



JUDICIAL

Hellholes[®]

2022/23



“The goal is always to find a way to place your case into Philadelphia if you are a plaintiff’s lawyer.”

– A Neuwirth firm attorney

“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](#) op-ed discussing 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](#)

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.

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Executive Summary

The 2022-2023 Judicial Hellholes® report shines its brightest spotlight on eight 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.

JUDICIAL HELLHOLES®

#1 GEORGIA Nuclear verdicts are bogging down business and third-party litigation financing is playing an increasing role in litigation. The Georgia Supreme Court issued several liability expanding decisions in 2022 and placed the onus for reform on the Georgia legislature.

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

The Pennsylvania Supreme Court continues to promote forum shopping and eliminated an important rule governing where lawyers may file medical liability cases. The Court also opened the door to awarding plaintiffs unreasonable attorneys' fees. The Philadelphia Court of Common Pleas continues to be a preferred court for mass tort litigation. This court also hosts most of the state's nuclear verdicts. Plaintiffs from across the country flock to the Court of Common Pleas because of its reputation for excessive verdicts and its "open door" policy to out-of-state plaintiffs.

#3 CALIFORNIA Baseless Prop-65 lawsuits thrive in courts and the volume of litigation continues to skyrocket. Small businesses are weighed down by frivolous Private Attorney General Act (PAGA) and Americans with Disability Act (ADA) accessibility lawsuits. The state's unique lemon law provides windfalls for plaintiffs' lawyers. California also is at the forefront of the climate change litigation battle and a state court permitted a novel theory of COVID-19 liability to proceed.

#4 NEW YORK California and New York battle it out for the most "no-injury" consumer class action lawsuits and the most claims under the ADA. New York also continues to see a surging number of nuclear verdicts driven in part by the allowance of "anchoring." The state has adopted an open-door policy for predatory lawsuit loans and the litigation climate contributes to the state being one of the worst for doctors.

#5 COOK COUNTY, ILLINOIS Illinois, especially Cook County, is a magnet for "no-injury" lawsuits stemming from the state's Biometric Information Privacy Act (BIPA) and consumer class actions. Additionally, an overwhelming percent of the state's nuclear verdicts come out of the Cook County trial court.



#6 SOUTH CAROLINA ASBESTOS LITIGATION South Carolina’s consolidated docket for the state’s asbestos litigation has developed a reputation for extraordinary pro-plaintiff rulings. A Texas law firm has its way in court and appellate courts bolster outlier rulings. As a result, the state has become a hot spot for asbestos claims.

#7 LOUISIANA Coastal litigation continues to drain state resources. Judicial misconduct appears to run rampant across the state and the investigation continues into a massive scheme to defraud commercial truckers and insurers in Louisiana courts. A state court also opened the floodgates to COVID-19 litigation not permitted elsewhere.

#8 ST. LOUIS St. Louis once again finds itself on the list; however, the “Show-Me-Your-Lawsuit” state has made important progress through legislative reforms. While the legislature has prioritized civil justice reform, there is more work to be done. Junk science is permitted in St. Louis courts, which have a history of nuclear verdicts. Courts allow “phantom damages” and it’s a favorite jurisdiction for asbestos litigation.

WATCH LIST

Beyond the Judicial Hellholes®, this report calls attention to three 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 LEGISLATURE Despite all the work done by the Florida Supreme Court and Governor Ron DeSantis to mitigate lawsuit abuse, much-needed reforms continue to stall in the Florida Legislature. The legislature needs to address issues including inflated medical damages and deceptive trial lawyer advertising and take additional action to respond to the state’s property insurance crisis.

NEW JERSEY reappears on the Watch List due to a variety of factors that could lead to the “perfect storm” of litigation abuse across the state. The trial bar has achieved the triple threat – they wield unprecedented power in the state legislature, the Governor has no real interest in civil justice reform, and the new makeup of the New Jersey Supreme Court may result in a shift toward activism and expansion of liability.

TEXAS’S COURT OF APPEALS FOR THE FIFTH DISTRICT repeatedly misapplies established U.S. Supreme Court and state precedents and procedures, requiring review and reversal by the state’s high court. It has developed a reputation for being pro-plaintiff and pro-liability expansion.

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 American Law Institute’s adoption of a controversial restatement, Madison and St. Clair Counties – the plaintiffs’ lawyers preferred jurisdictions for asbestos litigation, the Montana Supreme Court’s refusal to apply a statutory cap on damages, and a Wisconsin appellate panel decision to affirm a judgment despite unreliable expert testimony.

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 developments, the Florida Supreme Court issued a pair of well-balanced commonsense decisions, the U.S. Court of Appeals for the Fourth Circuit upheld a West Virginia law regulating deceptive advertisements, the Arizona Supreme Court required a heightened standard for punitive damages, and Maryland's highest court rejected the "loss of chance" doctrine.

In addition to court actions, nine state legislatures enacted significant, positive civil justice reforms in 2022, including an Arizona bill to prevent over-naming of defendants in asbestos litigation, Florida legislation to address the property insurance crisis, and Kansas and Louisiana bills that regulated misleading and deceptive trial lawyer advertising.

CLOSER LOOKS

THE MASS TORT MACHINE Mass tort litigation has become a multi-billion-dollar industry for plaintiffs' lawyers as they target manufacturers of everything from pharmaceuticals and medical devices to herbicides and military-grade ear plugs. Regardless of the product, the trial bar's playbook is essentially the same every time. They spend millions of dollars on advertising in plaintiff-friendly Judicial Hellholes® in search of potential claimants. Plaintiffs' lawyers rely on traditional and social media to bolster litigation, often pushing inaccurate and baseless claims in friendly outlets. Lawyers then partner with so-called experts to provide misleading scientific evidence to support their claims both inside and outside the courtroom. These activities are mostly funded by third-party investors who invest the necessary money up front to initiate these tactics. The goal is to overwhelm the courts with a flood of questionable litigation and pressure the defendant to settle even meritless cases.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL – FOR THE PEOPLE OR FOR THE PROFIT?

When the National Association of Attorneys General was founded in 1907, its goal was to support the top law enforcement officer in each state in fulfilling the sworn oaths each took to serve the people of their state. The organization claims to be a "nonpartisan national forum providing collaboration, insight, and expertise to empower and champion America's attorneys general." But over time, NAAG's focus has shifted from promoting collaboration to promoting entrepreneurial litigation. NAAG has primarily turned into an organization that has only one goal: suing businesses for profit.

Judicial Hellholes®



TOP ISSUES

- Propensity for nuclear verdicts
- Trial court issues record punitive damages award
- Expansive views of product liability law
- Open-door policy for third party litigation financing
- High Court requires loser to pay... twice

A new #1 Judicial Hellhole® burst onto the scene in 2022. The litigation climate in Georgia has deteriorated for years and in 2022 it reached fever pitch. Georgia replaced California on the top of this year's list thanks in no small part to a massive \$1.7 billion nuclear verdict that can charitably be called concerning. Georgia state courts issue some of the country's largest nuclear verdicts in state and superior courts, as personal injury lawyers cash in on plaintiff-friendly judges that benefit greatly from trial lawyer campaign contributions.

Additionally, the **Georgia Supreme Court** refused to modernize the state's seatbelt gag rule, precluding a jury from hearing evidence about whether an occupant wore a seatbelt at the time of a crash. The Court also declined to expressly adopt the apex doctrine, a framework that courts across the country have adopted to protect high-level corporate employees from unnecessarily being deposed. To make matters worse, the Court issued a ruling that will force defendants to potentially pay double the plaintiffs' attorneys' fees when they are unsuccessful at trial.

The **Georgia Supreme Court** points to the **Georgia General Assembly** as the appropriate branch to handle growing policy concerns. The General Assembly has responded in years past, but much work remains to be done to address the lawsuit abuse sweeping across the state. Until state leaders focus on the many abuses bogging down the state's economy and burdening small business, Georgia will be firmly affixed atop

LEGAL SERVICES ADVERTISING SPENDING

GEORGIA

Plaintiffs' lawyers are well aware of the court's propensity for liability-expanding decisions and spend millions of dollars on advertising. [Between 2017 and 2021](#), residents in Georgia saw the fourth most local legal services ads on television and heard the fourth most ads on the radio. In total, plaintiffs' lawyers spent \$391 million on 4,449,755 advertisements across television, radio and outdoor mediums during this five-year period.

In Georgia, Trial lawyers spent \$39.2 million on more than 567,000 local television advertisements from January through August 2022.

ECONOMIC IMPACT OF LAWSUIT ABUSE

GEORGIA

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Georgia residents pay a "tort tax" of \$1,111.28 per person and 117,809 jobs are lost each year, according to a recent study by [The Perryman Group](#). If Georgia enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$11.9 billion.

the Judicial Hellholes® list.

NUCLEAR VERDICTS

Georgia has been one of the most prolific producers of nuclear verdicts nationwide. Nuclear verdicts are awards that exceed \$10 million.

From 2010 to 2019, [53 nuclear verdicts](#) in personal injury and wrongful death cases were reported in Georgia totaling more than \$3 billion. According to a recent study published by the U.S. Chamber of Commerce Institute for

Legal Reform, “During the final two years of the ten-year period, these verdicts propelled Georgia into the top five states for nuclear verdicts.” The recent dramatic rise in nuclear verdicts can be attributed to several factors, including the state’s allowance of “anchoring” tactics by plaintiffs’ lawyers. Anchoring is a tactic that

From 2010 to 2019, 53 nuclear verdicts in personal injury and wrongful death cases were reported in Georgia totaling more than \$3 billion.

lawyers use in order to place an extremely high amount into jurors’ minds to start as a base dollar amount for a pain and suffering award. While some states have laws that prevent or limit this tactic’s use in a courtroom, Georgia is one of a few that has a specific state statute allowing the practice.

Premises liability cases [have generated](#) some of the most absurd nuclear verdicts in Georgia, particularly lawsuits blaming businesses for the criminal conduct of others on or near its property. Additionally, the trucking industry has been a primary target of runaway verdicts, as has been well chronicled by recent [Judicial Hellholes® reports](#).

The nuclear verdicts against the trucking industry not only affect the companies named in those lawsuits, but the industry itself. According to a [study](#) by the **American Transportation Research Institute (ATRI)**, the average auto liability premium has increased significantly for fleets of all sizes. With the [average size](#) of verdicts in excess of \$1 million increasing from \$2,305,736 to \$22,288,000 nationwide between 2010 and 2018, insurance companies are charging more to cover these excessive litigation risks. These rising insurance premiums often hit small businesses the hardest and have driven many out of business.

Notorious Plaintiffs’ Firm Responsible For Several Nuclear Verdicts In State

James Butler Jr., the founding partner of [Butler Prather LLP](#), formerly of Butler Wooten Cheely & Peak, a well-known plaintiffs’ lawyer in the state of Georgia who has secured multiple nuclear verdicts of \$100 million or more.

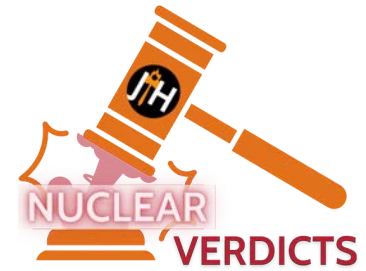
Butler contributes thousands of dollars each year to judicial campaigns across the state. Between 2016 and 2022, he donated [thousands of dollars](#) directly to campaigns for appellate and supreme court justices.

In addition, his law firm is listed as a [supporter](#) of **Gwinnett County State Court Judge Shawn Bratton**, the judge who oversaw Butler’s case against Ford this year that resulted in the eye-popping \$1.7 billion verdict discussed below.

Record Punitive Damage Award Handed Down In Gwinnett County

In August 2022, a Georgia jury returned a \$1.7 billion punitive damage verdict against Ford, finding that the company sold millions of “Super Duty” models with defectively weak roofs. As mentioned above, the plaintiffs were represented by James Butler, Jr., a financial supporter of the judge overseeing the case. Butler and his team are requesting anywhere from [\\$549 million to \\$686 million](#) in attorneys’ fees plus an additional \$500,000 in litigation costs on the basis that the automaker rejected the plaintiffs’ [\\$50 million](#) settlement offer and opted to defend itself at trial.

This is the [highest](#) punitive award to be issued in Georgia’s history and is an almost [fourfold](#) increase on the previous state record for punitive damages of \$457 million.



Butler initially brought the case in **Cobb County Circuit Court**. Disappointed by the way things were going, he [voluntarily dismissed](#) the case and refiled it in Gwinnett County before a friendly judge. **Gwinnett County Judge Shawn Bratton** was a plaintiffs' lawyer prior to being appointed to the bench in 2014 and has deep ties with the Georgia plaintiffs' bar. While federal courts and some states have a pre-dismissal rule to prohibit voluntary dismissals like these, Georgia has not adopted such a rule.

The ethically questionable events and severely biased court orders leading up to the massive verdict epitomize what we have come to expect in Judicial Hellholes®. In July 2015, about fifteen months after the accident, the plaintiffs' lawyers [secretly exhumed](#) the bodies of the decedents and hired the Chief medical examiner for the Georgia Bureau of Investigation, Jonathan Einstat, to conduct an "unofficial" and "private" autopsy at an undisclosed location. No other autopsy had been conducted and first responders listed their causes of death as "multiple traumas."

Ford was never given notice of the plaintiffs' intention to exhume the bodies until they received the plaintiffs' autopsy report. By then, the bodies were reburied before Ford could conduct their own counter-autopsy. Neither the plaintiffs' lawyers nor the medical examiner properly documented the autopsy and the examiner only took selective photos based on "the feel" of the autopsy. Upon completing his examination, the medical examiner dismembered the body in a way that future testing could not be conducted. (2018.04.06 – Hill – FMC's Motion for Sanctions – Spoliation)

During trial, the court granted the plaintiffs' [motion in limine](#) (a pre-trial request to exclude evidence) to prevent Ford from making any insinuations about the autopsy process. The court prohibited Ford from questioning the credibility of the autopsy, suggesting in any way that the autopsy was conducted in secret, or stating that they were excluded from the autopsy. Without proper documentation, Ford argued that the exhumation procedure had a prejudicial effect on its ability to prove causation.

Additionally, Ford was prohibited from informing the jury that the plaintiffs were improperly wearing their seatbelts during the crash.

In total, **Judge Bratton** granted 25 of the plaintiffs' lawyers 31 motions in limine, while only denying 3 (the others were either limited, deferred or withdrawn). On the other hand, Judge Bratton only granted 8 of Ford's 32 motions in limine.

On the 15th day of the trial, Butler moved for a mistrial. He objected to a question by one of Ford's lawyers during expert testimony, expressing to the judge he was concerned about where the lawyers were going with their line of questioning. Following a brief recess, **Judge Bratton** ordered a mistrial on the basis that Ford violated 3 motions in limine excluding certain evidence and arguments.

Once the mistrial was declared, the plaintiffs filed a [post-mistrial motion](#) for sanctions against Ford. The court obliged and issued the most extreme "death penalty" sanctions.

As part of these [sanctions](#), on retrial, the jury was instructed to assume six things from the outset:

1. The roof on the subject 1999-2016 Super Duty trucks was and is defectively designed and dangerously weak;
2. The roof on the subject 1999-2016 Super Duty trucks was and is susceptible to collapse or crush in a foreseeable rollover wreck which can cause death or serious injury to occupants of the trucks;
3. The acts and failures to act by Ford Motor Company in selling trucks with that weak roof amount to a willful, and a reckless, and a wanton disregard for life;
4. Ford Motor Company knew of the dangers posed by the roofs in the subject trucks and therefore had a duty to warn members of the public of that danger, but willfully failed to so warn the public;
5. The defect in the roof of the Hills' truck resulted in roof crush that caused the injuries that led to the deaths of both Mr. and Mrs. Hill; and
6. The rollover wreck in this case was foreseeable.

Judge Joseph Iannazzone oversaw the retrial. He instructed the jury to presume the facts from the sanctions order to be true. He advised them that their sole responsibility was to determine the amount of compensatory damages and whether there was “clear and convincing evidence” that punitive damage should be imposed against Ford. (2022.08.04 Transcript Sanctions findings at trial)

In August 2022, the trial concluded, and the jury awarded plaintiffs [\\$24 million](#) in compensatory damages, including \$8 million for pain and suffering. The jury also awarded \$1.7 billion in punitive damages. Following the verdict, the jury confirmed that once the court issued the sanctions order, it wasn’t a matter of whether to award punitive damages, it was a matter of how much.

Ford immediately filed a motion for a [new trial](#) and a motion to remit hoping the new senior judge now overseeing the case will lower the \$1.7 billion verdict considerably to align with U.S. Supreme Court guidelines.

While legitimate ethical questions exist in this case, it also highlights how the state of Georgia’s current legal climate can be frequently manipulated by cunning personal injury lawyers to create fundamental unfairness for Georgia defendants.

Other Recent Examples Of Nuclear Verdicts In Georgia

The [2021 Judicial Hellholes](#) report highlighted a \$200 million award in Rabun County in *Baetchelder v. Malibu Boats LLC*, the county’s largest ever verdict to date. Malibu Boats LLC was held liable for failing to provide any warnings or guidance to users of a boat that its design was susceptible to bow swamping if weight was being carried in the bow seat. The verdict included \$80 million in pain and suffering plus \$120 million in punitive damages to the parents of a boy who died in a boating accident.

In 2022, Malibu Boats LLC [requested](#) the court disregard the verdict or order a new trial because there was insufficient evidence to hold it liable for failing to warn and the punitive damage amount violated the U.S. Constitution as “excessive and arbitrary punishment.” However, **Judge B. Chan Caudell** denied this request in an [80-page order](#) and upheld the \$120 million in punitive damages.

Other examples of recent nuclear verdicts include:

- **December 2021:** [\\$113.5 million verdict](#) (including \$100 million in punitive damage) in a wrongful death case in **U.S. District Court for the Northern District of Georgia**
- **September 2022:** [\\$77 million verdict](#) (including \$10 million for pain and suffering, \$55 million for value of life, and \$1 million in punitive damages) in a wrongful death case in **DeKalb County Superior Court**
- **October 2022:** [\\$75 million verdict](#) (including \$9 million for past medical damages, \$20 million for future medical expenses and \$46 million for pain and suffering) in a medical liability case in **Fulton County Superior Court**

KEY CASE TO WATCH



A key case to watch that could impact Georgia’s nuclear verdicts is [Taylor v. Devereux Foundation](#), a challenge to the state’s statutory limit on punitive damages. A Cobb County jury ordered a health clinic to pay a former patient \$7.6 million over allegations that it failed to prevent sexual abuse in the facility, plus \$50 million in punitive damages. After the trial court reduced the punitive damages portion of the award to \$250,000 to reflect the maximum permitted by state law in a non-product liability case unless a defendant acted with specific intent to cause harm, the plaintiff’s attorney challenged the constitutionality of the cap in an appeal to the Georgia Supreme Court.

The limit has been in place since mid-1980s and has twice been upheld by the Georgia Supreme Court. As ATRA highlighted in [its brief](#), a statutory limit on punitive damages does not intrude upon the fact-finding

authority of the jury, and it is rather a public policy determination to avoid excessive awards that is best resolved by the General Assembly. The **Georgia Supreme Court** is expected to decide the case in 2023.

GEORGIA SUPREME COURT EXPANDS PRODUCT LIABILITY

A March 2022 Georgia Supreme Court ruling places manufacturers at risk of liability when a third party's misuse of a product during criminal activity causes harm.

In that case, plaintiffs were injured in a car accident after the driver crashed into the back of another car going 107 mph. Right before the crash, the driver said she was “just trying to get the car to 100 m.p.h. to post it on Snapchat” using Snapchat's Speed Filter.

The plaintiffs sued Snapchat as well as the speeding driver. They alleged Snapchat negligently designed its speed filter and it “was motivating, incentivizing, or otherwise encouraging its users to drive at excessive, dangerous speeds in violation of traffic and safety laws.” They made these claims despite the app containing a “pop-up” warning stating among other things, “Please, DO NOT Snap and drive.”

A Georgia trial court dismissed the claim against Snapchat and a split Court of Appeals affirmed that ruling, finding the App maker did not owe a duty of care to the plaintiffs. The **Georgia Supreme Court** reversed, sending the case back for further consideration. In [Maynard v. Snapchat](#), the **Georgia Supreme Court** ruled that a manufacturer has a duty to use reasonable care when selecting from alternative designs to reduce reasonably foreseeable risks of harm posed by its products. As a dissenting justice observed, “imposing a duty on a manufacturer at the design stage to account for and design against its product being used in the commission of a crime falls beyond what is reasonably foreseeable under traditional principles of tort law.”

LOSER PAYS – TWICE!

Typically, in civil litigation, each party pays its own legal fees, a principle known as the “American Rule.” In some instances, statutes authorize a prevailing party (or just the plaintiff) to recover attorneys' fees. ATRA has cautioned that while “loser pays” laws may be attractive as a means to discourage meritless litigation, they run the risk that they will be imposed largely on defendants, which courts may view as having the deep pockets to pay legal fees, while plaintiffs who bring frivolous suits get a pass. This year, a Georgia Supreme Court decision broke new ground, however, when it ruled that a business that defends itself at trial, and loses, can be required to pay a plaintiff's attorney's fees – twice!

Following an auto accident, a plaintiff demanded a \$600,000 settlement from the defendant. The defendant, who did not believe the offer was made in good faith, went to trial. A jury found in the plaintiff's favor, awarding \$3 million in compensatory damages. The jury also tacked on over \$1.2 million in attorney's fees, based on a Georgia law that allows it to do so if it finds the defendant was overly litigious, acted in bad faith, or “caused the plaintiff unnecessary trouble and expense.” You may be wondering how a person racks up \$1.2 million in attorney's fees in an auto accident case. The jury computed the amount based on the plaintiff's lawyer's contingency fee – 40%.

But that \$1.2 million, bringing the total verdict to \$4.2 million, apparently was not enough. The plaintiff then asked the court to award him attorney's fees *again*. This time, his lawyer relied on a separate [Georgia law](#) requiring a court to award attorney's fees if a defendant rejects an offer of settlement, goes to trial, and the verdict is 125% above the offer. Both the trial court and an intermediate appellate court unanimously rejected this request, rationally finding the plaintiff had already recovered these costs and could not receive double recovery for the same expense.

The **Georgia Supreme Court** disagreed, ruling in March 2022 that a plaintiff could collect his attorney's fees twice – once under each statute. In [Junior v. Graham](#), the state high court viewed the statute allowing a jury to award fees as compensatory in nature, while the “offer of settlement” law allowing a court to award fees as a sanction. The Court also reasoned that since the Georgia legislature had not specifically

prohibited use of both statutes together when it enacted the Georgia offer of settlement law as part of a tort reform package enacted in 2005, it would allow double recovery.

Georgia Supreme Court observers characterized the ruling as “[somewhat surprising](#).” Already, they say, plaintiffs’ lawyers are amending their complaints and are serving offers of settlement to take advantage of the decision. Now, defendants in Georgia will face [additional pressure](#) to settle cases, even when the amounts demanded seem unreasonable or they do not believe they are responsible for the plaintiff’s injury.

THIRD-PARTY LITIGATION FINANCING

Companies that provide loans to plaintiffs in personal injury suits in exchange for a percentage of their awards are permitted to charge extremely high interest rates despite Georgia’s usury law. Unfortunately, the legislature has not acted to address these practices, which take advantage of vulnerable consumers and complicate the ability of parties to resolve litigation.



Georgia finds itself in this situation after the **Georgia Supreme Court** ruled in [Ruth v. Cherokee](#) (2018) that litigation funding companies are not subject to the state’s [Payday Lending Act](#) because their repayment of lawsuit loans is contingent upon the success of the underlying case. In January 2020, a federal judge, bound by the Georgia Supreme Court decision, [reluctantly found](#) that lawsuit lenders can charge any usurious rate they want in the state.

In its 2018 ruling, the **Georgia Supreme Court** noted that the **Georgia General Assembly** may revisit the scope of the law should they disagree with the decision. There has been no movement, however, in the Georgia legislature to address the growing concern posed by unbound lawsuit lending, which leads to unreasonable settlement demands, and lengthier, more costly litigation.

“[Third-party litigation financing] ... is a very murky place right now. I don’t understand why anybody’s afraid of the light unless they’ve got something to hide.”

– Tripp Haston, Bradley Arant Boult Cummings LLP

In addition, Georgia does not require companies that provide lawsuit loans, or who otherwise invest in litigation to disclose their involvement. [Lack of funding transparency](#) permits predatory financing companies or lenders who act unethically to operate without any regulatory oversight. Other states like [Wisconsin](#) and [West Virginia](#) have recently enacted legislation that requires disclosure of consumer litigation financing.

Tripp Haston, the head of the life sciences practices at Bradley Arant Boult Cummings LLP [commented](#), that “[third-party litigation financing] ... is a very murky place right now. I don’t understand why anybody’s afraid of the light unless they’ve got something to hide.” Georgia has not yet made any proposals on funding transparency.

GEORGIA HIGH COURT REFUSES TO EXPRESSLY ADOPT APEX DOCTRINE

The apex doctrine is a framework that courts across the country have adopted to protect high-level corporate employees, who have no unique or superior knowledge of a particular case, from being pulled into depositions. In addition to its purpose of saving time and resources, this doctrine prevents plaintiffs from abusing the discovery system to pressure a company into settlement by disrupting its operations. To avail oneself to the apex doctrine, the party must [show](#) that (1) the corporate executive lacks unique, first-hand knowledge of the facts at issue and (2) other, less intrusive means of discovery, such as questioning other employees, have not been exhausted.

In June 2022, the **Georgia Supreme Court**, while recognizing the importance of the principles behind the apex doctrine, [refused](#) to expressly adopt it. The **Georgia Supreme Court** noted that such policy concerns are to be addressed by the **Georgia General Assembly** rather than the judiciary. Instead, the Court

emphasized the importance of a trial court's discretion in determining good cause and refused to adopt rules that restrict such discretion. According to the court, judges must balance the interest of the parties in securing permissible discovery on a case-by-case basis.

Discretionary depositions of high-ranked officials [may hinder](#) the official's ability to perform their duties. Permitting discovery without demonstration of an official's unique knowledge and before exhausting other avenues of information, allows litigants to pressure a party to settle out of necessity rather than litigate based on the merits of the case.

QUESTIONS SURROUND FUTURE OF STATE'S SEATBELT GAG RULE

Under what's known as the "seatbelt gag rule," lawyers defending a product liability claim cannot inform the jury that someone hurt in an auto accident was not wearing a seatbelt.

[Enacted](#) by the Georgia legislature in 1988, critics of the statute argue that the policy behind the seatbelt gag rule has [long ended](#). At the time of enactment, people questioned the effectiveness of seatbelts in preventing injuries. Some legislators believed that air bags were sufficient and seatbelt use was not widespread. Since then, forty-nine states have mandated the use of safety belts and numerous [studies](#) have proven the protection that modern seatbelts provide. With clear evidence that seatbelt usage is crucial to both a driver's and passenger's safety, many states are discarding the seatbelt gag rule as an anachronistic law that "may have been appropriate in its time," but has become outdated by further studies. Instead, these states allow juries to consider seatbelt use when allocating fault or determining the cause of an injury.

Unfortunately, the **Georgia Supreme Court** passed on an opportunity to constrain the state's gag rule; however, the justices did leave the door open to a future change.

A product liability suit against Ford [alleged](#) that a defectively designed airbag restraint system failed to deploy during a collision, resulting in a passenger's injury. During [discovery](#), the plaintiffs filed a motion to exclude any evidence concerning the plaintiffs' seatbelt use at the time of the collision. Ford responded that "given the interconnected designs of restraints and airbags, it is pragmatically impossible ... to conclude that a differently designed airbag would be safer without considering occupant seatbelt use or nonuse." Ford argued that applying the seatbelt gag rule in this context, when it was necessary to its defense, would violate its right to due process and equal protection.

In the Supreme Court [opinion](#), the Court found Georgia's seatbelt gag rule applied to the claim but did not rule on the constitutionality of the statute as applied. The Court acknowledged that "some of us [on this court] have serious concerns about the constitutionality of a statute that strips from a defendant the ability to present evidence that could be critical to its ability to present a defense of a product it designs and manufactures." The Court found that it could not rule on this issue at an early stage in the litigation, which had been certified by a federal trial court before trial.

#2

THE PENNSYLVANIA SUPREME COURT & THE PHILADELPHIA COURT OF COMMON PLEAS



TOP ISSUES

- Nuclear verdicts hit Pennsylvania
- High court continues to promote forum shopping, eliminates medical liability venue rule
- Unreasonable attorneys' fees permitted by courts
- Mass tort litigation floods Philadelphia Court of Common Pleas Complex Litigation Center

LEGAL SERVICES ADVERTISING SPENDING

PENNSYLVANIA

Plaintiffs' lawyers are well aware of the court's propensity for liability-expanding decisions and spend millions of dollars on advertising. Trial lawyers spent \$11.7 million on more than 88,400 local television advertisements in Philadelphia in January through August 2022. From 2017-2021, trial lawyers spent more [\\$360 million](#) on 3.7 million local advertisements across television, radio and outdoor mediums.

ECONOMIC IMPACT OF LAWSUIT ABUSE

PENNSYLVANIA

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Pennsylvania residents pay a "tort tax" of \$1,281.12 per person and 162,680 jobs are lost each year, according to a recent study by [The Perryman Group](#). If Pennsylvania enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$16.37 billion.

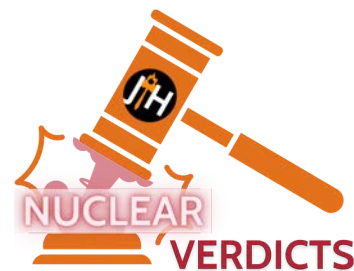
Leadership in the Keystone State continues to turn a blind eye to the abuses occurring in the state's civil justice system, particularly in the Philadelphia Court of Common Pleas and the Supreme Court of Pennsylvania. In perhaps the most disappointing decision in 2022, the Supreme Court of Pennsylvania eliminated the state's venue rule for medical liability lawsuits. This decision will likely lead to a drastic increase in medical liability litigation in some of the most plaintiff-friendly courts in the state.

Nuclear verdicts are prevalent in Philadelphia and the City continues to be a hotspot for mass torts including asbestos litigation and pharmaceutical litigation due to the court's propensity for high damage awards and low barriers to entry.

NUCLEAR VERDICTS HIT PENNSYLVANIA

Pennsylvania in Top 3 for Most Nuclear Verdicts

According to a [2022 U.S. Chamber study](#), Pennsylvania had 78 nuclear verdicts (\$10 million or more) in personal injury and wrongful death cases between 2010 and 2019. These verdicts totaled over \$11 billion in damages, with a median of \$20 million. The state ranked third in per capita nuclear verdicts and fifth in total nuclear verdicts. Medical malpractice and product liability cases pose the most risk of an astronomical award. They accounted for more than 60 percent of nuclear verdicts. Not surprisingly, the **Philadelphia Court of Common Pleas** hosted more than half of the state's nuclear verdicts.



Recent examples of nuclear verdicts include a [\\$18.1 million award](#) in a Philadelphia trip-and-fall case and a [\\$19.7 million verdict](#), also in Philadelphia, in a medical liability case alleging that a physician failed to diagnose a lesion in a patient with a complex medical history. Businesses also remain on edge after earlier trials of pelvic mesh and Risperdal product liability cases resulted in a series of massive verdicts, including amounts as high as [\\$120 million](#) and [\\$8 billion](#).

THE SUPREME COURT OF PENNSYLVANIA CONTINUES TO PROMOTE FORUM SHOPPING

The state high court's loose application of venue rules has been [well-chronicled](#) in recent Judicial Hellholes® reports. Pennsylvania judges have made a habit of swinging open the courtroom doors to out-of-state plaintiffs. This policy benefits plaintiffs who live elsewhere but negatively impacts Pennsylvanians. It clogs courts, drains judicial resources, and drives businesses out of the state leading to job loss.

In addition, Pennsylvania courts have been slow to apply the U.S. Supreme Court's 2017 ruling in [Bristol-Myers Squibb v. Superior Court](#), which instructed state courts to dismiss cases that have no connection to the state. The **Pennsylvania Supreme Court** openly defied the U.S. Supreme Court in [Hammons v. Ethicon](#), which was the state high court's first opportunity to apply the BMS decision to claims brought by out-of-state plaintiffs in Pennsylvania courts.

Unfortunately, 2022 was more of the same from the Pennsylvania Supreme Court.

Elimination of Venue Rule for Medical Liability Cases

In August 2022, the **Supreme Court of Pennsylvania** eliminated constraints that have prevented lawyers from picking the most plaintiff-friendly jurisdiction for filing medical liability actions. At issue was a 2002 [court rule](#) that required plaintiffs' lawyers to file medical liability lawsuits in the county where treatment occurred, not where a jury is expected to view the claim most favorably or return the largest award. The purpose was to reduce forum shopping and create a more fair and balanced playing field. Excessive medical liability drives up doctors' insurance expenses, increases costs for patients, and reduces the public's access to healthcare.

In light of the newly [relaxed venue restrictions](#), attorneys are able 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**, supported the change. Plaintiffs will now flock to areas like Philadelphia, where juries are more willing to award higher verdicts in favor of plaintiffs.

A [2020 report](#) by the General Assembly's **Legislative Budget and Finance Committee** found that professional liability insurance rapidly increased in Pennsylvania in the years before the court restricted venue, peaked in 2007 (4 years after rule change) and has steadily decreased since. The Committee advised that eliminating the medical liability venue rule would have a destabilizing effect on the insurance market.

Another [actuarial report](#) issued in June 2022, prior to the court releasing its order, found that restricting venue helped shift medical malpractice suits from Philadelphia, a plaintiff-friendly venue,

to neighboring, more appropriate venues that have a greater connection to the case. The report predicted that, if the venue rule was eliminated, urban areas were expected to see higher caseloads, both from neighboring county transfers and speculative cases seeking to take advantage of the higher probability of success

“The goal is always to find a way to place your case into Philadelphia if you are a plaintiff's lawyer. Simply put, the insurers will attach a higher value for the identical case in Philadelphia County than they will in Delaware County.”

– a Neuwirth firm attorney

in those courts. The report also predicted that hospital liability premiums would increase by 3.1% to 4.7% on average and that physicians stood to see a 4.9% to 7.2% increase in their insurance costs on average. This will likely have a greater impact on rural counties and could lead to an access-to-care crisis as doctors flee the area due to impending higher insurance costs. Unfortunately, the **Supreme Court of Pennsylvania** did not heed these warnings and still amended the venue rule to eliminate limitations on where medical liability cases may be filed.

In response to the court's order, the Pennsylvania Legislature introduced a [proposed constitutional amendment](#) allowing it to establish venue rules, not the state supreme court. The bill faces an uphill battle and is currently pending in the Pennsylvania House of Representatives.

Plaintiffs' Lawyer Exposes His Own Venue Shopping Game

Look no further than an [April 2022 blog post](#) by a Neuwirth firm attorney to see the importance and the impact of being able to forum shop in Pennsylvania. His post discusses how “venue shopping is a major component of my decision-making on cases.”

“The goal is always to find a way to place your case into Philadelphia if you are a plaintiff’s lawyer. Simply put, the insurers will attach a higher value for the identical case in Philadelphia County than they will in Delaware County.... For example, a torn rotator cuff with surgery in Philadelphia may be worth \$200,000, while the same injury may be valued at \$75,000 in Chester County.”

“So, how have I created venue? Well, on several occasions, I have had my private investigator track a defendant from their home in the suburban counties to their offices in Philadelphia and then had the defendant served in person in Philadelphia County... And then, tada! You have venue that is really unassailable...”

CASES TO WATCH



In May 2022, the **Supreme Court of Pennsylvania** [agreed to review](#) a ruling that allowed a plaintiffs' lawyer to file a case against a company in any county that the business derives revenue, regardless of the forum's connection to the underlying case. In *Hangey v. Husqvarna Professional Products, Inc.*, the defendant, a lawn equipment seller, derived only 0.005% of its total sales from Philadelphia dealers. The trial court found that given the company's negligible business in Philadelphia, the case should be tried in Bucks County, where the plaintiff had purchased the lawnmower that he alleged was defective. An appellate court reversed, ordering the case transferred back to Philadelphia, and allowing the case to proceed there against all defendants in the more liability-friendly forum.

SCOTUS to Weigh in on Positive Pennsylvania Decision

In April 2022, the **U.S. Supreme Court** agreed to consider whether the due process clause of the Fourteenth Amendment prohibits a state from requiring a business to consent to the jurisdiction of its courts, including in cases that lack a connection to the state. In *Mallory v. Norfolk Southern Railway*, a Virginia resident sued a Virginia-based railroad in Pennsylvania, relying purely on the railroad's registration to do business in the state. A state statute, **42 Pa. C.S.A. § 5301**, provides that by registering to do business in Pennsylvania, a company also consents to general jurisdiction in the state's courts.

In early 2022, the **Pennsylvania Supreme Court** correctly affirmed the trial court's decision finding that such a statutory scheme “does not constitute voluntary consent to general jurisdiction but, rather, compelled submission to general jurisdiction by legislative command,” and is unconstitutional under the due process clause.

UNREASONABLE ATTORNEYS' FEES

At the conclusion of 2021, the **Pennsylvania Supreme Court** delivered a Christmas present to the plaintiffs' bar in [Lorina v. Workers Compensation Appeal Board](#). The Court held that it is "mandatory" to shift fees to an employer when its petition for termination of benefits is denied under the Worker's Compensation Act, even if plaintiff has chosen counsel that charges premium rates and bills excessive hours.

In that case, the plaintiff filed for worker's compensation after a slip and fall injury on the job. The employer paid for back pain treatment for the employee for six months before filing a petition to terminate the benefits because the employee had recovered. The workers' compensation judge denied the petition, finding the employee had yet to fully recover. Post-litigation, the plaintiff requested \$14,050 in attorneys' fees under the statute's fee shifting provision, an amount the defendant argued was unreasonable. The **Workers' Compensation Appeal Board** agreed, finding the plaintiff's attorneys billed excessive hours for menial tasks in a relatively straightforward case. An appellate court affirmed, ruling that the plaintiff was not entitled to attorneys' fees because his employer had a reasonable basis for its petition to end benefits. The **Pennsylvania Supreme Court**, however, reversed the lower court, finding that an employer ordinarily has a "mandatory" obligation to cover a prevailing plaintiff's attorneys' fees, and courts may award fees even when an employer had a reasonable basis for its decision.

CASES TO WATCH



Supreme Court To Decide Reasonableness Of Punitive Damages

The **Supreme Court of Pennsylvania** is currently considering whether an amount of punitive damages that is nine times higher than a plaintiff's compensatory damages is *per se* excessive and whether courts should apply a per-judgment or per-defendant calculation when determining the ratio.

In [Bert v. Turk](#), a business sued a competitor, two of its subsidiaries and a former employee for poaching its sales force and client base. The jury awarded \$250,000 in compensatory damages and \$2.8 million in punitive damages. Defendants argued that the ratio exceeded [U.S. Supreme Court precedent](#) on punitive damages, which has stated that punitive damages that are more than nine times compensatory damages (9:1) are rarely constitutional and even a 4:1 ratio pushes the boundary of constitutionality in a typical case. The trial court found no constitutional problem because the judge calculated the ratios by dividing the punitive damages assessed to each defendant (rather than the total punitive award) by the total compensatory award, resulting in much lower ratios.

The Court now has an opportunity to establish "[clearer guidelines](#)" for punitive damage awards and to follow those established by the U.S. Supreme Court.

Evidence of Compliance with Safety Standards

The **Supreme Court of Pennsylvania** also is considering whether courts should admit evidence of industry and government standards in design defect cases. In [Sullivan v. Werner](#), a carpenter sued a scaffold manufacturer, alleging a design defect after falling through the platform and injuring his back. The plaintiff's lawyer sought to exclude evidence of government regulations and industry standards for scaffold design offered by the defendant, citing Pennsylvania [case law](#). He argued that evidence of a product's compliance with industry standards may be kept from the jury in a strict liability claim because the reasonableness of the manufacturer's conduct is irrelevant.

As argued by amici for the scaffold manufacturer in their [brief](#), these standards "promote uniformity in product design, reduce costs associated with development and testing, and ensure the product is safely designed and manufactured;" and therefore, businesses rely on such standards "to safely and cost-effectively" manufacture goods. The standards also are "widely recognized by the majority of courts as relevant to a design-defect claim." Finally, Pennsylvania plaintiffs introduce evidence of noncompliance with such

standards; thus, [allowing defendants](#) to present evidence of compliance with these standards “levels the currently uneven litigation playing field.”

BATTLE BREWING OVER SOVEREIGN IMMUNITY DAMAGE LIMITS

In June 2022, the **Legislative Budget and Finance Committee** [issued a report](#) recommending the state develop new sovereign immunity liability caps for catastrophic claims. Despite finding that the current limit of \$250,000 (\$1 million aggregate) sufficiently provides relief for over 99 percent of claims against the Commonwealth, the Committee recommended raising the amount of pain and suffering damages allowed for catastrophic claims.

The study relies heavily on anecdotal evidence and comparisons of past and present purchasing power, and in doing so, overlooks its own conclusions that the caps are on the whole sufficient.

MASS TORTS LITIGATION IN PHILADELPHIA COURT OF COMMON PLEAS

The **Philadelphia Court of Common Pleas** is the plaintiffs’ bar’s preferred jurisdiction for mass tort litigation. The court’s **Complex Litigation Center**, which hosts mass tort programs targeting pharmaceutical and medical device companies, is especially notorious.

PFAS

Just four days before voters went to the polls in November, the **City of Philadelphia** filed a [lawsuit](#) in the Philadelphia Court of Common Pleas against manufacturers of products containing trace amounts of poly-fluoroalkyl substances (“PFAS”), including 3M Co. and DuPont. The suit seeks to hold the manufacturers liable for contaminating local water sources with PFAS. The City hired [Sher Edling](#), a notorious plaintiffs’ firm handling climate change litigation across the country, to assist with the case.

PFAS is a family of chemicals that are especially useful in suppressing fire and reducing flammability. Small amounts of PFAS chemicals are commonly found in manufacturing and consumer goods, as well as firefighting foam that was commonly used at military installations, airports and industrial sites. Although heavy doses of PFAS can be toxic to humans, the chemical is not harmful in small quantities. The EPA maintains a “health advisory level” for the concentration of PFAS chemicals in water. The manufacturers substantially complied with the standards until this June when the EPA [drastically reduced](#) the targets to almost untraceable amounts. The lawsuit argues that the manufacturers should be held liable for exceeding the new target levels and examines the manufacturer’s conduct from as far back as the 1950s.

The City made typical product liability claims for design defect, failure to warn, and general negligence. The City, however, also put forth expansive claims for public nuisance and trespass, a popular strategy for municipality plaintiffs in recent environmental and opioid litigation.

In response to the lawsuit, a representative for 3M Co. [said](#) that the company “acted responsibly in connection with products containing PFAS” and promised to “vigorously defend its record of environmental stewardship.”

Vena Cava Filters

Almost [1,800 claims](#) are pending in the Complex Litigation Center alleging that Rex vena cava filters often fail and are ineffective. While the claims proceed to trial individually, they share a discovery mechanism for efficiency. In February 2022, a Pennsylvania appellate court [upheld](#) an order issued by the Philadelphia Court of Common Pleas requiring the company to provide financial records for the purpose of assessing punitive damages.

As pointed out by the defense, this decision implicates “highly private information of non-parties” that could wreak “[havoc](#)” on individuals not involved in the litigation. Among the private financial information requested was details about employees’ income and bonuses and how money was distributed. The discovery

order requires the individual defendants “to disclose private financial information that far exceeds the narrow parameters” set by Pennsylvania law, which only allows “information concerning the wealth of a defendant” to be admitted. Individual plaintiffs also had not yet proven that they were entitled to punitive damages, but the order assumes that they are available.

Following the February ruling, the litigation [halted](#) as the manufacturer entered settlement negotiations with the plaintiffs. The parties completed settlement conferences in July and November, though terms of the settlement agreement were yet to be finalized as of the date of publication. The parties have, however, established a qualified settlement fund and appointed a fund administrator according to [docket history](#).

Zantac

In 2022, the **Complex Litigation Center** initiated a new program for claims related to Zantac, an over-the-counter heartburn medication that was recalled by the FDA after finding that storage at high temperatures may result in an unacceptable level of an impurity in some instances over time. The program quickly caught the attention of plaintiffs’ attorneys; [filing records](#) show that 640 claims were pending in the CLC’s Zantac program as of October 15. Although a federal judge from the Southern District of Florida is already overseeing [multi-district litigation](#) for Zantac claims, many plaintiffs are opting to file Zantac claims in the Philadelphia Court of Common Pleas. They are choosing Philadelphia because it is an advantageous venue for a plaintiff to litigate in, [according](#) to the plaintiffs’ liaison counsel for the Zantac litigation, Rosemary Pinto of [Feldman & Pinto](#).

An Administrative Judge from the Philadelphia Common Pleas initiated the Zantac program through a June order. Zantac claims [began to flow](#) into the Complex Litigation Center in July (35 claims) and exploded thereafter – plaintiffs’ lawyers filed 186 suits in August and an additional 332 in September. Full data for October was not available at the time of this report, but Zantac producers should “anticipate that the number of filings will continue to grow in the coming months,” [said](#) Zantac plaintiffs’ attorney Tracy Finken of [Anapol Weiss](#).

New Mass Tort Programs For Herbicides

The **Complex Litigation Center** also initiated [new mass tort programs](#) for Roundup® (Bayer) and Paraquat (Syngenta), two of the most commonly used herbicides in the United States. Roundup® has been linked to cancer, though many scientists, [including](#) those at the EPA, have concluded otherwise. Similarly, a link between Paraquat and Parkinson’s disease has been hotly debated among scientists. Although these new programs haven’t been quite as trendy among plaintiffs’ attorneys as the Zantac program, both have seen steady growth since emerging this May: [154 claims](#) had been filed in the first 6 months of the Paraquat program and [130 claims](#) had been filed in the Roundup® program in the same time period. Despite the modest start, Thomas Kline, a founding partner of plaintiffs’ firm [Kline & Specter](#), [believes](#) that the Roundup® program is “going to be the marquee program for the foreseeable future.”

Paraquat herbicide, has emerged as a [top target](#) of mass tort litigation advertising. Since the beginning of 2021, more TV ads have aired across the country soliciting claims alleging injuries caused by paraquat than mass tort ads related to any other product. More than \$24 million has been spent on more than 150,000 of these ads since 2021.

A Second Wave Of Reglan Litigation On The Horizon?

In 2018, Teva [settled](#) claims alleging that use of the digestion drug, Reglan, led to various illnesses. These lawsuits were centered in the Philadelphia Court of Common Pleas Complex Litigation Center, which had about 2,000 claims on its docket. Following the March 2022 publication of a [journal article](#) linking Reglan to an increased risk of stroke, a previously unknown side effect, more lawsuits may be coming.

Following this news, one plaintiffs’ attorney observed, “It is not out of the realm of possibility” that there would be a new wave of Reglan lawsuits may be on the horizon. If so, Philadelphia is likely to once again be the hotspot for Reglan litigation.

Risperdal

Risperdal, an anti-psychotic medication, has been one of the top targets of the trial bar in Pennsylvania. Despite an \$800 million settlement announced by Johnson & Johnson, [almost 1,000 claims](#) were still pending in the Philadelphia Court of Common Pleas' Complex Litigation Center as of November 2, 2022.

Asbestos Litigation

In 2021, Philadelphia [remained](#) the fourth most popular jurisdiction to file lawsuits claiming injuries from exposure to asbestos. Plaintiffs' lawyers filed 203 asbestos lawsuits in Philadelphia in 2021. In the first half of 2022, Philadelphia [dropped one spot](#) (#5) in the jurisdiction rankings for asbestos filings, despite a 27.2% increase in lawsuits compared to the first half of 2021. In total, [over 750 asbestos cases](#) were pending in the Philadelphia Court of Common Pleas as of November 2022.



TOP ISSUES

- Prop-65 litigation bogs down economic growth
- No-injury lawsuits target businesses across the state
- State's unique lemon law provides windfall for plaintiffs' attorneys
- Court permits novel theory of COVID-19 liability
- State at forefront of climate change litigation battle

After reclaiming its spot atop the Judicial Hellholes® list in 2021, California's fall to number three can only be attributed to the excessive lawsuit abuse occurring in Georgia and Pennsylvania, as opposed to any improvements made by the Golden State. Courts across the state continue to allow novel theories of liability to proceed and small businesses are bogged down by frivolous lawsuits. Uninjured serial plaintiffs file hundreds of meritless lawsuits targeting businesses, and ultimately, plaintiffs' lawyers are the only people benefiting from the state's unbalanced civil justice system.

PROP-65 LITIGATION CONTINUES TO BOG DOWN ECONOMIC GROWTH

[Proposition 65](#), a well-intentioned law enacted in 1986, has become one of the plaintiffs' bar's favorite tools to exploit. Baseless Prop-65 litigation unjustly burdens companies that do business in California.

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 more than [1,000 chemicals](#) that state environmental regulators deem carcinogenic or otherwise toxic. [110 chemicals \(11.5%\)](#) were added in the last decade. Failure to comply can cost up to \$2,500 per day in fines, and settlements can cost \$60,000 to \$80,000.

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](#). Over the last decade (2012-2021), what are known as Prop 65 "60-day notice" filings have increased from [908 in 2012](#) to [3,185 in 2021](#), a rise of 251%. These notices are often sent by organizations

LEGAL SERVICES ADVERTISING SPENDING

CALIFORNIA

Plaintiffs' lawyers are well aware of the court's propensity for liability-expanding decisions and spend millions of dollars on advertising. Through June 2022, lawyers, law firms and companies that specialize in generating leads for lawsuits spent [\\$34 million](#) to air approximately 250,000 television ads for local legal services or soliciting legal claims in California's top three media markets – Los Angeles, San Francisco-Oakland-San Jose, and Sacramento-Stockton-Modesto.

ECONOMIC IMPACT OF LAWSUIT ABUSE

CALIFORNIA

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. California residents pay a "tort tax" of \$1,917.89 per person and 748,775 jobs are lost each year, according to a recent study by [The Perryman Group](#). If California enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$75.5 billion.

or individuals to companies asserting a Prop 65 violation, threatening suit, and demanding labeling changes and monetary settlement.

Of even more concern, [33 percent of the 20,510 notices](#) filed under Prop-65 in the past decade were filed in 2020 and 2021. As of October 31, [2,613 notices](#) had been filed in 2022.

The **California Office of Environmental Health Hazard Assessment (OEHHA)**, which manages Prop-65, recently considered [proposed rule changes](#) for Prop-65 product warnings. Specifically, OEHHA considered removing restrictions on when a short form warning may be used and removing the “known to cause cancer” tagline from warning labels. Unfortunately, the rule making period expired in 2022 and OEHHA intends to re-start the entire process, further delaying any relief.

The money companies spend on compliance and litigation unnecessarily drives up the cost of goods for California consumers. It also harms small businesses that do not have the in-house expertise or means to evaluate the need for mandated warnings or handle litigation.

Serial Plaintiffs



As is often the case with litigation gold mines in California, serial plaintiffs and their attorneys look to profit from Prop-65 litigation abuse. This activity is primarily driven by several new, aggressive bounty hunter plaintiffs who are searching for payouts despite not suffering any injuries.

According to the California Attorney General’s office, businesses settled [673 Prop-65 claims](#) in 2021 totaling \$13.9 million, with greater than 86% of that amount – more than \$12 million in total – going to plaintiffs’ attorneys. As of October 31, businesses had settled [564 claims](#) and paid out \$12.7 million, with plaintiffs’ lawyers receiving 88.1% or \$11.2 million in 2022.

Glyphosate

The most infamous Prop-65 case involves Monsanto’s Roundup® products. California added the popular weed killer’s active ingredient, [glyphosate](#), to the Prop-65 listing in July 2017. Roundup® has been the top target of mass tort product liability litigation television advertising since 2015 with an estimated [\\$131 million](#) spent on more than 625,000 ads that have aired nationally and locally across the United States.

Regulators and scientists worldwide have deemed glyphosate safe, except for 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 (EPA)**.

Plaintiff	Number of Settlements	Civil Penalty Collected	Attorneys' Fees Collected	Law Firm
Anthony Ferreiro	91 (1 every 4 days!)	\$82,800	\$1,001,500	Evan J. Smith (Brodsky & Smith)
Gabriel Espinoza	44	\$69,150	\$786,100	Evan J. Smith
Audrey Donaldson	36	\$77,500	\$640,350	Evan J. Smith
Erna Bell	42	\$68,500	\$796,500	Evan J. Smith
Precila Balabbo	56	\$98,000	\$1,111,000	Evan J. Smith
Ecological Alliance	122	\$82,750	\$1,912,700	Custodio & Dubey
Keep America Safe and Beautiful	47	\$139,014	\$786,400	Seven Hills LLP, AV Justice Law

2021 Serial Plaintiffs

Plaintiff	Number of Settlements	Civil Penalty Collected	Attorneys' Fees Collected	Primary Law Firm
Anthony Ferreiro	36	\$54,500	\$666,000	Evan J. Smith (Brodsky & Smith)
Gabriel Espinoza	26	\$29,500	\$394,500	Evan J. Smith
Audrey Donaldson	21	\$39,100	\$322,350	Voorhees & Bailey
Erna Bell	49	\$74,100	\$940,000	Evan J. Smith
Precila Balabbo	62	\$1,254,800	\$105,000	Evan J. Smith
Ecological Alliance	83	\$66,900	\$1,346,200	Custodio & Dubey
Keep America Safe and Beautiful	25	\$71,200	\$482,300	Seven Hills LLP

2022 Serial Plaintiffs (Data as of October 31, 2022)

The EPA concluded in a [2016 paper](#) that glyphosate was “not likely” to be a human carcinogen, and in June 2020, it issued a [preliminary determination](#) that the 2016 paper would be its final determination on the human health effects of glyphosate.

Following the EPA’s determination, plaintiffs challenged the agency in court. In [Rural Coalition v. EPA](#), the plaintiffs claimed that the EPA’s determination was not supported by the “substantial evidence” necessary to survive review. The EPA pushed back that the paper was sound science, and “inconsistencies” found and “limitations” experienced while conducting the study “precluded [the agency] from coming to any firm determination on glyphosate’s” cancer risk to humans.

In June 2022, the **Ninth Circuit** ruled that the EPA “cannot reasonably treat its inability to reach a conclusion about [cancer] risk as consistent with a conclusion that glyphosate is ‘not likely’ to cause cancer” and required the EPA to re-evaluate the cancer risk associated with glyphosate. Following this decision, the EPA [stated](#), “EPA’s underlying scientific findings regarding glyphosate, including its finding that glyphosate is not likely to be carcinogenic to humans, remain the same. In accordance with the court’s decision, the Agency intends to revisit and better explain its evaluation of the carcinogenic potential of glyphosate and to consider whether to do so for other aspects of its human health analysis.”

Because of [pending litigation](#) brought by the **North American Wheat Growers Association** seeking an injunction to block California’s attorney general from requiring a cancer warning on glyphosate products, the **California Office of Environmental Health Hazard Assessment** amended the regulation to no longer require the phrase, “Glyphosate is known to the state of California to cause cancer.” The [amended phrasing guidelines](#) still require manufacturers to warn of the risk of glyphosate but allows them to acknowledge that competing studies exist on whether the chemical is linked to cancer.

Personal Injury Cases

California courts’ willingness to rely on junk science has given rise to thousands of baseless personal injury claims against Roundup®. To date, Monsanto has paid out over [\\$11 billion](#) in judgments and settlements across the country. Currently, there are over 30,000 cases pending, including [4,000 in an MDL](#) in the Northern District of California.

In June 2022, the **California Supreme Court** refused to review another massive verdict in [Monsanto v. Pilliod](#). The plaintiffs sued Monsanto after they both developed cancer allegedly caused by Roundup®. At trial, the jury awarded them over \$2 billion, which was later reduced by a superior court to \$87 million. The reduced award was later affirmed by an appellate court. Both the [California Supreme Court](#) and the [U.S. Supreme Court](#) denied review of *Pilliod*.

The **U.S. Supreme Court** had another opportunity to restore sanity to the litigation but unfortunately declined to do so in June of 2022. SCOTUS [declined to hear Monsanto v. Hardeman](#), a \$25 million verdict involving glyphosate warnings on Roundup®. The **Ninth Circuit** rejected Monsanto’s argument that federal law preempts the state law claim because the **EPA** had approved Roundup’s® label. While many states recognize a defense based on compliance with federal standards, California does not. The court [held](#) that the EPA’s continued registration of the product and approval of its label does not carry the force of law, a requirement for federal preemption.

In its [amicus brief](#), ATRA argued that “If left uncorrected, [the Ninth Circuit’s decision] will bring disuniformity to federal preemption doctrine, and it will threaten many businesses with billions of dollars of damages liability for failing to take actions that are illegal under federal law.” The Ninth Circuit’s decision [will allow](#) lawsuits to severely punish companies for not including cancer warnings on products, even when near-universal scientific and regulatory consensus is that the product does not cause cancer. The responsible federal agency, the EPA, has forbidden such warnings for Roundup’s® active ingredient, glyphosate. The Ninth Circuit’s decision allows a company to be punished under state law for not including a label that is disallowed by federal regulators.

Despite the early major losses mentioned above, Monsanto [won](#) the last five consecutive Roundup® trials in Missouri, California, and Oregon after the credibility of the plaintiffs’ expert witnesses and evidence came into question.

Plastics

Another popular Prop-65 target for plaintiffs’ lawyers are phthalates. Ingestion of phthalates has been linked to cancer in rats, but [even OEHHA](#) could not link them to cancer in humans, despite adding them to the Prop-65 list. [Congress instituted](#) a permanent ban on phthalates in 2008 for use in children’s toys and specifically cited children putting toys in their mouth as reasoning for the ban, but left phthalate use unregulated otherwise. California has a host of phthalates on the Prop-65 list including [DEHP](#), [DIDP](#), [DBP](#) and [DINP](#). DEHP is the main source of phthalate litigation. It is [commonly used](#) in items such as plastic packaging, shower curtains, PVC pipes, tool grips, apparel and footwear.

PHthalate Settlement Data:

Year	# of Settlements (% of all settlements)	Total Settlement Payout	% of Total Settlement to Lawyers
2021	371 (55%)	\$7,098,414	88%
2022 (As of Oct. 31)	298 (53%)	\$5,841,400	91%

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 2021, a California federal court granted a motion for a preliminary injunction barring the Attorney General and anyone else from filing new lawsuits against businesses for not displaying Acrylamide warnings. In [California Chamber of Commerce v. Beccerra](#), U.S. District Judge Kimberly Mueller ruled that the State failed to show that the required cancer warnings are purely factual and uncontroversial. It also failed to show that **Prop-65** imposes no undue burden on businesses that would have to provide the warnings. The judge said that the acrylamide warning requirement “is controversial because it elevates one side of an unresolved scientific debate” about whether consuming foods and drinks with acrylamide causes cancer.

Following this decision, the **Council for Education and Research on Toxins (CERT)** [appealed](#) the preliminary injunction order and moved for an emergency stay, which the court granted to the extent that it bars any private enforcer from bringing new Prop-65 acrylamide actions.

In an interesting turn of events, **Judge Mueller** [recused herself](#) in September 2021 from the lawsuit at the urging of two advocacy groups that intervened in the case. The documents in the motion remain sealed but seem to argue that **Judge Mueller** has an interest in the outcome of the case based on her husband’s business interests. While stating that there is nothing requiring her recusal and she has no bias or prejudice, **Judge Mueller** indicated that she felt pressured by the “uncommonly aggressive, scorched earth efforts” of the advocacy groups, which included extensive personal details about the judge and her husband in their motion that have little relevance to the case. **Judge Mueller** indicated that she believes the recusal motion was not motivated by a fear of bias, but likely was spurred by the belief that the organizations would have a better chance of success before another judge.

The **Ninth Circuit** [affirmed](#) Judge Mueller’s granting of the preliminary injunction in March of 2022 and [denied](#) *en banc* review of the decision in October; however, that’s not the end of the story. In April 2022, CERT attempted to litigate the issue for a third time in a year, and filed a [motion to vacate](#) the preliminary injunction order because Judge Mueller did not immediately recuse herself. The case was reassigned

to multiple judges and ultimately landed on **Judge Ana de Alba's** docket. The case has stalled while **Judge de Alba** gets up to speed.

New Targets on the Horizon

In early 2022, multiple PFAS were added to California's Prop-65 list. [PFAS are a group of chemicals](#) used in materials such as packaging, textiles and metal piping to make them moisture resistant. [Suits involving PFAS](#) make up a very small portion of current litigation, but producers should be on alert.

NO-INJURY LAWSUITS TARGET BUSINESS ACROSS THE STATE

The "Food Court"

California once again challenged New York for the most "no-injury" consumer class actions targeting the food and beverage industry. These 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 in anyone's decision to buy a product.

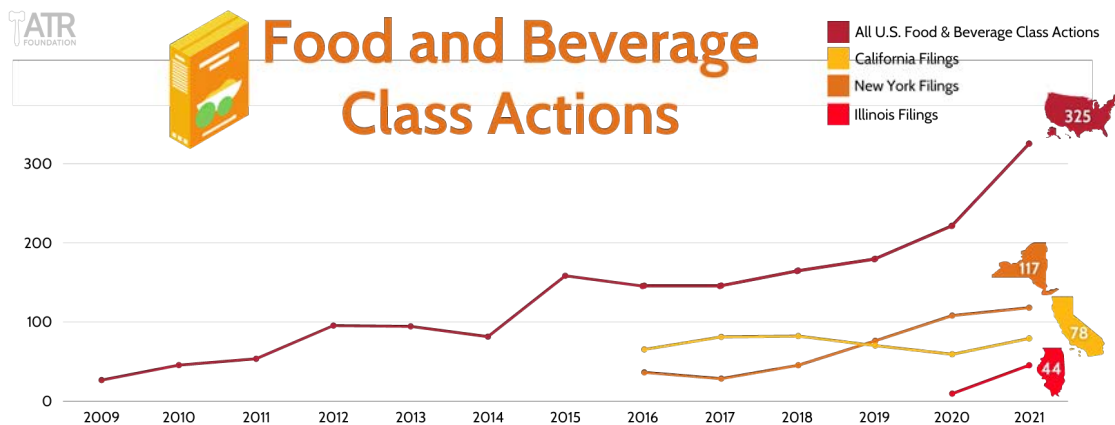
In 2021, plaintiffs' lawyers filed [78 food and beverage class action lawsuits](#) in California, up from 58 in 2020.

Plaintiffs' lawyers stand to make millions in these class actions, while consumers receive pennies on the dollar. According to a [recent report](#) by Jones Day, lawyers in certified consumer class action cases in 2019 and 2020 received from settlements, on average, 10% more than the class members they represented.

2022 food and beverage class action settlements in California included a [\\$1.5 million settlement](#) with Welch's over claims that one of its products is heart-healthy when science allegedly showed otherwise. The average payout to class members was \$4.94, while the class counsel received \$394,657, or 26% of the total settlement.



In January 2022, the **Los Angeles County Superior Court** gave final approval to a [\\$3.7 million settlement](#) in a class action alleging that Nestle/Ferrara could have fit more candy in its boxes (known as "slack fill"). Class members who bought products ranging from Raisinets to Rainbow Nerds qualify for 50 cents per purchase (maximum of 16) while the court approved the attorneys to receive \$1.42 million for their fees and costs (38% of the total amount).



Sources: Perkins Cole Food Litigation Year in Review 2019, 2018, 2017 and 2016; Perkins Cole Food & Consumer Packaged Goods Litigation Year in Review 2021 and 2020; Institute for Legal Reform's "The Food Court" (August 2021)

'Americans With Disabilities Act' Shakedown Lawsuits Reach Fever Pitch

California continues to be home to more than 50% of the nation's **Americans with Disabilities Act** accessibility litigation. In 2021, [5,930 claims](#) were filed in California – more than half of the 11,452 claims filed nationwide. These are federal lawsuits claiming that businesses violated standards under the Americans with Disabilities Act (ADA) that are intended to ensure that public places are accessible to everyone but have been abused by serial plaintiffs and certain attorneys. [Through June 2022](#), of the 4,914 claims filed nationwide this year, 1,587 claims were filed in California.

California also is [seeing a jump](#) in website accessibility lawsuits, with 359 filings in 2021, compared to 223 in 2020. In total, website accessibility filings have increased more than 3,000% since 2018. Serial plaintiffs are specifically targeting California hotels, alleging that the accessibility information provided on reservation websites is not sufficiently detailed for the plaintiffs to decide whether the hotel meets their

ADA Website Accessibility Federal Lawsuit Filings

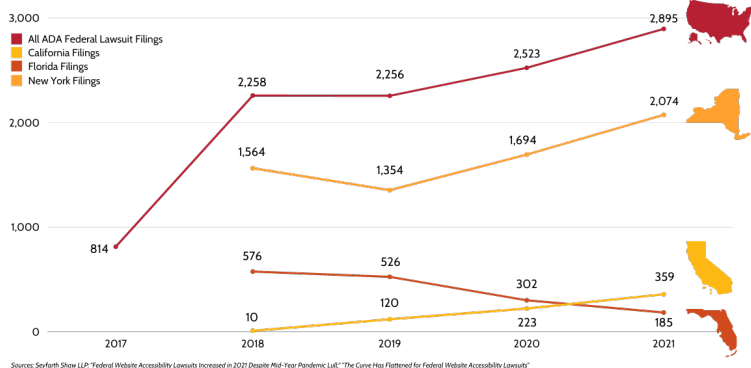


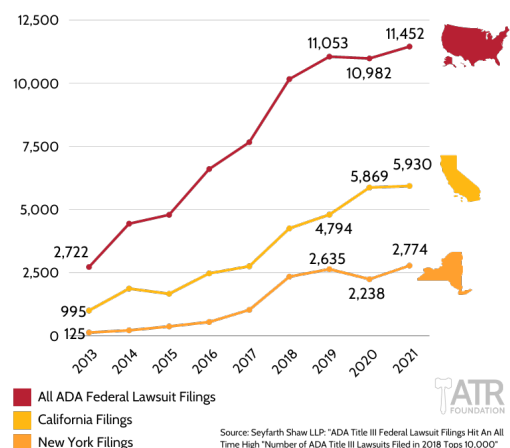
Chart: 10 in 2018 to 120 in 2019 to 223 in 2020 to 359 in 2021

Serial Plaintiffs

The [Potter Handy](#) law firm set up the **Center for Disability Access (CDA)** and has filed thousands of lawsuits on behalf of just a handful of plaintiffs over the past few years. For example, CDA has helped a quadriplegic plaintiff file over [4,000 ADA claims](#) in California since 2010, which amounts to roughly 1 per day for 11 straight years. The plaintiff filed over 1,000 claims in 2021 alone, forcing businesses, already struggling to recover from the pandemic, to close for good. A federal grand jury [indicted](#) the plaintiff for tax fraud in 2019 after failing to pay taxes on his lawsuit income.

CDA filed [560 ADA claims](#) on behalf of another plaintiff in 2021, bringing his grand total to [over 1,700 claims](#) filed. Fortunately, **Judge Jacqueline Scott Corley** caught on to the nature of the plaintiff's activities, and earlier this year, [dismissed](#) one of the lawsuits brought against a Redwood City restaurant. The judge concluded that he "travelled to Redwood City for the purpose of finding establishments to sue" and that he is "not credible" given his history as a serial plaintiff. In a later suit filed by the same plaintiff, federal **Judge Vince Chhabria** (Northern District) [levied](#) a \$35,000 sanction against CDA for conspiring to falsify plead-

ADA Federal Lawsuit Filings



accessibility needs. Among the details that the lawsuits claim should be included are the dimensions of space under desks and sinks. The [Department of Justice](#), however, has made it clear that, "a reservation system is not intended to be an accessibility survey."

Businesses argue that on the fly, pandemic-related changes in operations are making ADA compliance more challenging and opportunistic plaintiffs' lawyers and serial filers are seeking to take advantage of the opportunity.

SERIAL PLAINTIFFS



ings. “You may not lie in an effort to keep your lawsuit alive. And that is the real problem here,” said Judge Chhabria in his sanction order.

Yet another serial plaintiff represented by CDA has earned well over [\\$5 million](#) in ADA settlements. CDA has filed over [800 complaints](#) on his behalf and obtained more than 500 settlements.

Fortunately, the courts are beginning to see through CDA’s predatory lawsuits; over 90 CDA cases have been dismissed to date.

Fighting Back

In April 2022, the San Francisco and Los Angeles district attorneys filed a [joint suit](#) against **Potter Handy** for “[unlawfully circumventing](#)” California state procedural requirements by “filing thousands of boilerplate, cut-and-paste federal court lawsuits that falsely assert its clients have standing under the [ADA].” The DAs’ action alleged that the [sheer number of claims](#) made it “literally impossible for the Serial Filers to have personally encountered each listed barrier, let alone intend to return to hundreds of businesses located hundreds of miles away from their homes.”

The DAs’ action further [alleged](#) that these ADA shakedown lawsuits have extracted tens of millions of dollars from California businesses. Plaintiffs demand between \$10,000 to \$20,000 to settle, and most businesses have no choice but to pay because litigating a case can cost \$50,000 or more even if the business wins. The opportunistic plaintiffs’ lawyers target mom-and-pop shops with little financial resources, especially owners who speak English as a second language. The lawsuit asked that CDA return all settlement money to California business owners.

Unfortunately, in August 2022, **San Francisco Superior Court Judge Curtis Karnow** [dismissed](#) the lawsuit. He found that Potter Handy’s filings were covered under the state’s “litigation privilege.” This bars a third-party litigant from using client communications and lawsuit filings as evidence against the firm. The judge found it applies “irrespective of the communication’s maliciousness or untruthfulness.”

The cities appealed the dismissal in October. The Los Angeles DA [dubbed the appeal](#) “the best course of action” to guard against more “frivolous boilerplate lawsuits.” Meanwhile, the San Francisco DA [said](#) she was appealing “to protect business from predatory law firms that are abusing disability protections by filing these fraudulent lawsuits.”

SEA CHANGE MAY BE COMING FOR FRIVOLOUS ‘PRIVATE ATTORNEYS GENERAL ACT’ LITIGATION

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.

[Three quarters](#) of the penalties paid by non-compliant employers go to the state’s **Labor and Workforce Development Agency** while only 25 percent go to the “aggrieved employees” and their lawyers who take a third or so of that. In some cases, the plaintiffs’ lawyers receive even more.

In June 2022, the **U.S. Supreme Court** issued a decision in [Viking River Cruises v. Moriana](#) that will impact plaintiffs’ lawyers’ ability to circumvent arbitration agreements. In this case, the plaintiff brought a PAGA claim after leaving Viking Cruises. He claimed he did not receive final pay within 72 hours as required by California labor law and then included various other labor code violations on behalf of other employees at the company. Viking Cruises sought to enforce the employment contract’s arbitration clause and dismiss the other representative claims for lack of standing. California lower courts denied the validity of the arbitration clause and allowed the PAGA claims to move forward.

The **U.S. Supreme Court** held that the **Federal Arbitration Act** prohibits California courts from not enforcing employment arbitration agreements as it violates each litigant’s right to bilaterally agree to arbitration. Therefore, the Court ruled the individual dispute between the plaintiff and Viking Cruises is severable and should be enforced in arbitration as provided by the agreement. As a result, the representative claims should be dismissed, as the plaintiff no longer has standing to bring them.

As a result of the U.S. Supreme Court’s ruling, the **California Supreme Court** agreed to hear [Adolph v. Uber](#), recognizing that the lower court’s decision may conflict with the *Viking Cruises* decision. In *Adolph*, an Uber driver sued the company in state court for misclassifying him as an independent contractor. Despite signing an arbitration clause in his employment contract with Uber, he sought statutory damages under PAGA. Uber filed a motion to compel arbitration of the individual claim and dismiss the representative claims. Nevertheless, both the trial court and appellate court dismissed the motion and allowed both the individual and representative claims to move forward.

Questions Remain about Standard for Manageability of PAGA Claims

In December 2021, a California appellate court [held](#) that “courts have inherent authority to ensure that PAGA claims can be fairly and efficiently tried and, if necessary, may strike claims that cannot be rendered manageable.” The **California Supreme Court** denied review in December of 2021.

Despite this ruling, in March 2022, a California appellate court reached the opposite conclusion in [Estrada v. Royalty Carpet Mills](#). The court held that “allowing dismissal of unmanageable PAGA claims would effectively graft a class action requirement onto PAGA claims, undermining a core principle” of PAGA. The panel did note however that trial courts are not “powerless when facing unwieldy PAGA claims” – the judge may limit discovery if “plaintiffs are unable to show widespread violations in an efficient and reasonable manner.” Recognizing the need to resolve the circuit split, in June, the **California Supreme Court** agreed to review the case.

Ballot Initiative

California voters will consider the [Fair Pay and Employer Accountability Act](#) in November 2024. The Act would address abusive litigation by replacing PAGA with a complaint system through the Labor Commissioner who would enforce the law by conducting investigations and arbitrating the suit. The only legal challenges would be appeals and 100% of monetary awards would [go straight to the employee](#), rather than the state and plaintiffs’ attorneys.

LEMON LAW ABUSE

Lawsuit abuse under California’s [Song-Beverly Consumer Warranty Act](#), otherwise known as the California lemon law, continues to flood the court system. Between 2018 and 2021, 34,397 lemon law lawsuits were filed in state court. This equates to one lawsuit for every [324 automobiles](#) sold in the state.

While automobiles have become more reliable and the frequency of problems with them have [generally decreased](#) over the past decade, lawsuits under California’s Song-Beverly Consumer Warranty Act have actually [increased](#).

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.

Another common maneuver aimed at maximizing legal fees involves the practice of adding multiple layers of lawyers and law firms into a lemon law case. Given the simple, fact-centric nature of the litigation, this layering serves only to drive up attorneys’ fees. The **U.S. District Court for the Central District of California** [recognized the obvious wastefulness](#) of this practice: “[A]s a result of having twelve attorneys from two firms billing on this matter, the billing records are riddled with duplicative inter-office communications and entries reviewing prior filings and case materials.”

In 2019, plaintiffs-side consumer law firms filed two suits in Los Angeles County against their high-profile former co-counsel, **Knight Law Group**. [Knight Law Group](#) describes itself as one of the “leading law firms in California practicing in the area [of] consumer litigation.” Docket data certainly supports their claim: Knight has filed more than [4,560 lemon law](#) cases in the last five years, though it often associates with others to take them to trial.

The lawsuits – *Hackler Daghighian Martino & Novak PC v. Knight Law Group*, and *Law Offices of Michael H. Rosenstein LC v. Knight Law Group LLP* – spotlight client-sharing arrangements and fee-splitting practices employed in the world of high-volume lemon law cases.

The image painted by the other law firms in their suits is deeply troubling. They describe a fee-generating arrangement applied to hundreds of cases, in which Knight “focused on marketing and operations” while tapping other firms to perform most case development and trial tasks. Disturbingly, this alleged system promotes inefficiency and makes pursuit of fees the centerpiece of this “consumer” litigation.

The cases settled in early 2022 with the Knight Law Firm paying an undisclosed amount to the other firms. Following this litigation, the law firms are no longer aligned, and the Knight Group has established a new relationship with [Greenberg Gross](#), a boutique firm in Orange County.

In July 2022, **Judge Barbara Meiers** chastised the behavior of [Knight Law Group](#) in a run-of-the-mill lemon law case. In [Ramirez v. Ford](#), the plaintiff purchased a lemon car from Ford and contacted the company to fix the problem. Ford offered to replace the car or repay its value in full (about \$30,000). The plaintiff retained Knight Law Group before responding to Ford, and after obtaining counsel, they ceased contact with Ford and filed a lawsuit.

Despite the significantly lower value of the car, plaintiff's counsel repeatedly refused to settle for anything less than \$70,000 plus fees. In July 2022, the defendant submitted evidence proving that the company substantially complied with the [Song-Beverly Act](#) and that both plaintiff and the Knight Law Group made knowingly false allegations of willful misconduct by Ford. Following this revelation, the plaintiff quickly settled for \$30,000 – Ford's initial offer.

Following the settlement, [Judge Meiers](#) awarded limited fees to Knight Law Group. Despite the law firm requesting over \$20,000 in fees and costs, she awarded \$8,800. Judge Meiers, in denying all other fees and cost requests, stated, "What this plaintiff's counsel should have done, and arguably was even duty bound to have done, both in the interests of the consumer and well as required by the policies underlying the Act, was to as quickly as possible sit down with Ford and work out the details of a car return or refund." She continued, "There was no perceivable justification whatsoever ... for the filing of any lawsuit."

"[P]erhaps the wrong issue is now before the court and the issue ought to be whether or not sanctions should be being ordered against the plaintiff and for how much, and not how much the Knight firm should be awarded, or more aptly be rewarded, for its conduct of this ostensibly bad faith case."

– Judge Barbara Meiers

Does a Used Car Count as a 'New Vehicle'?

In July 2022, the **California Supreme Court** agreed to decide whether a used car should be considered a "new vehicle" under the state's lemon law. In *Rodriguez v. FCA*, plaintiffs filed a lemon law claim after experiencing issues with a used vehicle they purchased from a car dealership with two years and 55,000 miles of road wear that was still under a manufacturer's limited warranty.

The trial court granted summary judgment for the manufacturer, holding that a used vehicle cannot qualify as "new," regardless of its warranty status. The appellate court [affirmed](#) the decision and noted that the plaintiff's position (that any car under a limited warranty still qualifies as "new") would lead to "problems," inconsistencies and absurd results.

CALIFORNIA AT THE FOREFRONT OF CLIMATE CHANGE LITIGATION BATTLE

California municipalities and their outside counsel have been at the forefront of meritless litigation seeking to hold the oil and gas industry liable for the effects of global climate change.

The onslaught of litigation [began in 2017](#) with municipalities filing suits in state courts against energy companies claiming "extraction, refining, and/or formulation of fossil fuel products ... is a substantial factor in causing the increase in global mean temperature and consequent increase in global mean sea surface height."

Among the legal claims behind these cases, the plaintiffs allege that the oil and gas industry is liable for creating a public nuisance. Historically, public nuisance law involved instances in which a property owner's activities unreasonably interfered with 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 on one's property.

Now, plaintiffs' lawyers, on behalf of municipalities and other local government entities, are seeking to dramatically expand this legal theory to address broad public policy issues. In addition to climate change, similar litigation has been filed in the context of vaping, opioids, and the disposal of plastic waste.

[The County of San Mateo v. Chevron Corp.](#) and [The City of Oakland v. BP P.L.C.](#) are the leading cases working their way through the California courts. [Sher Edling](#), the plaintiffs' firm spearheading climate change litigation across the country, represents the municipalities. While much of the litigation to date has focused on whether the cases belong in state or federal court, the expansion of public nuisance law has been at the forefront of the arguments.

Both cases were originally filed in California state courts and the defendants attempted to remove them to federal court. *San Mateo* was immediately sent back to state court; however, in February 2018, **Senior U.S. District Judge William Alsup** for the **U.S. District Court for the Northern District of California** denied *City of Oakland* plaintiffs’ motion to remand the case back to state court. In [his order](#), Judge Alsup described climate change as a “worldwide predicament” that “demands the most comprehensive view available...;” “If ever a problem cried out for a uniform and comprehensive solution, it is the geophysical problem described by the complaints.”

The United States government laid out a similar concern in its [amicus brief](#) before the Ninth Circuit. It highlighted the essential nature of fossil fuels and argued that the issues with applying California state law to out-of-state sources “are magnified here, where the sources of emissions alleged to have contributed to climate change span the globe.”

Unfortunately, the **Ninth Circuit** had an opportunity to uphold this position and push back on activist attorneys’ attempts to improperly expand the law but failed to do so. In a pair of opinions released in [May 2020](#) and [April 2022](#), the **Ninth Circuit** held that, regardless of the “novel and sweeping causes of action” at issue, the energy companies did not satisfy the necessary requirements for federal jurisdiction.

In 2021, the **U.S. Supreme Court** [declined to hear](#) *City of Oakland* and the **Ninth Circuit** [denied a petition](#) for rehearing *en banc* of *County of San Mateo* in June 2022. Defendants argued that its decision was in direct conflict with an [earlier Second Circuit decision](#), which found it was inappropriate to use state laws and the courts to address costs attributed to greenhouse gases.

CALIFORNIA SUPREME COURT REFUSES TO REVIEW EXPANSIVE CONSUMER PROTECTION RULING

In 2016, the California Attorney General filed an enforcement action against Ethicon, a subsidiary of Johnson & Johnson, alleging that it violated California’s Unfair Competition Law (UCL) and False Advertising Law (FAL) by distributing untrue or misleading communications about its pelvic mesh products.

At trial, California surgeon-witnesses who implanted mesh explained they knew about the relevant risks and that the statements were not deceptive. The trial court nevertheless [held](#) that Ethicon’s pelvic mesh marketing materials and disclosures directed at pelvic surgeons were UCL and FAL violations. It found that the materials contained false and misleading statements that did not disclose the full scope and severity of mesh-specific risks. The court concluded that this was likely to deceive doctors. It relied principally on testimony from doctors who never implanted mesh, or who did so outside the state of California.

The trial court then purported to determine how many times Ethicon violated the UCL and FAL. Neither statute defines what constitutes a single violation or offers any guidance as to how a court should make that decision. Further, violation counting does not require any showing of harm to individual consumers. As the trial court acknowledged, it is simply “up to the [c]ourt to determine what constitutes a violation for the purpose of calculating penalties.”

Here, the trial court counted each printed piece of marketing that it estimated was ordered to California, and each brochure requested to be sent to California – regardless of whether such materials were actually delivered, read, relied-upon, or resulted in harm. For example, the court found 52,176 UCL and FAL violations based on a forensic accountant’s “estimate” of print marketing materials shipped into the state from 2008 to 2011. The accountant simply extrapolated one sales representative’s ordering patterns to all other California sales representatives (26 in total), assuming that all representatives ordered materials at the same monthly pace. The court also determined that Ethicon shipped 8,108 print marketing materials to California between January 2012 and February 2017, based on Ethicon’s discovery responses. It concluded that every single piece of material constituted both a UCL violation and an FAL violation – regardless of whether the marketing materials were read by consumers or had even reached their destinations.

In total, the court found that Ethicon committed 153,351 UCL violations and 121,844 FAL violations. As for the penalty per violation, the court recognized that it had wide discretion under California law to impose a penalty “up to \$2,500.” Reasoning that a significant penalty was appropriate, the trial imposed a

The trial court denied plaintiffs’ request for injunctive relief. It highlighted a letter from over 70 physicians lauding defendants’ mesh products and stating their grounds for supporting the right to access them and expressed concern that an injunction might prompt Ethicon to withdraw its products from California.

penalty of \$1,250 for each violation – with no differentiation among the type or severity of violations. The trial court thus imposed \$343,993,750 in civil penalties against Ethicon.

The trial court denied plaintiffs’ request for injunctive relief. It highlighted a letter from over 70 physicians lauding defendants’ mesh products and stating their grounds for supporting the right to access them and expressed concern that an injunction might prompt Ethicon to withdraw its products from California.

On appeal in April 2022, the **California Court of Appeals** [largely affirmed](#) the trial court’s decision. It [concluded](#), however, that the trial court erred in finding Ethicon liable for certain oral marketing communications when there was insufficient evidence regarding such communications. Accordingly, the Court of Appeal revised the total violations to 134,386 UCL violations and 107,244 FAL violations, and a corresponding \$302,037,500 in civil penalties.

In a disappointing order issued in July, the **California Supreme Court** [denied](#) Ethicon’s petition for review. Ethicon is appealing the decision to the U.S. Supreme Court and filed its petition in mid-November.

CALIFORNIA LOWER COURTS EMBRACE NOVEL THEORY OF COVID-19 LIABILITY

In June, the **California Supreme Court** agreed to decide whether businesses can be held liable for injuries and deaths related to an employee’s COVID-19 exposure on their premises.

The state high court’s decision to address this question came after it declined to consider the issue in a similar case. In the earlier case, the **Los Angeles Superior Court** [ruled](#) that See’s Candies could be held liable for the death of an employee’s husband following contraction of COVID-19. The employee allegedly contracted the virus at the candy factory and exposed her husband. An intermediate appellate court affirmed, and the **California Supreme Court** declined review.

The more recent appeal involves a woman who sued her husband’s employer after contracting COVID-19. The complaint alleges that the plaintiff, who was at high risk due to her age and health, contracted the virus after her husband, who was employed by a furniture company, was exposed at a construction site. In that instance, a federal district court dismissed the suit.

The **Ninth Circuit** [certified two questions](#) to the California Supreme Court including whether the state’s workers’ compensation precludes suits by the spouse of an employee and whether California law extends a duty of care to prevent COVID beyond employee to members of an employee’s household.

CHANGE IN COURT COMPOSITION

California Supreme Court Chief Justice Tani Cantil-Sakauye [will retire](#) at the end of the year. Following her announcement, **Governor Gavin Newsom** [elevated Justice Patricia Guerrero](#) to Chief Justice and appointed **Judge Kelli Evans** of the Alameda Superior Court to the state’s high court.

Justice Cantil-Sakauye authored the much-maligned [Dynamex](#) opinion in which California adopted the “ABC test” for determining employee/independent contractor status and set off the ensuing A.B. 5 and Prop-22 battles that have been covered extensively in previous Judicial Hellholes reports.

Justice Guerrero was appointed to the Supreme Court by Governor Newsom in March of this year and was elevated to Chief Justice after just six months on the bench. While sitting as a judge in the appellate division, Justice Guerrero authored the [Bolger](#) decision which held that Amazon is subject to strict liability for defective products sold by independent third-party vendors on its website.

Justice Evans has little judicial history, as she [only served](#) for a year in the Alameda Superior Court. Prior to joining the bench, she worked for Governor Newsom for several years and was part of his [inner circle](#).

END NOTES

This year, the California legislature passed [A.B. 35](#), which raises the \$250,000 cap on noneconomic damages in medical liability cases established by the [Medical Injury Compensation Reform Act](#) (“MICRA”) in 1975. While it is good news that a limit remains in place, noneconomic damages in medical liability cases will rise each year for the foreseeable future. For wrongful death claims, the noneconomic damages cap will jump to \$500,000 in 2023 and rise \$50,000 each year until the cap hits \$1 million. Medical liability claims that do not involve a death will start with a \$350,000 limit on noneconomic damages. The cap will continue to increase by \$40,000 each year until it reaches \$750,000. After a decade, when the caps reach these levels, the maximum award for noneconomic damages in medical liability cases will continue to rise indefinitely in California by two percent each year.



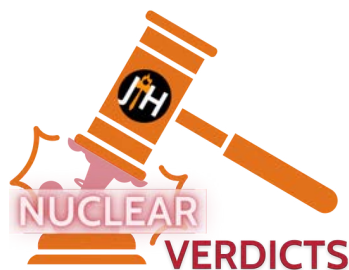
TOP ISSUES

- Nuclear verdicts on verge of another boom
- Number of food lawsuits continue to rise
- Open-door policy for predatory lawsuit loans
- State is ground zero for ADA accessibility lawsuits
- Litigation climate contributes to state being one of worst for doctors

New York’s fall in the rankings is in no way a reflection of positive change in the Empire State, but rather due to the immense challenges facing other jurisdictions. Lawsuit abuse continues to plague New York and bog down the state’s economic growth. Meritless food class actions, American with Disabilities Act lawsuit trolling, third-party litigation financing, and nuclear verdicts only worsened in New York in 2022.

New York City paid out [\\$794.4 million](#) in taxpayer funds to cover judgments and settlements in the 2022 fiscal year, up more than 38% from the previous year (\$575.9 million). This exceeds any 12-month high at least since 1998. According to a [study](#) by the **New York Civil Justice Institute**, New York State is ranked number one in lawsuit costs per capita and number of lawyers per capita in the world.

Meanwhile, the legislature did not address the problems plaguing the state’s civil justice system, and instead, lawmakers focused on expanding liability.



NUCLEAR VERDICTS ON VERGE OF ANOTHER BOOM

New York State continues to see a surging number of nuclear verdicts, obtained by plaintiffs’ lawyers who use manipulation tactics like “reptile theory” and anchoring to drive up awards using New York’s generous liability laws.

Nuclear verdicts are awards at levels above \$10 million. With no caps on pain and suffering awards and plenty of jurors with negative opinions about businesses, New York has been a prime target for plaintiffs’ lawyers seeking outrageous verdicts. According to a recent U.S. Chamber [study](#), New York was #3 for the most nuclear verdicts in personal injury and death cases between 2010 and 2019 and #2 for the number of nuclear verdicts per capita.

LEGAL SERVICES ADVERTISING SPENDING

NEW YORK

Plaintiffs’ lawyers are well aware of the court’s propensity for liability-expanding decisions and spend millions of dollars on advertising. Trial lawyers spent \$59.3 million on more than 833,000 local advertisements in 2021. Between 2017 and 2021, trial lawyers spent more than [\\$360 million](#) on 3.7 million lawsuit advertisements across television, radio, and outdoor mediums in New York markets. Trial lawyers spent \$34.6 million on more than 506,800 local television ads between January and August 2022.

ECONOMIC IMPACT OF LAWSUIT ABUSE

NEW YORK

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. New York residents pay a “tort tax” of \$1,875.36 per person and 358,217 jobs are lost each year, according to a recent study by [The Perryman Group](#). If New York enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$36.3 billion.

One of the main drivers of nuclear verdicts is a New York law, [CPLR 4016\(b\)](#), which allows plaintiffs' lawyers to request that a jury award a specific dollar amount for any element of damages. Plaintiffs' lawyers use this law to engage in a tactic known as "anchoring," in which they place an extremely high figure into the jurors' minds to start as a base dollar amount for a pain and suffering award, which, unlike medical expenses or lost wages, lacks a means of objective measurement. Although [New York law](#) confines a plaintiff's recovery to "reasonable compensation," its courts have [repeatedly awarded](#) amounts beyond its former de facto cap of \$10 million for a pain and suffering award. In 90% of the [cases](#) where a plaintiff's lawyer asked a jury to award more than \$20 million, the jury awarded at least the level requested.

In November 2021, a New York appellate court sustained the largest noneconomic damage award in the state's history. In that instance, a Manhattan jury awarded \$59 million against the New York City Department of Education after a high school laboratory experiment went wrong, severely burning a student. This amount was just below the [\\$70 million](#) suggested by the plaintiff's lawyer. Even after an appellate division [reduced](#) the amount of the pain and suffering award to \$29 million, it remains the highest pain and suffering award approved by a New York appellate court.

Bad becomes Worse

The state legislature has only added fuel to the fire of nuclear verdicts through the recent passage of the [Grieving Families Act \(GFA\)](#). Introduced by **State Senator Brad Hoylman**, the Act expands compensable damages in New York's wrongful death actions. Though state law previously limited recovery to pecuniary losses, plaintiffs' lawyers will now be able to seek unlimited and subjective damages for grief or anguish. The **GFA** also expands the eligible recipients of these damages to include "close family members," including, but not limited to, spouses, domestic partners, children, parents, grandparents, stepparents, and siblings. Whether a person qualifies as a "close family member" would be an issue to be decided by a jury at trial. In addition, the GFA nearly doubles the statute of limitations for filing lawsuits to blame someone for a person's death. In sum, the GFA means more wrongful death lawsuits, by more people, with larger awards will soon arrive in New York. The changes will surely increase litigation costs, settlement demands, and verdicts.

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The **GFA** is on the verge of becoming law after passing both the New York Senate and Assembly on June 2, 2022. With only the governor's signature standing between its enactment, **Senator Hoylman**

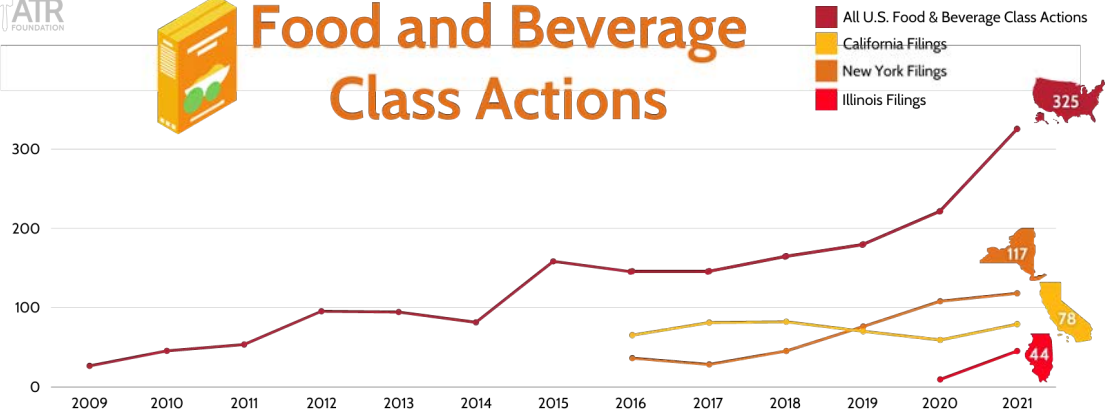
has [urged](#) **Governor Kathy Hochul** to sign the bill without any modifications. Meanwhile, medical groups and businesses have [spoken](#) to Hochul to express their concern about expanded liability. At the time of publication, Governor Hochul had yet to offer her decision on the legislation with pressure from both sides, but she has until December 31 to act.

NUMBER OF FOOD LAWSUITS CONTINUES TO RISE

Since 2017, food and beverage class action filings have [more than tripled](#) in New York. Plaintiffs' lawyers regularly abuse the vague language of New York's consumer protection law ([GBL § 349](#)), which does not require a plaintiff to demonstrate that the business intentionally misled consumers or that a consumer actually relied on the misrepresentation to her detriment. Although a plaintiff must demonstrate that a practice is "likely to mislead a reasonable consumer acting reasonably under the circumstances," many New York courts have refused to assume that a reasonable consumer reads the product's ingredients.



Food and Beverage Class Actions



Sources: Perkins Coie Food Litigation Year In Review 2019, 2018, 2017 and 2016; Perkins Coie Food & Consumer Packaged Goods Litigation Year in Review 2021 and 2020; Institute for Legal Reform's "The Food Court" (August 2021)

Many of these lawsuits settle for their nuisance value soon after they are filed, providing no benefit to consumers. Those that are certified as class actions provide big paydays to plaintiffs’ lawyers. For example, in [Hesse v. Godiva Chocolatier Inc.](#), the U.S. District Court for the Southern District of New York approved a \$7.5 million settlement in a certified class action lawsuit that alleged that Godiva Chocolatier’s packaging misled consumers into believing all its chocolate was produced in Belgium. The case settled after the court found that reasonable consumers could view a label touting the location of a company’s founding as representing the products’ continued place of production. The court ultimately [approved](#) \$2.7 million in fees for the plaintiffs’ lawyers, an amount that was reduced from the \$5 million they had sought because consumers only claimed about half of the money set aside to reimburse them for their supposed loss.

Vanilla Vigilante

After [years of filings](#) by the “Vanilla Vigilante” – **Spencer Sheehan**, New York courts have grown impatient with his lawsuits that have often claimed that vanilla-flavored products do not include, or lack a sufficient amount of, pure vanilla. For example, in [Parham v. Aldi](#), a New York federal court dismissed allegations that Aldi misled its consumers about its vanilla almond milk product. The **Southern District of New York** adopted the report of a magistrate judge who found that a “reasonable consumer would understand the word ‘vanilla’ on the front of the carton to describe how the product tastes, not what it contains, especially in circumstances where the ingredients listed on the product container do not mention vanilla at all.” The court did not allow the plaintiff to amend the complaint, finding any attempt to salvage the claim would be futile. The **Eastern District of New York** similarly dismissed a lawsuit alleging the same complaint against Dove vanilla ice cream bars. “This case, like the litany of vanilla cases before it, is about flavor and there is no allegation that the ice cream bars do not taste like vanilla,” [wrote](#) U.S. District Judge **Raymond J. Dearie**.

This ruling marked the [sixth](#) court in New York to have dismissed vanilla cases with the same reasoning, showing signs of hope for the vanilla-flavored product makers.

Although the number of vanilla cases may be subsiding in New York, Sheehan has his eyes set on other flavorings. From strawberry flavoring in Pop-tarts to onion powder in Yumions, Sheehan has relentlessly [filed](#) class action lawsuits targeting other consumer products. Fortunately, judges have applied the same reasoning used in vanilla cases to [other flavors](#), stating that no reasonable consumer would expect the flavor described on the label to necessarily reflect the product’s ingredients.

PREDATORY LAWSUIT LOANS



Third-party litigation financing has flourished in New York City in recent years, generating millions of dollars for finance firms. This industry preys on vulnerable consumers, while making it more difficult to resolve cases for reasonable amounts.

These businesses operate like payday lenders, encouraging individuals with lawsuits to take a relatively small “advance” on their expected settlement. [Examples abound](#) of consumers taking a small loan (\$350 to \$1,200) while a run-of-the-mill claim like a slip-and-fall is pending and then being on the hook to pay the lender five or ten times that amount. These amounts are taken from the plaintiff’s settlement, after payment of the personal injury attorney’s contingency fee. When a settlement is reached, a consumer may have little or nothing left. In one instance, a lawsuit lender has reportedly charged New Yorkers interest rates as high as [124%](#).

In 2017, the state Attorney General and the Consumer Financial Protection Bureau brought a [suit](#) against RD Legal Funding for exploiting 9/11 first responders and NFL concussion victims with interest rates up to 250 percent. Although the initial lawsuit was [dismissed](#) by **Judge Loretta A. Preska** in 2018 due to constitutional defects in the CFPB’s single-director leadership structure, the 2020 U.S. Supreme Court ruling in [Seila Law v. CFPB](#) fixed the problematic structure and compelled Judge Preska to [reverse](#) her decision in 2022. The CFPB and the Attorney General may now proceed with their litigation from 2017, but there have not been any updates.

Other dangers of litigation funding are illustrated by a scam that played out in New York City. In 2021, a federal grand jury indicted [five conspirators](#) – two doctors, two personal injury lawyers, and one litigation funder – on mail- and wire-fraud charges. The defendants were caught recruiting [vulnerable individuals](#), also referred to as “patients” by the perpetrators, to stage trip-and-fall accidents in various areas of New York City. After the patient staged an accident, the two attorneys would file personal injury lawsuits on their behalf against businesses and insurers. The two doctors would then instruct patients to undergo unnecessary medical and chiropractic treatments to maximize the value of their claims. Afterwards, the patients received a mere post-surgical [stipend](#) of \$1,000 to \$1,500.

The litigation funder would offer to pay for patients’ medical and legal costs in exchange for up to 50% [interest rate](#) on medical loans and up to 100% on personal loans.

The scam, which began in 2013, generated almost \$31 million, according to prosecutors. After [pleading guilty](#) to wire fraud conspiracy, the litigation funder agreed to forfeit over \$650,000, and awaits sentencing. He may be on the hook to pay as much as \$3.9 million in restitution and will likely face prison time up to 20 years. The lawyers and doctors involved will soon go to trial.

In an advertisement for advocacy group [Consumers for Fair Legal Funding \(CFLF\)](#), Reverend Kirsten John Foy shared his [story](#) on how people may fall victim to predatory lawsuit lending. During an arrest by New York Police Department (NYPD) officers for alleged trespassing, Foy was left with a fractured kneecap and a torn rotator cuff. Foy sued NYPD for monetary damages, but his inability to work and the need to cover medical bills led him to rely on lawsuit lending. Foy ultimately received an approximately \$225,000 settlement from NYPD. The amount of money that Foy saw was less than half of the actual settlement – about \$75,000 after repaying his two loans.

According to CFLF, there are many like Foy who fall victim to these practices. For that reason, CFLF is pushing lawmakers for greater regulation of the lawsuit lending industry.

Although **State Senator Anna Kaplan** has proposed [two bipartisan bills](#) to rein in these abuses by setting a ceiling on interest rates and tracking litigation funding, the industry’s lobbying power prevents the legislation from moving out of committee. One of the bills, named [New York Consumer Litigation Funding Act](#), aims to limit the litigation funding company’s control over the litigation and require these companies to disclose in exact terms the maximum amount the consumer may have to pay.

In addition to subjecting lawsuit lending to safeguards similar to other consumer loans, New York should ensure that the court and all parties are aware of such arrangements. Transparency can expose predatory lending practices and also ensure that parties are aware that a third party may be influencing the litigation or impeding the ability to reach a settlement. Lawsuit lending can drive up settlement demands (as plaintiffs must consider not only how much of the settlement will go to his or her attorney, but also to the lawsuit lender) and make it more difficult to reasonably resolve cases.

Unlike some jurisdictions, **New York** does not require litigants to disclose the existence of a litigation funding agreement. Although a funding agreement could potentially be discoverable if it is relevant to the case and not otherwise protected from disclosure, thus far, New York courts presented with the issue have found funding agreements [irrelevant](#) and [undiscoverable](#).

NEW YORK RISES UP THE RANKS OF WORST STATES FOR DOCTORS

New York is now the second worst state for doctors, after previously coming in at No. 3, according to an annual ranking by [WalletHub](#). The state also ranks first in [two categories](#): highest malpractice award payout amounts per capita and most expensive annual malpractice liability insurance. The average [payout](#) of a neck/back injury rose from \$3.8 million in 2015 to \$6.8 million in 2019. During the same time period, a brain injury award increased by 560 percent from \$5 million to \$27 million.

One reason New York is home to so many medical liability cases is because it is [one](#) of 15 states that allows unlimited damage awards. New York also has no rules regarding minimum expert qualifications, making it easier for plaintiffs' lawyers to bring in unqualified witnesses to testify against doctors.

State lawmakers are pushing for a bill that will make bringing medical malpractice cases even more lucrative for personal injury lawyers. [Current New York law](#) protects patients with a sliding scale for the percentage an attorney can take as a contingency fee after a successful medical malpractice case. The [percentage](#) declines as the total amount of settlement or award increases, starting with 30 percent on the first \$250,000 down to 10 percent of any amount over \$1.25 million.

[S.9421](#) sponsored by **Assemblyman Charles Lavine** and **Senator Jamaal Bailey**, would alter the standard for a court to allow an attorney to receive a fee that exceeds the cap. Rather than require "extraordinary circumstances," it allows a court to grant a higher fee based on the performance of the attorney, results of the case, and consent of the client (though not required). The bill does not require the attorney to submit the number of hours spent working on the case. **Lawsuit Reform Alliance of New York Director Tom Stebbins** [stated](#), "These bills have nothing to do with justice and everything to do with enriching trial lawyer sharks as they circle the injured and vulnerable."

The shift in contingency fees will not only affect the plaintiff, but the defending doctors and health care workers. With more medical malpractice lawyers who seek to maximize profit, New York's malpractice liability insurance and award payout will increase even more.

RETROACTIVE COVID-19 LIABILITY

In the early days of the COVID-19 pandemic, the New York legislature [enacted](#) the **Emergency Disaster Treatment Protection Act (EDTPA)**, which provided immunity to those who provided health care services in good faith during the pandemic, absent gross negligence, reckless conduct, or willful or intentional misconduct. The legislature repealed EDTPA on April 6, 2021, however, when then-Governor Cuomo signed [Senate Bill S5177](#).

Days later, a plaintiff filed a [medical malpractice lawsuit](#) against Elderwood at Amherst, which provides nursing home care in western New York. At issue is whether the repeal of EDTPA retroactively eliminates the liability protection extended to health care facilities and professionals. The **Erie County Supreme Court** decided that the repeal is not retroactive and dismissed the plaintiff's complaint in its entirety. The court determined that the New York bill, as any other legislation, is presumed to apply prospectively absent clear

legislative intent otherwise and no such showing was made in this case. By ruling on this ground, the court did not need to address the constitutional due process implications of retroactively eliminating protections that healthcare providers relied upon during the pandemic.

The plaintiff appealed the dismissal and the case is currently pending in the **Appellate Division, Fourth Department**. ATRA filed an [amicus brief](#) alongside others to support the trial court's order. As the brief explains, the presumption against retroactivity is rooted in the elementary notions of fairness, as it prevents a legislature from exercising arbitrary power to violate due process.

GROUND ZERO FOR 'AMERICANS WITH DISABILITIES ACT' LAWSUIT ABUSE

In recent years, New York has seen a [surge](#) in **Americans with Disabilities Act (ADA)** lawsuits filed in federal courts. Specifically, some plaintiffs' lawyers have focused on lawsuits claiming that websites are not sufficiently accessible to those with disabilities. Few of these lawsuits are filed by plaintiffs who face real injury from lack of access, and most of these cases are filed by firms and serial plaintiffs who make vague and conclusory allegations about the inaccessibility of websites to those who are visually impaired.

While traditional ADA accessibility lawsuits focus on physical barriers in brick-and-mortar locations, the drastic increase in **ADA website accessibility** cases began in 2017, when New York courts decided that websites qualify as a "[place of public accommodation](#)" under the ADA; and therefore, [must comply](#) with its statutory requirements. Since these decisions, New York courts have been flooded with ADA website accessibility cases.

In 2021, [2,074](#) of the 2,895 website accessibility lawsuits nationwide were filed in New York's federal courts, which amounted to 71% of the litigation. California placed a distant second with only 359 filings during the same period. With its broad interpretation of "place of public accommodation," New York's federal courts have been targeted by serial plaintiffs who file countless lawsuits through firms like **Stein Saks, PLLC** and **Cohen & Mizrahi LLP**.

Second Circuit Intervenes in No Injury ADA Lawsuits

Even if such claims are viable, the federal appellate court overseeing New York has made clear that ADA plaintiffs, like others, must show they experienced an actual injury to pursue a website accessibility claim. In [Harty v. West Point Realty](#), a disabled Florida resident sued a hotel in a New York federal court for having a website with allegedly insufficient accessibility information required by the ADA. In March 2022, the **Second Circuit** upheld the district court's dismissal of the lawsuit because the plaintiff asserted no plans to actually visit the Holiday Inn Express West Point; and therefore, his ability to travel was not hampered by the inaccessibility of the hotel's website. The **Second Circuit** ruled that plaintiffs must prove that they suffered a "[concrete](#)" and "[particularized](#)" injury from being deprived of information on a website to establish the Article III standing that is constitutionally required to maintain an action in federal court.

Three months later, the **Second Circuit** again intervened to reject no-injury ADA lawsuits. In that instance, the appellate court [affirmed](#) a district court's order dismissing five ADA accessibility lawsuits brought against retailers, alleging that they failed to offer gift cards in Braille. **Southern District of New York Judge Gregory Howard Woods** found that the plaintiffs had filed a generic complaint that failed to show standing and that, even if they experienced an injury, the ADA regulates places not products.

In [affirming](#) the plaintiffs' lack of standing, the **Second Circuit** called out the "Plaintiffs' transparent cut-and-paste and fill-in-the-blank pleadings," and observed that the four plaintiffs before the court had filed 81 of 200 "essentially carbon-copy complaints" in just a three-month period. The complaints even included the same typos. The Second Circuit found the plaintiffs' naked assertions of injury stemming from the inability to purchase braille gift cards implausible.

Despite a few positive court decisions, plaintiffs' lawyers and serial plaintiffs are undeterred in their efforts and continue to file abusive ADA lawsuits at an alarming rate. Small businesses across the state are

one frivolous lawsuit away from being forced to close their doors as many still struggle to regain their footing following COVID-19 shutdowns.

ASBESTOS LITIGATION

Courts nationwide have experienced a [significant decrease](#) in the number of asbestos complaints filed, amounting to a 16 percent drop between 2017 to 2021. Although **New York City** mirrored this trend with 19.4 percent fewer asbestos filings in 2021 than the previous year, its courts continue to serve as the [third most popular](#) jurisdiction for asbestos litigation with 249 cases filed that year. Only Madison and St. Clair counties in Illinois host more. In a 2022 mid-year [report](#), New York retained its ranking with the third most asbestos filings and a 11% increase in cases filed than the previous year.

Over-Naming Defendants

A main cause of concern in New York asbestos litigation in recent years has been the over-naming of businesses as defendants. Plaintiffs' lawyers name numerous defendants without any proof that their client was exposed to a particular company's products and pressure these companies to settle. On average, plaintiffs' lawyers named [48 companies](#) as defendants in each complaint filed in New York's asbestos docket in 2021 and sometimes significantly more. This practice wastes taxpayer dollars, congests the court system, and delays plaintiffs' compensation.

New York lacks a proper gatekeeping function to prevent plaintiffs' lawyers from over naming defendants. **Senator Pete Harckham** introduced [S.7810](#) in January 2022, which would require plaintiffs' lawyers, when filing an asbestos complaint, to submit an information form identifying the basis for the suit against each defendant. The bill remains stagnant in the Senate Judiciary Committee.

Proof of Causation Matters

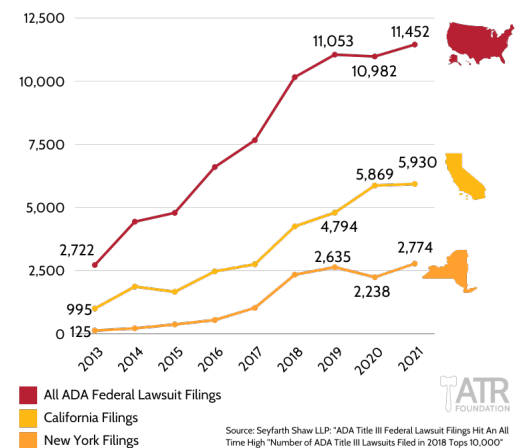
In an April 2022 decision, New York's highest court issued a ruling that will make it less likely that companies that are not responsible for a plaintiff's asbestos-related medical condition will nevertheless be held liable or feel compelled to settle.

In [Nemeth v. Brenntag North America](#), the Court of Appeals found that the plaintiff's expert witnesses had not shown that the plaintiff contracted mesothelioma as a result of exposure to talcum powder allegedly tainted with asbestos, rather than her exposure to numerous other asbestos-containing products made by defendants who had settled before trial. This testimony was insufficient, the court ruled, because the experts failed to establish that the plaintiff was actually exposed to a level of asbestos from the remaining defendant's product that could have caused her illness. The court emphasized that, in any toxic exposure case, "conclusory assertions of causation" are not enough. As a result, the appellate court reversed a \$16.5 million verdict.

Following the *Nemeth* decision, New York experienced a wave of dismissals as the Appellate Division applied this causation standard. Each case cited *Nemeth* and required a showing beyond mere exposure to products with asbestos to meet the causation burden.

For example, in [Dyer v. American Billtrite](#), the plaintiff claimed that the decedent's cancer was caused by his exposure to asbestos while cutting vinyl floor tiles. Although the plaintiff's expert witness testified that there was a "dangerous concentration" of asbestos released during this work, the Appellate Division

ADA Federal Lawsuit Filings



found he failed to show that those levels are known to cause lung cancer. Simply saying that an amount is “dangerous” or “excessive” is not enough to establish causation. The Appellate Division reached a similar result in [Grunert v. American Biltrite](#). In that instance, the plaintiff did not show that he actually worked with Amtico tile, as opposed to five similar brands, and, even if he did, that level of exposure to asbestos from working with the tile would have been insufficient to cause cancer.

Preventing Forum Shopping

The **New York Court of Appeals** also took steps to prevent out-of-state asbestos cases from overwhelming New York courts by raising the standard to establish personal jurisdiction.

In June 2022, the Court held that plaintiffs bear the burden of establishing personal jurisdiction using a two-pronged jurisdictional inquiry – the first inquiry is whether a defendant conducted sufficient activities to have transacted business within the state; and the second inquiry is whether plaintiff’s claim arises from the transactions. In that [instance](#), the court dismissed a case filed in New York arising from exposure to asbestos during military service in California against a valve manufacturer that principally operated in Massachusetts and Texas. The claimed link to New York was that the company sold valves to a New York company for use in their boilers. The ruling prevents out-of-state plaintiffs from crowding New York courts with asbestos lawsuits that originate in other states.

Following these positive developments, it remains to be seen whether they will have a meaningful impact and prevent the types of abuses that have been so prevalent in New York’s asbestos litigation.

UNIQUE SCAFFOLD LAW CONTINUES TO BURDEN STATE ECONOMY

New York City is the [second most expensive](#) city to live in worldwide. One root cause of the high cost of living in New York is excessive construction costs due in part to the state’s “[Scaffold Law](#).” Over a century ago, the state legislature enacted the Scaffold Law to protect construction workers who helped build the concrete jungle known as New York City today. After Illinois [repealed](#) a similar law in 1995, New York is the only state that maintains this form of absolute liability over contractors.

Written in New York Labor Law’s section 240/241, the Scaffold Law assigns strict liability for any gravity-related injuries. Contractors and employers are virtually defenseless from lawsuits regardless of the workers’ negligence or recklessness. Eliminating the strict liability component would create over 27,000 new jobs and [12,600 additional housing units](#).

The increased risk of liability has led to a [300 percent increase](#) in general liability insurance rates. **New York School Boards Association** estimates the Scaffold Law costs Upstate New York [\\$200 million](#) every year while the **School Construction Authority** paid \$240 million in insurance costs alone despite an excellent safety record. The Scaffold Law costs approximately \$785 million in [public dollars](#) every year and is adding hundreds of millions of dollars to construction projects like the Hudson Gateway project and Tappan Zee bridge reconstruction.

An interesting [statistic](#) indicates that frequency of injuries on construction projects in New York has decreased, but the number of Scaffold Law cases has nonetheless increased by 500 percent since 1990. This indicates that the Scaffold Law no longer serves the intended purpose of protecting workers but is rather utilized by plaintiffs’ lawyers to inflate non-serious injury claims and reap the benefits of absolute liability.

There is one recent piece of good news. In April 2022, the **New York Court of Appeals** reined in misuse of the statute when it ruled in [Cutaia v. Board of Mgrs.](#) that an “accident alone” involving a fall is insufficient to establish a Scaffold Law violation. There must be at least some evidence an employer’s failure to provide an additional safety device or lack of a sufficient ladder caused the fall.

NEW YORK AT THE FOREFRONT OF EAST COAST CLIMATE CHANGE LITIGATION

Like its west coast counterpart, California, New York City continues to be on the forefront of regulation through litigation with respect to U.S. energy policy on climate change on the East Coast.

After New York lost its lawsuit against Exxon and other energy producers in 2021, **Attorney General Letitia James** immediately filed another [lawsuit](#) against the same companies under a different legal theory. Instead of arguing that state courts have the authority to advance national energy policies, New York City [contends](#) that the defendants violated the City's Consumer Protection Law by misleadingly promoting their products as beneficial in addressing climate change and marketing their companies as environmentally responsible. Upon both parties' agreement, the New York City case is on hold as the U.S. Supreme Court [decides whether to review](#) a similar case that would have major implications on the future of climate change litigation.



TOP ISSUES

- Overwhelming percent of state's nuclear verdicts come out of county court
- Abusive BIPA lawsuits target businesses
- “No-injury” lawsuits clog courts
- Plaintiff-friendly jurisdiction for asbestos litigation

Cook County has become ground zero for “no-injury” lawsuits, mainly arising out of the state’s **Biometric Information Privacy Act (BIPA)**. BIPA litigation has reached record highs with no signs of slowing down and the county has become a magnet for food and beverage litigation. The county also remains a preferred jurisdiction for asbestos litigation.

Unfortunately, the state’s General Assembly is one of the most plaintiff-friendly legislatures in the country and does very little to combat the pervasive liability-expanding agenda of the plaintiffs’ bar.

While previous reports have included Madison and St. Clair counties in Illinois’ Hellholes designation, the issues plaguing those counties have narrowed. They are the plaintiffs’ bar’s preferred jurisdictions for asbestos litigation, an issue discussed in the Dishonorable Mentions section.

COUNTY KNOWN FOR NUCLEAR VERDICTS

A recent U.S. Chamber [study](#) found that over a 10-year period (2010-19), Illinois ranked sixth among states for the number of nuclear verdicts (\$10 million and more) in personal injury and wrongful death cases during this period and fourth for nuclear verdicts per capita. The **Cook County Circuit Court** hosted two-thirds of these nuclear verdicts.

“NO-INJURY” LAWSUITS CLOG COURTS

BIPA Lawsuits

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

LEGAL SERVICES ADVERTISING SPENDING

COOK COUNTY, ILLINOIS

Plaintiffs’ lawyers are well aware of the court’s propensity for liability-expanding decisions and spend millions of dollars on advertising. Between 2017 and 2021, plaintiffs’ lawyers spent **\$205 million** on 1.7 million local advertisements across television, radio, and outdoor mediums in Illinois. Trial lawyers also specifically targeted the Chicago-media market (including Cook County) at a high rate, spending \$16.1 million on over 100,600 local television ads from January–August 2022.

ECONOMIC IMPACT OF LAWSUIT ABUSE

COOK COUNTY, ILLINOIS

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Illinois residents pay a “tort tax” of \$1,543.70 per person and 192,605 jobs are lost each year, according to a recent study by [The Perryman Group](#). If Illinois enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$19.43 billion.

In Chicago, excessive tort litigation costs residents in excess of \$11.39 billion in personal income annually and results in a loss of more than 178,000 jobs each year. Excessive costs result in an annual “tort tax” amounting to about \$2,094 per person.

to a person whose fingerprint, voiceprint, 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 has surged. In 2021, at least [89 judicial opinions](#) referring to BIPA were published, up from 62 in 2020 and over four times the number published 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.

In February 2022, in a highly anticipated [opinion](#) in a case that originated in Cook County, the **Illinois Supreme Court** held that BIPA injuries are not compensable under the state’s Workers’ Compensation Act because “[t]he personal and societal injuries caused by violating the Privacy Act’s prophylactic requirements are different in nature and scope from the physical and psychological work injuries that are compensable under the Compensation Act.”

Despite acknowledging that its decision in *McDonald v. Symphony Bronzeville Park* would contribute to a flood of lawsuits in Illinois courts, the justices found that the no-injury litigation was a problem “more appropriately addressed by the legislature.”

As with most BIPA cases, the employee did not claim to suffer any injury. The case rested entirely on the fact that the employer had not given written notice of biometric data collection for a fingerprint-operated timekeeping system.

In his [special concurrence](#), **Justice Michael Burke** agreed that the injury was not compensable under the Workers’ Compensation Act because “quite simply, there is no injury.” He pointed out the irony of the

“Put bluntly, the McDonald decision slams the door on any hope that a court would intervene to prevent a flood of these types of claims against employers.”

– Partners at Manning Gross & Massenburg

majority’s decision and the main crux of the BIPA problem: the plaintiff originally pled that fear of her biometric information being compromised caused her “mental anguish,” however, she later dropped the mental anguish claim and proceeded only on the technical violation of BIPA. Therefore, under the majority’s analysis, the plaintiff only won “by denying the existence of an injury.”

Through the majority’s decision, the justices have further opened the gates to meritless “no-injury” lawsuits. As [pointed out](#) by partners at Manning Gross & Massenburg: “Put bluntly, the *McDonald* decision slams the door on any hope that a court would intervene to prevent a flood of these types of claims against employers.”

CASES TO WATCH

In yet another pivotal case originating in Cook County, the **Illinois Supreme Court** is [poised to decide](#) whether a BIPA claim accrues each time a business scans a person’s biometric information and each time it’s transmitted to a third party or only upon the first scan and first transmission.



Employees are suing their ex-employer, White Castle, for failing to obtain permission before collecting their fingerprints to use as log-in credentials for accessing work computers and collecting paychecks. White Castle filed a motion to dismiss, arguing that the statute of limitations on the claims had expired, as the injury – collecting the employee’s data without written consent – occurred in 2008.

The plaintiffs’ lawyers countered by arguing that it was a new BIPA violation each time the improperly collected BIPA data was utilized, and therefore, it was a violation every time an employee logged in to the system.

As pointed out in an [amicus brief](#) filed by the **U.S. Chamber of Commerce**, under the plaintiff’s rule “damages in these cases reach truly stratospheric levels” – collection and use of one employee’s biometric information could lead to thousands of distinct claims against the employer.

The **Illinois Supreme Court** also is deciding whether BIPA lawsuits are subject to the state’s one-year default statute of limitations for privacy actions or the state’s “catch-all” provision, which gives a five-year statute of limitations for claims with no defined period. The BIPA statute does not include its own deadline for filing a claim. The **Cook County Circuit Court** [held](#) that the five-year statute of limitations applied, rather than the one-year statute of limitations for privacy actions.

Five years is an exceptionally long statute of limitations. It will make no-injury BIPA claims especially lucrative for plaintiffs’ lawyers because the longer the statute of limitations, the larger the classes and number of alleged violations subject to civil penalties. Most state consumer protection laws, for example, set a statute of limitations of [two or three years](#).

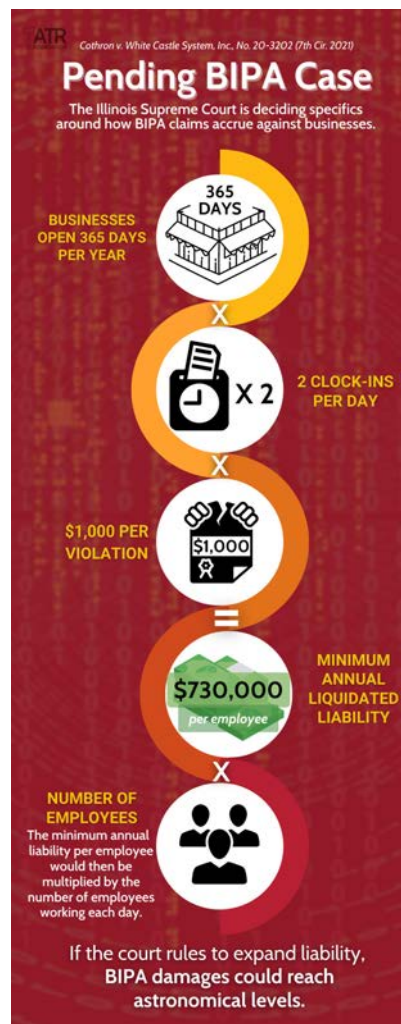
As noted by the **Illinois Chamber of Commerce** in its [brief](#) in the case, *Tims v. Black Horse Carriers*, additional time does not protect workers or promote BIPA compliance. “Allowing plaintiffs five years to bring Privacy Act claims will effectively delay compliance with the statute and risk compromising more individuals’ privacy rights.” A one-year statute of limitations would allow employers in the state to “focus on hiring employees, keeping stores and warehouses open, and staying in business, as opposed to litigating expensive class actions.”

First BIPA Trial Reaches a Verdict

The first ever BIPA case went to trial in 2022 and ended with a federal jury delivering a [\\$228 million verdict](#) in favor of the class of plaintiff truck drivers. The truck drivers filed the BIPA suit in the **Circuit Court of Cook County**, but the defendant, a national railroad company, [removed the case](#) to the Northern District of Illinois. The suit claimed that the defendant required the truckers to scan their fingerprints to access the railyard and did not comply with the procedural requirements of BIPA.

After a weeklong trial, the jury found in favor of the truckers and assessed the maximum statutory penalty against the defendant despite the plaintiffs not suffering any injury or harm. The jury held the defendant liable for 45,600 violations of BIPA and found that each of these violations was willful or reckless, resulting in a \$5,000 penalty per violation. The jury thus left the railroad company on the hook for \$228 million in damages. The jury returned this maximum verdict after a brief period of deliberation – [reports suggest](#) less than an hour.

The landmark verdict demonstrates that Illinois juries are willing and able to assess massive statutory penalties for BIPA violations, even when the plaintiffs did not allege any actual injury.



BIPA Settlements

Recent BIPA settlements show the true profit motive for plaintiffs' attorneys behind bringing these cases. In January 2022, Chicago Hyatt [settled a BIPA class action](#) for \$1.08 million with class members recovering \$865 per person and class counsel receiving over \$430,000. The case was brought in Cook County by a hotel employee who clocked in and out of work using her fingerprint. She claimed no injury aside from the hotel's failure to follow BIPA's notice, consent, and record-keeping requirements.

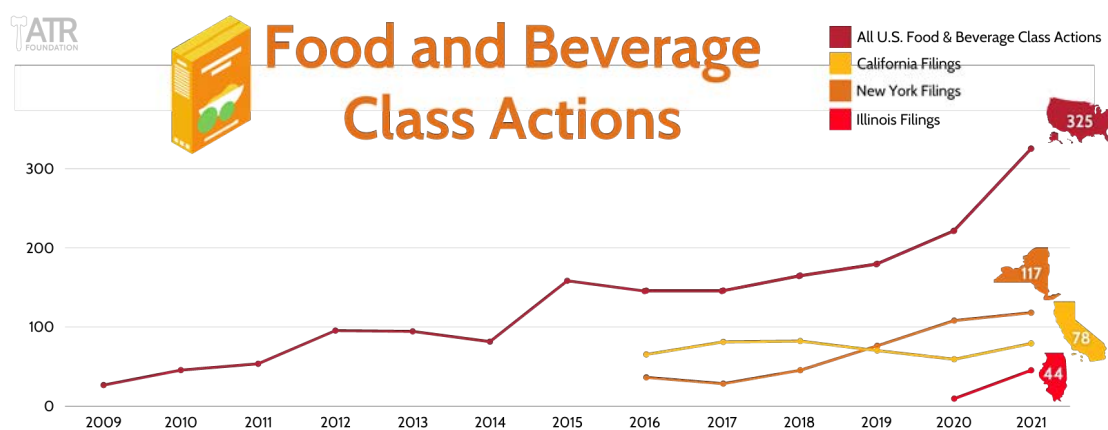
In another 2022 settlement, a class of employees sued the producer and data server of biometric timekeeping devices bought by employers across the state. The company entered into a [\\$15.3 million settlement](#) that offered individual class members between \$290 and \$580. The attorneys representing the class took home over \$5 million. The case was filed in Cook County Circuit Court but was later removed to federal court.

"NO-INJURY" FOOD & BEVERAGE LITIGATION

Illinois saw a [450 percent increase](#) in consumer class actions targeting food and beverage products in 2021, rising from 8 suits in 2020 to 44 suits in 2021. Illinois rose from 5th (2020) to 3rd (2021) in hosting national food and beverage marketing claims. The vast majority of these cases are filed in federal court in the Northern District of Illinois, which includes Cook County.

This jump in lawsuits may stem from a prolific filer of no-injury consumer class actions, [Spencer Sheehan](#), who appears to be more frequently filing lawsuits in Illinois after a string of defeats in New York's federal courts.

Fortunately, federal judges in Illinois do not appear receptive to these suits either. For example, the **Northern District of Illinois** dismissed a complaint that Kellogg's strawberry Pop-Tarts didn't contain enough [strawberries](#) in March 2022. That court also dismissed another lawsuit that claimed "[frosted chocolate fudge](#)" Pop-Tarts didn't truly contain the ingredients expected for fudge. The **Southern and Northern Districts of Illinois** both dismissed lawsuits claiming Haagen-Dazs vanilla milk chocolate ice cream bars contained less milk chocolate than consumers expect. The **Northern District** dismissed similar lawsuits he filed against [Costco](#) and [Whole Foods](#) targeting their chocolate ice cream bars.



Sources: Perkins Cole Food Litigation Year in Review 2019, 2018, 2017 and 2016; Perkins Cole Food & Consumer Packaged Goods Litigation Year in Review 2021 and 2020; Institute for Legal Reform's "The Food Court" (August 2021)

Nevertheless, similar lawsuits continue. One recent lawsuit, filed in Illinois federal court in August 2022, claims Walmart’s honey mustard doesn’t have enough [honey](#). Another pending [class action lawsuit](#) claims that Poland Spring’s sparking water “with a twist of lemon,” contains less lemon ingredients than consumers expect.

Other consumer class actions have resulted in significant settlements in Illinois. This year, a [settlement](#) was reached between Fairlife Milk and class members over advertising statements indicating that dairy cows were treated with “[the utmost care](#),” despite allegedly being subject to conditions typical for industrial dairy cattle. The parties agreed to settle for \$21 million. Each claimant can receive a 25% refund of the purchase price of the milk up to \$20 without receipts, while class counsel will receive \$7 million in fees and over \$95,000 for expenses.

A FAVORABLE JURISDICTION FOR ASBESTOS LITIGATION

As asbestos claims continue to fall nationwide, the number of lawsuit filings in Cook County remained constant. Lawyers flock to **Cook County** due to their plaintiff-friendly reputations, low evidentiary standards, and judges’ willingness to allow meritless claims to survive. Cook County [was ranked](#) in the top-10 (#7) for 2021 asbestos lawsuit filings, representing an almost 10-percent increase over the previous year. In the first half of 2022, Cook County [recorded](#) a slight decrease in asbestos filings but remained a top-10 (#9) jurisdiction.



TOP ISSUES

- Extraordinary pro-plaintiff rulings
- Texas law firm has its way in court
- Appellate court bolsters outlier rulings

A newcomer to the Judicial Hellholes® list in 2020, South Carolina’s asbestos litigation has quickly developed a reputation for bias against defendants, unwarranted sanctions, low evidentiary requirements, liability expanding rulings, unfair trials, severe verdicts, and a willingness to overturn or modify jury verdicts to benefit plaintiffs. As a result, the state has become a [hotspot](#) for asbestos claims.

RULINGS FAVOR PLAINTIFFS

In 2017, retired **South Carolina Supreme Court Chief Justice Jean Hoefler Toal** was appointed to preside over South Carolina’s asbestos docket. Judge Toal has a broad record of pro-plaintiff rulings, including imposition of severe and unwarranted sanctions on defendants.

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

The **South Carolina Court of Appeals** has affirmed some of her expansive rulings, missing important opportunities to keep the state in the mainstream and contributing to the state’s reputation as an outlier in its handling of asbestos cases.

FILINGS ON THE RISE DESPITE NATIONAL DROP-OFF, TEXAS FIRM AT THE CENTER

Those familiar with South Carolina asbestos litigation say that **Judge Toal** typically sides with plaintiffs’ lawyers from Dallas, Texas, **Law Offices of Dean Omar Branham Shirley, LLP**, and their local counsel **Kassel McVey Attorneys at Law**.

Although national asbestos claim filings are down overall in recent years, lawsuits have risen [dramatically](#) in South Carolina due to the activity of out-of-state firms such as the **Dean Omar firm**.

In 2021, [Jessica Dean](#), the firm’s lead partner, withdrew from several South Carolina cases after [news broke](#) that a paralegal signed and filed Dean’s out-of-state-attorney applications without her knowledge. Additionally, courts in Connecticut and Iowa [rejected](#) Dean’s requests to participate in cases in those states, and a Minnesota judge [sanctioned](#) her firm \$78,000 in defense fees and costs after a plaintiff’s witness flouted a court order.

WEAK CAUSATION STANDARD APPLIED

In *Edwards v. Scapa Waycross, Inc.*, decided in August 2022, and *Jolly v. General Electric Co.*, decided in September 2021, the **South Carolina Court of Appeals** delivered a significant blow to the state’s asbestos litigation environment by affirming verdicts based on a controversial [“cumulative dose” theory](#) espoused

by plaintiffs' experts. This theory allows plaintiffs' experts to testify that every exposure to asbestos contributes to the development of asbestos-related disease, making it easier for plaintiffs to establish causation. The theory is an outgrowth of the discredited "[each and every exposure](#)" theory, which espouses the view that "every exposure to asbestos above a threshold level is necessarily a substantial factor in the contraction of asbestos-related diseases." As the **U.S. Court of Appeals for the Seventh Circuit** has [explained](#), "just like 'each and every exposure,' the cumulative exposure theory does not rely upon any particular dose or exposure to asbestos, but rather all exposures contribute to a cumulative dose." Both theories are incompatible with the substantial factor standard required for causation, but the **South Carolina Court of Appeals** views cumulative dose testimony as "[background information](#) essential for the jury's understanding of medical causation."

The South Carolina appellate court's holdings stand in stark contrast to jurisdictions such as **New York**, which recently [reaffirmed](#) that "plaintiffs must rely on expert opinions that establish a scientific expression of [dose](#) with sufficient, case-specific, specificity, to establish [proof](#) of causation that a particular defendant's product caused their injuries. Conclusory or qualitative statements do not suffice."

SEVERE AND UNWARRANTED SANCTIONS

National asbestos attorneys say Judge Toal's discovery orders are more frequent, broader, and the sanctions more severe than in any other jurisdiction. Sanctions in asbestos cases are rare outside of South Carolina. Also, lawyers [familiar](#) with asbestos litigation in South Carolina say they cannot remember sanctions motions being filed in the seven years before **Judge Toal** took over the asbestos docket from **Judge D. Garrison Hill**.

Dean Omar Branham Shirley, LLP routinely demands overbroad discovery in conjunction with corporate defendant depositions, in which businesses are required to turn over what they believe are excessive, irrelevant, and often impossible to produce documents. When defendants cannot comply, or Dean Omar does not like the answers at the deposition, the firm seeks sanctions. In a [sample](#) of five 2020 cases, the firm filed 22 motions for discovery related [sanctions](#), including eight in one case.

In three cases involving bankrupt defendant Covil Corp., **Judge Toal** issued what is referred to as a "[doomsday sanction](#)," striking all of the insulation company's pleadings. In its appeal, Covil described the sanction 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.

More recently, the **South Carolina Supreme Court** agreed to review "the largest monetary sanction ever reported in South Carolina jurisprudence – over [\\$300,000](#) ." The sanction was imposed *after* a jury returned a defense verdict in *Howe v. Air & Liquid Systems Co.*

The asserted basis for the sanction was Cleaver-Brooks, Inc.'s production of documents during trial that rebutted a surprise theory sprung by the plaintiff's lawyers at trial that turned out to be factually inaccurate. According to [Cleaver-Brooks](#), the documents "were never the subject of any discovery request, and they had no relevance to the case prior to the Plaintiff's surprise in-court questioning." The **South Carolina Court of Appeals** summarily [affirmed](#) the trial court's order "without explanation or even holding oral argument." The **South Carolina Supreme Court** recently [agreed to review](#) the extraordinary sanction in *Howe*.

Defendants hope that the state's high court will curb Judge Toal's extraordinary habit of imposing sanctions in asbestos cases. In August 2022, the **South Carolina Supreme Court** in [Kovach v. Whitley](#), a non-asbestos case, held that Judge Toal erred in imposing a sanction against a plaintiff who filed a lawsuit that was at odds with representations the plaintiff made in a prior criminal action. The **South Carolina Supreme Court** found "[no factual basis on which to justify an award of sanctions.](#)" The Court also noted there were "a host of reasons" why the amount of the sanction may have been "an additional abuse of discretion." The Court did not address the merits of the amount of the sanction because the prior issue was dispositive.

OVERTURNED A DEFENSE VERDICT, ADDING 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 Corp. said it could not produce old documents because the papers had been destroyed in a fire, the court found that spoliation occurred and [sanctioned](#) 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 did not identify Covil in his deposition and a representative for another company, Daniel Construction, testified that they did not have any records indicating that Covil supplied insulation for Mr. Crawford's workplace and could not definitively place Covil as a supplier or contractor at the plant.

Despite the judge's instruction and after hearing all the testimony, the jury reached a defense verdict.

Three months later, **Judge Toal** threw out the [verdict](#) by invoking South Carolina's "**thirteenth juror**" doctrine. As explained by the South Carolina Supreme Court, the effect of the thirteenth juror doctrine "is the same as if the jury failed to reach to a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome." According to **Judge Toal**, "as the 'thirteenth juror,' the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." She used this incredible power in *Crawford* to [order](#) a new trial, giving the plaintiff a second chance to win a case that was lost.

On at least two occasions, **Judge Toal** increased jury awards when she believed the juries did not award enough money to the plaintiffs.

In *Edwards v. Scapa Waycross, Inc.*, **Judge Toal** increased a \$600,000 jury award by \$400,000 for a total of \$1 million. The judge also refused to reallocate plaintiff's internal apportionment of settlement proceeds to be more reasonable under the facts. The **South Carolina Court of Appeals** [affirmed](#) on both issues.

In *Jolly v. General Electric Co.*, **Judge Toal** increased an award to a worker and his wife by some \$1.6 million. The jury awarded the worker \$200,000 in actual damages and \$100,000 to his wife for loss of consortium. Judge Toal increased the worker's award to \$1.58 million and his wife's award to \$290,000. She also refused to allow a setoff for the portion of prior settlements that plaintiff's counsel had allocated to future losses. The **South Carolina Court of Appeals** affirmed on both issues, signaling "the Court of Appeals will give [much deference](#) to the circuit court and is disinclined to disturb these rulings in the absence of an obvious abuse of discretion."

IMPROPER CONSOLIDATION OF ASBESTOS TRIALS

In 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 talc products.

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

The other case involved a 20-year-old woman who was diagnosed at the age of 14 with peritoneal mesothelioma, which affects the lining of the abdomen and is less strongly associated with occupational asbestos. Studies cited by J&J, show between 95-99% 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 was 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 had 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. The case settled before the appellate court had an opportunity to rule.

NUCLEAR VERDICT IN TAKE-HOME EXPOSURE TRIAL

In 2021, a jury awarded [\\$32 million](#) to a worker whose wife died from mesothelioma allegedly caused by second-hand asbestos exposure. **Judge Toal** [presided](#) over the case.

In the 1980s, Robert Weist worked for Metal Masters at a turkey processing facility owned by Kraft Heinz. Weist alleged that he and his father were exposed to asbestos through their work at the facility and brought asbestos home on their clothing. Weist's wife was allegedly exposed to asbestos while doing the family's laundry and later died. Kraft Heinz and Metal Masters were [ordered](#) to pay \$11 million in survival damages, \$10 million in wrongful death damages, and \$1 million in loss of consortium damages. The jury imposed another \$10 million in [punitive damages](#) against Kraft Heinz.

INSURERS "ALTER EGO" OF DEFUNCT ENTITIES

Judge Toal has made a practice of declaring insurers the "[alter ego](#)" of defunct entities to subject the companies to lawsuits like other asbestos defendants. Persons familiar with South Carolina asbestos litigation says that circuit court has created at least [twenty-one receiverships](#), using the same receiver and receiver counsel, to pursue coverage under insurance issued to defunct companies.

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

DOOR OPENED FOR MORE LAWSUITS

In 2021, the **South Carolina Supreme Court** in *Keene v. CNA Holdings, LLC* upheld a \$16 million award to the family of a maintenance worker who died following years of asbestos exposure at a polyester fiber plant. The plaintiff's employer had been hired by the plant's owner to provide all maintenance and repair workers at the plant. The plant owner's corporate successor argued that the plaintiff was a statutory employee so the state's workers' compensation law provided the exclusive remedy for his claims.

The **South Carolina Supreme Court** [disagreed](#). In a landmark decision, the Court narrowed the state's "statutory employee" doctrine, making it easier for workers to bring lawsuits for many workplace injuries. The court [held](#):

If a business manager reasonably believes her workforce is not equipped to handle a certain job, or the financial or other business interests of her company are served by outsourcing the work, and if the decision to do so is not driven by a desire to avoid the cost of insuring workers, then the business manager has legitimately defined the scope of her company's business to not include that particular work.

"In short," a practitioner [explains](#), "[c]ourts will honor the company's decision to have the work performed by someone other than an employee, the [statutory employee] doctrine will not apply, and the company can be sued in tort for injuries suffered by the worker." The **South Carolina Supreme Court** added that the original purposes of the statutory employee doctrine are "certainly not served by granting [the plant owner] immunity for its wrongful conduct." [Dissenting Justice George C. James, Jr.](#) said that the majority's comment "will be taken to heart," likely leading to more litigation against employers.



TOP ISSUES

- Coastal litigation bogs down state's economy
- Investigation into state-wide staged accidents scheme continues
- State court opens floodgates to COVID-19 litigation
- Court system known for judicial misconduct and a lack of transparency

Louisiana has made strides over the past few years, but there is still work to be done if it wants to escape the Judicial Hellholes® list once and for all. Meritless coastal litigation continues to bog down the state's economy and drive jobs to neighboring states. Judges make headlines for all the wrong reasons and the state has opened the floodgates for COVID-19 litigation that has been stymied by other states.

COASTAL LITIGATION

Since [2013](#), Louisiana courts have had their hands tied with coastal litigation. Louisiana parishes have sued Exxon Mobil, Chevron, and more than 200 energy companies alleging that their operations have damaged coastal marshes and wetlands. Coastal litigation has had enormous implications for the state's energy industry with the potential to dish out billions of dollars in damages.

Seeking home field advantage

There is no end in sight to this litigation. Last year, U.S. Court of Appeals for the Fifth Circuit [partially reversed](#) an earlier decision that had kept 42 lawsuits filed by six Louisiana parishes in state court. The federal appellate court [found](#) that the oil and gas companies had filed a timely request to remove the cases to federal court soon after it became apparent that the parishes had sued the companies for actions they took during World War II while acting under the authority of a federal wartime agency.

After the Fifth Circuit returned the case to the federal district court, however, **Judge Martin Feldman** of the **Eastern District of Louisiana** [ruled](#) that the state's 25th Judicial District Court in Plaquemines Parish

LEGAL SERVICES ADVERTISING SPENDING

LOUISIANA

Plaintiffs' lawyers are well aware of the state's propensity for liability-expanding decisions and spend millions of dollars on advertising. From 2017 to 2021, Louisiana residents saw the fifth most local legal services ads on television. Plaintiffs' lawyers spent \$175 million on 3.5 million local television advertisements in Louisiana. Trial lawyers spent \$26.3 million on more than 594,000 local television advertisements from January through August 2022.

ECONOMIC IMPACT OF LAWSUIT ABUSE

LOUISIANA

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Louisiana residents pay an annual "tort tax" of \$1,010.57 per person and 46,302 jobs are lost each year, according to a recent study by [The Perryman Group](#). If Louisiana enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$4.7 billion.

In the [Greater New Orleans Area](#), excessive tort litigation costs residents in excess of \$2.2 billion in personal income annually and results in a loss of 34,620 jobs each year. Excessive costs result in an annual "tort tax" amounting to about \$2,763 per person. Direct costs absorbed by residents and businesses amount to more than \$2.4 billion annually and more than \$3.5 billion in gross product is lost due to litigation costs.

should decide the bellwether Plaquemines Parish case. While the removal request was timely, the district court found that the companies' compliance with federal regulations was not enough to show that they were directly "acting under" the direction of a federal officer, which would have provided jurisdiction in federal court.

This issue is now again before the Fifth Circuit. During [oral argument](#), this August in *Plaquemines Parish v. Chevron USA*, Chevron's attorney, Peter Keisler, argued that a remand to state court would rob oil companies of the opportunity to present a federal defense that arises directly out of their relationship with the government. Keisler cited WWII-era directives that demanded oil producers drill and extract excess oil to support the war effort. In order to meet the oil production quotas, companies [contend](#) that the federal government directed them to ditch their best practices and overlook the damage that the excessive drilling would cause the coastal marshes.

Detrimental effects on economy

These lawsuits have a tremendous impact on Louisiana's economy, affecting an industry with more than 250,000 workers. As the home to [one-fourth](#) of the nation's energy supply, the Louisiana natural gas and oil industry has a value exceeding \$16 billion a year. **Louisiana Oil & Gas Association President Mike Moncla** [said](#), "since the beginning of the coastal litigation process, the oil and gas industry in Louisiana has been on the decline. These frivolous lawsuits have hurt jobs, bankrupted marine service companies and operators, and have decimated the state's tax revenue it receives from energy production."

These unfounded lawsuits continue to drive jobs and investment away from Louisiana. In fact, a [2019 study](#) found that two years after the lawsuits began, 2,000 job losses were directly attributable to the impact of the litigation risk. While proponents of the lawsuits claim they will help bring resources to rebuild Louisiana's coastline, this litigation stifles job creation while doing little to nothing for the coast.

Settlement on the horizon?

After about a decade of time-consuming and expensive litigation, some companies are considering [settlement](#). Last year, Freeport McMoRan [agreed](#) to pay \$100 million over 20 years to end the lawsuits. About \$23.5 million of the money is intended to fund coastal restoration projects, however, these funds would be controlled by a new unelected bureaucracy called the [Coastal Zone Recovery Authority \(CZRA\)](#), which has broad power to direct funds to non-restoration-related projects. Critics fear that the settlement leaves a large percentage of the dollars in unrestricted funding buckets, which may be used for efforts that have nothing to do with restoring the coast. They call it a [political slush fund](#).

There are already indications that the settlement is [unraveling](#). As of September 2022, at least four of the twelve coastal parishes that must sign off on the Freeport-McMoRan settlement have [rejected](#) the deal. Meanwhile, the state legislature has twice declined to approve legislation that would establish the CZRA, doubting the benefit of the litigation to the environment and public.

As a critic of the litigation, **Pelican Institute CEO Dan Erspamer**, [observed](#), "Momentum is building toward what should be the goal: End the suits and get back to the hard work of coming together to protect our environment and create jobs for our people."

STAGED ACCIDENTS

Fueled by a climate of lawsuit abuse, the high cost of auto insurance has long plagued Louisiana families and businesses. Louisiana drivers pay an [average](#) of \$2,906 per year for full coverage car insurance, ranking Louisiana as the second most expensive state in the nation behind Florida.

One driver of Louisiana's high cost of auto insurance is simply fraud. A sprawling federal investigation, dubbed "**Operation Sideswipe**," is exposing the scope of one such scheme, [staged accidents](#) with [big rigs](#) in the New Orleans area. These accidents typically involved a driver ("the slammer") intentionally colliding with a tractor trailer then another person entering the vehicle and feigning injury. Working with lawyers

and doctors who may have been in on the scheme, the participants would then demand compensation for the bogus accident. Those involved ultimately secured settlements from insurance companies that provided coverage for the commercial carriers.

The dominos continue to fall in this ongoing investigation. In February 2022, **U.S. Attorney Duane Evans** of the **Eastern District of Louisiana** announced [seven more indictments](#) in this [widespread staged-accident fraud scheme](#). In April, a court ordered [three](#) defendants to pay \$5.5 million in restitution for faking a wreck with a tractor-trailer and received either probation or jail time. The next month, federal prosecutors [announced](#) two more sentencing for conspiracy to commit wire fraud arising out of the staged automobile collisions. At least 38 defendants have been [convicted](#) in operation sideswipe.

STATE OPENS THE DOOR FOR COVID-19 LITIGATION

A Louisiana court has potentially opened the floodgates for COVID-19 coverage lawsuits with its decision in [Cajun Conti LLC v. Certain Underwriters at Lloyd's](#). In a 3-2 majority opinion, the state's **Fourth Circuit Court of Appeal** ruled in August 2022 that an insurer must cover a restaurant's lost revenue during government-mandated closures.

"All-risks" insurance policies such as the one in this case typically cover "direct physical loss." The need to close a restaurant due to structural damage from a fire, storm, or earthquake are obvious examples. Oceana Grill, a New Orleans restaurant, took a leap by claiming that the existence of the virus on surfaces was a "direct physical loss" to property and argued that the policy lacked a specific exclusion for losses from viruses or global pandemics. When filed in March 2020, it was a first-of-its-kind business interruption suit for COVID-19 pandemic losses.

Federal district courts around the country have permanently tossed about [50% of the 1,427 suits](#) from policyholders against their insurance companies seeking pandemic loss-related coverage, according to [Law360's COVID-19 Insurance Case Tracker](#). Another 20% of the pandemic insurance suits filed in federal courts have been voluntarily dismissed, the tracker shows, though about 27% have yet to be fully decided.

The Louisiana appellate decision is an outlier. The court's majority [found](#) the policy language of "direct physical loss" to be ambiguous, and Cajun Conti was reasonable to interpret the policy to cover COVID-19 losses. **Judge Joy Cossich Lobrano** concurred with the majority opinion that physical damage was not necessary to trigger policy coverage in a contamination case as long as the property was made unusable.

Plaintiffs' lawyers plan to use the ruling as "persuasive authority for cases involving identical policies held by other restaurants and businesses," [according to John W. Houghtaling II of Gauthier Murphy & Houghtaling LLC](#). Already, plaintiffs' lawyers representing a New Orleans jeweler have asked a federal appellate court to [revive](#) a dismissed business interruption suit based on the *Cajun Conti* ruling. Obviously, requiring insurers to pay for widespread shutdowns that were not contemplated by the policy would lead to higher insurance rates for all.

JUDICIAL MISCONDUCT AND A LACK OF TRANSPARENCY

Louisiana has a longstanding reputation for its lack of transparency dealing with judicial misconduct. Scandals continue to bring attention to this issue, contributing to both the public and legislature losing patience with the judicial branch's repeated promises to do better.

Changes to the [Louisiana Supreme Court's procedures](#) adopted in 2020 are a step in the right direction, but do not do enough. Most notably, "confidentiality still remains during the Commission's initial consideration of a complaint and during any investigation of a complaint," the Court announced. This means that the public will remain unaware of complaints filed against judges that do not lead to action by the Judiciary Commission.

According to [Louisiana Supreme Court's Annual Report for 2021](#), "the Judiciary Commission of Louisiana received and docketed 526 complaints against judges and justices of the peace, and 110 complaints were pending from previous years... Of the 526 complaints filed, 320 were screened out as not within

the jurisdiction of the Commission or failing to allege facts implicating a possible violation of the Code of Judicial Conduct or Louisiana Constitution. The remaining 206 complaints were reviewed to consider the need for investigation. The Commission authorized in-depth investigations in 25 complaints, including some filed before Jan. 1, 2021.” In other words, the Commission acted on less than 5% of complaints.

Through August 2022, the Louisiana Judiciary Commission [issued](#) seven hearing dispositions.

Good News

In November 2021, **Louisiana Supreme Court** made substantive changes to [Rule XXIII](#) in an effort to increase accountability for judges facing allegations of judicial misconduct, protect the public, and help expedite judicial discipline matters. Under the rule changes, judges who have been indicted or charged with a serious crime, if convicted, will typically be required to repay the costs of appointing a judge to cover his docket while he is suspended from performing judicial functions.

TRIAL LAWYER ADVERTISING

In 2021, Louisiana suffered a major setback after **Governor John Bel Edwards**, a longtime plaintiffs’-bar ally, [vetoed Senate Bill 43](#), which would have prohibited certain common misleading lawsuit advertising practices. Despite overwhelming support for the bill, the Louisiana Legislature failed to garner enough votes to override the veto.

The sponsor, **Senator Barrow Peacock**, introduced similar legislation in 2022, and this time, Governor Edwards signed the bills into law. [SB 378](#) prohibits deceptive or misleading practices in lawsuit advertisements, specifically those presented as a medical alert, health alert, drug alert, or public service announcement. The new law also prohibits displaying federal or state government agency logos in a misleading manner and requires a lawsuit advertisement that references an FDA approved prescription drug to include the following statement or a substantially similar statement: “Consult your physician before making decisions regarding prescribed medication or medical treatment.”

In addition, Louisiana enacted [SB 383](#), which protects the public from other practices in lawsuit ads that are likely to deceive the public by requiring certain disclaimers. Specifically, lawsuit ads cannot reference past successes, such as large verdicts, without disclosing that results may vary or do not guarantee future success. Nor can they present staged scenes or client testimonials without disclosure or use trade names or other practices that could be understood as promising results. This new law is consistent with [Public Citizen, Inc. v. Louisiana Attorney Disciplinary Board](#) (5th Cir. 2011), which recognized that lawyer advertising that is potentially misleading but can be presented in a way that is not deceptive can be regulated when needed to protect consumers.



TOP ISSUES

- Judges permit junk science in their courtrooms
- A history of nuclear verdicts
- A favorite jurisdiction for asbestos litigation
- Courts allow “phantom damages”

While the judges in St. Louis continued to ignore both state law and U.S. Supreme Court precedent and allowed junk science to fill their courtrooms, the Missouri legislature must continue to prioritize reforms to address the lawsuit abuse bogging down business in the state. The future success of the state is contingent on both branches of government addressing the work needed to ensure the state has a fair and balanced civil justice system.

JUDGES REFUSE TO EXERCISE ROLE AS GATEKEEPER OVER EXPERT TESTIMONY

Roundup® Litigation

St. Louis, along with fellow Judicial Hellhole® California, is home to tens of thousands of lawsuits against Monsanto involving its Roundup® weedkiller. These lawsuits allege that the active ingredient in the product, glyphosate, causes non-Hodgkin lymphoma.

Despite the Missouri legislature [requiring](#) closer scrutiny of proposed expert testimony in 2017 by adopting a standard consistent with federal courts and most other state courts, St. Louis judges have allowed junk science in their courtrooms. Law firms across the country are flocking to St. Louis to file their lawsuits.

In August 2022, the first St. Louis County case involving three plaintiffs from Florida, Washington, and upstate New York went to trial. Ten of the 12 jurors in the St. Louis courtroom [sided](#) with Monsanto, even after hearing a month’s worth of unfounded science put forth by plaintiffs’ witnesses. Jurors on the opposite side of the state, in Jackson County (Kansas City), reached the same conclusion in a [similar trial](#) just three months earlier.

The St. Louis case fell apart under cross-examination as the expert witnesses proved less than credible. While this jury bailed out the system, it is unreasonable to expect juries to reach the proper resolution in the absence of a judge performing his or her responsibilities.

LEGAL SERVICES ADVERTISING SPENDING

ST. LOUIS

Plaintiffs’ lawyers are well aware of the court’s propensity for liability-expanding decisions and spend millions of dollars on advertising. From 2017 – 2021, plaintiffs’ lawyers spent \$98 million on [1.5 million](#) advertisements across television, radio, and outdoor mediums in Missouri. Trial lawyers specifically spent \$5.29 million on more than 75,400 local advertisements in St. Louis alone in January through August 2022.

ECONOMIC IMPACT OF LAWSUIT ABUSE

ST. LOUIS

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. St. Louis residents pay a “tort tax” of [\\$1,463 per person](#) and 30,663 jobs are lost each year, according to a recent study by [The Perryman Group](#). If Missouri enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$5.6 billion and St. Louis’ gross product would increase by over [\\$3 billion](#).

The LinkedIn [resume](#) of one plaintiffs' witness, **William Sawyer**, advertised that he was a "board-certified toxicologist" -- until he was confronted on the stand and forced to [admit](#) that he was unable to obtain certification from the American Board of Toxicology. Sawyer [failed both](#) of his attempts to pass the examination required to secure that important credential. Sawyer then turned to **Robert O'Block**, founder of the American College of Forensic Examiners, who supplied an appropriate diploma. In fact, O'Block was so willing to certify any paying customer that he once [certified a cat](#) as a toxicologist.

Sawyer is a full-time expert witness in glyphosate product liability trials, an occupation that has made him a millionaire. Billing \$785 an hour for his time, Sawyer has collected [\\$2.5 million](#) from his testimony in four Roundup® trials, according to his own testimony at trial.

At least Sawyer had academic training in toxicology. Fellow expert witness Charles Benbrook, by contrast, testified about the health effects of glyphosate [despite](#) having no training whatsoever in medicine, toxicology, or epidemiology.

Benbrook runs the [Heartland Health Research Alliance \(HHRA\)](#) which produces studies linking cancer to herbicides like Roundup®, as well as competing herbicides like dicamba and [2,4-D](#). His studies are likely laying the groundwork for future lawsuits against those products.

The trial bar sees great value in Benbrook's endeavor, rewarding him [\\$1.3 million](#) for his testimony in addition to the \$220,000 annual salary he takes from his non-profit, scientific research organization. The trial bar not only provides funding, it provides management direction. The vice chair of that organization is [Robin Greenwald](#), a partner at **Weitz & Luxenberg**, one of the many firms suing Monsanto.

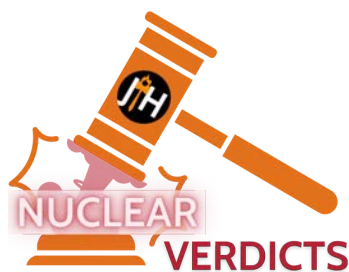
Environmental safety agencies in the [United States](#), [Canada](#), [Brazil](#), [Australia](#), [New Zealand](#), Japan, and the [European Union](#) have spent decades reviewing the health impacts of glyphosate. All agree that no credible evidence exists linking glyphosate to non-Hodgkin's lymphoma. But there is one outlier organization that says otherwise and it is heavily relied upon by plaintiffs' lawyers. An advisory group of the **International Agency for Research on Cancer (IARC)** deemed glyphosate a "probable human carcinogen." Testimony in 2017 by a senior scientist on that IARC panel revealed [critical evidence](#) favorable to glyphosate had been withheld and would likely have changed IARC's conclusion. The panel was run by [Christopher Portier](#), a scientist who received \$160,000 from litigators and worked under the direct supervision of Robin Greenwald.

The jurors bailed out the system this time around, but for St. Louis to move off the Hellholes® list, judges must embrace their role as gatekeepers at the outset of trial and not allow junk science to be heard in their courtrooms.

Pending Litigation

The [first Roundup® trial](#) in the City of St. Louis began at the beginning of November. The plaintiff claims that he developed cancer due to prolonged exposure to the herbicide. ATRF will keep a watchful eye on the case to see whether [Judge Michael Mullen](#) permits junk science to be introduced in his courtroom.

A HISTORY OF NUCLEAR VERDICTS



According to a [2022 U.S. Chamber study](#), Missouri ranked in the top-10 for most nuclear verdicts from 2010-2019. Nuclear verdicts are those that exceed \$10 million. This includes a [\\$4.69 billion](#) verdict awarded by a City of St. Louis jury in 2018 to women who claimed use of baby powder caused their development of ovarian cancer. The verdict was later reduced by an intermediate court to \$2.12 billion. The St. Louis area also has hosted several other nuclear verdicts in recent years, such as a [\\$110 million](#) and [\\$72 million](#) in earlier talcum powder trials, both of which were thrown out on appeal.

Among the factors contributing to these massive verdicts is the allowance of “anchoring.” Missouri law permits plaintiffs’ lawyers to urge juries to return a specific amount to compensate a person for his or her pain and suffering and other subjective noneconomic damages. Lawyers will suggest an unreasonably large award, making that number an “anchor” point in jurors’ minds. As a result, jurors can be manipulated into awarding levels that are far beyond amounts they would otherwise reach and that can truly serve a compensatory purpose.

A FAVORITE JURISDICTION FOR ASBESTOS LITIGATION

While much-needed asbestos trust transparency legislation [continues to stall](#) in the Missouri legislature, **St. Louis** remains a preferred jurisdiction for the plaintiffs’ bar. St. Louis once again was in the [Top-10](#) for the most asbestos cases filed overall (5th), and the most mesothelioma (8th) and lung cancer (2nd) filings in 2021. As of July 2022, St. Louis had seen a decline in filings and [ranked sixth](#) in most asbestos cases filed overall.

A 2022 nuclear verdict in an asbestos case in St. Louis highlights the need for reform. In [Trokey v. Chesterton Co.](#), the plaintiff claimed he was exposed to asbestos while working on Ford brakes as a gas station mechanic, causing him to develop mesothelioma. Ford argued that the plaintiff never worked for Ford, did not regularly work as a mechanic, and that his exposure likely came from a source other than brake linings. Nonetheless, the jury awarded [\\$20 million](#) – \$10 million to him and \$10 million to his wife. Anchoring played a part in that award. The \$20 million award was the same amount the plaintiffs’ lawyer requested in his [closing argument](#).

DESPITE REFORM, COURTS ALLOW PLAINTIFFS’ LAWYERS TO SEEK DAMAGES FOR AMOUNTS NEVER PAID

In 2017, the Missouri Legislature passed [S.B. 31](#), which included an overhaul of the collateral source rule. For years, the statute was interpreted by all to prohibit the introduction of evidence to recover damages based on the amount billed by a healthcare provider if that amount was more than the amount that was paid by a patient or on the patient’s behalf for treatment. This rule, which is consistent with the [statutory text](#) and legislative intent, limited the recovery to the amount actually paid for medical care.

In recent years, however, Missouri courts have allowed plaintiffs’ lawyers to introduce evidence of the inflated amount billed for “any other purpose” to show severity of injuries, rather than directly introduced for the amount sought to be compensated. Allowing this evidence of the amount billed has artificially increased damage awards, delayed settlement of cases and increased the cost of insurance premiums in Missouri.

Missouri should close the loophole and prohibit the admissibility of billed amounts for medical treatment that no one ever paid.

MISSOURI LEGISLATURE MUST PRIORITIZE CIVIL JUSTICE REFORM

Missouri has made progress in recent years addressing areas in which St. Louis and other areas of the state are prone to lawsuit abuse. The jury is out on whether courts have faithfully applied these legislative changes. For example, a recent [study](#) found that although the Missouri legislature made it easier for courts to quickly dismiss meritless consumer class actions in 2020, “the limited decisions available suggest that courts have not yet fully recognized the significance of the changes.” The judiciary has also not yet updated its jury instructions to reflect the new, higher standard for punitive damage awards adopted in the same bill. Instead, effective July 1, 2022, the committee overseeing the instructions [placed](#) a “CAUTION” comment on the existing instruction flagging the legislative change and indicating that “case law will determine the extent of those changes and the impact on jury instructions.” The Committee felt the need to state in the new comment that it “takes no position on the constitutionality of any provision of S.B. 591.”

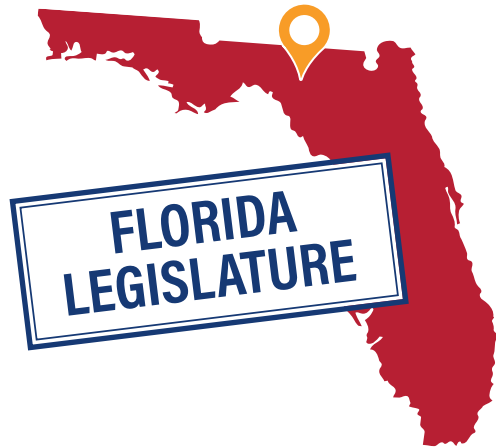
Despite these questions, as lawsuit abuse continues in St. Louis courtrooms, the Missouri Legislature must prioritize civil justice reform to ensure the state has a fair and balanced judicial system. Much work remains to be done.

The legislature failed to pass three key bills in its 2022 legislative session. The first, [S.B. 631](#), would have reduced the statute of limitations in personal injury cases from five years, which is among the longest in the country, to two years. The second, [S.B. 669](#), would have required a plaintiff to prove that the defendant designed, manufactured, sold, or leased the particular product that was alleged to have caused the injury and not a similar or equivalent product. Its purpose is to cut off the novel innovator liability theory that attempts to hold makers of brand name products liable for injuries alleged to have occurred from taking a generic version of a product. Courts have widely rejected this theory. Finally, the legislature failed to consider [H.B. 2017](#), which would have addressed concerns that the anchoring practices discussed above are resulting in excessive awards. The bill specified that neither party nor their attorney could seek or make reference to a specific dollar amount or state a range for awards for noneconomic damages for the jury to consider. Given St. Louis's propensity for high verdicts, this reform would have gone a long way.

Watch List



The Judicial Hellholes® report 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.



While Governor Ron DeSantis and the Florida Supreme Court consistently take affirmative steps to address litigation abuses in the Sunshine State, the Florida Legislature lags in these efforts. We applaud the legislature for enacting reforms during a special session to address the ongoing property insurance crisis in the state, but much work remains to be done if the state is to be removed once and for all from the Judicial Hellholes® report.

Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. Florida residents pay an annual “tort tax” of \$812.52

per person and more than 173,000 jobs are lost each year, according to a [recent study](#) by The Perryman Group. If Florida enacted specific reforms targeting lawsuit abuse, the state would increase its gross product by over \$17.66 billion.

RISING COSTS OF LITIGATION IN THE STATE

Nuclear Verdicts Drive Up Cost Of Litigation

From 2010 to 2019, Florida produced the most nuclear verdicts (213) of any state in the country according to a recent study by the U.S. Chamber. The 213 verdicts totaled \$35 billion. When the number of Florida’s nuclear verdicts is compared to population, the state fares even worse. Florida had, by far, the most nuclear verdicts per capita over the 10-year span. Florida barely edged out California (211) for the top spot; however, the Sunshine State has [almost half](#) the population of the Golden State, making its No. 1 ranking even more concerning. Nearly two thirds of Florida’s nuclear verdicts in personal injury and wrongful death cases were in product liability and auto accident cases, which is far above the national average.

Two recent judgments levied against trucking companies exemplify the nuclear verdict risk for commercial drivers facing a personal injury lawsuit in Florida. In 2020, a jury delivered a [\\$411 million](#) verdict against Top Auto for a highway collision caused by one of the company’s truck drivers. In a similar case decided last year, another jury handed out a [\\$1 billion verdict](#), inflated by \$900 million in punitive damages.

The prevalence of nuclear verdicts in Florida can be attributed to a handful of issues including inflated medical damages, the abuse of letters of protection, and large punitive damages awards. According to the [U.S. Chamber report](#), “Florida is also more prone to punitive damage awards than other states. Forty percent of nuclear verdicts in Florida included a punitive damage element compared to 26% nationally.”

Trial Lawyer Advertisements Fill The Airwaves

Trial lawyers are well aware of the Florida courts reputation for nuclear verdicts, and as a result, spend hundreds of millions of dollars on advertising trying to find their next “goose that lays the golden egg.”

From [2017-2021](#), viewers in Florida saw the most local legal services ads on television than viewers in any other state and trial lawyers spent more money on these ads than in any other state. During this five-year span, trial lawyers spent over \$885 million on 9.35 million local advertisements on television, radio, and outdoor billboards and signs. Between January and August 2022, trial lawyers spent \$94.6 million on more than 1.03 million local television ads alone.

Inflated Medical Damages And Letters Of Protection

Plaintiffs’ lawyers in Florida have long abused what are known as “letters of protection” to inflate damages for medical care. 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 through the patient’s insurance coverage, but instead 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 avoid using their insurance to cover medical expenses but rely on a letter of protection.

Under Florida law, at trial, jurors only hear evidence of 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 submission of treatment invoices for payment until after trial, there is no amount paid for a judge to set off the award.

In a prime example, a plaintiff in a case in Florida 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](#), and was billed \$19,000 by the doctor but the total amount actually accepted as full payment 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.

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.

Mixed Bag from the Courts

The **Florida Supreme Court** issued a positive decision requiring accuracy in damages in [Dial v. Calusa Palms Master Ass’n](#) (2022), highlighted later in the [Points of Light](#) section. The Court established that plaintiffs whose past medical expenses were paid by federal programs such as Medicare can only admit into evidence the amounts actually paid, not the fictitious amounts that no one is actually responsible to pay.

While the **Florida Supreme Court** once again issued a commonsense decision, trial courts across the state have not been so fair and balanced. For example, in September, **Orange County Circuit Court Judge Kevin B. Weiss** [precluded](#) a defense expert from testifying about reasonable and customary hospital bills at trial. The defense sought to use the expert’s testimony to demonstrate that the requested medical expenses did not conform to standard medical industry pricing.

The [expert in question](#) founded a medical billing service and has testified as a billing expert in numerous personal injury cases. Using her usual methodology, the expert prepared a report demonstrating the requested medical expenses were far greater than fees charged by other local hospitals for comparable treatment.

Despite having ample experience and hard evidence to support her opinion, **Judge Weiss** held that the expert had not demonstrated that “she can provide reliable, trustworthy testimony” under the [standard](#) for admission of expert testimony. Other Florida trial court judges also have prevented medical billing experts from exposing inflated charges.

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

LITIGATION ABUSES CONTRIBUTE TO STATE'S PROPERTY INSURANCE CRISIS

Florida is home to more property insurance lawsuits than the rest of the country combined. While Florida accounts for only [7 percent](#) of the nation's homeowners' claims, the state accounts for 76 percent of the nation's homeowners' insurance lawsuits. In 2021 in Florida, there were 100,595 lawsuits resulting in \$7.8 billion in damages. Outside of Florida, in 2021, there were 24,700 lawsuits resulting in \$2.4 billion in damages.

The cost of defending these lawsuits in Florida has increased exponentially over the past several years. In 2016, insurers paid [\\$1.5 billion](#) defending these lawsuits and that number doubled to \$3 billion in 2021. Unfortunately, the consumers are not reaping the benefits from this increase. 71% of the money goes to the plaintiffs' attorneys while plaintiffs receive a mere 8 percent. The remaining 21 percent pays for the defense attorneys.

The property insurance crisis has a very real impact on Floridian property owners and insurers. As of August, five insurance companies had gone [out of business](#) in 2022, after 4 exited the market in 2021. This has led to a massive shortage of coverage at a time when Floridians impacted by Hurricane Ian are in desperate need. [Florida Citizens](#), the state's insurer of last resort, has seen a huge spike in policy holders as a result. They issued 760,000 policies at the end of 2021 and are projected to have issued over 1.2 million by the end of 2022.

Losses from recent Hurricane Ian are projected to hit [\\$67 billion](#), with high-end estimates coming closer to \$74 billion. Within two weeks of the storm, over [500,000 claims](#) were filed in Florida cumulatively claiming an insured loss of over \$5 billion. Sadly, [less than 20 percent](#) of the homes in the most-heavily impacted Florida counties had flood insurance due to the recently rising rates. While many will rely on Florida Citizens, it is [underfunded](#) and most likely won't be able to cover the massive losses from Hurricane Ian.

Litigation abuses are some of the driving forces behind the rising costs of litigation. State leaders, including Governor DeSantis, [have recognized](#) the impact the state's civil justice system is having on the property insurance crisis.

The state's litigation environment has bred schemes arising out of Hurricanes Irma (2017) and Michael (2018). The current property insurance and housing crisis has been fueled by contractors exploiting assignment of benefit loopholes in Florida insurance law and a run of assignee-friendly court decisions. “Florida is the most volatile property insurance market in the country, and it is on the verge of collapse,” [said](#) Mark Friedlander, spokesman for the Insurance Information Institute.

The scheme involves a contractor approaching a homeowner and asking if he or she wants the contractor to complete a free inspection from storm damage. After the inspection, the contractor tells the homeowner there is roof damage, but not to worry because the contractor can get a new roof for free through insurance and the homeowner doesn't have to do anything. This typically leads the homeowner to assign his or her rights over to the contractor, who then files an insurance claim and sues the insurer when

“Florida's general tort environment related to property insurance has led to thousands of frivolous lawsuits.”

– Governor DeSantis

it balks at paying for the new roof. The insurance companies tend to settle for much more than the original claim value to avoid paying attorneys' fees, especially because of fee shifting and contingency fee multiplier that massively increase costs if a court finds against the insurer. As pointed out by [Senator Jeff Brandes](#), "Ultimately the victim is every Floridian who is buying their neighbors' roofs."

GOOD NEWS



PROPERTY INSURANCE LITIGATION REFORM. As part of a special session, the **Florida Legislature** passed and **Governor DeSantis** [signed](#) critical legislation to address the ongoing property insurance crisis in the state. [SB 2D](#) should work to reduce the frivolous litigation that is driving up insurance costs by: (1) reserving attorney fee multipliers – a mechanism by which an award of attorneys' fees to plaintiffs can be doubled or tripled – for rare and exceptional circumstances; (2) confirming that before an insured can file a lawsuit alleging that an insurer acted in bad faith, the claimant must show that the insurer actually breached its agreement with the policyholder; and (3) preventing insureds from transferring their unilateral right to receive attorneys' fees to contractors.

EXTENDING COVID-19 LIABILITY PROTECTIONS FOR HEALTH CARE PROVIDERS. In 2021, Florida [provided](#) essential COVID-19 liability protections to businesses, health care providers, and other entities. As originally enacted, the protections for health care providers were slated to end on March 30, 2022. The **Florida Legislature** acted quickly to ensure that hospitals, nursing homes, and physicians can focus on providing necessary health care without the constant fear of frivolous COVID-19 related lawsuits, passing [SB 7014](#), which extends those protections for an additional 14 months. **Governor DeSantis** [signed the legislation](#) into law on February 25, 2022.

New Jersey reappears on the Judicial Hellholes® report's Watch List in 2022 due to a variety of factors that could lead to a "perfect storm" of litigation abuse across the state. The state's civil justice system faces a triple threat – the plaintiffs' bar now wields unprecedented power and influence in New Jersey's Legislature because the new Senate President is a practicing plaintiffs' attorney. New Jersey's recently reelected governor is a progressive stalwart who has shown no interest in civil justice reform priorities and the new makeup of the New Jersey Supreme Court may result in a shift toward activism and expansion of liability.

ATRA will keep a watchful eye on New Jersey to see if the state's leadership can resist the influence of the powerful plaintiffs' bar or if it will embrace a liability-expanding agenda and become a full-blown Judicial Hellhole®.



THE PLAINTIFFS' BAR COMMANDS NEW JERSEY'S LEGISLATURE

In November 2021, **New Jersey** held statewide elections for its legislators and governorship. As a result of surprising outcomes in those elections, **State Senator Nicholas Scutari** is New Jersey's new Senate President. Senator Scutari replaced outgoing **Senate President Steve Sweeney**, a moderate Democrat who served as a balancing force for over a decade when it came to pushing back against the trial bar's liability-expanding agenda.

Senate President Scutari is a practicing plaintiffs' personal injury attorney who previously chaired the Senate Judiciary Committee. Prior to his ascension, Senator Scutari's legislative agenda was unabashedly pro-plaintiff, and he was resistant to compromise on civil justice reform initiatives. To make things worse, **Senator Jon Bramnick**, an influential Republican, is also a plaintiffs' attorney whose priorities often align with those of the plaintiffs' bar. Against this backdrop, the plaintiffs' bar now wields outsized power in New Jersey's Legislature.

Shortly after the November 2021 election, incoming **Senate President Scutari** immediately began to leverage his leadership position to push his pro-plaintiff agenda – before even formally assuming the role. During the lame duck session, he aggressively pushed legislation entitled the “[New Jersey Insurance Fair Conduct Act](#).” The sponsors of the bill, **Senator Scutari** and then **Assemblyman Bramnick**, erroneously claimed that insurance policyholders had no recourse against their auto insurers when they delay payment or make disagreeable settlement offers on uninsured and underinsured motorist (“UM/UIM”) claims. To remedy this supposed problem, the legislation allowed policyholders to bring [private civil actions](#) against their auto insurers for any “unreasonable delay or unreasonable denial of a claim for payment of [UM/UIM] benefits under an insurance policy” or any violation of statutorily prohibited insurance trade practices.

The bill did not define an “unreasonable” delay or denial, creating legal [uncertainty](#) that will yield years of litigation. It allowed successful claimants to recover “actual verdicts that shall not exceed three times the applicable coverage amount,” as well as pre- and post-judgment interest, reasonable attorney's fees, and all reasonable litigation expenses.

The proposed legislation was [contrary](#) to the traditional understanding of bad faith, which addresses conduct beyond simple negligence or breach of contract. Despite these concerns and at the urging of Senator Scutari, **New Jersey Governor Phil Murphy** [signed](#) the bill into law on January 18, 2022. There is concern that this new law will lead to a significant increase in meritless claims against carriers, which burdens the insurance industry in New Jersey and makes it harder to do business in the state.

Later, in July 2022, during the New Jersey Legislature's budget negotiations, **Senator Scutari** [advanced](#) a large package of legislation seeking to radically upend the state's automobile insurance market for the benefit of the plaintiffs' bar. Among other things, the bills sought to [increase](#) mandatory minimum insurance coverage for motorists and businesses; [diminish](#) certain lawsuit thresholds designed to reduce litigation; radically [change](#) personal injury protection coverage and medical expense benefits; and [require](#) certain pre-litigation disclosures regarding available insurance coverage.

The net [effect](#) of enacting this package of legislation would have been a surge in auto accident litigation and related windfalls for the plaintiffs' bar and a corresponding increase in insurance costs for New Jersey motorists. Fortunately, only [two](#) out of a dozen bills in Senate President Scutari's package of legislation made it to Governor Murphy's desk and were signed into law.

Despite enactment of only two of the bills in 2022, Senator Scutari's agenda remains cause for concern. He is expected to pursue similar pro-plaintiff legislation that will increase the pot of money that the plaintiffs' bar can access in personal injury litigation, which increases incentives to pursue such cases.

NEW JERSEY'S GOVERNOR HAS NO INTEREST IN CIVIL JUSTICE REFORM

In November 2021, **Governor Murphy**, an ambitious progressive, was elected to another four-year term. While Governor Murphy is sympathetic to social justice issues, he has shown no interest in civil justice reform.

One of the most concerning developments is the Murphy Administration's desire to transform the traditionally narrow tort of public nuisance into a state revenue-generating regulatory juggernaut. Governor Murphy's Attorney General and Department of Environmental Protection have actively pursued passage of a bill that seeks to transform public nuisance law in the context of lead paint. The bill, [Senate bill 1005](#), constitutes a radical swing in legal theory away from the rule of law and toward unrestrained confiscation by the State.

Since the early 1970s, New Jersey has [established](#) a comprehensive legislative and regulatory regime to combat the hazards of lead paint. Certain New Jersey municipalities with deteriorating housing stock, however, lack sufficient resources to address lead paint hazards. As a result, in the early 2000s, a group of local governments represented by private plaintiffs' lawyers sued a group of paint manufacturers for money damages under a theory of public nuisance. In 2007, in [In re Lead Paint Litigation](#), the **New Jersey Supreme Court** rejected the municipal plaintiffs' use of the tort of public nuisance as a vehicle for a massive payday. The Court concluded that the municipal plaintiffs failed to meet all the elements of the tort, which did not apply to the distribution of everyday household products that were legal when sold and premises that property owners, not paint manufacturers, had the ability to address. The Court also rejected the invitation to "create an ill-defined claim that would essentially take the place of [the government's] own enforcement, abatement, and public health funding scheme."

Now, **S1005** would undo the state supreme court's ruling. If passed, the proposed legislation will defy the traditional understanding of public nuisance law by removing all the elements as applied to the State. The State could simply identify the presence of lead paint anywhere in the state and demand payment from manufacturers, even though manufacturers stopped making lead paint decades ago. This would present significant constitutional issues and is fundamentally unfair. It also sets a dangerous precedent for applying this faux public nuisance doctrine to other products, such as pharmaceuticals, fossil fuels, and automobiles. The bill is [under consideration](#) by the Senate Budget and Appropriations Committee.

In October, New Jersey Attorney General Matthew Platkin joined other Judicial Hellholes in filing a [climate change lawsuit](#) against several oil and gas companies. In yet another attempt to inappropriately expand New Jersey's public nuisance law, the State [alleges](#) that the companies created a public nuisance and deceived the public about the harmful impact of fossil fuels on climate change. It comes as no surprise, the State hired Sher Edling, the national plaintiffs' firm leading the charge on climate change litigation across the country, to handle the lawsuit.

Climate change is a global problem that requires a comprehensive policy solution. 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.

THE SHIFTING POLITICAL MAKEUP OF THE NEW JERSEY SUPREME COURT

By the end of his second term, **Governor Murphy** will have appointed five of seven justices on the New Jersey Supreme Court. During Governor Murphy's first term, **Justice Walter Timpone**, a Democrat, retired, and was [replaced](#) with **Justice Fabiana Pierre-Louis**, a Democrat. **Justice Jaynee LaVecchia**, an Independent, [retired](#) next, in December 2021. Then in February 2022, only months into Governor Murphy's second term, **Justice Faustino Fernandez-Vina**, a Republican, retired. In July 2022, **Justice Barry Albin**, a progressive Democrat, retired. **Justice Lee Solomon**, a Republican, will also retire during Murphy's second term at his mandatory retirement date of August 17, 2024. These mass retirements give Governor Murphy an almost unheard-of opportunity to shape the future of the court.

The result of Murphy's judicial appointments will most likely be a left-leaning New Jersey Supreme Court with a propensity to expand liability that will last for a generation due to the young ages of Governor Murphy's appointees. The Court was more restrained in the past, even earning a [Point of Light](#) reference in 2021, so this could mark a significant change in the New Jersey civil justice environment.

A recent workplace asbestos-exposure case, [Fowler v. Akzo Nobel Chems., Inc.](#), could serve as a preview of the high court's future pro-plaintiff position. The central issue in the case was the adequacy of the warnings on a product's packaging and whether other manufacturer-provided educational materials should be considered when evaluating whether a manufacturer fulfilled its duty to warn.

The Court [held](#) that an asbestos manufacturer or supplier that places insufficient warnings on asbestos bags used in the workplace has breached its duty to warn the worker, regardless of whether it also provided the employer with supplemental information intended to reach the employees. From a practical perspective, this means that the totality of a manufacturer or supplier's efforts to communicate risk and safety information, such as flyers for an employer to hang in the workplace, are insufficient. A manufacturer may be liable for the limited information printed on a bag, even when it is unlikely that a worker will see an industrial product's packaging and safety training by the employer is more important. This ruling will clearly lead to an increase in lawsuits despite legitimate, substantive efforts by manufacturers and employers to mitigate risks associated with products used in the workplace.



Justices of the Fifth District Court of Appeals (Fifth Court as it is referred to by the locals) repeatedly misapply established U.S. Supreme Court and state precedents and procedures, requiring review and reversal by the **Texas Supreme Court**. In the first half of 2022 alone, the Texas Supreme Court *unanimously* overturned five Fifth Court decisions that addressed significant civil justice issues. The Fifth Court consistently (and wrongly) sided each time with plaintiffs and expanded liability.

The Fifth Court is one of 14 appellate courts in Texas and has jurisdiction over state trial court decisions in the northeastern corner of the state, including Dallas, Collin, Grayson, Hunt, Rockwall

and Kaufman counties. Composed of an elected Chief Justice and twelve justices, who serve six-year terms, the appellate court typically decides cases in three-justice panels.

PLAINTIFF-FRIENDLY DISCOVERY RULINGS

Apex Doctrine Ignored Despite Directive from State Supreme Court

Last October, the **Texas Supreme Court** [commanded](#) the Fifth Court to vacate its order requiring an executive at American Airlines to be deposed. The case involved a gate check agent's alleged theft of a passenger's personal information. The **Texas Supreme Court** applied the apex doctrine, which prevents plaintiffs' lawyers from abusing the discovery system by subjecting corporate executives to depositions [unless](#) they have "unique or superior knowledge" of the relevant facts. The state high court unanimously [overruled](#) the appellate panel's order to compel deposition, concluding that any of the executive's knowledge could also be obtained via a "less intrusive means of discovery," such as by questioning a company employee who has knowledge of the events at issue.

Although the **Fifth Court** complied with the high court's order in the *American Airlines* case, it has refused to recognize the apex doctrine in subsequent appeals. For example, three top executives of a real estate company [appealed](#) a trial court's order to compel their testimony in a suit stemming from a crane collapse on one of their properties. The executives argued that they had no personal knowledge of the accident; the company's engineers and lower-level employees were better positioned to give testimony about what occurred. Therefore, the executives contended that reversal of the deposition order was proper under the Texas Supreme Court's analysis of apex doctrine in *American Airlines*. The Fifth Court panel, however, summarily [denied](#) the petition in a 143-word opinion, finding that the executives "failed to show a clear abuse of discretion" by the trial judge.

Deference to Trial Court's Plaintiff-Friendly Discovery Rulings

The **Fifth Court** has repeatedly refused to provide defendants relief in appeals challenging overbroad discovery orders by Dallas County trial courts. Moreover, as with the apex doctrine decision, the opinions denying relief are often brief and fail to assess the merits of the appeal, even when a defendant raises a reasonable concern.

For example, an appellate panel [refused to vacate](#) a discovery order that required the defendant company to produce over 1,000 documents in a case stemming from an ordinary roadside accident. The defendants [argued](#) that complying with the discovery order required the company to complete over 3,000 hours of document review and would cost the company \$58,000. Despite the extensive costs to the defendant, the panel denied relief in a single-page opinion.

In another instance, the **Fifth Court** [upheld](#) a discovery order in a simple breach of contract case compelling a company to produce 10 years' worth of financial, trade secrets and other confidential information regardless of whether it was related to the contract dispute. The company was not a party to the lawsuit, but a holding company for a diverse group of companies with no involvement in the dispute. The **Fifth Court** panel disagreed and denied the corporation relief from the discovery order in a [156-word opinion](#).

Requiring Prohibited and Costly Discovery in Healthcare Liability Claims

Another example of the Fifth Court leaving discovery abuse unchecked came in the context of a medical liability case. In that instance, a plaintiff attempted to compel a healthcare provider to provide copies of its policies and procedures at an early stage in the litigation, something not provided for by the Texas Medical Liability Act, and the Fifth Court allowed it. In February, the **Texas Supreme Court** [unanimously overruled](#) the appellate court. The high court explained that, in medical liability cases, Texas law establishes “strict limits” on pre-expert report discovery restricting it to requests for the patient’s medical records. The purpose of this law is to protect healthcare providers from costly discovery before the plaintiff takes the minimal step of obtaining an expert opinion supporting the claim that the healthcare provided did not meet the applicable standard of care. As the Texas Supreme Court observed, the expert report requirement “is intended to separate potentially meritorious health-care liability actions from frivolous ones.”

FIFTH COURT ERRORS LEAD TO UNNECESSARY DELAYS & LITIGATION COSTS

Misapplications of established law by the Fifth Court can delay a final determination in cases by years and exponentially increase litigation costs for all parties involved.

For example, a split Fifth Court panel affirmed a trial court’s decision to nullify an arbitration clause in an employment contract. The majority held that ambiguous terms in the contract made the contract, including its arbitration requirement, unenforceable. However, the **Texas Supreme Court** [reversed](#) the decision in March, finding that the appellate panel’s ruling was inconsistent with U.S. Supreme Court precedent. The **U.S. Supreme Court** [has held](#) that arbitration provisions are severable from the rest of a contract. Since the contract “clearly and unmistakably” directed the suit to arbitration, a fact even conceded by the plaintiff, the Texas Supreme Court directed that an arbiter decide the case.

The **Texas Supreme Court** also [scolded the Fifth Court](#) for dismissing an appeal due to a legal technicality. In that case, the defendant filed an interlocutory appeal related to a jurisdictional argument. While this appeal was pending, the trial court entered a default judgment against the defendant. Believing that the interlocutory appeal covered the jurisdictional challenge, the defendant did not appeal the final judgment. The **Fifth Court** later [dismissed](#) the interlocutory appeal because the defendant did not appeal the final judgement, depriving the defendant of due process. The unanimous Texas Supreme Court [reversed this ruling](#) in March, holding that “the Rules of Appellate Procedure do not require [the defendant] to forfeit substantive constitutional rights that were timely presented to the court of appeals for review” due to a technicality.

COURT FINDS JURISDICTION WHEN PLAINTIFF DOESN'T EXIST

In July, a Fifth Court panel [upheld](#) a default judgment in a case where the plaintiff company did not formally exist. The plaintiff purported to be a Texas-based LLC, but was neither registered with the state, nor had any formal business records. On appeal, the defendant corporation [argued](#) that the trial court did not have subject matter jurisdiction to issue the default judgment because the plaintiff does not exist as a corporate entity and repeatedly falsified pleadings claiming that it was registered as an LLC in the state. However, the appellate panel [denied](#) the petition for relief in a 204-word opinion.

NUCLEAR VERDICT UPHELD BY QUESTIONABLE APPELLATE RULING VACATED BY SETTLEMENT

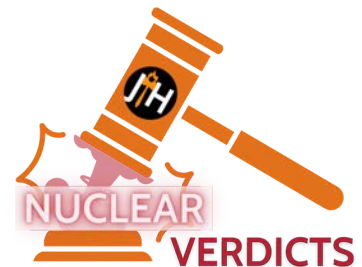
Last June, a panel of **Fifth Court justices** [upheld](#) a \$194.4 million judgment against Toyota despite serious procedural and evidentiary concerns raised by the automaker.

The case arose when passengers of a 2002 Lexus sustained serious injuries upon being rear-ended on the highway. The passengers sued Toyota, claiming their car had defectively designed seatbelts. At trial, Toyota conclusively demonstrated that the seatbelts far exceeded federal vehicle safety standards when the car was manufactured. Meanwhile, the trial judge – disregarding Texas’ [traditional limitations](#) on introducing evidence of dissimilar products and injuries – allowed the plaintiffs to present “other incident” evidence. This included evidence of accidents involving different manufacturers, unrelated injuries, and even a “60 Minutes” segment on seatback collapses.

The Dallas County jury found for the plaintiff and awarded \$242 million in damages, including \$144 million in punitive damages against Toyota. Shockingly, the jury found the driver who rear ended the plaintiffs only 5% liable for the injuries; Toyota was held 95% liable. The trial court subsequently granted the *plaintiff’s* motion to reduce the damage award to keep the verdict within state caps, reducing the award to \$208 million with Toyota responsible for \$194.4 million.

A three-justice panel of the Fifth Court [affirmed the judgment](#) last June. The **Fifth Court** subsequently denied Toyota’s motion for rehearing in a split decision. The dissenter, **Justice David Schenk**, [noted](#) that, he had “grave concerns regarding the many and serious evidentiary errors that permitted obviously irrelevant and distressing character evidence” to be presented to the jury, which “may have taken control of the proceedings below.”

Toyota [appealed](#) to the Texas Supreme Court. However, the [parties settled](#) the case for an undisclosed amount before the justices decided whether to hear the case. As part of the January 2022 settlement, the judgment against Toyota was vacated.



GOOD NEWS



A **Fifth Court panel** [refused to apply](#) a court-made “discovery rule” to extend the statute of limitations for health care liability claims. In order to protect doctors and other health care providers from the potential of being sued long after they had treated a patient, the Texas legislature adopted a statute of limitations that requires a claim to be filed within two years of “the occurrence of the breach or tort” if the date is ascertainable, or “the last date of the relevant course of treatment” or hospitalization if not. Thus, the panel held that the “discovery rule” is not viable because it conflicts with the state’s strict formulation for determining the accrual date for the statute of limitations on medical malpractice claims.

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 are not otherwise detailed in other sections of the report.



CONTROVERSIAL RESTATEMENT ADOPTED BY THE AMERICAN LAW INSTITUTE

[Recent reports](#) have examined the American Law Institute’s mission shift over the past decade from “scholarly institution that was safely above the fray” to that of an advocacy group proposing novel expansions in liability law. Perhaps the clearest example of the ALI’s activist mentality is the [Restatement of the Law, Consumer Contracts](#), which the ALI approved in May 2022.

Through this project, the ALI has proposed creating a separate and unprecedented area of governing law distinct from the established law of contracts. This Restatement’s basic goal is to recommend novel rules for courts to adopt that would enhance consumers’ ability to challenge and void agreements they enter voluntarily with businesses and other entities. To accomplish this policy goal, the Restatement resorts to inventing rather than “restating” existing law. For example, it intertwines contract law with state consumer protection statutes to create a new theory of “deceptive contracts,” allowing consumers to challenge – and courts to overturn – any allegedly misleading contracts or terms. It also ignores both the Federal Arbitration Act and the Supreme Court’s ample precedents favoring arbitration and pre-dispute arbitration agreements. Judicial adoption of this Restatement’s provisions may encourage state court judges to nullify arbitration agreements or otherwise reach results inconsistent with existing law.

When the Restatement was approved in May 2022, the ALI adopted a motion that adds a new, even more radical section on “**Interpretation and Construction of Consumer Contracts.**” This section provides in part that standard contract terms (i.e. boilerplate terms) are to be interpreted to effectuate the “reasonable expectations of the consumer” and construed “against the drafter of the term” (i.e. business). It further provides that any ambiguities in the language of the standard contract term or the process by which a consumer assents to provisions are to be resolved against the business supplying the term or process.

“The ALI’s deepening engagement in legal advocacy through novel restatements of the law ... appears poised to mislead judges as to existing law and potentially compromise fairness in the courts.”

– U.S. Senator Thom Tillis

departure from its “historic mission to educate judges.” Given the involvement of sitting members of the federal judiciary in the ALI, he asked several questions about the future of the organization. He stated his concern that “the ALI’s deepening engagement in legal advocacy through novel restatements of the law ... appears poised to mislead judges as to existing law and potentially compromise fairness in the courts.” He points specifically to the recently enacted Restatement of the Law, Consumer Contracts and the Restatement of Copyright Law.

In October, U.S. Senator Thom Tillis from North Carolina, [wrote a letter](#) to Richard Revesz, Director of the American Law Institute, expressing his concern about the organization’s

PLAINTIFFS' LAWYERS PREFERRED JURISDICTIONS FOR ASBESTOS LITIGATION

As asbestos claims continue to fall nationwide, the number of lawsuits filed in three Illinois counties, Cook, Madison and St. Clair, remain constant. The courts in these three counties host nearly half of the nation's asbestos litigation. Plaintiffs flock to these county courthouses due to their plaintiff-friendly reputations, low evidentiary standards, and judges' willingness to allow meritless claims to survive.

Madison County

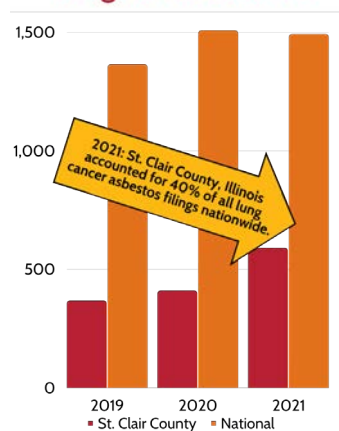
Madison County remains the [plaintiffs' favorite venue](#) for asbestos claims regardless of where the plaintiffs live or the exposure to asbestos allegedly occurred. Over 95% of all cases filed in Madison County were by non-Illinois residents and over 7% of all filings in the county were by residents of Florida, a state almost 1,000 miles away. Additionally, several filers in 2021 held their primary residency in Canada.

Of note – based on the data, it appears the decline in the number of asbestos claims filed in Madison County in 2021 results from plaintiffs' lawyers choosing to instead file in neighboring St. Clair County.

Asbestos litigation in Madison County has driven innocent businesses to bankruptcy. Plaintiff's lawyers

are on "an endless search for a [solvent bystander](#)," since many former asbestos manufacturers are now bankrupt. This "avalanche of speculative lawsuits" has led nearly 140 businesses to file for bankruptcy, even though many of the claims "turned out to be meritless as to those companies because many of the plaintiffs could not demonstrate exposure to their products." For example, Ferro Engineering filed for bankruptcy after litigating more than 182,000 asbestos claims, despite only 5% of the claims resulting in a monetary payment to the plaintiff.

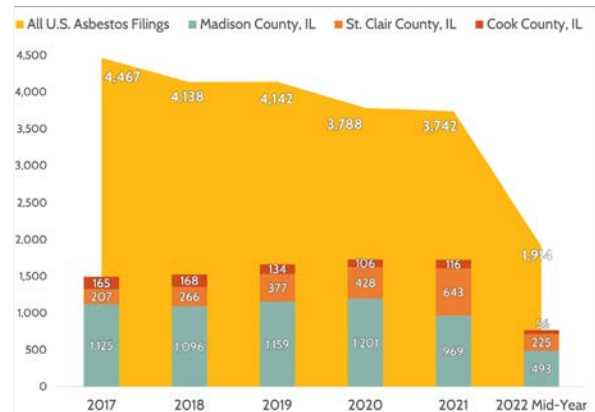
St. Clair County Asbestos Filings Lung Cancer Claims



Source: KCIC Industry Report Asbestos Litigation: 2021 Year In Review



Illinois Asbestos Filings



Sources: KCIC Industry Report Asbestos Litigation: 2021 Year In Review

KCIC Report

St. Clair County

St. Clair County saw a greater than 50% increase in asbestos filings in 2021 mostly due to an influx of lung cancer claims.

Three law firms, [SWMW Law](#), [The Gori Law Firm](#), and [Flint Law Firm](#), are [largely responsible](#) for this spike. These firms increased the number of asbestos lawsuits they filed in St. Clair from 31 filings in 2020 to 106 in 2021, 312 filings in 2020 to 344 filings in 2021, and 13 filings in 2020 to 102 filings in 2021, respectively.

MONTANA SUPREME COURT RULES INSURER WAIVED STATUTORY CAP BY PROVIDING EXCESS COVERAGE

Lawsuits against state and local governments are typically subject to statutory caps on damages to protect taxpayers and the government's ability to provide public services. A recent Montana Supreme Court decision, however, exposes insurers who provide coverage to public entities to damage awards that vastly exceed the statutory maximum.

Montana law [limits](#) the amount that counties must pay in tort actions to \$750,000 per claim and \$1.5 million per accident. A trial court found Gallatin County liable for over \$12 million in damages to a plain-

tiff, who was injured by a county-owned snowplow. Atlantic Specialty Insurance Co. (ASIC), the county's insurer, offered to pay the maximum amount of the county's statutory liability, \$750,000.

In July 2022, the **Montana Supreme Court** [ruled](#) that ASIC must provide \$6.5 million in coverage. While the policy limited coverage to the amount the county was "legally obligated" to pay, the Court found that the policy did not explicitly limit its coverage to the \$750,000 statutory cap. Since the policy insured Gallatin County for a limit of \$1.5 million in coverage and \$5 million in excess coverage, the majority found that ASIC must pay the full \$6.5 million in coverage, regardless of the statutory limit.

The dissent, as well as legal observers, [question](#) how an insurer can be obligated to pay more than the legal liability of its policyholder. The decision could impact the ability of Montana's cities and counties to obtain excess liability coverage, which protects them from the risk that a statutory limit does not apply in a certain case.

WISCONSIN APPELLATE PANEL AFFIRMS JUDGMENT DESPITE UNRELIABLE EXPERT TESTIMONY'S INFLUENCE

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 untested junk science (a first-of-its-kind theory that the headrest prongs in the seat were defective) and evidence of unrelated recalls and subsequent remedial measures. Unbelievably, the Wisconsin Court of Appeals [affirmed](#) that verdict in October 2022.

In 2011, Wisconsin enacted [tort reform](#) – declaring Wisconsin "open for business" – including the adoption of Daubert, a rebuttable presumption that a product compliant with federal or state regulations is not defective, and protections against the introduction of subsequent remedial measures. The Court of Appeals disregarded those reforms. It found that the evidence of unrelated recalls of different products could rebut the presumption that the seat was not defective; that subsequent remedial measures were admissible to impeach Hyundai's witnesses before they even testified; that the subsequent remedial measure was admissible as evidence of a reasonable alternative design – even though the design did not exist when the product was sold; and that a biomechanical expert could offer medical causation testimony and a medical expert could provide biomechanical causation testimony, without assessing the reliability of those opinions.

The automaker has filed a petition for review to the Wisconsin Supreme Court. If the high court does not grant review and the verdict is not reversed, a single court in Wisconsin will have effectively wiped-out significant portions of the legislature's tort reform – raising the question whether the state is really "open for business" after all.

Points Of Light

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

UNDER GOVERNOR DESANTIS AND STATE SUPREME COURT, FLORIDA'S LITIGATION CLIMATE CONTINUES TO IMPROVE

Although the work is far from over, **Governor Ron DeSantis** has turned the state of Florida around, appointing the most conservative Florida Supreme Court in decades – a court that is deferential to legislative efforts to stop lawsuit abuse and poised to correct the course set by the prior activist court.

The Florida Supreme Court Authorizes Immediate Appeals Of Decisions Allowing Punitive Damages Claims To Proceed

Florida has a sensible rule that does not allow plaintiffs' lawyers to threaten defendants with punitive damages unless they have evidence supporting that request. When initially filed, complaints cannot include a demand for punitive damages. Instead, a plaintiff must file a motion for leave to amend the complaint and submit evidence supporting the request. The grant or denial of leave to assert a punitive damages claim can be a "game changer," as the addition of such a claim to a case exposes a defendant to intrusive financial worth discovery and a potentially large verdict. Such claims are supposed to be brought only after meeting a high bar. But previously, a trial court order granting or denying leave to assert a punitive damages claim was not subject to any type of immediate appellate review, often resulting in punitive damages claims erroneously moving forward. In early 2022, the **Florida Supreme Court** [responded by adopting](#) a rule change that allows a party to seek immediate appellate review of an order granting or denying a motion for leave to assert punitive damages.

The Florida Supreme Court Delivers A Win For Truth In Damages

In a tort action, the measure of a plaintiff's compensatory damages is supposed to reflect the person's actual loss. In personal injury cases, the plaintiff's medical bills represent a significant part of compensatory damages, but invoiced amounts are typically paid at discount rates pursuant to contracts between the plaintiff's health insurer and medical service providers. Accordingly, the appropriate measure of compensatory damages for past medical expenses is the amount the plaintiff, or the plaintiff's insurer, has actually paid, or is obligated to pay, not the sticker-price amount initially charged by the medical providers. To allow a plaintiff to recover the full undiscounted amount would result in a windfall of "phantom damages" which the plaintiff would never be responsible to pay.

A question recently arose with regard to payment of healthcare expenses by Medicare and similar benefits. Under state law, medical benefits paid pursuant to a federal program like Medicare are not considered collateral sources that may be set off from a verdict. In *Joerg v. State Farm*, the prior iteration of the Florida Supreme Court [held](#) that in determining a plaintiff's *future* medical expenses, evidence of a plaintiff's eligibility for future benefits like Medicare is inadmissible. Enterprising plaintiffs' attorneys argued that *Joerg* meant that, in determining a plaintiff's *past* medical expenses, a plaintiff should be permitted to introduce the gross amount billed by a medical provider, and the defendant may not introduce evidence that the plaintiff's Medicare benefits in fact paid a discounted amount.

The **Florida Supreme Court** ended this argument in *Dial v. Calusa Palms Master Ass'n*, which finally and unequivocally [establishes](#) that plaintiffs whose past medical expenses were paid by federal programs such as Medicare can only admit into evidence the amounts actually paid, not the fictitious amounts that no one is actually responsible for paying.

FOURTH CIRCUIT UPHOLDS WV LAW REGULATING DECEPTIVE LAWSUIT ADVERTISEMENTS

The **U.S. Court of Appeals for the Fourth Circuit** upheld a West Virginia law regulating misleading lawsuit advertising practices, reversing a federal district court decision.

In 2020, the **West Virginia Legislature** passed the [Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act](#). The Act prohibits specific practices in lawsuit advertisements that give false impressions that they reflect medical or governmental advice. The law also requires informational disclosures to prevent confusion and protect public health. For example, it prohibits the use of phrases such as “health alert” or “public service health announcement,” displaying the FDA logo, or suggesting a product has been recalled when it remains approved for use. The law also required ads targeting prescription drugs to caution viewers not to discontinue a prescribed medication without first consulting their doctors.

[A 2019 FDA study](#) shows the real-life consequences of deceptive trial lawyer ads. Researchers found 66 incidents of adverse events following patients discontinuing the use of blood thinner medication (Pradaxa, Xarelto, Eliquis or Savaysa) after viewing a lawsuit advertisement. The median patient age was 70 and 98% stopped medication use without consulting with their doctor. Thirty-three patients experienced a stroke, 24 experienced another serious injury, and seven people died. **Dr. Shawn H. Fleming**, doctor for one of the deceased, stated before a 2017 U.S. House Judiciary committee hearing, “It’s my opinion that the tone and content of these advertisements imply a qualitative judgment about these medications that are just not true. When you say call 1-800-BAD-DRUG, that clearly implies it’s a bad drug, which runs counter to current medical evidence and also to the FDA’s recommendations.”

“It’s my opinion that the tone and content of these advertisements imply a qualitative judgment about these medications that are just not true. When you say call 1-800-BAD-DRUG, that clearly implies it’s a bad drug, which runs counter to current medical evidence and also to the FDA’s recommendations.”

– Dr. Shawn H. Fleming

A unanimous Fourth Circuit panel rejected a First Amendment challenge mounted by West Virginia plaintiffs’ attorneys to the law. The appellate court found that each of the bill’s prohibitions was tailored to address practices that are “inherently or actually misleading” and that the law’s disclosure requirements were in response to “concrete concerns supported by empirical evidence.” The Court concluded, “The act’s prohibitions and disclosures work together... to protect the health of West Virginia citizens who may be misled into thinking that attorneys are reliable sources of medical advice.”

ARIZONA DEFENDANTS MUST HAVE ‘EVIL MINDS’ FOR PUNITIVE DAMAGE LIABILITY

The **Arizona Supreme Court** [clarified](#) that punitive damages are reserved for “punishing outrageous conduct” and are inappropriate in cases involving ordinary negligence.

The underlying case involved a fatal highway accident in which a truck driver lost control of his vehicle while driving down a hill in rainy conditions. His truck obstructed the roadway, and another driver struck the plaintiffs’ vehicle while trying to avoid the obstruction.

According to the **Arizona Supreme Court**, the driver’s negligent conduct – losing control of his truck while travelling down a hill on a slick road – fell well short of the “aggravated, outrageous, malicious or fraudulent” standard required to justify punitive damages. Furthermore, allegations that the driver was speeding, even if proven, would be a “far cry from the outrageous or quasi-criminal conduct sufficient to establish an evil mind.”

The ruling will help ensure that plaintiffs’ lawyers do not misuse punitive damages to threaten or collect nuclear verdicts by portraying defendants as “big corporations” with deep pockets, when they did not engage in malicious conduct.

MARYLAND REJECTS LOSS OF CHANCE DOCTRINE

The **Maryland Court of Appeals** declined to adopt the “loss of chance” doctrine in July 2022, finding that the doctrine’s relaxed causation framework directly conflicts with the statute’s traditional standard, which requires a plaintiff to show that a defendant’s negligence more likely than not caused the plaintiff’s injury.

The loss of chance doctrine permits a relaxed standard for causation in the medical malpractice context, allowing plaintiffs to recover for the lost chance of a better outcome, such as surviving longer, even if the outcome would likely be the same regardless of a delay in a diagnosis. The state’s top court had previously held that the **Maryland Wrongful Death Act** does not permit loss of chance claims. The trial court properly applied this precedent to dismiss a claim speculating that had a doctor immediately followed up on abnormal CT scans, his wife, who had metastatic breast cancer, would have lived 30 months longer. Both parties’ experts had agreed that a metastatic breast cancer diagnosis was a “death sentence,” regardless of the discovery timeline.

On appeal, the widower petitioned a Court of Special Appeals panel to disobey *stare decisis* and find loss of chance doctrine compatible with the state’s wrongful death statute; the panel [did not oblige](#).

Before Maryland’s highest court, the plaintiff reversed course, arguing his claims did not fall under the loss of chance doctrine because he was seeking damages for his wife’s loss of a concrete period of life, rather than her natural life expectancy. Although two judges were persuaded by the plaintiff’s distinction, the majority recognized it as a veiled “collateral attack on our previous loss of chance decisions.” The majority [rejected the claim](#), reaffirming that it is not the judiciary’s role to make sweeping policy changes:

“The General Assembly is best equipped to identify, consider, and reconcile competing policy interests associated with the decision of whether to adopt the loss of chance doctrine. Therefore, any changes to the Wrongful Death Act are best suited to the legislative process in the General Assembly and not from this Court ‘in the guise of statutory construction.’”

IN THE LEGISLATURE

In their 2022 legislative sessions, nine states enacted significant reforms to address excessive liability and litigation abuse.

- **Arizona** prevented over-naming of defendants in asbestos litigation. Plaintiffs must provide the basis for each claim against each defendant and include supporting documents. ([S.B. 1157](#))
- **Colorado** clarified the state Supreme Court’s problematic 2021 decision in [Rocky Mountain Planned Parenthood](#) involving landowner liability for injuries caused by a third-party’s criminal activity. ([S.B. 115](#))
- **Florida** addressed the state’s property insurance crisis, as explained in the [Florida Legislature Watch List section](#). ([S.B. 2-D Special Session](#))
- **Georgia** provided for apportionment of damages in single-defendant lawsuits. ([H.B. 961](#))

- **Kansas** and **Louisiana** regulated misleading and deceptive trial lawyer advertising. (KS – [S.B. 150](#); LA – [S.B. 378](#) and [S.B. 383](#))
- **Arizona** and **Missouri** instructed courts that they may not rely on secondary sources that conflict with state law in certain contexts. (AZ – [H.B. 2272](#); MO – [S.B. 775](#))
- **Oklahoma** increased transparency when the state’s attorney general hires outside counsel. ([S.B. 984](#))

In addition, **Idaho** and **Tennessee** extended their previously enacted COVID-19 liability protections. (ID – [H.B. 444](#); TN – [H.B. 2671/S.B. 2448](#))

Closer Looks



THE MASS TORT LITIGATION MACHINE

Mass tort litigation has become a multi-billion-dollar industry for plaintiffs' lawyers as they target manufacturers of everything from pharmaceuticals and medical devices to herbicides and military-grade ear plugs. Regardless of the product, the trial bar's playbook is essentially the same every time. They spend millions of dollars on advertising in plaintiff-friendly Judicial Hellholes® in search of potential claimants. Additionally, plaintiffs' lawyers rely on traditional and social media to bolster litigation, often pushing inaccurate and baseless claims in friendly outlets.

They sometimes partner with so-called experts to provide misleading scientific evidence to support their claims both inside and outside the courtroom. This concerning trend repeats fallacies and influences public perception of the litigation and the parties on each side.

Third-party investors provide the necessary money up front to initiate these tactics. Hedge funds, institutional investors, and public and private companies have poured [billions of dollars](#) into funding litigation. The lawsuit-investment industry is rapidly growing, with startup businesses joining the fray, seeing a lucrative opportunity.

DRIVERS OF THE MACHINE

Third Party Litigation Financing

Third party litigation funding (TPLF) is the practice of investors buying an interest in the outcome of a lawsuit. It has quickly become a multi-billion-dollar industry.

There are multiple types of litigation financing, but “**big-ticket**” lawsuit lending, typically involves hedge funds and private equity companies that specialize in financing mass tort litigation, commercial and intellectual property litigation, or a broader portfolio of cases handled by a law firm.

Third-party litigation funders front money to plaintiffs' law firms in exchange for an agreed-upon cut of any settlement or money judgment. When these cases are resolved, the lawsuit lender is usually entitled to a percentage of the recovery, much like a contingency-fee. Investors are attracted by the prospect of a substantial return on their investment and law firms use the money to cover upfront litigation costs.

TPLF can create litigation, not just fund it. For example, an outsider's financial investment in a case may be used to cover the cost of mass tort lawsuit advertising that has surged in recent years and the call centers that handle the responses. These ads often urge viewers who have taken a prescription drug, been treated with a medical device, or used a consumer product to “call right now” because “you may be entitled to substantial compensation.” Even when sound science does not support these suits, mass tort lawyers and their investors understand that if they quickly generate thousands of claims tying a widely used product to a common illness, the targeted company will face strong pressure to reach a global settlement. That settlement will result in a substantial payout to both the contingency-fee lawyers and investors.

TPLF raises a number of ethical concerns, such as a threat to a lawyer's ability to exercise independent judgment in cases where the funder can influence litigation or settlement decisions. The presence of an unknown third-party with a stake in the outcome can change what is essentially a two-party negotiation into a multi-party process with a “behind-the-scenes” influencer. As a TPLF company executive [has acknowledged](#), litigation funding “make[s] it harder and more expensive to settle cases.”

Trial Lawyer Advertising

Law firms and businesses known as “lead generators” spend obscene amounts of money on lawsuit advertising because they know it’s an effective way to needlessly scare consumers and encourage them to file claims.

These ads include those soliciting claims alleging that consumer products, pharmaceuticals, and medical devices were responsible for people developing medical conditions that either have a range of potential causes or the cause of which is unknown. Top targets of these ads include Roundup® weed killer, talcum powder and, more recently, the herbicide paraquat.

Roundup® has been the top target of mass tort product liability litigation TV ads since 2015, with an estimated [\\$131 million](#) spent on more than 625,000 ads airing nationally and locally across the country. Second only to Roundup® litigation ads, are ads soliciting claims alleging a link between the use of talcum powder and incidences of cancer. An estimated [\\$109 million](#) has been spent on more than 370,000 talc litigation ads nationwide since 2015.

Since plaintiffs’ lawyers have earned billions of dollars on talc and Roundup® litigation, showing a good return on their advertising investment, they’re now turning their attention to another herbicide--paraquat. Since the beginning of 2021, more TV ads have aired across the country soliciting claims alleging injuries caused by paraquat than mass tort ads related to any other product. Advertisers have spent more than [\\$24 million](#) to air more than 150,000 of these ads since 2021.

Junk Science

The trial bar engages in massive television ad buys and public relations campaigns that peddle misinformation and taint the public’s preconceptions, while judges in Judicial Hellholes® fail to restrict falsehoods in their courtrooms. For example, the trial bar is spending hundreds of millions of dollars trying to drive home the message that products like Roundup® and talcum powder cause cancer, despite the lack of sound scientific evidence verifying these claims.

Roundup®

Monsanto, the maker of Roundup®, is one of the country’s most vilified companies. Lawsuits have been filed in several Judicial Hellholes® including St. Louis, Philadelphia, and California. In October, Florida’s [first trial](#) began.

Monsanto faces thousands of cases across the country alleging Roundup® causes cancer. Expert witnesses testify that glyphosate, the active ingredient in [Monsanto’s](#) signature Roundup® weedkiller, is to blame for triggering the disease. Trial lawyers have chosen to file a bulk of the litigation in Judicial Hellholes® because judges are known to allow junk science in their courtrooms.

As detailed extensively in the [St. Louis Judicial Hellholes® section](#), Monsanto recently prevailed in a jury trial in the **21st Judicial District of Missouri**. The St. Louis case fell apart under cross-examination as the plaintiff’s expert witnesses proved less than credible. While the truth prevailed in this case, it is unreasonable to expect jurors to arrive at the proper resolution in the absence of judges performing their gatekeeping responsibilities and keeping junk science out of their courtroom.

Trial lawyers turn to individuals with dubious credentials and a loose appreciation of ethical norms for one reason – the truth simply isn’t on their side.

Environmental safety agencies in the U.S., Canada, Brazil, Australia, New Zealand, Japan, and the European Union have spent decades reviewing the health impacts of glyphosate. All agree that no credible evidence exists linking glyphosate to non-Hodgkin’s lymphoma.

But one outlier organization says otherwise. An advisory group of the **International Agency for Research on Cancer (IARC)** deemed glyphosate a “probable human carcinogen.” In 2017, a senior scientist on that IARC panel testified critical evidence favorable to glyphosate had been withheld and would likely have changed IARC’s conclusion. The panel, however, was run by **Christopher Portier**, a scientist who received \$160,000 from litigators and worked under the direct supervision of a partner at one of the law firms suing Monsanto.

Talcum Powder

Plaintiffs' lawyers see the media as co-counsel in mass tort litigation. Most recently, *The New Yorker* published a [story](#) about Johnson & Johnson and its long-running talc litigation. The company is attempting to resolve the talc-related claims against it through a bankruptcy process that **Judge Michael Kaplan** of the U.S. Bankruptcy Court called “the optimal venue for redressing the harms of both present and future talc claimants in this case – ensuring a meaningful, timely, and equitable recovery.” In February, **Judge Kaplan ruled** that Johnson & Johnson's subsidiary acted in “good faith” when it commenced a bankruptcy case to achieve that laudable goal.

As Judge Kaplan's ruling is reviewed by the **U.S. Court of Appeals for the Third Circuit**, the plaintiffs' lawyers seems unwilling to let the case's facts and legal arguments speak for themselves. Instead, as their [communications](#) with *The New Yorker* show, they helped orchestrate a media broadside in the form of a misleading 8,000-word article riddled with false statements, half-truths and omitted facts they then promoted tirelessly on social media. This pattern of lacing the record with inflammatory statements for the press and social media to amplify has real – and troubling – consequences, [as evidenced](#) by the violent threats leveled at Judge Kaplan and his staff on social media, voicemails, and emails since the plaintiffs' attorneys ramped up their media campaign.

In advance of the hearing last February before Judge Kaplan on the issue now up on appeal, the plaintiffs' team funneled documents disclosed in the litigation to Reuters. Whether the intended result was to sway the scales of justice or smear Johnson & Johnson in the press to toy with its stock price, the fact is that plaintiffs' attorneys use the media as their co-counsel.

Now, plaintiffs' attorneys are at it again, persuading *The New Yorker* to print their *allegations* as if they were *facts*. One of the sources *The New Yorker* cites is the plaintiffs' attorneys' hired gun expert, **Dr. David Egilman**, who testifies that, every time he looks, he finds asbestos in the tissue of customers who use Johnson & Johnson's Baby Powder. In addition, Dr. Egilman [recently testified](#) that, when shown a picture of the Orion constellation, it was a depiction of talc, which allegedly contained asbestos. To someone with a hammer, everything looks like a nail. What is also significant is that neither of these aspects of Dr. Eligman's background were mentioned by *The New Yorker*.

The magazine also failed to disclose that, in 2007, **Dr. Egilman** conspired with others to violate a protective order in a case regarding the drug Zyprexa, and he provided hundreds of cherry-picked confidential documents to various media outlets – including by using a sham subpoena. A federal district court held extensive hearings and [strongly rebuked Dr. Egilman](#) for his conduct, [noting that he and his conspirators](#) “executed the conspiracy using other people as their agents in crime.” **Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York** stated that “Such unprincipled revelation of sealed documents seriously compromises the ability of litigants to speak and reveal information candidly to each other; these illegalities impede private and peaceful resolution of disputes.”

Judge Weinstein issued a Stipulated Order in which **Dr. Egilman accepted responsibility** and was ordered to pay Eli Lilly \$100,000, which the company then donated to a charity of its choosing. Not surprisingly, none of this was reported by *The New Yorker*.

Despite a myriad of baseless claims by the plaintiffs' bar, independent medical experts have not found a confirmed link between talcum powder and cancer.

Multi-District Litigation Abuse

The trial bar also seeks to exploit procedural advantages within the judicial system itself. Problems have centered on a little-known process known as multidistrict litigation – or MDL for short – used by the federal courts to consolidate lawsuits involving similar issues to save time.

After spending countless millions of dollars in advertising to recruit claimants, law firms flood the MDL process with tens of thousands of dubious claims, knowing that it's next to impossible for judges – or the

defendants – to sort through and check them all. These claims may include plaintiffs who did not even use the product at issue or whose medical condition likely had other causes.

It's a big problem; over [70 percent](#) of civil cases in federal courts are currently in MDLs. As of October 2022, there are nearly [400,000 pending cases](#) in MDLs, largely in product liability litigation. This percentage has [surged](#) from under 30 percent just ten years ago. As two law professors noted in a [recent article](#), “MDLs gravitational pull over thousands of cases demolishes all of the normal expectations of individual process and federalism.”

Once thousands of cases are filed and consolidated, and without the protections that MDLs “demolish,” it's often game over. It's impossible to bring that many cases to trial, so MDL defendants are faced with two unappealing options: settle for a king's ransom or declare bankruptcy.

WHAT IS THE END RESULT?

The problematic mass tort litigation system is driving companies into bankruptcy. This is playing out in real time in [LTL Management](#) (talcum powder) and [Aearo Technologies](#)' (ear plugs) bankruptcy processes.

Historically, courts have respected the view that filing for bankruptcy is a well-recognized way for a business to respond when the claims of creditors, including those bringing lawsuits, threaten the viability of that business. This is especially true in cases of mass tort liability. The bankruptcy process provides a fair and efficient way to resolve both current and future claims.

Plaintiffs' lawyers are aggressively pushing the message that the bankruptcy process isn't fair and advocating for reforms to exempt some lawsuits from the bankruptcy process. Why the opposition? The simple fact is that trial lawyers often benefit from the worst abuses of our legal system. They want to generate as much leverage for themselves as possible, and bankruptcy court stands in their way. Their motivation is largely self-serving: plaintiffs' lawyers stand to earn millions of dollars in attorneys' fees should mass tort litigation continue.

The bankruptcy process is one that seeks to balance the interests of all creditors and debtors. For companies that enter bankruptcy, regardless of the reason, the process is fair and has been proven to work for all parties involved. Creditors and debtors work out a plan under the supervision of a bankruptcy judge. Lawsuits are generally handled in bankruptcy by creating a special fund to equitably pay plaintiffs in the bankruptcy and in related litigation. Then, only after an overwhelming percentage of creditors approve a plan is it generally accepted by a bankruptcy judge. Companies like GM, Chrysler, and United Airlines, for example, have gone through this process and successfully emerged from bankruptcy. Other companies are less fortunate, and their assets are liquidated to pay creditors.

Ultimately, its due in large part to abuses of the civil justice system that companies find themselves in this position. Regardless, no defendant should be denied legal protections that are available to all. Addressing some of the mass tort abuses outlined above would mean it is less likely that companies will seek bankruptcy protection. Fairness for all parties matters – not the interests of plaintiffs' lawyers paid on a contingency fee. Now more than ever, courts around the country must balance the scales and ensure that businesses can get the fair shake they deserve from our civil justice system—for the sake of our economy, and most of all, justice.

THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL – FOR THE PEOPLE OR FOR THE PROFIT?

When the [National Association of Attorneys General](#) was founded in 1907, its goal was to support the top law enforcement officer in each state in fulfilling the sworn oaths each took to serve the people of their state. The organization claims to be a “nonpartisan national forum providing collaboration, insight, and expertise to empower and champion America’s attorneys general.”

But over time, NAAG’s focus has shifted from promoting collaboration to promoting entrepreneurial litigation. NAAG has primarily turned into an organization that has only one goal: suing businesses for profit.

Over the past few decades, NAAG has played a significant role in some of the most prominent mass tort lawsuits. Its targets have included tobacco manufacturers, and most recently, opioid manufacturers and distributors. A recent [ATRA report](#) points to NAAG’s involvement in a 2021 opioid settlement with McKinsey & Co. in which the organization received \$15 million. NAAG also received \$103 million that grew to [\\$140 million](#) from the landmark Tobacco Master Settlement Agreement.

NAAG fully participates in settlements reached in these multistate lawsuits, just as individual states and their for-profit, contingency-fee counsel do. This places what once was an independent association in a situation in which it now appears to have profit as an overriding motive when it helps to initiate and settle litigation, just as the trial bar does.

HOW DOES IT WORK?

NAAG essentially acts as a self-sustaining “[litigation machine](#),” mainly funded by two revenue sources: yearly dues from state attorneys general and carveouts from multistate litigation settlements. NAAG’s programs are then operated through these funds, training attorneys in state AGs’ offices and the state AGs themselves to be more effective in litigation.

NAAG [promotes](#) coordinated mass tort litigation by having members participate in working groups that focus on potential multistate lawsuits. Their activities include information-sharing agreements between state attorney general offices as well as monthly phone calls to discuss investigations. NAAG then offers “lead” states the opportunity to recruit other states to join specific litigation. Finally, NAAG provides grants to states to help litigation get off the ground. Utilizing this sort of outside source for litigation allows AGs to avoid using state-appropriated funds or asking the legislature for more funds. This funding side-step weakens the potential checks and balances of legislative oversight.

Outside influence, whether it is from NAAG or other activist organizations, creates a concerning lack of accountability and transparency in state attorney general offices.

ROLE AS A THIRD-PARTY FUNDER

As discussed in the “[Closer Look](#)” section on mass tort litigation, third-party litigation financing is a driving force behind mass tort litigation. Even more disturbing is NAAG is getting in on the action, using its extensive resources to drive lucrative multi-state litigation targeting various deep-pocketed industries.

Far from being a neutral entity, NAAG massively benefits financially from these lawsuits and, in turn, uses its accumulated wealth and resources to help coordinate and facilitate even more lawsuits. The NAAG playbook is starting to come out of the shadows after [the recent departure](#) of several of its disgruntled members, including attorneys general from Montana, Texas, and Missouri. Additionally, seven other attorneys general [joined Kentucky AG Daniel Cameron](#) in sending a letter to NAAG’s executive director outlining their concerns about how the organization is funded.

As reported by the Wall Street Journal, NAAG currently has more than [\\$280 million](#) in assets. The organization distributes these funds as grants to states to help litigation get off the ground. States receive grants to fund research and other expenses to determine participation in a multistate lawsuit. In return, NAAG

buys an interest in the outcome of a lawsuit and receives an agreed-upon financial carve-out from the final settlement.

This TPLF process diverts settlement money away from actual victims and provides it to NAAG – putting profits before the public interest. It also allows state attorneys general to avoid using state-appropriated funds or having to go to their respective state legislatures for more funds to pursue financially lucrative or ideologically driven litigation. NAAG’s grant process allows state attorneys general to participate in a multistate action to gain funding to pursue the research and litigation required without having to directly dip into the state appropriation process. This funding side-steps and weakens the checks and balances a state legislature should want to exercise in these situations.

The injection of a third party’s financial interest in litigation threatens a state’s ability to exercise independent judgment in cases where the funder can influence litigation or settlement decisions – changing litigation involving plaintiffs and defendants into a multi-party process with a behind-the-scenes megadonor. As **Attorney General Cameron** [explains](#) in his letter to NAAG’s executive director, this process likely violates state laws that exclusively vests the power of the purse with their legislatures.

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 jurisdictions." Personal injury lawyers are drawn like flies to these rotten jurisdictions, looking for any excuse to file lawsuits there. When Madison County, Illinois was first named the worst of the Judicial Hellholes last decade, some personal injury lawyers were reported as cheering "We're number one, we're number one."

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

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

PRETRIAL RULINGS

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

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

DECISIONS DURING TRIAL

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

UNREASONABLE EXPANSIONS OF LIABILITY

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

JUDICIAL INTEGRITY

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



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