurance Company*** (prior to Governor DeSantis's appointments), contingency risk multipliers in Florida are now commonplace. As just one example, in a run-of-the-mill insurance coverage dispute, ***Santiago v. Florida Peninsula Insurance Co.***, the Court awarded the plaintiff's attorney $1.2 million in fees on a $41,000 plaintiff's award using a 2.0 multiplier. The chance that a court may award a multiplier in any given case is a real risk that's pushing defendants to pay higher, unreasonable settlements.

The **Florida Legislature** had an opportunity to pass legislation in 2020 and realign Florida with the federal standard, so that contingency risk multipliers are only awarded in "rare and exceptional" circumstances, but the legislature failed to do so. It should not miss the opportunity again in 2021.

FIXING THE "NO-FAULT" PERSONAL INJURY PROTECTION SYSTEM

The history of fraud in Florida's **"no-fault" personal injury protection (PIP) system** has been long chronicled in the Judicial Hellholes report. Under the current PIP system, insurers are required to pay up to $10,000 for medical expenses stemming from auto accidents no matter who is at fault. Florida lawyers and their associates have been abusing the system for years, contributing to why Floridians have some of the highest car insurance rates in the country. Legislators must come together and address the rampant fraud plaguing the system.

INFLATED AWARDS FOR MEDICAL EXPENSES

Plaintiffs' lawyers have also long abused what are known as "letters of protection" to inflate medical expenses for the purpose of lawsuits. Letters of protection are agreements between a person who needs medical care, his or her lawyer, and a healthcare provider under which the healthcare provider agrees to not seek to collect a fee for medical treatment from the patient, but wait to collect out of an expected settlement or judgment. Letters of protection can serve a legitimate purpose when a person is uninsured and unable to pay for medical expenses. However, some Florida lawyers recommend that their clients not use their insurance to cover medical expenses, but rely on a letter of protection.

Under Florida law, at trial, jurors learn the initially invoiced amount of medical expenses, which is essentially a "sticker price" that is often three or more times the amount that is ultimately accepted by the healthcare provider as full payment. After a verdict, Florida law requires judges to adjust the award to reflect the actual amount of medical expenses paid and accepted, a process called a "set off." Florida's personal injury lawyers often use letters of protection to avoid this set off. By avoiding evidence of the actual value of medical treatment, there is no amount paid for a judge to set off the award.

This type of abuse benefits no one but the lawyers and the medical clinics that may be in cohorts with them. The lawyers get to inflate the damage award and collect a larger contingency fee. The medical provider gets paid a rate that is much higher than market value. The plaintiff, however, has these high rates taken from his or her share of the judgment, even if they would have been covered by insurance.

Legislation can ensure that jurors receive accurate information on the actual value of medical expenses and prohibit abuse of letters of protection. The legislature should also revisit the need to place reasonable constraints on subjective and unpredictable noneconomic damage awards, which are particularly important for preserving access to affordable medical care.

TRIAL BAR SETS SIGHTS ON SOUTH FLORIDA - SPENDS MILLIONS ON ADVERTISING

According to a 2020 report, television viewers in **South Florida** saw approximately 113,000 local legal services advertisements in the third quarter of 2019 (July-September). The lawyers, their firms and others who purchased these local legal services ads spent $13 million during the three-month span.

In addition to the local ads, Florida viewers also were exposed to $71 million worth of national legal services ads. These 45,000 ads were shown on national broadcasts as well as cable networks, as opposed to just airing locally. Approximately 60 percent of those ads solicited claims related to alleged injuries caused by pharmaceutical drugs, medical devices and agricultural products.

To put into perspective how frequently local legal services ads run on Tampa televisions, when compared with ads for clothing stores, they run 13 times as often. When compared with ads for pizza delivery and restaurants around Miami and Ft. Lauderdale, legal services ads run nine times as often.

Several plaintiffs' firms, including the Florida powerhouse, **Morgan & Morgan**, received millions of dollars from the COVID-19 federal **Paycheck Protection Program**. Morgan & Morgan applied for and received $12 million - $27 million in relief from five different states, including Florida. This money was meant to help cover operating expenses including rent and employee salaries and benefits. Meanwhile, during this same time period, the firm increased its lawsuit advertisement spending from approximately $50,000 per day to $300,000 per day.

RETURN TO HELLHOLE STATUS?

South Florida has developed a well-deserved reputation for its aggressive personal injury bar and fraudulent and abusive litigation practices. While the rest of the state has looked to curb litigation abuse, some South Florida judges have allowed it to run rampant. Whether its abuse of letters of protection, assignment of benefits, or bad faith laws - South Florida is ground zero for the state's litigation problems.

According to a Publix lawyer testifying before the **Senate Judiciary Committee**, at any given time, there are approximately 450 personal injury claims pending against Publix, most of them in Florida. On average, the cost of settling Publix claims in Florida was 65 percent higher than the cost in any other state in which Publix operates. The cost of settling Publix claims in South Florida was 50 percent higher than the cost in the rest of the state.

While the volume of cases in 2020 was considerably lower because of the courts' COVID-19 shutdown, if the amount of money spent by the trial bar on advertising is any indication, Florida's litigation activity will return to its high levels in 2021. If South Florida refuses to follow the lead set by the rest of the state, and the trial bar continues to have its way, the area may return to its previous status as a Judicial Hellhole.

OKLAHOMA

A newcomer to the Judicial Hellholes list in 2019, the "**Sooner State**" moved down to the Watch List in large part due to a lack of activity in the state because of the pandemic. State leadership did little to rectify Oklahoma's liability environment; however, the **Oklahoma Supreme Court** has a real opportunity to improve the state's litigation climate in 2021. Given the Supreme Court's recent propensity to expand liability, there is concern the Court will continue down the same path. All eyes will be on Oklahoma in the coming year.

OKLAHOMA SUPREME COURT HAS OPPORTUNITY TO ROLL BACK IMPROPER EXPANSION OF PUBLIC NUISANCE LAW

In August 2019, **Cleveland County District Court Judge Thad Balkman**, at the urging of **Attorney General Mike Hunter (R)**, drastically expanded liability under the state's public nuisance law. **Judge Balkman** ruled that Johnson & Johnson created a public nuisance through its marketing of ingredients used to make opioids and awarded the state $572 million to fund an "abatement program." About six weeks later, however, Judge Balkman admitted that he had made a $107 million math error, and indicated that he would reduce the judgment to $465 million.

According to J&J, the judgment has "grave implications for all businesses operating in the state," carries "immense public policy implications" and is "threatening wide-ranging liability" for companies that operate in the Sooner State.

INVENTIVE PUBLIC NUISANCE LEGAL THEORY

Historically, public nuisance law involved instances in which a property owner's activities unreasonably interfered in a right that is common to the public, usually affecting land use – not the manufacturing of a legal and highly regulated product. Typical cases include blocking a public road or waterway, or permitting illicit drug dealing or prostitution on one's property. Now, **Oklahoma** has expanded the law to cover costs related to a public health crisis. Oklahoma law now is well outside of the legal mainstream as evidenced by a May 2019 decision in North Dakota where a judge dismissed a similar claim against Purdue Pharma.

Manufacturers should view the Oklahoma judgment with great concern, as the applicability of vague public nuisance law to other activities will grow, particularly as states look to perceived deep pockets to fund public health or other programs. By this logic, cell phone manufacturers could be held liable for harm caused by distracted drivers. Similarly, automakers might be held liable for accidents caused by drunk drivers. And manufacturers of alcoholic beverages could be liable for economic costs and injuries associated with alcoholism. If allowed to stand, this case certainly opens the door to those possibilities.

VERDICT APPEALED

The **Oklahoma Supreme Court** now has the opportunity to bring the state back in line with the rest of the country and restore common sense to the state's civil justice system.

Both sides have appealed the $456 million judgment. Johnson & Johnson, among other things, raises the question of whether public nuisance claims must be connected to a property dispute, in accordance with the traditional understanding of the tort. The state's appeal claims the amount awarded by the trial court is insufficient to abate the crisis. The plaintiffs' lawyers initially requested $17.5 billion over 30 years. Additionally, the State has asked for $468,920 to cover litigation costs.

In 2017, when AG Hunter joined scores of other states and municipalities in suing makers of opioids, he chose not to rely on his own office's lawyers or even hire one of the many plaintiffs' firms experienced in pharmaceutical litigation. Instead, without any competitive bidding process, he awarded contracts to three law firms that had generously contributed to his campaigns over the years. In fact, one of the firms he selected – **Glenn Coffee & Associates** – does not even tout litigation as a service offered on its website. **Glenn Coffee** is a former Senate Pro Tem and was an advisor to Hunter's 2018 campaign. Prior to the start of the Johnson & Johnson trial, Coffee withdrew his services, but not before his firm became entitled to collect millions of dollars from the settlements with Teva and Purdue Pharma.

Another firm, Texas-based **Nix Patterson**, a key player in the tobacco litigation in the '90s, boasts to clients the availability of its private plane – because apparently flying commercial just takes too long. All told, the employees and families of the three firms selected by Hunter contributed at least $72,500 to his political campaigns.

Between the settlements and the J&J verdict, as of right now, these lawyers will earn than $100 million.

ADDITIONAL OPIOID LITIGATION FILED BY AG HUNTER

In an interesting development, Hunter filed an additional lawsuit in **Cleveland County** against three opioid distributors; however, this time he did not rely on the state's public nuisance law. The suit sought damages from McKesson Corporation, Cardinal Health and AmerisourceBergen for their failure to stop or report large orders that could have been under suspicion of misuse. Hunter later voluntarily dismissed the case after defendants had it removed to federal court and sued each company individually back in state court..

The sudden change in tactics by the attorney general points to an acknowledgment of the shaky ground on which his previous public nuisance claims stand. Hunter's use of public nuisance law in the opioid context is of particular interest given that he took a dramatically different position regarding public nuisance law in another high-profile case. In May 2019, Hunter joined 17 fellow state AGs in filing an amicus brief in a climate change case in a federal appeals court in California. In that instance, the AGs argued that use of public nuisance law is inappropriate. The brief states that "the issues surrounding climate change and its effects – and the proper balance of regulatory and commercial activity – present political questions that cannot be resolved by judicial decree." It also should be noted that in July of 2018, Hunter authored an op-ed entitled, "Lawsuits are not the answer to climate change." In this piece, he explicitly stated, "you cannot litigate what legislators refuse to legislate and regulators refuse to regulate."

This is a sound and reasoned analysis, but he fails to follow the same reasoning in the state's opioid litigation. He cautions that if the courts adopt this expansive view of public nuisance law, it would lead us into a situation in which virtually anything could be deemed a public nuisance. We agree with AG Hunter – in the context of the climate change case.

While the litigation around climate change and the opioid crisis are different matters, they each intend to "solve" complex problems through litigation. Attempting to resolve a public health crisis in court, however, requires the court to assume the responsibilities and authority of the other two branches of government.

OKLAHOMA LEGISLATURE PUSHES BACK ON STATE SUPREME COURT'S EXPANSION OF LIABILITY

In January 2020, **Senator Julie Daniels (R)** and **Representative Mike Sanders (R)** introduced a Joint Resolution to overturn the Oklahoma Supreme Court's decision in ***Beason v. I.E. Miller Services***, which struck down the state's statutory limit on noneconomic damages. In 2011, the state enacted legislation that generally limited noneconomic damages, such as awards for pain and suffering, to $350,000 per person in personal injury cases. The law did not impact the ability to recover other damages such as lost wages and medical expenses.

"[A] legislative cap on damages… is included within the historically recognized role of a legislature in defining, creating, or abolishing a legal cause of action."

– Justice James Edmondson

This was blatant overreach by the court. As **Justice James Edmondson** stated in dissent, "[a] legislative cap on damages… is included within the historically recognized role of a legislature in defining, creating, or abolishing a legal cause of action." Most courts have respected the prerogative of legislatures to enact reasonable limits on awards for pain and suffering. The Oklahoma Supreme Court did not.

S.J.R. 40 would have granted Oklahoma voters the opportunity to amend the state's constitution to reinstate the limit on noneconomic damages. Unfortunately, this legislative effort was derailed by the COVID-19 shutdown.

GOOD NEWS ON COVID-19 FRONT

While the effort to place reasonable constraints on subjective noneconomic damage awards fell short due to the pandemic, Oklahoma legislators deserve credit for proactively addressing the concerns of healthcare providers, businesses, schools, and others with COVID-19 related liability.

In May, the **Oklahoma legislature** passed significant COVID-19 liability protections for health care providers and facilities, manufacturers and distributors of cleaning supplies or personal protective equipment, and employers.

Under the **COVID-19 Public Health Emergency Limited Liability Act**, health care facilities and providers that treat a person for COVID-19 during the public health emergency are protected from liability unless they are grossly negligent or engage in willful or wanton misconduct.

The **Oklahoma legislature** also provided needed protections for businesses, schools, and others from lawsuits claiming that they operated in a manner that exposed a person to COVID-19. **S.B. 1946** provides a safe harbor from liability if a person or entity operated consistently with public health guidance, regulations, and orders applicable at the time of the alleged exposure.

Finally, the **COVID-19 Product Protection Act** extends liability protections to businesses that have shifted their operations to make products that are critical in protecting the public during the pandemic. Those who design, manufacture, label, sell, distribute, or donate personal protective equipment or disinfecting and cleaning supplies, who do not ordinarily make such products, will not face lawsuits claiming the product is defective unless they knew of a defect and disregarded it. This liability protection also applies to lawsuits targeting businesses, health care providers, schools and others alleging that they should not have selected, distributed or used the product.

NEW JERSEY

New Jersey remains a Mary Poppins's carpetbag of liability: you never know what will pop out nor how big it will be! While the legislature leads in setting the tone for liability expansion, the state's supreme court has started to keep up.

PRO-PLAINTIFF LEGISLATURE

The **New Jersey legislature** has been a breeding ground for problematic legislation. Every session, its members introduce and try to pass numerous liability-expanding bills. Several pieces of legislation would pin the burden of the COVID-19 pandemic on businesses that are struggling during the economic downturn.

S2380

New Jersey enacted legislation in September providing that any essential worker who contracts COVID-19 is legally presumed to have caught the virus at work. Despite research that finds the main sources of COVID-19 are family and social gatherings as well as travel, the legislation would embrace a counterfactual idea that businesses are the main source of COVID-19 in the state. If people believe that businesses are the source of COVID-19, it could dampen the post-COVID-19 economic recovery. Business leaders were quick to point out that it would be illogical to extend the policy to illnesses like the flu and colds and claim it is unfair for COVID-19 to be treated as an employer-driven liability.

A3844

In a proposal that would have a devastating effect on insurance in New Jersey, the legislature is considering a bill that would mandate insurers cover all COVID-19 business interruption claims, even on policies that have specifically excluded pandemics and viruses. Thankfully, the legislature put the bill on hold. Even though there would have likely been constitutional issues on retroactively changing a contractual relationship, the legislation is indicative of the legislature's willingness to compel business to bear the costs of COVID-19.

S1152

S1152, introduced by **Teresa Ruiz (D)** and currently in committee, would change the way courts analyze all standardized consumer contracts. The bill would mandate courts interpret contracts with a presumption of substantive unconscionability. This would mean that courts could more easily invalidate any standardized consumer contract a business uses, whether that be in insurance, contracting, or realty among others.

SR57

A resolution entitled "Urges Governor and AG to pursue legal action against fossil fuel companies for damages caused by climate change," is making its way through the legislature. It requests that **New Jersey Attorney General Gurbir Singh Grewal (D)** pursue legal action against oil and natural gas companies. Such action would be similar to that taken by other attorney generals in **Minnesota, New York,** and **Washington, DC**. The legislation has gained some popular attention in local publications. Monmouth University held a webinar on the topic this summer. This type of litigation attempts to establish public policy through lawsuits, which cannot solve such complex problems. Attempting to resolve an environmental crisis requires a court to assume the responsibilities and authority of the other two branches of government.

GOOD NEWS - S2333

On the bright side, New Jersey is one of the states that has provided reasonable protections from liability for healthcare providers during the pandemic. The legislation gives assurance to doctors, nurses, and hospitals that are treating surges of COVID-19 patients that they will not unfairly be held liable as a result of shortages of staff, beds, and equipment during the declared emergency. A healthcare provider remains subject to liability if it provides care in a grossly negligent or reckless manner.

DETERIORATING JUDICIAL CLIMATE

The legislature in Trenton has been busy, but that has not deterred plaintiffs from litigating or the **New Jersey Supreme Court** from expanding liability.

Plaintiffs continue to file copious numbers of **"Americans with Disabilities Act" (ADA**) lawsuits challenging the accessibility of a business's physical facilities or websites to those with disabilities. In **New Jersey**, there has been a rise in the number of ADA lawsuits. While the state lags far behind the **California, New York,** and **Florida** leaders, New Jersey had a 15 percent increase in ADA lawsuits between 2018 and 2019. Halfway through 2020, New Jersey remained in the top 10 states for these types of lawsuits.

The **New Jersey Supreme Court** has expanded liability and allowed plaintiffs to bring multiple suits for the same action. In ***Sun Chem. Corp v. Fike Corp***, the Court ruled that plaintiffs can sue under the state's **Products Liability Act (PLA)** and again under the state's **Consumer Fraud Act (CFA)**. In the case, a chemical company brought a CFA claim against manufacturers of a fire suppression system after the system failed to stop a fire. The Court reasoned that the CFA and the PLA govern different conduct, and therefore, different remedies are available.

Furthermore, the Court has expanded asbestos liability as plaintiffs' lawyers search for solvent defendants. In ***Whelan v. Armstrong International***, the Court found a company liable even though the plaintiff conceded that the defendant had not manufactured the asbestos causing the injuries. In this case, Armstrong International had made parts containing asbestos, but those parts were replaced by others from a different manufacturer. Because the replacement part manufacturer remains unknown, the Court found that it would be fair to burden Armstrong with an injury it factually did not cause.

OPPORTUNITY TO REINFORCE EXPERT EVIDENCE STANDARD

In 2018, the **New Jersey Supreme Court** ruled that state courts must evaluate the reliability of proposed expert testimony in a similar manner as federal and most state courts. That ruling came after **Atlantic County Judge Nelson Johnson** found that plaintiffs' experts had cherry-picked evidence to support their testimony that the acne medication Accutane caused Crohn's disease. After the appellate division reversed, finding New Jersey applied a more "relaxed" approach to admitting expert testimony, the **New Jersey Supreme Court** reinstated Judge Johnson's ruling, finding his reasoning "unassailable." The Court also adopted the rigorous *Daubert* factors for future cases, which demands that judges serve as gatekeepers over the reliability of expert testimony.

"It was almost as if counsel and the expert witnesses were saying, Look at this, and forget everything else science has to teach us."

– Judge Nelson Johnson

This August, however, the appellate division again reversed a decision by Judge Johnson. This time, **Judge Johnson** had dismissed a pair of lawsuits claiming that use of Baby Powder caused two women to develop ovarian cancer, finding the plaintiffs' experts relied on weak studies, while disregarding more reliable science. His ruling criticized the "narrowness and shallowness" of the experts' scientific inquiries and found that their options "slanted away from objective science toward advocacy." Judge Johnson wrote, "It was almost as if counsel and the expert witnesses were saying, *Look at this, and forget everything else science has to teach us.*"

The appellate panel, however, found that since there was "more than minimal support" for an association between talc and ovarian cancer, the case should go to trial. That, of course, is not the standard for judicial gatekeeping under the New Jersey Supreme Court's 2018 decision. If not reversed, the appellate division ruling would end a stay of 800 talc cases pending in **Atlantic County**. Observers are closely watching whether the **New Jersey Supreme Court** will again side with Judge Johnson's rigorous gatekeeping or New Jersey will revert to an everything goes to trial approach. ATRA filed an amicus brief with the state high court in October urging it to keep "junk science" out of New Jersey courtrooms.

COLORADO

The "**Centennial State**" had a troubling year with all three of its government's branches. The judicial branch expanded the liability of businesses and other organizations that operate in the state. The executive branch intertwined itself with monied interest groups, allowing them to influence the governor's office. Meanwhile, the legislature has refused to face the costs COVID-19 has brought to businesses.

SUPREME COURT EXPANDS PREMISE LIABILITY

Colorado's liberal Supreme Court has expanded premises liability and is poised to increase already-high defendant discovery costs.

In 2020, the Court expanded the liability of any business, organization, or individual when a third party engages in a premeditated criminal act on its property. That expansion of liability results from the Court's ruling in a case arising out of a mass shooting at a Planned Parenthood facility in Colorado Springs. The Court ruled that a reasonable juror could find that the shooter was not the predominant cause of the deaths and injuries, but could conclude that Planned Parenthood bore responsibility and could be held liable. The Court reasoned that given Planned Parenthood's knowledge of threats against the organization, a juror could find that that the organization should have taken actions such as hiring more security, and installing a fence and steel doors. The Court reached this decision even as evidence indicated that the organization had provided physicians at its facilities with self-defense training and even offered them with custom-fitted bulletproof vests free of charge. As a result, the **Colorado Supreme Court** ruled that the trial court wrongly dismissed the claims against Planned Parenthood.

The outcome places any organization – whether it is a synagogue, advocacy group, or controversial business – at risk of a lawsuit if attacked. As the dissenting justices observed, "dangerous consequence of this move is to subject a landowner to liability for the irrational actions of a mass murderer, who has no concern about detection or death." If threatened, an organization may have to choose between installing extraordinarily expensive and potentially ineffective fortifications or liability should there be an attack.

The high court is also expected to rule on a case that could increase defendants' discovery costs by requiring medical organizations to identify all non-parties who received similar care to that of the plaintiff and procure and share their medical information.

A GOVERNOR FOR SALE?

After running a self-financed campaign to prove he was not beholden to wealthy interest groups, **Governor Jared Polis (D)** is gladly allowing those groups to pay more than $1 million worth of salaries in his office. Under secretive agreements fettered with non-disclosure clauses, interest groups like the **U.S. Climate Alliance** and the **Emerson Collective** have been able to place employees in the governor's office. Advocacy groups are attempting to implement their agenda by directly funding attorneys and policy staff within the government itself.

Governor Polis' top adviser on climate change, who is responsible for "moving Colorado to 100 percent renewable energy and hitting pollution reduction targets", is funded by the **U.S. Climate Alliance**. The Alliance works with the government to combat climate change by ensuring member states voluntarily abide by the **Paris Climate Accords**. It conducts a program designed to embed staff funded by affiliated non-profits into executive branch offices of the governors of member states. These "sponsored" employees work as de facto environmental and climate experts and have full latitude to work on litigation and policy matters.

This effort to implant staff is nominally overseen and run out of the Ted Turner funded **UN Foundation**, a 501(c)(3) nonprofit with a heavy focus on environmental issues, although several other nonprofits take part in funding and embedding staff as well. These nonprofit organizations include the **World Resources Institute**, the **Georgetown Climate Center**, and **The Climate Group**.

Functionally, to place staffers in executive offices, the Alliance proposes to top aides of a targeted governor that the administration host a staff member who will work solely on climate issues. Should a willingness exist, a partner nonprofit then fully funds that position and the Alliance works with the governor's office to fill this new role within the administration. While the embedded staff member is paid directly by the government, the state invoices the nonprofit for the cost of that person's compensation

This individual is treated as a government employee and therefore may suggest regulations, legislation, and policy much like anyone else on state payroll. The significant difference is that an outside entity ultimately funds these individuals' positions. Because the Alliance is not incorporated and its funding and expenses are spread among several groups, it is difficult to guess the funding levels of its initiatives. However, internal emails obtained via public records requests by the **Competitive Enterprise Institute** pin the Alliance's budget for embedded staff at $10 million in 2018, with potential funding increases to $25 million in 2019, and $50 million reportedly sought for 2020.

Governmental use of staff paid for by nonprofits such as the **U.S. Climate Alliance** raises significant conflict of interest concerns. As these individuals are compensated by the advocacy group that placed them in their role, there is an inherent conflict as to whether the staff member is working to advance the interests of the state or pushing an outside group's agenda. Those two roles may not necessarily be aligned. While one might assume that nonprofit funded staff would have in mind the best interest of the state in which they are embedded, the optics would almost assuredly be different if a plaintiffs' law firm or even a large corporation did the same exact thing. For example, consider the outcry that would likely result if the tobacco industry embedded a staff member in the state health department. Similarly, what would be the response to a hedge fund embedding a top analyst with a state's pension fund? And why stop at a single position? What if a food manufacturer or organic advocacy group funded an entire division within a state health department or consumer protection agency? As these hypotheticals show, the arrangements in place in certain states with the U.S. Climate Alliance violate both commonsense and basic good government.

LEGISLATORS CALL FOR TRANSPARENCY

Bipartisan legislators and officials have condemned the practice and called for greater transparency. "These are funds the **Joint Budget Committee** has no discretion or appropriation authority over, and it is something that has caught our attention and something that is concerning," said **Senator Dominick Moreno (D)**.

"These are funds the Joint Budget Committee has no discretion or appropriation authority over, and it is something that has caught our attention and something that is concerning."

– Senator Dominick Moreno

Despite the governor's lead, **Attorney General Phil Weiser (D)** declined the opportunity to incorporate climate change attorneys funded by a similar group – the Bloomberg-funded **NYU State Energy & Environmental Impact Center**.

LEGISLATURE REFUSES TO ADDRESS COVID-19 CONCERNS FOR BUSINESS

Colorado is one of the obdurate states that has declined to even introduce legislation addressing liability concerns of schools, businesses, healthcare providers, protective equipment makers, and others during the pandemic. Some businesses are afraid to reopen, given their liability exposure. Colorado's ski industry, restaurants, railroads, sports franchises and others are all at risk of lawsuits should a customer claim he or she contracted COVID-19 as a result of exposure when visiting. The owner of Royal Gorge Route Railroad, a staple for tourism in Colorado, recognizes that, even with a frivolous lawsuit alleging COVID-19 exposure, given the absence of insurance coverage, businesses are "flapping out in the breeze, and that will put any business out of business."

In fact, rather than address COVID-19 liability concerns, the legislature passed a series of pandemic-related bills that gave plaintiffs' lawyers new tools to bring COVID-19 related lawsuits and imposed new obligations on employers. For example, one bill incentives employees who lose their jobs during the pandemic to claim that action stemmed from their raising safety concerns. Another bill exposes businesses to liability if they raise prices on any of a wide range of products during the pandemic. A third bill requires employers to provide paid leave to employees, not only for reasons related to the pandemic, but for a wide range of purposes.

MARYLAND

Maryland has provided a mixed bag this year. There have been some promising advances in the Baltimore courts on asbestos litigation, and there have been some disappointing opinions on expansion of liability. Medical companies in Maryland face a difficult legal climate that is affecting access to medical liability insurance and could prevent important patient care, which is especially important given the ongoing COVID-19 pandemic.

MARYLAND PERSONAL INJURY ATTORNEYS REPEATEDLY SEEK LIABILITY EXPANSIONS

A PLAINTIFF ATTORNEY BAILOUT?

Over the years, Baltimore has decreased as an attractive venue to file asbestos suits. It has over 27,000 asbestos cases on the docket, many filed by the **Law Offices of Peter Angelos**. In 2018, Baltimore was the third most popular jurisdiction in the country for asbestos filings, and in 2019 it had dropped to sixth place. The Peter Angelos' law firm continues to burden Baltimore courts. Of the 167 asbestos lawsuits filed in Baltimore in 2019, 162 of them were filed by that firm.

Since 2017, more than 5,000 asbestos cases have been resolved in the Baltimore courts. The courts are on track to resolve about 500 cases each month, and administrative judge **Michel Pierson** has told state legislators that the court is on track to resolve more than 5,000 cases a year and is working efficiently to eliminate the backlog. Because the courts are properly reviewing each case individually, plaintiffs' attorneys are voluntarily dismissing many of their own cases. They do so because they know that the case does not have merit, and they were hoping to consolidate the cases in a way that packages the weak cases with those that may be viable. As a result, the **Law Offices of Peter Angelos** has decreased its asbestos filings by 71.4 percent and is voluntarily dumping hundreds of lawsuits each month.

In an effort to salvage some profits from these meritless cases, **Peter Angelos** is using his political clout to push a legislative bailout for plaintiffs' attorneys in Maryland. He hired **Gerald Evans** of **Evans and Associates** and paid him over $200,000 to lobby the legislature on his behalf. Last year Angelos tried to salvage the situation by sneaking in a piece of legislation at the end of the session. The legislation would have required that all asbestos cases be resolved in mediation as opposed to the court system that is now handling them individually. Had the pandemic not interrupted the 2020 legislative session, it is possible that **Peter Angelos** would have tried the sneaky maneuver again. The **Maryland General Assembly** should resist Angelos' efforts to involve it in the judiciary's affairs. Instead, the court should be permitted to continue its effort to clean up the asbestos docket by requiring plaintiffs with long-dormant claims to submit credible evidence of an asbestos-related impairment, giving priority to sick claimants and dismissing claims that are not viable.

ELIMINATION OF STATUTORY LIMITS ON NONECONOMIC DAMAGES

The **Maryland legislature** perennially explores eliminating the contributory negligence rule, decreasing the standard for punitive damages, and raising or eliminating the statutory limit on noneconomic damages in personal injury, medical liability, and wrongful death cases.

Members of the legislature have sought to repeal or lower the requirement that expert witnesses actually work in the medical field they are testifying about. Currently, an expert can only devote 20 percent of his or her time to testimony. Repealing this rule would allow "expert" testimony from people who may barely practice in the field, but spend most of their time as hired-gun expert witnesses. The more time experts spend testifying in court, the less time they spend actually treating patients. This creates a niche culture of professional witnesses providing less informed testimony.

Prior to the COVID-19 pandemic, the **Maryland General Assembly** considered legislation that would eliminate the state's statutory limits on noneconomic damages. Maryland was among the first states that placed reasonable limits on pain and suffering awards, which are not capable of objective measurement and can be wildly unpredictable and excessive. Statutory limits are also critical to preserving affordable and accessible healthcare. Yet, in 2020, **Delegate David Moon (D)**, whose top donor is the plaintiffs' attorney lobbying group, the **Maryland Association for Justice**, introduced **H.B. 1037**. That legislation, a variant of which is introduced every year, would allow unconstrained noneconomic damage awards if a jury finds a defendant's conduct was beyond ordinary negligence. This would open a huge door for plaintiffs' lawyers to circumvent the cap and eliminate the predictability that is a benefit of the law. Should this occur, Maryland residents would soon see an increase in auto and homeowner's insurance, and higher healthcare costs, and could experience an access to care crisis.

DETERIORATING CLIMATE FOR MEDICAL LIABILITY

Maryland set a new record for the largest medical malpractice payout ever in US history. Johns Hopkins must bear the burden of a $205 million birth injury verdict after the court decreased it from $229 million due to Maryland's statutory limit on noneconomic damages. The verdict is twice as large as the next largest medical liability verdict. The defendant has submitted two notices of appeal *(search case number 24C18002909).* The bulk of the $205 million verdict is $200 million earmarked for future medical expenses. As of February 2020, four reinsurers have pulled out of the Maryland market, and Johns Hopkins has said doctors may refuse to care for OB patients if the verdict is upheld. Maryland medical liability payouts are twice as large as the national average, and in **Baltimore County**, they are three times larger than the national average.

While Johns Hopkins has had to deal with its medical woes, the University of Maryland Medical System (UMMS) has not been spared either. In July 2020, the Maryland attorney grievance commission alleged that plaintiffs' attorney **Stephen Snyder** had been attempting to blackmail the medical system for $50 million. According to the complaint, after having settled two cases with UMMS, **Stephen Snyder**, in conversation with UMMS, asserted that the medical system was pressuring doctors to perform lucrative transplant surgeries and that the transplant surgery quality was floundering. During these conversations he reportedly offered to provide consultation services to the medical system for up to $50 million. In those conversations he had explicitly mentioned that the payment method should appear in a way as to not look like extortion, according to the complaint. In October 2020, the US Attorney in Baltimore brought charges against Snyder for attempted extortion and other violations. Snyder faces up to 20 years in prison for his conduct. Snyder is seen as only second to Peter Angelos as Maryland's most successful plaintiffs' attorney.

LIABILITY-EXPANDING COURT OPINIONS

There were two important liability expanding court decisions that came out of Maryland this year: *Plank* and *Steamfitters*. In ***Plank***, the **Maryland Court of Appeals** created a new tort claim: breach of fiduciary duty. Prior to the decision, Maryland courts split as to whether breach of fiduciary duty was a cognizable legal theory. Now it is, and LLC members should be wary because members may now sue one another under a breach of fiduciary duty liability theory. The ruling also opens up the possibility for litigation from minority stakeholders in corporations, beneficiaries of trusts, and other parties with a lesser say in a financial arrangement.

In ***Steamfitters***, Maryland's highest court ruled that there is a general duty to protect neighbors' property from third party risks. In this case, a group of Steamfitter Union apprentices were smoking outside the premises, and a cigarette butt landed on mulch and started a fire that destroyed a neighboring house. The court reasoned that the union owed a duty to guard against foreseeable risks. In allowing for liability where the causation requirement is weak, *Steamfitters* allows litigation against parties that are increasingly distanced from loss and would not normally be subject to litigation.

GOOD NEWS!

The **Maryland Court of Appeals** joined the vast majority of states when it adopted the ***Daubert*** standard for assessing the admissibility of expert testimony. This decision earned the Court a "Point of Light" in this year's report.

WEST VIRGINIA

In the former and recovering perennial Judicial Hellhole West Virginia, there remains reason for concern. Asbestos litigation abuse continues, recent West Virginia Supreme Court of Appeals elections have led to the election of a judge sympathetic to plaintiffs and the state's Attorney General has started to play an activist role.

BETWEEN A ROCK AND A HARD PLACE

West Virginia Attorney General Patrick Morrisey (R) has been litigating liberally. In August 2020, he joined a host of other state attorneys general and sued Walmart and CVS arguing "they failed to monitor and report suspicious orders of prescription painkillers to their retail pharmacies in a state ravaged by the opioid epidemic." Walmart and CVS are not the manufacturers of the drugs; rather, they are simply filling lawfully prescribed medication ordered by a licensed doctor. In fact, pharmacies have been sued for not fulfilling opioid prescriptions. When CVS decided not to fill certain opioid prescriptions, plaintiffs' attorneys saw the opportunity to profit and launched a class-action for discriminating against patients. Thanks to the AG's actions, pharmacies in the state find themselves between a rock and hard place. In fact, **Morrisey** had already launched lawsuits against Walgreens and Rite-Aid in June. In both cases, he has requested the assistance of outside private counsel.

Major public crises demand a major response by government leaders, but the continued wave of contingency-fee litigation brought by state and local governments is the wrong approach. It won't do much to help victims or solve the crisis, and instead creates lasting problems for the civil justice system.

LACK OF TRANSPARENCY IN AG OFFICE

During his 2020 election campaign, **General Morrisey** refused to sign a transparency oath that ATRA sends to all candidates for state attorney general. The oath requires that, if elected, the candidate will release information on outside counsel bidding if an attorney general plans to hire a private law firm. Transparency is essential to ensure that the citizens of a state can be confident that litigation brought on behalf of a state with private outside counsel is truly in the public interest.

Morrisey's refusal to sign the oath is both surprising and disappointing given the focus he placed on transparency and ethics reforms early in his tenure. In July 2013, he publicly adopted a sound **transparency policy** with respect to his office's hiring of outside counsel. This policy embraced many of the same policies included in the ATRA oath. Increasing government transparency and reducing excessive litigation are critical aspects of enhancing a state's economic development climate and growing job opportunities.

ASBESTOS LITIGATION

Plaintiffs' attorneys have their tricks for gaming the system. In West Virginia, plaintiffs' firms, once they are able to find an injury, sue everyone under the sun. For example, the **Prim Law Firm** has found just three plaintiffs, but it has been able to use those three plaintiffs to sue 169 defendants. Goldberg, Persky & White's three plaintiffs are not far off, suing 162 defendants. And the Antion and McGee Law Firm's eight plaintiffs are suing 166 defendants.

A West Virginia judge has noticed this disturbing trend. **Judge Ronald Wilson** acknowledged the "abuse" and was taken aback by the plaintiff attorney's unwillingness to settle the disputes. The judge, seeking to promote a settlement, mentioned that the **West Virginia Supreme Court of Appeals** is quite conservative explaining "you [plaintiff attorneys] reap what you sow." The lawsuits are currently on hold due to the COVID-19 pandemic, and **Judge Wilson** has said he does not want to hold trials while masks are mandated. ATRF will be tracking this litigation.

THE COURTS

This June, West Virginians went to the polls to elect their supreme court justices. Three new justices were elected to the high court: **Tim Armstead**, **William Wooton**, and **John Hutchison**. **Justice Hutchison** received over $100,000 in campaign contributions from "Personal Injury Lawyer interests."

In November, when the Supreme Court of Appeals issued an extraordinary liability-expanding decision, it was Justice Hutchinson who authored the opinion. Notoriously plaintiff-friendly West Virginia Attorney General Darrell McGraw filed that case in 2003 with the help of a private personal injury lawyer against three manufacturers of respirators and dusk masks. The complaint alleged that – in the 1970s and 1980s – the masks did not provide sufficient protection against illnesses, even as they met government standards. The case sat largely dormant until late 2016 when Attorney General Morrisey asked the trial court to amend the complaint –13 years later – and to separate Consumer Credit and Protection Act (CCPA) from other claims for trial.

West Virginia's statute of limitations for CCPA claims seemed to clearly bar the suit, as it does not permit civil penalties for violations "occurring more than four years before the action is brought." The high court, however, allowed the amendment and adopted a "discovery rule" that circumvented the statute of limitations. But that is not all. While the lawsuit sat, the state legislature amended the CCPA to increase the maximum civil penalty that had long been "no more than" $5,000 to $5,000 "per violation." This change allowed for penalties in the hundreds of thousands of dollars – for each product sold or advertisement, for example. The court ruled that these higher civil penalties applied retroactively. On top of this, the court ruled that the state did not have to produce basic information, such as how many faulty respirators it contends were actually used by workers and how many workers were allegedly misled. The court found that information "expensive, irrelevant, and unnecessary" to deciding the CCPA claim. In sum, what is generally viewed as a conservative state supreme court surprisingly breathed new life into an old lawsuit, involving even older conduct, with higher penalties and less opportunity to defend against the claims.

Like several other jurisdictions, a West Virginia trial court is considering whether Amazon can be held liable as if it were a product manufacturer or seller for a product sold by a third party over its online platform. A woman was injured after a charger shorted and produced flames. Even though the charger was not designed, manufactured, or shipped by Amazon, the plaintiff chose to name Amazon as a defendant. The case is before former **West Virginia Supreme Court Chief Justice Warren McGraw**, now serving as a judge in the **Wyoming Circuit Court**. ATRF will be monitoring this lawsuit along with the others that seek to hold online sales platforms liable for products others design and sell.

MONTANA SUPREME COURT

Montana continues to be an outlier in its approach to personal jurisdiction, to the point that the **U.S. Supreme Court** has stepped in to address the growing controversy. The **Montana Supreme Court** also expanded asbestos liability, allowed duplicative litigation against insurers, and continued to sidestep deciding the constitutionality of the state's limit on punitive damages.

PERSONAL JURISDICTION OPINION CATCHES U.S. SUPREME COURT'S ATTENTION

According to U.S. Supreme Court precedent, for a state court to decide a case involving a corporate defendant, the business must either be incorporated or headquartered there (known as general jurisdiction) or the lawsuit must involve the defendant's conduct that occurred in that state (known as specific jurisdiction). Without one of these forms of personal jurisdiction, a court cannot hear a case without violating due process.

Nevertheless, the **Montana Supreme Court** has shown a willingness to exercise personal jurisdiction without any link between conduct that occurred in Montana and the plaintiff's injuries. This occurred in a case in which a Montana resident died after the tread on her car's tires came undone and the car rolled into a ditch. After a product liability action was filed in a Montana state court, the car's manufacturer, Ford, asked the court to dismiss the suit because it is headquartered in Michigan, incorporated in Delaware, and the vehicle was not designed, manufactured, assembled, or originally sold in Montana. The trial court denied this motion, which was affirmed by an appeals court and the **Montana Supreme Court**. In reaching this decision, the **Montana Supreme Court**, in a July 2019 ruling, found that merely conducting business in a state by placing a product in the stream of commerce is sufficient to satisfy due process. Contrary to the U.S. Supreme Court's ruling, the **Montana Supreme Court** found that a "direct connection" is not needed between the defendant's conduct in the state and the specific plaintiff's injury for a court to exercise personal jurisdiction.

While in some cases the **Montana Supreme Court** has required a nonresident defendant to have engaged in some transaction or conduct in the state, it has expanded the standard to include whether the defendant has made a compelling case that exercising specific jurisdiction would be unreasonable.

The **U.S. Supreme Court** has granted certiorari in ***Ford Motor Company v. Montana Eighth Judicial District Court*** to review the Montana Supreme Court's inconsistency. The high court heard oral arguments in the case on October 7, 2020. The standard Montana courts applied would eviscerate the due process limits on personal jurisdiction the **U.S. Supreme Court** has established and could well expose corporations that do business nationwide to lawsuits in all fifty States. And plaintiffs' lawyers will, of course, choose to bring these cases in Judicial Hellholes.

ASBESTOS LITIGATION

Asbestos litigation has bankrupted scores of companies, leaving plaintiffs' lawyers to continually search for new solvent targets to sue. In March 2020, the **Montana Supreme Court** opened the door to lawsuits against workers' compensation insurers, finding that, although they did not make or sell asbestos, or employ those who were exposed, they may have had a duty to warn of the risks of exposure.

In ***Maryland Casualty Co. v. Asbestos Claim Court***, former mine workers sued their employer's workers' compensation insurer. The employees claimed exposure to asbestos at a W.R. Grace work site. This work site had been inspected by the employer's workers' compensation insurer, and Grace had consulted with the insurer about the "ongoing asbestos dust problem." The employees claimed that the insurer had a duty to warn employees of this risk. The **Montana Supreme Court** held that although the harm was caused by a third party, Grace, the workers' compensation insurer had a duty to warn because it engaged in an affirmative undertaking – it had assumed responsibility by advising Grace with how to address asbestos risks and providing employee-specific medical evaluations.

COURT EXPANDS UNDERINSURED MOTORIST COVERAGE

The **Montana Supreme Court** also has expanded liability by allowing individuals who are in auto accidents to seek damages from their own underinsured motorist coverage even after litigation between the drivers establishes that the damages did not exceed the at-fault driver's policy limits.

In ***Reisbeck v. Farmers Insurance Exchange***, Kirk Reisbeck sued Darrell King after King rear-ended him. King was only insured for $50,000, so Reisbeck asked for additional coverage from Farmers Insurance under his underinsured motorist (UIM) policy. Farmers refused to pay, so Reisbeck filed a separate lawsuit against Farmers. At the trial between Reisbeck and King, a jury awarded Reisbeck just $10,000, but before judgment was entered, the parties settled for $50,000, King's policy limit. Farmers then moved for summary judgment because the litigation between the drivers had established that Reisbeck's damages did not exceed his insurance, providing no basis for UIM coverage.

While the trial court dismissed the UIM case, the **Montana Supreme Court** reversed, holding that the outcome of the personal injury lawsuit between the drivers did not affect the driver's lawsuit against his own insurer. As the dissent recognized, this decision gives parties a "second bite at the apple" by allowing them to relitigate the amount of damages in a lawsuit against an insurer that a jury already decided in prior litigation. It will result in unnecessary, duplicative litigation that wastes judicial resources, exposes insurers to unwarranted liability, and may increase the cost of auto insurance for drivers.

U.S. SUPREME COURT REINS IN MONTANA SUPREME COURT'S APPROACH TO ENVIRONMENTAL LITIGATION

Last year, the **Montana Supreme Court** in a controversial case held that state courts are free to impose additional liability on companies that are complying with EPA orders and regulations to clean up contaminated land.

The **U.S. Supreme Court** in part reversed that decision in an April 20, 2020, opinion. The Court held that the **Montana Supreme Court** had erred in finding that the landowners who sued Atlantic Richfield were not "potentially responsible parties" under the **Comprehensive Environmental Response, Compensation, and Liability Act**. As owners of polluted property, they fell within this classification. While those who are not potentially responsible parties may take remedial action, those who are potentially responsible parties must get EPA approval before doing so. The Court did not reach the issue of whether the plan developed under the federal Superfund statute preempted the state court-ordered restoration plan because the plaintiff landowners had not gone through the EPA-approval process.

Since then, the EPA has lodged a $150 million settlement with Atlantic Richfield to clean up the Butte Priority Soils Operable Unit site. The consent decree was filed in the **U.S. District Court for the District of Montana** on June 8, 2020. After a public comment period, the federal court approved the agreement on September 16.

GUIDANCE STILL NEEDED ON CONSTITUTIONALITY OF PUNITIVE DAMAGE LIMIT

The **Montana Supreme Court** continues to duck the issue of the constitutionality of the state's statutory limit on punitive damages. A Montana statute limits punitive damage awards to no more than $10 million or three percent of a defendant's net worth, whichever is less, to avoid excessive punishment and jackpot justice. In September 2019, the Court heard oral arguments in a case in which plaintiffs' lawyers sought to invalidate that limit.

But in January 2020, the Court reversed the underlying verdict entirely for other reasons, and therefore, did not reach the constitutional issue. The Court previously ducked the issue back in 2015 when it ruled that Michigan law applied to the case before it and that state's law did not allow for punitive damages.

Montana trial court judges have split on whether to apply the statutory limit, some finding it violates the right to jury trial or due process. These rulings are contrary to courts in the vast majority of states, which recognize that setting constraints on punishment is firmly within the legislature's policymaking authority.

It is up to the Montana high court to issue a definitive ruling, finding that the law is constitutional. ATRF will watch closely in the hopes the Court will uphold the reasonable punitive damages limit enacted by the legislature.

DISHONORABLE MENTIONS

This report's **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 and aren't otherwise detailed in other sections of the report.

IDAHO SUPREME COURT ALLOWS 'PHANTOM DAMAGES' AND EXPANDS MEDICAL LIABILITY

An Idaho Supreme Court ruling, issued in the final days of 2019, will allow plaintiffs' lawyers to mislead jurors by introducing inflated bills for medical treatment that no one paid and assert creative theories of liability against healthcare providers.

The ruling came in the context of a medical malpractice case in which the plaintiff alleged that a patient developed complications as a result of hip replacement surgery, including becoming infected with Methicillin-Resistant Staphylococcus Aureus, a type of bacteria that is resistant to antibiotics. The trial court ruled that the jury should determine his damages for medical expenses based on the amount his healthcare providers accepted as payment for his treatment. The **Idaho Supreme Court** reversed this ruling, however, and found that the jury should consider only the amounts originally invoiced by the providers, before significant portions of these bills were written off to reflect the amount paid through Medicare.

The high court ruled that after the jury reaches an inflated amount of damages for medical expenses based on the invoiced amounts, a judge can reduce the award to deduct amounts not paid. The problem with this approach is that a jury may be influenced by costs of medical expenses that do not reflect reality to award higher noneconomic or other damages.

The **Idaho Supreme Court** also ruled that plaintiffs' lawyers who represent clients who believe they were harmed by negligent medical care are not limited to bringing lawsuits under **Idaho's Medical Malpractice Act**, but can assert a variety of common law actions.

For example, the case before the Court included claims for intentional infliction of emotional distress, negligent infliction of emotional distress, gross negligence, reckless, and willful and wanton conduct. The lower court had dismissed these claims, finding them subsumed by the **Idaho Medical Malpractice Act**, but the high court reinstated them. The court found plaintiffs' lawyers cannot use other causes of action to circumvent the proof requirements of the Medical Malpractice Act, though it left the door open to lawsuits against healthcare providers where these evidentiary requirements may not apply.

MISSOURI APPELLATE COURT RESTRICTS RIGHTS OF DEFENDANTS UNDER '065 AGREEMENTS

A unique Missouri law permits a defendant to allow a plaintiff to obtain a judgment against it in court, so long as the plaintiff only seeks to collect the award from the plaintiff's insurer. Such agreements are known as **'065 Agreements**, reflecting the Missouri statute that authorizes them. In 2017, the Missouri legislature amended this law to require that parties give notice to the insurer of these types of agreements, so that the insurer can intervene and protect its interest if needed.

In July 2020, a Missouri appellate court held that the statute only provides insurers with a right to decide whether to defend the policyholder in the underlying litigation before entering an '065 agreement or intervene in a pending lawsuit. It does not give them the ability to contest the policyholder's liability or the plaintiff's damages when it intervenes.

In that case, Plaintiff Collin Knight entered a settlement with his grandparents (the Knights) after being injured in a water ski accident while under their supervision. After State Farm declined to defend or indemnify the Knights, the parties agreed to limit the settlement amount to the Knights' insurance. At arbitration, the plaintiff was awarded $6 million, and the Knights provided notice to State Farm, which sought to intervene. The circuit court confirmed the arbitration award, and State Farm appealed, contending it had a right to a jury trial and to dispute the charges. The appellate court upheld the lower court's decision.

OREGON SUPREME COURT STRIKES DOWN LIMIT ON NONECONOMIC DAMAGES

In July 2020, the **Supreme Court of Oregon** invalidated a state law that placed a reasonable limit on the subjective and immeasurable portion of awards in personal injury cases – those awarded for noneconomic damages.

Oregon has had ping-pong like rulings on the constitutionality of noneconomic damage limits for the past 25 years. The **Oregon Supreme Court** upheld a noneconomic damage cap when applied in a wrongful death case in 1995. The Court then invalidated the limit in a 1999 product liability case as a violation of the right to jury trial. Just four years ago, the Court overruled the 1999 case, finding it "wrongly decided" a case finding damages limits permissible in a medical malpractice case against a state hospital. In that instance, the **Oregon Supreme Court** observed that "it is difficult to see how the jury trial right renders a damages cap unconstitutional. Neither the text nor the history of the jury trial right suggests that it was intended to place a substantive limitation on the legislature's authority to alter or adjust a party's rights and remedies."

Yet, in ***Busch v. McInnis Waste Systems***, this year, the Court ruled that the statutory limit violated a citizen's right to remedy. That case stemmed from a pedestrian who was awarded $10.5 million in noneconomic damages, including for pain and suffering, in addition to $3 million in economic damages, after he was hit by a garbage truck while crossing a Portland street. The state's high court ruled that the legislature generally cannot limit noneconomic damages without providing an injured party a "quid pro quo," some other supplemental remedy. The Court also improperly second-guessed the need for a statutory limit and the level at which it was set, intruding on the legislature's policymaking role.

Unlike the **Oregon Supreme Court**, most other state and federal courts have upheld such laws as a legitimate, constitutional public policy decision. As a result of the decision, Oregon residents can expect it to become more difficult to reach reasonable settlements in personal injury cases, to pay higher insurance rates, and to have more defensive medicine and reduced access to medical care.

WISCONSIN TRIAL COURT ALLOWS JURY TO CONSIDER IRRELEVANT EVIDENCE AND JUNK SCIENCE

In February 2020, a Wisconsin trial court doled out a $38.1 million verdict after a teenager rear-ended the plaintiff's 2013 Hyundai Elantra. But rather than place responsibility on the driver, plaintiffs' lawyers led the jury to place 84 percent of responsibility for the plaintiff's injuries on the car's manufacturer, providing a deep pocket for recovery. This outcome was influenced by the court's improper admission of junk science and other evidence. As a result, Hyundai is on the hook for $32 million of the award.

The plaintiff claimed the prongs used to hold the driver's headrest were improperly designed; the same headrest design has been used in millions of cars by many carmakers across the world. At trial, the court refused to exclude evidence of unrelated product recalls and Hyundai's subsequent remedial measures. The automaker has appealed the decision.

If the verdict is not reversed, it is possible that a single court in Wisconsin, not a regulatory agency or trade group, will influence automakers to redesign their headrests and risk widespread recalls.

ACTIVIST NEW MEXICO ATTORNEY GENERAL SEEKS TO EXPAND LIABILITY UNDER STATE'S PUBLIC NUISANCE LAW

New Mexico Attorney General Hector Baldereas (D) is suing the makers of Zantac under public nuisance doctrine. The State alleges that the heartburn medication contains a contaminant, NDMA (n-nitrosodimethylamine) and that New Mexico residents who have used the drug have an elevated risk of cancer. The lawsuit follows an April 2020 recall, ordered by the **Food and Drug Administration** after the agency found that levels of NDMA in the drug can rise during storage to amounts beyond the acceptable limit. Even though the FDA and manufacturers acted promptly to remove the drug from the market, New Mexico is seeking to profit off the recall. The State's complaint explicitly asks that any recovery against the makers of Zantac and pharmacies selling Zantac be an amount to fund a statewide medical monitoring program "for many years to come." This is an inappropriate expansion of the public nuisance doctrine, and capricious attorneys general should not sue regulated and rule-following companies in order to fund public services.

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 and others to stem abuses of the civil justice system not detailed elsewhere in the report.

This report's Points of Light typically comprise noteworthy actions taken by judges and lawmakers to stem abuses of the civil justice system not detailed elsewhere in the report.

IN THE COURTS

SIXTH CIRCUIT REINS IN OPIOID MDL JUDGE

In April 2020, the **U.S. Court of Appeals for the Sixth Circuit** clarified what rules apply in multidistrict litigation and reversed a district court's clear abuse of discretion in ***In Re: National Prescription Opiate Litigation***. In the decision, which was issued on April 15, 2020, the Court held that the **Federal Rules of Civil Procedure** apply to MDLs "just as it does in individual litigation."

Writing for the court, **Judge Raymond Kethledge** stated, "MDLs are not some kind of judicial border country, where the rules are few and law rarely makes an appearance." He continued, "an MDL court's determination of the parties' rights in an individual case must be based on the same legal rules that apply in other cases, as applied to the record in that case alone."

The opinion arose out of the opioid multidistrict litigation pending in federal court in Ohio. The MDL includes more than 2,700 cases filed by counties, municipalities and states from across the country. The Court was asked to address three rulings by the lower court that disregarded the **Federal Rules of Civil Procedure.** The district court allowed the counties to amend their complaint to include additional allegations against several pharmacies 19 months after the deadline and required the defendants to produce data for almost every opioid prescription filled anywhere in the United States for the past 13 years.

As a result of this decision, bellwether cases against the pharmacies over dispensing allegations may not proceed because the claims were added too late.

While multidistrict litigation is meant to increase the efficiency of the judicial system, the Court insisted that, "an MDL court must find efficiencies within the Civil Rules, rather than in violation of them."

MARYLAND HIGH COURT ADOPTS HEIGHTENED EXPERT EVIDENCE STANDARD

On August 28, 2020, Maryland joined the supermajority of states and federal courts in providing judges with the authority and responsibility of keeping "junk science" out of the courtroom. Since 1978, Maryland had allowed expert testimony on the "generally accepted" methodology basis even if the expert's conclusions are not. The federal courts abandoned this test in 1993, instead empowering judges to serve as gatekeepers over the reliability of proposed expert testimony. In replacing the *"Frye"* test with the *"Daubert"* standard, courts charged judges with analyzing expert testimony to ensure it is consistent with sound science, which allows judges to weigh considerations like peer reviews, methodology testing, error rates, whether the data supports the testimony, in addition to whether the methodology is generally accepted.

The case that delivered Maryland's welcomed change is ***Rochkind v. Stevenson***, which involved whether a child's exposure to lead paint over the course of fifteen months in the defendant's apartment building caused her to develop ADHD. The trial court admitted expert testimony from a pediatrician indicating that this short-term exposure was a "significant contributing factor" to development of ADHD and "not new science." Since Maryland courts had only scrutinized the admissibility of "novel scientific theories," it focused more on the expert's qualifications, than the reliability of the expert's theory.

A 4-3 majority of the **Maryland Court of Appeals** adopted the ***Daubert*** standard and instructed that trial courts apply it to all expert testimony. It explained that, under this approach, "the parties and the trial court are forced to reckon with the factors that really do determine whether the evidence is reliable, relevant and 'fits' the case at issue." When properly applied, the Court of Appeals noted, *Daubert* "expose[s] evidentiary weaknesses that otherwise would be overlooked if, following the dictates of *Frye*, all that is needed to admit the evidence is the testimony of one or more experts in the field that the evidence at issue derives from methods or procedures that have become generally accepted."

TENNESSEE UPHOLDS NONECONOMIC DAMAGE LIMIT

The **Tennessee Supreme Court**, in February 2020, rejected an invitation from plaintiffs' lawyers to invalidate the state's statutory limit on noneconomic damages, which applies to all personal injury cases. The state legislature adopted the law as part of a package of civil justice reforms Tennessee enacted in 2011 to control runaway verdicts, while providing plaintiffs with reasonable compensation for pain and suffering.

That case, ***McClay v. Airport Management Services***, involved a woman who injured her foot when visiting a store at the Nashville International Airport. A jury returned a verdict that included $444,500 for medical expenses and $930,000 for pain and suffering. The defendant then requested that the trial court reduce the noneconomic damage portion of the award to $750,000, the maximum permitted by the statute for non-catastrophic injuries.

The state high court respected the legislature's authority to alter tort law and define available remedies without intruding into the jury's task of deciding factual issues. The Court also found that a statutory cap on noneconomic damages does not interfere with the judicial power of the courts, which interpret and apply the law. The decision was particularly important because the **Tennessee Supreme Court** found unpersuasive an outlier decision by the **U.S. Court of Appeals for the Sixth Circuit** which had, two years earlier, "guessed" that Tennessee courts would find caps on damages violates the state constitution's right to jury trial.

Three months later, an intermediate appellate court in Tennessee applied the *McClay* ruling to uphold application of the statutory limit in a medical liability case, where such constrains are especially important. In that case, **Yebuah v. Center for Urological Treatment**, a healthcare provider had admitted fault after a doctor accidently left a medical ring inside a patient's body during a surgery that removed a cancerous tumor. A jury awarded the plaintiff $4 million in damages for pain and suffering and lost enjoyment of life, and $500,000 to her husband for loss of consortium. The Court of Appeals rejected the plaintiff's constitutional challenges to application of the statutory limit to the award, following the *McClay* decision.

As explained in the amicus brief ATRA joined to support the constitutionality of the Tennessee law in ***McClay*** and ***Yebuah***, statutory limits on noneconomic damages ensure that liability remains reasonable and predictable, stops unreasonable demands that complicate the ability to fairly resolve litigation, and promotes consistent treatment of individuals with comparable injuries. In the medical liability context, these laws have proven effective in expanding access to care and reducing costly and unnecessary defensive medicine.

IN THE LEGISLATURES

- **Iowa** enacted legislation that will ensure that juries decide damages based on a person's actual medical expenses, not inflated "phantom damages" based on invoiced amounts that no one paid (**S.F. 2338**).
- **Louisiana** enacted the "**Civil Justice Reform Act of 2020**," which includes collateral source rule reform, lowers the amount of damages sought to qualify for a jury trial, and repeals a rule that did not allow jurors to learn that a person in an auto accident was not wearing a seat belt (**H.B. 57**).
- **Missouri** adopted legislation to stem abusive consumer class actions under the **Missouri Merchandising Practice Act** and to unwarranted punitive damage awards (**S.B. 591**).

COVID-19 LIABILITY PROTECTIONS

- The following states enacted some level of COVID-19 liability protections: **Alaska, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Virginia, Wisconsin,** and **Wyoming.**

CLOSER LOOKS

THE COVID-19 LITIGATION SURGE & RESPONSE

As the pandemic reached the United States, entrepreneurial personal injury lawyers saw the opportunity to bring a wide range of lawsuits. Early on, a coalition of national law firms specializing in mass tort litigation formed a "**Coronavirus Litigation Task Force**" to identify targets and theories for litigation. Law firm websites sprung up, inviting people to blame their illness or family member's death on someone rather than on the virus. Some websites provide a roadmap for suing for contracting COVID-19 at work. Others attempt to prompt lawsuits against nursing homes or others. One website, "Top Class Actions," uses that familiar language often heard on billboards and late-night TV ads: "If you believe that your rights were violated by a company as a result of the coronavirus pandemic, you may be entitled to compensation." More of these types of advertisements for COVID-19 lawsuits are expected in months ahead.

THE SURGE OF COVID-19 LAWSUITS

Thousands of COVID-19 related lawsuits have already been filed. Many lawsuits stem from weddings, vacations, and other events cancelled in the wake of the pandemic, colleges and other schools that moved from in-person to virtual programming, and disputes over whether insurance policies cover lost income stemming from the need to shut down during a pandemic. The pandemic and economic downturn also has predictably resulted in a surge of employment litigation. Of particular concern is a growing number of lawsuits that seek to make businesses and others pay for a person's exposure to COVID-19. These types of lawsuits pose a threat to restarting the economy. A single unwarranted lawsuit could cause a small business that is already on the brink to fold.

Thus far, COVID-19 exposure lawsuits have primarily targeted those that have experienced outbreaks, such as cruise ships (including those who did not become ill) and nursing homes. Lawsuits filed by employees of retailers, meat processing plants, supermarkets, and healthcare providers are also mounting. In addition, some plaintiffs' lawyers have filed class actions alleging that business's operation – a fast-food restaurant, golf course, office building, or shipping facility – poses a risk of transmitting COVID-19 and is a public nuisance. As doors open and operations move back toward "normal," more lawsuits are likely to target schools, daycare centers, offices, stores, factories, and others.

Plaintiffs' lawyers counter that showing that a specific business's operations caused a person to contract COVID-19 will be very difficult to prove. That is true, but it disregards the real world of litigation. First, plaintiffs' lawyers look for clusters of cases so that juries will presume causation based on an outbreak, regardless of whether the defendant is truly at fault. Second, as seen in many other types of litigation, businesses and their insurers are likely to settle claims regardless of the merits. They make a judgment that paying up early can be far less expensive, intrusive, and risky than prolonged litigation. A minuscule percentage of cases actually reach a jury. Third, some plaintiffs' lawyers bring creative claims that avoid the need to prove that a defendant's actions caused a specific person to contract COVID-19. For example, they seek damages for emotional harm or financial loss merely from exposure to the virus, or assert a public nuisance claim.

WHAT IS A BUSINESS, SCHOOL, OR OTHER ENTITY EXPECTED TO DO TO GUARD AGAINST COVID-19 EXPOSURE?

Cases alleging that a person was exposed to COVID-19 at a business, school, or other property should not be treated in the same manner as an ordinary slip-and-fall lawsuit. Business owners understand their duty to put up a caution sign when there is a wet floor. Supermarkets know they have a duty to regularly monitor the aisles for spills and broken products and promptly clean them up. How a reasonable business owner would protect others from COVID-19 is far less clear, particularly when knowledge of the virus and how it is transmitted is continually developing and changing.

What was considered responsible behavior three weeks ago, may not be considered responsible today. Did a business fulfill its duty if it required all employees and visitors to wear masks on June 1, but not on May 1 when a person alleges exposure to COVID? Should a daycare center or school have performed temperature checks and asked about a family's health back in May despite having privacy concerns? Should a restaurant have limited occupancy to half of the permissible level – why not to one quarter, or why not close entirely? These cases, litigated years later, will be viewed in hindsight, rather than under the constantly developing knowledge and evolving guidance that we live with today.

Meanwhile, many businesses have stepped up to provide critical goods, services, and facilities to aid in the response to the pandemic. Businesses are converting plants from making automobiles and aircraft parts to making face masks, gowns, ventilators and other needed items. Breweries and distilleries are producing hand sanitizer. When companies quickly ramp up production or manufacture products they do not ordinarily make, they place themselves at risk of liability if there is an issue with the product's manufacturing, design, instructions, or warnings.

Healthcare providers are also, of course, very concerned about heightened exposure to medical malpractice lawsuits, particularly when they are providing care in an unprecedented environment with shortages of people, equipment, and supplies.

THE FIRST COURT RULINGS

Early indications provide hope that judges will properly apply legal principles to dismiss unwarranted COVID-19 lawsuits.

In May, a federal court in Missouri dismissed a lawsuit alleging that a meat processing company had created a public nuisance and breached its duty to provide a safe workplace during the pandemic. **U.S. District Court Judge Greg Kays** found that the company had significantly altered its operations to reduce the risk of transmission of the virus. **OSHA** and the **USDA**, not the courts, Judge Kay ruled, were the place to bring concerns over whether more was needed to comply with public health guidance the agencies had issued for meat processing plants. The court also found claiming that "potentially contracting COVID-19" is too speculative of an injury for a lawsuit.

The first rulings in lawsuits against cruise lines indicate that plaintiffs have an uphill battle to show that they contracted COVID-19 aboard the ship, but that they may nevertheless continue the litigation and press for settlements. **U.S. District Judge R. Gary Klausner** of the **Central District of California** dismissed 13 early "fear of" COVID lawsuits brought on behalf of cruise ship passengers in July, warning that allowing such cases to proceed would "lead to a flood of trivial suits" and "open the door to unlimited and unpredictable liability." In August, a second federal judge in same court threw out emotional distress claims brought by a couple diagnosed with COVID-19 following a cruise, but whose symptoms were not indicated. In that case, **Judge Dean Pregerson** observed, "it strikes me that it may be unclear in the complaint that there's any injury." Since that time, **Judge Klausner** has continued to dismiss negligence claims brought by passengers due to their failure to adequately link the cruise to their diagnoses. He allowed claims alleging intentional infliction of emotional distress to proceed, but ruled that the passengers' contract with the cruise line did not allow them to do so through a class action. Both judges gave the plaintiffs an opportunity to amend their negligence claims and try again, and that litigation continues.

A federal judge in New York also dismissed a public nuisance claim brought against Amazon, claiming the company was not doing enough to protect workers at a Staten Island warehouse from COVID-19. **Judge Brian Cogan** ruled that it is Occupational Safety and Health Administration's role, not the courts, to determine what are sufficient workplace protections. However, even if it was the court's place to decide the issue, **Judge Cogan** found in a November 2020 ruling that the plaintiffs lacked a viable public nuisance claim. The risk of contracting COVID-19 is common to all New York City residents, and they were attempting to sue over a future harm.

Most courts that have ruled on insurance disputes thus far have found that business interruption policies cover losses of income following physical, structural damage to a specific property, not a pandemic that affects everyone. When considering a claim brought by a magazine publisher that suspended its operations, for example, U.S. District **Judge Valerie Caproni** of the **Southern District of New York** observed, "[The virus] damages lungs. It doesn't damage printing presses." While **Judge Caproni** indicated that she felt bad for every small business that has experienced losses due to the pandemic and gave the plaintiffs' lawyers an "A for effort" and a "gold star for creativity," she refused to require insurers to cover losses that were not covered by the policy. A few courts, however, have allowed these lawsuits to proceed, giving plaintiffs' attorneys hope. Some observe that the tide could change. The chance of success in each case may depend on the contract language and exclusions in the specific policy at issue.

Federal judges in California have also dismissed the first lawsuits to reach rulings on airfare refunds. Those cases tried to impose liability based on airlines taking more than seven days to issue a refund of a flight canceled due to the pandemic. That seven-day period, however, does not appear in the airlines' contracts with passengers, but is the Department of Transportation's interpretation of a prompt refund, which even DOT recognizes may not always be attained by an airline that is operating in good faith. Those "slow refund" claims are likely to be dismissed, and cases involving passengers who never cancelled reservations or requested refunds will also face challenges.

Meanwhile, judges have allowed class actions against colleges and universities to go forward. As a federal district court judge in Florida observed, "like the ripple in a pond after one throws a stone, the legal system is now feeling COVID-19's havoc with the current wave of class action lawsuits that seek tuition reimbursement related to forced online tutelage."

Plaintiffs' lawyers will likely become more sophisticated in crafting complaints and pursing COVID-19 litigation. For instance, one personal injury lawyer predicted that as exposure cases progress, plaintiffs' lawyers will hire experts to back their claims that their clients contracted the virus at a particular defendant's location. And, in Judicial Hellholes where state law may be more open to no-injury lawsuits and novel legal theories, judges are likely to provide plaintiffs with every opportunity to amend and refine their complaint, and subject a defendant to intrusive discovery and expensive litigation until they settle. For example, in June, a Cook County Circuit Court judge refused to dismiss a class action against McDonalds alleging that the restaurant chain's operation created a public nuisance by not adequately protecting its employees from the virus.

STATE LEGISLATURES ARE RESPONDING

Even with the pandemic effectively shutting down many state legislatures and the virus arriving as legislative sessions concluded, twenty-one states and the District of Columbia enacted laws addressing liability concerns stemming from the pandemic. Legislators understand that their constituents overwhelmingly believe that the pandemic is not the time for lawsuits and that those who are providing healthcare and products to help in the COVID-19 response should not operate in fear of liability.

Fourteen of these states have provided assurance to responsible businesses that operating during the pandemic will not result in a lawsuit blaming them if a person visits their business and becomes ill, including Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. Two additional states – Alabama and Arkansas – took similar action through executive orders. These states have taken one of three approaches. Some states have raised the standard for liability from bare negligence, which allows for speculative claims, to requiring a showing that a business, school, or other entity recklessly disregarded a known risk that a person would be exposed to COVID-19 or were grossly negligent in their operation. Other states have provided a safe harbor from liability when a business or other entity operated in compliance with executive orders and public health guidance. Several states have adopted a hybrid of both approaches.

Ten states limited the risk of liability for those who make, sell, or donate personal protective equipment or other products in response to the pandemic. These states include Alaska, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Wisconsin.

Nearly all of these states have provided assurance to doctors, nurses, hospitals, and other healthcare providers that they won't be hit with COVID-19 lawsuits. These laws generally hold healthcare providers accountable for grossly negligent conduct when medical care is compromised due to the pandemic. In addition, Governors in at least nineteen states have also addressed COVID-19 liability concerns, primarily for healthcare providers, through executive orders. These include governors in states that traditionally are not known for supporting legal reform, such as New York, New Jersey, and Pennsylvania.

The enacted COVID-19 liability legislation varies significantly from state to state. For example, a unique provision in Iowa's law does not permit lawyers to sue on behalf of people who allege no more than exposure, emotional harm, or the flu-like symptoms that millions of Americans are likely to experience. Louisiana enacted a law specifically for restaurants that follow COVID-19 proclamations and procedures. The North Carolina law shields volunteer organizations that offer their facilities in support of the state's response to the pandemic. A Georgia law presumes that a person assumed the risk of exposure when he or she attends an event or other public gathering and the ticket, receipt, wristband, or a sign at the entrance warns of this inherent risk.

THE FUTURE – OPERATING IN THE MIDST OF A PANDEMIC

Even if a vaccine is on the horizon, businesses, schools, and others will continue to operate in a pandemic environment for some time. As state legislative sessions begin in 2021, legislators should adopt a balanced approach that protects businesses from unwarranted and excessive liability, encourages businesses to follow best practices for reopening and operating during these uncertain times, and holds those who act recklessly or engage in misconduct responsible for causing harm.

AMERICAN LAW INSTITUTE – ACADEMICS OR ACTIVISTS?

Once a stalwart of the American legal profession, it appears the **American Law Institute** has shifted its mission from its original purpose to promote the clarification and simplification of the law to that of an advocacy organization.

What once was a scholarly institution that was safely above the fray, has now plainly shifted its focus to legal advocacy. As evidence of this, the ALI went so far as to hire a lobbyist last year to represent it in the Texas Legislature to oppose a bill that declared that the ALI's restatements were not controlling in any action governed by the laws of Texas. The ALI saw this as a threat to both its prestige and influence.

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

The **ALI** publishes treatises, known as Restatements, with the intent to "clarify, modernize, and otherwise improve the law." The Restatements summarize state common law and the legal principles articulated in judicial opinions from around the country. Judges often look to these Restatements when making decisions and accord them great deference, as though they had the force of statute or precedent. ALI publications are cited thousands of times each year by courts and have been cited a total of more than 210,000 times by courts over the past century. Some of the ALI's most famous Restatements, including the Restatement (Second) of Torts; Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm; Restatement Third, Torts: Products Liability; and Restatement (Second) of Contracts have had a significant influence on matters of interest to the ATRF. The **ALI** also publishes Principles of the Law, which are meant to influence legislators and guide them when drafting legislation.

The **ALI** has long been held out as the gold standard for positive guiding developments in the law. But recently the Institute has at times deviated in a troubling way from its traditional approach. Rather than simply restating and summarizing the law, it has proposed dramatic changes in key, long- established areas that have stood the test of time.

SEISMIC SHIFT IN 2010

The ALI's 2010 "**Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm**" reversed decades of accepted doctrine regarding the duty of care owed by land possessors to trespassers. It declared that such a duty did, in fact, exist, with the notable exception for flagrant trespassers – a completely undefined term in the law. This embrace of minority views marked a dramatic change for the organization.

Tellingly, ALI reporters then wrote an article in Trial Magazine, a publication for the plaintiffs' bar, extolling this and other provisions as a boon to that segment of the bar and their clients. The article provided detailed guidance for plaintiffs' lawyers looking to forge a lucrative new line of trespassers' lawsuits against property and business owners. This new coziness with the trial bar marked a decided turn away from the ALI's largely objective past and toward a future of openly subjective advocacy.

In response to the restatement, the **American Tort Reform Association** led an effort to codify the relevant law on the duty of care owed to trespassers. The effort focused on freezing the law in place – in statute – so that any court called upon to rule on this issue would look to that statute, not the new restatement. Since 2011, such laws were enacted in 24 states, and no court has subsequently adopted the ALI provision on trespassers.

ADDITIONAL ADVOCACY PROJECTS FOLLOWED

Unfortunately, the trespass doctrine was not a one-off and the ALI has taken an activist approach to several new projects including the 2018 **Restatement of the Law of Liability Insurance** and the pending **"Restatement of the Law of Consumer Contracts."**

RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

In May of 2018, the **American Law Institute** voted to adopt the troublesome **Restatement of the Law of Liability Insurance**. This restatement failed to restate the law as it was written, but rather represents the minority views.

The restatement contains a number of litigation fuel centers that were not supported by existing law:

- It recognizes a novel vicarious liability claim against insurers for the independent professional malpractice of retained defense counsel lacking "adequate" malpractice insurance.
- It states that insurers can be forced to pay punitive damages for reckless behavior, even if the policy excludes punitive damages.

RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS

Perhaps the most troubling of all of the ALI's recent restatements is the **Restatement of the Law of Consumer Contracts**. It attempts to create out of whole cloth a separate area of contract law for so-called consumer contracts despite the fact that it does not appear that any court has articulated a separate set of consumer contract rules that operate differently than the general law of contracts.

Furthermore, it is abundantly clear that the restatement seeks to merge contract law with consumer protection statutes. Such law exists for the purpose of regulation and broader protection for the public.

They are not intended as a means by which to compensate individuals or entities that have contractual disputes. The proposed Restatement also would create a novel theory of deceptive contracts, allowing a consumer to void any contract or term adopted as a result of what is alleged to be a deceptive act or practice. This concept would be an inappropriately broad and amorphous new common law rule, which is derived from statute, not judicial development of the common law.

The restatement further seeks to expand the traditional "unconscionability" doctrine, which would embolden courts further to invalidate or modify certain contracts or portions of contracts between businesses and consumers.

Finally, the restatement's arbitration provision ignores both the **Federal Arbitration Act** and U.S. Supreme Court precedent regarding predispute arbitration agreements. A broad and ambiguous requirement granting judges the power to determine whether an arbitration clause was entered into in good faith undoubtedly will lead to lawsuits regarding what exactly constitutes that good faith.

This increased ambiguity in the law regarding the validity of arbitration clauses will only serve to increase litigation. Plaintiffs' lawyers are already scurrying to eliminate predispute arbitration in many of the Judicial Hellholes, and these clauses are unlikely to be upheld, opening the door for entrepreneurial plaintiffs' lawyers to file a multitude of class actions.

In many ways, this restatement is no different than an article in a law journal advocating expanded civil liability, and judges should treat it that way. The late **Justice Antonin Scalia** said as much in a 2015 **decision**, writing that authors of ALI restatements have, "[o]ver time … abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."

There is universal concern about the direction the **ALI** is taking this project- from state Attorneys General to the Civil Justice community, the project is an orphan and does not appear to have support outside the four walls of the ALI.

A May 2020 vote was delayed due to COVID-19.

RESTATEMENT (THIRD) OF TORTS: CONCLUDING PROVISIONS

The **ALI** is proposing to "restate" a medical monitoring rule as part of the organization's pending **Restatement (Third) of Torts: Concluding Provisions**. The draft restatement includes a controversial provision that would allow medical monitoring to be awarded as part of damages even in the absence of a present physical injury. Such a restatement rule implicates the same policy considerations expressed by other courts that have rejected medical monitoring claims by the unimpaired in favor of a present physical injury requirement. Most recently in 2020, the **Illinois Supreme Court** took this mainstream approach and refused to award medical monitoring costs when a plaintiff has not experienced a present physical injury.

In ***Berry v. City of Chicago***, plaintiffs' lawyers filed a class action on behalf of city residents in an area where the city had replaced water lines, alleging that negligently performed work may have exposed them to lead. The action sought to require the city to establish a trust fund to pay for the medical monitoring of all class members to diagnose potential incidences of lead poisoning. The Illinois Supreme Court's September 2020 ruling recognized that the tort system compensates individuals for actual harm and that an increased *risk* of harm is not an injury. As the court explained, requiring a present physical injury "establishes a workable standard for judges and juries who must determine liability, protects court dockets from becoming clogged with comparatively unimportant or trivial claims, and reduces the threat of unlimited and unpredictable liability." The **U.S. Supreme Court** and other state high courts have followed similar reasoning in rejecting medical monitoring claims.

ALI membership will likely vote at the 2021 Annual Meeting on whether to tentatively approve the medical monitoring provision of the Restatement.

PHANTOM DAMAGES AND THE TRIAL BAR'S EFFORTS TO GAME THE SYSTEM

Jury verdicts across the country continue to rise, with payout amounts increasing 51.7 percent annually from 2010 to 2018 while overall inflation grew only 1.7 percent. As trial lawyers flock to file lawsuits in the wake of the pandemic, the U.S. is poised to hold onto its reputation as the most litigious country in the world, and our $373.1 billion tort system is likely to grow even more expensive. A recent study showed that in 2018, small businesses shouldered 53 percent, or $182 billion, of the U.S. tort system's commercial liability costs. This immense burden is too much for many to shoulder and is forcing doors to close or owners to relocate to less litigious states.

While small and large businesses may face lawsuits that bankrupt them, everyday Americans pay the price of lawsuit abuse through a "tort tax" costing more than $760 per person every year in Judicial Hellholes across the country.

'PHANTOM DAMAGES' CONTRIBUTE TO PRICE TAG OF LAWSUIT ABUSE

A variety of civil justice abuses contribute to the growing litigation costs, none more so than judges permitting "phantom damages" to be introduced in their courtrooms. "Phantom Damages" exist any time lawsuit recoveries are calculated using the dollar amount a patient was billed for a medical service instead of the amount the patient, their insurer, Medicare, Medicaid, or workers' compensation actually paid for treatment. For example, a hospital may bill $20,000 for an emergency room visit, while the amount the hospital actually receives after adjustments may be $8,000. The $12,000 difference is not owed or ever paid in the real world.

The use of inflated billed amounts only increases the overall cost of the judicial system, spreading the financial burden on the backs of every American through higher costs on goods and services. These amounts become a driving factor for settlements or jury awards in personal injury cases when juries are asked to assign a verdict of three to four times the amount of the inflated medical bills.

But, juries are only told the "phantom" large dollar amount billed. They are not informed of the actual amount paid by a patient or his or her insurer. They're not made aware of the financial interest of medical finance companies or their impact on health care costs. Consequently, we see higher and higher phantom damage awards and settlement amounts based on exaggerated numbers intended to produce a larger payout for trial lawyers.

Juries' lack of access to critical evidence is allowable in more than 36 states, contributing to the dramatic rise in settlements and verdicts with phantom damage awards.

Twenty-five states plus DC allow full recovery of phantom damages under most or all conditions, with little opportunity for defendants to question juries about whether medical bills reflect a reasonable market value.

Eleven states allow juries to consider evidence of phantom billed numbers, but courts reduce awards post-trial to actual amounts paid. While a slight improvement from those allowing full recovery of phantom damages, this approach demonstrates a lack of trust for juries by withholding the reality of the medical care costs at issue.

ARCHAIC STATUTE CREATES "PHANTOM DAMAGES"

It is the collateral source rule in most jurisdictions that creates "phantom damages." This is an archaic, century old evidentiary rule where the courts discussed the "prophylactic effect" on the wrongdoer. The courts feared the wrongdoer would not be deterred from similar acts in the future if the wrongdoer benefitted from reduced damages by of collateral sources.

The collateral source rule provides that in computing damages, a jury is not permitted to consider compensation the plaintiff received for the injury from sources other than the defendant, even if the payments partially or completely mitigated the plaintiff's actual monetary loss. Evidence of payments coming from third parties are barred from the jury's ears, allowing an injured party to receive an award to cover lost wages or medical expenses even when already reimbursed for those losses from a third party. More than a dozen states have a collateral source rule that applies in all civil cases and 18 states have a rule with limited exceptions. The remaining states have addressed the issue through a variety of reforms, including a requirement that damage awards be decreased by the amount paid by third-parties, or at the very least, the states allow such evidence to be considered by the jury.

The collateral source rule encourages litigation because it creates incentives to sue, even if a person has already received or is receiving substantial compensation. Such litigation, and the attendant transactional costs, such as attorneys' and expert witness fees and court expenses, may increase insurance premiums and needlessly use judicial resources.

Over time, this concept is outdated where the wrongdoer is not ultimately paying these inflated damages, rather, insurance consumers are paying them with increased rates. This contributes to the rising "tort tax" paid by Americans, especially in Judicial Hellholes across the country.

SECOND-GENERATION OF 'PHANTOM DAMAGES' IS HERE

"Phantom Damages" are not new; however, a troubling new trend in our civil justice system threatens to further bloat the system, as "phantom damages" grow larger due to an increased use of medical finance companies and "letters of protection."

MEDICAL FINANCING

Instead of using health insurance coverage, trial lawyers are now encouraging clients to enter into agreements with third-party medical financing companies to pay for medical care related to injuries. Lawyers go so far as encouraging their patients to not use their health insurance, but rather use the medical finance companies. The patient still finds themselves liable for the full amount billed even if they do not recover in the lawsuit. Patients do not benefit from insurers' price negotiations and are responsible for inflated medical costs.

With the advent of medical finance companies, the amount of the phantom damages in an individual case have increased significantly. They represent the second generation of phantom damages. The persons now receiving the benefits not only include the plaintiffs' attorneys and their clients, but also pre-selected medical providers and these medical finance companies. In some cases, lawyers will even recommend clients to doctors the lawyer has a relationship with, and those doctors often charge a much higher amount than a typical doctor might charge.

The financial interest of a business that is not a party in a lawsuit should not play an outsized role in a case. It unduly increases litigation costs and hinders the parties' abilities to efficiently resolve matters.

LETTERS OF PROTECTION

Another troubling trend contributing to the rise in "phantom damages" is the abuse of "letters of protection" to medical providers in personal injury cases. In this instance, a doctor treats a patient on a letter of protection provided by the injured party's attorney that states the bill will be paid out of the settlement or verdict proceeds. It is similar to medical financing because the injured party is still liable for the full amount billed even if they do not recover in the lawsuit and patients do not benefit from insurers price negotiations.

A prime example in Florida shows the immense financial impact letters of protection have on litigation costs. A Florida plaintiff slipped and fell in a grocery store, injuring both knees, requiring identical surgeries on each knee. For the first knee surgery, the plaintiff used health insurance, was billed $19,000 by the doctor and the total cost was $3,400. However, the second knee surgery was performed under a letter of protection, resulting in $59,000 billed by and owed to the surgery center.

As discussed in the **Florida Watch List section**, Florida is ground-zero for this type of abuse. According to a Publix lawyer testifying before the **Florida Senate Judiciary Committee**, at any given time, there are approximately 450 personal injury claims pending against Publix, with a vast majority filed in Florida. The single largest factor in the cost of these claims is whether it involves a letter of protection. More than 60 percent of 450 claims at any given time involve letters of protection and of those claims, 61 percent of the plaintiffs have health coverage and choose not to use it. The cost of settling in Florida is 65 percent higher than the other states in which Publix operates and its largely due to letters of protection, which inflate damage awards and provide windfalls to plaintiffs and their attorneys.

CONCLUSION

The impact of "phantom damages," medical financing companies, and letters of protection on the cost of civil litigation is undeniable. When determining damage awards, juries should be permitted to consider all evidence needed to fully analyze each case. They should be made aware of referral relationships between attorneys and doctors as well as both usual and customary billed costs to compare with those requested in cases where medical finance services or letters of protection are involved. As the system currently operates, the only winners are the plaintiffs' lawyers at the expense of everyday Americans and employers.

THE MAKING OF A JUDICIAL HELLHOLE:

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

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

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

While most judges honor their commitment to be unbiased arbiters in the pursuit of truth and justice, Judicial Hellholes' judges do not. Instead, these few jurists may favor local plaintiffs' lawyers and their clients over defendant corporations. Some 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 juris- dictions." 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.

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