



JUDICIAL

# Hellholes<sup>®</sup>

2021/22



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

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

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

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

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

– The [New York Law Journal](#) 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](#)

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

– Madison County Board member and Judiciary Chair Mike Walters talking about the “[terrible drain](#)” the infamous asbestos docket has been on the county’s economy.

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

– “The Cost of Lawsuit Abuse: An Economic Analysis of Louisiana’s Coastal Litigation” by the [Pelican Institute for Public Policy](#)

# Preface

Since 2002, the American Tort Reform Foundation's (ATRF) Judicial Hellholes® program has identified and documented places **where judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner**, generally to the disadvantage of defendants. More recently, as the lawsuit industry has aggressively lobbied for *legislative* and *regulatory* expansions of liability, as well, the Judicial Hellholes® report has evolved to include such law- and rule-making activity, much of which can affect the fairness of any given jurisdiction's civil justice climate as readily as judicial actions.

The content of this report builds off the American Tort Reform Association's (ATRA) real-time monitoring of Judicial Hellhole® activity year-round at [JudicialHellholes.org](https://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.*

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

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# Executive Summary

The 2021- 2022 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 CALIFORNIA** “The Golden State” once again regains its position as the No. 1 Judicial Hellhole® thanks to its relentless pursuit of liability-expanding principles. California’s appellate courts are the first to hold e-commerce companies strictly liable for products sold on their sites. 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) lawsuits and the state’s unique Lemon Law provides windfalls for plaintiffs’ lawyers. In addition to the troublesome courts, the activist attorney general continues to push an expansive view of public nuisance law and the legislature ignores the need for reform and pushes a liability-expanding agenda.

**#2 NEW YORK** The “Empire State” is mounting a strong challenge for the No. 1 spot as the state’s leadership seems intent on creating the worst legal climate in the nation. The gap between California and New York is narrow, as the two jurisdictions battle it out for the most “no-injury” class action lawsuits and the most claims under the Americans with Disabilities Act. New York also has an activist attorney general that is on the front lines of the battle between climate change activists and energy companies. The state is a preferred jurisdiction for asbestos litigation and, like California, the legislature ignores the need for reform and continues to push a liability-expanding agenda.

**#3 GEORGIA SUPREME COURT** The significant deterioration of the “Peach State’s” civil justice system has propelled the state supreme court to its highest-ever ranking at No. 3. The Georgia Supreme Court eliminated apportionment of fault in certain cases and expanded bad faith liability for insurers. It also adopted an expansive view of jurisdiction of its courts over out-of-state businesses. Nuclear verdicts are bogging down business and third-party litigation financing is playing an increasing role in litigation.

**#4 PHILADELPHIA COURT OF COMMON PLEAS & THE SUPREME COURT OF PENNSYLVANIA** The “Keystone State’s” fall from the No. 1 position was in no way a reflection of progress or improvements made in the state, but rather indicative of the number of issues plaguing other jurisdictions. The Philadelphia Court



**JUDICIAL  
Hellholes®**  
2021/22

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of Common Pleas continues to be a preferred court for mass torts. 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. The state’s comparative fault system is in jeopardy and the Pennsylvania Supreme Court issued several liability-expanding decisions, including one that will spur more consumer class actions.

**#5 COOK, MADISON AND ST. CLAIR COUNTIES, ILLINOIS** This trio of Illinois counties is a magnet for asbestos litigation and “no-injury” lawsuits stemming from the state’s Biometric Information Privacy Act (BIPA). Making matters worse, the Illinois General Assembly is one of the most plaintiff friendly legislatures in the country and Governor J.B. Pritzker supports a liability-expanding agenda to the detriment of Illinois citizens and small businesses.

**#6 LOUISIANA** The optimism expressed in last year’s Judicial Hellholes® report that Louisiana’s litigation environment was moving in the right direction faded in 2021. State leadership impeded progress and the state’s civil justice system failed to improve. 2021 brought a veto of a much-needed bill to rein in deceptive lawsuit advertising practices and 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.

**#7 CITY OF ST. LOUIS** A perennial Judicial Hellhole®, the City of 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. The City of St. Louis Circuit Court is notorious for allowing blatant forum shopping and permitting “junk science” to permeate the court room. Additionally, there is uncertainty around the state’s standard for punitive damages, which is dangerous in a court known for excessive awards.

**#8 SOUTH CAROLINA ASBESTOS LITIGATION** A newcomer to the Judicial Hellholes® list in 2020, South Carolina’s consolidated docket for the state’s asbestos litigation has developed a reputation for discovery abuse, unwarranted sanctions, low evidentiary requirements, and multi-million-dollar verdicts. As a result, the state has become a hot spot for asbestos claims. While the volume of litigation dramatically decreased this year, in large part due to COVID-19 shutdowns, the court’s tendency to favor plaintiffs continues.

## WATCH LIST

Beyond the Judicial Hellholes®, this report calls attention to five 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. Without these reforms, the trial bar is still able to capitalize, and they know it. Issues that need to be addressed include inflated medical damages, bad faith reform, litigation financing, and attorneys’ fees multipliers.

**COLORADO** The “Centennial State” remains on the Watch List due to its courts allowing scientifically dubious expert testimony and the state legislature’s propensity to enact liability-expanding legislation that targets the state’s employers.

**TEXAS’S COURT OF APPEALS FOR THE FIFTH DISTRICT** A newcomer to the report, the Dallas court has developed a reputation for liability-expanding decisions. The court disregarded the state’s longstanding prohibition on introducing evidence about different products and dissimilar accidents and held a defendant

liable for injuries caused by a product that exceeded safety standards. The Texas Supreme Court overturned the court's failure to apply the apex doctrine, a rule that prevents harrasing high-level executives by subjecting them to depositions where they have no first hand knowledge.

**MARYLAND** Maryland's legislative session was disappointing, but not disastrous. Lawmakers abandoned two bills that would have provided much needed COVID-19 liability protections, but no significant liability-expanding bills were passed. Despite the Court of Special Appeals' reversal of the largest medical malpractice verdict in U.S. history, Maryland's medical malpractice climate remains unstable. The Baltimore Circuit Court is steadily working through the decades-long asbestos backlog, which primarily consists of stale, meritless filings from the notorious Law Office of Peter Angelos.

**MINNESOTA** After spending three years on the Judicial Hellholes® list, Minnesota drops down to the Watch List thanks to inactivity caused by COVID-19 shutdowns rather than any reforms or improvements by the courts or legislature. Minnesota still has some of the most plaintiff-friendly medical malpractice laws in the country, a lenient evidentiary standard that allows for admission of junk science and is facing the effects of a 2020 Minnesota Supreme Court ruling allowing third-party litigation financing. In addition, 2021 brought disappointing litigation developments in the "Gopher State" relating to climate change and strict liability for e-commerce platforms.

## 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 Utah Supreme Court's decision to embrace the theory of 'take home exposure' theory in asbestos litigation and the lack of transparency surrounding the Kentucky Attorney General's hiring of contingency fee lawyers to pursue the state's pension plan litigation.

## POINTS OF LIGHT

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

Among the positive decisions, the Missouri Supreme Court upheld the state's statutory limit on non-economic damages in medical liability cases, the Texas Supreme Court prevented 'phantom damages,' the Oklahoma Supreme Court rejected the improper expansion of public nuisance law, and the Mississippi Supreme Court protected the ability to receive a fair trial and rejected junk science. Additionally, the report shines a bright spotlight on all the positive steps taken by the Florida Supreme Court and Governor Ron DeSantis to establish a more fair and balanced civil justice system in the state of Florida.

In addition to court actions, five state legislatures enacted significant, positive civil justice reforms in 2021, including elimination of 'phantom damages' in Montana, and improving the fairness of asbestos litigation in North Dakota, Tennessee and West Virginia. West Virginia also established an intermediate court of appeal and enacted legislation allowing juries to consider whether a driver or passenger wore a seat belt in civil cases.

Additionally, 20 states [enacted](#) laws that protect healthcare providers, businesses, schools, manufacturers of personal protective equipment, and others from meritless claims during the COVID-19 pandemic. These laws strike a balance that protects public safety without jeopardizing the ability of businesses to operate and reduce the threat that individuals and organizations that are providing vital medical care, products, and services during the pandemic will be rewarded with a lawsuit.

## CLOSER LOOKS

**MASS ARBITRATION... THE NEW CLASS ACTION?** In recent years, arbitration has come under attack by the plaintiffs' bar and its allies. Legislatures and courts in Judicial Hellholes® like California have tried to limit the use of arbitration, specifically in the employment law context. The plaintiffs' bar has even been able to get Congress to consider limiting arbitration through the Forced Arbitration Injustice Repeal Act (FAIR) Act. While one faction of the trial bar seeks to eliminate arbitration entirely, another more entrepreneurial group seeks to profit from the process. Historically, arbitration preserved claims as individual matters – not ones that are treated as a monolithic “class.” That distinction, however, may be changing with recent cases being handled by plaintiffs' lawyers as “mass arbitrations.”

**COVID-19 LITIGATION AND LIABILITY PROTECTION** During the COVID-19 pandemic, businesses are struggling to operate and reopen safely, healthcare providers are treating patients with limited beds and staff, and manufacturers have shifted their operations to make needed personal protective equipment. The last thing they need to worry about is more lawsuits. To help reduce this concern, many states are providing assurance to businesses and others that if they act responsibly, they will have some degree of liability protection. Many governors acted early on through executive orders, most of which addressed only healthcare liability. State legislatures followed with broader laws. Almost two years into the pandemic, employers now face additional liability concerns due to vaccine mandates.

**COMMEMORATING THE 20TH ANNIVERSARY OF THE JUDICIAL HELLHOLES® REPORT** The American Tort Reform Foundation began publishing its annual Judicial Hellholes® report and rankings in 2002. Over the past twenty years, some have heeded the warning of being named a Judicial Hellhole®, actively making changes to rebalance their civil justice systems. Others, however, remain in the dregs, making little improvement or even becoming more deeply entrenched, year after year. Introducing the “Escaped” List and the “Everlasting Judicial Hellholes®”

# Judicial Hellholes®



## ISSUES

- Baseless Prop-65 lawsuits thrive in courts, volume skyrockets
- Small businesses weighed down by frivolous PAGA lawsuits and ADA litigation
- State's unique Lemon Law provides windfall for plaintiffs' attorneys
- Activist attorney general continues to push expansive view of public nuisance law
- Legislature ignores need for reform; pushes liability-expanding agenda
- Hotbed for asbestos litigation

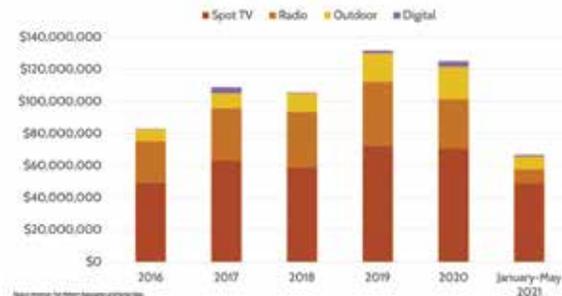
After a two-year hiatus, the “Golden State” has once again reclaimed its spot atop the Judicial Hellholes® list. While the state’s demotion was due to the plethora of issues that faced former-Number 1, the Philadelphia Court of Common Pleas and the Supreme Court of Pennsylvania, and not a result of reform; this year it is too hard to ignore the significant lawsuit abuse and liability-expansion occurring in California.

## PROP-65 LITIGATION ON THE RISE AS BOUNTY HUNTER PLAINTIFFS TARGET BUSINESSES ACROSS THE STATE

[Proposition 65](#), the originally well-intentioned law enacted in 1986, is one of the plaintiffs’ bar’s favorite tools to exploit. Baseless Prop-65 litigation unjustly burdens companies that do business in California. The money companies spend on compliance and litigation unnecessarily drives up the cost of goods for California consumers. **Prop-65** subjects consumers to ridiculous warnings declaring that most everything

## LEGAL SERVICES ADVERTISING SPENDING

### CALIFORNIA



Plaintiffs’ lawyers are well aware of the courts’ propensity for liability-expanding decisions and spend millions of dollars on advertising. Local trial lawyer ads [increased more than 115%](#) between 2016 and 2020 while the spending on those ads increased by more than 50%. Through May of 2021, trial lawyers spent almost \$67 million on over 707,000 ads.

## ECONOMIC IMPACT OF LAWSUIT ABUSE

### CALIFORNIA

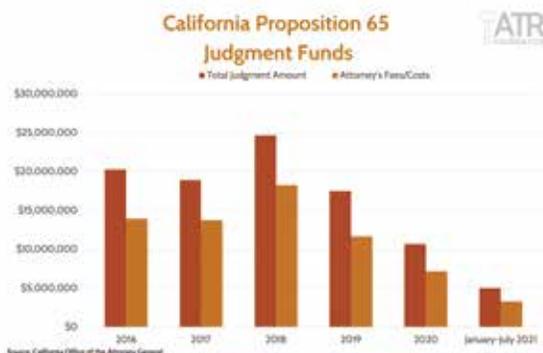
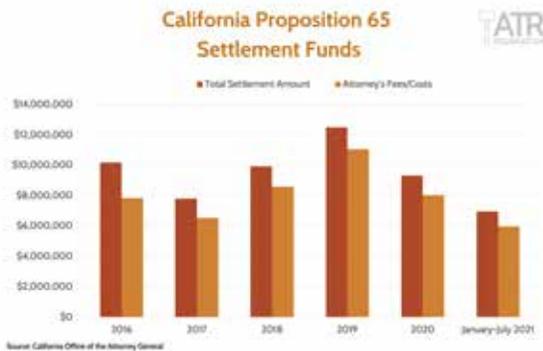
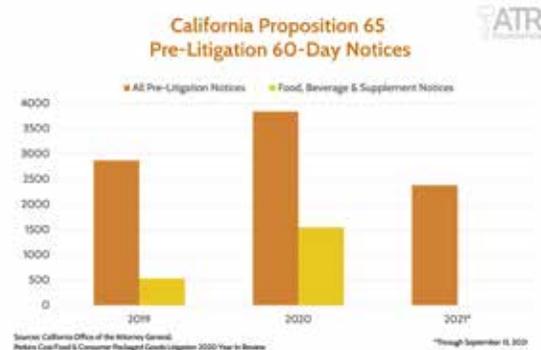
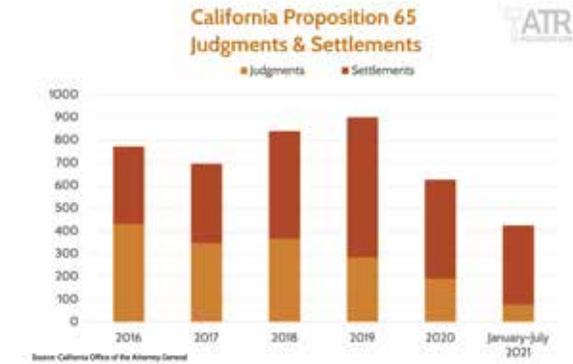
Lawsuit abuse and excessive tort costs wipe out billions of dollars of economic activity annually. California residents pay a “tort tax” of **\$574** per person and **206,474** jobs are lost each year, according to a [recent study](#) by John Dunham & Associates. If California enacted specific reforms targeting lawsuit abuse, the state would save over **\$22 billion**.

causes cancer. It also harms small businesses that do not have the in-house expertise or means to add the necessary warnings or handle litigation.

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 listed chemicals that state environmental regulators deem carcinogenic or otherwise toxic. 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. In fact, California saw a shocking rise in Prop 65 pre-litigation notices to the food and beverage industry in 2020, jumping from 534 in 2019 to 1,546 in 2020. As of November 2021, plaintiffs' lawyers had sent more than 2,600 litigation notices to businesses across the state.

This activity is primarily driven by several new, aggressive bounty hunter plaintiffs who are searching for payouts despite not suffering any injuries. A vast majority of the notices claim that plaintiffs' lawyers or advocacy groups detected traces of acrylamide, lead, and cadmium in products, accounting for more than 85% of all notices received by food, beverage and supplement companies.



According to the California Attorney General's office, businesses settled 435 Prop-65 claims in 2020 totaling \$9.3 million. About 86% of that amount, more than \$8 million, went to plaintiffs' attorneys. There were also 191 judgments in 2020 totaling \$10.7 million, with \$7.2 million (67%) going to plaintiffs' attorneys.

Through October 2021, Prop 65 activity has already exceeded the prior year. As of November 15, 2021, businesses have spent almost \$11.5 million to settle 556 Prop 65 claims. As in 2020, 86% of that amount, \$9.9 million, has gone to plaintiffs' attorneys. In addition, there have been 138 Prop-65 judgments in 2021 totaling almost \$9.8 million, with \$5.9 million of this sum (60%) going to attorneys.

### Glyphosate

The most infamous Prop-65 case involves Bayer's Roundup® products. California added the popular weed killer's active ingredient, glyphosate, to the

Prop-65 listing in July 2017. 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)**.

In June 2020, a federal judge pushed back against California’s baseless warning requirement and that decision is now on appeal to the **Ninth Circuit Court of Appeals**. **Federal Judge William Shubb** [ruled](#) that California cannot require Bayer AG to label its glyphosate-based weedkiller Roundup® as “known to the state of California to cause cancer.” **Judge Shubb** stated “Notwithstanding the IARC’s determination that glyphosate is a ‘probable carcinogen,’ the statement that glyphosate is ‘known to the state of California to cause cancer’ is misleading. Every regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does.”

The **U.S. Chamber of Commerce, California Farm Bureau Federation** and others are [urging the Ninth Circuit](#) to uphold the lower court’s decision. The groups argue that ordering companies to carry “subjective and stigmatizing speech” violates First Amendment rights. The **California Farm Bureau Federation** observed that the availability of glyphosate is critical to the agricultural industry, not only allowing farmers to improve crop yields, but also to protect the environment. The **U.S. Chamber** pointed to the “[highly misleading](#)” and “[heavily debated](#)” nature of California’s mandated warnings.

The **EPA** also [has explicitly challenged](#) California’s designation of glyphosate as a carcinogen. The federal agency told all glyphosate registrants to remove Prop-65 warnings because the language (stating that glyphosate is carcinogenic) constitutes a false and misleading statement that violates the Federal Insecticide, Fungicide, and Rodenticide Act’s prohibition against misbranded substances.

### ***Glyphosate Personal Injury Cases***

Unfortunately, California courts rely more on plaintiffs’ attorneys than scientific experts when making these important determinations. In May 2021, a Ninth Circuit judge affirmed a \$25 million verdict involving glyphosate warnings on Roundup®. The judge 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 standards and instructions do not preempt state law because the EPA’s approval of the Roundup® labels do not carry the force of law, a requirement for federal preemption.

This case is [on appeal](#) to the **U.S. Supreme Court**. Bayer claims that the Ninth Circuit’s errors will allow companies to be severely punished 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 would allow a company to be punished under state law for not including a label that is disallowed by federal regulators.

In August 2021, a California appellate court [affirmed](#) a trial court’s \$87 million award for a couple’s claim that exposure to glyphosate gave them non-Hodgkin’s lymphoma. The lawsuit consisted of design defect and failure to warn claims under California state law, with the court again rejecting Bayer’s argu-

***“Notwithstanding the IARC’s determination that glyphosate is a ‘probable carcinogen,’ the statement that glyphosate is ‘known to the state of California to cause cancer’ is misleading. Every regulator of which the court is aware, with the sole exception of the IARC, has found that glyphosate does not cause cancer or that there is insufficient evidence to show that it does.”***

– Judge William Shubb

ment that the claims are preempted by federal law. In November 2021, the California Supreme Court [denied](#) Bayer's request to hear the case leaving the massive verdict intact.

While California has hosted multi-million glyphosate verdicts, juries are not always willing to overlook science and pin the blame on a business for the tragedy of a person's cancer diagnosis. In October 2021, for example, a Los Angeles jury [found](#) that the plaintiff's family's use of Roundup® in their yard and his school's use of the product in its fields was not the cause of his lymphoma.

### **Settlement Discussions**

On May 26, 2021, **U.S. District Judge Vince Chhabria** [refused to approve](#) a \$2 billion class action settlement to cover future claims that Roundup® caused cancer because it would do little to help class members.

The \$2 billion settlement would have provided up to \$200,000 for each class member who was exposed to Roundup® and later was diagnosed with non-Hodgkin's lymphoma. It would have allocated \$50 million to a fund for "extraordinary" cases allowing individuals to be compensated more than \$200,000. The proposed settlement of future claims followed a separate \$9.6 billion settlement by Bayer in 2020 for current Roundup® claims.

### **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 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. Becerra](#), **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. This decision is on appeal to the Ninth Circuit.

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 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.

## **SMALL BUSINESS TARGETED BY FRIVOLOUS LAWSUITS**

### **California's "Sue Your Boss" Law**

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

California and president of Holt of California.

PAGA authorizes “aggrieved” employees to file lawsuits seeking civil penalties on behalf of themselves, other employees, and the State of California for labor code violations. Many PAGA lawsuits revolve around technical nitpicks, such as an employer’s failure to print its address on employees’ pay stubs, even though the address was printed on the paychecks themselves.

[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 February 2021, an intermediate court held that venue in PAGA cases is not limited to the individual employee’s location because he or she is suing on behalf of all employees at all locations. In [Crestwood Behavioral Health, Inc. v. Superior Court](#), the plaintiff filed a PAGA claim against her former employer in Alameda County. The plaintiff worked in Solano County and the defendant’s principal place of business was Sacramento County. The court allowed the case to proceed because the defendant owned two additional facilities in Alameda County. Plaintiffs’ lawyers will abuse this venue provision to bring PAGA claims in courts viewed as most favorable to plaintiffs.

California courts also have allowed plaintiffs to circumvent arbitration clauses by refusing to enforce them in PAGA claims. In July 2021, the **California Supreme Court** [denied Uber’s petition](#) to review whether companies can require workers to arbitrate PAGA claims. The Court did not give any reason for denying review, leaving the issue to lower courts. Courts across the state have ruled that because employees act as agents of the state when filing PAGA cases, pre-dispute arbitration provisions in employment contracts are invalid. The state is not a party to the employment contract, and therefore, PAGA litigation is not bound by the contract provisions.

Uber has [argued](#) that the **Federal Arbitration Act (FAA)** and U.S. Supreme Court decisions interpreting that law do not permit state courts to disregard agreements to arbitrate disputes, including claims brought under PAGA.

### Good News

In May 2021, the **Ninth Circuit** held in [Magadia v. Wal-Mart Associates, Inc.](#) that plaintiffs must have experienced an actual injury from the alleged violation of the labor code to pursue a PAGA action in federal court. Previously, plaintiffs would bring PAGA claims and argue they had standing to sue because they were standing “in the shoes of the State” as they do in what is known as a *qui tam* action. Following this decision, a PAGA plaintiff must show actual Article III standing to bring a claim, and a plaintiff’s standing to maintain another claim does not establish standing to maintain a separate PAGA action.

The Ninth Circuit [found](#) that PAGA differs from the traditional *qui tam* theory because PAGA actions implicate the interests of third parties other than the State. It reached this decision in a case in which a plaintiff brought a class action against Walmart alleging four separate causes of action: unpaid meal break premiums, inaccurate itemized wage statements, unfair and unlawful business practices, and PAGA violations. The district court awarded over \$101 million in damages and civil penalties for the alleged wage statement violations, from which Magadia had suffered. The district court also awarded \$70,000 in PAGA civil penalties based on meal period premium violations, which Magadia did not experience but still brought on behalf of other employees.

The **Ninth Circuit** reversed the judgment and award for both the wage statement violations and the meal period premium judgement. The Court held that Magadia lacked standing to bring the PAGA claim because he himself experienced no such violation. Instead of grouping the meal period premium claim with the wage statement claim, the Court treated the two actions as separate.

### ‘Americans With Disabilities Act’ Lawsuit Abuse

In 2020, [California again led the country](#) with the most 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. That year, lawyers

filed 5,869 of these ADA cases in California’s federal courts. **New York**, the next highest state, had less than half this amount, 2,238. California’s 2020 ADA filings broke the state’s record number of lawsuits by 22%, a figure that is especially shocking in a year where there was a national decrease in ADA lawsuits – likely due to the pandemic. Through June 30, 2021, [California led](#) all states in ADA lawsuit filings with 3,340, more than half of the 6,304 filed nationally.



California also is seeing a jump in [website accessibility lawsuits](#), going from 10 in 2018 to 120 in 2019 to 223 in 2020. 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 accessibility needs. Among the details that the lawsuits claim should be included are the dimensions of space under accessible desks and sinks. Seven plaintiffs, all represented by the same law firm, have filed over 450 lawsuits.

In California, penalties for ADA violations are much higher due to the state’s [Unruh Civil Rights Act](#), which provides for a fine of [\\$4,000 per violation](#), a fine [other states](#) do not have, plus attorneys’ fees. Often these so-called “violations” are as minor as a mirror that is an inch too high or a sidewalk or parking lot that is angled one degree too much.

Small business’ efforts to fight back against the abuse suffered a disappointing setback when the **California Supreme Court** refused to review a case brought by the Riverside District Attorney that was dismissed by lower courts.

In that instance, **Riverside County District Attorney Mike Hestrin** sued multiple attorneys in April 2019, alleging they engaged in ADA “shakedowns” of small businesses. The complaint claimed that the attorneys violated the **California Unfair Competition Law (UCL)** and false advertising laws. The lawyers sought to abuse the system by seeking out minor ADA violations to make easy money at the expense of small businesses. The **Riverside Superior Court** [dismissed the case](#), holding that litigation privilege precluded this suit.

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

Unfortunately, in December 2020, the Court of Appeals [affirmed the dismissal](#). The court agreed with the lower court’s finding that California’s litigation privilege applied to the District Attorney’s UCL claim and made no material findings on the allegations themselves. In April 2021, the **California Supreme Court** [denied](#) a petition for review.

### Worker Classification Battle Wages On

In November 2020, California voters delivered a huge victory for Rideshare services like Uber and Lyft and those who rely on these services for affordable transportation. **Proposition 22** passed, which granted ride-hail and delivery companies an exemption from treating its drivers as employees, as required by **A.B. 5**.

**A.B. 5**, enacted in September 2019, codified the [California Supreme Court’s adoption](#) of what is known as the “**ABC Test**,” a more stringent standard for determining whether a person is an employee or indepen-

dent contractor. The bill amended the law by presuming workers are employees unless the business can prove three elements. The law specifically targeted the [gig economy](#) like Uber, Lyft and DoorDash that use digital platforms to connect workers with customers.

The Prop 22 victory was short-lived, however. In August 2021, **Alameda County Superior Court Judge Frank Roesch** [ruled](#) that **Prop 22** is unconstitutional and unenforceable. Although [Prop 22](#) passed with 59% of the vote of California citizens in November, Judge Roesch said that the measure only serves to protect the economic interests of the companies rather than California citizens and workers.

## LEMON LAW ABUSE

Lawsuit abuse under California's [Song-Beverly Consumer Warranty Act](#), otherwise known as the California lemon law, has reached a fever pitch and judges are [calling for the Legislature](#) to step in.

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.

In May 2021, an intermediate court [held](#) that "it is an error of law for the trial court to reduce or deny an award of attorney's fees in a civil rights or public interest case based on a plaintiff's rejection of a [settlement] offer when the ultimate recovery has exceeded the rejected offer." In [Reck v. FCA](#), a couple sued the automaker under California's lemon law for a defective Chrysler. FCA offered to settle at \$81,000, including reasonable attorney's fees, which amounted to \$15,000. Reck's counsel advised him to reject the offer, and the case went to trial. On the second day of trial, the parties settled at \$89,500, only an \$8,500 increase from the initial offer, but the attorneys' fees requested skyrocketed from \$15,000 to \$187,247 - a \$172,247 increase. Despite the straightforward nature of the case, plaintiff's counsel added a second law firm before trial bringing the total number of lawyers involved in the case to 13.

The trial court found the fees and additional lawyers to be excessive and did not require the additional fees to be paid. It limited attorneys' fees to those incurred up through the initial rejection along with certain fees included after the settlement, totaling \$30,237. The plaintiffs appealed.

The appellate court [remanded](#) the decision, ordering the trial court to determine a reasonable attorneys' fee for actual hours expended. While the court did not approve the initially requested \$187,247, it said the trial court erred by *categorically* denying *all* attorneys' fees incurred after the initial offer so long as the final settlement beats the rejected offer, no matter how small the difference may be.

This decision will incentivize plaintiff's attorneys to advise their clients to reject reasonable settlement offers and go to trial. Attorneys can rack up fees and over-litigate simple cases, understanding that so long as the resulting settlement increases by *any* amount, they will likely receive higher fees.

## Judge Calls on Legislature for Reform

In [Spitzfaden v. FCA US LLC](#), plaintiffs' lawyers sought \$148,826 in fees, plus costs of almost \$35,000. The accepted settlement was \$110,000 and the car at issue cost \$32,000 (brand new). **Judge Timothy Taylor**, the judge overseeing the case, repeatedly stated that California's lemon law system is abusive and caters to plaintiffs' attorneys. He found the fees to be "clearly out of proportion to the results obtained" but argued

*"The lemon law plaintiff's bar has been emboldened to over-litigate cases the manufacturers regularly seek to settle, with no benefit to the injured consumer. Indeed, the over-litigation for purposes of padding the fee application can actually injure the consumer by delaying resolution of the case and the buy-back of the vehicle."*

– Judge Timothy Taylor,  
*Allen v. Jaguar Land Rover N. Am.*

that other courts have made it clear that trial courts lack the authority to rein in the system. He called on the legislature to amend the law to ensure the reasonableness and legitimacy of attorney's fees and costs.

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 attorney fees.

In 2019, plaintiffs-side consumer law firms filed two suits in Los Angeles County against their high-profile former co-counsel, **Knight Law Group**. 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 cases are scheduled to go to trial in [February](#) and [April](#) 2022.

[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 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, encourages misleading timekeeping practices and makes pursuit of fees the centerpiece of this "consumer" litigation.

Although the Los Angeles lawsuits describe using two firms, court filings show Knight lemon law cases commonly involve three or even four law firms entering appearances for a plaintiff. The **U.S. District Court for the Central District of California** recognized the obvious wastefulness of this practice in [Luna v. FCA US LLC](#) in 2020: "[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."

## HOME OF 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 2020, California came in second with [58 new food and beverage class action filings](#). New York had 107 and the next closest state, Missouri, only had 13. California had the most class actions targeting dietary supplements with 25. Overall, California hosts [about 25%](#) of the nation's food litigation.

## Lucrative Nature of Litigation Exposed

In June 2021, **U.S. District Judge William Orrick** [approved a \\$15 million settlement](#) ending a class action against Post Foods LLC. The lawsuit, filed in 2016, alleged that Post cereal labels led consumers to believe that

the cereals were healthier than they really were. By indicating truthfully that the products contained “no high fructose corn syrup” and were “Made with Natural Wildflower Honey,” the suit claimed, consumers would overlook that cereals such as Honey Bunches of Oats, Honeycomb, and Waffle Crisp, contain added sugar.

The details of the settlement expose the lucrative nature of these lawsuits for the plaintiffs’ bar. The [plaintiffs’ attorneys received \\$5.5 million](#) in fees, more than a third of the total award, plus nearly \$1 million as reimbursement for litigation expenses. Meanwhile, the lead plaintiffs were awarded \$5,000 each, and consumers each received a few dollars if they completed a claim form before the deadline.

There are limits, however, for how much money courts will entertain awarding lawyers in these creative but often ridiculous lawsuits. For example, in June 2021, [the Ninth Circuit rejected](#) a proposed settlement of a class action alleging Wesson Oil did not qualify as “100% natural” because it allegedly contained ingredients made from GMOs. In that instance, the lawyers would have received seven times more money in fees and costs than the class members they purportedly represented. The appellate court ruled that a settlement that awards \$5.85 million to attorneys in fees and nearly \$1 million in costs, but sets aside just \$1 million to be divvied up among 15 million consumers is not fair, reasonable, or adequate. In fact, the settlement was premised on the lawyers, “virtually worthless” achievement of getting a food maker to agree to stop using labeling on a product it no longer owned. The **Ninth Circuit** summed up the case, [Briseno v. Henderson](#), as “How to Lose a Class Action Settlement in 10 Ways.”

## ACTIVIST AG PUSHING EXPANSIVE VIEW OF PUBLIC NUISANCE LAW

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

### Climate Change Litigation

In June 2021, the **United States Supreme Court** refused to intervene in the legal battle waging between California municipalities and the energy sector over climate change, leaving intact a Ninth Circuit decision that the litigation belonged in state court.

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

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

– U.S. District Judge William Alsup

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

On appeal, the **Ninth Circuit** missed an opportunity to push back on activist attorneys’ attempts to improperly expand public nuisance law. Unfortunately, the Court [remanded the case](#) to state court, reasoning that the cities’ claims arose under state law, and therefore, federal courts did not have jurisdiction.

## Update In State Opioid Litigation

This summer a landmark trial took place in **Orange County Superior Court** before **Judge Peter Wilson**. The **City of Oakland, Los Angeles County, Orange County** and **Santa Clara County** sued four drug makers under public nuisance law, alleging that pharmaceutical marketing caused widespread opioid abuse. The municipalities sought \$50 billion from the drug makers, including Johnson & Johnson and Endo Pharmaceuticals.

**Motley Rice** represented the cities and counties, as private contingency fee lawyers from similar litigation brought across the country.

On November 1, **Judge Wilson** [tentatively rejected the allegations](#) finding the plaintiffs failed to prove the pharmaceutical companies created an actionable public nuisance for which the defendants are legally liable.

**Judge Wilson** said that “[there is no evidence](#) to show that the rise in prescriptions was not the result of medically appropriate provision of pain medications to patients in need.” Without such evidence, the government plaintiffs would have to show that the drug makers’ contributions to the opioid crisis were more than “negligible or theoretical,” which they failed to show.

**Judge Wilson** said his legal findings “are in no manner intended to ignore or minimize the existence and extent of the ongoing opioid crisis,” while noting that the drug makers do not dispute the existence of the crisis. J&J echoed Judge Wilson in its statement following the ruling, saying it “recognize[s] the opioid crisis is a tremendously complex public health issue, and we have deep sympathy for everyone affected.”

The plaintiffs’ attorneys said the plaintiffs plan to appeal the judgement.

The case was one of the oldest in the nationwide wave of opioid lawsuits accusing drug manufacturers of recklessly marketing addictive painkillers. While several trials have commenced across the country, [Oklahoma’s 2019 judgement](#) against Johnson & Johnson remains the only one with a verdict; however, on November 9, 2021, the **Oklahoma Supreme Court** overturned the trial court’s decision.

Americans are rightly concerned about the opioid crisis. The reality is that this complicated problem requires a comprehensive solution. Our civil justice system exists to resolve disputes—not to perform the functions of legislators and regulators. Broader public policy challenges should be addressed by those entrusted with such responsibilities. In the case of opioids, that includes Congress, state legislators and federal and state public health officials and regulators. They are obliged to serve and protect the public, and they are accountable to us all. By contrast, lawyers operating on a contingency fee basis are driven by a profit motive.

## STRICT LIABILITY FOR E-COMMERCE COMPANIES

In 2020, the [California Supreme Court](#) refused to review *Bolger v. Amazon LLC*, a “[first-of-its-kind](#)” decision that allowed Amazon.com to be held strictly liable for products sold on its site.

In that case, a customer purchased a laptop battery from a third-party seller that exploded, causing severe injuries. The plaintiff sued both the third-party seller and Amazon. Amazon argued that it only provides services and is not a seller, manufacturer, or previous owner. In many cases, Amazon never handles the product at all and should not be found liable for alleged defects in such products. Following traditional product liability principles, the trial court held that Amazon could not be strictly liable because it was not the product’s seller. A state appellate court later reversed the trial court and found that Amazon put itself in the stream of distribution, and therefore, should be treated the same as a brick-and-mortar retailer.

In May 2021, the [California Court of Appeal](#) used the *Bolger* case as precedent, holding Amazon liable for injuries caused by an allegedly defective hoverboard sold by a third-party seller.

These decisions abandon the principle that strict liability applies only to those who design, make, or sell a product. Aside from courts in California and a [federal appellate court interpreting Pennsylvania law](#), most courts have not expanded strict liability law to third-party sellers. Recent examples include in the Supreme Courts of [Ohio in 2020](#) and [Texas in 2021](#).

## PRO-PLAINTIFF LEGISLATURE PUSHING LIABILITY-EXPANDING AGENDA

California remains one of a few states not to address COVID-19 liability concerns for businesses and individuals on the frontlines during the pandemic. Two thirds of states have enacted liability protections to date, and while [a bill](#) was introduced in California in 2021, legislators refused to grant it a hearing. California small businesses continue to be exposed to potential liability for COVID-related injuries and illnesses, even if the businesses follow health and safety protocols.

In place of passing much-needed reform, the legislature focused intently on expanding liability in a variety of ways.

### New Law Will Result in Skyrocketing Survival Damages, Insurance Costs

Under California's longstanding law governing survival actions, a personal representative of an estate can recover economic damages on behalf of a person who dies because of someone else's negligent or wrongful act. These economic damages are [limited to actual expenses](#) incurred by the decedent up until their death, including loss of wages and medical bills, as well as punitive damages meant to punish the wrongdoer. The [current statute](#) explicitly states that these recoverable damages "do not include damages for pain, suffering, or disfigurement," because those damages are personal to the decedent.

But after California's passing of [S.B. 447](#), an estate can now recover for pain and suffering, loss of consortium, emotional distress, and disfigurement on behalf of the decedent. In a state with tort damages already out of control, this bill's enactment will lead to awards in survival actions skyrocketing.

[Opponents argued](#) that the bill will essentially allow plaintiffs' attorneys to double dip into damages because the statute already allows punitive damage awards, with some suggesting plaintiffs' attorneys pushed the bill just so they could raise case valuations and settlement demands.

The new law will seriously impact California residents as well, with insurance premiums likely taking a steep rise once the effects of the bill set in. California insurance policies do not cover punitive damages, and the increased risk that insurers must cover pain and suffering awards in survival actions will lead to premiums that dig even deeper into their policyholders' pockets.

## END NOTES

In August 2021, the **California Supreme Court** [denied review](#) in *Phipps v. Copeland Corp.*, a lawsuit in which an HVAC technician claimed that his exposure to asbestos while working in the company's compressors caused his mesothelioma. The jury found Copeland, the only defendant remaining by the end of the trial, 60% responsible for the plaintiffs' \$25 million in noneconomic damages. Copeland appealed, arguing substantial evidence did not support the jury's allocation of fault in light of the plaintiff's exposure to asbestos from many other compressor manufacturers and others, and that the award was excessive. An appellate court affirmed the judgment.

The **Civil Justice Association of California (CJAC)** [urged](#) the state supreme court to review the case, particularly on the issues of comparative fault and jury discretion in increasing a defendant's share of damages. The appellate court held that the company did not introduce enough evidence of the fault attributable to other parties to overturn the jury's apportionment. The court also held that a jury may increase a defendant's share of damages above its causal contribution to the injury based on its "more culpable" state of mind.

The appellate court's opinion conflicts with precedent over who bears the burden in apportioning fault. By raising the defendant's burden of proof, the court's opinion puts defendants at risk of having to pay more than their fair share of noneconomic damages. The decision will likely have repercussions beyond asbestos cases, potentially affecting environmental, products liability, and construction defect litigation by neutralizing effective apportionment.



## ISSUES

- Record number of consumer protection lawsuits filed in NY courts
- ADA website accessibility lawsuit abuse on the rise
- Activist AG pursuing regulation through litigation
- A preferred jurisdiction for asbestos litigation
- Legislature ignores need for reform, pursues liability-expanding agenda

New York's race to the bottom (or the top) of the Judicial Hellholes® list continued in 2021, as the state's leadership seems intent on creating the worst legal climate in the nation. The gap between California and New York is narrow, as the two jurisdictions battle it out for the most "no-injury" class action lawsuits targeting the food and beverage industry and the most claims under the Americans with Disabilities Act. The two states also have activist attorneys general trying to regulate industries through litigation.

Rather than address the overwhelming need for liability protections for workers and businesses on the frontline of the pandemic, the state legislature pursued a liability-expanding agenda.

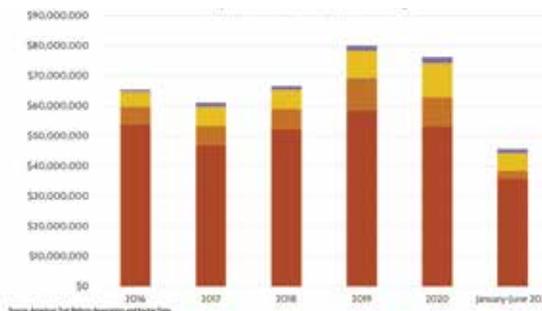
## RECORD NUMBER OF FOOD LAWSUIT FILINGS FLOOD COURTS

This year, **New York** is on pace to break the 2020 record of [183 consumer class action filings](#). In 2020, more food-related lawsuits pervaded New York courts than the next four states combined. According to the **New York Civil Justice Institute**, consumer class actions in New York [tripled](#) between 2017 and 2020, largely due to food and beverage lawsuits, which accounted for approximately 60% of such claims in 2020. Through June 30, 2021, [77 food marketing class actions](#) were filed 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 consults a nutrition label.

## LEGAL SERVICES ADVERTISING SPENDING

### NEW YORK

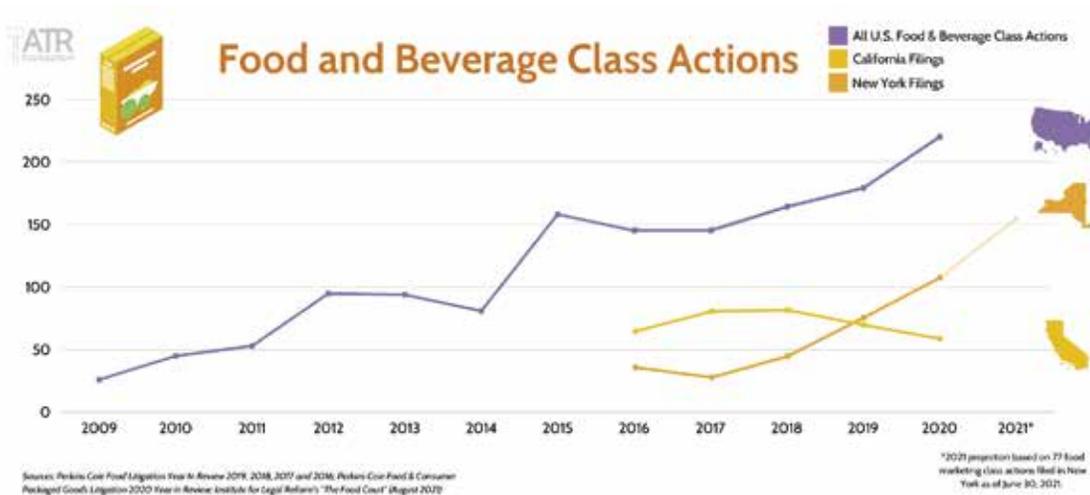


Lawyers know this is a Judicial Hellhole® – local trial lawyer ads [increased more than 65%](#) between 2016 and 2020 across New York state. Spending on those ads also increased more than 16% during that time period. Through June of 2021, trial lawyers spent almost \$46 million on over 660,000 ads.

## ECONOMIC IMPACT OF LAWSUIT ABUSE

### NEW YORK

New York residents are paying a "[tort tax](#)" of **\$1,450** per person. If the legislature chose to refocus its efforts on reform measures, the state would save over **\$28 billion**. These savings would support an additional **244,556** jobs and an increase of **\$53 billion** in increased economic activity annually.



The plaintiff may recover actual damages or \$50, whichever is greater, and courts may triple actual damages up to \$1,000 if the defendant knowingly or willfully engaged in the deceptive act.

In June 2021, the **New York Court of Appeals** [expanded](#) the application of the state’s consumer protection law to a business setting. The high court held that directing conduct to a “subclass of consumers” is sufficient to satisfy the statutory requirement that a defendant’s conduct was consumer-oriented, because the defendant’s conduct was not limited to “a private contract dispute, unique to the parties.” In other words, a defendant’s conduct does not need to be directed at all members of the public to satisfy the first element of the law.

Previous precedent defined consumers as those “who purchase goods and services for personal, family, or household use,” but in this case, defendants sold an annual treatise on New York tenant law, a book meant for business use. According to the state’s high court, it is immaterial that the conduct was only directed to legal professionals because “[GBL §349](#) is focused on the seller’s deception and its subsequent impact on consumer decision-making, not on the consumer’s ultimate use of the product.” Thus, [GBL §349](#) applies to products used exclusively in a business setting, not just products used for personal or household use.

Worse yet, the legislature is considering a bill that would encourage even more frivolous consumer protection lawsuits. [A. 2495A/S. 6414](#) expands the consumer protection law to prohibit not only “deceptive” acts, but also “unfair” or “abusive” acts, increases the minimum statutory damages from \$50 to \$2,000 and permits unconnected third-party organizers to sue for the alleged harm, even if the alleged violation is not consumer oriented.

### “Vanilla Vigilante” Finds New Targets

Infamous Long Island attorney **Spencer Sheehan**, also known as the “[Vanilla Vigilante](#),” continues to prolifically file lawsuits specializing in product flavoring. Sheehan filed [half](#) of the state’s consumer class action lawsuits in 2019 and almost two thirds in 2020.

2021 has been no different. In January, he filed a [lawsuit](#) on account of 7-Eleven’s marketing of “Yumions.” According to Sheehan, the bag features a depiction of a green onion, but the snack only contains onion powder, which does not provide the same health benefits as real onions. The complaint stated: “Since each part of the onion – bulb, root, stem, and skin – has unique flavor and aroma compounds, onion powder necessarily is unable to provide the ‘oniony’ flavor appreciated by consumers.”

He also filed another suit on account of [Whole Foods’](#) marketing of “Lemon Raspberry Italian Sparkling Mineral Water,” which the lawsuit claims misleads consumers into believing that the product contains an appreciable amount of lemon and raspberry. This lawsuit was voluntarily dismissed in August 2021.

In April 2021, [Sheehan & Associates](#) reached a settlement with [Blue Diamond](#) on behalf of a proposed class of consumers who purchased Almond Breeze vanilla-flavored products. The settlement, valued at approximately \$2.6 million, awards cash payments of up to \$1 per item with proof of purchase, and \$0.50

per item without proof of purchase. Plaintiffs’ lawyers could receive as much as \$550,000 for fees and costs, while the named plaintiffs would share \$25,000.

In October 2021, Sheehan [targeted](#) Pop-Tarts’ classic strawberry toaster pastry. The plaintiff sought \$5 million, claiming that the company’s marketing of its strawberry pop-tart deceived consumers because the pastry contains higher quantities of pears and apples than strawberries.

### Good News

In June 2021, **U.S. District Judge Raymond J. Dearie** [dismissed a consolidated proposed class action](#) brought by Sheehan against Mars Wrigley. Plaintiffs alleged that Mars Wrigley violated New York’s consumer protection laws by marketing its vanilla-flavored ice cream bars as “vanilla” because consumers are misled to believe that the product is flavored exclusively by vanilla beans. **Judge Dearie** found that plaintiffs failed to demonstrate that “a reasonable consumer acting reasonably under the circumstances would be misled by the phrase ‘vanilla ice cream’” because “[t]his 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.”

Since mid-2019, **Sheehan & Associates PC** has filed virtually identical complaints against, and forced quick settlements with, Nestle, Friendly’s, Blue Diamond, Califia, Trader Joe’s, and others.

## NEW YORK LEADS THE WAY WITH ADA WEBSITE ACCESSIBILITY ABUSE – BUT RELIEF MAY BE NEAR

New York led the nation in federal **Americans with Disabilities Act (ADA) Title III** website accessibility filings with [1,694](#) in 2020. The runner up, Florida, only produced 302 lawsuits. Three New York firms filed a vast majority of the cases - **Cohen & Mizrahi LLP**, **Gottlieb and Associates**, and **Mard Khaimov Law, PLLC**. These law firms represent [serial plaintiffs](#) in hundreds of lawsuits. For example, in June 2021, **Cohen & Mizrahi** filed nine lawsuits in one day on behalf of a single plaintiff.

New York’s surge in ADA Title III cases stems from two 2017 decisions, [Andrews v. Blick Art Materials, LLC](#) and [Marett v. Five Guys Enterprises LLC](#), in which two New York federal judges found that websites are subject to the ADA. However, in August of 2021, **New York District Judge Eric Komitee** [dismissed](#) a case against Newsday claiming that the newspaper company violated **ADA Title III** by failing to provide closed captioning for videos on its website. Departing from previous New York district court decisions, **Judge Komitee** concluded that websites are not covered by ADA Title III because the history and plain language of the statute confine the term “public accommodation” to physical spaces. This ruling has the potential to inspire other judges across the state and stem the tide of frivolous accessibility claims that congest New York courts and harm small businesses.



### More Good News

In June 2021, **Judge Brenda Sannes** of the **U.S. District Court for the Northern District of New York** [dismissed](#) 17 of plaintiff Deborah Laufer’s ADA cases against various hotels across the state for lack of standing. A self-proclaimed “tester,” Laufer contends that she advocates for disabled people by bringing civil rights claims against businesses that allegedly fail to comply with ADA regulations. Here, she claimed that numerous hotels failed to provide sufficient information regarding accessibility features and barriers on their online reservation systems (ORS). In the past three years, Laufer has brought 63 ADA lawsuits in the **Northern District of New York** and 551 others across the nation (including appeals).

**Judge Sannes** determined that being a “tester” fails to satisfy the requirements for standing. In order to demonstrate a “concrete and particularized” past injury and likelihood of future injury, Laufer would need to establish that she “had a purpose for using the [ORS] that the complained-of ADA violations frustrated” and that she intended “to return to the [ORS] to book a room, or at least to obtain information that would allow her to decide whether to book a room.”

After **Judge Sannes** permitted her to amend her complaints, Laufer alleged that she intended to travel to the areas surrounding defendants’ hotels; however, the court was not convinced given the massive time and financial commitment such a travel itinerary would entail. Additionally, Laufer had not mentioned “her vague desire to travel ‘all over’ New York State and the rest of the country” until she was prodded by the court.

## ACTIVIST ATTORNEY GENERAL REGULATING INDUSTRY THROUGH LITIGATION

### Climate Change Legal Battle

**New York City** continues to be on the forefront of regulation through litigation with respect to U.S. energy policy on climate change. NYC is currently suing energy producers, alleging they should be penalized for selling oil, gas, and other energy products by paying the City’s costs for future infrastructure projects, including seawalls, to protect it from storms and rising waters. **Judge John Keenan** of the **Southern District of New York** dismissed the initial lawsuit [because](#) “the serious problems caused [by climate change] are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government.”

In 2020, the City appealed Judge Keenan’s dismissal to the **U.S. Court of Appeals for the Second Circuit** and asked whether the City’s state tort law claims could be so leveraged to circumvent Congress and federal agencies. The City [argued](#) that state law applied because “there is no uniquely federal interest” in its ability to sue for local property damages. The energy producers [countered](#) that federal law applied because these cases invoke federal energy and emissions policies. In April 2021, the **Second Circuit** [affirmed the dismissal](#), determining that the issue of greenhouse gas emissions implicates global issues that are incompatible with the application of New York state law; therefore, federal common law applies and is displaced by the **Clean Air Act**.

Activist [Attorney General Letitia James](#) and her opportunistic trial lawyer friends are hellbent on holding the energy industry liable for climate change. Three weeks after the **Second Circuit** affirmed the dismissal, **New York City**, represented by [Sher Edling](#), filed another lawsuit advancing a different theory of liability.

**The City** [now contends](#) that the defendants violated **NYC Code § 20-700**, which bars “any deceptive or unconscionable trade practices in the sale ... or in the offering for sale ... of any consumer goods or services,” by including in their advertisements unsubstantiated claims and implied communications that falsely convey that they are environmentally responsible energy companies. For example, the lawsuit alleges just as the tobacco industry advertised “low-tar” and “light” cigarettes, energy companies advertise their fossil fuel product as emissions reducing and environmentally beneficial without disclosing that use of their products is harmful.

This new theory of liability is part of Sher Edling’s concerted effort to profit from this litigation across the nation. The firm represents other states, including [former Judicial Hellhole® Minnesota](#), in similar litigation.

*“[T]he serious problems caused [by climate change] are not for the judiciary to ameliorate. Global warming and solutions thereto must be addressed by the two other branches of government.”*

– Judge John Keenan, Senior U.S. judge  
for the Southern District of New York

## THIRD PARTY LITIGATION FINANCING

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

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

In 2020, the **New York Court of Appeals** was [asked to determine](#) whether a litigation financing agreement is usurious in certain instances. The Court had the opportunity to determine whether a specific litigation finance agreement constituted a loan or a "cover for usury." The **Ninth Circuit** [certified the question](#) to the **New York Court of Appeals** because "the result is likely to have wide-reaching implications" and because "[o]ther states that have addressed [the issue] have reached conflicting results." Unfortunately, the case settled in 2021 before the court had the opportunity to issue a ruling.

## NUCLEAR VERDICTS

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

The [New York Law Journal](#) points to how the rise in nuclear verdicts is "turning the New York court system on its head" and is "contributing to the demise of New York state."

In April 2021, the **Appellate Division, First Department** awarded a [record-high award of \\$20 million](#) in pain-and-suffering damages after plaintiffs' lawyers used an improper tactic known as "anchoring" to achieve a staggering verdict in the lower court. Anchoring occurs during summation, when lawyers suggest an unreasonably large award to the jury and that number becomes the starting point in a juror's mind.

In this case, *Perez v. Live Nation*, plaintiffs' lawyers asked a jury to award \$85 million in noneconomic damages to a worker who fell while assembling a booth for an event at Jones Beach. Even though the plaintiff is able to live alone, drive himself, and exercise at the gym, the jury obliged with an \$85.75 million pain-and-suffering award on top of \$13.5 million for medical care and lost wages. The trial court [lowered](#) the noneconomic damage award to \$40.6 million – an amount wildly beyond that which New York courts have permitted. The appellate court lowered this award to \$20 million.

Unlike some other states, New York law does not set a hard cap on awards for a person's pain and suffering, which cannot be objectively



measured. Instead, in New York, a verdict is “excessive or inadequate if it deviates materially from what would be reasonable compensation.” Courts look to prior awards for comparable injuries, sustained on appeal, for guidance. Prior to the recent dramatic rise in nuclear verdicts, only two New York appellate cases surpassed \$10 million in noneconomic damages and this number became known as the state’s “de facto” limit.

In July 2020, the **New York Law Journal** published a [three-part series](#) titled, “Ahead to the Past: The Evolution of New Rules of Engagement in the Age of Social Inflation and Nuclear Verdicts.” In this piece, the

**“Rather than provide just compensation, [nuclear verdicts] are thinly veiled efforts to punish the defendant that are nearly always awarded at the specific request of plaintiff’s counsel.”**

– New York Law Journal

authors discuss how plaintiffs’ attorneys employ a “how dare they defend” approach to litigation. This method allows for disproportionate compensation by fueling emotional outrage. They use specific language, such as “big corporations” and “hired guns” when speaking to the jury and encourage them to “send a message” to the defendants.

Tort law is meant to compensate, not to punish. As the authors [observe](#), “Rather than provide just compensation, [nuclear verdicts] are thinly veiled

efforts to punish the defendant that are nearly always awarded at the specific request of plaintiff’s counsel.”

Nuclear verdicts directly impact all New Yorkers, as they lead to higher insurance rates, higher consumer goods costs, and fewer jobs. Since public entities, such as public schools and the transit authority, are subject to these types of awards, nuclear verdicts also place taxpayers on the hook and place city services [at risk](#).

## MEDICAL LIABILITY

A 2021 report ranked **New York** as the [third worst state for doctors](#), due in part to high medical malpractice awards. New York tied with Massachusetts, Pennsylvania, South Dakota, and Alaska for the [highest medical malpractice award payout](#) amounts per capita.

COVID-19 forced health systems to prioritize crucial services and reduce services that do not provide proportional benefits relative to costs. Health care providers spend an estimated [\\$46 billion per year](#) conducting unnecessary tests and procedures to avoid medical malpractice liability. This practice, known as “defensive medicine,” drives practitioners out of rural areas due to the exorbitant cost of doing business. Data collected during the [COVID-19 pandemic](#), during which health care providers reduced defensive medicine practices, along with prospective monitoring of the reemergence of overuse, could reveal the full societal burden of overuse.

*“One little-known secret in the medical community is that it is not greedy doctors or insurance companies or hospitals that made health care so expensive. It is unnecessary tests and procedures doctors and hospitals must do in order to check off the boxes for the inevitable lawsuit. They are waiting to pounce on doctors and hospitals while wrapping themselves in the flag of ‘holding the medical establishment accountable’ and that keeps doctors and hospitals doing some things twice. And some things doctors know are unneeded but must do.”* –Hank Campbell, [Science 2.0 Article](#).

In December 2020, **Chief Administrative Judge Lawrence Mark** further stacked the deck against defendants with a new deposition order. The [new rule](#) limits depositions to seven hours per witness, which may [adversely impact defendants](#) by limiting their ability to collect crucial testimony from plaintiffs and essential nonparty witnesses. The complex nature of medical malpractice litigation typically necessitates multiple deposition sessions of essential witnesses to tease through years of medical care and treatment as well as information concerning chronic and preexisting conditions.

## ASBESTOS LITIGATION

New York City continues to be a preferred jurisdiction for asbestos litigation ranking third for most popular with a total of 310 filings in 2020. It once again ranked second for mesothelioma case filings in 2020, totaling 130. At the date of publication, 2021 data was not yet available.

### Over-Naming Defendants

A significant concern with New York City asbestos litigation is the over-naming of defendants. Because many former asbestos defendants are now bankrupt, plaintiffs indiscriminately name dozens of defendants with no proof of exposure, congesting the court system, wasting taxpayer dollars, and delaying plaintiffs' compensation.

According to a [recent study](#) that reviewed 488 NYCAL case filings from 2015-2020, the average number of named defendants in a single case is 30-40. One case filed in 2020 named 106 defendants. Of the 540 defendants named in the sample, 249 companies were dismissed from 100% of the cases in which they were named, while over 400 companies were dismissed from more than 50%.

### Personal Jurisdiction

In January 2021, the New York Court of Appeals [raised the bar](#) for defendants when asserting the affirmative defense of lack of personal jurisdiction in asbestos litigation. The Court held that defendants must unequivocally assert their defense at trial. In the case at hand, Defendant wrote in his answer, "Where applicable, Kohler preserves its right to object to personal jurisdiction of plaintiff over Kohler." The trial court [held](#) that this defense "lacked specificity and did not fairly apprise the plaintiffs of the objection..." Applying tortured reasoning, the court stated that the defendant only preserved the right to object later and did not explicitly raise the defense. The appellate court agreed and upheld the decision without issuing an opinion.

## SCAFFOLD LAW

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

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

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

Because the Scaffold Law adds hundreds of millions of dollars to New York public projects every year, three New York-based contractor groups and the New York State Conference of Mayors and Municipal Officials have [implored](#) U.S. Transportation Secretary Pete Buttigieg to waive the Scaffold Law for contractors working on the \$11.6 billion Hudson River Construction project. Additionally, the Scaffold Law is [impeding](#) affordable housing in New York State. Efforts to reform the law over the past several years consistently have fallen on deaf ears.

## LIABILITY-EXPANDING LEGISLATIVE AGENDA

Despite the demonstrable need for reform, the **New York Legislature** pursued an aggressive liability-expanding agenda in 2021.

One of the most egregious bills passed was [A.2543/ S.4730](#), which expands the state's **False Claims Act** to cover everyday tax disputes. The bill incentivizes avaricious trial lawyers to target large tax filers to fish for miscalculations and/or compel settlements. The trial bar argues that this legislation will benefit taxpayers, increase state revenues, and reduce instances of fraud – but a closer look shows that is not the genuine intent. If they truly intended to reduce fraud, it would be far more beneficial to leave everyday tax disputes with the Tax Department rather than move them into state courts where the costs and delays of litigation likely will drive outcomes for taxpayers as much or more than the merits of a case. Moreover, under this legislation, complex tax issues will be evaluated and decided upon by judges who may have little or no tax law expertise.

If **Governor Kathy Hochul** signs this bill, lawyers can be expected to target deep pockets rather than the most severe violations. This will turn tax compliance into a money-making operation instead of upholding legal compliance and the taxpayers' interests. The net effect could well be for trial attorneys to seek to review the work of every accountant in New York who advises wealthy clients in search of a disputable tax position that could result in their next payday.

Other concerning bills include:

- **Interest on Judgments for Summary Judgment** ([A.2199/ S.473](#))

This proposal would amend the **New York State Civil Practice Law and Rules** (CPLR) to mandate calculation of interest from the date of entry of the order denying summary judgment when summary judgment was subsequently granted on appeal. The calculation of pre-judgment interest would no longer be confined to contractual disputes and wrongful death actions. The legislation passed both the Senate and the Assembly.

- **Comprehensive Insurance Disclosure** ([A.8041/ S.7052](#))

This proposal would require a party to provide a copy of every insurance policy, contract, or agreement, as well as the extent to which the policy has eroded, other cases with potential to erode the limit, and the claims adjuster's contact information, a virtually insurmountable task for large institutions such as hospitals, universities, and municipalities. The bill passed the Senate and the Assembly within a few hours. **Tom Stebbins** of the **Lawsuit Reform Alliance of New York** [described](#) this Midnight Rider as “quintessential Albany backroom dealing.”

- **Antitrust Litigation** ([A.1812/ S.933A](#))

This proposal would discourage innovation by permitting private class action lawsuits against entities with a “dominant position in the conduct of any business, trade, or commerce.” Although the bill was aimed at large tech companies, trial attorneys seeking a payday will target first-to-market [entrepreneurs](#). Additionally, if this bill passes, New York will be the [only state](#) in the country to require businesses to inform a state Attorney General of mergers and acquisitions and other related transactions. The bill passed the Senate.

- **Green Amendment** ([A.2261/ S.5394](#))

On November 3, [60.8%](#) of New York voters approved **Ballot Proposal 2**, which expanded **Article I of the New York Constitution** to protect “a right to clean air and water, and a healthful environment.” This amendment will allow private attorneys to [enforce](#) this right against private landowners, businesses, and the New York State Department of Conservation (NYSDEC). Since “clean air and water” and “healthful environment” are [not defined](#), courts will need to flesh out the scope of these terms, and even businesses operating under existing legal emissions permits could be vulnerable to litigation.



### ISSUES

- Court turns apportionment of fault law on its head
- Court issues series of liability-expanding decisions
- Nuclear verdicts bog down business
- Third-party litigation funding driving litigation

The significant deterioration of the Georgia civil justice system that took place in 2021 has propelled the “Peach State” to its highest-ever ranking on the Judicial Hellholes® list. The **Georgia Supreme Court** has developed a propensity to expand liability whenever given a chance and other courts around the state are following its lead.

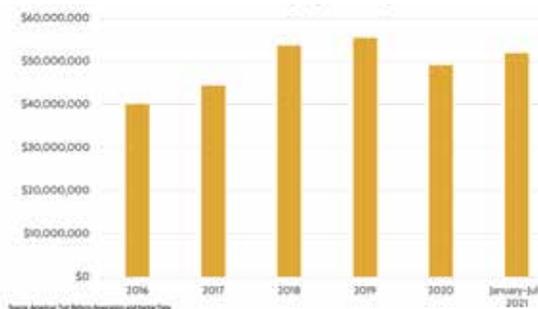
In 2021, the high court eliminated apportionment of fault in certain cases and expanded bad faith liability for insurers. The state continues to have a reputation for nuclear verdicts and third-party litigation financing is playing an increasing role in litigation.

### HIGH COURT ELIMINATES APPORTIONMENT OF FAULT IN CERTAIN CASES

In August 2021, the **Georgia Supreme Court** delivered the plaintiffs’ bar its most significant victory in the Judicial Hellholes® report’s 20-year history. In *Alston Bird LLC v. Hatcher Management Holdings*, the high court ruled that Georgia law does not allow a jury to apportion fault to all those who share responsibility in single defendant cases. In other words, an individual or business can be required to pay a plaintiff’s entire damage award if it is the only one sued, even if others were at fault. This result is contrary to the legislature’s adoption of a law that was intended to ensure that a defendant’s liability is proportionate to its level of fault. The **Georgia General Assembly** can clarify the statute to address the Court’s ruling and the absurd result that the ability of a jury to allocate fault among responsible parties depends on how many defendants a plaintiff names in a complaint.

### LEGAL SERVICES ADVERTISING SPENDING

#### GEORGIA



Trial lawyers are catching on to the state’s plaintiff-friendly ways and have drastically increased the amount of money they spend on advertising.

### ECONOMIC IMPACT OF LAWSUIT ABUSE

#### GEORGIA

The rise in lawsuit abuse is impacting the state’s economy and the **Georgia Legislature** is remaining relatively indifferent. If the legislature focused on addressing the problem through enacting certain reforms, state residents and businesses would save **over \$3 billion**. These annual savings would support **38,209** additional jobs and **\$6.24 billion** in increased economic activity. In addition, the state government would benefit from **\$291 million** in increased tax revenues.

## OTHER LIABILITY EXPANDING DECISIONS

### Bad Faith

In April 2021, the **Georgia Supreme Court** lowered the bar for plaintiffs bringing bad faith claims against their insurers. In *Geico Indemnity Co. v. Whiteside*, the high court held that a defendant's [lack of notice](#) of a lawsuit against a policyholder is no excuse for failing to settle a claim.

In this case, an individual was driving another person's car, which was insured by GEICO, when she collided with a bicyclist. The bicyclist's lawyer demanded the full \$30,000 policy limit from GEICO and GEICO offered \$12,409. The bicyclist's attorney ignored this counteroffer and sued the driver. The driver failed to notify GEICO of the lawsuit, discarded the summons and complaint, and failed to appear in court. As a result, the bicyclist obtained a default judgment of \$2,916,204 and forced the driver into involuntary bankruptcy. The bankruptcy trustee sued GEICO in federal court for negligently or in bad faith failing to settle the claim.

The jury determined that GEICO acted in bad faith when it failed to settle the bicyclist claim for \$30,000 and that it was 70% liable (totaling more than \$2.7 million with interest) for the default judgment.

GEICO appealed and the **Eleventh Circuit** certified questions to the **Georgia Supreme Court** including whether Georgia's law relieves an insurer of liability in a bad faith suit when it had no notice of the underlying lawsuit against its insured.

The **Georgia Supreme Court** held that although the policyholder was required to provide notice to GEICO as a condition of receiving insurance coverage, GEICO "should have foreseen" that an unreliable, unsophisticated, and unstable driver would fail to do so.

While the court did acknowledge that this decision may be limited to the facts at hand, it [opens the door](#) for similar decisions in the future.

### Employment Liability

Last year's [Judicial Hellholes® report](#) highlighted *Frett v. State Farm Employee Workers' Compensation*, in which the **Georgia Supreme Court** held that routine work breaks are incidental to work and, therefore, injuries suffered during that time are eligible for coverage. The ruling overturned the Court's own [85-year-old precedent](#), which found that employee injuries suffered while off the clock are non-compensable.

Relying on last year's *Frett* decision, the **Georgia Court of Appeals** [found](#) that a worker who suffered an injury during her lunch break is eligible for benefits under Georgia's workers' compensation law. The plaintiff was walking to her car during her lunch break when she tripped on a sidewalk in a company-owned lot. This ruling provides a glimpse into the future of workers' compensation laws in the state, where employees can now seek coverage for non-work-related injuries suffered during scheduled breaks.

### Registering To Do Business In Georgia Means Registering To Get Sued In Georgia Courts

In September 2021, the **Georgia Supreme Court** [ruled](#) that simply registering to do business in Georgia subjects an out-of-state business to lawsuits in Georgia's state courts for all matters, regardless of the suit's connection to Georgia. The state high court reached this result by adhering to its own three-decade-old decision that it acknowledged was "in tension" with a series of recent **U.S. Supreme Court** cases. Those U.S. Supreme Court cases have generally found that due process does not permit state courts to assert jurisdiction over a business that is not located or headquartered in a state unless there is a sufficient connection between the business's actions in that state and the lawsuit. Contrary to Georgia, several [state](#) and [federal](#) appellate courts have rejected a "consent by registration" approach to jurisdiction. The outcome in this case, *Cooper Tire & Rubber Co. v. McCall*, may discourage corporations from registering to do business in Georgia.

## High Court Weighs In On Meaning Of “Sufficient Notice”

In *Roberts v. Unison Behavioral Health*, the Georgia Supreme Court lowered the bar for plaintiffs for providing the State with sufficient notice of a claim, which is intended to facilitate settlement before a plaintiff files a lawsuit.

In that instance, a person involved in an accident with a van owned by a Georgia community service board sent the state a notice of the claim that lacked details describing her injury. Instead, the notice vaguely described the “nature of loss suffered” as “bodily injury; past, present and future mental and physical pain and suffering; infliction of emotional distress; past, present, and future medical expenses; past, present, and future lost earning; diminished earning capacity.” The notice stated that the amount of loss claimed for the unspecified injuries was \$1 million.

The driver then filed a negligence action in state court. Although a Georgia trial court allowed the case to proceed, the Court of Appeals granted an interlocutory appeal and reversed, holding that the “description of the nature of her loss does not fulfill the requirement that she state the required information ‘to the extent of [her] knowledge and belief and as may be practicable under the circumstances.’” The Georgia Supreme Court, however, revived the lawsuit, finding that a plaintiff fulfills the notice requirement even if he or she simply parrots the statutory definition of loss without explaining the injuries involved.

As a result of the ruling, more Georgia taxpayer money is likely to go toward paying litigation expenses and judgments that could have been avoided through early, reasonable settlements.

## NUCLEAR VERDICTS BOG DOWN BUSINESS

Nuclear verdicts are multi-million-dollar awards, usually for a person’s subjective and immeasurable pain and suffering, at a level that far exceeds an amount that reasonably compensates a person for an injury. These awards typically result from a plaintiffs’ lawyer’s urging the jury to return a specific, extraordinary amount and misleading them to think that level is the norm. It also can result from plaintiffs’ lawyers

inflaming the jury to improperly punish a defendant for conduct that would not qualify for punitive damages. The Judicial Hellholes® report has chronicled how the trucking industry has been one of the hardest hit by nuclear verdicts in Georgia. The American Transportation Research Institute (ATRI) [indicates](#) that while there were only four cases in 2006 where the awards exceeded \$1 million, there were over 70 in 2013. From 2010 to 2018, the average verdict for truck crashes [jumped](#) from \$2.3 million to \$22.3 million, a nearly 1,000% increase. As a result, commercial

insurance rates are skyrocketing. In the past two years, rates increased an average of 20% - 25% annually, which is suffocating smaller companies (“One respondent specified that “low risk” motor carriers are experiencing 8% to 10% increases in insurance costs, while new ventures and average-to-marginal carriers are experiencing a 35% to 40% annual increase – a trend that has occurred for three consecutive years”). Another carrier [cited](#) an increase of more than 100% in one year, \$340,000 per year to \$700,000 per year, which forced the company to close and more than 50 employees to lose their jobs.

[John McGlynn](#), director of transportation at [Burns & Wilcox explained](#): “It is really the smaller and mid-sized operations that feel the brunt of this. They have less financial flexibility. I think, ultimately, the ones that will not be able to afford the premiums will be the smaller, family-owned, 10-unit-and-less drivers. We will lose that history, that free spirit and independence which was the foundation of the trucking industry.”

Umbrella or excess liability rates have [increased](#) more than 75%, forcing most companies to scale back



on their coverage. Mike Card, president of Combined Transport, explained “If someone wins \$20 million from the jury, my insurance companies only pay the first \$5 [million]. I would have to pay the next \$15 million. We couldn’t afford that. We’d have to shut our doors.”

A recent [study](#) finds that: (1) corporate mistrust, (2) growth in third-party litigation financing, and (3) social pessimism and jury sentiment favoring plaintiffs, are the driving forces behind nuclear verdicts, which leads insurers to raise rates. According to the study, almost 50% of participants in the [2019 Edelman Trust Barometer](#) believed that the “system” was failing them.

*“This sentiment leads to a loss of faith and a desire for change, the report suggests, which may be spurring people to shift their trust to things they can exert control over – like verdicts. This attitude, legal and liability insurance experts believe, can lead juries to be biased toward the rights of plaintiffs – thinking businesses should bear a greater share of responsibility than individuals. The end result? When it exists, this prejudice can place any corporate defendant at a disadvantage.”*

The number of nuclear verdicts in **Georgia** decreased in 2021, in large part due to court shutdowns during the pandemic. Despite the slowdown, a **Rabun County** jury delivered the county’s [largest](#) ever verdict. According to the family’s lawyers at [Clark Fountain La Vista Prather & Littky-Rubin](#), the verdict also is the largest single verdict for noneconomic damages in a wrongful death case in Georgia history. The jury [awarded](#) an astounding \$200 million, including \$80 million in pain and suffering plus \$120 million in punitive damages, to the parents of a boy who died in a boating accident. The jury found that Malibu Boats, the boat manufacturer, had negligently failed to warn of the boat’s susceptibility to swamping. It found the company 25% responsible and placed the other 75% of responsibility with the operator of the boat, the boy’s great uncle.

## THIRD-PARTY LITIGATION FUNDING

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

## EXPANSION OF PREMISE LIABILITY CONTINUES

The **Georgia Supreme Court** set the stage for courts across the state to expand premises liability for landowners with its landmark decision in [Martin v. Six Flags Over Georgia](#). Here, the plaintiff was attacked by assailants at a bus stop outside of a Six Flags Over Georgia amusement park. A Georgia jury reached a \$35 million dollar verdict, imposing 92% of the damages on Six Flags and just 2% to each of the four named attackers. The state high court unanimously ruled that businesses are subject to liability for harm to a customer even when it is a result of crime that occurred off of its property if criminal activity is allegedly “foreseeable.”

This decision opened the floodgates to outrageous lawsuits and nuclear verdicts in premises liability cases. In [Georgia CVS Pharmacy, LLC v. Carmichael](#) (November 2021), the **Court of Appeals of Georgia** upheld a \$42,750,000 verdict against the pharmacy for a shooting that occurred in the parking lot. The plaintiff had arranged to meet an acquaintance, Gray, in the CVS parking lot to purchase an iPad. After the transaction, an unknown assailant entered the plaintiff’s car, threatened to kill him, and ordered him to hand over his money. The plaintiff tried and failed to shoot the assailant with his own pistol, at which point the assailant shot the plaintiff several times and fled. The plaintiff survived but sustained severe injuries.

Astonishingly, the jury found that CVS was 95% at fault, the plaintiff 5% at fault, and Gray and the assailant both 0% at fault. On appeal, CVS argued that the trial court erred in denying its motion for a directed verdict or a new trial because the plaintiff failed to provide sufficient evidence of proximate cause, superior knowledge of the danger on the part of CVS, and the efficacy of additional lighting or security guard presence in deterring the attack. The **Court of Appeals** concluded that the plaintiff demonstrated sufficient evidence in all three instances and affirmed the verdict.

## CASES TO WATCH

### Apex Doctrine

In October 2021, the **Georgia Supreme Court** [agreed to decide](#) whether Georgia will adopt the **apex doctrine**, a framework implemented by courts across the country to avoid the propensity of some plaintiffs' lawyers to needlessly require high-ranking corporate officials to sit for depositions when they have no first-hand knowledge of the issue involved. In [General Motors v. Buchanan](#), the trial court allowed Mary Barra, CEO of General Motors, to be deposed in a case involving a fatal car accident allegedly caused by a defect in a Chevy Trailblazer. The plaintiff sought to depose her based on general statements she made in April and July of 2014 regarding her Speak Up program, which promotes intra-company innovation to identify and remedy product safety issues. The **Georgia Court of Appeals** upheld the decision and refused to adopt the apex doctrine.

ATRA filed an [amicus brief](#) in the Georgia Supreme Court arguing that the deposition of a high-level executive is reserved for when it is truly needed for the pursuit of justice, rather than an unjust attempt to gain an unwarranted litigation advantage irrespective of the facts. The Georgia Court of Appeals' decision will incentivize abusive discovery, erode confidence in judicial discovery process, and undermine fundamental fairness and justice for manufacturers and other corporate litigants. It is critically important that executives are free to advance a beneficial corporate culture without fear of being subjected to deposition simply because of their job title when they have no direct involvement in, or superior knowledge of a given lawsuit. These leaders should not be subject to depositions based on general statements about safety, the implementation of safety programs, or the advancement of corporate safety cultures, for example. Consumers, employees, and other members of the public benefit significantly when leaders, like Barra, take a personal stake in advancing a better corporate culture.

### Product Liability

The **Georgia Supreme Court** [granted certiorari](#) to determine whether the **Georgia Court of Appeals** erred in dismissing a husband and wife's personal injury suit against Snapchat regarding its "speed filter" which allegedly distracted the driver who hit them. Consistent with basic principles of tort law, the appellate court affirmed the trial court's determination that Snapchat does not have a general duty to prevent actors from misusing their product. Will the **Georgia Supreme Court** find otherwise?

## COVID-19 LIABILITY

[Many states](#) have enacted robust liability protections for businesses and health care providers from COVID-19 related lawsuits, and Georgia took a step in the right direction in addressing these concerns.

The legislation, originally enacted in August 2020, raises the standard for a plaintiff to recover for a claim alleging that he or she was exposed to COVID-19 on any premise, a claim of injury from receiving medical care effected by the pandemic, or a claim that personal protective equipment made, sold, or donated in response to the pandemic is defective. The law also provides an assumption that a person assumed the risk of exposure to COVID-19 at a public gathering or premises if a warning is conveyed on a sign, receipt, ticket, or event wristband. A plaintiff can overcome these liability protections by claiming that a defendant was grossly negligent, reckless, or engaged in willful misconduct. In 2021, **Governor Brian**

Kemp (R) signed [H.B. 112](#), the **COVID-19 Recovery Act**, which extends the liability protections for another year until July 2022.

The law does not cover COVID-19 liability for acts or transmission prior to the bill's implementation, however, leaving businesses exposed when the disease was least understood and most unpredictable.



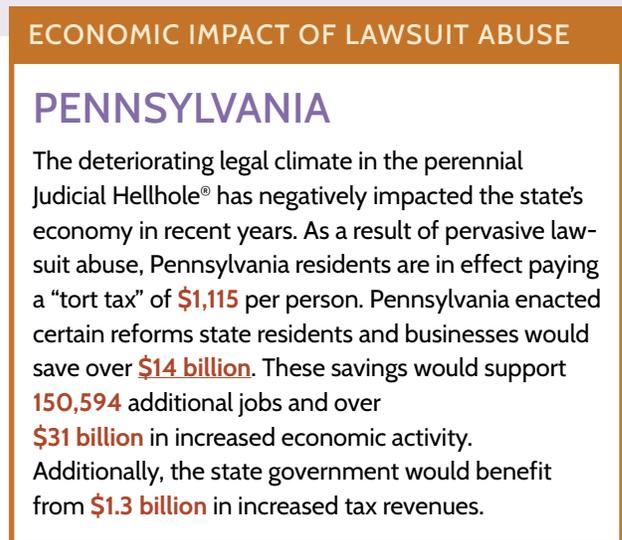
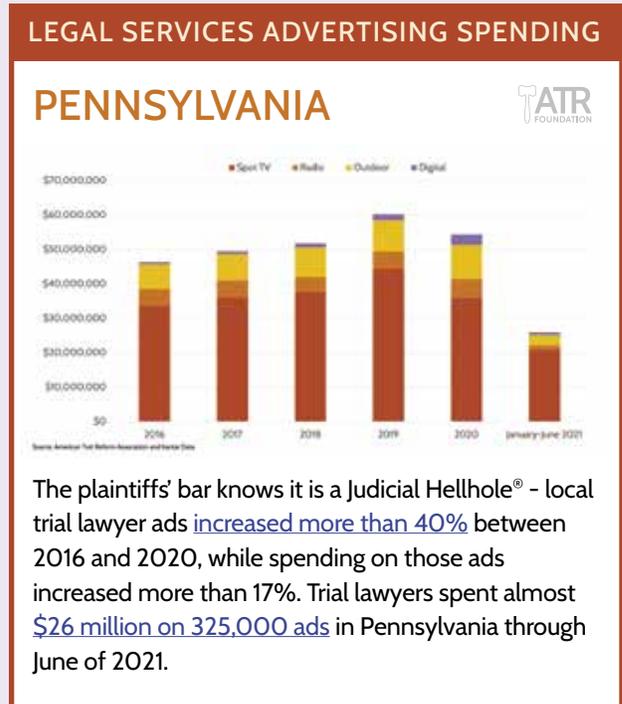
### ISSUES

- Mass tort litigation floods Philadelphia Court of Common Pleas Complex Litigation Center
- Loose application of venue laws
- Comparative fault in jeopardy
- Liability-expanding decisions target business

The reigning No. 1 Judicial Hellhole®, the Philadelphia Court of Common Pleas & Supreme Court of Pennsylvania once again lands near the top of the list in 2021. Its drop to the No. 4 spot is not due to reforms or progress made in the state, but indicative of the number of issues plaguing California, New York and Georgia. Additionally, shutdowns resulting from the COVID-19 pandemic led to a decrease in activity.

The **Philadelphia Court of Common Pleas** continues to be a preferred court for pharmaceutical mass torts cases and asbestos litigation. 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. This policy clogs the courts, drains court resources, and drives businesses (and jobs) out of the state.

The **Supreme Court of Pennsylvania** joined the Court of Common Pleas atop the list in 2020, and the Court continues to expand liability for businesses and municipalities across the state.



## PHILADELPHIA COMPLEX LITIGATION CENTER IS MASS TORTS HOTSPOT

The **Philadelphia Court of Common Pleas Complex Litigation Center** is the plaintiffs' bar's preferred jurisdiction for mass tort litigation specifically targeting pharmaceutical and medical device companies.

### Risperdal Litigation

In May 2021, the **U.S. Supreme Court** announced it would [not review](#) a \$70 million verdict against Janssen Pharmaceuticals in favor of a Tennessee plaintiff in the **Philadelphia Court of Common Pleas**. The **Philadelphia Court of Common Pleas** found Janssen Pharmaceuticals liable for not adding warnings about specific risks associated with the antipsychotic drug Risperdal when used off-label to treat autism in adolescent patients. The **Pennsylvania Supreme Court** had also refused to consider the appeal.

The massive verdict, which was upheld by an intermediate Pennsylvania appellate court, disregards the fact that federal law prevents companies from unilaterally making changes to product labels once they are approved by the **Food and Drug Administration (FDA)**, including warning of risks of off-label use. State courts should not then hold liable product manufacturers who merely follow federal law. If state courts are permitted to second guess the FDA, the agency's authority and expertise will be severely undercut. This potentially adds fifty layers of regulatory uncertainty for companies that operate nationwide.

The staggering \$70 million award was for the plaintiff's *compensatory* damages. The plaintiff's lawyers will seek millions more in punitive damages.

There are more than [7,000 Risperdal cases](#) currently pending in the **Philadelphia Court of Common Pleas Complex Litigation Center**. Outsized verdicts like these reinforce the court's "open door" policy and encourage plaintiffs' lawyers across the country to flock to the court. Decisions such as these benefit out-of-state plaintiffs to the detriment of Pennsylvania citizens. The increased litigation clogs the courts and wastes taxpayer dollars.

The case also serves as an important reminder of why it is so important for states to pass civil justice reforms to rein in activist courts. The **United States Supreme Court** grants certiorari in [less than 2%](#) of cases and it is dangerous to rely on the high court to police the decisions of state courts.

### Paraquat Litigation

The plaintiffs' bar's next self-proclaimed target in Pennsylvania courts is Paraquat, one of the most widely used herbicides. Multiple complaints have been filed in Pennsylvania, and according to [Jeffrey P. Goodman](#), partner at [Saltz Mongeluzzi & Bendesky, P.C.](#), "These [paraquat] filings are only the [tip of the iceberg](#) with what is expected to be the next major mass tort."

### Asbestos Litigation

Philadelphia remains in the Top 4 most popular jurisdictions to file lawsuits claiming injuries from exposure to asbestos. There were [209 asbestos lawsuits filed in Philadelphia in 2020](#). In total, there were [over 600 asbestos cases](#) pending in the **Philadelphia Court of Common Pleas** as of November 2021.

The high volume of filings follows the Pennsylvania Supreme Court's 2020 [Roverano decision](#) on the application of Pennsylvania's Fair Share Act to strict liability asbestos actions. The court nullified the "Fair Share" approach, which is intended to allocate a damage award to each defendant in proportion to its level of fault for the plaintiff's injury. Instead, the Court ruled that liability would be apportioned equally among responsible parties. Using mental gymnastics, the Court said it is impossible to apportion a strict liability claim based on fault because strict liability is not fault-based, despite numerous courts around the country having found ways to do just that. The impact of course is that minor players may be required to pay damages that are disproportionate to their responsibility for an injury – contrary to the basic premise of fair share liability. The Court accepted the [plaintiffs' contention](#) that illnesses caused by asbestos inhalation are "incapable of being apportioned in a rational manner because the individual contributions to the plaintiff's

total dose of asbestos are impossible to determine.” In [dicta](#), the *Roverano* decision “also appears to point to an abrogation of the rule against ‘each and every fiber’ as a theory of causation.”

In *Roverano*, the court also ruled that the **Fair Share Act** permits bankrupt entities to be listed on the verdict sheet, but only if the trusts have been joined as third-party defendants or entered into a release with the plaintiff. Thus, a plaintiff can easily evade having most bankrupt entities, which may be those who are primarily responsible for a plaintiff’s exposure, appear on the verdict form by simply delaying the filing of any available asbestos bankruptcy trust claims until after trial. Unlike many other states, Pennsylvania has not enacted asbestos bankruptcy trust transparency legislation to require plaintiffs to file their asbestos trust claims before trial.

### Good News

Although the deck is stacked against them in Philadelphia, juries sometimes reject inflammatory claims that are unsupported by science. This occurred when a **Philadelphia Court of Common Pleas** jury found that using Johnson & Johnson’s signature talcum powder did not cause a plaintiff to develop ovarian cancer. The plaintiff, who used Johnson & Johnson’s product for three decades, argued that the company was responsible for her cancer because it was aware of the risks associated with its product since the 1940s. The jury sided with Johnson & Johnson, which emphasized other factors that could have caused Klein’s cancer, such as genetic factors. “Despite the lack of any scientific evidence to support their claims, the plaintiff trial bar continues to push forward with its misinformation campaign to drive baseless and inflammatory headlines in the hopes they can force a resolution of these cases,” Johnson & Johnson [explained](#). “The claims by these lawyers are unfounded and it is clear the only interest they have is their own financial gain.”

## LOOSE APPLICATION OF VENUE LAWS LEADS TO FORUM SHOPPING

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

At the crux of this issue is the state’s [venue rule](#), which judges have interpreted very liberally. It permits venue in any “county where [a corporate defendant] regularly conducts business,” which allows cases to be filed in Philadelphia even when there is little to no connection between Philadelphia and the incident in question.

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

In October 2020, the **Supreme Court of Pennsylvania** openly defied the **U.S. Supreme Court** in [Hammons v. Ethicon](#), which was the state high court’s first opportunity to apply the *BMS* decision to claims brought by out-of-state plaintiffs in Pennsylvania courts. In this instance, an Indiana resident claimed that Ethicon, a New Jersey company, made a defective pelvic mesh device. The plaintiff did not receive medical treatment in Pennsylvania, and all conduct relevant to her claim took place in Indiana or New Jersey.

The only connection between the parties and Pennsylvania was that Ethicon contracted with a Pennsylvania company, Secant, to provide the mesh and the plaintiffs’ lawyer decided that Philadelphia would be a more favorable place to sue. Doing business with third parties, however, does not automatically subject an out-of-state business to personal jurisdiction where that company is located unless there is a specific connection between the forum and the injury. Nevertheless, the **Supreme Court of Pennsylvania** [ruled](#) that Ethicon’s connection to Secant allowed Pennsylvania courts to assert jurisdiction over Ethicon. Contrary to *BMS*, the **Supreme Court of Pennsylvania** viewed it sufficient for a plaintiff to show a tie between the state and the “underlying controversy,” rather than the individual’s claim, for a state court to decide the case.

Following the high court's lead, courts across the state loosely apply venue laws to allow plaintiffs to forum shop. In March 2021, a Pennsylvania Superior Court [held](#) that the percentage of a company's overall business conducted in a county is only one factor in considering whether venue is proper. Venue may be proper for a company in any county from which it derives significant revenue, regardless of the venue's connection with the underlying case. In *Hangey v. Husqvarna Prof. Products, Inc.*, the defendant derived only 0.005% of its national sales from Philadelphia dealers, but the Court held that its contacts were sufficient because it had an authorized dealer in Philadelphia that sold \$75,310 worth of products.

### Court Refuses to Bring Defamation Venue Law into 21st Century

In November 2021, the Pennsylvania Supreme Court ignored calls from lower court judges to appropriately amend venue laws in cases arising from alleged online defamation in response to modern era technology and communication.

The **Philadelphia Court of Common Pleas** previously [permitted](#) a Chester Heights mayoral candidate to sue for defamation in Philadelphia even though she was a resident of Delaware County and the information was aimed at Delaware County residents. The lawsuit alleged the candidate was the victim of a smear campaign and that the defamatory statements were available to Philadelphia residents online.

**Judge Arnold New** based his ruling on a 1967 case, *Gaetano v. Sharon Herald*, and held that in a defamation action, "publication" occurs in any county where the statement is read and understood to be defamatory. Applying the law to allow a lawsuit to be filed anywhere in the state is inconsistent with the purpose of a defamation action, which is to restore a person's name in his or her community. In his opinion, Judge New stressed that his job as a trial court judge is to [apply the law](#), rather than "make new law." He urged the state's high court to reevaluate the state's venue rules related to defamation to change the law to reflect modern communication technology and prevent clear forum shopping by plaintiffs' lawyers. A request that also was made by **Superior Court Judge Mary Murray** in her concurring opinion upholding the trial court's decision. "As technology continues to grow and its application implicates various elements of both criminal and civil law, this court will continue to be presented with novel appeals involving the use of electronic communication, the majority of which will be decided by precedent that never contemplated electronic publication," [wrote](#) Judge Murray.

Unfortunately, their requests largely fell on [deaf ears](#). Under this decision, plaintiffs can bring their cases in any of the multiple counties in which the online publication was viewed. This decision will lead to "[unchecked forum shopping](#)" because plaintiffs will be able to choose the most plaintiff-friendly court in which to bring their case.

### A Return to Forum Shopping in Medical Liability Cases?

Constraints that have prevented lawyers from picking the most plaintiff-friendly jurisdiction for filing medical liability actions are in jeopardy. The **Supreme Court of Pennsylvania** is considering easing the court's 17-year-old restraints on medical liability lawsuits. At issue is a [2002 court rule](#) that required plaintiffs to file medical malpractice lawsuits in the county where treatment occurred, not where a jury might view the claim most favorably. The purpose was to reduce forum shopping and create a more fair and balanced playing field. Forum shopping increases the number of meritless lawsuits and drives up doctors' insurance costs. It leads to increased costs for patients and reduces patients' ability to access doctors.

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

## COMPARATIVE FAULT IN JEOPARDY

Following the Supreme Court of Pennsylvania’s *Roverano* decision in 2020 that weakened the state’s **Fair Share Act** with regards to asbestos litigation, a Pennsylvania superior court went a step further and put the future of comparative fault in jeopardy. In a [case](#) that originated in the **Philadelphia Court of Common Pleas**, the court suggested in dicta that the **Fair Share Act** is [only implicated](#) when the plaintiff’s comparative negligence is at issue. In other words, if the plaintiff is not partially at fault for his or her own injury, full joint and several liability applies to the defendants and any one of them may be required to pay the full amount of the damage award.

If followed, the ruling would effectively gut the state’s 2011 **Fair Share Act**, which was intended to replace joint and several liability with comparative fault. The consequences of this shift would be far-reaching. Rather than permitting a plaintiff to recover the entire judgment from one deep-pocket defendant, the **Fair Share Act** [ensured](#) that each defendant’s liability was proportionate to its level of fault. Prior to the Fair Share Act’s enactment, solvent entities, including small businesses, were often compelled to settle questionable lawsuits to avoid the threat of joint and several liability.

## LIABILITY-EXPANDING DECISIONS BY HIGH COURT TARGET BUSINESS

According to a [report](#) by the **Pennsylvania Coalition for Civil Justice Reform**, through early 2021, “the Supreme Court [of Pennsylvania] has handed down 36 decisions since early 2016 that impact the exposure of civil litigants to lawsuits. Twenty-six of those decisions have expanded liability, some by blatantly ignoring, reinterpreting, or ‘re-legislating’ statutes passed by the General Assembly and signed into law by the governor. Only ten decisions have upheld or reined in current understandings of the scope of civil liability and damage awards.” This represents a significant sea change in the court’s approach.

### Expansive View of “Catch-All” Provision

In February 2021, the **Pennsylvania Supreme Court**, in a 4-3 decision, [held](#) that a plaintiff did not need to prove that a business was fraudulent or negligent in its representation to the plaintiff to succeed on an **Unfair Trade Practices and Consumer Protection Law** (“CPL”) claim. By removing the requirement of fraud or negligence, the Court removed any requirement that a business intended to mislead the consumer. In doing so, the Court “[open\[ed\] the floodgates](#) to an explosion of litigation by consumers with nothing more than ‘buyer’s remorse.’”

In its amicus brief, ATRA argued that the legislature [did not intend](#) for the standard under the CPL to be strict liability and the language of the statute did in fact require a showing of intent to deceive. This strict liability interpretation will have large policy implications. Allowing consumers to easily sue business could have severe ramifications on the state’s economy.

The Court, however, disagreed and found that a plain reading of the statute led to its interpretation. It found that the CPL should be construed broadly to prevent “unscrupulous business practices.” However, as the dissent stated, this interpretation removes protections for “honest businesspeople from incurring unforeseen penalties for statements or acts that no consumer would have been confused or misled by.” Additionally, this new standard imposed by the court makes it easier for consumers to file suits against businesses leading to a rise in litigation costs which will be passed on to consumers. In the end, the court’s decision will significantly harm consumers, businesses, and the Commonwealth.

*“The Supreme Court [of Pennsylvania] has handed down 36 decisions since early 2016 that impact the exposure of civil litigants to lawsuits. Twenty-six of those decisions have expanded liability, some by blatantly ignoring, reinterpreting, or ‘re-legislating’ statutes passed by the General Assembly and signed into law by the governor.”*

– Pennsylvania Coalition for Civil Justice Reform

## Municipal Liability Expansion

The **Supreme Court of Pennsylvania** not only expanded liability for businesses across the state, it also did so for municipalities and local government.

In June 2021, the **Supreme Court** [held](#) that an exculpatory contract, which releases the City of Philadelphia from its mandatory duty of public service, is contrary to public policy and unenforceable. In this case, the plaintiff was injured in a bike crash while participating in a charity ride through Philadelphia. Before the event, the plaintiff signed an agreement, which provided that the City of Philadelphia was not liable for any personal injuries arising out of the event.

The City argued that its duty to ensure public safety stems from the common law, not statutory law, and was therefore waivable via contract, akin to a private property owner hosting a recreational event. It does not concern public policy because the signer voluntarily participates in the non-essential activity. The City emphasized that Pennsylvania courts are highly reluctant to interfere with parties' freedom of contract on public policy grounds.

The Court disagreed and held that the exculpatory clause was unenforceable because the General Assembly intended to impose liability for negligent acts relating to street hazards and enforcing the contract would jeopardize public health. Because the city's duty to maintain public streets arose long before the bike ride, the city's involvement is distinguishable from that of a private host.

In a dissenting opinion, **Justice Max Baer** argued that the applicable **Tort Claims Act** does not preclude exculpatory agreements, reasoning that a contractual release of liability is not equivalent to the City conferring immunity unto itself. Rather, the release serves as a defense to liability for specific conduct; therefore, "there is no inherent conflict between allowing a local government to be sued and permitting that governmental entity to assert a contractual defense in that lawsuit, like any other private litigant."

In a separate case, the **Supreme Court** expanded the definition of a "dangerous condition" for the purposes of the real estate exception to sovereign immunity. In [Wise v. Huntingdon County Housing Development](#), the Court held that insufficient outdoor lighting of state property, occurring because of the location on the property of a pole light and a tree blocking that light, constitutes a "dangerous condition" of the property for purposes of the real estate exception to sovereign immunity. The case arose after a person tripped and fell on a sidewalk in the Chestnut Terrace public housing complex.

## Supreme Court Recognizes Horizontal Piercing Theory

In [Mortimer v. McCool](#), the **Pennsylvania Supreme Court** abandoned *stare decisis* and allowed a plaintiff to treat affiliated businesses as a single entity. In its [amicus brief](#), the **U.S. Chamber of Commerce** argued that implementation of the single entity theory would stray from other states and create uncertainty, driving business out of Pennsylvania. "This Court should reject the plaintiff's invitation to abandon *stare decisis* by implementing an unworkable rule that contravenes longstanding public policy and would make Pennsylvania a disfavored outlier." The theory stifles innovation and harms small businesses. According to its brief, "Expanding the scope of veil piercing to businesses that merely have some level of overlapping ownership and then making it easier for litigants to pierce the veil would create disincentives for existing family business to expand or to invest in new business lines."

## Cases To Watch

The **Supreme Court of Pennsylvania** [has been asked](#) whether mere registration to do business in Pennsylvania subjects a foreign corporation to personal jurisdiction in Pennsylvania courts. In [Mallory v. Norfolk Southern Railway](#), the plaintiff alleged that he was exposed to carcinogens in the course of his employment with Norfolk Southern Railway Company, causing him to develop colon cancer. The lower court dismissed the complaint with prejudice for lack of personal jurisdiction over the defendant, a foreign corporation registered in the state.

## LACK OF COVID-19 LIABILITY PROTECTION

Pennsylvania remains [one of the few states](#) in the country to not enact COVID-19 liability protections for frontline workers and businesses. Following Governor Tom Wolf's veto of a COVID-19 liability protection bill because it was "overreaching," the House passed a COVID-19 safe harbor bill providing temporary liability protection to healthcare providers, businesses, nursing homes, and schools absent gross negligence or intentional misconduct. [H.B. 605](#) has since stalled in committee in the Senate and state leadership lacks the sense of urgency to prioritize this important legislation.

The decision to not implement protections for those on the frontlines could be highly problematic for businesses and health care providers across the state. In the initial stages of COVID-19 litigation, Pennsylvania courts have shown a propensity to expand liability for defendants. The **Allegheny Court of Common Pleas** became one of the only courts in the country [to find](#) that income loss resulting from the spread of COVID-19 is covered under the parties' insurance agreement, which encompasses "direct physical loss or damage to" property. Although the terms "direct" and "physical" modify both "loss" and "damage," the court interpreted the disjunctive "or" to signal separate meanings for "loss" and "damage." The court reasoned that actual harm to property is not necessary because "loss" focuses on deprivation of property, while "damage" focuses on tangible destruction of property. The court concluded that loss of use of Plaintiff's property resulting from the spread of COVID-19 is covered under the income loss provision of the parties' insurance contract. Most courts have ruled that actual physical damage to a property is necessary to collect under "business interruption" policies.

In another case, the same court [justified liability](#) under the Business Income, Extra Expense, and Civil Authority provisions of the insurance contract based on the same reasoning as above. The court stated, "Even absent any damage to property, the spread of COVID-19 has resulted in a serious public health crisis, which has directly and physically caused the loss of use of property all across the Commonwealth."

## 2021 JUDICIAL ELECTIONS

After a [heated race](#) for an open seat on the state's highest court, Republican **Commonwealth Court Judge Kevin P. Brobson** [defeated](#) Democrat **Superior Court Judge Maria McLaughlin**. Brobson will replace **Pennsylvania Supreme Court Justice Thomas Saylor** in December when Saylor turns 75, the mandatory retirement age. The court's political makeup will remain unchanged: two Republicans and five Democrats. **Deputy Attorney General Megan Sullivan** secured a spot on the Superior Court and the two open Commonwealth Court seats will be filled by Republican **Stacy Wallace** and Democrat **Lori Dumas**.



## ISSUES

- Preferred jurisdiction for asbestos litigation
- BIPA “No-Injury” litigation floods court dockets
- Legislature pursues trial bar agenda

This trio of Illinois counties is a magnet for asbestos litigation and “no-injury” lawsuits stemming from the state’s **Biometric Information Privacy Act**. Making matters worse, the **Illinois General Assembly** is one of the most plaintiff-friendly legislatures in the country and **Governor J.B. Pritzker (D)** supports a liability-expanding agenda to the detriment of Illinois citizens.

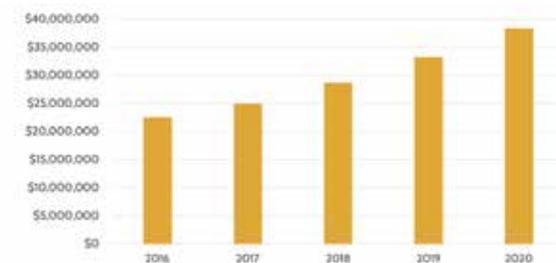
## ASBESTOS FILINGS CONTINUE TO FLOOD COUNTY COURTS

Despite an 11% decrease in the number of asbestos lawsuits filed in 2020 nationwide, both **Madison** and **St. Clair counties** experienced an increase in filings. 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** experienced an increase from 1,159 in 2019 to 1,168 in 2020. Madison County remained the most popular jurisdiction in the country for asbestos litigation, accounting for 31.7% of all filings nationwide compared to 28% in 2019. **Madison County** had nearly three times as many filings as the second most popular jurisdiction, neighboring **St. Clair County**.

## LEGAL SERVICES ADVERTISING SPENDING

### ILLINOIS



Plaintiffs’ attorneys are well-aware of the counties’ plaintiff-friendly reputations and pour millions of dollars into lawsuit advertisements. Over the [past five years](#), spending on local legal services television advertising in Illinois has increased 70%. Law firms and lawsuit lead generators spent more than \$38 million on local TV advertising in 2020, airing an estimated 249,447 ads. In 2020, Illinois accounted for more than 9% of all spending on [legal services TV ads](#) mentioning COVID-19 or coronavirus. Total estimated spending on these COVID-19 ads in Illinois was \$3,040,230. Chicago alone accounted for \$3,006,400 of that number, making it the highest spending media market in the United States.

Approximately \$55.4 million was spent on advertisements in the first three months of 2021 in Illinois. \$45 million went to national TV ads while \$7 million was spent on local spot television ads. Nearly half of all local ads and spending can be attributed to three law firms – **Lerner & Rowe Attorneys, Consumer Law Group, and Malman Law**.

## ECONOMIC IMPACT OF LAWSUIT ABUSE

### ILLINOIS

[Excessive tort costs cost Illinois 140,630 jobs](#), [\\$9.57 billion](#) in wages, and [\\$27.51 billion](#) in economic output annually. Lawsuit abuse results in less investment in businesses, less productivity, and more time and money being spent on litigation. Furthermore, if the Illinois legislature focused on improving the civil justice climate it could save the state’s residents and businesses over [\\$13 billion](#). Lawsuit abuse imposes a “tort tax” of [\\$1,049](#) per Illinois resident.

**St. Clair County** saw a more dramatic increase in asbestos lawsuits with [424 total filings](#) in 2020, a 12.5% increase from 2019. St. Clair County, with its population of about 260,000 residents, accounted for 11.5% of the asbestos complaints filed nationwide in 2020.

While Madison and St. Clair counties are the plaintiffs' bar's most preferred jurisdictions in the nation for asbestos litigation, **Cook County** also makes an appearance in the Top 10. While in 2020, **Cook County** saw a 21.6% decrease in filings from 2019, it remained the eighth most popular jurisdiction for asbestos claims in the nation. In total, these three counties accounted for 46% of the nation's asbestos claims in 2020. [2021 data not yet available when report was sent to press]



## 'NO-INJURY' BIPA LAWSUITS BOG DOWN BUSINESS

Illinois lawmakers enacted the [Biometric Information Privacy Act \(BIPA\)](#) in 2008, but it lied dormant until 2015 when plaintiffs' lawyers discovered its business potential. BIPA provides a private right of action to a person whose fingerprint, voiceprint, or hand or facial scan, or similar information is collected, used, sold, disseminated, or stored in a manner that does not meet the law's requirements. The number of BIPA class actions has surged. Between 2008 and 2018, there were [163 BIPA class action lawsuits](#) filed. In 2019 alone, there were over 300 BIPA class actions filed – almost double the previous ten years combined.

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.

The number of BIPA lawsuits [surged](#) after the **Illinois Supreme Court**, in a [2019 decision](#), ruled that a plaintiff does not need to show any harm to collect damages. Class action lawyers are cashing in by targeting businesses of all sizes that use iris scans, fingerprints and facial recognition data that are used increasingly to keep physical workplaces and sophisticated communications and cyber systems safe. These lawsuits do not allege any harm from collection of the information (which is encrypted) but seek substantial civil penalties along with attorneys' fees and litigation costs.

A vast majority of 'no-injury' cases have been brought by employees against employers. For example, an [Illinois precision machining company](#) now faces a BIPA class action lawsuit in the **Circuit Court of Cook County**. The employees allege that the company, in which employees use fingerprint scans to clock in and out of work, violated the statute because the company never informed them in writing about its data collection practices.

The **Illinois Supreme Court** is hearing an appeal of an important case that will directly impact the future of the pending employee-employer BIPA cases. In [McDonald v. Symphony Bronzeville Park LLC](#), the Court will decide whether BIPA claims are preempted by the **Illinois Workers' Compensation Act (IWCA)**. The defendant, a nursing home operator, argues that the exclusivity provisions of the Workers' Compensation Act bar an employee's claim for damages stemming from a requirement that she use her fingerprint to sign in and out of work. In that case, an Illinois appellate court distinguished statutory BIPA lawsuits, which do not require an injury, from the types of accidental work-related injury claims that must go through the workers' compensation system. As one litigator [pointed out](#), "The statute is largely shaping

up to be, for all intents and purposes, largely a strict liability statute.” Illinois’ BIPA litigation has immense [economic consequences](#) for employers, and if liability continues to expand, it will ultimately drive even more businesses out of the state.

### Statute of Limitations for BIPA Claims

In September 2021, an Illinois appellate court decided a question that dramatically affects the amount of civil penalties that plaintiffs’ lawyers can seek under BIPA: whether a one-year or five-year statute of limitations applies to BIPA claims. The longer the period, the longer plaintiffs’ lawyers can reach back in seeking civil penalties for each instance a company did not fully comply with the requirements of the Illinois statute. Unsurprisingly, the court ruled that in most instances, such as cases alleging retention, informed consent, and data safeguarding requirements, the state’s “catchall” five-year statute of limitations applies. Only in BIPA cases in which publication of a person’s information is involved does a one-year statute of limitations apply, the court ruled.

This exceptionally long statute of limitations will raise settlement demands and make no-injury BIPA claims especially lucrative for plaintiffs’ lawyers. Most state consumer protection laws, for example, set a statute of limitations of [two or three years](#).

## LEGISLATURE PURSUES TRIAL BAR AGENDA

The powerful Illinois trial bar flexed its muscles during the 2021 legislative session, pushing the legislature to pursue its liability-expanding agenda. Sympathetic legislators used a variety of questionable tactics to successfully pass priority bills, including late-night amendments and last-minute substitutions.

Illinois [S.B. 72](#), the **Prejudgment Interest Act**, was enacted in May 2021 and took effect on July 1. Prior to this act, Illinois did not provide prejudgment interest on damages for personal injury or wrongful death. [Under the new law](#), prejudgment interest begins to accrue the day the action is filed at a rate of 6% annually. As a result, parties named in a lawsuit will have to weigh the increased risk of defending themselves in court because, while the case is litigated, the potential award is rising.

This bill was presented as a “compromise” by its proponents after **Governor J.B. Pritzker (D)** vetoed the initial version, [H.B. 3360](#), which called for a rate of 9%. This bill was set to die, but at the 11th hour, **Senate President Don Harmon** introduced a loaded amendment. It passed the House a few days later on January 13 around 3 a.m. While [H.B. 3360](#) originally dealt with mortgages, the unrelated amendment created a law with far-reaching implications for the state’s civil justice system.

It is small businesses and their employees who will ultimately pay the price when astronomical litigation costs force businesses to raise prices across the board, simply to keep up. In turn, this will increase the “tort tax” burden on consumers, while simultaneously increasing payouts for trial lawyers. It opens defendants in civil cases to unnecessary financial exposure, and at a time when many businesses across the state already are struggling.

Another midnight-surprise passed by the **Illinois Legislature** is [S.B. 2406](#). The bill, which will break up the state’s **20th Judicial Circuit Court**, passed in the middle of the night on the last day of the legislative session without a public hearing. Proponents of the bill [claimed](#) that its purpose was to address a heavy caseload coming from the **St. Clair County courthouse**, but the real purpose seems to be to protect one of America’s premier personal injury destinations. A perennial Judicial Hellhole®, **St. Clair County** has long been infamous as a magnet for asbestos, class actions and no-injury lawsuits thanks to its plaintiff-friendly judiciary. The rest of the circuit surrounding St. Clair County has been [trending away](#) from the plaintiff-friendly approach, recognizing a need to protect local businesses from frivolous lawsuits. Because of St. Clair County’s lucrative history for the trial bar, the plaintiff-friendly legislature [couldn’t risk](#) letting the county become less attractive for lawsuits that fill the pockets of trial lawyers.

In addition to breaking up the 20th Judicial Circuit Court, the Democrat-controlled legislature also redrew the supreme court districts for the first time since 1964, with a party-line vote. Illinois’ seven

Supreme Court justices are elected by five Supreme Court districts. **Cook County** elects three of the justices, while the other four districts each elect one justice.

While proponents in the legislature say the decision to redraw the map was in response to population changes, critics [argue it is a ploy](#) to keep the status quo in the state's high court. This became a concern following Justice Thomas Kilbride's unsuccessful retention campaign in 2020, making him the first state Supreme Court justice to lose a retention vote in Illinois history. The new map shrinks the **Third District**, Kilbride's former district.

### Long-time Legislative Champion for Trial Bar Steps Down

In February 2021, former **Illinois Speaker of the House** [Michael Madigan stepped down](#) from his legislative seat in the face of a federal investigation of political corruption. **U.S. Attorney John Lausch** charged ComEd, a utility company, with [bribery](#) for attempting to influence an unnamed Illinois legislator, [fitting](#) Madigan's description, through the provision of "financial benefits." The bribery scheme allegedly began in 2011 and lasted through 2019. Prosecutors estimate at least \$150 million in "[anticipated](#)" legislative benefits were conferred. As part of a deferred prosecution agreement, ComEd has [agreed to pay a \\$200 million fine](#). While Madigan has not been charged and has denied wrongdoing, he has been implicated as "[Public Official A](#)" in documents outlining the bribery scheme.

**Madigan** has raked in [hundreds of thousands of dollars](#) in campaign contributions over the years from the **Illinois Trial Lawyers Association PAC** and served as an effective roadblock to civil justice reforms. While his departure deals a blow to the plaintiffs' bar, the new Speaker of the House, **Emanuel "Chris" Welch**, is a [longtime Madigan ally](#) who will likely continue to push plaintiff-friendly legislation.



The optimism expressed in last year's Judicial Hellholes® report that Louisiana's litigation environment was moving in the right direction faded in 2021 with a veto of a much-needed bill to rein in deceptive lawsuit advertising practices while coastal litigation continued 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.

### ISSUES

- Governor issues veto to protect his plaintiffs' bar allies
- Coastal litigation drags on
- More developments in litigation scheme to defraud commercial carriers and insurers
- Judicial misconduct reduces public trust in the system

### ECONOMIC IMPACT OF LAWSUIT ABUSE

#### LOUISIANA

Louisiana continues to [lose jobs and revenue](#) to the tune of billions of dollars annually due to excessive civil courts costs. The current total impact of these costs results in **\$3.87 billion** in lost economic activity, **22,550** job losses and **\$1.12 billion** in lost wages for hardworking Louisianans. Were Louisiana to enact additional reforms, the resulting savings to residents and businesses would be an estimated **\$2.1 billion**. This translates to an annual hidden "tort tax" of **\$451** currently being paid by every single Louisiana resident.

Additionally, Louisiana was one of only two states to receive an “F” Grade on R Street Policy’s national [Insurance Regulation Report Card](#) in 2020, citing the state’s extremely high auto loss ratio, among other factors.

## LEGISLATIVE DEVELOPMENTS

### Bill addressing misleading lawsuit advertising passes legislature overwhelmingly only to be vetoed by Governor Edwards

A legislative priority, **S.B. 43** by **Senator Barrow Peacock**, focused on [limiting misleading lawsuit advertising practices](#) and solicitations for legal services. This bill passed the legislature by a bi-partisan margin, but it was ultimately vetoed by **Governor John Bel Edwards (D)**, a longtime ally of the plaintiffs’ bar.

Key provisions of this consumer protection bill included:

- Requiring ads to inform viewers that they are paid advertisements for legal services, and to identify the sponsor of the ad and the law firm that will handle cases.
- Prohibiting ads for legal services from misleading viewers to think they are public service announcements or medical alerts or using agency government agency logos without permission to suggest government affiliation or approval.
- Prohibiting ads that indicate a product has been recalled when it has not.
- Ensuring that ads seeking plaintiffs for lawsuits that allege prescription drugs cause injuries to warn viewers to “Consult your physician before making decisions regarding prescribed medication or medical treatment.”
- Prohibiting using, selling, or buying private health information to solicit individuals for lawsuits.

Louisiana accounts for a disproportionate amount of [legal services TV ads](#) and spending on those ads (4% of all spending and 5.6% of ads in one quarter) considering that the state makes up less than 1.5% of the nation’s population.

These types of misleading advertisements have [literally frightened consumers](#) into stopping the use of medicines prescribed by health care professionals without consulting a physician with harmful- sometimes deadly – results. A 2019 FDA study found 66 reports of patients experiencing adverse effects from discontinuing use of blood thinner medication after viewing TV advertisements. Of those 66 reports, only 2% spoke to their medical professional, 33 experienced a stroke, 24 experienced other serious injuries, and seven patients died.

*“This legislation was aimed at protecting patients and making sure medical professionals are able to give medical advice while lawyers give legal advice. Patients whose medication or medical devices are working for their conditions should not stop medical treatment because of a trial lawyer advertisement. They should seek medical advice before acting on unsubstantiated claims.”* – Karen Eddlemon, **Louisiana Coalition for Common Sense Executive Director**

## DISPROPORTIONATE TRIAL LAWYER ADS



The Legislature entered an historic [veto override session](#) following the veto, one of 28 from Governor Edwards during the 2021 session, but failed in its efforts. During the override session, **Senator Peacock** read a [letter](#) he distributed to members of the **Louisiana Supreme Court** asking for guidance on the issue before he returned the bill to calendar without requesting a vote.

In his letter, **Senator Peacock** requested that the **Louisiana Supreme Court** further address the issue and report back to the Legislature, specifically seeking clarification regarding the party responsible for regulating advertising in Louisiana that does not fall under the court's jurisdiction, such as non-attorney marketing firms known as lead generators or aggregators, or attorneys or firms outside the state. In response, the Court advised that it is unable to intervene in a matter between the Legislative and Executive branches. However, the Court does plan to organize a strategic planning discussion on lawyer advertising.

## UNFOUNDED COASTAL LAWSUITS CONTINUE TO DRAG ON, COSTING JOBS AND INVESTMENT

Coastal lawsuits targeting Louisiana's critical energy industry stretch the law far beyond its intent, ignore critical facts and involve private lawyers in a space meant for democratically elected decision makers who are accountable to the public. Coastal lawsuits attempt to outsource the enforcement of state-issued permits to local governing authorities. Even though energy companies provide [thousands](#) of quality jobs for hard-working Louisianans and [millions](#) in tax dollars for state coffers, these baseless lawsuits continue to move forward under Governor Edwards and his high-paid trial attorney friends. The 43 cases filed by six coastal parishes and the City of New Orleans have dragged on since 2013, with no resolution in sight. The question of jurisdiction remains at issue.

In a recent development, the **U.S. Court of Appeals for the Fifth Circuit** [partially reversed](#) an earlier decision to keep lawsuits filed by **Cameron and Plaquemines Parishes** in state court. The Court agreed that no federal question existed; however, it remanded the cases back to federal district court to determine whether federal-officer jurisdiction applied. The decision was based on an expert report filed by one of the parishes containing what the court saw as a new theory of liability that might justify removal to federal court. The district court must decide if the companies were acting under the authority of a [federal wartime agency](#). The lawsuits claim damages relating to the producers' conduct carried out at the direction of the federal government during World War II. The parishes claim the producers should have followed certain "prudent practices," but many of these supposed prudent practices would have directly conflicted with federal mandates.

The decision has implications far beyond these two parishes. At issue is whether the hundreds of oil companies named in the suit can be required to pay costs attributed to decades of coastal erosion and wetlands losses.

## THE PLOT THICKENS WITH STAGED AUTO ACCIDENT SCHEME TO DEFRAUD COMMERCIAL CARRIERS AND THEIR INSURERS

Fueled by a climate of lawsuit abuse, the high cost of auto insurance has long plagued Louisiana families and businesses. Litigation plays a significant role in driving up insurance costs, leading to premium increases of [18.3 percent](#) since 2015 for Louisiana drivers. Louisiana's auto insurance rates are the [highest](#) in the country. Some insurance companies are no longer writing policies in the state, which reduces competition for consumers. Louisianans are feeling the effects on their pocketbooks, and some businesses are considering whether to relocate to less litigious states or close their doors.

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

## “Operation Sideswipe”

The latest developments in the sprawling federal investigation, dubbed “Operation Sideswipe,” continue to expose the scope of these schemes to stage accidents with [big rigs](#) in the New Orleans area.

The investigation centers around staged “[accidents](#)” in 2016 and 2017. 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.

[Seven more defendants](#) were indicted for their alleged involvement in these schemes seeking to defraud trucking companies and their insurers, generating big payouts for themselves. The current total now stands at a whopping 40 defendants.

Louisiana law enforcement officials should be commended for pursuing the wrongdoers. It will deter individuals from engaging in similar behavior in the future because they know that they will be met with significant civil and criminal penalties if they do.

## JUDICIAL MISCONDUCT CONTINUES TO RUN RAMPANT

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.

Scandals continue to plague members of the judiciary as outlined below. Most notably, **Louisiana Supreme Court Justice Jefferson Hughes, III** admitted to committing [judicial misconduct](#) over a visit to the home of a Hammond political operative who alleged Justice Hughes [offered him money](#) to shift support to another candidate vying for an open seat on the Louisiana Supreme Court. **Justice Hughes** agreed to pay more than \$2,000 to the state judicial commission to cover the costs of the investigation and was publicly [censured](#) for violating several judicial canons.

### Disciplinary hearing set over judicial transparency

In a November hearing, the **Judicial Commission of Louisiana** investigated Louisiana district court judge’s [alleged unethical conduct](#) during a 2018 election campaign, a sign that the state is hopefully starting to address its lack of judicial transparency.

The Commission is investigating allegations that **Fourth Judicial District Court Judge Sharon Marchman** made false and misleading statements about her 2018 opponent, **Judge James “Jimbo” Stephens**.

The allegations include misleading soft-on-crime attack ads launched by Judge Marchman’s campaign. In 2018, the **Louisiana Judicial Campaign Oversight Committee** concluded that **Marchman** violated a canon of the Louisiana Code of Judicial Conduct by falsely connecting Judge Stephens with Senator Bernie Sanders.

“Louisiana’s long-standing lack of judicial transparency is a big part of the problem that continually lands our state at or near the bottom of most national business climate rankings,” [said Lana Sonnier Venable](#), executive director of **Louisiana Lawsuit Abuse Watch**. “Instances of alleged misconduct, like this one, are being more widely reported and continue to draw the ire of the public.”

## Use of Mandatory Bar Association Dues for Lobbying

A pair of federal court rulings could soon free Louisiana lawyers from [mandatory bar membership](#).

In July, the Fifth Circuit reopened a case brought by New Orleans attorney Randy Boudreaux, who claims that mandatory bar membership violates his first amendment rights because the bar uses his membership dues for political lobbying purposes.

The appellate court did not yet eliminate the requirement for lawyers to join the bar, but it did say the bar association failed to properly disclose its activities, reversing a 2020 U.S. District Court dismissal of Boudreaux's claims.

The **Louisiana State Bar Association (LSBA)** frequently engages in political or ideological initiatives completely unrelated to the practice of law, largely fighting against tort reform in the legislature. [Since at least 2007](#), the LSBA has used mandatory membership dues to take a position on more than 500 bills filed in the state legislature.



### ISSUES

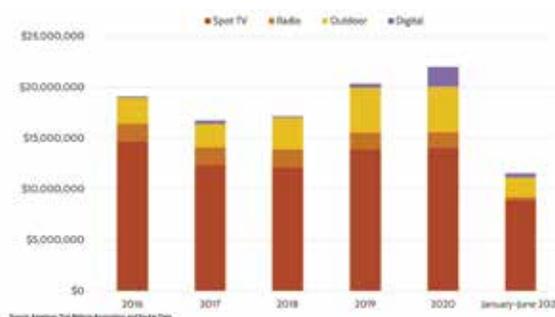
- Open-door policy for out-of-state plaintiffs
- Junk science permitted in courtrooms
- Uncertainty around standard for punitive damages

**A** [perennial Judicial Hellhole](#)<sup>®</sup>, St. Louis once again finds itself on the list; however, the “Show-Me-Your-Lawsuit” state has made some important progress through legislative reforms. But while the legislature has prioritized civil justice reform, there is more work to be done.

The future success is contingent on the St. Louis court's proper application of the new statutes. Some St. Louis judges [have a history](#) of ignoring both state law and U.S. Supreme Court precedent regarding expert evidence standards, personal jurisdiction and venue, and damage awards.

## LEGAL SERVICES ADVERTISING SPENDING

### MISSOURI



The City of St. Louis Circuit Court is notorious for allowing blatant forum shopping and awarding excessive punitive damage awards. The court also fails to ensure that cases are guided by sound science. Lawyers know this is a Judicial Hellhole<sup>®</sup> – local trial lawyer ads [increased nearly 75%](#) between 2016 and 2020, while spending on those ads increased more than 15% during the same time period.

## ECONOMIC IMPACT OF LAWSUIT ABUSE

### MISSOURI

A recent [study](#) by John Dunham & Associates states that if additional reforms are enacted, state residents and businesses would save more than **\$1.7 billion**. These savings would support **20,880** additional jobs and **\$3.38 billion** in increased economic activity.

## PLAINTIFFS' LAWYERS FLOCK TO ST. LOUIS

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

Despite the 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 to be heard in their courtrooms. Plaintiffs' experts, whose testimony has been determined to not be [based in science](#) by other state courts, have been permitted to testify in St. Louis courts.

### Talc Litigation

In June 2021, the **U.S. Supreme Court** delivered an important reminder about the importance of states enacting civil justice reform and reining in activist judges. The Court announced that it would not review a landmark talcum powder case (*Ingham*) which resulted in a multi-billion-dollar verdict out of the **City of St. Louis Circuit Court**. The **Supreme Court** grants certiorari in [less than 2%](#) of cases and it is dangerous to rely on the high court to police the decisions of rogue state judges.

In July 2018, a City of St. Louis jury awarded \$4.69 billion – [\\$550 million in actual damages and \\$4.14 billion in punitive damages](#) – to a group of [22 plaintiffs](#). The women [claimed](#) that their ovarian cancer was caused by [exposure to asbestos](#) allegedly found in Johnson & Johnson's baby powder. Of the 22 women involved in the lawsuit, 17 had [no connection to Missouri](#). Each was awarded the same amount of money, despite there being [different facts](#) for each, and differences in relevant law. [After a six-week trial](#), jurors deliberated for less than a full day before reaching this astounding result.

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

In a very disappointing order in November 2020, the **Missouri Supreme Court** [refused](#) to review the verdict. ATRA [had urged](#) the state's high court to review the case and (1) limit the trial court's exercise of personal jurisdiction over a case where the defendant and many plaintiffs had little to no connection to the forum state, (2) not allow the trial court to join multiple plaintiffs in a single trial whose only commonality is alleging injury by the same product, and (3) address the constitutionality of the massive punitive damages award.

ATRA also [urged](#) the **U.S. Supreme Court** to review the case, specifically the improper joinder of 22 plaintiffs, each with different medical backgrounds and outcomes, into one case. The **Supreme Court** should have reviewed this case to provide clearer guidance to lower courts regarding joining such dissimilar claims. The onus is now on the Missouri legislature to enact essential civil justice reforms to ensure the protection of defendants' due process rights.

The ability for businesses to receive a fair trial in St. Louis may be slowly improving. In September 2021, days after a Philadelphia jury found that Johnson & Johnson's talcum powder does not cause cancer, a St. Louis Circuit Court jury reached the same conclusion in the first multi-plaintiff talc verdict following *Johnson & Johnson v. Ingham*. Each of the three plaintiffs had a different condition: Susan Vogeler has clear-cell cancer, Victoria Giese has low-grade cancer, and Debra Marino had high-grade cancer. Allen Smith, who represented the women, sought \$923 million in damages. The jury [concluded](#) that baby powder could not have caused all three cancer variations.

### Roundup Litigation

**St. Louis**, along with fellow Judicial Hellhole® **California**, is home to tens of thousands of lawsuits against Bayer AG involving its Roundup® weedkiller. All of them allege that the active ingredient, glyphosate, causes non-Hodgkin lymphoma. Law firms across the country are flocking to St. Louis to file their lawsuits. As of July 2021, California-based [Singleton Law Firm](#) had approximately [400](#) Roundup® cases pending in Missouri. Another prominent player is [Kirkendall Dwyer LLP](#), a Texas-based firm.

Facing mounting lawsuits generated by a barrage of lawsuit advertising, the cost and risk of trials, and harm to its business, in June 2020, Bayer [settled](#) around 95,000 of the 125,000 claims for more than \$10 billion.

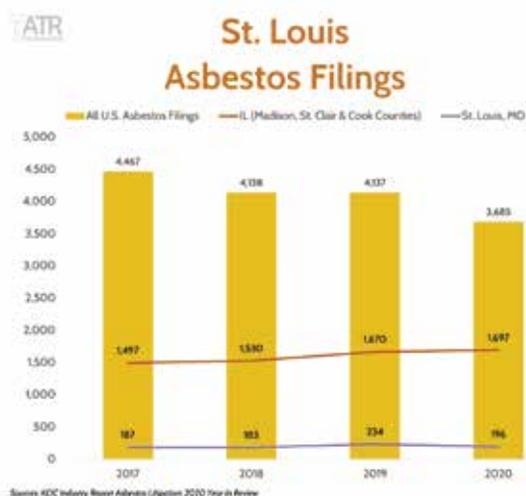
In May of 2021, **Judge Vince Chhabria** of the **U.S. District Court for the Northern District of California** rejected a \$2 billion class action proposal to settle future claims alleging that Roundup® causes cancer.

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

### 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 (3rd) filings in 2020. As of April 2021, nationwide lawsuits alleging exposure to asbestos caused a person's [lung cancer](#) were up 29% compared to that time last year. By comparison, in St. Louis, lung cancer filings were up 74%.

Asbestos trust transparency legislation would prevent plaintiffs' lawyers from alleging that solvent companies are responsible for their clients' exposure to asbestos in order to obtain compensation from trusts set up by those companies, then hiding this information when suing insolvent companies in court. Several states have enacted similar laws and it would make St. Louis a less attractive venue for plaintiffs' lawyers.



### UNCERTAINTY AROUND STANDARD FOR PUNITIVE DAMAGES IN MEDICAL LIABILITY CASES

Missouri courts have a history of handing down unreasonable punitive damage awards. On July 1, 2020, **Governor Mike Parsons (R)** signed into law [S.B. 591](#), a new framework for punitive damages. Among other safeguards designed to prevent abuse, under the new law, a jury can award punitive damages upon a showing “by clear and convincing evidence that the defendant intentionally harmed the plaintiff without just cause or acted with a deliberate and flagrant disregard for the safety of others.”

Under the previous standard, Missouri courts could hit doctors with punitive damages for treatment decisions that were arguably negligent (i.e. mistakes) even though punitive damages are supposed to be reserved for egregious cases of misconduct. The case below is an example of that occurring. The legislature's enactment of **S.B. 591** responded to it and will hopefully prevent the misuse of punitive damages in the future.

In March 2021, the **Missouri Supreme Court** upheld a circuit court’s application of a lesser standard for the award of punitive damages in a medical malpractice case. In [\*Rhoden v. Missouri Delta Med. Ctr.\*](#), the **Missouri Supreme Court** ruled that “acting willfully, wantonly, or maliciously is equivalent to acting with a complete indifference to or in conscious disregard for the rights or safety of others.” The court concluded that plaintiffs made a submissible case for aggravated circumstances damages by alleging that a doctor knowingly and incorrectly informed a patient, who was not experiencing a health emergency, that his two treatment options were (1) prostate surgery or (2) self-inserting catheters for the rest of his life. Considering the patient’s high risk for surgery, the doctor did not explore non-invasive treatment options, which constituted a complete indifference to or conscious disregard for the patient’s safety.

In his dissent, **Judge Zel Fischer** stated that the applicable statute, which instructs the jury to award punitive damages if the defendant demonstrated “complete indifference to or conscious disregard for the safety of others,” reflects “the general standard for the award of punitive damages. . . developed in Missouri cases between 1973 and 1976.” In 1986, the **General Assembly** enacted **§538.210**, which specifies: “An award of punitive damages against a health care provider. . . shall be made only upon a showing by a plaintiff that the health care provider demonstrated willful, wanton or malicious misconduct with respect to his actions which are found to have injured or caused or contributed to cause the damages claimed in the petition.” **Judge Fischer** concluded: “In my view, the General Assembly’s intent could not have been clearer: the less culpable standard of ‘complete indifference or conscious disregard’ for punitive damages no longer applied to claims against health care providers.”

The impact of this decision on future cases is uncertain, but there is hope that it will be limited following the enactment of **S.B. 591**, which applies to all cases filed after August 2020. This bill was enacted in response to the intermediate appellate court’s failure to recognize the change in standards.

## MISSOURI LEGISLATURE MUST CONTINUE TO PRIORITIZE CIVIL JUSTICE REFORM

The **Missouri Legislature** has taken great strides toward addressing lawsuit abuse over the past few years. It remains to be seen whether these reforms will remove the state from the Judicial Hellholes® list once and for all, but the ATRF remains hopeful and will keep a close eye on the state.

Even with the progress, there is more work to be done. In 2021, the legislature failed to pass a significant reform bill that would have addressed several problems within the state’s civil justice system. [\*\*H.B. 922\*\*](#) is legislation that originally would have reduced the statute of limitations in actions for personal injury cases from five years, which is among the longest in the country, to three years and, after being amended, included several other affirmative civil justice reform provisions. In addition to reducing the statute of limitations, **H.B. 922** included helpful reforms addressing asbestos litigation, product liability, “innovator liability,” and collateral source recovery.

### COVID-19 Liability Protections

On July 7, 2021, **Governor Mike Parson** signed [\*\*S.B. 51\*\*](#), which provides reasonable liability protections to businesses, healthcare providers, and others that are operating during an unprecedented time. The enacted legislation provides that an individual or organization cannot be held liable in a lawsuit by a person who blames them for exposure to COVID-19 unless that person can point to clear and convincing evidence of reckless or willful misconduct that caused an injury. The Missouri law also provides a presumption that a person assumes the risk of exposure if the owner of a property posts a sign warning visitors of the inherent risk. In addition, the bill provides assurance to frontline healthcare providers that are operating with shortages of staff, equipment, and beds during the pandemic that they will not be subject to liability except in cases of reckless or willful misconduct. Businesses that have stepped up to make personal protective equipment and other products to aid the pandemic response are also subject to this higher standard in product

liability actions. The Missouri law shortens Missouri's otherwise exceptionally long five-year statute of limitations to one year for exposure lawsuits and two years for medical and product liability actions and limits punitive damages in any COVID-19 related action to nine times the amount of compensatory damages.

This legislation provides much-needed protection for frontline workers and businesses as the trial bar looks to capitalize on the pandemic. Trial lawyers in Missouri spent approximately [\\$408,440](#) on 1,890 advertisements mentioning COVID-19 or coronavirus from March through December 2020.



## ISSUES

- Pro-plaintiff judge manages litigation
- Texas law firm has its way in court
- Appellate court misses opportunity to rein in trial court

**A** newcomer to the Judicial Hellholes® list in 2020, South Carolina's consolidated docket for the state's asbestos litigation has developed a [reputation](#) for discovery abuse, unwarranted sanctions, low evidentiary requirements, and multi-million-dollar verdicts. As a result, the state has become a [hot spot](#) for asbestos claims. While the volume of litigation dramatically decreased this year, in large part due to COVID-19 shutdowns, the court's tendency to favor plaintiffs continues. The court's drop in the rankings is not a result of any reforms or changes in approach, but rather a reflection of the decrease in activity and the severity of abuses in other jurisdictions.

## JUDGE DEMONSTRATES UNABASHED PARTIALITY TOWARD PLAINTIFFS

In 2017, retired **South Carolina Supreme Court Chief Justice Jean Hoefler Toal** was appointed to preside over South Carolina's asbestos docket. Over the past four years, Judge Toal has built a record of broad, pro-plaintiff rulings and has imposed severe and unwarranted discovery sanctions on defendants in almost every case she hears.

In [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 made the unusual move of naming insurance carriers as the "alter egos" of their insureds.

### Preclusion Of Defense's Evidence/Take-Home Exposure

In September 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 and did not allow the jury to hear evidence that could have significantly altered the outcome.

In the 1980s, Weist was working at a Louis Reich Co. facility owned by Kraft Heinz where he was allegedly exposed to asbestos-containing materials manufactured and distributed by Metal Masters. Weist claimed that asbestos from Metal Masters' products stuck to his clothing and Kraft Heinz failed to warn him about the dangers of second-hand exposure. 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.

What the jury did not learn is that Weist's wife was not just exposed to asbestos on her husband's clothing, but that her father, an insulator, and uncle also worked in places where asbestos was present.

## FILINGS ON THE RISE DESPITE NATIONAL DROP-OFF, TEXAS FIRM HAS FREE REIN

Those familiar with South Carolina asbestos litigation say that **Judge Toal** almost always sides with plaintiffs' lawyers from Dallas, Texas, [Law Offices of Dean, Omar, Branham and Shirley](#) and their local counsel [Kassel McVey](#).

Although national asbestos claim filings are down 9%, lawsuits are skyrocketing in South Carolina due to the activity of **Dean Omar Branham Shirley**, which increased its complaint filings by [400%](#) between 2017 and 2020.

[Jessica Dean](#), the firm's lead partner, recently [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 try cases in those states, and a Minnesota judge [sanctioned](#) her \$78,000 in defense fees and costs after her witnesses flouted a court order.

**Dean Omar Branham Shirley** 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** just does not like the answers at the deposition, the firm seeks sanctions.

In a sample of [five 2020 cases](#), the firm filed at least 22 motions for discovery-related sanctions, including eight motions against defendant companies in just one case.

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

## HIGHLY ANTICIPATED APPELLATE DECISION A BIG DISAPPOINTMENT

In September 2021, the **South Carolina Court of Appeals** delivered another blow to South Carolina's asbestos litigation environment when it ruled in *Jolly v. General Electric Co.* Observers hoped that the appellate court would take the opportunity to rein in Judge Toal and restore some fairness and balance to the litigation. Unfortunately, the decision likely will only further embolden the plaintiffs' bar.

*Jolly* was the first asbestos case ever heard by **Judge Toal**. At trial, the jury returned a modest verdict against Fisher Control and Crosby Valve. Judge Toal used a mechanism known as "additur" to increase the award by almost [\\$1.6 million](#). Judge Toal has [made a habit](#) of overturning or modifying jury verdicts with which she disagrees.

**Judge Toal** also allowed **Dean Omar** to manipulate setoff in a manner they have continued in cases following *Jolly*. A setoff prevents double recovery for a single harm. It reduces the plaintiff's award to deduct money already paid to the plaintiff by the defendant or by other sources for the same injury. The appellate court left the setoff unchanged, a decision that will encourage **Dean Omar** and other plaintiffs' firms to continue this pattern of behavior.

The trial court [did not fully consider](#) amounts that the plaintiff had already received as settlements for the same injuries, which should have been deducted from the verdict and the appellate court affirmed. The appellate court's decision also gives Judge Toal leeway to increase awards beyond the jury's verdict.

The court rejected Appellant's argument that the allocation of funds for a future wrongful death claim is compensation for the personal injuries at issue here because wrongful death damages benefit all of plaintiff's heirs/beneficiaries, not only Plaintiff and his wife "[t]herefore, this slight overlap in damages does not rise to the level of a 'double recovery.'"

Appellants also argued that the circuit court should have rejected the plaintiff's allocation of settlement proceeds to a future wrongful death claim because signing a release of a personal injury claim forecloses a future wrongful death claim. The court rejected Appellants' assignment of error because "[i]t logically follows that those proceeds should be allocated among the claims that were released."

The court also allowed an "any exposure" theory that, contrary to science, allows plaintiffs to recover from any defendant that exposed them to asbestos, no matter how miniscule the exposure compared to other sources.

# Watch List

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



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

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

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

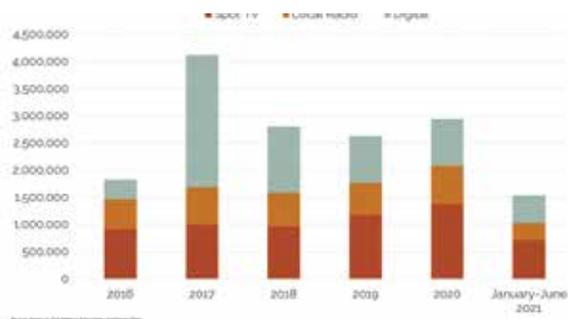
**D**espite all the work done by the Florida Supreme Court and Governor DeSantis to mitigate lawsuit abuse, much-needed reforms continue to stall in the Florida Legislature. Without these reforms, the trial bar is still able to capitalize, and they know it. For the state to be removed from the Judicial Hellholes® report, the Florida legislature must enact meaningful reforms to continue to improve the litigation climate.

## ‘DEFLATE’ MEDICAL DAMAGES

Plaintiffs’ lawyers in Florida have long abused

### LEGAL SERVICES ADVERTISING SPENDING

#### FLORIDA



As anyone who has set foot in Florida knows, lawsuit ads are everywhere. The number of legal services ads in Florida [increased](#) by more than 60% between 2016 and 2020. Spending on those ads also increased by more than 50%. Most notably, spending on digital legal services ads increased by nearly 800% during those five years.

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.

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.

## BAD FAITH REFORM

Bad faith lawsuits targeting insurers continue to be fertile ground for trial lawyers looking to game the system, but the Florida legislature continued to avoid addressing the larger issues at play for yet another year.

In 2019, the **American Property and Casualty Insurance Association** released a [study](#) finding that Florida’s bad faith lawsuits cost insurers \$4.6 billion every year, a cost that is then passed down to Florida consumers. More than [80 percent](#) of Floridians think it is unfair that insurance rates rise due to excessive lawsuits and inaccurate claims against insurance companies.

Currently, most often in situations where there is clear liability, substantial damages, and low policy limits, trial lawyers use delay tactics and multi-pronged, impossible-to-satisfy demands to set insurers up for a bad faith action. Last year, the **Florida Legislature** failed to pass [S.B. 924](#), which would have established a “reckless disregard” standard for bad faith claims against insurers.

## LITIGATION FINANCE REFORM

Third-party litigation funding, or litigation finance, is an industry of investors, both large and small, who invest in lawsuits by providing funds in return for an ownership stake in a legal claim and a contingency in the recovery. While “crash cash” loan sharks have played a problematic role in litigation for several years, there is now an emerging group of hedge fund investors providing litigation funding for major class action lawsuits.

In 2013, a trade publication called *The Hedge Fund Journal* ran an [article](#) titled “The Emerging Market in Litigation Funding.” It termed litigation as a “very attractive asset class.” It was right. Life has been good for litigation finance since then.

In August 2021, a prominent lawsuit investor, Burford Capital (traded on the London Exchange), [reported](#) 95 percent annual return on invested capital and \$500 million in new capital commitments. Australia-based [Omni Bridgeway](#) terms itself the global leader in litigation funding. Its website gives a state-by-state rundown on the environment for litigation finance in the United States.

The advent of litigation funding firms has flooded the system with millions of dollars and the notion of a plaintiff’s lawyer having to mortgage his firm to bring a case is from a bygone era. This practice enables parties to shift the financial burden of lawsuits off their balance sheets and minimize the risk of pursuing litigation. But the practice also increases the probability that meritless claims will be brought, creates questions about who is actually controlling the litigation other than the plaintiff and defendant, and makes settling lawsuits far more difficult and expensive. There is authority in Florida permitting these types of

### ECONOMIC IMPACT OF LAWSUIT ABUSE

#### FLORIDA

Florida enacted certain tort reforms, the resulting savings to residents and businesses of the state would be more than **\$5.3 billion**. The savings from reforming Florida’s tort system could support an additional **71,971** jobs and **\$11.52 billion** in increased economic activity.

arrangements (for example, [Kraft v. Mason](#)), and consequently, Florida has been cited as an attractive state for investing in litigation, particularly given its size. The Legislature has thus far failed to respond to this questionable practice, and in 2021, the Legislature declined to pass [H.B. 1293](#) or its [Senate companion](#) that would have reined in and regulated the use of litigation financing.

## MULTIPLYING ATTORNEYS' FEES

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

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

## GOOD NEWS

### Combating Frivolous COVID-19 Litigation

On March 29, 2021, Florida joined the growing number of states to pass [COVID-19 liability protection laws](#) designed to ensure businesses, health care providers, and other entities face fewer frivolous lawsuits tied to claims of COVID-19 exposure. Under Florida’s legislation, defendants are shielded from liability absent clear and convincing evidence of gross negligence. The law also requires that a plaintiff provide a supporting physician’s affidavit at the beginning of the case, and to show that the defendant did not make a good faith effort to comply with public health standards. The law creates a one-year statute of limitations for all COVID-19 related lawsuits. The liability protections apply retroactively, though not to claims filed before the law took effect.

### Enacting Much Needed Property Insurance Litigation Reforms, Including on Attorney Fees

Through [S.B. 76](#), the Legislature enacted several property insurance litigation reforms, including prohibitions on predatory advertising by contractors and public adjusters used to manufacture roof claims, stronger pre-suit requirements before filing property insurance-related suits, and a restructuring of attorney fee awards in property insurance disputes. Notably, under S.B. 76, any award of attorney’s fees to a prevailing insured will be directly tied to how successful the insured was in recovering the amount demanded through litigation. Should the claim proceed to trial, the new legislation requires the insured to obtain an award of at least 50 percent of the disputed amount in order to be entitled to all his or her reasonable attorney fees. Recoveries between 20 and 50 percent result in a proportionate recovery of attorney fees and costs. A recovery of less than 20 percent of the disputed amount means no fee recovery by the insured’s attorney.

Colorado remains on the Watch List due to its appellate courts allowing scientifically dubious expert testimony and the Colorado legislature’s propensity to enact liability-expanding legislation that targets the state’s employers.

## HIGH COURT SIGNALS SUPPORT FOR JUDGES TO ABANDON ESSENTIAL ‘GATEKEEPING’ ROLE

A pair of birth-injury cases in Colorado has significantly diminished the role that Colorado judges play in evaluating the reliability of expert evidence.

In both [cases](#), plaintiffs’ lawyers attempted to introduce questionable expert testimony asserting that healthcare providers use of a medication to induce contractions and failure to conduct an earlier Cesarean section led to a child’s birth with brain damage. Two trial courts excluded expert testimony proposed by the plaintiffs that would have attributed the baby’s condition to Cranial Compression Ischemic Encephalopathy (CCIE), a theory that prolonged, frequent compression of a child’s head during contractions can decrease oxygen and blood flow to the child’s brain during delivery. These courts, [consistent with the positions of the American College of Obstetrics and Gynecologists](#) and the [American Medical Association](#), found the theory insufficiently supported by science to be admissible in court. Nevertheless, in both cases, the **Colorado Court of Appeals** reversed the trial courts. The appellate court found that despite the lack of published articles and testing supporting the theory, the state applies a “liberal admission standard” for expert testimony, which allows the case to proceed to trial. This approach is contrary to the gatekeeping function of the courts, which provides judges with the responsibility of screening out made-for-litigation science.

In September, the [Colorado Supreme Court refused to review](#) one of the cases, leaving the door open to junk science in Colorado courtrooms.

## COLORADO LEGISLATURE DOES TRIAL BAR’S BIDDING

### Medical Liens Legislation

This year, Colorado enacted [H.B. 1300](#), legislation that will fracture practical control over the claim and litigation process, undermining Colorado’s public policy encouraging settlement. It addresses the financing and recovery of medical treatment expenses incurred by individuals injured due to a third-party’s negligence. This law will allow healthcare providers who treat injured persons to, in lieu of submitting treatment charges to the patient’s health insurer or an applicable government program like Medicaid, take a lien against the patient’s future recovery on a claim or lawsuit against the tortfeasor who caused the injury and sell that lien to another entity. The lien purchaser will then have the right to recover not just the lien purchase price, but an amount reflecting the usual and customary provider charge “billed” for the services provided to the injured party in the absence of insurance.

**H.B. 1300** will allow lienholders to exercise control over the claims without their involvement being known or disclosed. It turns defendants and their insurers into quasi-collection agents who must monitor priority positions to prevent additional exposure.

Finally, **H.B. 1300** would further entrench phantom damages as the law of Colorado. “[Phantom damages](#)” exist any time lawsuit recoveries are calculated using the dollar amount a patient was billed for a medical service instead of the amount the patient, their insurer, Medicare, Medicaid, or workers’ compensation actually paid for treatment. For example, a hospital may bill \$20,000 for an emergency room visit, while the amount the hospital typically receives after adjustments may be \$8,000. The \$12,000 difference is not owed or ever paid in the real world.



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

### Legislature Looks to Increase Burdens on Employers, Both Small and Large Businesses

The Colorado legislature has made a habit of enacting legislation that will lead to increased burdens on business across the state, large and small. According to Jason Reisman, partner at Blank Rome LLP, “Colorado [] is [giving California a run for its money](#)” in coming up with new ways for employees to sue their employers.

#### “Equal Pay for Equal Work”

The state’s [Equal Pay for Equal Work Act](#) took effect this year. The Act precludes employers from using an individual’s salary history as a basis for making pay decisions and creates a private right of action for employees to pursue wage bias claims. It creates a private right of action for “aggrieved” employees, who [may bring a civil action](#) in district court to pursue remedies. Penalties for violations include fines ranging from \$500 to \$10,000 per violation.

Employers also are required to include salary and benefit information in job postings, as well as publicize promotional opportunities to employees. These transparency rules do not apply to a job that is performed entirely out of the state, but if there is even a chance that any aspect of the job is performed in Colorado or by a Colorado resident, the employer must list the information in the job posting.

In today’s world where more jobs are being performed remotely, some job listings have gone so far as to say that Colorado residents [need not to apply](#), leading to fewer job opportunities for the state’s residents. Employers do not want to open themselves up to the increased liability and frivolous lawsuits that are certain to follow the bill’s enactment.

The Act also says an employer cannot pay an employee less than a worker of a different sex if they perform “substantially *similar*” work, a much lower bar than the federal standard of “substantially equal” work. The unfamiliar language will likely [prove confusing](#) when courts are interpreting the law and lead to even more litigation.

Given the private right of action and the amorphous nature of the applicable standards, the Act is primed to be a lucrative goldmine for the entrepreneurial Colorado plaintiffs’ bar.

#### New Law Adds to Labor Costs for Agricultural Employers

Agricultural employers in Colorado are [already strained](#) by drought conditions and the continuing rise of production costs. The state’s newly signed **Agricultural Workers’ Bill of Rights** will only add to the industry’s burdens. It will increase labor costs by removing the longstanding exemption of agricultural workers from minimum wage, meal and rest break, and overtime pay requirements. The bill contains a private right of action and will open the floodgates to litigation targeting the agriculture industry.

**“The net effect of significant additions of labor costs to agricultural employers will be more family farms and ranches being sold to developments and loss of jobs for agricultural workers.”**

– Bonnie Brown,  
Colorado Wool Growers Association

This new Colorado law also conflicts with the federal **Fair Labor Standards Act**, which exempts agricultural workers from minimum wage and overtime requirements. At the state level, [only a few states](#) entitle some, not all, agricultural workers to minimum wage.

### ***Dangerous Employment Liability Bill Fails, But May Return in Future***

[S.B. 176](#) would have allowed workplace discrimination claims against private employers to go directly to court, rather than first go to the **Colorado Civil Rights Division** for review and potential resolution. It also would lower the standard for actionable hostile work environment claims from “severe or pervasive” to anything that “undermines a person’s sense of well-being” and makes employers liable for conduct of independent contractors. The bill passed the Senate but was postponed indefinitely by the House Judiciary Committee.

### **Legislature Fails to Pass COVID-19 Liability Protections**

Once again, Colorado’s legislature failed to protect the state’s workers and businesses from excessive liability arising out of the COVID-19 pandemic. Two bills, [HB21-1074](#) and [SB21-080](#), would have provided individuals and organizations such as schools, businesses, healthcare providers, and religious organizations liability protection in lawsuits claiming that they are responsible for a person’s exposure to the virus. This protection would only be available to those who complied with applicable public health guidance. It would not be available if gross negligence or willful misconduct led to a person developing COVID-19.

Colorado is one of the [few states](#) not to enact any level of protection.

### **CASE TO WATCH**

The **Colorado Supreme Court** is [poised to rule](#) in an important case involving proper application of the state’s judgment interest statute.

The case, *Ford Motor Co. v. Walker*, deals with a 2009 car accident in which a plaintiff claimed that his injuries from being rear-ended in a car accident were exacerbated by the design of the car seat. The original trial resulted in an award of nearly \$3 million. This judgment was [reversed](#) by the state’s appellate courts after finding the trial court improperly instructed the jury to apply a plaintiff-friendly standard for determining whether a complex product is defective. The case was then retried in 2019, ten years after the accident, and the court again entered a judgment for Walker nearing \$3 million.

Following the award, Walker requested pre-judgment interest rate of [nine percent](#) for the entire ten years between the accident and the final judgement. Ford conceded that it owed pre-judgment interest up until the date of the first judgment but argued that interest should accrue at the lower post-judgment rate following the first judgment. Despite the automaker prevailing in the first appeal due to the trial court’s error, the trial court and intermediate appellate court sided with Walker, applying the nine percent pre-judgment interest rate from the inception of the lawsuit to the final judgement, adding more than \$3.6 million in interest to the award.

ATRA’s [amicus brief](#) to the Colorado Supreme Court notes that the Colorado Court of Appeals’ decision irrationally penalizes civil defendants who successfully appeal adverse verdicts. The court’s holding forces defendants to pay interest at a high fixed rate during time spent on appeal to correct erroneous trial court actions, even where that appeal is successful and the lower court’s verdict is vacated.



## COURT UPHOLDS MASSIVE VERDICT DESPITE PRODUCT EXCEEDING SAFETY STANDARDS

In June 2021, the **Court of Appeals for the Fifth District of Texas** [disregarded](#) the state's long-standing prohibition on introducing evidence about different products or dissimilar accidents in product liability cases when it upheld a massive verdict in a case centered around a 2016 car accident.

A Texas jury awarded \$242.1 million dollars to a couple who blamed an automaker for their children's injuries after another driver rear-ended

their car at 50 miles per hour while stopped in traffic on a highway. The plaintiffs claimed that Toyota was liable for an alleged design defect and failure to warn that the seat back and restraint system could collapse backward in a rear-end collision. The jury found Toyota and its non-manufacturing seller 95% liable, and the driver who crashed into their completely stopped car only 5% liable for the plaintiffs' injuries. It did so despite the fact the product exceeded federal safety standards, there was no evidence of a safer alternative design, and the court had refused to allow Toyota to present its own expert rebuttal testimony. Additionally, the jury found Toyota failed to warn of the risk of the seats collapsing in an accident even though the plaintiffs never read the owner's manual and would not have seen any warning.

Texas [traditionally limits](#) the admission of evidence from unrelated accidents; however, the trial court allowed plaintiff to present "other-incident" evidence. But here, the court allowed the plaintiffs to introduce evidence related not only to other incidents, but to entirely different manufacturers and types of injuries, including a "60 Minutes" clip about seatback collapses. The trial court played the clip for the jury and waited until after it was played to instruct the jury that the clip should not be taken as proof of the defect at issue, but only as evidence of knowledge to the public. The **Court of Appeals** upheld this deviation from the law.

Texas law also expressly affords a [meaningful presumption of nonliability](#) for manufacturers that comply with federal safety standards, and the vehicle in this case exceeded safety standards put forth by the **National Highway Traffic Safety Administration**. In rebutting this presumption, a claimant usually cannot introduce evidence unrelated to the product or incident at issue.

It is exceedingly difficult for a jury to not be prejudiced by such an inflammatory and graphic video. Despite its prejudicial nature, the **Court of Appeals** [upheld](#) the trial court's decision to admit it as evidence because "the trial court confirmed [the] limited purpose in its instruction to the jury" was to show the industry's knowledge of the risk of rear-end collisions not to show a defect, even though that instruction did not come until after the clip was played.

## TEXAS SUPREME COURT OVERTURNS FIFTH DISTRICT, RECOGNIZES APEX DOCTRINE

In October 2021, the [Texas Supreme Court directed](#) the **Dallas Court of Appeals** to vacate its order compelling the Executive Vice President for People and Communications (EVP) of American Airlines Group, Inc. to be deposed.

The suit involved allegations that a gate agent improperly accessed a passenger's personal information and used it to harass him through internet and telephone communications. In such cases, high-ranking corporate officials are traditionally protected from compelled testimony under the **apex doctrine**, [unless](#) they have "unique or superior knowledge" of relevant facts.

The trial court denied American's motion to quash the subpoena and ordered the plaintiff to serve a new deposition notice that included the particular matters on which the EVP would be deposed.

Due to unexplained delays by both the trial court and the plaintiff, American was unable to timely file its writ of mandamus in the Dallas Court of Appeals. The **Court of Appeals** ignored American’s reasoning for its delay and denied the petition, never reaching the merits of the case.

American then sought mandamus relief from the **Supreme Court of Texas**. In its petition, American explained that the four-month delay in receiving the trial court order and the plaintiff’s delay in serving a new notice justified American’s delay in filing its petition. The Supreme Court [agreed](#).

In its order, the **Supreme Court of Texas** said that the **Dallas Court of Appeals** was incorrect in holding that American’s delay was “unexplainable” and “unreasonable.” The Court criticized the intermediate court for not better examining the record and reaching a rushed decision.

The Court also ruled that the EVP is protected from being deposed. As required by the apex doctrine, the plaintiff failed to show that the EVP had any “unique or superior personal knowledge” of discoverable information that could not be obtained through lower-level employees. The plaintiff also [did not pursue](#) “less intrusive means of discovery.” “Unnecessarily requiring apex officials to prepare for and attend depositions takes them away from their duties and hurts the organizations they serve — and, ultimately, the public,” the Court [said](#).

***“Unnecessarily requiring apex officials to prepare for and attend depositions takes them away from their duties and hurts the organizations they serve — and, ultimately, the public.”***

– Supreme Court of Texas

## PROCEDURAL IRREGULARITIES UNEARTHED BY SITTING JUSTICE

A sitting justice has brought to light some [troublesome procedural irregularities](#) within the **Court of Appeals for the Fifth District of Texas**.

**Justice David Schenk** says some of his colleagues have manipulated court rules to change decisions with which they disagree. In two such instances, [members of the court](#) unnecessarily [delayed the release](#)

***The violation of the court’s rules of procedure “deprives the litigants of their right to a decision and judgment in accord with them, and hence, literally due process.”***

– Justice David Schenk

of opinions with the hopes of changing the final outcome. The efforts were unsuccessful both times; however, this did not alleviate Justice Schenk’s concerns.

The violation of the court’s rules of procedure [“deprives the litigants of their right](#) to a decision and judgement in accord with them, and hence, literally due process... Such efforts to obstruct the precedential effect of a panel decision, regardless of whether the Court as a whole would even agree

to convene *en banc*, much less agree to a new result, may also be seen as an attempt to benefit a subsequent litigant,” Schenk said. It “creates more ominous prospects of potentially manipulating the result at the panel *despite lack of support from a majority of the court.*”



Maryland's legislative session was disappointing, but not disastrous. Lawmakers abandoned two bills that would have provided much needed COVID-19 liability protections, but no significant liability expanding bills were passed. Despite the Court of Special Appeals' reversal of the largest medical malpractice verdict in U.S. history, Maryland's medical malpractice climate remains unstable. The **Baltimore Circuit Court** is steadily working through the decades-long asbestos backlog, which primarily consists of stale, meritless

filings from the notorious **Law Office of Peter Angelos**.

Given the Maryland legislature's propensity to pursue liability-expanding legislation and the delicate and instable nature of asbestos litigation and medical malpractice litigation in the state, ATRF will keep a careful eye on Maryland's civil justice system. Term-limited **Governor Larry Hogan (R)** has served as an important backstop and depending on the outcome of the November 2022 gubernatorial election, lobbyists for the plaintiffs' bar could be further emboldened.

### Lawmakers Fail to Pass Desperately Needed COVID-19 Liability Protections

Yet again, Maryland lawmakers failed to pass crucial COVID-19 liability protections. Egregiously, lawmakers failed to even *vote* on two promising bills, [HB 508](#) and [SB 210](#), which would have shielded persons and entities from civil liability stemming from the COVID-19 pandemic absent gross negligence or intentional wrongdoing. Both bills were heard in committee but failed to advance further, leaving Maryland in the minority of states that have not safeguarded healthcare providers, businesses, and others from burdensome lawsuits.

### Lawsuit-Generating Data Privacy Legislation Withdrawn

For several years, Maryland lawmakers have introduced litigation-generating data privacy bills that are never seriously considered. This year was no different. A string of ambitious data privacy bills was introduced but not a single one reached bicameral votes. [HB 218/SB 16](#) would have required private entities that collect biometric identifiers and information to establish a written, public framework for destroying such information in compliance with particular schedules and guidelines. The private right of action, including a provision that would have allowed recovery of \$1,000 in damages plus attorneys' fees regardless of whether a person experienced an actual injury, would have taken Maryland down the problematic road paved by Illinois and California. **Delegate Sara Love**, the bill's sponsor, withdrew it. This bill's demise is fortunate because it failed to contemplate [technological innovations](#).

### Maryland Court of Appeals Denies Certiorari, Effectively Finalizing Reversal of \$229 Million Medical Malpractice Verdict

In 2019, a Baltimore County jury unsettled the state's healthcare environment by returning a record-breaking \$229 million verdict against **Johns Hopkins Bayview Medical Center** in a birth-injury case. In that instance, a plaintiff diagnosed with early-onset preeclampsia, a potentially life-threatening pregnancy complication, repeatedly declined a Caesarian section despite warnings that the fetus was at an elevated risk for severe physical and mental disabilities or death. After her daughter was born with severe mental and physical disabilities requiring life-long care, the plaintiff sued the hospital, Johns Hopkins, alleging claims for lack of informed consent and negligent treatment. The plaintiffs' attorney touted the verdict as the largest medical malpractice award in U.S. history. The **Maryland Court of Special Appeals** unanimously [reversed](#) in February 2021, finding there was no evidence showing that the plaintiff's healthcare providers withheld material information or were negligent in providing treatment. The court explained that

the “right to individual autonomy includes the right to refuse treatment or to withdraw consent to treatment at any time, even if the decision ‘has a detrimental effect.’” On May 28, 2021, Maryland’s highest court denied certiorari, effectively finalizing the Court of Special Appeals’ decision.

Although the appellate court resolved this case fairly, the initial verdict sent shockwaves through certain segments of the medical malpractice insurance industry. The fact that a Baltimore County jury rendered such an extreme verdict creates uncertainty about the risks of insuring the state’s urban doctors. Medical malpractice premiums in Maryland increased [18.8%](#) between 2019 and 2020, and rates are expected to rise more as the system absorbs the impact of the astonishing verdict.

### The Jig Is Up for Asbestos Monger Peter Angelos

The Law Firm of Peter Angelos filed tens of [thousands](#) of asbestos cases in Baltimore in the 1990s and has secured [hundreds of millions of dollars](#) from litigation. Angelos is notorious for urging judges and lawmakers to consolidate asbestos trials in an effort to package weak claims with viable ones and compel settlements.

At first, the judiciary was open to the idea, and permitted consolidation on two occasions. For example, in 1991, **Angelos** represented more than 90% of the plaintiffs in a consolidated case consisting of [9,032](#) claims, the largest consolidated action in U.S. history at the time. However, this practice simply encouraged Angelos to continue filing dubious claims and the docket soon became clogged again. In 2014, Angelos again tried to consolidate thousands of cases, but the court was not fooled by Angelos’ money-grabbing scheme and denied the request. **Judge John Glynn** [explained](#) that “charg[ing] headlong into consolidation” would be an inefficient use of court resources. The **Baltimore City Court** opted to implement a version of the [innovative approach](#) employed by the manager of federal asbestos litigation (MDL-875).



In December of 2016, the court adopted a procedure in which judges [individually review](#) pending cases at monthly status conferences to filter out non-viable ones. Predictably, Angelos’ firm is voluntarily dismissing the majority of its cases when they are called up for a status conference, revealing that most of Angelos’ pending cases [lacked](#) basic evidentiary support such as medical diagnoses, verifications of exposure, and corroborative witnesses.

Angelos’ decrease in filings caused Baltimore’s total filings to drop. In 2015, 2016, and 2017,

**Baltimore** ranked second in the nation in asbestos

filings with [694](#), [548](#), and [495](#), respectively. In 2018, **Baltimore** ranked third in the nation in asbestos filings with [330](#), dropped to sixth place in 2019 with [166](#) filings, and fell to fourteenth place in 2020 with only [54](#) filings, a 67.5% decrease from the previous year.

In April 2019, Angelos, determined to continue benefiting from meritless cases, [enlisted](#) **Gerald Evans of Evans and Associates** to lobby the legislature to sneak an 11th hour bill establishing a mediation program for the asbestos docket. The legislature [did not take the bait](#). In October of 2019, the Angelos firm again [urged](#) consolidation at a House Judiciary Committee hearing in which the panel was briefed on issues that might arise in the 2020 legislative session. If the pandemic had not interrupted the 2020 legislative session, Angelos probably would have revived his duplicitous tactics. This year, however, Angelos was quiet, as the procedural updates that Baltimore began implementing in 2014 continue to steadily weed out his meritless claims lingering in the system. ATRF is optimistic that Maryland’s asbestos litigation climate will continue to improve, and that Angelos’ stale filings will continue to be dismissed into oblivion.



**A**fter spending three years on the Judicial Hellholes® list, Minnesota drops down to the Watch List thanks to inactivity caused by COVID-19 shutdowns rather than any reforms or improvements by the courts or legislature. Minnesota still has some of the most [plaintiff-friendly medical malpractice laws](#) in the country, a [lenient evidentiary standard](#) that allows for admission of junk science, and is facing the effects of a [2020 Minnesota Supreme Court](#) ruling allowing third-party litigation financing.

In addition to these ongoing issues, 2021 saw litigation developments in the “Gopher State” relating to [climate change](#) and [strict liability for e-commerce platforms](#) like Amazon.

## ACTIVIST AG PURSUES REGULATION THROUGH LITIGATION

### Climate Change Litigation

In June 2020, **Minnesota Attorney General Keith Ellison** [announced a lawsuit](#) against several oil companies, including Exxon, Koch Industries Inc., and the American Petroleum Institute, claiming they misled Minnesotans about climate change. The lawsuits were brought under statutes that tackle consumer fraud, deceptive trade practices, and false advertising. **Minnesota** is one of several local jurisdictions around the country attempting to shift costs related to climate change to energy companies.

Ever since **AG Ellison** announced the suit, [the companies have fought](#) to remove the case to federal court, arguing that climate change is a national and global issue rather than a local one. Energy companies have taken the same approach in similar lawsuits elsewhere, including in Hellholes® Louisiana, New York, and California.

The companies suffered a blow to their removal efforts in March 2021 when a U.S. District Court judge [sent the case back](#) to Minnesota state court. But [two recent decisions](#), including [one from the U.S. Supreme Court](#), have [strengthened the companies’ chances](#) of getting the case back to a more neutral federal court. The companies have appealed the decision to the **U.S. Court of Appeals for the Eighth Circuit**, and in August the district judge agreed to [pause his remand order](#) until the Circuit’s decision “because the impacts of [the two] decisions have not yet been tested in the Eighth Circuit.” In their appeal, the companies argued that a decision to keep the case in state court would interfere with [uniquely important federal policies](#), including energy policy, environmental protection, and foreign affairs.

Nonetheless, attorneys general from 16 states and the District of Columbia [filed amicus briefs](#) less than a week after the judge’s decision to pause the remand order, urging him to keep the case in state court. The AGs, along with local government groups, argued that the alleged state law violations should not be governed by federal environmental statutes and common law just because they deal with a national issue like climate change.

## FRONTLINE WORKERS AND BUSINESSES REMAIN VULNERABLE TO ABUSIVE LITIGATION

After failing to adopt COVID-19 liability protections in 2020, the **Minnesota Legislature** again ignored the liability concerns of businesses operating in the state. Despite [introduction of two bills](#) in the House, and another in the Senate, none of the three bills made it past the committee stage. [S.F. 512](#) and its House companion, [H.F. 571](#), would have given healthcare providers, facilities, and responders who operated with shortages of staff and equipment during the pandemic with protection from COVID-19 related lawsuits.

[H.F. 688](#) would have provided persons and businesses with immunity from claims alleging that they caused someone's exposure to COVID-19. These bills would not have precluded liability for intentional, reckless, or grossly negligent conduct.

With these bills never reaching a vote, Minnesota healthcare workers and businesses still face the risk of COVID-19 related liability, even when they follow proper health orders and government guidelines to protect themselves and others. More than two thirds of states have enacted some form of liability protection for frontline workers and businesses.

## AREAS OF CONTINUED CONCERN

### Medical Liability

"Minnesota's medical malpractice statutes are friendlier to injured patients than the national average," one medical malpractice lawsuit referral [website](#) observes. "Moreover, the state's courts recognize a broader range of theories under which an injured party can recover damages regarding claims cases emanating from medical malpractice related damages." One specific statute that is more plaintiff-friendly than most is Minnesota's [four-year](#) statute of limitations for medical liability cases. A majority of states allow for a case to be filed within [a two or three-year period](#). In addition, while many states place a reasonable limit on damages for pain and suffering in medical liability cases to protect the affordability of health care, Minnesota [does not](#) have such a law. Minnesota is also in the minority of states that allow plaintiffs to sue for "[loss of chance](#)," which seek damages for a reduced chance of recovery, even if it is more likely than not that a delay in a diagnosis or change in treatment would not have changed the patient's outcome.

### Expert Evidence

More than two thirds of states now follow the standard for admission of expert testimony applied in federal courts. That standard, as laid out in the U.S. Supreme Court's [Daubert](#) decision and **Federal Rule of Evidence 702**, empowers judges to serve as gatekeepers that ensure that the theories offered are reliable and backed by science. Five jurisdictions - Florida, Maryland, Missouri, New Jersey, and the District of Columbia - have transitioned to this approach over the past five years. Yet, in late 2018, the **Minnesota Supreme Court** [rejected](#) its own advisory committee's recommendation that it amend the state's rules of evidence to effectively follow this standard. Instead, Minnesota remains an outlier. It is among a half dozen jurisdictions that continue to apply a more lenient approach that can be misused to allow junk science.

### Third-Party Litigation Financing

In June 2020, the **Minnesota Supreme Court** [unanimously abolished](#) the common law offence of champerty. Champerty prevented a third party from sharing in a lawsuit's winnings. This ruling opens the doors to third-party litigation funding in Minnesota. It will lead to more lawsuits and leave Minnesota consumers unprotected from lenders' predatory practices.

## END NOTES

Minnesota courts, like those in other states, are [also considering](#) whether e-commerce platforms are subject to strict liability for products sold by third parties on their platforms that the online marketplace did not design, make, or own. It remains to be seen whether Minnesota courts adhere to traditional principles of product liability law, as most courts have done, or join the few courts that have subjected online marketplaces to strict liability.

# 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.

## AMERICAN LAW INSTITUTE REVIVES ACTIVIST RESTATEMENT OF "CONSUMER CONTRACT" LAW

In the 2020-21 Judicial Hellholes® report, the ATRF 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 proposed **Restatement of the Law, Consumer Contracts**. This work product attempts to create out of whole cloth new legal rules for courts to adopt that govern contracts between businesses and consumers.

This proposed Restatement is highly controversial because it departs from the traditional objective of an ALI Restatement to "restate" the most sound legal rules based on existing law developed by judges (usually over the course of centuries). Instead, the consumer contracts Restatement endeavors to dictate what the law "should be" based on the policy preferences of its law professor authors. As a result, this proposed Restatement recommends new ways for consumers to invalidate agreements they enter with businesses that lack a firm grounding in existing law. If adopted by courts, the Restatement's novel proposed rules would disadvantage businesses and increase overall product and service costs for consumers.

The ALI debated this proposed Restatement at its Annual Meeting in May 2019. The project generated substantial criticism across a broad range of stakeholders, with many calling for the project to be abandoned or at least not allowed to proceed as a Restatement. Such fundamental disagreements resulted in no further action taken on the project for years, leaving many to wonder if this work product would be shelved indefinitely. In October 2021, however, the ALI resurrected this proposed Restatement with few material changes after more than two years of inaction.

The ALI's decision to revive this controversial Restatement, and disregard basic concerns that have been raised for many years, shows that the organization has chosen to leverage its standing and influence more aggressively in the legal community to pursue legal advocacy. Rather than developing Restatements that assist judges by clarifying the law, the ALI is maneuvering to reinvent law. In doing so, projects such as the proposed **Restatement of the Law, Consumer Contracts** may end up misleading judges as to the actual state of the law, calling into question the purpose of Restatements.

## FLORIDA APPELLATE COURT SUBJECTS PHARMACY TO PUNITIVE DAMAGES FOR EMPLOYEE'S QUESTIONING OPIOID PRESCRIPTIONS

As the opioid epidemic rages, there is no shortage of pointing fingers in litigation as to who is responsible. In Florida, a recent court decision sends the confusing message that being careful when providing opioids can put you on the hook not only for liability, but even punitive damages.

The case arose when an experienced pharmacist began questioning the heavy volume of prescriptions coming from a doctor in the building who ran a busy pain management clinic. During this time, she was receiving so many opioid prescriptions that the pharmacy sometimes ran out of stock. This occurred during the height of the opioid crisis in an environment of new laws and regulations requiring pharmacists to closely scrutinize prescriptions.

As a result of her questioning the doctor's prescriptions, the doctor sued the pharmacist and her employer, Walgreens, for defamation. A trial in **Miami-Dade County**, a former Judicial Hellhole, resulted in a [\\$1.3 million award](#) to the doctor in March 2020 – one of Florida's Top 25 [largest verdicts](#) of 2020. The trial court dismissed the plaintiff's request for punitive damages, however, because the court found no evidence that the pharmacist had a malicious motive to destroy the doctor's reputation.

The **Florida Court of Appeals, Third District**, [reversed](#) this ruling in July 2021, finding the punitive damage claim must go to trial. It reached this outcome even though the pharmacist acted out of concern for the over-prescribing of opioids during a national crisis, not any ill will toward the doctor. Walgreens also argued, to no avail, that it was unaware of any defamatory statements, did not condone her conduct, and was not grossly negligent in training or supervising the pharmacist (as Florida law requires for imposing punitive damages on an employer).

Subjecting a pharmacy and pharmacist to punitive damage liability for being careful during the opioid crisis is contrary to public health. All interested parties, including regulators, government officials and doctors, are working together to put an end to the opioid crisis that is gripping many parts of the nation. The Florida appellate court's ruling may deter pharmacists from speaking out and doing their due diligence out of fear of facing harsh civil penalties.

## LACK OF TRANSPARENCY SURROUNDING KENTUCKY AG'S PENSION PLAN LITIGATION

In 2020, the **Commonwealth of Kentucky** intervened in litigation brought against KKR & Co. over the company's management of state pension plans, alleging breach of fiduciary duties and aiding and abetting in the breach of fiduciary duties based on hedge fund activities dating back to 2000. Now, the attorney general's office has hired private trial lawyers to lead the lawsuit on its behalf.

The Attorney General's office [contracted with the Oldfather Law Firm](#), a well-known Louisville plaintiffs' lawyer firm, determining that the contingency fee is "both cost-effective and in the public interest." The terms of the contract could lead to the private trial lawyers being paid a considerable portion of any money recovered by the state in the lawsuit.

The contract with the firm was not bid through the state's traditional processes thanks to a questionable provision in the state budget bill, which allows **Kentucky Attorney General Daniel Cameron** to hire and pay any counsel he chooses "on any contractual basis the Attorney General deems advisable." This provision was vetoed by **Kentucky Governor Andy Beshear**, who called it an "unprecedented authorization" that provides no guardrails on how much outside counsel might be paid, leaving no accountability for taxpayer dollars, but his veto was overridden by the legislature.

Under the contract, Oldfather attorneys and their subcontractors will be reimbursed with a set percentage of gross recovery received by Kentucky. The lawyers will receive 20% of the first \$250 million recovered, 15% of any amount between \$250 million and \$1 billion, and 10% of any recovery beyond \$1 billion.

In addition to the lack of transparency described above, **Attorney General Cameron** has yet to make public a report analyzing the performance of the financial institutions. This report cost Kentucky taxpayers over \$1 million, and despite promises to do so, state officials have refused to make it available to anyone including the defendant financial institutions.

If this report helps to make the case advanced by the amended complaint filed by the Attorney General, it is surprising, to say the least, that the Attorney General had to hire outside counsel on a contingency fee basis in addition to the lawyers on his own staff. If the report weakens or otherwise "harms" the AG's case, he should acknowledge that and further amend or dismiss his case.

**Attorney General Cameron** should embrace good government principles and work to create transparency in this and other government litigation. Kentucky taxpayers should be assured that his office is working in their best interests and not those of entrepreneurial trial lawyers.

## A TALE OF TWO COURTS: OHIO COURT DRASTICALLY EXPANDS PUBLIC NUISANCE LAW

In a year when the ATRF praises the **Oklahoma Supreme Court** for soundly rejecting an expansive view of public nuisance law, a recent verdict in an Ohio federal court serves as a stark contrast of what happens when an activist judge oversees litigation.

In November 2021, a jury in the [U.S. District Court of the Northern District of Ohio](#) found three pharmacies – CVS, Walgreens and Walmart, liable for creating a public nuisance by filling valid opioid prescriptions. The case was brought by two counties in Ohio as part of the national multi-district litigation (MDL) being overseen by **Judge Dan Polster**. The court adopted the very same expansive view of public nuisance law that the [Oklahoma Supreme Court](#) found to be dangerous and an inappropriate application of the law. Historically, public nuisance law involved instances in which a property owner's activities unreasonably interfered in a right that is common to the public, usually affecting land use. Unlike Judge Polster, the **Oklahoma Supreme Court** recognized that the opioid crisis is one to be solved by the legislative and executive branches of government and not the courts.

The decision [drastically distorts](#) public nuisance and product liability law. The companies were found liable for selling a legal and highly regulated product over which they had no control of the manufacture or labeling - and is heavily regulated. While technically a jury decided the case, it was Judge Polster's overall approach to the litigation that allowed such a dramatic expansion of the law to occur. As the Wall Street Journal points out, Judge Polster will use this verdict to hold the companies "[hostage](#) to a settlement."

The MDL process he oversees is intended to speed the process for courts to handle complex lawsuits that involve similar conduct; however, it should not be to the disadvantage of one party or another. The fact that **Judge Polster** began the process with a statement suggesting that he and the judiciary would "[solve](#)" the opioid crisis, and he also stated [on the record](#) that "no one has done enough," in this regard – plainly suggest that he would drive the process to achieve a desired outcome.

Judge Polster's management of the case is part of a broader and concerning trend in MDL litigation. 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."

Right from the outset, Polster pushed the parties for a [settlement](#), and in doing so, he plainly demonstrated where he thought fault should be allocated. In open court he went so far as to state that defendants are "responsible for having created the opioid crisis" and "must now take some responsibility for fixing it."

**Judge Polster** took [additional steps](#) that led defendants to conclude that he was attempting to "direct" the plaintiffs' trial strategy when he quickly scheduled a new "bellwether" trial after a decision of the **U.S. Court of Appeals for the 6th Circuit**. The defendants stated in a subsequent motion, "No party asked to have any case restructured... Rather, without warning and without considering the views of the litigants, the district court judge assumed control of the plaintiffs' cases."

This followed a strongly worded [Writ of Mandamus](#) the 6th Circuit issued in April of 2020, finding Polster disregarded the Federal Rules of Civil Procedure in his management of the litigation. Writing for the court, **Judge Raymond Kethledge** stated, "MDLs are not some kind of judicial border country, where the rules are few and the law rarely makes an appearance."

The **6th Circuit** further rebuked Polster, calling his decision to allow plaintiffs in the litigation to amend complaints 19 months post-deadline "plainly incorrect as a matter of law," which "manifests a persistent disregard of the federal rules."

In the end, **Judge Polster** got what he wanted in this trial. He most likely will continue to push the parties toward settling, in hopes that it happens [before the 6th Circuit Court of Appeals](#) can again weigh in on an appeal.

## UTAH SUPREME COURT EMBRACES ‘TAKE HOME EXPOSURE’ THEORY

The **Utah Supreme Court** ruled that employers owe a duty of care not only to their employees, but also to their employees’ family members, allowing a “take-home” asbestos exposure claim to proceed. This ruling goes against the longstanding tort principle that a party owes no duty to third parties with whom they have no relationship.

In *Boynton v. Kennecott Utah Copper, LLC*, the plaintiff sued his former employers, alleging that his exposure to asbestos while working on job sites owned by the three companies led to his wife’s death from mesothelioma in 2016. The plaintiff claimed that his wife was exposed to asbestos fibers that stuck to his clothes when she did his laundry.

After the trial court dismissed the claims against two of the defendants, finding that they had no duty to third parties, the **Utah Supreme Court** reversed.

While tort liability typically requires a direct relationship or action between an injured person and a defendant, the court did not require the plaintiff to establish such a relationship between the employers and the plaintiff’s wife. The court instead held that the operators were subject to liability because there was a foreseeable risk that an employee’s work with asbestos would expose his co-habitants.

In taking this approach, Utah joined the [minority](#) of jurisdictions that have ruled on the issue and allowed such claims. Other courts have rejected take-home exposure claims, either because of the limitless pool of plaintiffs that would result in dropping the need to show a relationship between the plaintiff and defendant or because it was not foreseeable at the time that an employee’s exposure to asbestos would harm people who are not present in the workplace. The direction of this decision could result in expanded liability based on the loose concept of foreseeability beyond the asbestos context.

# 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

### THANKS TO GOVERNOR RON DESANTIS'S LEADERSHIP 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 a **Florida Supreme Court** that is poised to correct the course set by the prior activist court and is deferential to legislative efforts to stop lawsuit abuse. It is now incumbent on the state's legislative branch to follow the lead of the other two branches and do their part to curb lawsuit abuse in the Sunshine State.

#### Florida's Judiciary Exercises Restraint

In years past, the **Florida Supreme Court** was known for its liability-expanding decisions and contempt for the lawmaking authority of the state legislature. But the court's three activist members left the bench in January 2019 after reaching the mandatory retirement age. These three justices, along with the swing vote of **Justice Jorge Labarga**, constituted the court's liberal majority that signed onto many of the decisions increasing liability and nullifying civil justice reform legislation in Florida.

In January 2019, newly elected **Governor Ron DeSantis** replaced these three retiring justices with three textualists, **Barbara Lagoa**, **Robert Luck**, and **Carlos Muñoz**. The three new justices joined a court dominated by conservatives **Charles Canady**, **Ricky Polston**, and **Alan Lawson**. In 2019, when **President Trump** elevated **Justices Lagoa** and **Luck** to the **U.S. Court of Appeals for the Eleventh Circuit**, **Governor DeSantis** exercised his new appointments wisely, appointing **Fifth District Court of Appeal Judge Jamie Grosshans** and well-respected litigator **John Couriel** to the state's highest court. With these appointments, a [majority](#) of the Court is no longer prone to reaching liability-expanding decisions. Moreover, these changes will be fairly long-lasting, with a majority of the seven justices currently sitting on the Court not facing mandatory retirement for more than a decade.

#### Florida Now Employs The Federal Summary Judgment Standard

The new **Florida Supreme Court** is already returning sense to Florida's civil justice system. As just one example, the **Florida Supreme Court** recently [replaced](#) the state's summary judgment standard—a [standard](#) that favored sending weak, unsupported cases to burdensome jury trials—with the federal summary judgment standard.

Summary judgment is an important court procedure that offers a pretrial opportunity to resolve a case or an issue on the merits where there is no genuine, disputed issue of material fact for a jury to decide, avoiding a costly and lengthy jury trial. Florida's prior summary judgment standard failed to fulfill that purpose by [requiring](#) that the movant meet an almost impossible burden: to *conclusively* "prov[e] a negative, i.e., the non-existence of a genuine issue of material fact." As a result of this unworkable threshold, "[\[t\]he cases are legion to say summary judgments should be granted rarely.](#)" The federal summary judgment standard is far more sensible, taking into account the burden that each party must bear at trial. Under that [standard](#), once the party moving for summary judgment has met its initial burden, the party opposing summary judgment must come forward with evidence—and may not simply point to the allegations—to support the essential elements of his claim and avoid summary judgment.

The new summary judgment standard went into effect on May 1, 2021, and applies even in pending cases.

## Florida Expands The Apex Doctrine To Protect High-Level Corporate Officers And Employees

The apex doctrine traditionally protects high-ranking employees and officials from burdensome and harassing discovery where they have no firsthand knowledge of the subject of the lawsuit. Before 2021, however, Florida courts had only allowed high-ranking government officials and employees to avail themselves of the protection of this doctrine. In [Suzuki Motor Corp. v. Winckler](#), a plaintiff sought to depose the chairman of the board of directors for Suzuki Motor Corp. in Japan in a routine products liability case. Suzuki pushed back and argued that the apex doctrine should protect high-ranking corporate employees just as it protects similar governmental officials from similar discovery. The **Florida Supreme Court** agreed, but went further to [revise](#) the **Florida Rules of Civil Procedure** to ensure all corporate defendants, even in pending cases, may invoke the apex doctrine.

Through its actions in adopting the federal summary judgment standard and the corporate apex doctrine through separate rule cases, and its adoption of a stronger standard for evaluating the reliability of expert testimony in 2019, the Court has shown a clear willingness to exercise its rulemaking authority to address the problems facing Florida's civil justice system through broad rule changes that apply even to pending matters.

## INDIANA RESTRICTS FORUM SHOPPING

On April 8, 2021, the **Indiana Supreme Court** [precluded](#) plaintiffs from avoiding having a case involving parties from multiple states heard in a neutral federal court by including uninvolved local store managers among the named defendants. For a federal court to have what is known as diversity jurisdiction over a given case, the adverse parties must all be citizens of different states. In this case, the plaintiff was injured when he tripped and fell in Walmart's garden department. The plaintiff and his wife not only sued Walmart, which is incorporated and headquartered outside Indiana, but also the store manager, Jim Clark, who lives in Indiana. Walmart argued that the plaintiff only named Clark to prevent the corporation from removing the case from Indiana state courts to a more neutral federal forum. According to an affidavit filed by the store manager, Clark was not even working or present in the store on the day the plaintiff was injured, and even if he were, it is Walmart, not the local manager, which sets safety policies and procedures for the store.

The **U.S. District Court for the Northern District of Indiana**, to which the case was transferred, asked the **Indiana Supreme Court** to determine "whether a store manager can be held liable for negligence when he is not directly involved in the accident at issue." The state high court addressed the plaintiffs' three negligence claims against Clark: failure to adequately hire, train, and supervise employees; failure to implement adequate safety protocols; and failure to maintain a safe premises. The Court concluded that all three claims necessarily failed because only employers may be sued for negligent hiring; Clark was wholly uninvolved in establishing safety protocols; and Clark was not in control of the premises. For these reasons, the Court determined that Clark could not be held liable for the plaintiff's injury. As a result, the federal court immediately dismissed the claims against the store manager and retained jurisdiction of the case, which settled after mediation.

## MARYLAND FEDERAL COURT REJECTS 'COVID-19' TAKE-HOME EXPOSURE

On June 23, 2021, a federal court in Maryland [dismissed](#) a take-home COVID-19 exposure case against Southwest Airlines, closing the door to similar claims by third-party plaintiffs. In this case, a Southwest flight attendant claimed that the airline's failure to implement sufficient COVID-19 safety measures at a mandatory training session resulted in her husband's death. According to the plaintiff, two weeks after the training, she was alerted of her exposure to the virus at the training session. By that time, the plaintiff and her husband were both experiencing severe COVID-19 symptoms and her husband passed away shortly thereafter.

The precise issue before the court was whether Southwest owed a duty of care to the plaintiff's husband. Southwest argued that Maryland case law does not recognize a duty to beyond those who are

employed by the airline and who must go through the workers' compensation system to receive compensation for work-related injuries. The plaintiff argued, however, that Southwest owed her husband a duty because his exposure and subsequent death from COVID-19 was foreseeable.

The court adhered to traditional principles of tort law, finding that Southwest did not owe the plaintiff's husband a duty, noting that "Maryland courts have historically been exceedingly concerned about 'opening the floodgates' to expansive new classes of third-party plaintiffs."

## MISSISSIPPI SUPREME COURT PROTECTS RIGHT TO FAIR TRIAL AND REJECTS JUNK SCIENCE

### Mississippi High Court Finds 'Taint of Unfairness' in \$10.5 Million Verdict, Orders New Trial

Years ago, certain areas of Mississippi were known for [jackpot justice](#) and as the lawsuit capital of the world until intervention by the **Mississippi Supreme Court** and legislature turned the state's civil justice system around. When those types of tactics emerged again in two cases that resulted in multi-million-dollar verdicts against an auto manufacturer, the **Mississippi Supreme Court** intervened to keep the state from sinking back into a Judicial Hellhole®.

First, in March, the **Mississippi Supreme Court** [reversed](#) a \$10.5 million **Coahoma County** verdict, finding "overwhelming evidence" of jury interference that deprived the defendant of a fair and impartial trial. The court found that the plaintiffs' counsel, Dennis Sweet, worked with Carey Sparks, a preacher, to sway the jury against Hyundai in a wrongful death case stemming from a head-on collision in which a car crossed the center lane of a highway into oncoming traffic.

Sparks and Sweet initially denied knowing each other or working together in an April 2015 hearing before the trial court. Multiple witnesses testified, however, that Sparks bragged about securing a large verdict in Clarksdale and that he had a friend on the jury. Sparks also told witnesses he preached to local congregations in the weeks leading up to a jury trial so jurors would recognize him in the courtroom and have a positive association with him. After the hearing, the trial court found that the allegations of outside influence on the jury were "speculative at best." Defendants appealed.

The case went to the Mississippi Supreme Court, which reversed the trial court decision and remanded the case for further discovery and investigation into the jury interference allegations. On remand, it was revealed that Sparks and Sweet falsely testified in April 2015. The two did know each other and evidence showed pay stubs in which Sweet paid Sparks for consulting services. Additionally, Sparks' best friend's aunt was a juror in the case. While the friend and aunt deny discussing the case with each other or Sparks, the conflict is apparent. The trial court found that Sweet had deceived the court and ordered him to self-report to the Mississippi Bar. Yet, the trial court still denied Hyundai a new trial.

Hyundai appealed to the **Mississippi Supreme Court**, which ruled in its favor. The Court concluded "that there was actual impropriety, a taint of unfairness, real and perceived, all of which is fatal to affirming the verdict" in this case. The Court held that a new trial was necessary due to "the [overwhelming] appearance of taint permeating the proceedings."

### Mississippi High Court Rejects Junk Science and Restores Integrity in Jury System

In September, the **Mississippi Supreme Court** intervened in another product liability case against Hyundai, which had resulted in a verdict of over \$2 million for a driver and passenger in **Bolivar County**. That case stemmed from a single-car accident in which the plaintiff claimed that a phantom never-found object interfered with the car's braking system and caused the driver to swerve into a median. Hyundai argued that the driver simply lost control of the car while trying to pass a truck. The **Mississippi Supreme Court** [reversed](#) the trial court for three reasons.

First, the trial court improperly prevented the automaker's attorneys from cross-examining the passenger about the inconsistencies between her initial statements to police that the driver had lost control of

the car and her position at trial after entering a settlement with the driver that the automaker was solely responsible for the accident. This error alone denied Hyundai a fair trial.

Second, the trial court allowed unreliable expert testimony during the trial. It permitted two of plaintiffs' expert witnesses to testify who were neither qualified nor reliable. The judge should have excluded both experts, the Supreme Court found, since neither had experience designing an anti-lock braking system and their theories involving a phantom object were not based on any legitimate scientific principles or methods.

Third, despite a [state law](#) that permits only judges to excuse summoned jurors for "undue or extreme physical or financial hardship," the court administrator and deputy clerk had unilaterally excused many people from jury service. Hyundai argued that, as a result, they were left with a jury pool in which the percentage of unemployed jurors far exceeded the local community. Although it had already found reversible error, the Court instructed "all circuit clerks, judges, attorneys, and other court personnel throughout our state" to follow the jury selection process mandated by Mississippi law because "it is in the public's interest that such [violations] should not reoccur."

## MISSOURI HIGH COURT UPHOLDS LIMITS ON NONECONOMIC DAMAGES

In July 2021, the **Missouri Supreme Court** [upheld](#) the legislature's ability to place a reasonable limit on the subjective portion of medical liability awards that are intended to compensate plaintiffs for noneconomic damages.

Nine years earlier, the same court had [invalidated](#) a similar law when it concluded that the legislature could not limit damages in causes of action that existed at common law in 1829 when Missouri established its constitution. On the other hand, in a separate ruling that same year, the Court [ruled](#) that the statutory limit could constitutionally apply in wrongful death cases, which did not exist at common law. In response to these rulings, the **General Assembly** replaced the common law medical malpractice cause of action with a new statutory cause of action. That law generally limits noneconomic damages, such as pain and suffering, in an action against a healthcare provider to \$400,000 and allows up to \$700,000 in cases involving catastrophic injuries.

This year's ruling in [Velazquez v. University Physician Associates](#), the **Missouri Supreme Court** found that the **General Assembly** is free to establish damage caps for statutorily created causes of action. Since the General Assembly replaced the common law medical malpractice cause of action with a statutory one, the Court held that the new noneconomic damage limits are constitutional.

## NORTH CAROLINA SUPREME COURT REJECTS ATTEMPT TO EXPAND LIABILITY

On December 18, 2020, the **North Carolina Supreme Court** adhered to traditional tort law when it [declined](#) to recognize a new type of lawsuit for "loss of chance."

Tort law requires a plaintiff to show that a defendant's actions caused a person's injury. A loss of chance theory would allow a plaintiff to sue a healthcare provider, usually on the basis that he or she should have diagnosed a condition earlier, even when it is more likely than not that any delay did not change the plaintiff's outcome.

In the North Carolina case, a patient who suffered a stroke claimed that an ER physician negligently failed to diagnose her condition early enough to administer a clot-busting drug known as a tissue plasminogen activator (tPA), which may have improved plaintiff's chance of a more favorable neurological outcome by, at most, 40%.

The **North Carolina Supreme Court** rejected the invitation to award damages for the *possibility* that a defendant's negligence contributed to a plaintiff's condition because it would "require a departure from our common law on proximate causation and damages." If liability is to be expanded in this way, the Court recognized that such a policy judgment is better suited for the legislative branch.

## OKLAHOMA SUPREME COURT REJECTS EXPANSIVE VIEW OF PUBLIC NUISANCE LAW

In 2019, **Judge Thad Balkman** of the **District Court of Cleveland County** determined that Johnson & Johnson created a public nuisance through its marketing of ingredients used to make opioids and awarded \$572 million—later reduced to \$465 million—to the state of Oklahoma to fund an abatement program. A decision that served as a main catalyst to the state being named a **Judicial Hellhole**<sup>®</sup> for the first time.

Historically, public nuisance law involved instances in which a property owner's activities unreasonably interfered in a right that is common to the public, usually affecting land use. Typical cases include blocking a public road or waterway, or permitting illicit drug dealing or prostitution on one's property. Judge Balkman's decision brought Oklahoma well outside of the legal mainstream, as evidenced by a May 2019 decision in **North Dakota** where a judge dismissed a similar claim against Purdue Pharma.

Both parties appealed to the **Oklahoma Supreme Court**, J & J **contending** that Judge Balkman's statutory interpretation "has no precedent in American legal history" and is based upon a "radical reimagining of Oklahoma law," and the state **contending** that the award is insufficient to abate the crisis. The plaintiffs' lawyers initially requested **\$17.5 billion** over 30 years. Additionally, the State asked for **\$468,920** to cover litigation costs.

The **Oklahoma Supreme Court** sided with J & J, **reversing** the district court. J & J's manufacture and distribution of a legal and highly regulated product did not violate a public right. The Court explained that violating a public right means interfering with the public's access to a public good, such as water or roadways; "a public right is more than an aggregate of private rights by a large number of injured people." The Court warned that applying this legal theory to J & J's conduct would open the door to a slew of products liability claims masquerading as public nuisance claims.

*"The common law criminal and property-based limitations have shaped Oklahoma's public nuisance statute. Without these limitations, businesses have no way to know whether they might face nuisance liability for manufacturing, marketing, or selling products, i.e., will a sugar manufacturer or the fast-food industry be liable for obesity, will an alcohol manufacturer be liable for psychological harms, or will a car manufacturer be liable for health hazards from lung disease to dementia or for air pollution. We follow the limitations set by this Court for the past 100 years: Oklahoma public nuisance law does not apply to J&J's conduct in manufacturing, marketing, and selling prescription opioids."*

The typical remedy for public nuisance claims is abatement of the nuisance, a result that will not be achieved by forcing J & J to fund state public health programs because J & J has no control over its products once they are sold. J & J was only responsible for 3% of prescription opioid sales in the state, while the settling defendants were responsible for 97% of the alleged harm. The Court acknowledged the severity of the crisis created by widespread opioid misuse but maintained that there is no legal basis for holding J & J liable. "Where the law does not expressly allow, J & J should not be responsible for the harms caused by opioids that it never marketed, manufactured, or sold."

Furthermore, the judicial branch is not equipped to reconcile large-scale social issues.

*"The Court has allowed public nuisance claims to address discrete, localized problems, not policy problems. Erasing the traditional limits on nuisance liability leaves Oklahoma's nuisance statute impermissibly vague. The district court's expansion of public nuisance law allows courts to manage public policy matters that should be dealt with by the legislative and executive branches; the branches that are more capable than courts to balance the competing interests at play in societal problems."*

The United States constitution demands that elected officials, who are accountable to the people, create law and policy, not appointed judges. “Further, the district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.”

*“[T]he district court stepping into the shoes of the Legislature by creating and funding government programs designed to address social and health issues goes too far. This Court defers the policy-making to the legislative and executive branches and rejects the unprecedented expansion of public nuisance law.”*

– Oklahoma Supreme Court

## TEXAS SUPREME COURT PREVENTS ‘PHANTOM DAMAGES’

On May 7, 2021, the **Texas Supreme Court** [held](#) that a trial court improperly prevented an insurer from challenging the reasonableness of the medical expenses that a plaintiff sought to collect. The Court’s decision stops plaintiffs and their attorneys from receiving “phantom damages” that do not reflect actual costs.

[Phantom damages](#) occur when a court awards damages based on amounts shown on an invoice for medical treatment, rather than what may be a significantly lower amount that a healthcare provider actually accepted as full payment for its services. These inflated damages increase the costs of insurance for drivers, homeowners, and businesses.

The plaintiff [was injured](#) in an auto accident and sued her insurance provider, Allstate, for \$37,000 in medical expenses. In response, Allstate filed an affidavit from a registered nurse experienced in medical billing and coding that indicated amounts that exceeded reasonable charges as well as errors. The trial court, however, would not consider the affidavit, prohibited the nurse from testifying, and even prevented Allstate from “questioning witnesses, offering evidence, or arguing to the jury the ‘reasonableness of the medical bills.’”

Not surprisingly, the **Texas Supreme Court** found that the trial court abused its discretion. The Court found that the nurse’s affidavit satisfied Texas’s statutory requirements and found her qualified to testify about the medical expenses. The Court ruled that the trial court abused its discretion in preventing her from testifying and Allstate from challenging the reasonableness of the medical bills.

Just a few weeks later, the Court addressed a related issue and again prevented excessive awards. On May 28, 2021, the **Supreme Court** [conditionally granted](#) Defendant K & L Auto Crusher’s petition for mandamus relief, an extraordinary remedy only available when the trial court clearly abused its discretion, and the petitioner cannot pursue an adequate remedy by appeal.

What occurred in this case was that four days after driving away from a car accident without reporting any injuries, the plaintiff obtained medical treatment. Rather than pay for this medical care, the plaintiff entered into letters of protection with the healthcare providers under which they agreed that the expenses would be paid out of any judgment or settlement. After undergoing multiple surgeries, the plaintiff sued the truck driver that he alleged collided with his car and the driver’s employer, K & L Auto Crushers. When the defendant attempted to obtain information from the plaintiff’s healthcare providers about the medical services that they provided, the trial court denied the request without explanation.

The **Texas Supreme Court** recognized that state law limits damages for medical expenses to the amount “actually paid or incurred” and requires medical expenses to be “reasonable.”

The Court found that negotiated rates for medical services and devices charged to private insurers and public payors are relevant to the reasonableness of the rate charged to a self-paying patient. The Court concluded that the trial court’s refusal to allow the defendant to obtain information on the medical charges deprived the defendant of “a reasonable opportunity to develop a defense that goes to the heart of its case.”

The Court's decision to allow discovery into reimbursement rates charged to private insurers and public payors will allow defendants to contest excessive medical charges incurred under letters of protection. Because medical providers who treat patients pursuant to letters of protection will now be required to comply with discovery requests for rates charged to other patients and to establish that its charged rate to a plaintiff is reasonable, some providers may refrain from abusing letters of protection to charge unjustifiable amounts.

In November 2021, the Texas Supreme Court reaffirmed its position in *In re ExxonMobil Corp.* The Court held that "Evidence of a medical provider's negotiated rates for private insurers and public payers is relevant, though not dispositive, when considering the reasonableness of its chagemaster rates... This is true regardless of whether a party is challenging the reasonableness of rates secured by a medical lien, as in North Cypress, or the reasonableness of rates supporting a claim for personal-injury damages."

## IN THE LEGISLATURES

### WEST VIRGINIA, ONCE A PERENNIAL HELLHOLE, EMERGES FROM WATCH LIST

Following another successful legislative session, **West Virginia** no longer finds itself on the Judicial Hellholes® or Watch Lists. West Virginia has taken great strides toward creating a fair and balanced civil justice environment. The ATRF will keep a close eye on future developments in the Mountain State to ensure it continues to protect the rights of both parties.

In 2021, the **West Virginia Legislature** enacted a bill to establish an intermediate court of appeals in the State of West Virginia ([S.B. 275](#)). Prior to this, West Virginia was one of only nine states that did not have an intermediate appellate court.

The legislature also addressed the issue of over-naming in asbestos litigation. Plaintiffs' attorneys have their tricks for gaming the system. In West Virginia, plaintiffs' firms, once they are able to find an injury, sue everyone under the sun. [For example](#), the **Prim Law Firm** has found just three plaintiffs, but it has been able to use those three plaintiffs to sue 169 defendants. Goldberg, Persky & White's three plaintiffs are not far off, suing 162 defendants. And the Antion and McGee Law Firm's eight plaintiffs are suing 166 defendants.

A West Virginia judge noticed this disturbing trend. [Judge Ronald Wilson](#) acknowledged the "abuse" and was taken aback by the plaintiff attorney's unwillingness to settle the disputes. The judge, seeking to promote a settlement, mentioned that the **West Virginia Supreme Court of Appeals** is quite conservative explaining "you [plaintiff attorneys] reap what you sow."

[H.B. 2495](#) provides that within 60 days of filing an asbestos or silica action, a plaintiff must file a sworn information form that specifies the evidence that provides the basis for each claim against the defendant and include supporting documentation. Plaintiffs have a continuing duty to supplement the required disclosures.

Finally, the **West Virginia Legislature** enacted legislation to displace the longstanding provision that had excluded seat belt non-usage evidence for any purpose if the claimant stipulated a reduction of damages by a mere five percent. Juries will be allowed to consider and use evidence that a claimant had failed to wear a seat belt when they determine the damages resulting from motor vehicle crashes. ([S.B. 439](#))

### ADDITIONAL LEGISLATIVE REFORMS

- **Montana** enacted legislation that addresses the definition of recoverable damages and the evidence admissible to establish the value of medical treatments ([S.B. 251](#)). Montana also enacted legislation that provides that, in general, a landowner does not owe a duty of care to trespassers with respect to the condition of the property. ([S.B. 338](#))
- **North Dakota** enacted legislation that requires asbestos claimants to support their claims with a medical report signed by a treating physician demonstrating that the claimant has asbestos-related impairment according to objective medical criteria. ([H.B. 1207](#))

- **Ohio** enacted legislation that reduces the statute of limitations on written contracts from eight to six years and on oral contracts from six to four years. ([S.B. 13](#))
- **Tennessee** enacted legislation that requires a plaintiff filing an asbestos claim to file, within 30 days of any complaint, an information form attested by plaintiff stating the evidence that provides the basis for each claim against each defendant and include supporting documentation. ([H.B. 1199](#))

# Closer Looks

## MASS ARBITRATION.... THE NEW CLASS ACTION?

Enacted in 1925, the [Federal Arbitration Act](#) established an alternative dispute resolution system through which private parties could resolve both federal and state law issues without appearing in court. Arbitration is intended to be a more efficient and less costly alternative to litigation. Over the years, the **U.S. Supreme Court** has issued several opinions strengthening the legitimacy and authority of arbitration since 1925.

Recently, however, arbitration has come under attack by the plaintiffs' bar and its allies. Legislatures and courts in Judicial Hellholes® like California have tried to limit the use of arbitration, specifically in the employment law context. The plaintiffs' bar has even been able to get Congress to consider limiting arbitration through the so-called [Forced Arbitration Injustice Repeal Act \(FAIR\) Act](#). This bill would prohibit enforcement of pre-dispute arbitration agreements in the context of employment, consumer, antitrust or civil rights disputes.

## 'MASS ARBITRATION' THE NEW CLASS ACTION?

While one faction of the trial bar seeks to eliminate arbitration entirely, another more entrepreneurial group seeks to profit from the process. Historically, arbitration preserved claims as individual matters – not ones that are treated as a monolithic “class.” That distinction, however, may be changing with recent cases being handled by plaintiffs' lawyers as “mass arbitrations.”

The effort is being [driven](#) by [Keller Lenkner](#), a small Chicago-based law firm. **Keller Lenkner** promotes itself as litigating individual arbitrations concerning consumer and employee rights. In the past two years, Keller has represented over 200,000 arbitration claimants by partnering with other law firms across the nation and investing millions of dollars in proprietary software. **Keller Lenkner** routinely files virtually identical arbitration demands against the same defendant with the intent of pressuring the company into a multi-million-dollar settlement.

Law firms leverage the arbitration fees defendants must pay to the **American Arbitration Association** (AAA) in order to pressure companies into a settlement. In mass arbitration claims, defendants must pay the AAA \$3,000 per individual claimant to secure a hearing. Even if defendants are successful, there is no way to recoup the administrative fees. When facing thousands of individual claims, the potential fees are too high, and companies opt to settle.

**Keller Lenkner** solicits clients through a webpage where potential claimants submit information about their experience with various defendants. Keller charges a flat fee of \$750 if the claimant wins, but charges nothing if the claimant loses or abandons the claim.

This is a dramatic change in large-scale civil claims. Once certified by a judge, the “class” in a class action is a single entity. The personal injury lawyer represents the entire class through one of a few class representatives. By contrast, with arbitration clients, the personal injury firm represents each client individually.

## ETHICAL ISSUES ABOUND

Because law firms like Keller Lenkner seek to represent individual claims on a mass scale, several ethical issues are raised. First, differing interests of clients must be considered. One could argue **Keller Lenkner** fails to ensure they are representing each client individually and not putting their own fiscal interests ahead of the individual client's interests. For example, in a case against CenturyLink, [22,000 clients](#) received iden-

tical advice on whether to opt out of a class action settlement. **Keller Lenkner** attempted to bar clients from inclusion in class actions in order to maintain a maximum number of viable arbitration claims.

Conflicts of interest also arise from differing interests. Can a lawyer recommend an outcome that could harm the interest of another client? And how does the law firm ensure that confidentiality and legal privilege is distinct and protected for each client?

Even a staunch plaintiffs' bar ally has acknowledged the ethical concerns around the practice.

[Professor Richard Zitrin](#), a legal ethics professor at the **University of California Hastings College of Law** and an ethics consultant for plaintiffs' firms, [testified](#) in a case involving DoorDash that, "Based on my background and experience, where, as here, plaintiffs' counsel purports to represent thousands of clients against a particular defendant, red flags go up in my mind about whether such representation meets the ethical requirements all lawyers must abide by."

***"Based on my background and experience, where, as here, plaintiffs' counsel purports to represent thousands of clients against a particular defendant, red flags go up in my mind about whether such representation meets the ethical requirements all lawyers must abide by."***

– Professor Richard Zitrin,  
University of California Hastings College of Law

## IMPACT OF 'MASS ARBITRATION'

Amazon, the world's largest online retailer, [amended its "terms of service"](#) in June, eliminating its arbitration clause, thereby allowing customers to bring lawsuits in courts across the country. While the decision came with very little publicity, the implications are significant. Thousands of claims can no longer be adjudicated through the arbitration process, but rather will end up in already overburdened courts. This will lead to greater hassle for consumers and larger paydays for plaintiffs' lawyers.

As more businesses potentially go the way of Amazon and conclude they would rather face class actions than mass arbitration, the country's legal system could lose a vital form of alternative dispute resolution.

With class members receiving, on average, [less than 30%](#) of a monetary award, the loss of arbitration would be devastating for both consumers and defendants.

Lawsuit abuse across the U.S. results in more than [\\$160 billion](#) in excessive tort costs, meaning every American pays approximately \$488 each year in a so-called tort tax. Tort costs affect 2,211,450 jobs across the country, with an estimated loss of \$143.8 million in wages. The economic costs and impacts of the excesses in the civil justice system are why we should preserve balanced, cost-effective alternatives to litigation.

## WHERE IS THE AMERICAN

***"The AAA, a nonprofit arbitration service provider, casts this astronomical sum as purported administrative fees and costs. In fact, it is a ransom orchestrated by politically-motivated lawyers, who are manipulating the arbitral to prop up baseless claims of 'reverse discrimination.'"***

– Uber Spokesperson

## ARBITRATION ASSOCIATION?

The **American Arbitration Association (AAA)** can play a meaningful role in protecting the arbitration process. It most likely never anticipated this type of abuse – but now, it should recognize that firms like Keller Lenkner are weaponizing their fees and using them as leverage to pressure companies into settlements.

This issue is now in front of a New York state court as Uber recently sued the AAA over excessive administrative fees resulting from a mass arbi-



tration targeting the company over an alleged discriminatory policy. According to [Uber](#), “The AAA, a nonprofit arbitration service provider, casts this astronomical sum as purported administrative fees and costs. In fact, it is a ransom orchestrated by politically-motivated lawyers, who are manipulating the arbitral process to prop up baseless claims of ‘reverse discrimination.’”

The merit of these cases never comes into play because of the high fees, so many settled claims are frivolous and unfounded. Companies would rather settle than pay millions of dollars in fees up front.

Uber [argues](#) that the AAA should adjust fees for mass arbitration, recognizing the efficiencies that come with identical actions. By lowering fees in mass actions, the AAA would eliminate the incentives for lawyers to bring these types of claims. It would protect the legitimacy and fairness of the process. Unlike Amazon, Uber is not abandoning arbitration. It is pushing for a more fair and equitable process that protects the rights of all parties.

Unlike other companies that have unsuccessfully challenged the AAA’s fees, Uber stands in a unique position having already paid about \$5 million in administration fees to initiate the [31,000 pending cases](#) that are a part of the mass action. Now, Uber is seeking relief from having to pay close to \$100 million in additional fees to arbitrate the “cookie-cutter” claims.

The AAA also should consider implementing a process to manage frivolous claims. The plaintiffs’ lawyers’ strategy is to drive up the fees as much as possible and force an early settlement. There have been examples of claims filed on behalf of deceased individuals and people who did not use a product or did not suffer a real loss. In these instances, defendants should be reimbursed.

Arbitration has long been under attack by the plaintiffs’ bar and its allies, and the mass arbitration cases may be yet another attempt to get rid of it. Amazon may be the first of many companies to eliminate the use of arbitration – a decision that harms consumers and will lead to lengthy and expensive court battles clogging already overburdened court systems.

## COVID-19 LITIGATION AND LIABILITY PROTECTION

During the COVID-19 pandemic, businesses are struggling to operate and reopen safely, healthcare providers are treating patients with limited beds and staff, and manufacturers have shifted their operations to make needed personal protective equipment. The last thing they need to worry about is more lawsuits. To help reduce this concern, many states are providing assurance to businesses and others that if they act responsibly, they will have some degree of liability protection. Many governors acted early on through executive orders, most of which addressed only healthcare liability. State legislatures followed with broader laws. The American Tort Reform Association's [COVID-19 resource webpage](#) summarizes and includes links to each of these laws.

### CONSTRAINTS ON COVID-19 LIABILITY ENACTED IN 2021

Two thirds of states have responded to the concern that businesses, schools, daycare centers, entertainment and event venues, and others would be sued for a person's exposure to COVID-19. Eighteen states enacted these laws in 2021, including Alabama, Alaska, Arizona, Arkansas, Florida, Indiana, Kentucky, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. They joined Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming, which adopted COVID-19 exposure legislation during the first year of the pandemic.

These laws vary significantly from state to state, but generally provide a safe harbor from liability to those who follow public health guidance, raise the standard of liability beyond bare negligence, or combine these approaches. For example, some states require a showing that a person recklessly disregarded a known risk that a person would be exposed to COVID-19 or was grossly negligent. The Mississippi, North Dakota, South Dakota, and West Virginia laws require a showing that a person's exposure to COVID-19 resulted from an intentional or malicious act, or willful misconduct. Some of these laws include heightened evidentiary requirements, such as in Florida and Texas. A 2021 Missouri law, similar to legislation enacted in Georgia in 2020, creates a presumption that a business is not liable if it posts a sign warning entrants of the inherent risk of COVID-19 exposure.

Nearly every state that enacted COVID-19-related tort legislation raised the standard for medical liability cases above ordinary negligence. State legislation varies in how it defines eligibility for liability protection (healthcare professionals, facilities, or both), the scope of conduct covered (directly treating COVID-19 patients or other care impacted by a lack of resources due to the pandemic), exceptions for coverage (such as whether nursing homes are included), and the conduct that remains subject to liability (such as gross negligence).

In addition, almost half of the states have limited the risk of liability of those who make, sell, or donate personal protective equipment and other products in response to the pandemic. Many of these companies shifted to make needed supplies that they do not ordinarily produce like masks, face shields, ventilators, and hand sanitizer. Alabama, Indiana, Missouri, Montana, Nebraska, North Dakota, South Carolina, South Dakota, Texas, and West Virginia enacted product liability protections in 2021, joining Alaska, Georgia, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Oklahoma, Tennessee, and Wisconsin. These laws vary significantly from state to state and may extend to products or parties beyond the already-robust liability protections for products covered by the federal **Public Readiness and Emergency Preparedness (PREP) Act**.

### THE LITIGATION

The first signs suggest that these types of liability protections are working. While there has been a substantial amount of COVID-19 related litigation -- well over 10,000 lawsuits -- many of these cases are a predictable result of furloughs and layoffs, business shutdowns and changes in operation, and a general economic downturn.

Litigation stemming from individuals contracting COVID-19 and alleging that someone is responsible has, thus far, primarily targeted nursing homes, cruise ships, and prisons – places where there have been outbreaks among people confined to a specific area. These lawsuits have faced [challenges](#) in proving causation, though some have settled.

A wider range of businesses have faced similar claims by [employees](#), though these types of claims are limited by state workers' compensation systems, which are intended to be the exclusive remedy for on-the-job injuries. Some employers have faced take-home exposure claims that typically allege a person died of COVID-19 after contracting the illness from a spouse who was exposed at work, though these remain rare. Some courts have [allowed](#) take-home claims to proceed, while [others](#) have found that since they directly stem from a workplace injury, workers' compensation provides the exclusive source of recovery.

In some instances, employees or others have brought [public nuisance claims](#), asserting that a business's operation poses an unreasonable risk of exposure. For example, a federal district court ruled in November 2020 that **OSHA**, not the courts, was in the best position to determine whether Amazon sufficiently protected workers in its Staten Island fulfillment center. That case is now on [appeal](#) to the **Second Circuit**.

While workers have brought relatively few personal injury claims against their employers stemming from COVID-19, the same cannot be said of [employment litigation](#), which makes up the largest share of pandemic-related lawsuits. These include lawsuits by employees alleging they were improperly terminated when they contracted COVID-19 or needed to quarantine, or denied accommodations, such as [requests to work from home](#). In some instances, plaintiffs allege that they were terminated for an impermissible reason, such as because they expressed concerns about workplace safety. Some lawsuits allege that the reason an employer laid off an employee was not based on financial or other permissible considerations, but discriminatory reasons, such as age or race. Changes in work schedules have also led to a significant amount of [wage and hour litigation](#). These include claims that employers should have paid employees for time spent taking COVID-19 tests or undergoing screenings before work, that employees worked off the clock when working from home, or that employees were not reimbursed for business expenses.

Contract claims also comprise a significant portion of COVID-19 related litigation. Aside from general disputes stemming from the inability to fulfill obligations during the pandemic, common contract claims seek refunds of payments for [weddings](#), travel and events, and [tuition](#) from schools that went virtual; involve disputes over commercial leases triggered by shutdowns and operating restrictions; and issues with fulfilling personal protective equipment orders.

There is also substantial insurance litigation. Most of this litigation involves whether a policyholder's property insurance policy covers losses stemming from shutting down or scaling back operations during the pandemic. The issue in many of these cases is whether these business interruption losses stem from *physical* loss or damage to the property, as many policies require. This litigation has slowed, with the [vast majority](#) of courts [finding in favor](#) of [insurers](#), including at least [four federal appellate circuits](#).

While the surge of COVID-19 hospitalizations, staffing and bed shortages, and the need to postpone non-emergency elective surgery and treatment led to the potential for medical malpractice claims, outside the nursing home context, plaintiffs' lawyers have filed a slow, but steady, number lawsuits against healthcare providers. They may be discouraged from filing speculative claims by Executive Orders issued by governors and legislation that, in most states, provides for liability only in cases of gross negligence or reckless misconduct.

Not surprisingly, the states with the most COVID-19 litigation are **California, New York, and Florida**.

## ON THE HORIZON

Even as COVID-19 diagnoses fall and, hopefully, the pandemic subsides, the threat of liability is far from over. The clock for filing lawsuits – set by state statutes of limitations – has only started to tick. As [employees return to their workplaces](#), students are back in classrooms, and large-scale events resume, the potential for exposure to the virus (and lawsuits) grows. Reports of overwhelmed hospitals and COVID-19

outbreaks continue. Meanwhile, some COVID-19 state liability protections will sunset if not extended.

COVID-19 related employment litigation is accelerating. As more employees return to their workplaces, lawsuits will emerge from disputes over [vaccination mandates](#) and demands for [exceptions](#), work-from-home requests, safety concerns, and mask and other policies. In fact, legislators in some states have [introduced bills creating](#) new private actions against employers that require their employees to be vaccinated. Many employers, however, are required to mandate employee vaccinations under federal law and risk [hefty fines](#) if they do not comply. Employers also expose themselves to tort claims, particularly when employees work in high-risk environments, unless they adopt adequate safety measures. But if these [bills](#) are enacted, employers will be subject to statutory, compensatory, and punitive damages, and payment of attorneys' fees if they follow federal law or believe vaccinations are needed to protect the safety of their workers and others. This type of sued-if-you-do, sued-if-you-don't legislation places employers in an untenable position. These bills also [undermine](#) state [workers' compensation](#) systems and conflict with the federal [PREP Act](#), which provides immunity to those who administer vaccination programs, including private employers.

Litigation is just beginning over the scope of these liability protections. In October, the **Third Circuit** undercut the **PREP Act** when it ruled in [Maglioli v. Alliance HC Holdings LLC](#) that plaintiffs could pursue negligence claims in state court, despite the PREP Act providing "an exclusive Federal cause of action" in cases of willful misconduct and the law's establishment of a fund to compensate others who claim a countermeasure-related injury.

Will certain courts become hotspots for COVID-19 litigation because they develop a reputation for departing from settled principles of law and accepting invitations to expand liability? Will courts properly apply the higher standards and defenses to COVID-related liability enacted by state legislatures? Will state legislatures subject employers to new lawsuits based on their vaccination policies? Time will tell.

## COMMEMORATING THE 20TH ANNIVERSARY OF THE JUDICIAL HELLHOLES® REPORT

The American Tort Reform Foundation began publishing its annual Judicial Hellholes® report and rankings in 2002. The 2021-2022 report marks the 20th anniversary of the report.



### THE 'ESCAPED' LIST

Over those 20 years, some have heeded the warning of being named a Judicial Hellhole®, actively making changes to rebalance their civil justice systems.

**Introducing the 'Escaped' List...**

#### **MISSISSIPPI'S 22ND JUDICIAL CIRCUIT: COPIAH, CALIBORNE & JEFFERSON COUNTIES**

Making the [first ever](#) Judicial Hellholes® list, **Mississippi's 22nd Judicial District** had taken advantage of flawed state laws to turn this small trio of counties into a mecca

for plaintiffs' lawyers to bring claims against business. Several factors contributed to litigation abuse in this district. First, the state's permissive joinder rules allowed thousands of plaintiffs to aggregate cases with diverse facts and questions of law into "mass actions." Between 1999 and 2000, the number of mass actions in Jefferson County alone [grew from 17 to 73](#).

Additionally, the state's liberal venue rules encouraged plaintiffs' lawyers to flood the friendliest courts with cases that had little connection to the judicial district, or even to the state, simply by naming a local

business as a defendant to avoid federal diversity jurisdiction. The **22nd Judicial District** was typically the venue of choice for plaintiffs' lawyers not only because of the lax joinder and venue rules, but because the courts frequently granted multimillion dollar verdicts. This led to a [2003 FBI investigation](#) resulting in several plaintiffs in Jefferson County being charged with corruption related to a multimillion-dollar award.

Following the 2002 and 2003 Judicial Hellholes® reports, [Mississippi's leaders took action](#) to rein in litigation abuse. The state legislature passed its first civil justice reform package, [H.B. 19](#), in late 2002 during a special session called by **Governor Ronnie Musgrove**. The package amended the state's venue laws, changed guidelines for punitive damages, and abolished joint liability for noneconomic damages for any defendant found to be less than 30 percent liable. A separate bill, [H.B. 2](#), made changes to the state's medical malpractice laws, including establishing a \$500,000 cap on noneconomic damages and providing notice requirements for plaintiffs filing medical liability claims.

In 2003, **Governor Haley Barbour** and **Lieutenant Governor Amy Tuck** were elected on a platform that made tort reform a top priority. Prompted by Governor Barbour, the legislature enacted a comprehensive civil justice reform bill, [H.B. 13](#), that included several significant reforms to strengthen the 2002 reforms. The bill most notably eliminated the "good for one, good for all" rule and required venue to be proper for each plaintiff instead of just one. The bill also addressed venue and joinder abuse, limited non-economic recovery against civil defendants, and abolished joint and several liability for all defendants.

## HAMPTON COUNTY, SOUTH CAROLINA

**Hampton County** was included as a "Dishonorable Mention" in the [2002](#) and [2003](#) editions of Judicial Hellholes® before being elevated to a full-blown Judicial Hellhole® in [2004](#). A small (population of 20,000), rural county, **Hampton County** hosted a disproportionate number of lawsuits because of state venue laws that allowed many out-of-state claims to be filed in the county. A plaintiff was permitted to file a claim anywhere that the defendant did business, regardless of where the plaintiff lived, where the primary place of business was, or where the injury occurred.

With these loose venue laws, plaintiffs would choose **Hampton County** due to its reputation for high verdicts and friendly courts and juries, turning the county into a litigation machine. While trial court judges are afforded discretion to transfer a case when it serves the convenience of witnesses and the interests of justice, judges in Hampton County had long shunned this discretion. This allowed cases to remain in Hampton County courts even when it would be more logical for the case to be heard elsewhere.

[In 2005, the Supreme Court of South Carolina](#) issued a decision that significantly reduced forum shopping in a case stemming from Hampton County. In [Whaley v. CSX Transportation, Inc.](#), a locomotive engineer filed a complaint for an alleged work-related injury 145 miles away from where the plaintiff lived, where each and every fact witness lived, where the employer maintained an office, and where there was another courthouse only 13 miles from the plaintiff's house.

At issue for the **Supreme Court** was whether a defendant can sue anywhere the business "owns property and transacts business," a lax standard that had been routinely applied by the Hampton County courts, or only where it has an office and agent for the transaction of corporate business. The court adopted the latter position, which ATRA supported in an amicus brief filed in the case. One month later, the **South Carolina General Assembly** [passed legislation](#) that further built upon the decision by providing that a case can only be heard in the jurisdiction where the alleged injury took place or in the jurisdiction of the defendant's principal place of business.

## WEST VIRGINIA

West Virginia, a perennial Judicial Hellhole® for [many years](#), emerged from Hellhole status in 2015 following [historic legal reforms](#) enacted by state lawmakers. A troubling alliance among plaintiffs’ lawyers, the courts, and **Attorney General Darrell McGraw** in the early 2000s made West Virginia a “field of dreams” for plaintiffs’ lawyers. Some of the worst issues included: Supreme Court justices who were [openly biased](#) against corporate defendants; [unfair consolidation](#) of vastly dissimilar claims; [asbestos fraud](#); a [loophole](#) permitting injured workers to file tort lawsuits rather than pursue their claims through the no-fault workers’ compensation system; a hostile [medical liability](#) climate; and excessive [punitive damages](#). The power and influence wielded by plaintiffs’ lawyers serving in the legislature prevented enactment of desperately needed reform.

Everything changed in 2014 when West Virginia voters made a [political course correction](#). The new legislature, under strong leadership by **Senate President Bill Cole** and **House Speaker Tim Armstead**, prioritized meaningful reforms and made several major achievements. Lawmakers tackled the issue of widespread excessive damage awards by passing several critical bills. [H.B. 2002](#) abolished the state’s antiquated and unfair rule of joint liability, which had required defendants that were 30% or more at fault for an injury to potentially pay 100% of a plaintiff’s damages. Now, individuals and businesses sued in West Virginia will typically pay damages in proportion to their level of responsibility for an injury. Additionally, punitive damage awards are now [capped](#) at four times the amount of compensatory damages or \$500,000. [S.B. 6](#) addressed disproportionate damage awards in medical liability cases by preventing plaintiffs from receiving compensation for expenses already covered by private insurers or Medicaid. The legislation also tightened expert witness requirements, tied the state’s limit on noneconomic damages to inflation, and included additional healthcare professionals and facilities within the noneconomic damage limits.

Lawmakers also passed meaningful asbestos reform. Trust transparency legislation now requires plaintiffs’ lawyers suing solvent companies in the tort system to [disclose](#) any claims also filed with asbestos bankruptcy trusts on behalf of the same client. This rule prevents plaintiffs’ lawyers from hiding evidence that their client’s injury was caused by sources other than the companies they name as defendants and reduces the potential for fraud. Moreover, lawmakers precluded individuals who have not developed a medically-recognized condition from suing, which preserves limited resources for those who actually become sick, and prevents questionable claims generated through mass screenings and [fraud](#). Other legislative victories included an [amendment](#) to the state’s consumer protection law that helped even the playing field for defendants, a legislative [override](#) of a 2013 high court [decision](#) that abolished the longstanding rule that property owners are not liable for “open and obvious” dangers, a [law](#) establishing that landowners owe no duty of care to trespassers, and a law [tightening](#) the loophole used by workers to sue employers outside the no-fault workers’ compensation system.

In the 2016 legislative session, the **West Virginia Legislature** enacted still more civil justice reforms. Lawmakers adopted the learned intermediary doctrine, the widely accepted principle that drug companies have an obligation to educate doctors instead of directly warning patients, a wrongful conduct bill protecting defendants from liability for injuries that occurred when a potential plaintiff was committing a crime, and sunshine legislation bringing transparency to and placing regulatory parameters on the state attorney general’s hiring of private attorneys on a contingency fee basis. In 2017, lawmakers passed two more important reforms: one lowering the states judgment interest rate ([H.B. 2678](#)), and another limiting products liability for innocent sellers ([H.B. 2850](#)).

Thanks to additional positive developments in 2021, which are highlighted in the Points of Light section, West Virginia is neither a Judicial Hellhole nor a Watch List jurisdiction for the first time in report history.

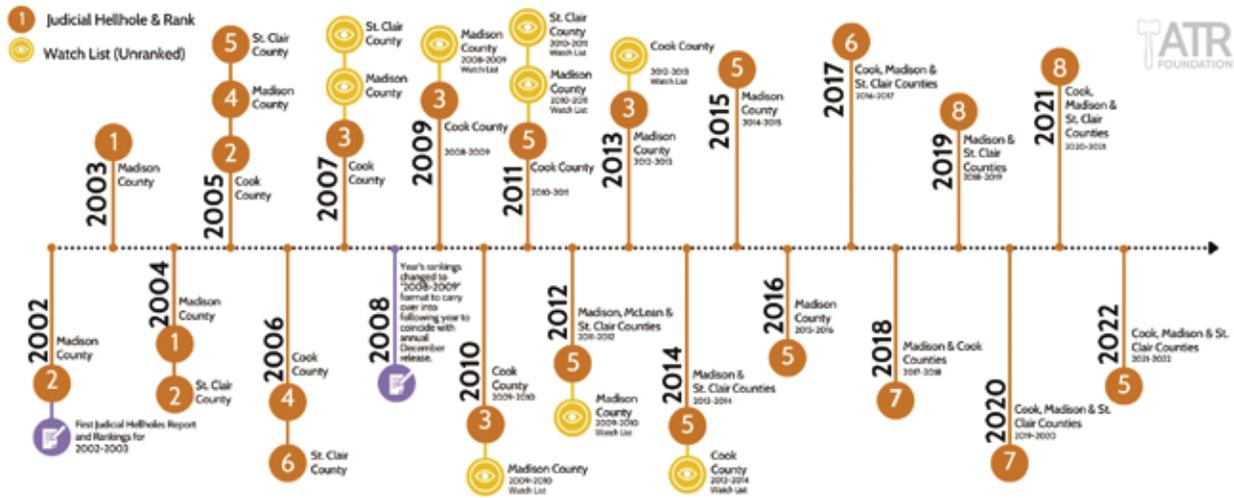
## EVERLASTING JUDICIAL HELLHOLES®

The previous jurisdictions took action to rid the undesirable “Judicial Hellholes®” designation. Others, however, seem to have almost embraced it, making little improvement or even becoming more deeply entrenched, year after year.

**Introducing, the Everlasting Judicial Hellholes® ...**

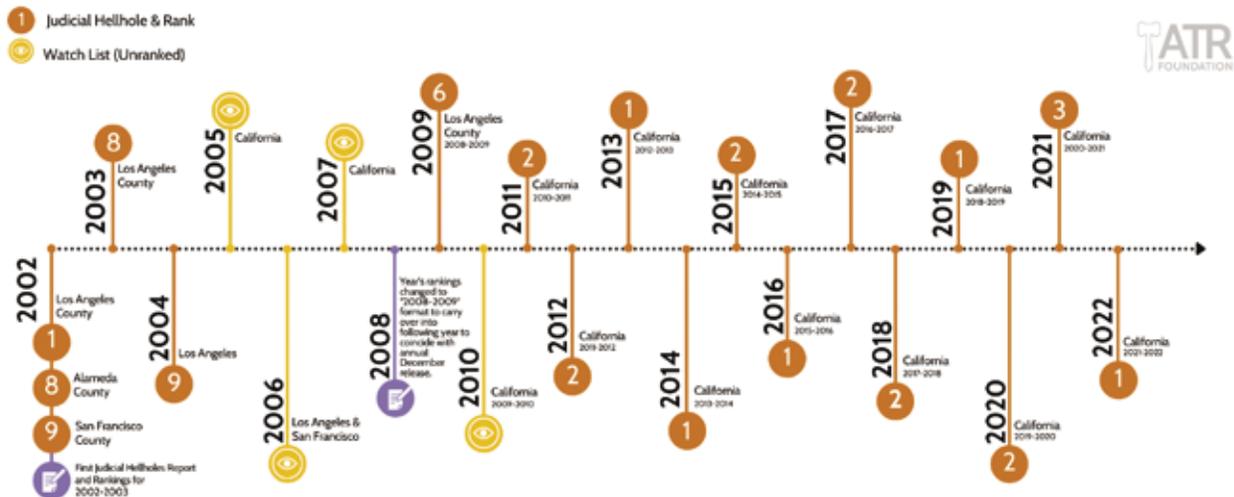
### ILLINOIS

Jurisdictions in Illinois have been named Judicial Hellholes® **every year** since the report’s inception. Recurring issues over the past 20 years include [asbestos litigation](#), [lawsuits that do not actually claim any sort of injury occurred](#), including these jurisdictions welcoming those related to [data privacy](#), and out-of-state lawsuits.



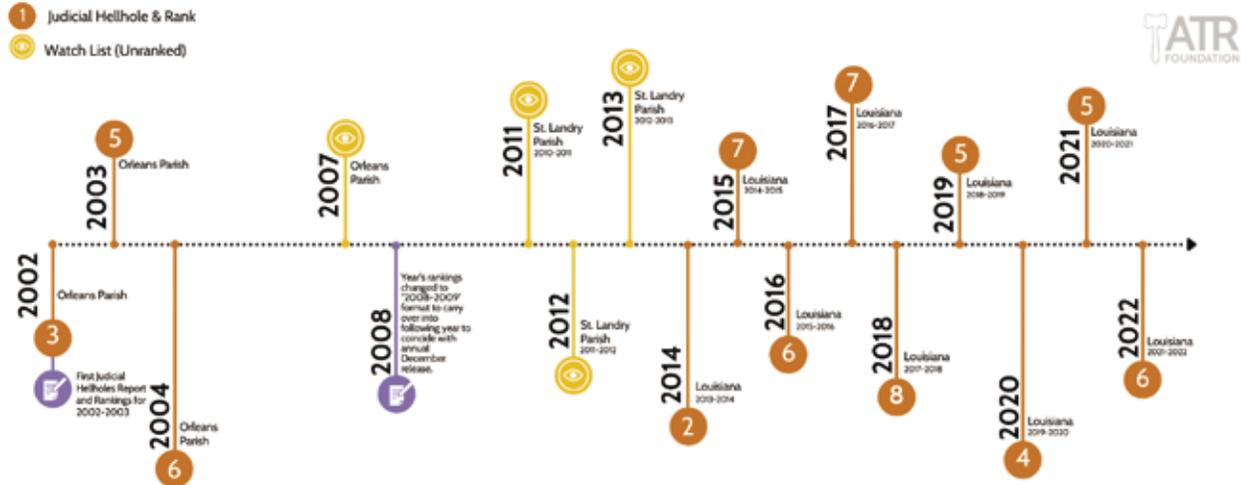
### CALIFORNIA

Jurisdictions in California were named Judicial Hellholes® a total of **15 years**, plus **four years** on the report’s Watch List. Recurring issues over the past 20 years include [lawsuits that abuse the Americans with Disabilities Act](#), [consumer- and food-related lawsuits](#) that do not actually claim any sort of injury occurred, abusive lawsuits against employers under the [Private Attorneys General Act](#) (2004), lawsuits related to the state’s [Proposition 65 lawsuits](#) alleging products contain traces of substances the state regards as [carcinogens](#), as well as the expansion of [public nuisance law](#).



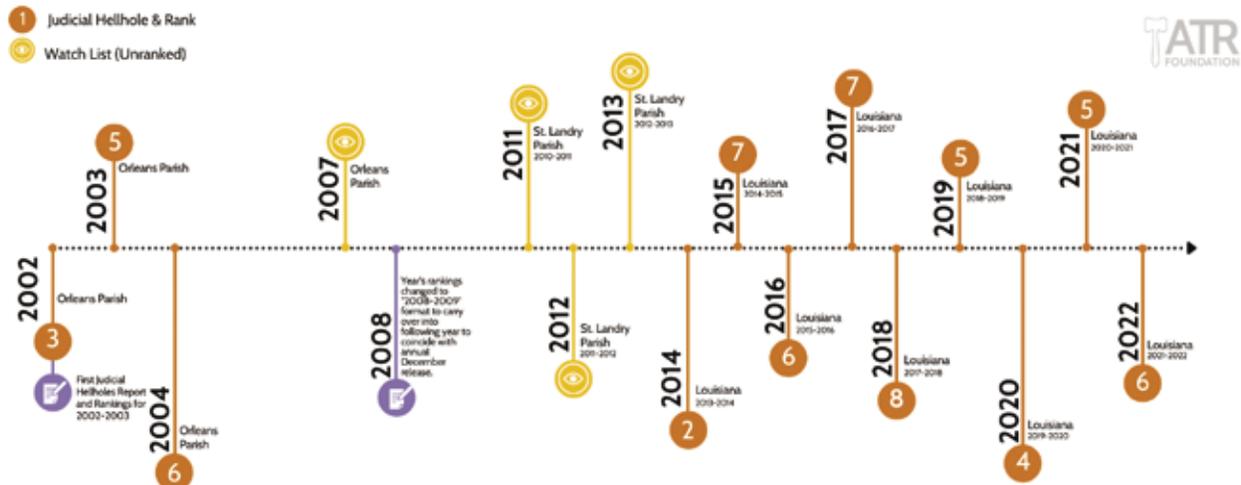
## LOUISIANA

Jurisdictions in Louisiana were named Judicial Hellholes® a total of **11 years**, plus **four years** on the report's Watch List. Recurring issues include [coastal and environmental litigation](#) against energy companies, [auto insurance scams](#) and a large number of auto injury claims, [government cronyism](#), and, up until recently, a [high jury trial threshold](#) that allowed plaintiff-friendly judges to decide many claims.



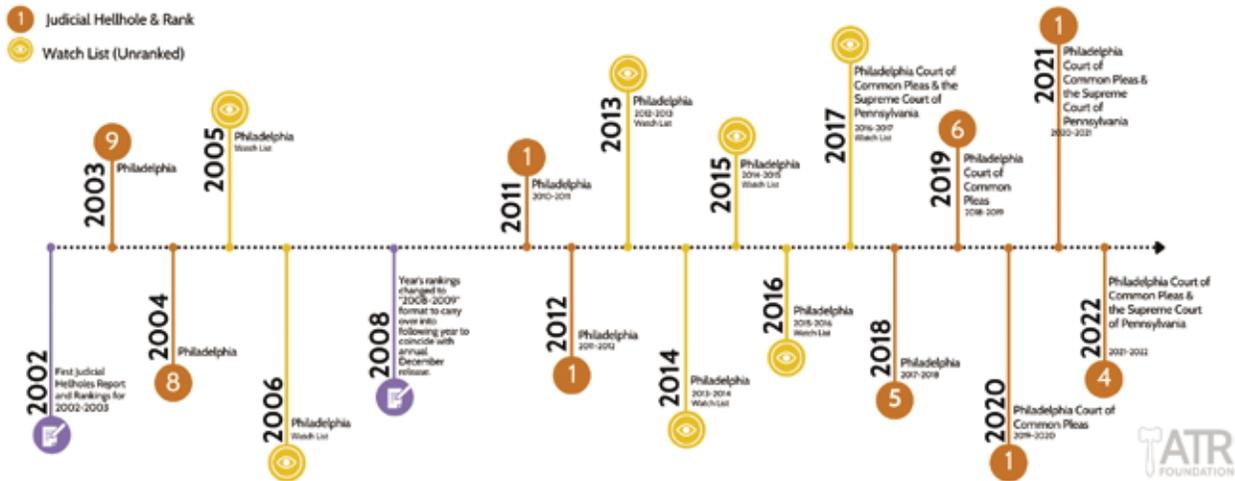
## NEW YORK

Jurisdictions in New York were named Judicial Hellholes® a total of **11 years**, plus one year on the report's Watch List. Recurring issues include [New York City's asbestos litigation](#), [lawsuits that abuse the Americans with Disabilities Act](#), the state's unique [scaffold law](#), [consumer- and food-related lawsuits that do not actually claim any injury occurred](#) and the legislature's repeated consideration of bills that would expand liability.



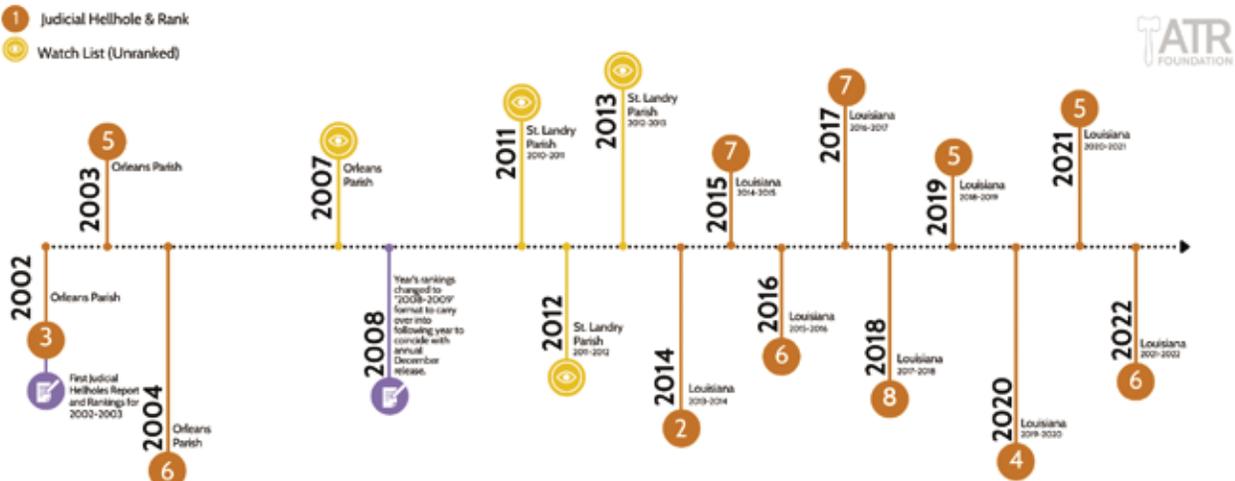
## PENNSYLVANIA

Jurisdictions in Pennsylvania were named Judicial Hellholes® a total of **eight years**, plus **seven years** on the report's Watch List. Recurring issues include mass tort litigation related to pharmaceutical products and medical devices, especially in [Philadelphia's Complex Litigation Center](#), forum shopping, medical liability, and asbestos litigation.



## ST. LOUIS

Jurisdictions in Missouri were named Judicial Hellholes® a total of **nine years**, plus **two years** on the report's Watch List. Recurring issues include allowing [junk science in the courts](#), especially in [talc lawsuits](#), [venue shopping](#), abusive consumer class actions, over-the-top [punitive damages](#), and [asbestos litigation](#).



# 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.





1101 Connecticut Avenue, NW, Suite 400  
Washington, DC 20036  
(202) 682.1163  
[www.ATRA.org](http://www.ATRA.org)