

2018  
2019

# JUDICIAL HELLHOLES

***“The majority’s second holding, however, would extend indefinitely a drug manufacturer’s duty to warn the customers of its successor, even after sale of the product line. No special feature of FDA law or practice warrants this rule. Plaintiffs’ theory of “predecessor liability” represents a substantial and unprecedented expansion of tort duties.”***

- California Supreme Court Justice Carol Corrigan in her concurring and dissenting opinion in [T.H. v. Novartis Pharmaceuticals Corp.](#) (December 21, 2017). The liability-expanding California Supreme Court adopted the novel theory of “innovator liability” or “predecessor liability,” becoming just the second state court to do so.

***“Patients are dying because they are afraid to take the medications prescribed for them due to the fear brought on by these negative and one-sided campaigns.”***

- [Statement](#) of Dr. Ilana Kutinsky discussing the impact of trial lawyer advertising before the U.S. House of Representatives Judiciary Committee’s Subcommittee on the Constitution. (June 2017)

***“The Philadelphia courts are overly congested and a Philadelphia jury should not be taxed with trying a case with which it has no relation.”***

- Pennsylvania Superior Court Judge William Platt reversing a decision by the Philadelphia Court of Common Pleas, finding the court lacked personal jurisdiction to hear the case. [Hovatter v. CSX Corp.](#) (April 27, 2018)

***“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. (January 2018)

***“The trial lawyers are the single most powerful political force in Albany. That’s the short answer. It’s also the long answer.”***

- New York Governor Andrew Cuomo, [explaining](#) why efforts to reform the state’s antiquated, growth hindering “scaffold law” have been thwarted. (April 23, 2014)

# 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](http://JudicialHellholes.org). It reflects feedback gathered from ATRA members and other firsthand sources. And because the program has become widely known, ATRA also continually receives tips and additional information, which is then researched independently through publicly available court documents, judicial branch statistics, press accounts, scholarship, and studies.

Though entire states are sometimes cited as Hellholes, specific counties or courts in a given state often warrant citations of their own. Importantly, jurisdictions singled out by Judicial Hellholes reporting are not the only Judicial Hellholes in the United States; they are simply among the worst. The goal of the program is to shine a light on imbalances in the courts and thereby encourage positive changes by the judges themselves and, when needed, through legislative action or popular referenda.

## ABOUT THE AMERICAN TORT REFORM FOUNDATION

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

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# EXECUTIVE SUMMARY

The 2018 - 2019 Judicial Hellholes report shines its brightest spotlight on nine jurisdictions, courts or legislatures that have earned reputations as Judicial Hellholes. Some are known for welcoming litigation tourism or as hotbeds for asbestos litigation, and in all of them state leadership seems eager to expand civil liability.

A [recent study](#) released by the U.S. Chamber Institute for Legal Reform highlights both the overall cost and inefficiencies of the tort system. The report states that the cost and compensation paid in the U.S. tort system totaled \$429 billion in 2016, accounting for 2.3 percent of the U.S. gross domestic product. The 2018-2019 Judicial Hellholes jurisdictions [largely contributed](#) to these costs, and on a local level, they saw job loss, personal income loss, and state revenue loss due to the excessive tort costs in the states. The data clearly demonstrate the need for a more balanced civil justice system.

**#1 CALIFORNIA** A perennial Judicial Hellhole, California has once again regained its position atop the Judicial Hellholes list due to the propensity of California judges and legislators to extend liability at almost every given opportunity. California courts have adopted novel theories of liability and unique California laws and expansive court decisions have fostered abusive “no-injury” litigation. As a result, the state has become a magnet for class actions targeting food and beverage marketing and disability access lawsuits. In addition, a new data privacy law is plaintiffs’ lawyer gold and is expected to lead to extensive lawsuit abuse.

**#2 FLORIDA** The Florida Supreme Court issued a series of liability-expanding opinions that invalidated civil justice reforms, damaging the state’s civil justice system. The high court once again showed contempt for the lawmaking authority of the state legislature and its decisions will have a lasting impact on the state’s legal climate. The Florida legislature also failed to address blatant lawsuit abuse and fraud, and plaintiffs’ lawyers continued with their usual antics.

**#3 NEW YORK CITY** While the New York City Asbestos Litigation has been featured in the report since 2013, the 2018-2019 report broadens the “Judicial Hellhole” distinction to include other types of litigation in New York City. Courts in New York City are filled with frivolous consumer class actions and judges permit plaintiff-friendly procedures and high awards in asbestos cases. The state high court also further stacked the deck against defendants in personal injury litigation. Hedge funds are increasingly investing in New York litigation and driving some of the most expensive cases in the state. Additionally, the legislature failed to address excessive construction liability and asbestos litigation abuse, and it expanded medical liability.

## 2018 2019 JUDICIAL HELLHOLES

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- 8 MADISON AND ST. CLAIR COUNTIES, ILLINOIS
- 9 TWIN CITIES, MINNESOTA

**#4 THE CITY OF ST. LOUIS, MISSOURI** The optimism for a more balanced City of St. Louis expressed in last year's report quickly evaporated in 2018 as judges were reluctant to end forum shopping and allowed plaintiffs' lawyers to introduce junk science in the city's talc litigation. "No-injury" consumer class actions continue to fill the courts and the liability-expanding state high court overlooked juror misconduct in a crucial case against a large in-state employer. Excessive lawsuit advertising has inundated jury pools, making it difficult for defendants to receive a fair trial, and once again, the legislature was unable or unwilling to pass needed legal reforms.

**#5 LOUISIANA** The state of Louisiana, led by Governor John Bel Edwards, has developed a propensity to hire former campaign donors to represent the state in litigation, creating the appearance of a "pay-to-play" system. There is rampant lawsuit abuse and the legislature has failed to address these problems. The Louisiana Supreme Court also has a propensity to expand liability.

**#6 PHILADELPHIA COURT OF COMMON PLEAS** Mass tort cases continue to flood the Philadelphia court system due to judges' loose application of venue laws and an overall lack of legal reform. Philadelphia also remains a hotbed for asbestos litigation. State leadership appears to be strongly aligned with the plaintiffs' bar, signaling little hope for change.

**#7 NEW JERSEY LEGISLATURE** In 2018, the New Jersey legislature distinguished itself as the most plaintiff-friendly legislature in the country. While the Judicial Hellholes report typically focuses on the courts, the New Jersey legislature is an exception because of its drastic liability-expanding agenda for the 2018-2019 session. The trial bar also has gained significant power and influence in the state legislature, leading to legislators' refusal to entertain even the most modest of tort reforms.

**#8 ST. CLAIR AND MADISON COUNTIES, ILLINOIS** These counties are notorious for their disproportionate volumes of litigation and large verdicts. St. Clair County is a magnet for "no-injury" consumer class action litigation, while Madison County continues to be the plaintiffs' favorite jurisdiction for asbestos lawsuits. St. Clair also is experiencing a meteoric rise in asbestos litigation, and a lack of legal reform in Illinois allows the litigation to flourish.

**#9 TWIN CITIES, MINNESOTA** A newcomer to the Judicial Hellholes report, the Twin Cities' position was solidified after the attorney general mishandled a lawsuit against a large Twin Cities employer and a Hennepin County trial judge stripped a company's defenses. The lower courts appear to be following the lead of the state's high court after it subjected property owners to expanded liability in 2018 and rejected a measure intended to remove "junk science" from the state's courts.

## WATCH LIST

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

**COLORADO SUPREME COURT** Liability-expanding decisions and rulemaking by the court coupled with prospects of a pro-plaintiff legislative agenda in 2019 has created an unfair and unbalanced environment for defendants in the Centennial State.

**GEORGIA SUPREME COURT** Georgia's Supreme Court in recent years has issued decisions that significantly expanded civil liability, and that troubling trend continued in 2018.

**MONTANA SUPREME COURT** The Montana Supreme Court's penchant for expanding liability, judicial activism, and defiance of U.S. Supreme Court precedent once again landed it on the Judicial Hellholes Watch List.

**NEWPORT NEWS, VIRGINIA** Perhaps most notable in 2018 is the lack of cases to go to trial in Newport News. Plaintiffs and defendants alike have sought to litigate asbestos cases in federal court, as a result, it is hard to know

whether problems and inequities that have manifested themselves in the past will persist. Newport News has been known for its evidentiary double standards, unsound legal rulings and lack of transparency in asbestos litigation.

**OHIO EIGHTH DISTRICT COURT OF APPEALS–CUYAHOGA COUNTY** A newcomer to the Watch List, the district has developed a reputation for handing down large damage awards and being a “haven” for class action lawsuits. It has developed a troublesome pattern of issuing unbalanced plaintiff-friendly decisions, which had to be overturned multiple times by the Ohio Supreme Court.

**PENNSYLVANIA SUPREME COURT** The high court issued a series of liability expanding decisions and has been selective, at best, in following U.S. Supreme Court precedent, inexplicably opening its doors to out-of-state plaintiffs.

**SUPREME COURT OF APPEALS OF WEST VIRGINIA** In an unprecedented move, West Virginia lawmakers voted to recommend the impeachment of all sitting members of the state’s highest court in 2018. Prior to the impeachment chaos, the court also issued a disappointing class certification decision that rejects U.S. Supreme Court precedent and encourages plaintiffs’ lawyers from all over the country to flock to West Virginia courts to file class action lawsuits. The 2018 elections did bring about some encouraging news with the election of **U.S Representative Evan Jenkins** and **former House of Delegates Speaker Tim Armstead** to fill the vacancies on the court.

## 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 aren’t otherwise detailed in other sections of the report.

Included among this year’s list is the American Law Institute’s adoption of a troublesome Restatement on Liability Insurance, Cook County, Illinois’ BIPA litigation, disappointing asbestos decisions in Delaware and Maryland, and the judicial nullification of liability limits in New Mexico and North Dakota. The Massachusetts high court also adopted ‘innovator liability’ and two Texas trial courts handed down massive judgments, one of which was the nation’s largest in 2018.

## 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 adhering to the rule of law, positive legislative reforms and other encouraging developments.

One very encouraging development this year was the New Jersey Supreme Court’s series of well-balanced decisions. A perennial Judicial Hellhole, the court took very important steps in helping to restore fairness in the state’s legal system.

Among the other positive decisions, the U.S. Supreme Court enforced a class action waiver in arbitration agreements, and the Fifth Circuit overturned a \$502 million verdict against Johnson & Johnson after finding “unequivocally deceptive” conduct by the plaintiffs’ lawyer. The Wisconsin Supreme Court also upheld the statutory limit on noneconomic damages in medical liability cases.

Meanwhile, legislatures in eight states enacted nine civil justice reform statutes in 2018, including asbestos trust transparency legislation in Kansas, Michigan, and North Carolina; transparency in private attorney contracting legislation in Kentucky and Missouri; and finally, an important e-Discovery and class action reform bill in Wisconsin.

## CLOSER LOOKS

**‘JUNK SCIENCE’ MAKING ITS WAY INTO AMERICAN COURTROOMS** Despite the U.S Supreme Court bestowing upon judges the responsibility of serving as “gatekeepers” to weed out junk science and prevent it from being offered to jurors in their courtrooms, many judges have either refused to accept this role or have fallen short in their efforts to do so. There is a growing trend of judges and juries relying on unsubstantiated “science” as the basis of massive judgments against corporate defendants. Reasonable rules and procedures are essential to a bal-

anced civil justice system, and it is up to the judiciary and lawmakers to ensure that junk science does not find its way into courtrooms.

**FIGHTING ‘NO-INJURY’ LAWSUITS** In recent years, plaintiffs’ lawyers are chipping away at the core requirement of a plaintiff experiencing an injury in order to file a lawsuit, bringing claims based purely on speculation, risks of future harm, and creative theories of financial loss. The injury requirement is a critical safeguard for the civil justice system and must be restored.

**ACTIVIST STATE ATTORNEYS GENERAL LOOKING TO REGULATE THROUGH LITIGATION** State attorneys general are seizing the opportunity to use current “hot-button” issues, like the opioid crisis and climate change, to propel forward their personal careers and generate campaign dollars for future political aspirations. Lawsuits brought by powerful state governments must serve the public interest, and not merely the profit-seeking interests of politically influential members of the plaintiffs’ bar.



# JUDICIAL HELLHOLES

## #1 CALIFORNIA

A perennial Judicial Hellhole, California has once again regained its position atop the Judicial Hellholes list after a two-year hiatus.

California judges and legislators alike have a propensity to expand liability at almost every given opportunity. The predatory litigation, driven by the powerful plaintiffs' bar, is an assault on the California consumer. The [cost of living](#) in California continues to be among the highest in the country due in large part to housing, food and energy prices, all of which have been driven up by lawsuit abuse and excessive state regulations.

A recent [Perryman Group study](#) estimates that excessive tort costs to the California economy result in \$11.6 billion in annual direct costs and 197,776 lost jobs when dynamic effects are considered.

- **Courts adopt novel theories of liability**
- **Unique California laws and expansive court decisions foster abusive “no-injury” litigation**
- **A magnet for class actions targeting food and beverage marketing, disability access lawsuits**
- **Massive \$1.2 billion public nuisance verdict stands**
- **New data privacy law is plaintiffs' lawyer gold**



## CALIFORNIA'S “EUREKA” LAWSUITS

The California motto, “Eureka,” (Greek for “I have found it”) is said to refer to the discovery of gold. Today, plaintiffs' lawyers are California's prospectors, searching for new theories of liability. Some have struck it rich.

### INNOVATOR LIABILITY

At the very end of 2017, the **California Supreme Court** became just the second state high court to adopt the novel theory of “innovator liability.”

This theory exposes a company that invested millions or billions of dollars into developing a medication to liability when a person who took a generic version made by a competitor alleges an injury from the drug.

California's decision to adopt innovator liability makes it an outlier. [At least 35 state and federal courts](#) have rejected innovator liability, which is a disincentive for companies to develop medications that save and improve lives. After the Alabama Supreme Court adopted this deep-pocket approach in 2014, the state's legislature quickly [overturned](#) the ruling.

In the California case, a trial court, the **Superior Court of San Diego County**, followed the traditional rule of tort law that a company owes no duty to a person who did not use its product and dismissed a case against a brand-name drug manufacturer, Novartis, brought by a person who took a generic version of a drug. The California Supreme Court, however, [ruled](#) that the case could move forward even when Novartis had sold its rights to the brand-name version six years prior to the plaintiff's alleged injury. The California Supreme Court took this approach even as it recognized that “only a handful of courts” had adopted innovator liability.

If innovator liability flourishes, it could impose billions of dollars of unwarranted liability on companies that invest significant time and expense to develop new products that are later copied and sold by others. These companies will be forced to act as an insurer for their generic competitors' products, which is likely to divert significant

resources from research and development. Since 90% of the current prescription drug market is generic, innovator liability has the potential to [shift 100%](#) of the liability to the 10% of the market that we rely upon to develop new medications.

### FRIVOLOUS PROP 65 LITIGATION

Baseless Proposition 65 litigation unjustly burdens companies that do business in California. The money spent by companies on compliance and litigation unnecessarily drives up the cost of goods for California consumers. It also [subjects consumers](#) to Henny Penny-like warnings declaring that everything from [brass knobs to Disneyland](#) causes cancer.

The originally well-intentioned law, enacted in 1986, is now one of the plaintiffs' bar's favorite tools to exploit. Under Prop-65, businesses are required to place ominous warning signs on products where tests reveal the slightest, non-threatening trace of any of more than [900 listed chemicals](#) that state environmental regulators deem carcinogenic or otherwise toxic. A troublesome part of the law allows private citizens, advocacy groups and attorneys to [sue on behalf of the state](#) and collect a portion of the civil fees, creating an incentive for the plaintiffs' bar to create these types of lawsuits. Each year, they send thousands of notices to companies threatening Prop 65 litigation and demanding a settlement. A [search of notices](#) on the California Attorney General's website shows that the number of these threatened lawsuits has tripled over the past decade. Food and beverage companies are among the [prime targets](#).

According to the California Attorney General's website, businesses settled [688 Prop 65 actions](#) in 2017 totaling \$25,767,500. Three-quarters of this money, \$19,486,362, went to the attorneys who brought the lawsuits to cover their fees and costs. Just 24 advocacy groups, law firms, and individuals were behind this litigation.

In 2018, the **California Office of Environmental Health Hazard Assessment (OEHHA)**, the chemical watchdog group responsible for enforcing Prop 65, issued a new set of regulations. It now requires a business owner to list all major chemicals present in a product, as opposed to having a general warning. Under the new rules, individual product signage is required on every store shelf. Failure to properly display a [\\$40 sign](#) could result in fines and legal settlements as large as \$60,000-\$80,000.

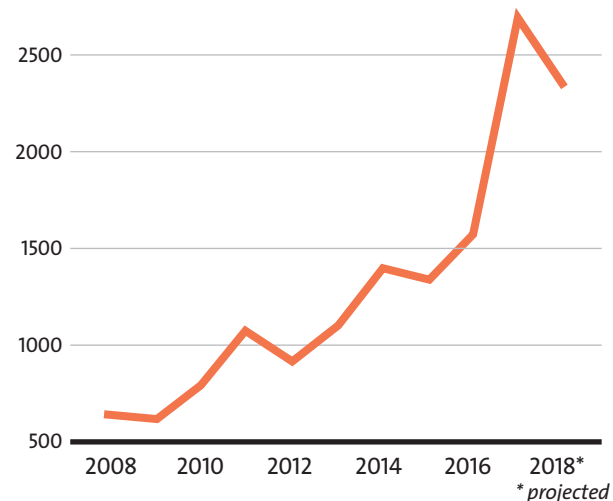
California courts and legislators have provided a mixed bag when it comes to their handling of Prop 65 litigation in 2018. On the one hand, a federal judge in the District Court for the Eastern District of California halted a Prop 65 requirement that Monsanto place warning labels on its Roundup® products, ruling that there was "[insufficient evidence](#)" the popular weed killer causes cancer.

Judge William Shubb [wrote](#) that the required warning for glyphosate "does not appear to be factually accurate and uncontroversial because it conveys the message that glyphosate's carcinogenicity is an undisputed fact, when almost all other regulators have concluded that there is insufficient evidence that glyphosate causes cancer." He continued, "As applied to glyphosate, the required warnings are false and misleading."

The Prop 65 requirement was based on a [2015 conclusion](#) by the **International Agency for Research on Cancer (IARC)** that glyphosate was a "probable" carcinogen. As discussed later in the Closer Look section on junk science, the 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.

A [unanimous California jury](#) relied on the same IARC conclusions about Roundup when it awarded Dewayne Johnson \$289 million in damages, \$250 million of which were punitive, despite Judge Suzanne Ramos Bolanos calling the evidence supporting punitive damages "[thin](#)." In October, however, Judge Bolanos, after she originally considered granting Monsanto's motion for a [new trial](#), [reduced the punitive damages](#) award from \$250 million to

### PROPOSITION 65 60-DAY NOTICE DEMAND LETTERS



\$39.25 million, in order to adhere to due process limits. ATRA will continue to keep a close eye on this case. Please check [www.judicialhellholes.org](http://www.judicialhellholes.org) for updates.

Another significant problem with Prop 65 litigation is that companies' products are [considered harmful](#) until proven not to be. After subjecting companies to nearly a decade of litigation, Los Angeles Superior Court Judge **Elihu Berle** [ruled](#) in March that companies that sell coffee, like [Starbucks](#), failed to show that coffee does not cause cancer; therefore, they must place cancer warnings [on lattes](#) and post warnings in their stores.

After the California agency that oversees Prop 65 warnings [proposed](#) exempting coffee from cancer warnings in August, plaintiffs' lawyers—you guessed it—[sued the State of California too](#).

### GOOD NEWS IN PROP 65 LITIGATION

Over-warning as a result of the California law dilutes the impact of all warnings and leads consumers to ignore warnings of significant risks. It may also discourage consumers from buying healthy foods. Recently, a California state appellate court ruled that breakfast cereals made by Post, General Mills and Kellogg do not have to carry Prop 65 cancer warning labels after receiving letters from the FDA that “contained [persuasive reasoning](#) why (warnings on whole-grain cereals) would mislead consumers and lead to health detriments.”

### EXPANSION OF CALIFORNIA'S PRIVATE ATTORNEYS GENERAL ACT

Enacted in 2004, California's **Private Attorneys General Act (PAGA)** has become a means around arbitration clauses in employment contracts that limit costly, plaintiffs' lawyer-enriching class actions.

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.

[Seventy-five percent of the penalties](#) paid by non-compliant employers go to the state's Labor and Workforce Development Agency while only twenty-five percent goes to the “aggrieved employees” and their lawyers who take a third or so of that. In some cases, the plaintiffs' lawyers receive even more. For example, plaintiffs' lawyers walked away with forty percent of a recent [\\$9 million PAGA settlement](#) with Target.

That settlement resolved three lawsuits accusing Target of failing to provide seating for more than 90,000 cashiers during their shifts. Target argued the nature of the cashier position does not permit sitting down, but settled given the lengthy litigation and plaintiffs' seeking more than \$200 million. A California judge [approved](#) a settlement that awarded the lawyers \$3.9 million in fees and \$200,000 in costs, even as he expressed discomfort with the amount that would go directly into the pockets of the attorneys. “Just don't tell anyone,” he quipped at a July 2018 hearing.

This year, two state appellate courts further expanded PAGA liability by allowing individuals to bring “no-injury” PAGA lawsuits. First, the **Court of Appeals for the Third District** [ruled](#) in May 2018 that, in PAGA lawsuits, “[a]n act may be wrongful and subject to civil penalties even if it does not result in injury.” The following day, the **Sixth District** found that a person affected by one Labor Code violation can sue an employer for any potential Labor Code violation, even if it did not affect him.

The **U.S. District Court for the Northern District of California** also weighed in on PAGA this year in a massive [labor law class action](#) against Walmart. There, the court allowed a PAGA suit that alleged pay stubs were not compliant with PAGA because they lacked pay period start and end dates to proceed and that Walmart [could not cure](#) the omission by issuing a compliant wage statement. In October 2018, Walmart also [agreed to settle](#) another cashiers' seating case for \$65 million, the largest settlement in the history of PAGA.

Unfortunately, [three PAGA ballot initiatives](#) were removed from consideration by their proponents in January of this year. The initiatives would have gone a long way toward eradicating the abuses taking place under PAGA. The first initiative would have repealed PAGA and placed an executive official in charge of issuing civil penalties for labor violations. The other two would have prohibited attorneys from collecting contingency fees in PAGA lawsuits, required an employee who brings a PAGA claim to personally suffer an actual injury, and mandated ethics training for lawyers filing PAGA claims.

## THE 'FOOD COURT'

California courts, both state and federal, continue to be ground-zero for “no-injury” consumer protection lawsuits targeting the food and beverage industry. The number of lawsuits has risen sharply in recent years. Since 2012, plaintiffs’ lawyers have filed over [500 class actions](#) challenging the marketing or labeling of food nationwide. About [one third](#) of the food class action litigation in federal courts nationwide is in the Northern District of California, also known as the “[Food Court](#),” located in San Francisco. California is a favorite for these lawsuits due to its plaintiff-friendly **Unfair Competition Law (UCL)** and the potential to bring large class actions.

Many of the targeted companies settle the litigation instead of risking the high cost of a trial and the negative publicity that would follow, leading to multi-million dollar settlements that feed the plaintiffs’ bar and provide little to [no benefit for consumers](#).

For example, this year, Ferrara Candy Co. settled a [class action lawsuit](#) in the **Northern District of California** for \$2.5 million. While Ferrara had accurately labeled its boxes with the number of ounces of candy inside, the lawsuit alleged that, due to the size of the boxes, consumers would think they would get more JuicyFruits or other candies. Consumers are entitled to a cash refund of \$0.50 cents per purchase, up to \$7.50 if no receipt is provided. The plaintiffs’ attorneys, who say they spent 1,500 hours and \$365,000 in expenses to protect the right of consumers to get their [due share of candy](#), asked the court for \$750,000 in attorneys’ fees, \$520,000 to administer the claims process, and a \$5,000 incentive award for the class representative.

By allowing these “no-injury” lawsuits to prosper, California judges have opened companies up to exploitation by entrepreneurial plaintiffs’ lawyers. Recently, YummyEarth received a letter from an unscrupulous plaintiffs’ lawyer demanding \$25,000 or else the company would be sued for intentionally misleading consumers by labeling lollipops as having “evaporated cane juice” instead of sugar. Apparently, his client was surprised to learn that there is indeed sugar in lollipops.

After YummyEarth refused to submit to the lawyer’s demands, the plaintiff purchased the lollipop, and subsequently, filed a lawsuit in the San Bernardino Superior Court. The lawyer representing the plaintiff, **Ryan Ferrell** of **Apex Trial Law**, is currently involved in a [racketeering lawsuit](#) that accuses him and his previous firm, Newport Trial Group, of [hiring college students](#) to serve as plaintiffs in class action lawsuits. The case was [filed in 2015](#) and is still working its way through federal court.

## GOOD NEWS FROM THE 'FOOD COURT'

The **Northern District Court of California** did provide a bit of encouraging news this January when it dismissed a proposed class action lawsuit alleging Starbucks [under-filled its lattes](#) and mochas to purportedly save on the cost of milk by [topping the drinks](#) with milk foam. As **Judge Yvonne Gonzalez Rogers** [recognized](#), “no reasonable consumer would be deceived into believing that Lattes which are made up of espresso, steamed milk, and milk foam contain the [number of ounces advertised on the menu] excluding milk foam.” Two months later, the U.S. Court of Appeals for the Ninth Circuit dealt another blow to frivolous California food litigation when it [affirmed](#) a trial court ruling that similarly found consumers understand that their iced coffee will include, yes, ice. Despite such sound rulings, California remains the national epicenter for food class action lawsuits.

## PUBLIC NUISANCE LAW- LEAD PAINT AND CLIMATE CHANGE LITIGATION

In February, the **California Supreme Court** allowed a [landmark lead paint](#) ruling to stand by [refusing](#) to review the decision. In the lower court case, a California trial court [held](#) that Sherwin-Williams and other former lead paint manufacturers companies created a public nuisance in homes built before 1981 in 10 California cities and counties by lawfully by promoting the use of lead-based paint in homes built in the early part of the last century. The companies were ordered to pay \$1.15 billion to inspect and abate the affected homes. An appellate court limited the companies’ liability to homes built before 1951 but left undisturbed the finding that lead paint is a public nuisance. The \$1.15 billion judgment was reduced to \$409 million.

In addition, the court issued an unprecedented abatement plan, which orders the abatement of even certain intact lead paint, despite a U.S. **Department of Housing and Urban Development** safety recommendation to

keep lead paint settled rather than remove it despite federal, state and local laws that permit intact lead paint in homes. All houses built prior to 1981 are presumed to have lead-based paint, and therefore, are considered a public nuisance, yet abatement funds are only available for homes built before 1951. While the decision only applies to the 10 municipalities named in the case, it has placed the [legal status](#) of all pre-1981 California homes in question. The companies [urged](#) the U.S. Supreme Court to review the California Supreme Court's novel ruling on the basis that it violated the free speech and due process clauses of the U.S. Constitution, but the high court [denied](#) the petition of certiorari in October.

Unfortunately, lead paint claims are not the only "public nuisance" lawsuits burdening California courts. Municipalities have used the lead paint ruling to make similar claims against the oil and gas industries for creating a public nuisance—climate change—by producing fossil fuels. For example, the City of Imperial Beach [filed a complaint](#) asserting that energy companies have "caused an enormous, foreseeable, and avoidable increase in global greenhouse gas pollution and a concordant increase in the concentration of greenhouse gases." The city also claims that the companies have contributed to global warming through their CO2 emissions.

### A BIT OF GOOD NEWS FROM THE COURTS ON PUBLIC NUISANCE LITIGATION

Recently, U.S. District Judge William Alsup dismissed a similar lawsuit filed by San Francisco and Oakland alleging that major oil and gas companies created a [public nuisance](#) and should be liable for the damages caused by the impact of climate change. In dismissing the case, the judge stated, "[t]he problem deserves a solution on a more vast scale than can be supplied by a district judge in a public nuisance case."

### LEMON LAW CASES TURNING INTO FRAUD CASES

A concerning trend has developed in California trial courts for car manufacturers. Lemon law cases are being bootstrapped into fraud claims, exponentially increasing damage awards and delaying resolution for consumers. What should be straightforward cases are becoming quite complex and consuming a large amount of the courts' time and resources.

The Song-Beverly Consumer Warranty Act, otherwise known as the California Lemon Law, 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 replace or repurchase a consumer's vehicle as quickly as possible. However, plaintiffs' lawyers have learned to exploit loopholes in the law and enrich themselves at the expense of a fair resolution for consumers.

A full refund or vehicle replacement is no longer sufficient. California trial courts have permitted these straight-forward Lemon Law cases to morph into fraud cases, allowing balloon payments many times the value of the vehicle in question. In order to prove fraud, the jury must find the defendant intentionally misrepresented or concealed the problem with the car, where as a Lemon Law case simply alleges a problem with the vehicle. As one California federal judge [observed](#) in a case in which a plaintiff rejected a reasonable settlement offer stemming from a defect that caused a "check engine" light to illuminate:

*"[The plaintiff's] counsel took a case about a 2004 Kia Sedona and is now being paid enough fees to buy a Lamborghini... Allowing a plaintiff in a lemon law case to multiply the proceedings based on its own refusal to settle cannot have been the state legislature's intent. It is not good for business, it is not good for consumers, it is only good for the lawyers."*

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Two recent cases involving near identical facts clearly demonstrate the difference between bringing a Lemon Law case and a fraud case. First, a Butte County court awarded a plaintiff [\\$126,376.56](#) in punitive damages (double the actual damages) for a defective car that originally cost \$43,065. In a similar fraud case, a Los Angeles court awarded a plaintiff [\\$500,000](#) in punitive damages when the plaintiff only suffered an actual loss of \$54,364. In that case, the jury found Ford liable for concealment and intentional misrepresentation. With that big of a difference in damages, it is easy to see why plaintiffs' attorneys prefer to bring fraud cases when the courts allow them to do so.

### EXCESSIVE TALC VERDICTS CONTINUE

In October 2017, a Los Angeles County judge threw out a [\\$417 million](#) verdict against Johnson & Johnson which attempted to tie the company's baby powder to a woman's development of ovarian cancer, finding no substantial evidence supported the verdict. Nevertheless, lawsuits alleging that talcum powder causes cancer continue to be filed in California. In May 2018, a Los Angeles jury found Johnson & Johnson liable for [\\$21.7 million](#) in compensatory damages and [\\$4 million](#) in punitive damages in a lawsuit claiming the company's baby powder contained asbestos, which a jury found caused a woman to develop mesothelioma. The jury pinned two-thirds of the responsibility for her development of mesothelioma on talc and just one third to her presence while her husband did automotive work.

## EXCESSIVE REGULATIONS AND BURDENSOME LEGISLATION MAKE MATTERS WORSE

### NEW DATA PRIVACY LAW IS PLAINTIFFS' LAWYER GOLD

Data privacy continues to garner national attention, as companies and regulators grapple with how to best reasonably protect consumers and their private data. True to form, California took the opportunity to impose over-burdensome regulations on businesses. This year, the legislature enacted the [most radical privacy law](#) in the country and it was signed into law by **Governor Jerry Brown** on June 28, 2018.

The law's most troubling provision is that its sole enforcement mechanism is a private right of action. The law provides for treble damages and attorneys' fees, creating large incentive for the plaintiffs' bar to file massive class actions. Consumers also can sue for data breaches without proving an actual injury, making it easy for trial lawyers to find potential class members.

The bill moved through the legislature in just over a week because lawmakers wanted to pass it prior to the deadline to withdraw a ballot initiative that would have imposed even more stringent rules. "While today's law marks some improvements to an overly vague and broad ballot measure, it came together under extreme time pressure, and imposes sweeping novel obligations on [thousands of large and small businesses](#) around the world, across every industry," Katherine Williams, a spokesperson for Google, told Yahoo Finance in a statement. "We appreciate that California legislators recognize these issues and we look forward to improvements to address the many unintended consequences of the law."

## BROADER LEGAL ISSUES FURTHER STACK THE DECK AGAINST DEFENDANTS

### ATTACK ON ARBITRATION

The California courts and legislature have long attempted to undermine the right of employers and employees to enter into arbitration agreements.

Despite the U.S Supreme Court's [clear rulings](#) finding arbitration agreements are enforceable and may not be disfavored by state laws, the California legislature again attempted to bar employers from requiring employees to sign agreements to [arbitrate claims](#).

**Assembly Bill 3080** passed the state Assembly and the Senate, only to be vetoed by **Governor Jerry Brown**. In his [veto message](#), Governor Brown observed that the bill "plainly violates federal law." While this is welcome news, Governor Brown will be leaving office soon and there is no telling whether his successor, **Gavin Newsom (D)**, will show as much measured restraint if, or when, the legislature introduces similar legislation.

## PLAINTIFFS' LAWYERS TARGET SMALL BUSINESSES

A stunning number of lawsuits were filed under the **Americans with Disabilities Act** in federal court against California businesses in 2017—[2,751 lawsuits](#)—up from 2,468 in 2016. California had the most ADA accessibility lawsuits of any state and had almost double the amount of the next closest state, Florida (1,488). These numbers do not include the many extortionate demand letters sent to businesses, nor does it include lawsuits filed in state courts.

In California, penalties for ADA violations are much higher than other states due to the state's **Unruh Civil Rights Act**, which allows plaintiffs to recover compensatory damages of [\\$4,000 per violation](#) (compared to \$1,000 under federal law) 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.

Not only are plaintiffs' attorneys targeting "brick and mortar" stores, they are now targeting companies for issues with [website accessibility](#) as well. Through the first six months of 2018, [2,155 lawsuits](#) alleging that online shopping and other website did not sufficiently accommodate individuals with visual impairments were filed in California alone. That number is more than double the next highest state, New York, which had 1,026.

Even the people this law is supposed to protect are starting to [speak out against](#) these predatory lawsuits, recognizing that the litigation is having a negative impact on people with disabilities.

Fortunately, some small business owners are fighting back. A San Jose law firm, the Moore Law Firm, since renamed **Mission Law Firm**, is being sued by the owner of Blossom True Value under the **Racketeer Influenced and Corrupt Organizations (RICO) Act** for making fraudulent statements in ADA access lawsuits. The firm has filed [over 1,400 ADA lawsuits](#) against small businesses across California, including one against Blossom True Value for violations that included a bathroom sign that was mounted too high. The owners had never received a complaint from a disabled customer. They fixed the problems and [settled out of court](#) for \$20,000. After settlement, the hardware store owner hired a private investigator and found that the lawyers made fraudulent statements during the case - including their claim that a disabled man twice had been trapped in the bathroom. The plaintiffs' firm has twice moved to dismiss the case, and the court has refused to do so in both instances.

## OVER-THE-TOP LAWSUIT ADVERTISING MAY CAUSE REAL HARM

Trial lawyers and aggregators spend large sums on television, digital, and print advertising to recruit new clients for product liability lawsuits. California's top media market and the second largest media market in the nation, Los Angeles, saw [\\$7.6 million spent](#) in its local television market to air 38,253 legal services ads in a three-month period alone between April and June of 2018. Area viewers saw 18 legal services ads every hour—that's seven times as many ads as viewers saw for pizza delivery and restaurants.

Spending on lawsuit ads in the San Francisco Bay Area totaled [\\$1.8 million](#) to air nearly 21,000 commercials in the second quarter of 2018.

Some consumers who see doomsday ads that exaggerate or misrepresent the risks of medications they take stop using their medicine. This may happen without consulting a doctor, exposing patients to harm. Reports submitted by doctors to the FDA have shown that at least 61 patients have stopped using their prescribed blood-thinner medications, Xarelto or Pradaxa, after seeing these commercials. [Six people died](#), of the 61, - three from strokes, one from cardiac arrest, one from a pulmonary embolism, and one from an unreported cause.

***"Patients are dying because they are afraid to take the medications prescribed for them due to the fear brought on by these negative and one-sided campaigns."***

**Dr. Ilana Kutinsky**, a doctor for an elderly patient who stopped her anticoagulation medication and died following a massive stroke, directly associated these dangerous ads with patient deaths. She [testified](#) before Congress, "Patients are dying because they are afraid to take the medications prescribed for them due to the fear brought on by these negative and one-sided campaigns."

Legislation was introduced in California to [address misleading lawsuit advertisements](#) that claim medical devices and prescription drugs are dangerous. **A.B. 3217** provided that a commercial is considered misleading if it understates the benefits of FDA-approved medications or medical devices or overstates the risks. Unfortunately,

after unanimously passing the Assembly (71-0), the Senate refused to even consider the bill. The Senate Judiciary Committee was scheduled to hear the bill in July, but the committee chair, **Senator Hannah-Beth Jackson (D)** took the bill off the agenda.

It turns out, **Consumer Attorneys of California**, a group that strongly opposes the bill, is one of Jackson's largest donors. The group has contributed almost [\\$55,000](#) to her campaigns, joining a large group of lawyers and lobbyists that have donated over [\\$650,000](#) to her campaigns over the years.

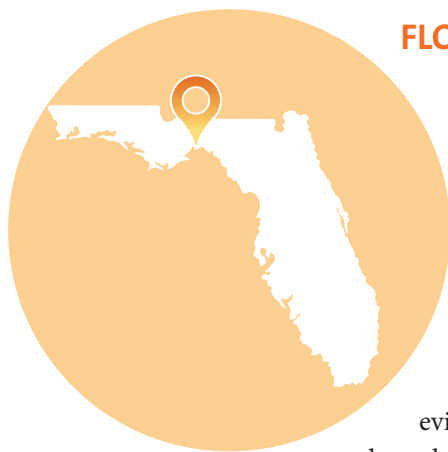
## #2 FLORIDA

Florida has not only experienced a series of devastating hurricanes over the past year, but also a storm of unsound decisions from the Florida Supreme Court that have further damaged the state's civil justice system. Last year's [#1 Judicial Hellhole](#) also suffers from a severe lack of legislative reforms, a continued crisis surrounding assignment of benefits, and abuse in its no-fault personal injury protection system. Plaintiffs' lawyers wreak havoc in the Sunshine State and Republican leadership continues to stymie efforts to clamp down on abuse.

According to the Perryman Group, [excessive tort costs](#) to the Florida economy result in \$7.6 billion in annual direct costs and a loss of 126,139 jobs when dynamic effects are considered.

Florida's fall from the #1 spot cannot be attributed to any improvement in the state's liability climate, but rather results from the sheer volume of problems plaguing California. Also, there is hope for improvements in 2019 in light of soon-coming changes in the Florida Supreme Court's membership and recent changes in the state's legislative leadership.

- **Florida Supreme Court repeatedly expands liability and invalidates reforms**
- **State legislature fails to address blatant lawsuit abuse and fraud**
- **Plaintiffs' lawyer antics continue**



### FLORIDA SUPREME COURT REPEATEDLY EXPANDS LIABILITY

The Florida Supreme Court's liability-expanding decisions and contempt for the lawmaking authority of the state legislature has repeatedly led to its inclusion in this report. As discussed in [last year's report](#), in 2017, the issued several rulings that hurt Florida's healthcare environment and allowed plaintiffs' lawyers to hide questionable referral relationships with doctors. This year, the court was up to its usual antics.

#### BRINGING BACK JUNK SCIENCE

In 2013, Florida's legislature brought state law on the admissibility of expert evidence in line with the federal courts and about [two thirds](#) of state courts. That law adopted the standard established by the 1993 decision of the U.S. Supreme Court in [Daubert v. Merrell Dow Pharmaceuticals](#). The statute effectively deputizes judges as gatekeepers to ensure that expert testimony presented to jurors is indeed reliable and not "junk science."

Unfortunately, the **Florida Supreme Court** rejected the Florida Legislature's efforts to improve Florida's expert witness standard. In [DeLisle v. Crane](#), defendants challenged plaintiff's expert's testimony that plaintiff developed mesothelioma due to a combination of low-dose exposures to asbestos fibers in sheet gaskets (while working at a paper company) and the filters of Kent cigarettes (while smoking), among other sources. A Broward County jury returned an \$8 million verdict. A mid-level appellate court, however, [overturned](#) the verdict, finding two of the plaintiff's expert witnesses failed to meet the *Daubert* standard.

In a 4-3 opinion, the **Florida Supreme Court** held that Florida's far weaker standard, which allows "[pure opinion](#)," is the "appropriate test in the Florida courts." As [predicted](#) in last year's Judicial Hellholes report, the court

used this asbestos-tobacco case as a means to find that, in requiring expert testimony to be based on sound science, the legislature encroached upon the court's authority to set court rules.

### **ALLOWING BAD FAITH LIABILITY WITHOUT BAD FAITH**

Another Florida Supreme Court ruling exposes insurers to liability far beyond the insurance policy limits purchased by the insured.

In *Harvey v. Geico General Insurance Co.*, the court ruled in favor of a policyholder who killed a man in a car accident while covered under a \$100,000 GEICO liability policy. GEICO tendered the policy limits in nine days, but the estate returned the check and sued the policyholder. A jury awarded the estate \$8.5 million in a wrongful death judgment. After the judgment, the policyholder, who was 100% at fault in the accident, sued GEICO. He alleged that his insurer did not promptly inform him that the estate had asked for a statement of his financial resources. Had the estate received this information and seen that he lacked money to pay a large judgment, he claimed, the case may have settled.

An intermediate appellate court found that, at most, GEICO was negligent in handling the claim and that its actions did not cause the excess judgment. In a 4-3 [ruling](#), however, **Justice Peggy Quince** reinstated the verdict, emphasizing that an insurer has a "duty to zealously represent customers against potential lawsuits."

The decision required an insurer to pay over 8000% above an insured's policy limits without evidence that the insurer had engaged in bad faith in processing a claim. Rulings like these mean higher insurance rates for Florida drivers. **Florida Justice Reform Institute President William Large** has called for the legislature to set "clear, objective standards in statute for avoiding bad faith while settling insurance claims."

### **REDUCING EXCESSIVE AWARDS VIEWED AS AN IMPERMISSIBLE "CAP" ON DAMAGES**

In September, the **Florida Supreme Court** [reversed](#) an appellate decision that reduced a \$20 million verdict to \$2 million, calling it an impermissible "cap on the amount of noneconomic damages."

The award came about in a wrongful death action brought by the daughter of a lifelong smoker who died from lung cancer. The jury awarded her \$6 million in compensatory damages, which was later reduced to \$4.5 million in accordance with the jury's finding that her mother was 25% at fault. As the plaintiff was a financially independent adult, these damages were for pain and suffering, not economic losses. The jury also awarded \$14 million in punitive damages.

The **Fourth District Court of Appeal** concluded that "the relationship between an adult child living independent of their parent is simply not the type of relationship" that could justify a multi-million-dollar award. It observed that appellate courts had overturned similarly high awards to adult children of smoker.

Noting that an appellate court should only find an award excessive if it "shock[s] the judicial conscience," the **Florida Supreme Court** determined the Fourth District failed to give proper deference to the trial court. Fresh off its ruling [invalidating](#) Florida's statutory limit on noneconomic damages in medical liability cases, the high court emphasized that "neither the Legislature nor this Court has established a cap on the amount of noneconomic damages a survivor may recover in a wrongful death action," and it would not allow Florida's trial court judges to impose what it viewed as cap.

### **EXPANDING 'DANGEROUS INSTRUMENTALITY' LIABILITY**

As a result of a September 2018 **Florida Supreme Court** ruling, businesses that simply rent equipment in Florida are now exposed to significantly greater liability.

While working for an independent contractor to clear debris from a vacant lot, Anthony Newton was injured when a tree stump was accidentally released and rolled over his hand. Newton blamed Caterpillar, however, for his injury, claiming the company was responsible because it leased the Bobcat loader in which he was hurt.

The **Florida Supreme Court** held that a company that rents construction equipment is liable for the actions of the person who uses it, reversing both the trial and appellate court. Instead, the court subjected Caterpillar to vicarious liability for an accident over which it had no control.

In a [4-3 decision](#), the **Florida Supreme Court** found the Bobcat qualified as a “dangerous instrumentality” under state law, and therefore, Caterpillar could be held vicariously liable. The court’s ruling expands the category of “dangerous instrumentality” to include machinery not previously found to meet this standard. It also extended a doctrine intended to protect the general public from “peculiarly dangerous” equipment to a hired construction worker injured on a private lot. Now, businesses that lease equipment, tools, or other products in Florida are likely to face more lawsuits if something goes wrong.

### IGNORING JUROR BIAS AND CONCEALMENT

In February, the **Florida Supreme Court** [refused to review](#) a multi-million dollar verdict against R.J. Reynolds, despite clear evidence of juror concealment and misconduct, allowing the verdict to stand.

A **Duval County trial court** awarded a plaintiff \$3.09 million in compensatory damages and \$7.75 million in punitive damages after finding the tobacco company liable.

When a juror was asked during jury selection about whether or not he had an opinion about cigarette companies, he simply responded, “they are a business.” That person was not only selected for the jury, but became jury foreman.

During the trial, it was discovered that his [posts](#) on Facebook referred to tobacco companies as “leeches” and encouraged addicts to stop “being a slave to some rich guy who sells tobacco products. Break the chain.” The trial court, however, refused to replace the juror with an alternate.

Following the trial, the juror posted a triumphant Facebook post:

*“I have finally been released from jury duty. I was the foreman November 3 thru 26th. Tobacco trial. Awarded \$18.6M to the plaintiff. (please share and inform others) ... Tobacco companies have lied to the public for over 60 years about how bad their products are... For anyone who doesn’t understand how the tobacco companies can be held responsible, please re-read the above facts... Those who lead others to temptation are as liable as Satan and deserve consequences for their actions as well.”*

The trial court denied the defendant’s motion for a new trial, finding that while the Facebook posts were relevant to jury service in the case, the language the defendant used to question the jury was too subjective and not specific enough, allowing the juror to provide a vague, evasive response. Never mind the fact that all of the other prospective jurors had no problem with the question and all answered appropriately.

R.J. Reynolds appealed, but the judgment was [affirmed](#) by a divided **First District Court of Appeals**. R.J. Reynolds then petitioned the Florida Supreme Court to review the case, but the court denied review.

### CONTINUING TO EXPAND MEDICAL LIABILITY AND RESTRICT ARBITRATION

The [2017-2018 Judicial Hellholes](#) report highlighted four medical liability decisions by the Florida Supreme Court that [undercut patient safety](#), [protected lawyers’ fees](#), [allowed higher damage awards](#), and [invalidated a law](#) intended to reduce litigation. It added one more ruling to that liability-expanding tally this September when it [found](#) that a trial court improperly dismissed a medical liability claim when the plaintiff’s case was based on the testimony of an expert witness who was not actively practicing medicine as required by Florida law. We are starting to see the true impact of these decisions.

As a result of the Florida Supreme Court’s continued expansion of medical liability, Florida now has some of the [highest medical liability payouts](#) of any state in the country. The Florida legislature had previously enacted a medical liability reform statute in 2003, which placed a reasonable limit on noneconomic damages in medical liability cases. This was in response to the severe [access to medical care crisis](#) facing the state and rising costs of health insurance. The statute was accomplishing the legislature’s intended goals until it was struck down by the court in two separate decisions, one in [2014](#) and one in [2017](#). Now, it appears Florida’s health care system is headed back in a very dangerous direction. In 2018, the price of the [least expensive silver health insurance plan](#) available to Florida residents increased by 47.6%.

Not only has the **Florida Supreme Court** expanded doctors’ liability, it also has significantly curtailed the ability of patients and doctors to avoid litigation by way of relatively inexpensive and quick resolutions through arbitration.



The court twice ruled, in [December 2016](#) and then again in [May 2017](#), that an agreement to arbitrate any dispute arising out of medical care entered between a doctor and patient is void and violates public policy unless the agreement mirrors provisions included in **Florida's Medical Malpractice Act**. The defendant in the most recent case, Kindred Hospitals East, urged the **U.S. Supreme Court** to review the decision, [arguing](#) that these rulings violate the Federal Arbitration Act, which promotes arbitration by generally requiring states to honor and enforce such agreements. The hospital noted that state law compelling it to surrender its defenses in order to arbitrate a dispute is incompatible with the federal law. Unfortunately, the high court [denied the petition](#) for certiorari in January of 2018, leaving Florida medical professionals with no option but litigation.

Lower courts have followed the lead of the Florida Supreme Court in issuing anti-arbitration decisions.

In June, **Miami-Dade County Circuit Judge Jose M. Rodriguez** [struck down](#) a [Florida law](#) that would have reduced a plaintiff's noneconomic damage award from \$500,000 to \$350,000 in a medical liability case because

the plaintiff had refused a doctor's request to attempt to resolve the issue through arbitration. The judge found that the "provisions [did not hold up](#) to current-day scrutiny" and violated the equal protection clause. Florida lawyers [observe](#) that this limit on noneconomic damages, which has been in place for thirty years, is "the last remaining vestige[ ] of the statutory scheme designed to limit intangible damages in medical malpractice cases." While courts in most other states have found that legislators may reasonably constrain subjective noneconomic damages, it is now open season on Florida's doctors.

*While courts in most other states have found that legislators may reasonably constrain subjective noneconomic damages, it is now open season on Florida's doctors.*

## MORE FLORIDA TRIAL BAR ANTICS

In what is one of the more bizarre cases of 2018, a South Florida plaintiffs' attorney [filed a class action lawsuit](#) against McDonalds alleging that the restaurant forces people who buy 'Quarter-Pounders' to pay for cheese whether they want it or not. The lawsuit accuses McDonalds of breaking antitrust laws by creating an "illegal tying arrangement." The suit asks for \$5 million - a 'Quarter-Pounder' costs roughly [\\$4.19](#).

The lawsuit was filed by **Andrew Lavin** of the Miami-based **Lavin Law Group** and it quickly caught the attention of another South Florida plaintiffs' firm. **John Uustal** of **Kelley Uustal** believes this case is actually a [secret plot](#) by tort reform organizations to discredit the Florida trial bar. He is offering up to \$100,000 to anyone who can help prove his theory.

Uustal cannot fathom why [any attorney](#) would bring as frivolous of a case as this, a question we ask ourselves hundreds of times a year. [According to Uustal](#), "We know that big corporate interests have successfully attacked the credibility of our civil justice system by highlighting frivolous lawsuits... They're perpetuating the idea that lawyers are shifty scammers. They are brainwashing us to think that lawsuits in general are frivolous." Uustal does not have to look much farther than his own home state of Florida to see "shifty scammers" and frivolous lawsuits are all around.

## THE LEGISLATURE HAS FAILED TO ADDRESS LITIGATION ABUSES

### RAMPANT FRAUD IN 'NO FAULT' PERSONAL INJURY PROTECTION SYSTEM CONTINUES

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

This year, the Florida legislature considered a [bill](#) that would have repealed the PIP system and replaced it with a bodily-injury coverage requirement. The bill died in committee in March. It was [criticized](#) because the proposed changes would have increased costs for motorists and many said it was simply "[PIP by another name](#)." The House considered another bill that was projected to [save motorists](#) on average \$81 a year, but that effort failed as well.

There is an overwhelming need for “no-fault” PIP reform as “[corrupt lawyers](#)” in South Florida were caught in a multi-million dollar insurance fraud scheme last fall. The lawyers tricked clients into believing they had lucrative lawsuits, encouraged them to visit a network of chiropractic clinics, and convinced them to have expensive treatments, even when uninjured. Accident victims were pushed to make dozens of unnecessary visits to the clinics until their bills reached the maximum \$10,000 PIP benefit.

These South Florida lawyers were not the only ones involved in this type of litigation, as the number of PIP cases reached a [record high](#) in 2017. The PIP system, which was supposed to reduce the number of lawsuits, instead produced more than [60,000 new cases](#) last year alone—a stunning increase of almost fifty percent in one year. PIP cases are by far one of the largest sources of litigation in Florida, representing [over half](#) of the state’s overall insurance litigation. These lawsuits significantly drive up consumer costs and directly impact the average Floridian. Some Florida drivers saw their premiums for PIP coverage increase by [over fifty percent](#) in 2017 alone.

### ASSIGNMENT OF BENEFITS REFORM CONTINUES TO STALL IN LEGISLATURE

The end of the 2018 legislative session marked more than five years without the passage of a bill that would address Florida’s [Assignment of Benefits](#) (AOB) abuse.

Assignment of Benefits allows an insured to sign over control of their homeowner’s or auto policy to a third party, who is then able to push for a higher claim payout, and sue an insurer without notifying the insured. For example, when a consumer needs home repairs after a storm, he can expedite the process by signing over the right to deal with the insurance company to contractors. It is intended to speed up repairs; however, lawyers and contractors [enrich themselves](#) by running up costs and making unnecessary repairs. Insurance companies are then pressured into settling inflated claims in order to avoid hefty litigation expenses.

The AOB crisis continues to drive up insurance rates and drag down the Florida economy. Abuse of this system imposes a tax on everyone in the state through higher insurance premiums. One popular Florida insurance company, [Heritage Property & Casualty](#), sought a double-digit rate increase for 2018. According to the company’s CEO, [Bruce Lucas](#), assignments of benefit fraud is costing homeowners more than \$1 billion annually and is considered the largest scam in the history of the state.

Lawsuits involving an AOB rose for a third straight year to [129,781 in 2017](#), up from just [20,000 in 2010](#). Lawyers in South Florida are especially focused on this “jackpot justice,” with [11 lawyers](#) filing a quarter of all AOB-related lawsuits from 2013-2016.

Thanks to this “[man-made litigation flood](#),” 9 in 10 property insurers sought [rate hikes](#) for 2018. The Wall Street Journal estimated that homeowners in Miami-Dade County could see premiums rise by more than [forty percent by 2022](#). [Florida Chief Financial Officer, Jimmy](#)

***“If left unchecked, AOB is literally a category five hurricane that would financially cripple the state of Florida.”***

**—Jimmy Patronis**

**Patronis**, stated that, “If left unchecked, AOB is literally a category five hurricane that would financially cripple the state of Florida.”

One might expect legislators to make AOB reform a high priority, given the growing crisis, but that certainly

has not been the case. Even more surprising, the legislator most focused on blocking reform measures is **Senator Anitere Flores**, a Republican from Miami. In 2017, Senator Flores, Chair of the Senate Banking and Insurance Committee, let an [AOB reform bill languish](#) in committee. This year, the House of Representatives passed a reform effort by a vote of [82-20](#), but it was once again stymied in the Senate by Senator Flores and **Senate President Joe Negron (R)**.

Senator Flores, however, was [fully supportive](#) of a bill sponsored by **Senator Greg Steube (R)**, a known trial bar advocate, that would have prevented insurance companies from including litigation costs in rates and limited their abilities to deny claims based on fraud. Under this legislation, [AOB fraud](#) would skyrocket.

It’s no secret that the [powerful Florida plaintiffs’ bar has infiltrated](#) the Republican party, and Senate President Joe Negron, and Senators Flores and Steube continued to do their bidding in the legislature in 2018.

## ADA LAWSUIT ABUSE CONTINUES

Florida continues to be a top spot for lawsuits under the **Americans with Disabilities Act**. While the Act was originally “[well-intentioned](#),” it has become one of the trial bar’s favorite litigation tools.

Typically, a single ADA plaintiff morphs into a “[serial suer](#),” filing multiple complaints simultaneously across the entire state of Florida. For example, Juan Carlos Gil, a legally blind man with cerebral palsy, brought a historic website-accessibility case against Winn-Dixie Stores Inc., which opened the floodgates to similar lawsuits. Gil is a plaintiff in at least 69 federal cases. Another Florida plaintiff, Ann Marie DeFeo has filed 154 lawsuits.

“On [any] given day, you’ll see the same plaintiff has filed 10 or more of these lawsuits against different municipalities,” said ADA defense lawyer **Anastasia Protopapadakis** of **GrayRobinson** in Miami. “It’s not unusual to see copy-paste form complaints that, hopefully they’ve gone through and changed the name of the defendant, but sometimes they forget.”

In Florida, plaintiffs can only claim attorneys’ fees and ask for an injunction in ADA lawsuits; however, plaintiffs often are unwilling to share time sheets for attorney fees or invoice for hired experts. “For filing the complaint, they already ask you for \$12,000 in fees, when it’s the same complaint that they’ve filed in all these other cases,” Christian Rodriguez, a defense lawyer, [said](#). “The ADA is a well-intentioned law, but it’s being abused by these serial plaintiffs.”

## ELECTION UPDATE

A strong trial bar supporter, **former Speaker of the House Richard Corcoran (R)** [failed in his bid](#) to become the next governor of Florida. Plaintiffs’ lawyers specializing in [medical malpractice](#) and [product liability claims](#) were among those contributing large sums to Speaker Corcoran’s campaign.

Former U.S. Representative **Ron DeSantis (R)** was elected governor, defeating **Andrew Gillum (D)**.

**Senate President Joe Negron**, another strong plaintiffs’ bar ally, [resigned](#) in May of 2018 and will not complete the final two years of his term. Senator Negron said he wanted to honor the limit of two straight four-year terms set on state senators. [Senator Bill Galvano \(R\)](#) will replace Negron as Senate president after Republicans maintained control of the Senate following the 2018 elections. **Representative Jose Oliva (R)** will replace former Speaker of the House Richard Corcoran.

The change in leadership is encouraging and increases the prospects of enacting legislative reforms in the future to address some of the longstanding abuses occurring in the state.

## OPTIMISM AS FLORIDA SUPREME COURT SHIFTS

After years of decisions expanding liability and invalidating legislative attempts to restore balance, the Florida Supreme Court’s composition is poised to significantly shift. On January 6, 2019, three members of the court—**Barbara Pariente, Fred Lewis and Peggy Quince**—[must retire](#), as they have reached Florida’s mandatory retirement age. The retiring justices formed the core of the court’s 4-3 majority for the past twenty years. They voted to reject stronger standards for expert testimony, invalidated reasonable limits on damages and attorneys’ fees, and found arbitration agreements unenforceable, among many other rulings that substantially contributed to the Sunshine State becoming a Judicial Hellhole. Incoming Governor Ron DeSantis will [fill](#) these open seats. After these changes occur, there is optimism that the court will reach evenhanded decisions that are firmly grounded in the law and respect the legislature’s authority to curb unwarranted liability and lawsuit abuse.

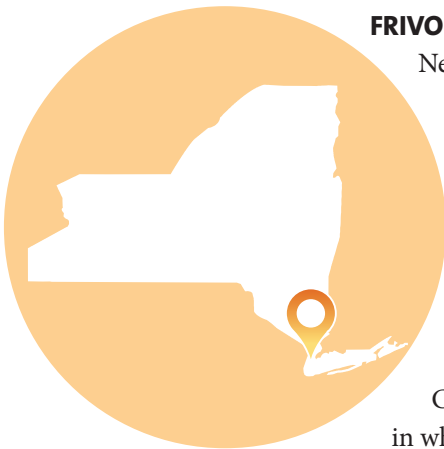
### #3 NEW YORK CITY

Since [2013](#), the Judicial Hellholes report has focused on the brazenly plaintiff-favoring ways of the **New York City Asbestos Litigation** court (NYCAL). This year's report broadens the "Judicial Hellhole" distinction to include other types of litigation in **New York City**.

While NYCAL continues to be of concern, New York trial lawyers have expanded their focus to areas including class action lawsuits targeting the food and beverage industry, American with Disabilities Act claims, and actions under New York's unique "Scaffold Law." Even Wall Street hedge funds are getting in on the litigation action, driving some of the largest cases in the state.

- **Frivolous consumer class actions**
- **Plaintiff-friendly procedures and high awards in asbestos cases**
- **State high court ruling stacks the deck against defendants in personal injury litigation**
- **Legislature failed to address excessive construction liability or asbestos litigation abuse, but expanded medical liability**
- **Hedge funds are increasingly investing in NY litigation**

### EMERGING LIABILITY CONCERNS



#### FRIVOLOUS CONSUMER LAWSUITS CLOG COURTS

New York has not been immune from the onslaught of frivolous food lawsuits that are plaguing other Judicial Hellholes. [A 2017 study](#) found that 22% of food class action lawsuits filed in federal court were located in New York, making the state second only to California (36%). Most of these food class actions are filed in two federal courts, the Southern District (Manhattan) and Eastern District (Brooklyn). The two most prevalent theories of liability are that food packaging contains empty space (known as "[slack fill](#)") and that products, for one reason or another, are not "natural" as advertised.

Plaintiffs' lawyers are the only ones that stand to gain from these lawsuits. Companies privately settle most of these claims to avoid the expense of litigation, in which case, consumers get nothing. For example, Werther's Originals [recently settled](#) a class action filed in the Southern District that [claimed](#) bags of its [Sugar Free Caramels](#) could fit more candy. No one will know how much the plaintiff and his law firm will get as a result of the [confidential settlement](#). When a class settlement is reached, which is rare, consumers typically get pennies to the dollar only to see an increase in the overall cost of goods.

A similar slack fill claim targeting Junior Mints brought by the same N.Y. firm, the Lee Litigation Group (which files these lawsuits by the dozen) was [dismissed](#) in August 2018. **Judge Naomi Reice Buchwald** ruled that allowing the suit to continue would "enshrine into the law an embarrassing level of mathematical illiteracy." Consumers, Judge Buchwald found, are quite capable of reading the number of ounces of food and serving size printed on the box. "The law simply does not provide the level of coddling plaintiffs seek," she concluded. Another plaintiff learned [the hard way](#) that she was not entitled to [\\$20 million](#) when her 8-piece bucket of KFC did not have chicken filled over the rim, as it appeared in an advertisement.

With regard to "natural" food lawsuits, a [few plaintiffs' firms](#) have likewise carved out a niche legal market and are looking for innovative new ways to line their pockets. Other notable suits in New York City [include](#) two men that filed a class-action against Chobani alleging that the yogurt was not Greek but rather Turkish, a mom who argued that products made by John Wm. Macy, a New Jersey-based cracker company, were not "all natural," and a plaintiff claiming CVS air fresheners only "mask the bad smell." While many of these types of ridiculous cases

***"The law simply does not provide the level of coddling plaintiffs seek."***

**– Judge Naomi Reice Buchwald**

settle, when companies fight them (at significant expense), federal judges in New York have shown a willingness to throw them out. For example, this May, **Judge Paul Engelmayer** dismissed a claim against Pepsi, finding no reasonable consumer believes [“diet” soda](#) is a weight-loss product.

## ACCESSIBILITY LAWSUITS TARGET SMALL BUSINESSES

Two [federal court judges](#) in New York opened the floodgates for lawsuits under the Americans with Disabilities Act when they ruled that corporate websites must comply with the Act’s accessibility requirements. The judges ruled that “a website is a place of public accommodation,” and even if companies do not have a physical store, they must operate websites in a manner that is compliant with the ADA. Previously, courts held that only brick-and-mortar stores had to comply. This ruling will cost New York businesses up to [\\$37,000](#) to add features to allow people who are visually impaired to shop online, an insurmountable cost for many small businesses.

As a result, [plaintiffs’ attorneys](#) have rushed to file cut-and-paste lawsuits against hundreds of stores whose websites are “lacking screen-reading software.” Lawyers are driving the litigation frenzy, as they stand to earn up to [\\$25,000](#) in fees per case. Plaintiff lawyer **Jeffrey Gottlieb** filed at least 26 lawsuits in less than two months on behalf of two plaintiffs. Another plaintiffs’ attorney, **Joseph Mizrahi**, [filed over 500 similar lawsuits](#) in Manhattan and Brooklyn federal courts in 2018 alone. While Gottlieb and Mizrahi will earn several thousand dollars in fees, New York law [prohibits their clients](#) from receiving more than \$500 per case.

This growing problem has caught the attention of Congress. In June, over [100 members urged](#) the Justice Department to clarify the applicability of the ADA to websites. A letter to then-**Attorney General Jeff Sessions** expressed concern with “proliferation” of lawsuits by private plaintiffs that threaten businesses with “unsubstantiated violations of the ADA.” [Legislation](#) that would have addressed some of the worst lawsuit abuses passed the U.S. House of Representatives earlier this year, however, the reform measure has permanently stalled in the Senate after 43 democratic senators pledged to [filibuster the bill](#).

To maximize their returns, some plaintiffs file multiple ADA lawsuits, [taking advantage](#) of a law meant to protect them. For example, **Arik Matatov**, of Queens, New York, is a “wheelchair user,” who has threatened to sue 49 different businesses for not having wheelchair ramps. Matatov sent letters [demanding](#) companies, including a bridal shop, pay him \$50,000 or else he would sue them in court for \$5 million. Interestingly, [The New York Post](#) caught Matatov walking around without a wheelchair on several occasions. The lawyer that helped him write the demand letters stated that he was unaware Matatov could walk because he had never met his client in person.

## NEW YORK’S HIGH COURT STACKS DECK AGAINST DEFENDANTS

In 2018, the **New York Court of Appeals** delivered a gift to the plaintiffs’ bar when, in a 4-3 opinion, it held that comparative fault applies only to damages, not to parties’ liability.

Comparative fault is intended to provide juries with the ability to allocate responsibility for an injury between all those who contributed to an injury. Juries complete this task while evaluating whether a defendant is liable for what occurred. Each defendant is then responsible for paying damages in proportion to its level of fault.

In [Rodriguez v. City of New York](#), New York’s highest court took a different approach. A majority of the court ruled that a judge may rule that a defendant is liable

for a plaintiff’s injury as a matter of law. The judge may then instruct the jury that the defendant has already been found at fault, leaving the jury only to evaluate how much the plaintiff’s actions contributed to his or her own injury. The dissenting judges recognized that this system has a defendant “entering the batter’s box with two strikes already called.” The “fairer outcome,” they recognized, is to allow the jury to consider both liability and damages.

The ruling gives plaintiffs significant leverage to pressure defendants to settle, even when the plaintiff’s actions significantly contributed to his or her own injury. New York lawyers who represent defendants in civil litigation [observe](#) that New York’s new approach, in which courts will find defendants liable before juries consider damages, is likely to increase litigation costs and lead to higher settlement values.

*The dissenting judges recognized that this system has a defendant “entering the batter’s box with two strikes already called.”*



## ASBESTOS LITIGATION REMAINS A MAJOR PROBLEM

### SILVER'S RETRIAL DEMONSTRATES PERVASIVE PROBLEMS

The retrial of **former New York State Assembly Speaker Sheldon Silver** in federal district court in Manhattan, based on allegations that he collected improper payments from **Weitz & Luxenburg**, a prominent asbestos law firm, [ended](#) with a conviction in May. Silver was originally convicted in 2015 of illegally accepting millions of dollars in “kick-backs” from the law firm for referring clients with mesothelioma to a doctor whom he gave \$500,000 in state grants.

The information that came out during trial showed the litany of problems and fraudulent activity permeating through New York City's asbestos litigation. Prosecutors alleged that Silver received illicit payments from **Weitz & Luxenburg** in exchange for taking steps in his official capacity to benefit Colombia University cancer research and two New York real estate developers. Mr. Silver was convicted on seven counts and was [sentenced](#) to seven years in prison. His legal team filed a [notice of appeal](#) in the **U.S. Court of Appeals for the Second Circuit** in mid-August.

### PAYOUTS ARE AMONG HIGHEST IN NATION

New York judges presiding over asbestos litigation have allowed plaintiffs' lawyers to act outside the bounds of the law and manipulate the legal system for their own gain.

After a massive asbestos settlement earlier this year, even Manhattan residents are starting to [call for tort reform](#). In April, a jury awarded \$60 million to the family of **Pietro Macaluso**, a construction worker who performed renovations on single-family homes in Brooklyn during the 1970's and 1980's. Prior to his death in 2017, Macaluso sued three companies that manufactured boilers he alleged were “laden with cancer-causing asbestos” and caused him to [develop pleural mesothelioma](#). During trial, **Justice Manuel Mendez** allowed the plaintiff's lawyer to show the jury a video of him lying on his deathbed in the hospital. The [jury](#) also was allowed to watch Plaintiff “say goodbye to his kids ... knowing that they would grow up without a father.” These videos and statements enflamed the jury and impacted their ability to fairly evaluate whether the boiler companies were responsible for Mr. Macaluso's death.

The high payout—[eight times the national average](#) for mesothelioma cases—demonstrates not only the prejudice resulting from the video, but also the plaintiff-friendly nature of NYCAL. **New York City** is [notorious](#) for paying out “more than any other major city to settle legal claims.” This number— \$84 per New York City resident— exceeds what city taxpayers spend on both Parks and Buildings departments, according to a survey by [Governing magazine](#).

The Macaluso case was not the only instance where a judge allowed inflammatory evidence to be presented to a jury. **New York Supreme Court Justice Lucy Billings**, who previously held the position of NYCAL Coordinating Judge, allowed plaintiff's lawyer **Daniel Blouin**, a shareholder for **Simmons Hanly Conroy**, to [resort](#) to a “steady stream of insults” and “incurable character assassinations” against defendant Goodyear Tire, its experts, and its lawyers during a trial in August. Among some of the more ridiculous things Blouin said, he accused defense counsel, **James Lynch**, of trying to “assassinate” his client, called experts “[juke box witnesses](#),” and accused the defense of paying off the experts. This was all part of Blouin's attempt to leave the jury with an “unfairly negative impression of Goodyear Tire.”

To no one's surprise, the [New York City jury](#), after about two hours of deliberation following a three-week trial, awarded [\\$40.1 million](#) to plaintiff, J. Walter Twidwell. Twidwell, a veteran with mesothelioma, alleged Goodyear Tires was to blame for his exposure to asbestos while working on gaskets and boilers in the U.S. Navy.

Justice Lucy Billings denied a request for a mistrial based on Blouin's unprofessional behavior, but “warned Blouin to be more careful about his conduct,” stating that she was “equally frustrated.” The court gave Blouin several “warnings” during the trial, but took no other action. As a result, Goodyear Tire was deprived of an opportunity to receive a fair and impartial trial.

### APPELLATE COURT KEEPS PLAINTIFF-FRIENDLY PROCESS

For many years, New York courts recognized that awarding punitive damages in asbestos cases, bankrupting companies today for conduct that occurred decades ago, [serves no purpose](#). It does not help future victims who will need money for medical expenses to push companies into bankruptcy. It does not punish those responsible when the asbestos exposure occurred. The only purpose served by punitive damages in asbestos cases is to give windfalls to lawyers.

In April 2014, however, **Justice Sherry Klein Heitler** [lifted](#) a long-standing ban on punitive damages in asbestos litigation and an appellate court upheld her authority to do so. But the appellate court left to her successor, **Justice Peter Moulton**, to determine whether punitive damages should be allowed. The new [Case Management Order](#) (CMO) allowed punitive damages and, naively or otherwise, trusted plaintiffs' lawyers to pursue punitive damages only on a "good faith basis." It also retained plaintiff-friendly procedures from prior CMOs.

A New York appellate court issued a disappointing ruling when it refused to modify this burdensome [CMO](#). The First Judicial Department's [short opinion](#) discussed several different provisions of the CMO and how they "differ from" the New York's Civil Practice Laws and Rules. Yet, the court [ruled](#) that the new CMO did not deprive defendants of due process and that while the procedures did not "strictly conform" to New York law, the judge overseeing NYCAL could impose them without the defendants' consent.

### **NYCAL COORDINATING JUDGE QUICKLY REMOVED, INDICATING CHAOS**

**Justice Lucy Billings**, who was appointed as NYCAL's coordinating judge in August of 2017, was reassigned after only six months on the job. She was [replaced in April](#) by **Justice Manuel Mendez**, but will continue as a judge for complex litigation. Critics say Justice Billings was unable to effectively address the asbestos backlog that plagues the NYCAL system. At the start of 2018, there were an [estimated 500 active asbestos cases](#) and 1,000 dormant cases. It remains to be seen whether this change will improve the status of the court.

"Sacking Justice Billings after only a few months certainly looks suspicious. This court is historically corrupt and chaotic," [said Tom Stebbins](#), executive director of the Lawsuit Reform Alliance of New York. "Reassigning a key judge after just six months only adds to the appearance of chaos and corruption."

*"Reassigning a key judge after just six months only adds to the appearance of chaos and corruption."*

– Tom Stebbins

## **THE NEW YORK LEGISLATURE HAS FAILED TO ACT**

### **SCAFFOLD LAW REFORM STALLS**

New York City is known for its impressive skyline. The city also is known for eye-popping real estate prices and an overall high cost of doing business. According to [Crain's](#), the state's Scaffold Law significantly contributes to these astronomical costs.

New York's **Scaffold Law** was enacted to "protect workers who helped build New York's now-iconic skyline in the 19th century." It [holds](#) 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.

Litigation and insurance costs stemming from **Scaffold Law** cost \$785 million in public funds each year. The New York School Boards Association has estimated that the [law costs](#) upstate school districts \$200 million each year, while the New York City School Construction Authority puts the cost on NYC schools at \$215 million annually.

New York lawmakers have long sought to address this excessive liability. For example, [legislation](#) proposed by **Assemblyman John McDonald (D)** would allow juries to allocate fault among those responsible for an injury in Scaffold Law lawsuits, just like other personal injury actions. Frustrated with the lack of action in the New York legislature, a [bill](#) introduced in the U.S. House of Representatives would set a comparative fault standard when an injury occurs on a construction project that is funding with federal taxpayer dollars.

### **TRANSPARENCY NEEDED IN ASBESTOS LITIGATION**

Although **former Assembly Speaker Sheldon Silver** may no longer be a problem for New York asbestos litigation, the legislature continues to ignore the systemic issues plaguing the asbestos docket and it has refused to act to prevent future Sheldon Silvers from arriving on the scene. Silver's previous firm, **Weitz & Luxenburg**, still dominates New York's asbestos litigation. In 2017, the firm handled [47% of claims](#) in the NYCAL Accelerated Docket

according to [asbestoscasetracker](#). This year, Weitz & Luxenburg has handled over [52%](#) of these claims.

[Asbestos trust transparency legislation](#) once again stalled in committee three weeks after Silver was convicted on charges stemming directly from the [scandal-prone asbestos court](#) system. The bill would have required plaintiffs' lawyers to disclose all claims they have filed seeking compensation from trust funds established by companies that have gone bankrupt due to asbestos litigation. This is necessary because plaintiffs' lawyers often claim that their clients were exposed to asbestos due to the bankrupt companies' products in order to qualify for money from the trust system, but then claim solvent companies are responsible in NYCAL litigation. The multi-year legislative effort has growing bipartisan support, increasing the chances that a bill may pass in the near future.

## NEW YORK HEDGE FUNDS ARE INCREASINGLY FINANCING LITIGATION

[New York hedge funds](#) are becoming increasingly involved in mass tort litigation against companies that make prescription medications and medical devices. Investment firms are lending money to law firms that represent plaintiffs in product liability lawsuits. In return, they become entitled to a portion of any recovery.

By taking advantage of the "current banking regulatory environment," hedge funds are creating an unfair playing field for defendants in tort litigation. Investors are [turning](#) the "civil justice system into a profit center," said **Tom Stebbins**, executive director of the Lawsuit Reform Alliance of New York. Some hedge funds even provide law firms with loans to buy large scale mass-tort cases from rival firms, increasing their case load.

The **New York City Bar Association** published a [formal opinion](#) in July 2018, concluding that lawyers may not enter into a litigation financing arrangement with a non-lawyer funder under which the funder is paid out of any recovery. Such arrangements, the NYCBA found, violate ethical rules that have long prohibited lawyers from partnering with or sharing fees with non-lawyers. These rules are intended "to protect the lawyer's professional independence of judgment." Separately, the New York State Bar Association [indicated](#) this year that a lawyer may not represent a client in litigation funded by a litigation finance company in which the lawyer is an investor. These opinions demonstrate the troubling conflicts of interest that arise in these types of arrangements.

Another form of lawsuit lending involves companies that offer "[cash advances](#)" to plaintiffs involved in personal injury litigation. These loans can carry an average annual interest rate that, [according to reports](#), can reach as high as 124%. Critics compare this lawsuit lending industry to "[mob loan-sharking](#)," which often leaves borrowers "with little or no money" after they receive their settlements because they must pay rates that can exceed [one hundred percent](#).

The New York legislature and the state's attorney general must take action in order to address the rampant abuse. Legislation introduced to [rein in predatory lawsuit lending](#) in 2018 passed the Senate 59-1, but has stalled in the Assembly.

## TRIAL LAWYER ADVERTISING

### TRIAL LAWYERS SPEND HUNDREDS OF MILLIONS ADVERTISING IN NYC

In the United States' largest media market, New York City, more than [22,000 legal services ads](#) aired—at a cost of nearly \$6.4 million during April through June of 2018. Plaintiffs' lawyers spent more money on television advertising in New York City during this period than in any other area. Between April and June, trial lawyers spent more than [\\$70,000 each day](#) on ads calling for plaintiffs to join class action lawsuits and more. New Yorkers saw 20 times as many ads for legal services as they did ads for pizza delivery and restaurants.

Over-the-top advertisements from personal injury attorneys with catchy jingles and toll-free numbers suggesting that medications and medical devices are dangerous pose their own threat to public health. These ads undermine the simple notion that doctors, not personal injury lawyers or the "aggregators" who generate and sell potential claims, should dispense medical advice.

The reason trial lawyers pump significant money into these ad buys is because, armed with more clients, they can pressure settlements and boost payouts when they go after product makers. This leads to larger contingency fees for themselves.

The ads do more than help recruit clients, however. They also influence citizens who might wind up serving

on a jury. A survey conducted by [Trial Partners, Inc.](#) found that 90% of jurors would be concerned if they saw an advertisement claiming that a company's product injured people. Additionally, 72% of jurors agreed that if there are lawsuits against a company claiming its products have injured people then there is probably truth to the claim—showing just how big of an impact these ads can have.

It is essential that the legislature and attorney general take action to ensure the public is not being improperly influenced by the false advertisements and to protect the public health interests.

### DID PLAINTIFFS' LAWYERS PRESSURE WOMEN INTO UNNECESSARY SURGERIES?

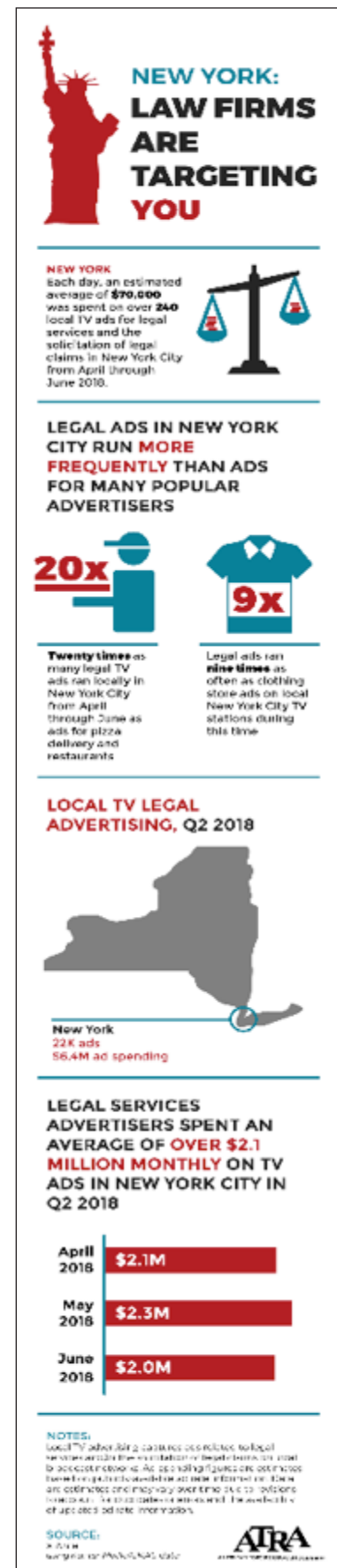
Prosecutors in the **United States Attorney's Office for the Eastern District of New York** have started a [formal investigation](#) into whether doctors, lawyers, financiers, and consultants have lured women into unnecessarily having pelvic mesh implants removed. The inquiry began after a [New York Times](#) exposé on the growing number of women who have been coaxed into having surgery.

According to the New York Times, women have been called at home and [convinced](#) that the implant supporting their bladder is defective and must be removed. Almost immediately, the women are flown to Florida and undergo surgery at walk-in medical centers. Litigation finance firms, such as Brooklyn-based **LawCash**, pay for their medical expenses, put them up in motels, and set them up with a lawyer - many are represented by a Minnesota law firm, **McSweeney Langevin** - in exchange for a portion of settlements the women might receive from the device makers when they sue. Lawyers are turning into "marketing firms to drum up clients," in order to try and win large settlements.

The suits against companies such as Boston Scientific and Johnson & Johnson claim that the mesh implants - used as a reinforcement device to correct pelvic organ prolapse - cause bleeding and discomfort. The surgeries increase the value of a legal claim by driving up medical expenses, though they may not be medically necessary. These unnecessary surgeries may cause additional health problems for the women, leading them to turn around and sue their lawyers for misleading them into undergoing surgery by "instilling fear of death in [them]."

### END NOTES

- **Governor Andrew Cuomo (D)** signed **Lavern's Law** in January, which [extends the statute of limitations](#) for medical liability cases alleging a missed cancer diagnosis. The new law increases the time period to file such a lawsuit from 15 months of the misdiagnosis to two-and-a-half years from when a person discovers the misdiagnosis, so long as the lawsuit is filed within seven years of treatment. The version of the bill signed into law is [significantly narrower](#) from what the New York plaintiffs' bar [originally sought](#), which would have expanded the period to file any medical malpractice claim. Still, New York's medical community is [concerned](#) that the new law "will drive up already exorbitant liability premiums, increase defensive medicine costs and discourage doctors from practicing in New York."





- In May, **New York Attorney General Eric Schneiderman**, a vocal [opponent](#) of civil justice reform, [resigned](#) after multiple women [reported](#) allegations of violent assault. Schneiderman filed for retirement in early June and will collect an annual [pension](#) of \$63,948, regardless of whether he is prosecuted and convicted of the charges against him. The Legislature chose **Solicitor General Barbara Underwood** to complete Schneiderman's term.
- Following in the footsteps of her predecessors, **Eric Schneiderman** and **Eliot Spitzer, Attorney General Underwood** has continued politicizing New York's unique-Martin Act, a 1921 law which grants the Office of the Attorney General far-reaching powers to investigate alleged financial fraud—without ever having to prove intent. To build on a fishing expedition began under Schneiderman, Underwood in October used the law to sue Exxon Mobil over [alleged discrepancies](#) in disclosures to investors about the impact of climate change regulations on its business.
- The **U.S. District Court for the Southern District of New York** [dismissed](#) a New York City lawsuit against ExxonMobil, BP and several other “oil giants” attempting to pin them with costs related to climate change. In his July ruling, **Judge John Keenan** [found](#) that “climate change must be addressed by the executive branch and Congress, not by the courts.” The [23-page decision](#) follows the June [dismissal](#) of a similar lawsuit brought by San Francisco and Oakland. Judges in these cases recognized that climate change is an issue that needs to be addressed policymakers, not regulated through litigation.

## #4 THE CITY OF ST. LOUIS, MISSOURI

The optimism for restoring balance in the City of St. Louis's legal environment described in [last year's report](#) quickly evaporated in 2018 as massive verdicts, blatant forum shopping, and legislative ineptitude plagued the “Show Me Your Lawsuit” State.

A reasonable observer would have to conclude that Republican lawmakers, who hold the majority in both legislative chambers, either condone lawsuit abuse and thus are aligned with the Missouri Association of Trial Attorneys or are incapable of taking on a wealthy entrenched interest. Either way, Missouri's “Show Me Your Lawsuit State” nickname will remain as will the status of St. Louis as a Judicial Hellhole, so long as policymakers continue to pledge their allegiance to wealthy personal injury lawyers.

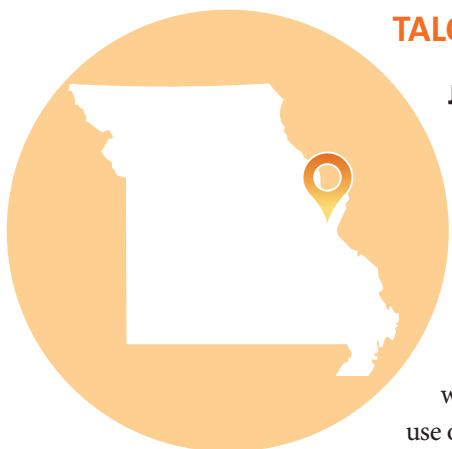
- **Talc litigation infused with forum shopping and junk science**
- **“No-injury” consumer class actions**
- **Liability-expanding state high court overlooks juror misconduct**
- **Excessive lawsuit advertising poisons jury pool**
- **Legislature is unable or unwilling to pass needed legal reforms**

### TALC LITIGATION

#### JUDGES RELUCTANT TO END FORUM SHOPPING

As chronicled by the city's inclusion in multiple Judicial Hellholes reports, St. Louis has quickly emerged as one of the nation's leading litigation hot spots. As [Bloomberg Business](#) noted, St. Louis “has developed a reputation for fast trials, favorable rulings, and big awards.” Loose venue rules and St. Louis judges' reluctance to properly apply U.S. Supreme Court precedent have encouraged out-of-state plaintiffs to flock to the jurisdiction.

The greatest example of this abuse is the talc litigation currently working its way through the Missouri court system. Lawsuits alleging a connection between use of Johnson & Johnson's talcum powder and ovarian cancer in women is certainly





nothing new in St. Louis; however, it reached new heights (or lows) in July when a St. Louis jury awarded [\\$550 million in actual damages and \\$4.14 billion](#) in punitive damages to a group of [22 plaintiffs](#).

The women [claimed](#) that their ovarian cancer was “caused by [exposure to asbestos](#) allegedly found in Johnson & Johnson’s baby powder.” Of the 22 women involved in the lawsuit, 17 had [no connection to Missouri](#). Each was awarded the same amount of money, despite there being “[different facts](#) for each, and differences in relevant law.” Jurors deliberated for less than a full day [after a six-week trial](#).

Johnson & Johnson plans to appeal the decision on multiple grounds, including whether St. Louis was the proper venue for the case. Johnson & Johnson was successful in overturning a previous St. Louis jury verdict in a similar case when a Missouri appellate court held that the verdict could not stand in light of the jurisdictional requirements outlined by the U.S. Supreme Court that require a connection between the claim and where it was filed. In that case, the plaintiff was a South Dakota resident and filed her lawsuit against the New Jersey-based company in St. Louis, Missouri.

Another Johnson & Johnson venue appeal is currently pending before the Missouri Supreme Court. The Court is deciding whether St. Louis city Judge Rex Burlison improperly allowed a case to go to trial that was originally filed in St. Louis County Circuit Court. Judge Burlison has allowed plaintiffs’ attorneys to [manipulate rules that permit combining the lawsuits of multiple plaintiffs in some circumstances](#) and has consolidated hundreds of cases involving plaintiffs from outside St. Louis with cases brought by St. Louis residents. After a St. Louis city jury awarded \$72 million in the first talc trial, lawyers began engaging in “[blatant forum shopping](#)” to ensure a maximum payday for their clients and St. Louis judges have allowed it to continue.

## JUNK SCIENCE IN THE COURTS

In addition to forum shopping in the talc litigation, there is concern that judges allow plaintiffs’ lawyers to introduce junk science in City of St. Louis courts. Expert testimony plays a crucial role in talc cases. Plaintiffs’ “experts” tell jurors that talcum powder causes ovarian cancer, even as the **American Cancer Society** has found that research regarding this link is “mixed” and potentially “biased,” and that if there is an increased risk, the risk “is likely to be very small.”

Even in generally plaintiff-friendly New Jersey, a judge in September 2016 [dismissed](#) two talc cases scheduled for trial after deciding that the plaintiffs’ experts who had testified in St. Louis were not qualified to testify in the Garden State.

Nevertheless, defendants’ pleadings to have those so-called experts excluded from St. Louis trials fall on deaf ears. Despite passing legislative reform in 2017, judges there invariably allow this junk science and, with visibly ill women or their surviving loved ones as sympathetic clients, practiced personal injury lawyers play to the jurors’ emotions and persuade them to come back with outlier verdicts that fly in the face of genuine science.

## ABUSIVE CONSUMER CLASS ACTIONS

Plaintiffs’ lawyers have [long abused the state’s consumer protection law, the Missouri Merchandising Practices Act \(MPPA\)](#), filing shakedown class action lawsuits alleging that product labels, advertisements, or other business practices are misleading where no reasonable consumer has been misled or lost money. They take advantage of a [2016 Missouri Court of Appeals decision](#) that subjects companies to lengthy and expensive litigation, including a full jury trial, even for the most ridiculous of claims.

For example, the **City of St. Louis** and certain other counties have experienced a wave of “slack-fill” lawsuits targeting various candy manufacturers, including Skittles, Reese’s Pieces, and Junior Mints. Plaintiffs claim the candy makers engaged in “[deceptive marketing](#)” because the packaging was not filled to the brim with candy— notwithstanding the fact that content weights were clearly printed on the boxes. A small group of attorneys have created their own profitable cottage industry in Missouri by filing these types of lawsuits. All they have to do is find a willing plaintiff. [The Hershey Company](#) and [Tootsie Roll Industries](#) are among the recent targets.

*St. Louis “has developed a reputation for fast trials, favorable rulings, and big awards.”*

*– Bloomberg Business*

## A PRO-LIABILITY SUPREME COURT

The **Missouri Supreme Court** has developed a reputation for being particularly friendly to plaintiffs. For example, contrary to most other state courts, the **Missouri Supreme Court** has struck down limits on [noneconomic](#) and [punitive damages](#), and adopted an expansive tort claim for [medical monitoring](#). That concern continues in 2018, the state high court set a dangerous precedent when it reinstated a verdict that was tainted by juror misconduct.

### MISSOURI HIGH COURT DISREGARDS JUROR MISCONDUCT

Sherry Spence [filed a lawsuit](#) against BNSF after her husband was killed in 2012 when a BNSF train struck his truck as he crossed railroad tracks. During the two-week trial in Stoddard County, now-retired **Judge Stephen Mitchell** issued 81 rulings—80 of which were for the plaintiff. Ultimately, a jury found the railroad 80% at fault for failing to maintain proper crossing conditions. It returned a [\\$20 million award](#), which was later reduced to \$19 million.

[Following trial](#), defense counsel learned that one of the jurors, Kimberly Cornell, did not truthfully answer questions during jury selection about her family's litigation and automobile accident history. During questioning, she indicated that she had never been a party to a lawsuit, never made a claim against another to recover money for physical injuries or damage to property, and did not indicate, when asked, that she had been a party to a lawsuit or that any close friends or family members had been involved in a motor vehicle accident.

Unbeknownst to BNSF, Ms. Cornell had been a plaintiff in six other cases, including a wrongful death case arising from an auto accident that killed her son. This information was not discovered by BNSF during jury selection because her last name was misspelled "Carnell" on a juror questionnaire and subsequent court documents, but she did not correct it. Four hours prior to the jury being seated and sworn in, however, the court clerk provided the lawyers with a new seating chart with the correct spelling of Ms. Cornell's name. At that point, it was too late for defense counsel to conduct additional juror research.

After the verdict, the plaintiff claimed BNSF knew the juror's name was misspelled. The court clerk testified that she caught the error and told "one of" the defense lawyers—although, she could not remember if it was the 5'5" female attorney or the 6'4" male attorney. Nothing in the record reflected this "notice," except a hand-written note on a single undated document. BNSF counsel stated in an affidavit that they in fact were never made aware of the error.

After the trial court let the verdict stand, the **Missouri Court of Appeals** [ordered a new trial](#). The appellate court found BNSF clearly asked jurors about their litigation history and ruled that the trial court abused its discretion when it found BNSF was not prejudiced by the juror's nondisclosures.

The **Missouri Supreme Court**, however, [overturned the Court of Appeals](#) and reinstated the verdict. The court refused to "disturb the circuit court's ruling" and deferred to its findings during the evidentiary hearing - choosing to believe the court clerk over the two defense attorneys. In its opinion, the court stated that the ruling was not "against the logic of circumstances" or "arbitrary and unreasonable as to shock the sense of justice," setting a dangerous precedent for juror misconduct moving forward.

### TRIAL BAR'S STRONGHOLD ON JUDICIAL SELECTION

While the need for judicial reform in Missouri is evident, the prospect for change is bleak. The plaintiffs' bar [exercises disproportionate influence](#) within the system that appoints Missouri judges to the bench at all levels. This so-called Missouri Plan was adopted in 1940 and functioned more or less evenhandedly until about 30 years ago. Since then, the system has been captured by plaintiffs' lawyers with predictable results.

Missouri's appellate judges are appointed by a seven-member panel. The [Appellate Judicial Commission's](#) membership is set by the [Missouri Constitution](#). It includes three non-lawyers appointed by the governor, three lawyers elected by the Missouri Bar Association, and the chief justice of the Missouri Supreme Court, each of whom serves a staggered six-year term. In practice, this purportedly "nonpartisan" court appointment plan ensures that the liability-expanding interests of plaintiffs' lawyers are disproportionately represented. Over the [past two decades](#), every panel between 2002 and 2012 included at least one former member of the Board of Governors of the Missouri Association of Trial Attorneys.

The [current commission](#) is comprised of three personal injury lawyers each specializing in a different area of civil liability. Two of the non-lawyers appointed by **Governor Jay Nixon** (D) are a union representative and a Democratic party staffer, both of whom consistently seek to appoint liability-expanding judges. The final member of the commission is a nurse and former paralegal at a plaintiffs' firm. Appointed in 2015, she replaced the committee's only businessman who consistently supported judicial candidates favoring reasonable limits on liability.

## LAWSUIT ADS INUNDATE ST. LOUIS

Trial lawyers have spent millions of dollars on advertising to attract plaintiffs to the "Show-Me-Your-Lawsuit" state. In the second quarter of 2018 alone, they spent \$186 million on advertisements nationwide. Television viewers in the St. Louis media market saw about [14,000 locally broadcast ads](#) by lawyers, law firms and others soliciting legal claims in the second quarter purchased at an estimated cost of \$860,000 -- an average of 12 ads per day during this time or nine times as many ads as those for pizza delivery and restaurants. The sheer volume of ads has led to [concern](#) that plaintiffs' lawyers have tainted the jury pool in St. Louis against the businesses they sue.

## THE LEGISLATURE FAILED TO PASS NEEDED LEGAL REFORM

Republican leadership introduced a strong, desperately-needed legal reform agenda for Missouri's 2018 legislative session, but when it came time to deliver, legislators failed miserably. Trial lawyers were able to infiltrate the legislature and affectively stymie the efforts.

Among the reforms considered were [venue reform](#), [amendments to the Missouri Merchandising Practices Act](#) (MMPA), legislation to [allow evidence of seatbelt non-use](#), [punitive damages reform](#), and an [asbestos trust transparency](#) bill.

### VENUE REFORM

First introduced eight years ago, venue reform legislation is arguably the reform that is most desperately needed to address lawsuit abuse in St. Louis. As discussed earlier, [plaintiffs are flocking](#) to St. Louis from all over the country because of the [lax venue rules](#) and the potential for [large awards](#). **S.B. 546/H.B. 1578** would have restricted the ability of plaintiffs' lawyers to combine the claims of out-of-state clients with those of Missouri residents. The bill was in line with the U.S. Supreme Court's monumental 2017 [Bristol Myers Squibb](#) decision, which unfortunately, St. Louis judges have been [slow to apply](#).

### MISSOURI MERCHANDISING PRACTICES ACT REFORM

Another proposal that the Missouri legislature has considered over multiple sessions and failed once again is legislation to amend the state's lawsuit-generating consumer law, the MMPA, discussed above.

The 2018 legislation, **S.B. 832**, would have [reduced the opportunity](#) for "no-injury" lawsuits and attorney-generated litigation. Claims that a business practice is misleading would be evaluated from the perspective of a "reasonable consumer" and there would be no award of damages unless consumers have actually lost money. The bill also would have required any fees awarded to lawyers who bring these class actions to have a reasonable relationship to the amount of the judgment—making more likely that these lawsuits provide a benefit to consumers, not just the lawyers who file them.

### EVIDENCE OF SEATBELT NONUSE

Everyone knows that wearing a seatbelt significantly reduces the chance of being seriously injured or killed in a car accident. For that reason, the law requires wearing seatbelts. In Missouri, however, an [outdated law](#) allows courts to reduce the damages of a person who did not wear a seatbelt—but only by 1%.

Legislation introduced in 2018, **S.B. 822**, would have allowed a jury to consider evidence of a plaintiff's failure to wear a seatbelt when deciding who is at fault for injuries resulting from auto accidents. The bill appropriately would have allowed a jury to place some of the responsibility on the plaintiff for actively choosing not to wear his or her seatbelt. Even after the bill was significantly narrowed to apply only in product liability actions, it did not receive a floor vote.

## PUNITIVE DAMAGES REFORM

The legislature had the opportunity to restore punitive damages to their intentional tort roots to provide clear notice of conduct that may result in punishment, like a speed limit sign on the highway. **H.B. 2119** provided that punitive damages should be available based only on 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. As with the other bills, it did not receive a floor vote in the Senate.

## ASBESTOS TRUST TRANSPARENCY REFORM

The legislature also failed to enact [asbestos trust transparency reform](#). This legislation would have prevented plaintiffs' lawyers from alleging that insolvent companies are responsible for their clients' exposure to asbestos in order to obtain compensation from trusts set up by those companies, then hide this information when suing solvent companies in court.

St. Louis had the [6th](#) most asbestos lawsuit filings of any jurisdiction in the country in 2017, according to consulting firm KCIC. St. Louis held this rank despite a 40% decrease in filings. This drop occurred primarily due to weak cases alleging asbestos caused lung cancer flowing to neighboring Judicial Hellhole, St. Clair County, Illinois. This shift likely is a positive result of Missouri's adoption of a [stronger standard](#) for expert testimony in 2017.

## GOVERNOR GREITENS' SCANDAL

While the legislature bears much of the blame for the lack of progress in 2018, the disgraced governor and the multitude of scandals surrounding his office certainly did not help. After being [indicted](#) on felony charges of invasion of privacy and [accused](#) by prosecutors of misusing his charity's donor list for political purposes, **Governor Eric Greitens (R)** resigned on May 29, 2018. Prior to his resignation, the legislature launched a [bipartisan investigation](#) that produced an extremely disturbing report detailing a coercive extramarital affair and threats of blackmail. Governor Greitens was replaced by his Lieutenant Governor, **Michael Parson**, who by all accounts is open to addressing legal reform in the future.

## ONE PIECE OF GOOD NEWS

In the midst of all of the chaos surrounding the Missouri capitol, the legislature enacted one significant piece of reform legislation. **H.B. 1531** builds on earlier reforms that increase transparency and protects the public purse when the state hires [private attorneys](#) on a contingency fee basis.

State hiring of private contingency fee lawyers has too often led to pay-to-play [corruption](#) of the civil justice system. In 2011, Missouri adopted a law to reduce such abuse by providing an open process for the state to hire outside counsel. This process includes explaining the need for hiring private attorneys, soliciting written proposals from firms interested in doing the work, and posting the resulting contract and payments on a public website. The law requires government lawyers who serve the public, not private lawyers motivated by profit, to control the course of the litigation and approve any settlement.

The new law strengthens this system. Like many other states that have adopted similar reforms, H.B. 1531 protects taxpayers by ensuring that a few private lawyers do not siphon an excessive portion of the state's recovery. The new law provides a sliding scale for attorneys' fees that is based on the amount recovered and does not allow a fee above \$10 million. It also protects due process by providing that lawyers may not receive a percentage of the civil penalties or fines imposed—reducing the incentive to inflict the greatest punishment for the highest profit.

## # 5 LOUISIANA

The Pelican State once again appears on this year's Judicial Hellholes list largely due to former plaintiffs' attorney and now governor, John Bel Edwards' (D) aggressive litigation agenda and propensity for hiring campaign donors to manage litigation on behalf of the state.

The total [current impact of excessive tort costs](#) on the Louisiana economy amounts to estimated losses of \$1.1 billion in annual direct costs and about 15,556 jobs are lost when dynamic effects are considered.

- **State known for hiring contingency-fee lawyers**
- **Lawsuit abuse and legislature's failure to address these problems**
- **Louisiana Supreme Court's propensity to expand liability**

### STATE'S PROPENSITY TO HIRE CONTINGENCY-FEE LAWYERS



#### USE OF PRIVATE LAWYERS TO SHAKE-DOWN ENERGY COMPANIES

Governor John Bel Edwards' election in 2015 solidified the trial bar's power and control in Louisiana. During his three years in the governor's mansion, **Governor John Bel Edwards (D)** has made a habit of hiring former campaign donors to represent the state in litigation, creating the appearance of a "pay-to-play" system.

It began shortly after Edwards took office in 2016. He issued an [ultimatum](#) to the state's oil and gas industry, either spend billions of dollars on restoring the eroding coast line or face a drawn-out, costly legal battle. This attempted [shake-down](#) failed and the two sides have been tied up in litigation ever since.

When the oil and gas industry refused to comply with Edwards' demands, he [strong-armed six local parishes](#) to file more than 40 lawsuits targeting major providers of oil and gas jobs in Louisiana.

Despite resolving some of its budget issues, the state budget remains in a precarious situation. Rather than considering raising taxes permanently or further reducing public spending, Governor Edwards is targeting the energy industry. The only problem is, it has become quite clear that the oil and gas industry is not going to cower to his bullying tactics and give him the settlement he so desperately needs to balance his budget. Under Governor Edwards' leadership, Louisiana posted the [worst economic performance](#) in the country in 2017. It was the only state where the economy actually shrank.

Recent research conducted by Louisiana State University's Center for Energy Studies found that the benefits of drilling outweighed the costs and environmental risks. According to an article in the [Wall Street Journal](#), the oil and gas industry employs about 5% of the state's workforce, contributes about 10% of aggregated payroll, and accounts for 10% to 15% of tax revenue. The industry has generated billions of dollars in [royalty payments](#) to landowners and has provided thousands of high-wage jobs to generations of Louisiana citizens. The continued litigation onslaught is only going to hurt those numbers and drive the oil and gas companies to [do business elsewhere](#). As the [Washington Examiner put it](#), "that prosperity is under threat, not from the federal government or even low oil prices, but from Louisiana's own governor, his trial lawyer donors, and the abuse of the legal system."

***"[T]hat prosperity is under threat, not from the federal government or even low oil prices, but from Louisiana's own governor, his trial lawyer donors, and the abuse of the legal system."***

**– the Washington Examiner**

The other breakdown in Edwards' case is that oil and gas exploration is not solely to blame for the coastal erosion that is occurring in the state. Other causes such as changes in the Mississippi River and levying of the river by the U.S. Army Corps of Engineers have played a role in causing the land erosion.



Regardless of these facts, Governor Edwards continues to target the industry and his trial lawyer friends are the true benefactors. The law firm that Edwards chose to lead the efforts on a contingency-fee basis, **Talbot, Carmouche & Marcello**, also happened to [raise \\$2 million](#) for a super PAC supporting Edwards' 2016 gubernatorial campaign. The same law firm also donated [\\$10,500](#) to reelect state district court judge **Michael Clement**, who just happens to be the judge who will hear several of these cases in Plaquemines Parish in 2019. Judge Clement will face reelection in 2020.

Plaquemines is among the six parishes that have filed suit against the oil and gas companies, and was expected to be the first to go to trial in the spring of 2019. Though some Plaquemines Parish Council members want to "[bring more energy-industry](#)" jobs back to the Parish, others (like **Parish President Amos Cormier**) want to use potential revenue from the litigation to rebuild the land it lost. A 2018 resolution to "cease and desist" from all activities related to the lawsuits [ultimately failed](#) before the Plaquemines Parish Council. Though the measure received a 4—3 vote, a five-member majority vote is required for Council passage.

These lawyers are fighting tooth and nail to prevent these cases from being removed to federal court—where judges are [not running for reelection](#) and cannot be prejudiced by special interests. The U.S. Supreme Court dealt a blow to the plaintiffs when it [denied a petition for certiorari](#) in the energy lawsuit brought by the **Southeast Louisiana Flood Protection Authority (SLFPA)**. By denying review, a federal district court's dismissal of a lawsuit filed by SLFPA, affirmed by the Fifth Circuit, stands. The court found the SLFPA did not have standing to bring the lawsuit. Unfortunately for Edwards, his cases have [no more merit](#) than that one.

In January 2018, the **Fifth Circuit** also made it clear that these cases belong in federal court, not plaintiff-friendly Louisiana state courts. In that instance, 600 plaintiffs from at least 13 states sued the oil and gas industry in Louisiana civil district court in 2002. That was before Congress responded to such abuse by enacting the **Class Action Fairness Act of 2005**, which provided federal jurisdiction over "mass actions" in which the claims of 100 or more plaintiffs are consolidated for a joint trial. After additional plaintiffs joined the suit in 2013, the Fifth Circuit [ruled](#) that a federal district court could decide the case. On June 8, 2018, the Fifth Circuit refused to revisit its decision, [denying](#) the plaintiffs' motion for a rehearing, meaning the case will proceed in federal court.

## TRIAL LAWYERS DRIVE LOUISIANA'S OPIOID LITIGATION

Coastal lawsuits are not the only litigation that Edwards has attempted to hire his campaign donors to manage, he also contracted with plaintiffs' firms to [represent the state](#) in its opioid litigation. Governor Edwards hired James Garner's firm, **Sher Garner Cahill Richter Klein & Hilbert** to represent the Department of Health in the opioid litigation. This firm raised tens of thousands of dollars for Edwards' transition team in 2016.

The governor's plans to repay his funders through the opioid litigation ultimately were derailed by **Attorney General Jeff Landry**, who filed a motion in October of 2017 to take control of the litigation and expand it to cover more agencies. Landry hired prominent plaintiffs' lawyer and former attorney general of Mississippi, **Mike Moore**, to represent the state in the litigation. The oft-feuding AG and governor reached an [agreement](#) prior to a [court hearing](#) under which the Attorney General's office will pursue the claims and take primary responsibility for the litigation.

Practically every governmental entity in Louisiana — mayors, sheriffs, parish presidents, police juries, district attorneys, cities, state agencies and the like — are hiring outside plaintiffs' attorneys and joining the "national stampede to [file](#) civil lawsuits" alleging that companies that make the pain medications should shoulder medical and law enforcement costs that result from opioid addiction.

The opioid epidemic is a serious public health crisis both nationally and in Louisiana specifically. Louisiana has ranked among the [top ten states](#) for opioid prescriptions on a per capita basis over the last few years and the state has spent \$677 million since 2007 on treatments for opioid abuse.

This growing problem needs to be addressed by elected policymakers, the expert regulators they appoint, the medical and scientific communities, and law enforcement. These groups must work cooperatively to advance public health and safety and ensure that these interests are not compromised by contingency-fee lawyers who are driven by profit.

Billions of dollars are at stake, and as **Pete Adams**, executive director of the Louisiana District Attorneys Association stated, “In addition to the seriousness of the issue, everybody is looking to get any dollars they can get.” The plaintiffs’ attorneys hired by Louisiana leadership stand to [gain millions of dollars](#) of any state recovery. As a result, their incentive is to maximize their fees irrespective of the public interest.

## LAWSUIT ABUSE AND LEGISLATIVE INACTION

### AUTO INSURANCE FRAUD

For the fourth straight year, Louisiana residents saw their [auto premiums increase](#), and in some cases, by double digits. According to the State Property Casualty Commission, Louisiana is the [second most expensive](#) state for auto insurance in the country.

Most Louisiana drivers are uninsured or underinsured ([about 55%](#)), encouraging drivers to turn to the court system to get larger payouts when an accident occurs. To compensate for this onslaught of lawsuits, Louisianans are forced to pay higher premiums. Plaintiffs’ lawyers are working behind the scenes to drive up the costs of even the most minor of fender benders, leading insurance companies to have no choice but to increase rates - or in the case of some companies, to [leave the state](#).

The Commission, in addition to blaming overzealous trial lawyers, points to the state’s [lack of tort reform](#) as a reason for these rate increases. [One reform bill](#) introduced in 2018 that failed in committee would have made evidence that a person was not wearing a seatbelt at the time of an accident admissible in court. Under current Louisiana law, the jury is not allowed to consider this highly relevant evidence when determining damage awards. [The bill](#) passed the House, but died in the Senate. Several other legal reform bills stalled in the legislature, preserving the status quo in favor of the plaintiffs’ bar.

### ADA ABUSE TARGETING SMALL BUSINESSES

Louisiana continues to see a rising number of claims targeting small businesses for minor violations of the **Americans with Disabilities Act (ADA)**. The filing of accessibility complaints in the state has [spiked](#) in recent years. As of June, Louisiana was among the [top 10](#) states hosting these types of lawsuits in federal court in 2018, a distinction the state did not achieve in [past years](#).

Typically targeting shopping centers and other small businesses, these claims often involve serial plaintiffs and are filed without giving notice to the establishment. Unfortunately, the cost of defending itself against even one frivolous lawsuit could be enough to force a small business owner to close its doors. This shameful approach of plaintiffs’ lawyers violates the spirit in which this important statute was written and does nothing to protect those the statute was intended to protect.

## LOUISIANA SUPREME COURT’S PROPENSITY TO EXPAND LIABILITY

### LOUISIANA SUPREME COURT ALLOWS PUNITIVE DAMAGES IN MARITIME CASES

For the first time in the court’s history, the **Louisiana Supreme Court** [ruled that punitive damages are available](#) under maritime law in cases against product manufacturers. Prior to this [4-3 decision](#), it was well-settled Louisiana law that punitive damages were available only where authorized by statute, and in this case, applicable state law did not provide for punitive damages.

Louisiana is the only “civil law” state in the country, meaning that the state’s judges rely primarily on written codes to decide cases, as opposed to judges in common law states who look primarily to prior court decisions to determine the outcome of a lawsuit. The court’s ruling signals its inclination to expand liability even when not supported by the statutory law.

It is deeply troubling that it would break away from the written Civil Code and allow for punitive damages when applicable statutes do not expressly allow for them.

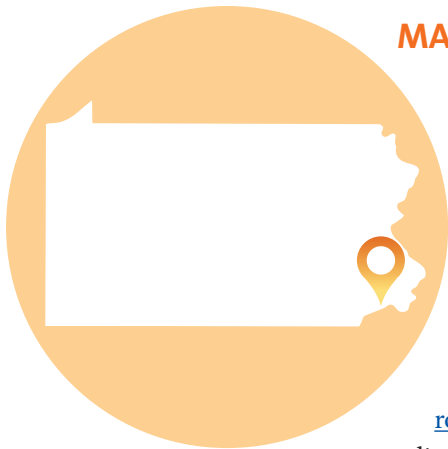
## END NOTES

- Louisiana does not have a reputation for the eye-popping jury verdicts that are seen in other Judicial Hellholes, but there is a troubling reason for this. Louisiana has earned the distinction of having the nation's highest jury trial threshold; civil cases valued at less than \$50,000 are tried by judges, without the benefit of a jury. Most states have significantly lower thresholds and [36 states](#) have no threshold at all. Perhaps it is no coincidence that a significant number of claims filed in Louisiana seek under \$50,000, allowing trial lawyers to go “judge shopping” for favorable venues, thus denying many citizens their fundamental right to a trial before a jury.

## #6 PHILADELPHIA COURT OF COMMON PLEAS

The Philadelphia Court of Common Pleas continues to be a national epicenter for product liability litigation. The court's Complex Litigation Center (CLC) hosts a mass torts program that attracts drug, medical device and asbestos cases from across the country. The continued surge of new lawsuits and judges' unabated willingness to open the court's doors to cases from outside the city and state solidifies “[The City of Unbrotherly Torts](#)” position on this year's list of Judicial Hellholes. In addition, both the governor and the legislature have adopted a pro-plaintiff platform signaling to courts around the state that decisions to expand liability are fully supported.

- **Mass tort cases flooding the Philadelphia court system**
- **Pro-plaintiff activities by state leadership**
- **Loose application of venue laws by judges**
- **Overall lack of legal reform**



### MASS TORT CASES AGAIN FLOODING PHILADELPHIA

Pharmaceutical litigation in Philadelphia's mass tort program exploded in 2017. [Over 5,000](#) product liability cases targeting prescriptions drugs were filed that year, compared with about 1,000 to 1,300 filed in 2015 and 2016, respectively.

At the end of 2017, the CLC mass tort program hosted over 10,000 cases against pharmaceutical and medical device manufacturers, and about 600 asbestos cases.

#### RISPERDAL LITIGATION

Over the course of 2017, the number of Risperdal claims pending in the CLC [rose 219%](#), according to court statistics. By June 2018, two thirds of the claims pending in the CLC mass tort program ([6,464 of 9,558 cases](#)) targeted the antipsychotic drug Risperdal. There are now [over 6,700](#) Risperdal cases pending.

The rise in filings stems from a [\\$70 million](#) verdict to a Tennessee plaintiff in July 2016, a result plaintiffs' lawyers called a “[game-changer](#).” At the time of the verdict, there were only [approximately 2,000 Risperdal cases](#) pending in the CLC, a number that has since tripled.

The claims against Johnson & Johnson unit Janssen Pharmaceuticals allege the company failed to adequately warn doctors that the antipsychotic drug, used to help people with conditions such as autism, can cause children to develop gynecomastia, a condition characterized by the abnormal growth of female breast tissue in young men. Bellwether trials began in January of 2015.

Throughout the litigation, lawyers for both sides have been locked in a heated battle over which state's law should apply in the litigation and whether punitive damages are available. Defendants argue that New Jersey law should apply because that is where the company is incorporated and headquartered. New Jersey law does not impose such punishment when the safety and labeling of the product at issue are approved by the FDA, as is the case here. On the other hand, plaintiffs argue that either Pennsylvania law, which does permit punitive damages in

such cases, or the law of each individual plaintiff's home state should apply.

The **Philadelphia Court of Common Pleas** had provided some clarity in the litigation after a judge issued a global ruling stating that New Jersey law applied to all Risperdal litigation, effectively taking punitive damages off the table. Unfortunately, in January 2018, a Pennsylvania appellate court muddled the waters when it ruled that the lower court must do a choice-of-law analysis on a case-by-case basis and [instructed](#) the Court of Common Pleas to further consider the applicable law.

That case involved a plaintiff from Wisconsin, a state that allows punitive damages of up to \$200,000 or twice the amount of compensatory damages. Johnson & Johnson argued that New Jersey had the greatest interest in applying its law because that is where the corporate decision making took place, an argument that has [ample legal support](#). The plaintiff argued that Wisconsin had a greater interest in having its law applied because that is where Plaintiff was prescribed and ingested the drug; a point that draws into question why the case was not brought in Wisconsin. The answer is presumably due to the plaintiff-friendly reputation of Philadelphia courts.

On [remand](#), **Judge Arnold New** rejected the defendant's motion for summary judgment, permitting the punitive damages trial to proceed.

The battle over the availability of punitive damages is not the only story line in the Risperdal litigation. Judges also have unfairly restricted defendants' expert evidence. Earlier this year, Janssen [urged an appeals court](#) to reverse a \$2.5 million verdict reached after the trial court prevented the company from introducing an article from a well-respected and peer-reviewed medical journal that directly contradicted testimony of the plaintiff's star witness.

Finally, there has been litigation around the relevant statute of limitations in these cases. On July 5, 2018, the **Pennsylvania Supreme Court** [agreed to hear](#) an appeal from an intermediate appellate court ruling that found two plaintiffs knew or reasonably should have known about their injuries and the cause by the time the company changed the Risperdal labeling to reflect an increased risk of gynecomastia. The appellate court ruled that the time period to file a lawsuit ended two years from the October 2006 labeling change. If affirmed, this ruling could result in the dismissal of thousands of Risperdal cases pending in Philadelphia.

## XARELTO LITIGATION

Through June of 2018, there were 1,854 cases targeting the blood thinner Xarelto in the **Philadelphia Court of Common Pleas**, an increase of 430 cases—or 23% since this time last year. Out-of-state plaintiffs account for [84% of these cases](#).

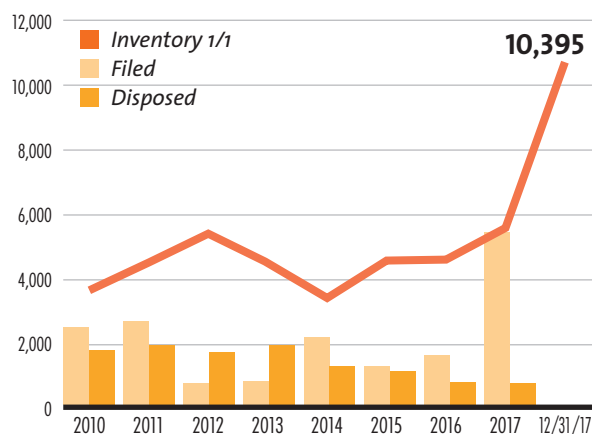
Despite the plaintiffs' lawyers' excessive filings, defendants continue to rack up the victories in court, leaving plaintiffs' attorneys to desperately search for a [winning theory](#). Plaintiffs originally claimed Bayer and Johnson & Johnson failed to warn of the possibility of excessive bleeding caused by Xarelto. However, the companies [successfully pointed out](#) that Xarelto's label mentions the risk of bleeding more than 70 times.

In early 2018, **Judge Michael Erdos** [reversed a \\$28 million verdict](#), which included \$26 million in punitive damages, issued by a [Philadelphia jury](#) to an Indiana plaintiff. Judge Erdos sanctioned two of the plaintiffs' lawyers for "improper photos and social media posts connected to the trial." The lawyers took photos in the courtroom while the trial was in progress. One of the lawyers used the [hashtag](#) "#KillinNazis." Bayer is a German company.

A few months later, a Philadelphia jury handed down yet another [verdict for the defense](#), finding that the company had adequately warned consumers about the dangers of severe bleeding.

For the trial bar, hope springs eternal, as lawyers [continue to file Xarelto cases](#) in the CLC, despite not having a viable theory of liability. This never-ending cycle must be stopped, and it is up to the Philadelphia courts to rid themselves of their plaintiff-friendly reputation and put an end to the excessive filings.

## PHARMACEUTICAL LITIGATION IN PHILADELPHIA'S MASS TORT PROGRAM 2010-2017



Source: CLC, [Mass Tort Report](#), December Term 2017

## PELVIC MESH LITIGATION UPDATE

The CLC also hosts litigation alleging that pelvic mesh implants, which are widely used to address stress urinary incontinence in women, are improperly designed despite FDA approval. Six cases that Ethicon has faced in Philadelphia have led to more than \$105 million in combined damages, exclusive of the amounts paid to settle cases. In the seventh of these cases, a hung jury could not decide whether the design of the mesh contributed to the plaintiff's injuries, leading the judge to [declare a mistrial](#) on September 24, 2018. [Ninety](#) pelvic mesh cases were pending in the CLC as of November 1, 2018.

## BAYER BATTLES PLAINTIFFS OVER REMOVAL TO FEDERAL COURT

Bayer is involved in another mass tort action in Philadelphia and is fighting to keep the litigation in the proper federal court and out of the Court of Common Pleas. [Fifteen plaintiffs](#) sued Bayer over the safety of a birth control device, Essure, and are appealing the removal of their cases to federal court, with hopes of having them sent back to the Philadelphia Court of Common Pleas. Plaintiffs contend the suits belong in state court because the parties are not from different states and the lawsuits only raise claims based on state law. As defendants point out, the claims are "[by definition](#)" based on federal law because they assert that Bayer failed to comply with FDA requirements. Plaintiffs recognize that if they are unsuccessful in their appeal, it could significantly narrow the Essure litigation because the federal court has already ruled that federal regulations [do not permit](#) many of the claims.

## PHILADELPHIA REMAINS A HOTBED FOR ASBESTOS LITIGATION

In addition to the excessive pharmaceutical mass tort litigation, **Philadelphia's Complex Litigation Center** also attracts asbestos litigation from all across the country.

Philadelphia ranked fourth nationwide for asbestos claims in 2017 with [263 new filings](#)—an overall increase of 6.5% from the previous year. Pennsylvania is second in the nation for mesothelioma filings, topped only by Judicial Hellhole Madison County, Illinois. Philadelphia saw a [32% increase](#) in these lawsuits in 2017. [Four of the top 10](#) asbestos plaintiffs' firms have connections to either Philadelphia or Pennsylvania at large. And asbestos litigation constitutes the [third highest](#) number of pending lawsuits in the Philadelphia Complex Litigation Center at [561](#) as of November 1, 2018, behind only Risperdal and Xarelto claims.

One bit of welcomed news - companies are starting to fight back against the rampant fraud in the asbestos litigation. In May 2017, John Crane Inc. (JCI) [filed a RICO claim](#) against the **Shein Law** firm and attorney **Benjamin P. Shein** in the U.S. District Court for the Eastern District of Pennsylvania. [Shein Law](#) markets itself as the "Philadelphia asbestos lawyers." The lawsuit alleges the lawyers "devised and implemented a scheme to defraud [asbestos defendants], and to obstruct justice" by "fabricating false asbestos 'exposure histories' for their clients ... and systematically conceal[ing] evidence of their clients' exposure to other sources of asbestos." The lawsuit also alleges the lawyers explicitly denied their clients were exposed to other sources of asbestos during litigation but, when the lawsuits ended, filed claims for additional compensation from asbestos bankruptcy trusts, telling different stories.

The Pennsylvania case was stayed pending appeal of a similar RICO case JCI brought in a federal court in its home state, Illinois. After the **Seventh Circuit** [ruled](#) the case could not proceed in Illinois in June 2018, the federal court in Pennsylvania reactivated the case. While the case settled soon thereafter, it has shined a much-needed light on the widespread fraud in the state's asbestos litigation.

## LOOSE APPLICATION OF VENUE LAWS AND FORUM SHOPPING

### FORUM SHOPPING OUTSIDE OF MASS TORT DOCKET

Philadelphia is a hotbed of litigation tourism; currently [84%](#) of plaintiffs with claims against pharmaceutical makers in the **Philadelphia Court of Common Pleas** are from out-of-state. These numbers are baffling in light of the U.S. Supreme Court's decision in [Bristol-Myers Squibb Co. v. Superior Court of California](#), which held that a state cannot exercise personal jurisdiction over claims brought by nonresidents against a nonresident company where the plaintiffs did not purchase, ingest, or suffer injury from the product in that state.



While widely considered to be a “[game changer](#)” for the defense bar, the decision seems to have fallen on deaf ears in Pennsylvania. The Philadelphia Court of Common Pleas is a magnet for mass tort claims from all over the country, and judges have allowed forum-shopping to continue in other types of litigation as well.

In several instances, the **Philadelphia Court of Common Pleas** has refused to dismiss cases brought by railroad workers who worked, lived and allege injuries that developed outside Pennsylvania. These plaintiffs hail from states such as Maryland, New York, Ohio and South Carolina. The witnesses, including the plaintiffs’ treating physicians, and evidence in the case are all located in states other than Pennsylvania. Businesses hauled into the Philadelphia court file “forum non conveniens” motions asking the court to dismiss cases with no connection to the area, so they can be refiled where they belong. But the **Philadelphia Court of Common Pleas** repeatedly denies these motions.

An appellate court intervened in one such case in July 2018. In *Hovatter v. CSX Transportation, Inc.*, the court [ruled](#) that the Court of Common Pleas should have dismissed two complaints against the railroad and directed that the cases be refiled in “more appropriate courts.” One case was brought by a lifelong Maryland resident who was injured, received medical treatment, and whose witnesses lived in Maryland. The other was filed on behalf of a Kentucky resident who alleged cumulative injuries during his work in Kentucky, Ohio, and Indiana, and received medical treatment in Kentucky and Ohio. Neither case against the railroad, which is incorporated in Virginia and based in Florida, had any connection to Pennsylvania.

A preliminary version of the [opinion](#) recognized that “courts in Philadelphia County are extremely congested” and have become “a magnet for tort suits” that have no connection to Pennsylvania.

In another recent case, the **Philadelphia Court of Common Pleas** [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 [Gaetano v. Sharon Herald](#), which was decided in 1967, and held that for purposes of a defamation action, “publication” occurs in the county where the statement is read and understood to be defamatory. “Therefore, under Pennsylvania law, as set forth in *Gaetano*, venue is proper in Philadelphia because Philadelphia is where the defamatory statement was read and understood to be defamatory of plaintiff.”

In his opinion, Judge New stressed that his job as a judge is to [apply the law](#), rather than “make new law” and urged the Superior Court to reevaluate the venue rules related to defamation; arguing the law needs to reflect the advances in modern communication technology.

The purpose of a defamation action is to restore a person’s name in their community, and under the plaintiff’s theory that was applied by Judge New, venue would be proper in any county because a person could access the information anywhere. Judge New implored the Superior Court to reevaluate the law and prevent clear forum shopping by plaintiffs.

## PRO-PLAINTIFF ACTIVITIES BY STATE LEADERSHIP

### GOVERNOR VETOES PHARMACY BILL

While Philadelphia may be a “Judicial Hellhole” because of the expansive liability, mass torts program, and open-door to lawsuits filed by people with no connection to the area; it does not help that **Governor Tom Wolf (D)** appears to be strongly aligned with the trial bar. Last year, the Philadelphia Inquirer uncovered a [scam](#) run by one of the city’s largest workers’ compensation law firms that just so happened to be donating money to the Governor right before he had an opportunity to veto legislation that would have put an end to it.

In the scam to rip off injured workers and insurance companies, plaintiffs’ lawyers from **Pond Lehocky** would refer injured clients to doctors who would send those same clients to a [preferred pharmacy](#). That may appear like legal cross promotion, until you learn that the lawyers and doctors also owned the pharmacy and would prescribe unnecessary medications for exorbitant costs, including \$1,900 for a tube of lidocaine (retail price \$14) and \$1,600 for a 5-ounce bottle of anti-inflammatory topical solution (retail price \$60-\$70), which they would then bill to the insurance carrier. In order to get approved to open the pharmacy, the application claimed there were no doctors with proprietary interests in the pharmacy, a claim now known to be false.

Twice now the legislature has tried to prevent similar improprieties from occurring in the future through the passage of **Senate Bill 936**. The bill would limit workers' compensation medication to an evidence-based list of approved medications to regulate the "type, dosage, and duration of the prescriptions." In addition to preventing the abuse perpetuated by Pond Lehocky, S.B. 936 would help address the devastating opioid crisis in the state. According to the **Workers' Compensation Research Institute**, Pennsylvania has the [second highest](#) amount of opioids prescribed per injured worker and the second highest number of opioid pills per prescription per claim.

It sounds like a common sense solution to two pressing issues, so why did **Governor Tom Wolf** [veto the law](#) in 2018? He [argues](#) the bill would not actually address opioid abuse because it would make physicians prescribe less costly drugs, not less drugs overall. His argument falls short however, because if you regulate the "type, dosage, and duration of the prescriptions," then you can certainly stop overprescribing by taking a patient off of the drug when they are healed, or regulate the dosage so they do not become addicted in the first place.

There may be another explanation for why the Governor would want to kill this bill. In the second half of 2017, Governor Wolf received \$1.1 million in campaign contributions from Fairness PA, a political action committee [funded by](#) the very doctors and lawyers involved in the insurance fraud scheme. Business leaders and groups from across Pennsylvania [joined together](#) to call on Governor Wolf to return the money, and stand up for justice.

Governor Wolf was reelected in November 2018, so the prospects of enacting this legislation in the near future are grim.

#### OTHER LEGISLATIVE EFFORTS

While it was encouraging to see the legislature come together to pass S.B. 936, even though the Governor Wolf vetoed it, the failure to pass **H.B. 1037** in the House was a major disappointment for civil justice advocates. The bill would have protected access to nursing home care by limiting punitive damages to 250% of the total compensatory damages. As it stands, nursing care facilities face a constant risk of being shut down by exorbitant punitive damages awards, a risk that leads many of them to settle all potential claims.

## #7 NEW JERSEY LEGISLATURE

In 2018, the New Jersey legislature distinguished itself as the most plaintiff-friendly legislature in the country. It immediately looked to capitalize on the change in leadership and pursued an agenda that included expanding civil justice liability. The legislature also continued to turn a blind eye to the problems caused by unsound laws that plague the state. Legislators did not even entertain the most modest of tort reforms, such as a limit on appeal bonds, and instead focused only on expanding liability for both businesses and individuals alike.

In a report that typically focuses on courts, New Jersey is an exception because of the legislature's focus on drastically expanding liability in numerous areas.

The **New Jersey Supreme Court** took steps toward improving the judicial health in the state and should be applauded. The court eviscerated the abuses occurring under the state's **Truth-in-Consumer Contract, Warranty and Notice Act** (TCCWNA) and adopted the *Daubert* standard with regards to expert evidence. These decisions are highlighted in the Points of Light section of the report. Unfortunately, improvements to the judicial environment were overshadowed by the legislative activities.

### A LIABILITY-EXPANDING AGENDA

#### LEGISLATURE ENACTS MOST EXPANSIVE EQUAL PAY LAW IN COUNTRY

On April 24, 2018, **Governor Phil Murphy** (D) signed the **Diane B. Allen Equal Pay Act** into law, the [strongest](#) and most expansive equal pay law in the country. The New Jersey law is considered the "strongest" in the country,

- **Legislature pursues liability-expanding agenda for 2018-2019 session**
- **Trial bar has gained power and influence in the state legislature**

not because of the additional protections it provides for employees, but rather for its draconian penalties and extensive look back period, all of which greatly benefit trial lawyers.

The law prohibits pay discrimination for “substantially similar work” based on characteristics protected by the **New Jersey Law against Discrimination** (i.e. race, sex, age, nationality etc.). Each payment of unlawfully disparate wages constitutes a separate offense. When coupled with the availability of both treble and punitive damages, and the extension of the statute of limitations to allow for up to six years of back pay, the new law provides a gift to plaintiffs’ lawyers.

In addition, the New Jersey law’s comparison of positions involving “substantially similar” work is so vague both sides will need to call in multiple experts to support their views. This will severely bog down the courts and turn them into de facto human resources departments.

The New Jersey law is an outlier, even compared with the laws of the most progressive states. [California](#) and [Massachusetts](#), for example, only allow for a two and three-year statute of limitations respectively. Plaintiffs in those states also can only recover twice the amount of lost wages, as opposed to treble and punitive damages. For these reasons, **Governor Chris Christie (R)** issued a [conditional veto](#) of a similar bill in 2016.



### **MORE MONEY TO WORKERS’ COMP LAWYERS**

Legislation enacted in August, **S. 2145**, gives another boost to the plaintiffs’ bar. The new law allows an attorney to collect more money at the expense of a client who was injured at work.

Previously, attorneys who represented clients in workers’ compensation claims were paid only for the incremental value they might bring over and above an employer’s insurance carrier’s initial offer of compensation. After all, the workers’ compensation system is set up to provide prompt, no-fault compensation without protracted litigation.

Now, an attorney can collect fees on total compensation his or her client receives, instead of any additional value the lawyer obtains. This change encourages unnecessary litigation that will delay payments to workers and allows lawyers to take a portion of their client’s recovery where the lawyer did not get anything other than what the employer offered to pay the employee.

### **SENATOR SCUTARI INTRODUCES TWO PROBLEMATIC LIABILITY-EXPANDING BILLS**

The so-called “**New Jersey Insurance Fair Conduct Act**,” **S. 2144**, would authorize new lawsuits against insurers. The legislation creates a private right of action for a claimant against his insurer for unreasonable delay or denial of a claim. It rewrites the legal definition of “bad faith” in the insurance context in a manner that is so expansive that plaintiffs would be able to sue insurance companies for [normal errors](#) that occur in the ordinary course of business.

The legislation also is packed with financial incentives for trial lawyers to file lawsuits, such as the ability to obtain treble (triple) damages and attorneys’ fees and costs. If enacted, this proposal will [open the floodgates](#) for frivolous bad faith claims and could cause insurance premiums to skyrocket by as much as [forty percent](#). New Jersey residents already pay among the highest average premiums in the nation, and this bill would only increase those costs. The bill, which passed the Senate in June, awaits Assembly consideration.

Another bill introduced by **Senator Nicholas Scutari, S. 1766**, would drastically expand the state’s wrongful death statute. Current New Jersey law provides fair and predictable compensation to those who file wrongful death claims, providing recovery for “pecuniary and economic loss.” The proposed legislation allows damages for “mental anguish, emotional pain and suffering, loss of society, and loss of companionship.” If enacted, S.B. 1766 would allow for purely emotional damages and introduce considerable uncertainty into litigation. This would make cases more difficult to settle and would increase insurance premiums for all New Jersey residents. The Senate Judiciary Committee reported the bill favorably in April 2018.

## ATTACK ON ARBITRATION

### ACTIVITY IN LEGISLATURE

The New Jersey legislature continued its efforts to limit arbitration rights. On September 27, 2018, **Senator Theresa Ruiz** introduced **S. 2996**, which makes any agreement to arbitrate unenforceable if a business entity attempts to apply an agreement to arbitrate to a purported contractual agreement that was created fraudulently with the consumer's personal information. The language of the bill is vague, and could therefore have unforeseen consequences restricting the enforceability of arbitration agreements even further.

Another dangerous bill currently pending in the New Jersey legislature is **S. 121**. This legislation prohibits arbitration agreements in employment contracts. Any employer who attempts to enforce an arbitration provision that is deemed against public policy under the bill would be responsible for attorneys' fees and costs, in addition to any available damages. The New Jersey Senate passed the bill in June 2018, but the Assembly has taken no action.

### HIGH COURT'S ANTI-ARBITRATION DECISION

And while the New Jersey high court should largely be praised for its 2018 decisions, it did issue a disappointing decision that voided an arbitration agreement because it did not "clearly and unmistakably inform the party signing it that he or she is agreeing to waive their right to be heard in court or their constitutional right to a trial by jury."

The agreement language in question stated, "If there are any disputes regarding this agreement, I ... hereby waive any right I ... may have to a trial and agree that such dispute ... will be determined by binding arbitration." And "By signing this document, I acknowledge that if anyone is hurt or property is damaged during my participation in this activity, I may be found by a court of law to have waived my right to maintain a lawsuit against SZITP."

According to the court, because the agreement did not specifically say, "I waive my right to go to court," it was not a clear waiver of the right to go to court. This reasoning ignores the [U.S. Supreme Court's instruction](#) that any doubts about whether a particular dispute is subject to arbitration must be resolved in favor of arbitration. The **U.S. Supreme Court** also [made clear in 2017](#) that state courts cannot impose special requirements as a condition of enforcing arbitration agreements. In a decision written by **Justice Elena Kagan**, the Supreme Court reaffirmed federal law requires courts to place arbitration agreements "on equal footing with all other contracts."

New Jersey courts have insisted that no "[magic words](#)" are necessary to make an arbitration agreement valid, but this case certainly says otherwise. Companies continue to have their agreements voided for not including specific terms, creating an expensive guessing game that benefits no one.

## TRIAL BAR GAINS POWER IN NEW JERSEY LEGISLATURE

With the election of **Governor Phil Murphy** in November 2017, New Jersey trial attorneys gained enormous power. While the New Jersey legislature always has tried to push a pro-plaintiff agenda, **Governor Chris Christie** served as an important backstop for eight years and prevented enactment of much of their liability-expanding agenda.

In addition to Governor Murphy, the trial bar also has a strong political ally in the chair of the Senate Judiciary Committee, **Nicholas Scutari (D)**. Senator Scutari, who also serves as chairman of the [Union County Democratic Party](#), is a trial lawyer by trade and has seen his political influence skyrocket over the past year. Senator Scutari oversees the confirmation process for Governor Murphy's cabinet members. Also, Senate President, and future governor-hopeful, **Stephen Sweeney (D)** has greatly empowered Scutari by giving him more leeway on legislative and policy matters.

With all of these changes in leadership and shifts in power in 2018, the floodgates opened and the legislature tackled a very plaintiff-friendly agenda.

## #8 ST. CLAIR AND MADISON COUNTIES, ILLINOIS

St. Clair and Madison Counties continue to house a powerful plaintiffs' bar and are notorious for their disproportionate volumes of litigation and large verdicts. In addition to the hyper-litigious culture, the prospects of legal reform are grim despite the state's desperate need for economic growth and job creation.

Excessive tort costs to the Illinois economy result in \$4.5 billion in annual direct costs and 81,685 jobs when dynamic effects are considered, according to a recent Perryman Group [study](#). As of 2018, the yearly fiscal losses due to excessive tort litigation are estimated at \$397.2 million in state revenues and \$335.4 million to local governments. For a state with as dire of a financial situation as Illinois, these costs are extremely concerning.

- **No injury consumer class action litigation in St. Clair**
- **Madison County is the #1 plaintiffs' favorite for asbestos lawsuits**
- **St. Clair is experiencing a meteoric rise in asbestos litigation, as weak claims flow from St. Louis**
- **Lack of legal reform in Illinois allows litigation and forum shopping to flourish**

### HIGH VOLUME OF LITIGATION OVERBURDENING THE JUDICIAL SYSTEM



#### “NO-INJURY” CONSUMER CLASS ACTION LAWSUITS

There has been a flurry of “no-injury” consumer class action lawsuits filed around the country challenging how food is labeled and advertised, such as whether the product qualifies as “all natural.” California was ground zero for this type of litigation, but it has quickly spread to other Judicial Hellholes across the country, with the pace hitting nearly [150 new filings](#) annually. **St. Clair County** has been a magnet for these lawsuits, as [21 such cases](#) asserting that products ranging from cake mix to barbeque sauce are not sufficiently natural have been filed there so far.

The **Nelson & Nelson** law firm of St. Clair County is [leading](#) the charge, as they have filed several “unnatural” class action lawsuits over the past few years. Most were voluntarily dismissed soon after filing, which could indicate that companies settled the claims for their nuisance value to avoid the expense of litigation.

In one instance, [the firm collected \\$245,000](#) and the class received nothing. As is most often the case, plaintiffs' lawyers walk away with hundreds of thousands of dollars in fees, while consumers are left with nothing but higher prices and fewer choices.

**David Nelson**, of **Nelson & Nelson**, filed [multiple class action lawsuits](#) this year on behalf of a St. Clair woman accusing manufacturers of false advertising. Since 2017, that individual has filed at least [six false advertisement](#) cases, including four in April and May of 2018 alone. In each of her lawsuits, the plaintiff alleges she was “injured” by paying higher prices for products than she claims they were worth.

Among the cases she has filed is a lawsuit against [Cedarlane Natural Foods](#) in May 2018, claiming the company's [Gluten Free Roasted Chili Relleno](#) is not “all natural” because it contains a common thickening agent. She also sued Schnuck Markets for falsely advertising the [amount of peanuts](#) in a mixed nuts container. The company said that the mixture contained less than fifty percent peanuts, but she claims it was more. Each of her six lawsuits are currently pending.

**Nelson & Nelson**, along with the **Armstrong Law Firm** of St. Louis, has filed [similar](#) class action lawsuits against food makers in St. Clair County.

The stakes are high for the plaintiffs' lawyers bringing these lawsuits. **St. Clair County Circuit Court** held 13 civil trials in 2017, and plaintiffs were awarded a total of [\\$4,046,499.82](#) in ten of those cases. There were only three defense verdicts in all of 2017.



## A HOTBED FOR ASBESTOS LAWSUITS

Madison County continues to be the preferred jurisdiction by trial lawyers bringing asbestos claims, with 1,128 cases filed in 2017. This is a [13.4% drop](#) from 2016; however, Madison County had [almost triple](#) the number of filings of the next closest competing jurisdiction, Baltimore, Maryland ([495](#)). One of the leading firms driving the Madison County asbestos litigation, **Maune Richle**, [increased its filings](#) by 4.1 percent in 2017.

From 2014-2017, plaintiffs' lawyers filed [6,071 asbestos cases](#) in Madison County, and 68% were on behalf of people who do not live in Illinois, let alone Madison County. Plaintiffs flock to the Madison County courthouse because of its plaintiff-friendly reputation, low evidentiary standards, and judges' willingness to allow meritless claims to survive.

While Madison County continues to be the most popular jurisdiction for asbestos litigation, St. Clair County's filings have been on a meteoric rise over the past two years. The county [filings increased](#) by 200% in 2017 from 69 in 2016 to 207 the following year. A large reason behind this sudden increase is the Missouri legislature's enactment of a [stronger standard](#) for the admissibility of expert testimony in March 2017. Following this change in law, asbestos-related filings dropped in [St. Louis, Missouri](#) (another perennial Judicial Hellhole), by 40.3% and [increased across the river](#) in **St. Clair County** by 200%. The *Daubert* standard requires judges to act as "gatekeepers" to prevent "[junk science](#)" testimony from being heard at trial, making it much more difficult for plaintiffs' attorneys to be successful with dubious asbestos claims. The vast majority of the asbestos lawsuits now filed in St. Clair allege that exposure to asbestos caused a person to develop lung cancer, which has other causes.

In May 2018, the **St. Clair County Circuit Court** heard its first asbestos case since becoming one of the trial bar's [preferred jurisdictions](#). The case settled prior to closing arguments after **Judge Vincent Lopinot** denied multiple defense motions and barred the defendant from presenting evidence that the plaintiff was exposed to asbestos while employed by others.

## TRIAL-LAWYER DRIVEN OPIOID LITIGATION

Unfortunately, Illinois has not been immune from the opioid epidemic and St. Clair and Madison Counties are looking to receive monetary relief through the court system.

**Brendan Kelly**, the state's attorney for St. Clair County, has moved forward with [an opioid lawsuit](#) against Purdue Pharma and Abbot Laboratories, accusing them of [deceptive advertising](#) and consumer fraud that contributed to opioid and heroin overdoses. [Multiple plaintiffs' attorneys](#) had a hand in filing the complaint.

Madison County's state attorney, **Tom Gibbons**, also is looking into filing an opioid lawsuit on behalf of the county. He recently submitted a [series of written answers](#) in response to questions put forth by Madison County Board member **Phil Chapman (R)** and the Judiciary Committee. Included among the questions was how much money the county might be expected to gain from a lawsuit, how the money would be spent, and then most importantly, questions regarding the ethical concerns over the bidding process to select an outside private law firm to handle the case.

***"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."***

**– Mike Walters**

**Madison County Board member and Judiciary Chair Mike Walters** has expressed strong opinions about his hope that the opioid litigation is not modeled after Madison County's infamous asbestos docket. He points to the "[terrible drain](#)" it has been on the county's economy. He [stated](#), "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."

The opioid epidemic is a serious public health crisis, but regulation through litigation is not the solution. The public health interests need to be the main priority, not the personal financial interests of the trial bar, which become the focus when outside private attorneys are hired to represent government entities.

## LACK OF LEGAL REFORM KEEPS ‘PRO-PLAINTIFF’ STATUS QUO

The Illinois legislature once again failed to advance commonsense reforms in 2018. [H.B. 4249](#) would have eliminated venue-shopping and made it more difficult for plaintiffs from around the country with no connection to Madison and St. Clair Counties to flock to those courthouses. The bill also would have made positive changes to the joint and several liability law and would have limited how much could be recovered for medical care and treatment expenses to the amount actually paid rather than amount initially billed. This section would prevent plaintiffs from receiving “windfalls” at the expense of defendants at trial. The bill was introduced in January but failed to gain any traction. Pro-business **Governor Bruce Rauner (R)** failed in his bid for reelection and was defeated by **J.B. Pritzker (D)** in November of 2018, further decreasing the likelihood of reforms passing in the near future.

Legal reform legislation also faces an uphill battle in Illinois because some people embrace the counties’ Hellhole status. Plaintiffs’ lawyers argue it is good for the area and community because it leads to an increase in court filing fees, and increased business and tax revenue generated by [new satellite law offices](#) opening in the counties. This ignores the fact that lawsuit abuse drains the economy and drives businesses out of the state, as pointed out above by Mike Walters. Companies know that they do not face a fair and balanced playing field in the courtrooms, and as a result, choose not to do business in the state, taking their revenue and jobs with them.

## #9 TWIN CITIES, MINNESOTA

Troubling trends in Twin Cities courtrooms, unprincipled actions by Minnesota’s attorney general and multiple vetoes of commonsense reforms by Governor Mark Dayton have earned Minneapolis and Saint Paul the unenviable distinction of being named a Judicial Hellhole. There is a pervasive liability-expanding view that is spreading throughout the state.

### MINNESOTA AG’S MISHANDLING OF GROUNDWATER CONTAMINATION CASE

In 2018, **Attorney General Lori Swanson** came under fire for paying \$125 million in attorneys’ fees to an out-of-state law firm after hiring it to manage a suit against 3M Company alleging that its disposal of perfluorinated chemicals (“PFCs”), which were used in a variety of products, had contaminated ground water. After seven years of litigation, 3M and the state agreed to a [settlement](#) in the form of an \$850 million grant aimed at improving water quality and sustainability, and that would also pay for fishing piers, trails and preserving open space. Of that settlement, the state paid [\\$125 million](#) in contingency fees to the private attorneys, or roughly [\\$47,000 per day](#) for seven years. 3M, formerly known as the Minnesota Mining and Manufacturing Company and founded in Minnesota in 1902, is headquartered in St. Paul and continues to be a major employer in the area. The lawsuit had sought \$5 billion.

Members of the **Minnesota House Ways and Means Committee** held a hearing on the settlement in mid-May over concerns about the fees paid and the fact that none of the fees would be injected back into the Minnesota state economy because it was paid to an out-of-state law firm. Following the hearing, efforts were undertaken in the House to prevent these types of payments in the future. The House [passed a budget bill](#) that included a provision prohibiting the attorney general’s office from contracting with outside private attorneys on a contingency fee basis, except in

- **Attorney General mishandles lawsuit against Twin Cities employer**
- **Hennepin County judge strips company’s defenses**
- **Governor vetoes three key commonsense legal reforms**
- **State high court subjects property owners to expanded liability and rejects stronger expert testimony standard**



limited cases; however, it was excluded from the [final version of the bill](#).

The state agency responsible for the safety and welfare of residents also raised a central problem with the attorney general's case. The **Minnesota Department of Health** concluded in reports as early as 2007 that there was no increase in the number of health problems seen in the affected areas. The [Department of Health](#) released a statement saying, "After hundreds of hours of review and analysis by highly trained and experienced statisticians and epidemiologists ... [the department] has concluded that there are no unusual occurrences of adverse birth outcomes or cancer occurrences that could plausibly be related to PFC exposure in the East Metro area."

Had the case gone to trial, the Attorney General was prepared to rely on the testimony of **Dr. David Sunding**, a professor at UC Berkeley. **Alan Bender**, a health department official and associate professor at the University of Minnesota, claimed the data used by the state agency was "[far superior](#)" to that used by Sunding. According to Bender, [Sunding's claim](#) that PFC pollution caused increased rates of childhood cancer deaths was the "most off-the-wall of his many mischaracterizations."

## HENNEPIN COUNTY TRIAL COURT JUDGE HANDS DOWN UNWARRANTED SANCTIONS

A recent series of court rulings in a case involving BNSF Railway shows why defendants believe they face an unfair and uphill battle in Twin Cities' courtrooms.

**Judge Amy Dawson** of the **Hennepin County District Court**, the largest trial court in Minnesota and the court for Minneapolis, disregarded the rule of law and failed a basic test of fairness in her handling of this case, which helped solidify the Twin Cities' position on the Judicial Hellholes list.

In that case, a railroad employee claimed to have sustained permanent injuries as the result of an alleged exposure to "hazardous chemicals" while working next to a specific railcar in BNSF's yard in January of 2014. BNSF conducted an immediate and [thorough investigation](#) with the local fire department, company hazmat responders and two emergency-response contractors, and found no odors, signs of leakage, or abnormalities in the railcar identified by Plaintiff.

It was not until [three years later](#), after litigation had commenced, that the plaintiff for the first time declared that his injuries were the result of exposure to "hydrocarbons" leaking from one of eleven different railcars, not owned or leased by BNSF, located on a different track in the yard. The court ordered BNSF to make those eleven cars available for inspection during the discovery stage of the litigation; however, the railroad was unable to do so because three years had passed and they did not own or lease the cars in question.

Following BNSF's inability to produce the cars, the plaintiff asked the court to sanction the railroad. The motion of sanctions was not limited to the missing cars but broadly claimed the railroad had discarded evidence and other misconduct, [without supporting evidence](#).

In the sanctions motion, the plaintiff did not show the product transported in the specified cars on the day of his alleged injury was "hydrocarbons," also known as "natural gas condensate." He argued, however, that he "[unearthed](#)" documentation that BNSF reported to the federal government on six different occasions the unintentional release of "natural gas condensate" around the same time period of his alleged exposure. Plaintiff argued that this proved BNSF had additional documents concerning the exposure that it failed to produce and that the material in the cars must have been "natural gas condensate."

BNSF repeatedly disputed the accuracy of this information and offered to provide testimony in support of its position, but the court refused to allow in the evidence, and instead, wholly accepted and adopted Plaintiff's claims.

Data in the documents relied on by Plaintiff were [later corrected](#) by the **U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration** because a technical glitch in the reporting system inaccurately reported "natural gas condensate" as the technical/trade name for BNSF's submission of the materials involved in the incidents. Despite this fact, the judge [relied on the inaccurate data](#) and denied BNSF's attempt to introduce refuting evidence.

Plaintiff also claimed that BNSF improperly disregarded relevant evidence by not making the 11 railroad cars available for inspection. BNSF argued that, because they were not aware of the involvement of the specific cars in

the accident until nearly three and a half years later and they had no control over their whereabouts, it had acted properly. Judge Dawson, not surprisingly, nevertheless agreed with the plaintiff.

Not only did Judge Dawson [impose sanctions](#), she struck all of BNSF's [liability and causation defenses](#), allowing the case to proceed to trial solely on the issue of damages, and ordered BNSF to pay the plaintiff's attorney's fees and costs. Essentially, BNSF was forced to go to trial with both hands tied behind its back. BNSF was denied the opportunity to present evidence indicating that the plaintiff's condition actually resulted from an [underlying pre-existing](#) condition and natural causes, not the alleged exposure to chemicals. The judge unfairly stripped BNSF of its right to have a jury decide the question of liability, and it simply became a question of how much money the plaintiff should be awarded.

In a result that should surprise no one, the jury returned a [\\$15 million verdict](#). In April 2018, Judge Dawson, again [without a hearing](#) or any responses by Plaintiff to BNSF's post-trial motions, denied BNSF's post-trial motions and [entered final judgment](#) against the company. Three months later, the court [fined](#) BNSF an additional \$4.6 million, in addition to ordering the railroad to pay \$1.1 million of the plaintiff's attorneys' fees and \$89,600 in expenses. The case, *Kowalewski v. BNSF Railway Company*, is now [on appeal](#).

## GOVERNOR MARK DAYTON'S "VETO TRIPLE PLAY"

Minnesota voters sent a strong message in 2016 when they elected a reform-minded, pro-business majority in the state legislature for only the second time since the early 1970's. During the 2017 session, legislators passed several commonsense initiatives long stalled in the state. Regrettably, however, Governor Mark Dayton's ['Veto Triple Play'](#) preserved the status quo in favor of the personal injury bar—a generous supporter of his campaigns.

The measures that Governor Dayton vetoed enjoy widespread support across the country. The "trespass" bill that the Governor vetoed, which merely codified existing law to guard against judicial adoption of an extreme proposal of the [American Law Institute](#) is extraordinary since he is the only governor ever to veto such a measure. By contrast, [24 other governors](#) of both parties have signed such legislation since 2011. He also vetoed bills that would have lowered the prejudgment interest rate and allowed defendants in auto-accident cases to introduce evidence as to whether plaintiffs were wearing their seatbelts.

## STATE HIGH COURT RESTRICTS LIABILITY PROTECTION FOR PROPERTY OWNERS

The **Minnesota Supreme Court** issued a [land-use decision](#) that will have a far-reaching impact on the 'Land of 10,000 Lakes.' In a June 2018 ruling, the court held that a [state law](#) that limits the liability of those who make their property available for recreational use, does not apply to private land unless it broadly open to public. This decision combined with Governor Dayton's veto of the trespass liability reform bill opens Minnesota landowners up to excessive liability.

The case involved a father who owned forty acres of land which he and his immediate family members used to deer hunt. The son was climbing into one of the deer stands built by his father when a nail came loose and he fell to the ground and broke both legs. He then sued his father.

The district court granted summary judgment to the father based on the application of recreational-use immunity. The father met the three criteria—he had given permission, for the use of the land for a recreational purpose, without charge. Minnesota's recreational-use statute was enacted "to encourage and promote the use of ... privately owned lands and waters by the public for beneficial recreational purposes."

In reversing the lower court, the Supreme Court held that the case did not sufficiently involve public use of the land. Even though the father allowed his immediate family members to hunt there, he did not allow extended family members or friends and excluded members of the public through the use of a "no trespassing" sign.

One can quickly see the dangerous precedent this decision sets. Under the court's logic, in order to be provided immunity from a family member's lawsuit, a landowner must post a sign that says, "Open for Public Use" and allow any and all people access to the land.

## MINNESOTA SUPREME COURT REJECTS *DAUBERT*

In November, the **Minnesota Supreme Court** [rejected](#) the proposed amendments to the Rules of Evidence seeking to adopt language that would functionally adopt the *Daubert* rule. These amendments would have brought Minnesota in line with more than two-thirds of the states. The decision solidifies Minnesota's position as an [outlier](#) in its approach to evaluating the admissibility of expert testimony.

[Adoption of these amendments](#), which were consistent with **Federal Rule of Civil Procedure 702**, would have kept “junk science” out of Minnesota courtrooms, and demanded that all expert evidence was based on reliable principles and methods. The *Daubert* standard empowers the trial judge to serve as a gatekeeper, ensuring that proposed expert testimony is the product of reliable scientific methods. The amendments would have brought about greater consistency and discouraged forum shopping.

Despite the **Advisory Committee** recommending similar amendments, this disappointing decision did not come as a surprise. In April 2018, Governor Dayton [appointed longtime Democratic](#) state **Representative Paul Thissen** to replace **Justice David Stras**, who was appointed to the **U.S. Circuit Court of Appeals for the Eighth Circuit**. Thissen is the fifth justice appointed to the Supreme Court by Governor Dayton, and the latest in a long line of partisan selections. The [other two members](#) of the seven-judge court were appointed by **former Governor Tim Pawlenty (R)**.

Thissen is the [first lawmaker](#) to make an immediate jump to the Minnesota Supreme Court, and he was known to support [progressive liability-expanding initiatives](#) during his time in the House.

## END NOTES

- Following the 2018 elections, **Tim Walz (D)** [will replace](#) Governor Mark Dayton (D) and **Keith Ellison (D)** [will replace](#) Lori Swanson (D) as attorney general.



# 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. But unlike the rankings of Hellholes relative to one another, jurisdictions on the **Watch List** are simply presented in alphabetical order.

## COLORADO SUPREME COURT

Liability-expanding decisions by the **Colorado Supreme Court** coupled with the prospects of a pro-plaintiff legislative agenda has created an unfair and unbalanced environment for those who face lawsuits in the Centennial State. The state appears to be moving in a dangerous direction and if it does not correct course, the Colorado Supreme Court or the state may find itself in unwanted company on next year's Judicial Hellholes list.

### LIABILITY EXPANDING DECISIONS

Four Colorado Supreme Court decisions issued in 2018 have exposed insurers to expanded liability, which will lead to higher rates for consumers.

Each of these decisions addressed the responsibility of insurers to promptly pay valid insurance claims. That is a reasonable and common requirement, however, Colorado takes an outlier approach. Under Colorado's bad faith law, a person can recover the amount of the covered benefit that was improperly delayed or denied, plus two times that value (essentially, triple damages), plus attorneys' fees and costs.

On May 21, the **Colorado Supreme Court** ruled that insurers must pay undisputed portions of a claim even when the total value of the claim is disputed. The court's decision in [State Farm v. Fisher](#) imposes an obligation on insurers to promptly make piecemeal payments of medical or other expenses or face a lawsuit. That type of system is inefficient and costly, and it has [already](#) led to a spike on the premiums Colorado drivers pay for insurance.

One week later, the court issued a trio of rulings under the statute. The first subjected insurers to higher damage awards under the statute. In [American Family Mutual Insurance Co. v. Barriga](#), the court held that damages awarded to a plaintiff as a result of a lawsuit alleging an unreasonable delay or denial of a claim should not be reduced by money the insurer later paid the policyholder. The court reasoned that the text of the statute provides no basis for such a reduction and found that "the general rule against double recovery for a single harm" does not apply.

The second ruling expanded the amount of time plaintiffs have to bring a lawsuit against insurers. Several federal judges interpreting Colorado law had [found](#) that the statute was "penal" in nature and therefore subject to a one-year statute of limitations period. In *Rooftop Restoration, Inc. v. American Family Mutual Insurance Co.*, however, the Colorado Supreme Court disagreed, [concluding](#) that while the statutory penalties "clearly carry a punitive element," the one-year period for "[a]ll actions for any penalty or forfeiture of any penal statutes" does not apply to unreasonable delay and denial claims. The decision will allow these types of claims to be filed for two years.

In the third case, [Guarantee Trust Life Ins. Co. v. Estate of Casper](#), the court ruled that since damages and attorneys' fees awarded under the insurance law are not considered penalties, but rather as actual damages, these amounts can be considered when calculating punitive damages. [Colorado law](#) permits recovery of punitive damages in an amount equal to actual damages awarded to a party. Thus, as Colorado lawyers representing policyholders [observed](#): "So, if the standards for punitive damages are met, then the actual damages a policyholder could receive under [the insurance law] — twice the covered benefits plus attorney fees — would be doubled. This means the policyholder could recover four times the covered benefit and twice the attorney fees!"



Colorado lawyers [observe](#) that “[t]aken together, these four decisions suggest that insurers operating in Colorado should not expect favorable decisions in statutory bad-faith cases for the foreseeable future.”

***Colorado lawyers observe that “[t]aken together, these four decisions suggest that insurers operating in Colorado should not expect favorable decisions in statutory bad-faith cases for the foreseeable future.”***

These decisions provide further incentive for gamesmanship that occurs in Colorado. Plaintiffs’ lawyers may submit medical bills or damage information piecemeal to see if they can confuse the insurer or cause a mistake, opening up the potential for a lucrative lawsuit. Greater liability for insurance companies will lead to an increase in rates for consumers as the companies look to absorb the additional costs.

The Colorado Supreme Court did provide a small ray of light for insurers in a year clouded with liability-expanding

rulings. In [Munoz v. American Family Insurance](#), the court ruled that lawyers representing policyholders cannot demand that insurers pay them prejudgment interest, which is calculated at 9% annually, when settling claims. In a September 2018 decision, the court [found](#) that prejudgment interest is only available when a complaint is actually filed, litigated, and results in a damage award.

### CHANGES TO COURT RULES FAVOR PLAINTIFFS

The Colorado Supreme Court has recently skewed court procedures to favor plaintiffs.

An [amended rule](#) of civil procedure, **Rule 16.1 “Simplified Procedure for Civil Actions,”** eliminates most discovery when a plaintiff’s claim for damages is less than \$100,000. While many states are experimenting with discovery in lower-exposure cases, they generally are not as extreme as this Colorado rule.

The rule requires each party to (1) take no more than six hours of deposition testimony, (2) make no more than five requests for production of documents, and (3) only disclose medical records that are related to the injuries and damages claimed; and even then, only for a period of five years prior to the accident. While Rule 16.1 was initially adopted in 2004, prior to September 2018 this system was voluntary and most parties opted out of it.

This rule restricts a defendant’s right to due process by significantly constraining the ability to obtain information necessary to mount a fair defense. The plaintiff also gets to keep the full amount of the verdict if a jury awards more than \$100,000, which is a change from the prior version of the rule.

### A SHIFT ON THE COLORADO SUPREME COURT

[Confirmation](#) of conservative Colorado Supreme Court Justice Allison Eid to the U.S. Court of Appeals for the Tenth Circuit in November 2017 to fill the vacancy left by Justice Neil Gorsuch and her replacement by a pro-plaintiff law professor, **Melissa Hart**, means that liability-expanding precedent may continue to build. However, in May 2018, Governor John Hickenlooper nominated his fifth judge to the seven-member Supreme Court bench after the retirement of **Chief Justice Nancy Rice**. The appointment of **Justice Carlos Armando Samur** was uniformly praised and he is expected to be a solid jurist.

### LEGISLATION TO WATCH FOR IN 2019

Colorado’s legislature has remained balanced in recent years due to its bipartisan composition - with Republicans controlling the Senate and Democrats controlling the House of Representatives and Governor’s mansion. While the trial bar has consistently pushed an aggressive liability-expanding agenda in the House, it has stalled in the Senate. That changed in November 2018, when Democrats [gained](#) the Governor’s seat, obtained control of the Senate, expanded their majority in the House, and took the state attorney general’s office.

The consolidation of power could open the door to liability-expanding laws. Colorado legislators may revive several bills that did not advance during the 2017 session. For example, plaintiffs’ lawyers have repeatedly attacked the state’s limit on noneconomic damages. Before the limits were adopted over 20 years ago, pain and suffering awards were completely subjective and unpredictable, making insurance rates unaffordable. In 2017, the Senate rejected **H.B. 1254**, which would have chipped away at the limit by removing it in cases alleging the wrongful death of a minor. If enacted, this bill would reintroduce uncertainty and have a [“catastrophic impact”](#) on Colorado businesses.

Colorado legislators also are expected to [reintroduce a bill](#) that would create a mandatory family and medical leave insurance program to provide wage-replacement benefits to individuals who take leave from work. This bill creates several “litigation traps” for employers by providing a private right of action if an employer rejects an employee request to take leave, treating such a decision as an “adverse employment action.” The law would permit a court to impose on the employer liquidated damages in the amount equal to the plaintiff’s denied compensation and attorney’s fees and costs.

Additionally, legislators are likely to revive their effort to enact the “**Ban the Box**” bill, which does not allow employers to inquire into a job applicant’s criminal history on an application or indicate that a person with a criminal history is ineligible for a position. If enacted, this bill would open employers up to liability, as negligent hiring claims alleging that an employer knew or should have known that a person was prone to violence or misconduct, have become common in lawsuits. Any “ban the box” legislation should not expose employers to additional liability or create a new private cause of action.

## GEORGIA SUPREME COURT

After emerging on the Watch List for the first time last year, the Georgia Supreme Court further solidified its position as a jurisdiction to watch in 2018. Although it has been spared from being named a full-fledged Judicial Hellhole (for now), liability expanding decisions by the Georgia Supreme Court are becoming the norm, and if the trend continues, it is likely the court will find itself in unwanted company on next year’s Judicial Hellholes list.



### SUPREME COURT ALLOWS INFLAMMATORY EVIDENCE OF CEO COMPENSATION TO BE ADMITTED

On March 15, 2018, the **Georgia Supreme Court** issued its highly anticipated decision in [Chrysler Group LLC v. Walden et al.](#) The court failed to capitalize on an opportunity to restore balance to the state’s judiciary and reign in the [runaway jury verdicts](#) plaguing the system.

The case originated in a trial court in Decatur County in 2016 and ended in the largest wrongful death and pain-and-suffering verdict in Georgia history, totaling a whopping \$150 million.

The award [in this case](#) stemmed from a tragic accident in which a reckless driver rear-ended a family in their Jeep Grand Cherokee as they sat at a stoplight. The impact exploded the gas tank, causing a fire which took the life of a child. At trial the judge allowed the plaintiffs’ attorney to concentrate his ire on the income of Chrysler’s CEO and otherwise suggest that company executives should go to prison instead of the driver who caused the accident.

A predictably enflamed jury found the driver to be 1% at fault and Chrysler to be 99% at fault. Incredibly, an intermediate appellate panel in November 2016 upheld the verdict, which had earlier been substantially lowered by the trial judge.

In upholding the lower court’s decision, the **Georgia Supreme Court** found that relevant evidence as to a witness’ bias, including witness’ compensation, “shall be admissible,” and determinations should be made on case by case basis.

In this case, the court weighed the prejudicial effect of the evidence compared to its probative value and determined that because the plaintiffs alleged that the CEO inserted himself into a federal safety investigation - that ultimately decided Chrysler’s design did not pose an “unreasonable” risk to safety and removed it from the NHTSA recall - the income of Chrysler’s CEO was relevant as it lends to the jury’s evaluation of his credibility.

The court allowed the introduction of this evidence, even after acknowledging that juries may use the evidence to “express biases against big businesses.” As discussed in [ATRA’s amicus brief](#), this decision is likely to encourage further efforts to enflame juries with this kind of unnecessary, distracting evidence.

### GEORGIA SUPREME COURT EXTENDS STATUTE OF LIMITATIONS IN MEDICAL LIABILITY CASES

In addition to allowing inflamed “runaway” verdicts, the **Georgia Supreme Court** also has developed a propensity for issuing liability-expanding decisions.

In late June of 2018, the court [affirmed](#) an appellate decision that improperly extended the statute of limitations in medical liability cases. The court allowed an amended complaint, involving a new defendant, to proceed after the statute of limitations had expired because the additional amendments “related back to the date of the original pleading.”

The plaintiff, Lorraine Thomas, was [injured in a car accident](#) and paramedics used a cervical collar to brace her neck. While at the hospital, doctors did not find any signs or injuries to the vertebrae. Prior to being discharged, a nurse removed her cervical collar. While waiting for her ride, plaintiff became unresponsive and was readmitted. A cervical MRI then revealed she had a spinal fracture.

Plaintiff filed a claim against the hospital and its personnel shortly before the statute of limitations expired. During the discovery phase, and after the statute of limitations had run, Plaintiff’s lawyers learned of a hospital rule that “barred anyone except a doctor from removing a cervical collar.”

The original complaint was filed four days prior to the expiration of the two-year statute of limitations. A little more than a year later, Thomas filed an amended complaint after her lawyers learned of this hospital policy. It added three additional counts of negligence against the hospital including a claim of imputed liability for simple negligence of the nurse who removed the cervical spine collar in violation of the hospital policy.

The employee’s care had not been at issue in the original complaint as it only claimed professional negligence by the hospital. A Fulton County Superior Court Judge denied the plaintiff’s efforts to amend the complaint and the plaintiff appealed.

In an [opinion](#) written by late **Chief Justice Hines**, the **Georgia Supreme Court** held that the new claim against the hospital “related back” to the original complaint. The court analyzed Georgia’s Civil Practice Act and expansively construed it to allow additional amendments when they “relate back to the date of the original pleading.” The court reasoned that Plaintiff’s additional claim occurred at the same time, same place, and was a part of the same incident, despite the fact that the amendment asserted a different actor than the individuals whose conduct was originally questioned.

The court’s decision circumvents the statute of limitations and opens up defendants to indefinite liability. By doing so, it is making laws without the proper authority and overstepping into legislative responsibilities.

### **SUPREME COURT EXPANDS LIABILITY FOR RESTAURANTS IN FOOD POISONING CASES**

In yet another liability-expanding decision, the **Georgia Supreme Court** [revived](#) a food-poisoning case that dated back to June 2014.

The plaintiffs alleged they contracted salmonella poisoning from chicken served by a caterer at a wedding rehearsal dinner. Plaintiffs Joshua and Taylor Patterson tested positive for Salmonella 48 hours after consuming Big Kev’s Barbecue. [The caterer argued](#) that the plaintiffs also consumed other food and beverages that day, including alcohol, desserts, and a meal from a fast food restaurant.

The Court of Appeals affirmed the trial court’s decision to grant summary judgment to the defendant, reasonably holding that in food poisoning cases based solely on circumstantial evidence, the plaintiff must supply additional evidence to show that the reason he or she became ill was due to the “acts or omissions by the defendant, to the exclusion of all other reasonable theories.”

Surprisingly, in an unanimous [opinion](#) written by **Justice Michael Boggs**, the **Georgia Supreme Court** [stated](#) that over the years there has been a “mistaken impression that food poisoning cases ‘are a unique species of negligence cases’ imposing a heavier burden upon the plaintiff to show proximate cause than that generally required.” Instead, the court reversed the lower court’s dismissal and returned the case for trial.

### **END NOTES**

- It’s not surprising to note that the **Georgia Supreme Court** chose to honor trial lawyer, **Joel Wooten**, of **Butler Wooten & Peak**, with the Amicus Curiae award.
- This special honor was presented to Wooten during a meeting of the Columbus Bar Association by three Ga. Supreme Court Justices, stating that he had a “profound impact on the State of Georgia and its legal system.”

Butler, Wooten & Peak, which Joel Wooten is a founding partner of, has been called “[among the most distinguished firms of trial lawyers in the United States.](#)”

- Wooten has been [lead counsel](#) in a number of prominent class action, trucking, product liability, and motor vehicle cases.
- In August, **Governor Nathan Deal (R)** appointed **Sarah Hawkins Warren** to fill Justice Britt Grant’s vacancy on the Georgia Supreme Court. **Justice Britt Grant** was [confirmed](#) by a narrow margin in late July to serve on the **11th U.S. Circuit Court of Appeals**. Justice Sarah Warren will become the youngest member of the nine-justice court and shares a [similar background](#) to that of Judge Grant.

## MONTANA SUPREME COURT

The Montana Supreme Court’s penchant for expanding liability and limiting defenses, and ongoing uncertainty regarding the validity of the state’s statutory limit on punitive damages has once again landed the court on the Watch List.

### AN OPPORTUNITY FOR LITIGATION

In *Atlantic Richfield Co. v. Montana Second Judicial District Court*, the **Montana Supreme Court** allowed a state environmental lawsuit seeking cleanup remedies that conflict with an ongoing federally-ordered cleanup plan.

In 2008, a group of private property owners in Opportunity, Montana sued Atlantic Richfield, alleging that a copper smelter, which had closed in 1980, had contaminated their land. After being shut down, the Anaconda Smelter site was placed on U.S. Environmental Protection Agency’s [priority list](#) for Superfund cleanups pursuant to the federal **Comprehensive Environmental Response, Compensation, and Liability Act** (“CERCLA”).

The EPA’s cleanup began in 1988, and although it is still ongoing, the property owners filed a lawsuit asserting claims for trespass, nuisance, and strict liability, and seeking restoration damages. They hired their own experts who recommended the removal of the top two feet of soil and the installation of permeable walls to remove arsenic from the groundwater, among other recommendations that went well beyond what EPA had found necessary and required.

After years of litigation, the company filed a writ of supervisory control with the Montana Supreme Court seeking reversal of trial court orders that allowed claims seeking restoration damages to continue. The restoration claims, however, were preempted by federal law because they directly conflicted with the CERCLA cleanup plan, Atlantic Richfield argued.

As federal appellate courts have [explained](#), “Congress concluded that the need for [swift execution of CERCLA cleanup plans] was paramount, and that peripheral disputes, including those over what measures actually are necessary to clean-up the site and remove the hazard, may not be brought while the cleanup is in progress.”

Nonetheless, in its split [decision](#), the **Montana Supreme Court** held that the property owners’ claims were not a challenge to the CERCLA cleanup plan and that state courts are free to impose additional liability on companies that are complying with the federal effort. It [allows](#) a state court to view the EPA’s generally binding recommendations as suggestions, and require companies to take actions that the EPA may have specifically considered and rejected.

With this ruling, the **Montana Supreme Court** overstepped into circumstances governed by federal law. Preemption is in place to prevent duplicative or inhibitive actions by a state that may interfere with a cleanup effort that is more properly handled by the federal government.

**Justice Laurie McKinnon** pointed out in her dissenting opinion that “[a]n action constitutes a challenge [to a CERCLA cleanup] if it is related to the goals of the cleanup.” As the property owners’ proposed restoration plan would impose different requirements than the EPA plan, it was “plainly contrary” to the federal cleanup, and directly interfered with the ongoing project.





In February 2018, the company filed a petition for writ of certiorari with the **U.S. Supreme Court**, urging the Court to give clear guidance on this important issue. As one group that filed an [amicus brief](#) observed, “Just as it would not let a jury tinker with a space launch, Congress would not let a jury reorganize a major environmental-restoration project.” As of publication, the petition remains pending as the Court has invited the Solicitor General to express the federal government position on the case.

The Montana Supreme Court’s decision turns the law of preemption upside down and threatens every company that works in good faith with the EPA on clean-up projects with new lawsuits that would require them to spend millions of dollars on top of the work they have already completed.

### **LIMITS ON TRADITIONAL DEFENSES**

The Montana courts and legislature have made it easier for plaintiffs to win product liability cases by limiting the few defenses available to those who are sued.

The Montana [product liability statute](#) only recognizes two defenses to a product liability action which preclude liability when a person has misused a product in a way that was unforeseeable or where a person used a product despite an obvious defect. The **Montana Supreme Court** has interpreted these defenses so narrowly that they rarely come into play.

For example, after a car accident, a plaintiff claimed the design of her Mazda’s seatbelt caused her injuries. As it turns out, the plaintiff had worn the seatbelt incorrectly. Instead of putting the shoulder belt over her shoulder, she ran it under her arm. A jury ruled in favor of the automaker at trial, but the **U.S. Court of Appeals for the Ninth Circuit** reversed in [Speaks v. Mazda Motor Corp.](#), finding the district court judge needed to instruct the jury that a person’s misuse of a product is not a defense under Montana product liability law if the product is misused in a way that is foreseeable to a manufacturer.

As **District Court Judge Donald Malloy** [observed](#) in May 2018 when the case was remanded from the Ninth Circuit for a new trial, “Here is the problem: we are asking seven lay people to decide if the design of the Mazda seat restraint system is defective” but “Montana law puts the question of misuse and/or negligence by the plaintiff off limits...”. As a result, Judge Malloy noted, “the confusion for the jury will be trying to sort out whether the design of the seatbelt is defective because of ‘fit’ while ignoring the plaintiff’s conduct in positioning the seatbelt in question, or in how her body was positioned...” Given the narrow interpretation of what evidence is permissible to defend a product liability claim, the district court recognized that a manufacturer’s “ability to defend itself in this type of action is severely circumscribed by Montana law.”

Further, legislative efforts to allow juries to allocate fault among all who are responsible for an injury faces court-created obstacles, including **Montana Supreme Court** [rulings finding](#) certain aspects of Montana’s comparative fault statute unconstitutional.

### **INCONSISTENT APPLICATION OF U.S. SUPREME COURT PRECEDENT**

After having its decision overturned by the **U.S. Supreme Court** in 2017 in *BNSF Railway Co. v. Tyrrell*, the **Montana Supreme Court** has signaled that it may be ready to apply constitutional principles that prevent plaintiffs’ lawyers from filing lawsuits in Montana that lack a connection to the state.

In *DeLeon v. BNSF Railway Co.*, the Court was faced with a classic case of forum shopping. A worker from Missouri and two workers from Texas filed lawsuits against the railroad in Yellowstone County, Montana to recover for on-the-job injuries that happened in their home states. While BNSF has track in Montana, like anywhere else, it is incorporated in Delaware and headquartered in Texas.

The plaintiffs chose to file in Montana despite a complete lack of connection between the case and the state, presumably because their lawyers believed the chance of success is greater in Montana state courts. They asked the court to find jurisdiction over BNSF based on the railroad’s registration to do business in the state combined with its operations in the state. The **U.S. Supreme Court** has [consistently ruled](#), however, that a state court can only exercise jurisdiction over a company if there is a specific connection to the case or the company is “essentially at home” in that state, meaning it is incorporated or has its principal place of business there.

The **Montana Supreme Court** appropriately [ruled](#) that a company does not consent to be sued in a state for any purpose simply by registering to do business there. To its credit, the court found that “extending general personal jurisdiction over all foreign corporations that registered to do business in Montana and subsequently conducted in-state business activities would extend our exercise of general personal jurisdiction beyond the narrow limits recently articulated by the Supreme Court” and is “inconsistent with due process.”

### **GUIDANCE NEEDED ON CONSTITUTIONALITY OF PUNITIVE DAMAGE LIMIT**

The **Montana Supreme Court** has avoided opportunities to decide the constitutionality of the state’s statutory limit on punitive damages, which permits awards of up to \$10 million or 3% of the defendant’s net worth. The court ducked the issue back in 2015 when it [ruled](#) that Michigan law applied and did not allow for punitive damages in that case. For that reason, the court did not rule on the constitutionality of Montana’s cap.

Meanwhile, Montana trial court judges are refusing to apply the statutory limit, [finding](#) it violates the right to jury trial or due process. This most recently occurred in Montana’s **Twentieth Judicial District Court** in Lake County in March 2018. In that case, *TCH Builders & Remodeling v. Elements of Construction, Inc.*, **Judge James Manley** found the limit on punitive damages “unconstitutional and will not be enforced,” following the lead of three other Montana trial courts. These rulings are contrary to courts in the vast majority of states, which have recognized that setting constraints on punishment is firmly within the legislature’s policymaking authority.

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

### **END NOTES**

- Montana politics have long transcended traditional party lines, yet it is still surprising that a state that places so much value on the free market has repeatedly ended up on the Watch List for expanding liability and hurting businesses. Maybe it has something to do with the fact that the state’s [law school](#) is named after a well-known Montana [personal injury attorney](#), or the fact that the school’s torts and trial practice is being taught by the former president of the Montana Trial Lawyers Association. However, it is most likely that “Big Sky Country” is simply not as pro-business as previously believed; a sad fact that hopefully serves as a catalyst for civil justice reform.

## **NEWPORT NEWS, VIRGINIA**

Despite appearing as a frequent flyer in [past editions](#) of this report, owing to its evidentiary double standards, unsound legal rulings and lack of transparency—and thereby, not surprisingly, yielding a higher winning percentage to claimants than in any other place in the country—Newport News, Virginia is perhaps most notable this year for the lack of verdicts emanating from it. Indeed, the last asbestos case to go to trial there was *Parker v. John Crane, Inc.* in early 2016, as noted in last year’s [report](#). And because there have been no trials since, it’s hard to know whether the problems and inequities that have manifested themselves in the past will persist.

Instead, the cases with the most activity this year are those proceeding in the federal court in Newport News, in which both plaintiffs and defendants (the latter group through removing cases to that court) have sought to litigate these claims. The sole asbestos case filed by a plaintiff in federal court appears to be in response to a maritime law case decided in the **Newport News Circuit Court**, holding that application of Virginia law’s “single disease” rule was consistent with maritime principles. Thus, the state trial court dismissed the suit as time-barred under the statute of limitations. In the plaintiffs’ federal suit, the trial judge reached a different interpretation of maritime law than the state court in the earlier case. That case is still pending in the federal district court.



As was emphasized in last year's report, a trilogy of decisions over the last two years from the **U.S. Court of Appeals for the Fourth Circuit** have carved a path for defendants confronted with claims for failure to warn of asbestos hazards to defend those suits in federal court, when the work in question was performed under contract with the federal government. Companies in the litigation are turning to these decisions and seeking removal of these cases to federal court. Those removals are under review in the U.S. District Court. For all of these reasons, Newport News remains a jurisdiction to watch.

## OHIO EIGHTH DISTRICT COURT OF APPEALS— CUYAHOGA COUNTY

The **Ohio Eighth District Court of Appeals in Cuyahoga County** has emerged as a “Watch List” jurisdiction due to its reputation for handing down large damage awards and being a “haven” for class action lawsuits. The district has established a concerning pattern of issuing unbalanced plaintiff-friendly decisions, needing to be overturned multiple times by the **Ohio Supreme Court**. The court has become an outlier in the state, especially in light of the [notable tort reform](#) enacted by the **Ohio General Assembly**.



### COURT SETS LOW BAR FOR THE AWARDING OF PUNITIVE DAMAGES

Recently, the court set a dangerous precedent by allowing the barest of facts to support a punitive damages award. In [Rieger v. Giant Eagle](#), the court upheld a punitive damages award of two times the amount of compensatory damages, even after finding the defendant's conduct not to be reprehensible, the standard for punitive damages in the state.

Plaintiff Barbara Rieger was injured at a Giant Eagle grocery store in Cuyahoga County by a motorized scooter driven by another shopper. Giant Eagle—like many grocery stores—make scooters available for their disabled shoppers. The plaintiff alleged that Giant Eagle had knowledge of prior accidents and did not properly train or screen their drivers.

At trial, the jury awarded Rieger \$1,198,000 in punitive damages and \$121,000 in compensatory damages. While the Eighth District modified the punitive damages award to \$242,000, after properly applying the state's statutory limit on punitive damages, the most chilling part of the decision was the fact that the court allowed punitive damages to be awarded at all. The court [stated](#) that it did not find the conduct “reprehensible” because the plaintiff “did not make any reference as to what Giant Eagle could have done differently to prevent future incidents.” This type of analysis will open the floodgates of using negligence cases to gain punitive damage windfalls.

The **Ohio Supreme Court** [has accepted jurisdiction](#) on the question of punitive damages.

### THE EIGHTH DISTRICT ADOPTS “WAIT AND SEE” APPROACH TO CLASS CERTIFICATION

Another significant **Eighth District** appeal currently pending in the **Ohio Supreme Court** could have a large impact on the future of class action lawsuits in the state. [Scatterfield v. Ameritech](#) is a class action lawsuit out of **Cuyahoga County** with roots that go back nearly 25 years. It involves various claims under public utilities law regarding cell phones; however, the key contention is over the assertion that class approval was appropriately granted by the Eighth District.

In upholding class certification, the **Eighth District** adopted a “wait and see” approach, in clear conflict to the U.S. Supreme Court's standard in [Comcast](#) that established plaintiffs need to demonstrate that issues are “capable of measurement on a class wide basis.”

Rather than digging deeper into the underlying class action issues during the early stages of litigation, the **Eighth District** instructed the courts to take plaintiffs' word as true, and fix the class later if need be. The “wait and

see” method costs both parties time and money and is not in the best interest of judicial economy. It will require increased litigation at every level. A class action is to be the exception to the general rule of judicial preference of litigation between discrete parties. If the innovative approach to class action litigation adopted here by courts in Cuyahoga County is left to stand—perhaps class actions will be less exception and more new-normal.

This is not the first time the **Ohio Supreme Court** has been asked to overturn an **Eighth District** class certification case. The Ohio Supreme Court has a history of doing so. The first example was in [Cullen v. State Farm](#), when the Eighth District upheld class certification even after the rigorous analysis showed that individual questions predominated over issues common to the class. The high court again overturned the **Eighth District** in 2013 in [Felix v. Ganley Chevrolet, Inc.](#), ruling that the Eighth District had improperly upheld class certification on an overly broad class of litigants whose damages widely differed. Class members lacked the key determination of injury as required under Ohio law.

Although the **Ohio Supreme Court** has continuously restored fairness into the legal system by reversing the **Eighth District**—particularly in class-action litigation—the state’s high court has repeatedly stated that its job is not one of “error-fixing.” With the large amount of cases that are brought on appeal, it is impossible that all of them will be granted discretionary review. The onus falls on the **Eighth District** to realign itself as a fair and balanced court and eliminate its reputation as being a plaintiff-friendly “haven” for class action litigation. If the court does not act soon, it may find itself in unwelcomed company next year as a full-blown Judicial Hellhole.

## PENNSYLVANIA SUPREME COURT

In recent years, the Judicial Hellholes report has given Pennsylvania credit for improving its litigation environment by instituting procedural safeguards that made it less welcoming to out-of-state plaintiffs. But now, those who do business and face lawsuits in the state are concerned that the **Pennsylvania Supreme Court** may take a liability-expanding turn. Recent rulings also indicate that Pennsylvania’s intermediate appellate courts have swung courtroom doors open to out-of-state plaintiffs whose claims have no connection to the state. As key cases reach the state high court, it will have a choice as to whether to adhere to traditional principles of tort liability and follow statutory law, or accept the plaintiffs’ bar’s invitation to expand liability and welcome more lawsuits to Pennsylvania.



### OPENING THE DOOR TO OUT-OF-STATE CONSUMER LAWSUITS

Historically, Pennsylvania’s **Unfair Trade Practices and Consumer Protection Law** (“**UTCPL**”) was limited to Pennsylvania plaintiffs who alleged wrongful acts that had a “sufficient nexus” to Pennsylvania. In February 2018, however, the **Pennsylvania Supreme Court** unanimously overturned years of precedent and ruled that non-Pennsylvanians could sue Pennsylvania-based businesses for out-of-state transactions no matter how tenuous their relationship to the state.

In [Danganan v. Guardian Protection Services](#), the plaintiff sued a Pennsylvania-based home security company

*The ruling “may encourage these plaintiffs to bring suit in Pennsylvania rather than their home states or in the state where the acts occurred in the hopes that courts will apply the UTCPL. While that may seem like a hassle, the broad remedies of the UTCPL, including treble damages and attorneys’ fees, could make it a worthwhile effort for plaintiffs and their counsel.”*

for allegedly continuing to bill him for his Washington D.C. home security system after he moved to California. The justices [decided](#) the language of the UTCPL evidenced no geographic or residency requirement, despite over ten years of precedent saying otherwise. In the end, the entire **Pennsylvania Supreme Court** sided with the out-of-state plaintiff to the detriment of Pennsylvania businesses.

As one Philadelphia attorney [observed](#), the ruling “may encourage these plaintiffs to bring suit in Pennsylvania rather than their home states or in the state where the acts occurred in the hopes that courts will apply the UTPCPL.” “While that may seem like a hassle, the broad remedies of the UTPCPL, including treble damages and attorneys’ fees, could make it a worthwhile effort for plaintiffs and their counsel,” he noted.

## KEY RULINGS EXPECTED FROM PA SUPREME COURT IN 2019

### WILL THE COURT RECOGNIZE THE MODERN REALITIES OF LITIGATION AND MEDIA?

Speaking of anti-business, a Pennsylvania appellate court recently adopted one of the most restrictive views of the attorney-client privilege in the country.

In *BouSamra v. Excela Health*, an intermediate appellate court [ruled](#) that a company waived the attorney client privilege by forwarding a communication between inside and outside counsel to a public relations consultant who was retained to develop a media plan and plan a press conference regarding its defense in a defamation action. The court failed to understand the relationship between lawyering and communications in a modern business and the public interest served by respecting the confidentiality of such communications.

In January 2018, the **Pennsylvania Supreme Court** [granted](#) review. ATRA filed an amicus curiae [brief](#) arguing that a privileged document should not lose its protections merely because a general counsel, or other lawyer for a company, shares that document with non-lawyers responsible for working with the company to navigate a multi-dimensional legal issue. The court [heard](#) oral argument in October 2018.

### WILL THE COURT EXPAND MEDICAL LIABILITY?

Another case [argued](#) before the **Pennsylvania Supreme Court** that month will decide whether plaintiffs can file medical malpractice claims long after the period set by the legislature to do so has ended.

In *Yanakos v. University of Pittsburgh Medical Center*, plaintiffs have urged the Supreme Court to adopt an exception to the state’s seven-year time limit to bring medical liability claims. There, the plaintiffs filed a lawsuit twelve years after a failed liver transplant, and said that they had not discovered the patient’s medical condition until after the seven-year period expired. While the legislature carved out other exceptions to the statutory period, and had not done so for this situation, the plaintiffs asked the court to find the statute unconstitutional and apply its own exception.

The intermediate appellate court properly [rejected](#) this invitation, finding the seven-year statute of repose is reasonable and in line with the government’s interest in prompt determinations of whether there was medical negligence. Creating an exception and allowing an extended time period, the court ruled, “would expose health care providers to further liability, undermining the equally legitimate government interest of keeping medical professional liability insurance affordable for the benefit of citizens of this Commonwealth.”

### WILL THE COURT REQUIRE DEFENDANTS TO PAY MORE THAN THEIR FAIR SHARE IN ASBESTOS AND OTHER PRODUCT LIABILITY CASES?

On July 21, 2018, the **Pennsylvania Supreme Court** [granted review](#) of a Superior Court decision holding that a state law that imposes liability in proportion to a defendant’s level of responsibility for an injury, known as the **Fair Share Act**, applies to asbestos cases.

The **Superior Court** had [reversed](#) a **Philadelphia Court of Common Pleas** ruling that exempted asbestos cases from the [same rules](#) for allocating fault that apply in other cases. Without such a rule, a single business that is found to have contributed to a plaintiff’s exposure to asbestos could end up having to pay the entire damage award, even if the plaintiff’s exposure was largely caused by others. Under the Fair Share Act, a defendant can be required to pay the full award only if found more than 60% responsible. In addition, the ruling could more broadly exempt other strict product liability cases from the Fair Share Act.

The Supreme Court also will have the opportunity to require plaintiffs to provide the court with any evidence of bankruptcy trust claims or settlements. The Superior Court appropriately held that when a jury apportions fault



among potentially responsible parties, the Fair Share Act requires that they consider evidence of any settlements by the plaintiffs with bankrupt entities. Ideally, the Supreme Court should require plaintiffs to provide all evidence of past and future bankruptcy trust claims and settlements, or consider them waived. If the high court does not do so, or worse, blindfolds juries from considering such settlements, passing a law to provide transparency in claims made against asbestos-related bankruptcy trusts, like **H.B. 238**, will become even more critical.

As of publication, this [closely-watched](#) case, *Roverano v. John Crane, Inc.*, is [pending](#) before the Pennsylvania Supreme Court with no date yet set for oral argument.

## PENNSYLVANIA APPELLATE COURTS ARE HESITANT TO CURB FORUM SHOPPING

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](#), 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.

The first opportunity for a Pennsylvania Superior Court to properly apply the BMS ruling on claims brought by out-of-state plaintiffs was in [Hammons v. Ethicon](#). The facts were similar to BMS—an out-of-state plaintiff brought suit in Philadelphia against Ethicon and its parent company Johnson & Johnson, neither of which are incorporated or headquartered in Pennsylvania. The plaintiff did not receive medical treatment in Pennsylvania, and all of the relevant actions related to her claim alleging a pelvic mesh device was defective took place where she lived, Indiana, or where Ethicon is based, New Jersey.

The only connection between the parties and Pennsylvania was that Ethicon had contracted with a Pennsylvania company to “design, test, and manufacture” the mesh and the plaintiff decided it would be a more favorable jurisdiction. Doing business with third parties does not automatically subject an out-of-state business to personal jurisdiction where that company is located unless there is a specific connection between the forum and the injury. The U.S. Supreme Court in BMS held that the “bare” decision to contract with a California company to distribute the drug nationally did not provide a sufficient basis for jurisdiction in California. As in BMS, Ethicon's link to a Pennsylvania company should not have provided a sufficient basis for a Pennsylvania court to decide the case.

Nevertheless, in June 2018, the Superior Court [declined to throw out](#) a \$12.8 million judgment reached in Philadelphia's mass tort program in late 2015. The court never explained how a third party's actions specifically contributed to the plaintiff's specific injury. Ethicon filed a [petition for appeal](#) to the **Pennsylvania Supreme Court** in September 2018, which, as of publication, is pending.

A few days after the Hammons decision, another Superior Court panel came down with a ruling that was even more extreme. In *Webb-Benjamin, LLC v. International Rug Group, LLC*, a dispute arose over commissions from a furniture sale that took place in Canada. After the event, the nonresident defendant registered to do business in Pennsylvania as a foreign corporation. The panel held that if a corporation registers to do business in Pennsylvania, it consents to personal jurisdiction in the state.

This is not the law of the land. As the **U.S. Supreme Court** indicated in *Daimler AG*, “[a] corporation that operates in many places can scarcely be deemed at home for purposes of general jurisdiction in all of them; otherwise, ‘at home’ would be synonymous with ‘doing business.’” The Court has repeatedly stated that conducting “continuous and substantial” business in a state is not enough to render a corporation “at home” in that state, subjecting it to the jurisdiction of its courts. Under the Superior Court's reasoning, however, any company doing business in a state has consented to be sued there. Observers question whether the ill-reasoned decision, which is contrary to “almost every other appellate court in the country,” indicates that Pennsylvania has gone off [“the jurisdictional deep end.”](#)

While there is hope the tide of jurisdictional overreach will subside, ATRA urges the Pennsylvania Supreme Court to show leadership by giving clear guidance to lower courts to end litigation tourism.

## A BIT OF GOOD NEWS FOR THE KEYSTONE STATE

Last year, this report predicted that problems would arise from the Pennsylvania Supreme Court's approach to bad faith lawsuits, where plaintiffs challenge the timeliness or manner in which an insurance claim is paid. While the court's 2017 [decision](#) in *Rancosky v. Washington National Insurance Co.* "could have been worse," its failure to explicitly find that "bad faith" claims always require an insurer to act with "bad faith" helped land the Pennsylvania Supreme Court on the [2017-2018 Watch List](#).

Fortunately, a state appellate court drew the line in a bad faith claim in April 2018 when it [reversed](#) a \$21 million judgment in *Berg v. Nationwide Mutual Insurance*. A divided three-judge panel found that the trial court judge who imposed the monstrous award, **Judge Jeffrey Sprecher**, acted with clear bias towards the insurance industry. There was no evidence, the appellate court found, that Nationwide engaged in bad faith when it asked an auto shop to repair a Jeep Grand Cherokee that had been damaged in an accident rather than write it off as a total loss.

When Judge Sprecher reached the multimillion-dollar bad faith verdict he issued an opinion that spanned more than 100 pages. Rather than focus on whether Nationwide committed bad faith, which was the issue before the court, the Berks County judge commented at length on the profitability and power of insurance companies, and their "massive assets." Lawyers representing the insurer argued on appeal that Judge Sprecher had gone on a "[tantrum](#)" against the carrier, assailing everything from its litigation tactics to its advertising practices.

The appellate court found that "[t]he relative power and wealth of the insurer as compared to the insured is not relevant to whether bad faith occurred in a particular case, unless some factual basis can be shown that the insurer used its wealth to engage in bad faith." To recover, the insured must show bad faith, the court reminded, and did not do so. The appellate court's ruling not only threw out the award of \$18 million in punitive damages and \$3 million in attorneys' fees, but entered judgment for the insurer.

The plaintiff filed a [petition for appeal](#) with the **Pennsylvania Supreme Court** in September 2018, which will continue litigation over a car accident in which no one was hurt that began a decade ago. As of publication, the high court has not decided whether to review the appellate court's decision.

## WEST VIRGINIA SUPREME COURT OF APPEALS

Since 2015, West Virginia lawmakers have made civil justice reform a key priority, enacting several pieces of affirmative legislation. Once a perennial Judicial Hellhole, the state has seen its status improve, as it dropped from the Hellholes list to the Watch List. While the hope was last year would be the last time the jurisdiction would be featured in the report, the **Supreme Court of Appeals of West Virginia** plunged into chaos in 2018.

### A COURT IN CHAOS

If there was ever a question of whether West Virginia needs an intermediate appellate court, like the vast majority of other states, that was resolved this year, as the state's high court plunged into turmoil leaving the availability of appellate review uncertain.

In an unprecedented move, West Virginia lawmakers voted to recommend the impeachment of all sitting members of the state's highest court. West Virginia's Supreme Court of Appeals is comprised of five justices, each elected to 12-year terms. The justices were charged with "[unnecessary and lavish](#)" spending of taxpayer dollars, maladministration, corruption and neglect of duty.

The Court began to unravel in late June when **Justice Allen Loughry** was [suspended](#) without pay following a federal indictment that includes charges that he spent \$363,000 to remodel his office, placed a historic desk in his home, and used a state vehicle for personal use. In October, he was [convicted](#) of 11 of 22 federal charges against him. Justice Loughry [resigned in November](#), one day before his impeachment trial was scheduled to begin.



Justice Menis Ketchum resigned from the court in late July, and subsequently plead [guilty](#) to a single count of wire fraud relating to his private use of state vehicles, following a federal investigation. Justice Robin Jean Davis [resigned](#) following the Houses' vote of impeachment in mid-August, stating that she wanted to "free up her seat" for the upcoming elections.

The Senate [rejected](#) a single Article of Impeachment against Justice Beth Walker by a 32-1 vote in early October, issuing instead a reprimand.

Soon after, the Supreme Court of Appeals, temporarily populated with lower court judges, [blocked](#) the impeachment trial of Chief Justice Margaret Workman, finding the Senate had not provided the justice with due process and had improperly considered issues that only the judiciary can oversee.

Later that month, Justice Walker was selected by the other members of the court as its [new chief justice](#).

Meanwhile, Governor Jim Justice [appointed](#) U.S. Representative Evan Jenkins, and previous House of Delegates Speaker Tim Armstead, to serve as interim Justices on the West Virginia Supreme Court of Appeals in late August, filling the vacancies created by the resignation of Justices Ketchum and Davis. Jenkins and Armstead [were formally elected](#) to the court by voters in the 2018 November election.

The future is uncertain for the Supreme Court of Appeals, as the composition of the court will be dramatically different in 2019. West Virginia is one of only nine states in the country that does not have an intermediate appellate court. Therefore, the West Virginia Supreme Court of Appeals is the only appellate court in the state, making it that much more important for the court to provide balance and fairness.

Legislation to establish an intermediate appellate court has [repeatedly](#) fallen short of enactment. A 2018 proposal [passed](#) the Senate by a 23-11 vote, but the measure stalled in the House. Although most West Virginians support establishing an intermediate appellate court, some members of the state's high court and the plaintiffs' bar have opposed doing so. The main sticking point was the [cost](#) of the new court for the state, which, of course, is ironic given the allegations regarding the justice's own wasteful spending. Legislative leaders viewed the high court's estimate of establishing an intermediate appellate court as "comical."

Now some of the justices that opposed the change, including [Justices Davis](#) and [Ketchum](#) and are gone, and [Justice Workman](#) is hanging on by a thread. After the events of 2018, the need for an intermediate appellate court has never been so obvious.

## A LOW BAR FOR CLASS CERTIFICATION

Before it fell into disarray, the West Virginia Supreme Court of Appeals issued a disappointing class certification decision that rejects U.S. Supreme Court precedent and encourages plaintiffs' lawyers from all over the country to flock to West Virginia courts to file class action lawsuits.

Once a class is certified, a settlement usually follows because the risks for businesses are too great to take the case to trial, making the issue of class certification vital. The court has adopted a broad interpretation of class certification rules, signaling almost all classes will be certified by West Virginia courts.

The high court's proclivity for class certification leniency first began in 2003, when the court held that a [common issue](#) of law or fact in a case is often enough to certify it as class action. The standard for class certification is a "[rubber stamp](#)," according to lawyers representing defendants in West Virginia courts.

Over the last decade, the U.S. Supreme Court has [tightened](#) the standard for class certification in federal courts.

*Defense lawyers say the state's "hyper-liberal standard for certification makes us an outlier in comparison to how class certification is dealt with in the federal courts and in other state courts."*

In a [memorandum decision](#) dated May 21, 2018, however, the West Virginia Supreme Court of Appeals applied a low bar for certification. In a case involving whether U-Haul failed to disclose to customers an "environmental fee" that funded the company's sustainability program, the

court found that the threshold to show commonality is "not high," and a common nucleus of operative fact or law is sufficient. U-Haul had argued that individual issues outweighed collective ones because evidence needed to show reliance, causation, and damages would vary from person to person.

Defense lawyers [say](#) the state’s “hyper-liberal standard for certification makes us an outlier in comparison to how class certification is dealt with in the federal courts and in other state courts.” The decision increases the likelihood that businesses will face meritless class action lawsuits in West Virginia courts.

### **MOST LEGAL REFORM PROPOSALS FAILED IN 2018**

In addition to the legislature failing to establish an intermediate appellate court, two other long-needed legal reform proposals did not cross finish line in the 2018 session.

Legislation [introduced](#), but not enacted, included a commonsense [proposal](#) that would have allowed jurors in West Virginia to learn whether or not people involved in car accidents were wearing their seatbelts. West Virginia law currently allows the court to reduce a plaintiff’s damages by [no more than 5%](#) for not wearing a seatbelt, even though wearing a seatbelt is often the difference between those who live and survive a car accident and is required by law. Keeping this law in place blindfolds the jury from fairly considering irresponsible behavior, as it would in any other personal injury case.

West Virginia has also failed to address its status as an outlier in allowing plaintiffs who believe they were exposed to a hazardous substance to collect cash awards for medical monitoring without a present physical injury. Legislation is needed to rein in a 1999 West Virginia Supreme Court of Appeals [decision](#) that allows such claims even if the amount of exposure to a toxic substance is insufficient to cause injury and regardless of whether there is a medical benefit to early detection of a disease. While some other states allow claims seeking medical monitoring, the requirements for doing so are tightly circumscribed and there are safeguards requiring any money spent to actually go toward medical tests. In West Virginia, plaintiffs can take the quick cash. The **West Virginia Senate** [unanimously passed](#) legislation to bring West Virginia’s medical monitoring law in line with other states in its 2017 session, but the proposal was not considered in 2018.

## **GOOD NEWS**

### **LEGISLATURE CURBS LITIGATION TOURISM**

While several other legal reform measures failed in the 2018 session, the West Virginia legislature deserves recognition for [adopting](#) a law that should curb litigation tourism to the Mountain State.

The legislature amended the state’s venue statute to provide that “a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state.” In addition, the law provides that where a case includes multiple plaintiffs, “each plaintiff must independently establish proper venue.” This provision prevents plaintiffs’ lawyers from circumventing the venue law by naming one West Virginia resident as a plaintiff and joining scores of people who do not live in West Virginia and whose claims have no connection to the state.

The legislation, which was signed into law by **Governor Jim Justice (R)**, applies to all civil actions filed on or after July 1, 2018. A previous attempt to address forum shopping was short lived, however, as the **West Virginia Supreme Court of Appeals** [invalidated](#) the law. This time, however, the law is further supported by a bevy of recent U.S. Supreme Court [rulings](#) finding it is perfectly proper, if not [constitutionally required](#), to consider whether the person filing a lawsuit in West Virginia is a resident of the state or has brought a claim there seeking favorable treatment.

### **WEST VIRGINIA REJECTS INNOVATOR LIABILITY**

The **West Virginia** Supreme Court of Appeals issued a [long-awaited opinion](#) rejecting “innovator liability” in May 2017.

As described earlier in this report, innovator liability seeks to hold brand name drug manufacturers liable for harm caused by products manufactured by generic companies. It has been pushed by plaintiffs’ lawyers around the country who seek to turn centuries of settled tort law on its head, subjecting original product designers or manufacturers to liability not only for harm allegedly caused by the products they made or sold, but also for harm from similar products made or sold by their competitors.

In *McNair v. Johnson & Johnson*, West Virginia's high court joined [at least 36 other courts](#), including six federal courts and various state courts, in rejecting this novel theory. The court found that innovator liability is inconsistent with both West Virginia tort law principles and public policy. The court [recognized](#) that the premise of product liability is to "place[s] responsibility for the harm caused by a product on the party who profits from its manufacture and sale." "Because the brand manufacturer did not place the generic product on the market," the court recognized that "it cannot spread the cost of compensating generic consumers by including the cost of insurance or judgments as part of the product's price tag." Innovator liability "would sever the connection between risk and reward ... that forms the basis of products liability law."

***The court agreed, observing that "[i]f brand manufacturers become liable for injuries allegedly caused by generic drugs, significant litigation costs would be added to the price of new drugs to the disadvantage of consumers."***

In addition, as ATRA argued in an [amicus brief](#), adopting innovator liability would unfairly subject brand name companies to unpredictable and potentially immense liability, stifling innovation and undermining public health.

The court agreed, [observing](#) that "[i]f brand manufacturers become liable for injuries allegedly caused by generic drugs, significant litigation costs would be added to the price of new drugs to the disadvantage of consumers." "[T]he increase in litigation against brand manufacturers," the court found, "could stifle the development of new drugs, which would have negative health consequences for society."



# DISHONORABLE MENTIONS

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

## AMERICAN LAW INSTITUTE ADOPTS TROUBLESOME INSURANCE RESTATEMENT

In May of 2018, the **American Law Institute** voted to adopt the [Restatement of the Law of Liability Insurance](#), yet [another troublesome restatement](#) to come out of the ALI in recent years. This Restatement fails to restate the law as it currently is written, but rather represents the minority views. ALI Restatements receive great deference from judges around the country, so some of the sections put forth by the Restatement are of serious concern.

The Restatement contains a number of litigation fuel centers that are not supported by existing law:

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

These are clearly minority views and demonstrate that the ALI Restatements are more akin to law review articles advocating for expansions of liability than restatements of existing law. The late Justice Antonin Scalia said as much in a 2015 [decision](#), writing that authors of ALI restatements have, “[o]ver time ... abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.”

Unfortunately, this Restatement is not a one-off and continues the troubling trend that began with the liability-expanding section on trespasser liability a few years ago. The ALI also is working on a Restatement of the Law of Consumer Contracts that is scheduled to be voted on in 2019. This project is particularly troublesome because “consumer” contract law is not something that exists, there is simply contract law, so once again, the ALI is attempting to restate something that does not exist.

## ARKANSAS SUPREME COURT STRIKES DOWN TORT REFORM BALLOT INITIATIVE

In a 6-1 decision, the **Arkansas Supreme Court** ruled that a ballot initiative that would have made significant changes to the state's civil justice system was [unconstitutional](#). The court ruled the issues in the measure were not singularly germane enough to be presented as one. The main provisions of Issue 1 included a limit on punitive damages to the greater of \$500,000 or three times compensatory damages; a limit on noneconomic damages to \$500,000 in all cases; and a limit on private attorney contingency fees to 33.3% of net recovery.

The General Assembly passed a significant legal reform package in 2003, **HB 1038**. Since the enactment of the legislation, the Arkansas Supreme Court has struck down much of the package on state constitutional grounds. Amending the state constitution through a ballot initiative was the only real path forward to ensuring the constitutionality of legal reform, but now the Court has blocked those efforts as well, leaving no available paths forward to enact civil justice reform.

## COOK COUNTY, ILLINOIS BIPA LAWSUITS ON THE RISE AGAIN AFTER TEMPORARY SLOW-DOWN

Illinois lawmakers enacted the **Biometric Information Privacy Act (BIPA)** in 2008, which provides a private right of action for those whose biometric information is improperly collected, used, sold, disseminated or stored. This has opened Illinois-based businesses up to massive potential liability, but nowhere has it hit quite as hard as Cook County, which has become “ground zero” for BIPA lawsuits. From August 2017 to March 2018, **Cook County** courts alone have received more than 40 proposed class action complaints claiming violations of the act.

BIPA requires companies to inform an individual in writing and receive a written release prior to taking or retaining his or her biometrics. If a company fails to follow this procedure then any “aggrieved” person can seek the greater of \$1,000 or actual damages for each violation negligently committed, and the greater of \$5,000 or actual damages for each violation recklessly or intentionally committed.

Following BIPA’s enactment, class-action trial lawyers immediately sought to cash in by targeting businesses with often unfounded allegations of negligent, even reckless handling of employees’ and customers’ biometric information, such as iris scans, fingerprints and facial recognition data 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.

Dozens of lawsuits are currently pending in courts throughout the state. For example, Wendy’s, Loews, [Southwest Airlines](#) and Amcor Rigid Plastics have each been accused of violating the law by using fingerprint scans to track employee hours. The plaintiffs complain they were not fully informed about the specific purpose and time frame for which their fingerprints were being collected, or that they did not offer written consent to the collection in the first place.

A balanced opinion issued by the **Second District Appellate Court** of Illinois in late December of 2017, slowed the rate of filings because the court held that “a plaintiff must allege more than a mere technical violation of BIPA’s notice and consent provisions in order to state a cognizable claim.” The plaintiffs alleged that Six Flags violated BIPA when it fingerprinted the plaintiffs without notice of—or an opportunity to consent to—their biometric collection, storage, use, and destruction policies.

Since the court’s decision, at least two Illinois trial courts have followed suit and dismissed BIPA claims; however, on May 30, 2018, the **Illinois Supreme Court** granted leave to appeal the Second District Appellate Court’s decision, once again opening the flood gates. Following this announcement, plaintiffs’ lawyers filed eight new BIPA cases in the month of June alone.

In 2019, the Illinois Supreme Court will decide this case, *Rosenbach v. Six Flags*, and determine whether BIPA’s private right of action, requires at least an allegation of actual harm from the collection of biometric information.

Due to the growing controversy surrounding the large volume of BIPA litigation, the Illinois legislature has been urged to amend the statute to limit its reach. Currently, it is considering **S.B. 3053**, which would carve out exemptions to the statute for entities that “collect biometric data exclusively for employment, human resources, fraud prevention or security purposes; collect biometric data but do not sell, lease or trade such information; or collect, store, transmit or protect biometric data in a manner that is equivalent to the manner in which the entity handles confidential or sensitive information.”

An amendment to the bill would go even further and expressly exclude things such as digital photographs, limit “biometric identifier” and “biometric information” by requiring the data be linked, and exempt entities that do not retain data for more than 24 hours.

If the Illinois Supreme Court reverses the *Rosenbach* decision, and allows BIPA lawsuits where there is no actual harm, Cook County courts can expect an even greater flood of BIPA lawsuits, and legislation like S.B. 3053 will be even more critical.

Illinois was the only state with a private right of action for violations of a biometric privacy law until California followed its poor example in 2018.

## DELAWARE SUPREME COURT OVERRULES TAKE-HOME ASBESTOS LIABILITY PRECEDENT

The Supreme Court of Delaware reversed its longstanding precedent and held that both manufacturers and employers can be held liable for “take-home” asbestos exposure. In [\*Ramsey v. Georgia Southern University Advanced Development Center\*](#), the now deceased wife of an industrial plant worker was allegedly exposed to asbestos because she regularly washed her husband’s clothes. Plaintiff argued that due to the lack of safety precautions taken, the clothes were covered in asbestos and this exposure led to her development of lung cancer.

Under the court’s prior decisions, employers owed no duty of care to family members of workers who were exposed to asbestos off-site. In overruling its own precedent, the court said the company was liable for “take-home” asbestos exposure because it was foreseeable that a spouse would do the worker’s laundry, and therefore, it was foreseeable she would have been exposed to the asbestos on clothing. According to the court, the company should have taken precautions to protect the spouse from this type of exposure.

## IDAHO ROLLS BACK SEATBELT NON-USAGE ADMISIBILITY

It has become a well-known and scientifically supported fact that seatbelts save lives and prevent injuries when used during a car accident. Since 1984, 49 of the 50 states have enacted some form of a law requiring the use of seatbelts. Federal law also requires auto manufacturers to equip vehicles with proper seatbelts to protect occupants.

While the use or non-use of a seatbelt can have a dramatic impact on the severity of injuries caused by an automobile collision, a disturbing number of states have evidentiary rules that either preclude or limit a defendant’s ability to introduce evidence of a plaintiff’s failure to wear a seatbelt.

In 2018, the **Idaho legislature** took a disappointing step backwards and enacted legislation preventing evidence of the failure to wear a seatbelt from being introduced in a civil action involving negligence. Previously, defendants were allowed to admit this for evidence of comparative negligence, appropriately placing some of the responsibility on the individual who took active steps and decided not to wear a seatbelt while in a car.

**H.B. 554** states, “the failure to use a safety restraint shall not be considered under any circumstances as evidence of contributory or comparative negligence, nor shall such failure be admissible as evidence in any civil action with regard to negligence.”

## MARYLAND HIGH COURT REFUSES TO APPLY STATUTE OF REPOSE IN ASBESTOS CASES

The Maryland Court of Appeals [overturned a state appellate court](#) and refused to apply the state’s statute of repose in asbestos cases. The case involved asbestos claims for wrongful death.

Maryland’s 20-year [statute of repose](#) for improvements to real property was first enacted in 1970. The statute was amended in 1991 to include an exemption allowing claims against manufacturers in asbestos-related litigation, but the Maryland intermediate appellate court ruled that any prior asbestos related claims pertaining to an improvement to real property would have to accrue by July 1990—20 years after the enactment of the original statute. The lower court ruled that the 1991 amendment could not revive older claims barred as of its effective date.

Because the plaintiff claimed his exposure to asbestos led to mesothelioma, the central issue at hand was determining at what point injuries from asbestos arise for the purpose of the statute of repose. Based on undisputed records, the plaintiff worked on insulation containing asbestos from May 3, 1970 until June 28, 1970, making the June 28th date his last possible exposure to asbestos. The plaintiff was not diagnosed with mesothelioma until 2013.

The trial court granted the defendants’ motion for summary judgment on the basis that there was no injury that could have led to a cause of action until the asbestos exposure resulted in a disease. The appellate court affirmed the trial court’s decision, also concluding that the injury did not arise until 2013—well outside the twenty-year limitations period set forth in the statute. The Court of Appeals reversed the rulings, holding that an injury arises at the time of last exposure. Since the statute does not bar causes of action that arose prior to July 1, 1970, the statute would not bar the plaintiff’s causes of action in this instance.

The high court failed to consider the impact of this decision on the already overwhelmed Maryland courts. The appellate court's decision would have barred a large collection of extremely old Baltimore City asbestos cases if it had been upheld. The Maryland Legislature even held a [hearing](#) in October of 2017 to consider how to manage the large backlog of asbestos cases currently bogging down Baltimore courts. Now, the courts' doors will swing wide open once again, flooding the state with even more asbestos litigation.

## MASSACHUSETTS HIGH COURT ADOPTS 'INNOVATOR LIABILITY'

This year the **Massachusetts Supreme Court** adopted the expansive theory of civil liability known as "innovator liability." The state joins perennial Judicial Hellhole, [California](#), as the only other state to adopt this dangerous theory of liability, which places liability on manufacturers of brand-name drugs when a person took a generic version.

In [Rafferty v. Merck](#), the court held that a brand-name drug manufacturer is subject to liability if a person takes a generic drug it did not make or sell if the person can show the brand-name manufacturer learned of a risk, but did not update its own label.

The Massachusetts high court ruled that allowing a generic drug consumer to bring a general negligence claim for failure to warn against a brand-name manufacturer poses too great a risk of chilling drug innovation. Applying deep pocket jurisprudence, it went on to find public policy is not served if generic drug consumers have no remedy. For that reason, the court abandoned the traditional rule that a manufacturer is only liable for products it makes or sells. It held that a brand-name manufacturer can be liable for a failure to warn claim involving a generic product if it recklessly disregarded a risk.

## NEW MEXICO AND NORTH DAKOTA JUDGES STRIKE DOWN MEDICAL LIABILITY LIMITS

Trial court judges in two states this year invalidated laws adopted to protect access to healthcare and ensure that affordable medical liability insurance is available to doctors. Placing reasonable constraints on medical liability reduce and stabilize medical liability insurance rates, improve access to critical specialists for local residents, and lessen the incentive to engage in costly defensive medicine. Statutory limits also make it easier for parties to reach fair settlements. The vast majority of courts have upheld such laws as a legitimate, constitutional public policy decision.

In North Dakota, however, **Judge Cynthia Feland** ruled that state law that permits plaintiffs to recover their full economic damages, such as medical expenses and lost income, but limits the subjective, intangible portion of awards for items such as pain and suffering to \$500,000, is unconstitutional. In a January 2018 ruling in *Condon v. St. Alexius Medical Center*, Judge Feland found that the law violates equal protection guaranteed by the North Dakota constitution by arbitrarily reducing damages for those who experience severe injuries. She second guessed the legislature's judgment that the limit was in the best interests of the state, viewing the law as based on assumptions and speculation. In finding the law lacked a rational basis, Judge Feland [relied heavily](#) on a similar ruling by the Florida Supreme Court, an outlier that has contributed to that state's designation as a Judicial Hellhole. *Condon v. St. Alexius Medical Center* is pending before the North Dakota Supreme Court.

Two months later, **Judge Victor Lopez** of the **Second Judicial Circuit** in Albuquerque, New Mexico [ruled](#) that the state's **Medical Malpractice Act** unconstitutionally restricted a plaintiff's "right to receive an unaltered jury verdict." His ruling in *Siebert v. Okun* throws into question a system that has benefited both health care providers and patients for decades. The New Mexico law allows plaintiffs who are injured by medical malpractice to recover all of their medical expenses, without any limit. The law also allows plaintiffs to recover up to \$600,000 in additional damages, such as for pain and suffering and lost wages. Punitive damages are not subject to the limit. The Act also created an innovative Patient Compensation Fund, financed by health care providers who meet insurance and other financial requirements, and pay an annual surcharge, to provide a source of funds to compensate those who are injured.

Although the **New Mexico Supreme Court** has previously [ruled](#) that "the Legislature created a balanced scheme to encourage health care providers to opt into the Act by conferring certain benefits to them, which it then balanced with the benefits it provided to their patients," Judge Lopez found the law invalid.

Both cases are now on appeal before their respective state supreme courts.

## TEXAS TRIAL COURT HANDS DOWN MASSIVE JUDGMENT DESPITE TOYOTA VEHICLE EXCEEDING FEDERAL SAFETY STANDARDS

On August 17, 2018, a Texas jury awarded \$242.1 million dollars in damages to a couple whose children were injured in a car accident. The jury found the front seats in the family's Lexus ES 300 were defective and unreasonably dangerous. The accident occurred when the driver of a Honda Pilot rear-ended the Lexus going 40 miles-per-hour while the Lexus was stopped in traffic on the highway. The jury found Toyota Motor Corp. and its non-manufacturing seller to be 95% liable, and the driver who crashed into their completely stopped car only 5% liable.

According to the plaintiffs, 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 liability and award damages on a design defect theory 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 liability for failure to warn despite the fact the plaintiffs admitted they had never read the owner's manual.

Toyota is appealing the decision and ATRA will file an amicus curiae brief in support.

## BEXAR COUNTY, TEXAS TRIAL COURT ENTERS NATION'S LARGEST JUDGMENT IN 2018

In October 2018, a Bexar County, Texas trial judge entered a judgment ordering Amrock, a title insurance and real property valuation company, to pay just under \$740 million to HouseCanary, a start-up technology company. Amrock is owned by Rock Holdings, which also owns lending giant Quicken Loans. A jury awarded HouseCanary \$706 million in actual and punitive damages, after finding that Amrock maliciously misappropriated Amrock's trade secrets. Before signing the judgment, the trial court added another \$29 million in interest and \$4.5 million in attorney's fees, resulting in the [nation's largest judgment](#) in 2018.

Texas law does not allow the award of speculative damages. For that reason, it is very difficult for a company that has shown modest profits to recover a significant amount of money for lost future profits. But the restrictive nature of Texas's law on lost-profits damages did not impede the trial court from signing a historic judgment in favor of a start-up company with virtually no history of success in the market.



# POINTS OF LIGHT

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

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

In its “Points of Light” section, the Judicial Hellholes report commends actions taken by judges, lawmakers and others to stem abuses of the civil justice system not detailed elsewhere in the report.

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

## IN THE COURTS

### SCOTUS RULES IN FAVOR OF EMPLOYERS AND ENFORCES CLASS ACTION WAIVERS IN ARBITRATION AGREEMENTS

This year the Supreme Court issued a major decision affecting the ability of employees to pursue class action claims. **Justice Neil Gorsuch**, writing for the majority, held that employers can require employees to arbitrate their disputes individually and waive their right to class or collective actions against their employer.

In the [5-4 decision](#), the Court rejected the National Labor Relations Board’s position in *D.R. Horton* that class action waivers violate employee’s rights. The opinion resolved three different cases that were argued together all involving an employee who had signed an arbitration agreement that contained a class action waiver. The plaintiffs attempted to bring litigation under the Fair Labor Standards Act and other state claims through a class action or collective action in federal courts.

The court stated that the answer to the case “was clear,” “In the Federal Arbitration Act, Congress has instructed federal courts to enforce arbitration agreements according to their terms- including terms providing for individualized proceedings.”

### FIFTH CIRCUIT OVERTURNS \$502 MILLION J&J VERDICT AFTER FINDING ‘UNEQUIVOCALLY DECEPTIVE’ CONDUCT BY PLAINTIFFS’ LAWYER

In April of this year, the U.S. Court of Appeals for the Fifth Circuit [threw out](#) a half-billion dollar verdict against Johnson & Johnson and DePuy Orthopedics and ordered a new trial in a bellwether products liability case that involved DePuy’s Pinnacle hip implant devices.

Writing for the three-judge panel, U.S. Circuit Court Judge **Jerry Smith** said that U.S. District Judge **Ed Kinkeade** in Dallas, TX, [erred](#) by allowing plaintiffs’ lawyers to present “inflammatory character evidence” about defendants. Judge Kinkeade [allowed evidence](#) regarding past wrongdoing by the defendants, evidence that was both “unduly prejudicial and irrelevant to the jury.” The “[most problematic evidence](#)” were allegations about bribes that Johnson & Johnson paid to “henchmen” of Saddam Hussein in Iraq, stemming from the company’s agreement in 2011 to pay a settlement to resolve a U.S. foreign bribery probe.

Judge Kinkeade’s proclivity towards rubber-stamping plaintiffs’ lawyers’ [irrelevant and prejudicial evidentiary requests](#) has been [well-documented](#) in Judicial Hellholes.

Judge Smith [also chastised](#) infamous plaintiffs' lawyer **Mark Lanier** in the court's opinion. The court found that Lanier should have disclosed the thousands of dollars in monetary "gifts" he gave to two doctors who testified as plaintiffs' expert witnesses in the trial. Lanier has been leading the charge in the hip implant litigation, which includes almost [9,300 lawsuits](#) consolidated before Judge Kinkeade.

The court [stated](#), "This is the rare case in which counsel's deceptions were sufficiently obvious, egregious, and impactful to penetrate the layers of deference that would ordinarily shield against reversal." "Lawyers cannot engage with a favorable expert, pay him 'for his time,' then invite him to testify as a purportedly 'non-retained' neutral party," Judge Smith [wrote](#). "That is deception, plain and simple. And to follow that up with [a] post-trial 'thank you' check merely compounds the professional indiscretion."

***"Lawyers cannot engage with a favorable expert, pay him 'for his time,' then invite him to testify as a purportedly 'non-retained' neutral party,"***

**– U.S. Circuit Judge Jerry Smith**

### **NEW JERSEY SUPREME COURT ADDRESS LAX STANDARDS AND LAWSUIT ABUSE**

The New Jersey Supreme Court delivered some good news in 2018 when it adopted a more rigorous standard for evaluating the reliability of expert testimony, applied the state's product liability law to claims brought by plaintiffs from other states, and ended no-injury class actions targeting technical issues in consumer contracts.

Governor Murphy also returned to the longstanding tradition of reappointing Supreme Court justices based on merit, resisting the urge to pack the court with political allies. In May 2018, he reappointed Justice Anne Patterson, author of the consumer contracts decisions, and preserved nonpartisan judicial independence.

#### ***Court Strengthens Expert Evidence Standards***

At long last, New Jersey will no longer be considered an evidentiary outlier that permits plaintiffs to bring meritless cases based on junk science. In August 2018, the **New Jersey Supreme Court** joined federal courts and the vast majority of states in adopting the *Daubert* standard for assessing the reliability of expert testimony.

The highly-anticipated decision was eleven years in the making. Up until now, New Jersey's status as hometown to many pharmaceutical companies coupled with its lenient standard for expert testimony made it a haven for plaintiffs' lawyers to bring product liability claims that would not be brought elsewhere.

*In re Accutane Litigation* was the consolidation of over 2,000 cases in which plaintiffs claimed Hoffman La Roche's prescription acne medication, Accutane, caused Crohn's Disease, a gastrointestinal illness. They made the argument despite that out of all the published epidemiological studies, not one found a causal relationship between Accutane and Crohn's disease.

To overcome this hurdle, plaintiffs' lawyers found two "experts" who were willing to testify that they believed the epidemiological studies to be unreliable, and that a causal relationship could be shown using other forms of evidence, such as animal studies.

The trial court excluded the plaintiffs' experts' testimony because it was a "conclusion-driven" attempt to cherry-pick supportive evidence while dismissing more reliable evidence. The appellate court panel reversed, however, and would have allowed them to testify.

In its August 2018 decision, the **New Jersey Supreme Court** found that "[t]he trial court did the type of rigorous gatekeeping that is necessary when faced with a novel theory of causation, particularly one, as here, that flies in the face of consistent findings of no causal association as determined by higher levels of scientific proof."

In reversing the appellate division, the state's high court explicitly adopted the factors used by most other courts in evaluating the reliability of expert testimony and charged courts with acting as gatekeepers. These factors include considering whether the theory has been tested, subjected to peer review and publication, its potential rate of error, and whether the expert's theory is generally accepted in the scientific community. Applying this standard, the court found the "clear result" was that the trial court correctly excluded the testimony. As a result, it found that an Atlantic County judge had properly dismissed 2,100 Accutane lawsuits that relied on the flawed expert testimony.

In adopting *Daubert*, the court found that “its factors for assessing the reliability of expert testimony will aid our trial courts in their role as the gatekeeper of scientific expert testimony in civil cases.”

### ***Court Dismisses Remaining Accutane Lawsuits***

Two months after adopting *Daubert*, the **New Jersey Supreme Court** dismissed the remaining Accutane litigation, which included actions by 532 plaintiffs of which only 18 were New Jersey residents. The other [514 plaintiffs](#) came to New Jersey from 44 other states.

The plaintiffs may have filed their lawsuits in New Jersey to benefit from what was at the time a lower standard for expert testimony. In contending that Accutane’s language warning of the risk of inflammatory bowel disease should have been stronger, they also had to contend with a state law that reasonably provides a preemption that a medication’s warnings are sufficient when the U.S. Food and Drug Administration has approved them. This preemption can be overcome, but only if a plaintiff can show that the manufacturer deliberately hid information from the FDA or there is clear and convincing evidence that the manufacturer knew or should have known of the inadequacy of the warnings. The plaintiffs sought to avoid this requirement of the **New Jersey Product**

**Liability Act** by claiming that the laws of their home states should apply.

*“The trial court did the type of rigorous gatekeeping that is necessary when faced with a novel theory of causation, particularly one, as here, that flies in the face of consistent findings of no causal association as determined by higher levels of scientific proof.”*

– New Jersey Supreme Court decision

Plaintiffs argued that the court should apply the laws of each jurisdiction. While the trial court had applied the New Jersey law and, as a result, dismissed the cases, the Appellate Division reversed. It engaged in a state-by-state analysis and found that most of the claims could not be summarily dismissed based on the presumption that an FDA-approved warning is sufficient, even though they were brought in New Jersey.

The **New Jersey Supreme Court** [ruled](#) that “New Jersey has an interest in consistent, fair, and reliable outcomes” and applied the New Jersey law to all cases. The high court also found that making a trial court judge become an expert in products liability law of 44 other jurisdictions would not promote principles of judicial efficiency. Finding no evidence that Roche deliberately concealed or withheld any material information from the FDA or improperly manipulated the regulatory process, the court dismissed all 532 cases.

The combination of more rigorous scrutiny of expert testimony and application of the state’s presumption that FDA-approved warnings are adequate will certainly give plaintiffs’ lawyers around the country pause before engaging in litigation tourism to the Garden State.

### ***Court Ends No-Injury Consumer Contract Lawsuits***

New Jersey’s **Truth-in-Consumer Contract, Warranty and Notice Act (TCCWNA)** was intended to prevent deceptive practices in consumer contracts but has instead led to increased litigation and massive class actions that are grossly out of line with any actual harm to the customer or culpability of the businesses that are sued. Spurred by TCCWNA’s minimum \$500 per violation penalty, opportunistic plaintiffs’ lawyers filed [numerous class actions](#) in recent years alleging technical violations in the fine-print of consumer contracts, even where consumers did not read it and experienced no injury. In 2018, the **New Jersey Supreme Court** issued two decisions that will substantially reduce the potential for the type of no-injury claims that have flooded New Jersey courts by clarifying who is an “aggrieved” consumer entitled to bring a claim under the statute.

First in *Dugan v. Dine Equity*, the court [held](#) that a plaintiff is not an “aggrieved consumer” unless he or she—at a minimum—received and “interacted” with the document at issue. Thus, to sustain a class action under TCCWNA, the plaintiff must now show not only that each class member actually read the document, but also that he or she was harmed as a result of reading it. Merely making a purchase and being exposed to a contract that did not comply with the technical requirements of the law is not enough to bring a lawsuit. That case claimed TGI

Fridays violated the Act because its menus did not indicate the price of beverages. At minimum, the court held, a plaintiff must show he or she received a menu to sue, therefore, a class action could not include those who did not.

In the second TCCWNA opinion, *Spade v Select Comfort*, a unanimous court ruled that plaintiffs must prove they have suffered some actual harm as a result of the alleged violation in order to be eligible to collect the statutory penalty provided by the law.

In that case, two consumers brought a class action claiming that Select Comfort's sales contract indicated that all sales were "final" in violation of the Act, yet they had not attempted to return their furniture. Two other consumers alleged that the sales contract they received from Bob's Discount Furniture failed to include language mandated by the Act indicating they are entitled to a full refund in the event of a late delivery—but their furniture was delivered on time. They also alleged that the language did not appear in the 10-point bold face type required by the regulations.

In both cases, the court concluded that a person who receives a contract with a provision that does not conform to statutory or regulation requirements can only bring a claim if he or she suffered adverse consequences because of that issue. The court rejected an expansive definition of "aggrieved consumer" offered by New Jersey's plaintiffs' bar, the **New Jersey Association for Justice**, which would have allowed anyone who is offered or enters into a contract that includes a technical violation to sue. To accept this definition, the court found, would be to read the word "aggrieved" out of the statute. That word "distinguishes consumers who have suffered a harm because of a violation of [the TCCWNA] from those who merely have been exposed to unlawful language in a contract or writing, to no effect."

As observed by practitioners on the ground, "No longer can plaintiffs bring these no-injury class actions and expect to hold hostage companies who do business in New Jersey. While plaintiffs can still bring TCCWNA cases, those will be reserved for the truly injured and deserving, and not the plaintiffs' class action bar." While litigators in New Jersey [agree](#) that the decision "hopefully ... puts the last nail in the coffin of these ridiculous no-injury claims under TCCWNA," others [note](#) that "it remains to be seen whether plaintiffs lawyers will brainstorm new and innovative ways to argue actual harm suffered."

### **WISCONSIN SUPREME COURT UPHOLDS LIMIT ON NONECONOMIC DAMAGES IN MEDICAL LIABILITY CASES**

In a [landmark medical liability decision](#), the Supreme Court of Wisconsin held that the state's statutory \$750,000 limit on noneconomic medical liability damages does not violate a patient's constitutional right to equal protection or due process. The Wisconsin Injured Patients and Families Compensation Fund was enacted by the legislature in response to a "medical malpractice crisis," and was designed to guarantee full payment of an injured party's economic damages while at the same time controlling liability by limiting noneconomic damages to \$750,000.

An intermediate appellate court, however, determined the limit was facially unconstitutional because it imposed an "unfair burden" on "catastrophically injured patients."

The Wisconsin Supreme Court reversed, finding the limit on noneconomic damages constitutional. The legislature carefully weighed its options and set out its objective "to ensure affordable and accessible health care for all of the citizens of Wisconsin while providing adequate compensation to the victims of medical malpractice." **Chief Justice Patience Roggensack** recognized the unfortunate nature of the plaintiff's injury, but recognized that, "[w]ere we to construe the cap based on our emotional response to (Mayo's) injury, we would be substituting our policy choice for that of the Legislature."

## IN THE LEGISLATURES

Eight states enacted nine civil justice reform statutes in 2018. An alphabetized list of those welcomed accomplishments follows below:

**Idaho** provided that a land owner, lessee, or lawful occupant, owes no duty of care to a trespasser, except to refrain from intentional or willful acts that cause injury to the trespasser ([H.B. 658](#)).

**Kansas** limited appeal bonds in civil litigation to \$25 million and \$2.5 million for small businesses ([S.B. 199](#)). Also enacted the Asbestos Trust Transparency Act ([H.B. 2457](#)).

**Kentucky** enacted Attorney General Sunshine legislation that provides for greater transparency when the state hires private attorneys on a contingency fee basis ([H.B. 198](#)).

**Michigan** enacted the Asbestos Bankruptcy Trust Claims Transparency Act ([H.B. 5456](#)).

**Missouri** enacted transparency in private attorney contracting legislation that limits fee amounts that may be paid by the state to a retained private attorney ([H.B. 1531](#)).

**North Carolina** enacted the Asbestos Trust Transparency Act ([S.B. 470](#)).

**West Virginia** provided that a nonresident of the state may not bring an action unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in West Virginia ([H.B. 4013](#)).

**Wisconsin** enacted e-discovery and class action reform legislation ([A.B. 773](#)).



# CLOSER LOOKS

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## 'JUNK SCIENCE' MAKING ITS WAY INTO AMERICAN COURTROOMS

In [\*Daubert v. Merrell Dow Pharmaceuticals\*](#) (1993), the **Supreme Court of the United States** bestowed upon judges the responsibility of serving as “gatekeepers” to weed out junk science and prevent it from being offered to jurors in their courtrooms. Unfortunately, many judges have either refused to accept this role or have fallen short in their efforts to do so. There is a growing trend of judges and juries relying on unsubstantiated “science” as the basis of massive judgments against corporate defendants.

This problem is exacerbated by the fact that one of the worst examples of “junk science” that found its way into our courts was funded by American taxpayers.

The **International Agency for Research on Cancer (IARC)**, supported by the National Institutes of Health (NIH), issued a report concluding that glyphosate, the active ingredient in the herbicide Roundup®, is carcinogenic. The IARC report was the basis for a San Francisco jury to enter a jury award of more than \$289 million against Monsanto. The essential evidence in this case—the IARC report—is in stark contrast to more than 800 scientific studies as well as analyses by the U.S. Environmental Protection Agency and the NIH. Despite the judge noting the expert evidence was “[thin](#),” the jury awarded a massive verdict to the plaintiff, which included a \$250 million punitive damages award. Fortunately, the judge later [reduced](#) the punitive damages award to align with due process limits.

Since its creation in the 1970s, IARC, located in Lyon, France, has reviewed over 1000 chemicals and agents of exposure and placed them in one of five different categories; (1) definitely carcinogenic to humans; (2A) probably carcinogenic to humans; (2B) possibly carcinogenic to humans; (3) not classifiable as to its carcinogenicity to humans; (4) probably not carcinogenic to humans.

Of the 1000 chemicals and agents reviewed, only one—caprolactam, a chemical used in Spanx®, has been found to be probably not carcinogenic.

Closer scrutiny of the IARC process reveals that it was advised by an “invited specialist,” **Christopher Portier**, in its work on glyphosate. At the same time Mr. Portier was working for the agency, he [was being paid](#) by the **Environmental Defense Fund**, an anti-pesticide group. Moreover, Mr. Portier [received \\$160,000](#) from law firms suing over glyphosate. When asked about this potential conflict of interest, Mr. Portier initially claimed to be advising firms on other IARC-related lawsuits and not glyphosate litigation. He later acknowledged that his statement was wrong. It is also worth noting that Mr. Portier had [no experience](#) with glyphosate prior to his work on it for IARC.

Following Mr. Portier’s arrival at IARC, the final glyphosate study was altered in [at least 10 ways](#) to remove or reverse conclusions finding no evidence of carcinogenicity. The agency removed multiple scientists’ conclusions that studies found no link between glyphosate and cancer in lab animals and statistical analyses of studies with negative findings were turned into positive ones. The determination that glyphosate was “probably carcinogenic” was based on “[limited evidence](#)” of carcinogenicity in humans and “sufficient evidence” in experimental animals.

The shakiness of the scientific methods used by IARC in developing the glyphosate report are gravely concerning, but even more troublesome, is the influence it is having on litigation in the United States. The IARC is not accountable to American voters or to any U.S. agencies; however, it is having an undeniable impact on U.S. consumers and corporations because of the weight its research is given in California, which mandate warnings based on IARC findings, and by U.S. judges.

Concern about IARC’s work on glyphosate led the **U.S. House Committee on Space, Science and Technology**, which has stated that the IARC finding on glyphosate is an “affront to scientific integrity that bred distrust and confusion,” to request that (now former) IARC Director Christopher Wild appear before the Committee. Mr. Wild refused to testify, and his successor, Elizabete Weiderpass, has not responded.

The problem of junk science in litigation, however, is not confined to IARC. In fact, it is a problem that many defendants face in Judicial Hellholes all around the country. For example, as discussed in the Twin Cities section, **Minnesota Attorney General Lori Swanson** relied on the inferior scientific expertise of a professor in a groundwater contamination lawsuit against 3M, despite her own state Health Department's strong disagreement with his conclusions. Faced with the prospect of an award fueled by junk science, 3M settled the case for \$850 million.

In yet another Judicial Hellhole, a St. Louis, Missouri jury awarded a massive \$4.5 billion award to 22 plaintiffs after concluding that there was asbestos in Johnson & Johnson's talcum baby powder, and that it caused ovarian cancer. Again, the role of expert testimony was crucial in the outcome. Although both the **American Cancer Society** and the **U.S. Food and Drug Administration** have concluded otherwise, jurors were told by plaintiffs' "expert" that talcum powder causes cancer.

Finally, this year's Florida section highlights the **Florida Supreme Court's** refusal to adopt the expert evidence standard laid out by the U.S. Supreme Court in *Daubert*. In 2013, the Florida legislature enacted a statute to bring state law on expert evidence in line with more than 30 states and the federal courts based on the Daubert process but the high court [flatly rejected](#) the standard in 2018.

Reasonable rules and procedures based on *Daubert* are essential to a balanced legal system, and it is the responsibility of the judiciary in the country as well as lawmakers to ensure that junk science does not find its way into our courtrooms. Jurors should expect and deserve to be presented only with reliable scientific information to support their deliberations.

## FIGHTING "NO-INJURY" LAWSUITS

It seems like a straightforward, commonsense principle: Before filing a lawsuit, a person must experience an injury. In recent years, however, plaintiffs' lawyers are chipping away at this core requirement, bringing claims based purely on speculation, risks of future harm, creative theories of financial loss created by hired gun "experts," and, simply, nonsense.

The requirement that a plaintiff show an actual injury is a critical safeguard for the civil justice system. It ensures that courts use their power and their limited resources to resolve real problems and compensate people for genuine harms caused by the wrongful conduct of another. Despite constitutional, statutory, and common law requirements, plaintiffs' lawyers are inundating courts with lawsuits that demand that businesses pay money to people who have experienced no harm.

In 2016, the **U.S. Supreme Court**, dealt a blow to "no-injury" lawsuits in *Spokeo, Inc. v. Robins*. There, the plaintiff claimed Spokeo violated the Fair Credit Reporting Act when it placed a profile on its website indicating the plaintiff was married with children, employed, held a graduate degree and was relatively affluent—information that was favorable, but inaccurate. The Supreme Court ruled that "a bare procedural violation, divorced from any concrete harm" is insufficient to show an "injury-in-fact" that is required for a federal court to consider a claim.

Yet, "no-injury" litigation continues. Here are highlights of recent developments in this area.

### INVENTING AN INJURY: THE SIZE OF AN EYE DROP

Plaintiffs' lawyers have filed several consumer class actions targeting glaucoma medication. These lawsuits do not claim the medications are ineffective or unsafe. Rather, they simply assert that the bottles dispense drops that are larger than necessary.

Two federal appellate courts have exposed the flaws in this theory. In *Eike v. Allergan*, the **Seventh Circuit** [reversed](#) an order granting class certification, finding the plaintiffs had alleged no wrongdoing and experienced no injury. Rather, the lawsuit was "simply based on dissatisfaction" and speculation, without any proof, that a bottle that dispensed smaller drops would be more cost effective.

The **First Circuit** reached the same result, but on a different basis. In *Gustavsen v. Alcon Laboratories, Inc.*, the court found that the FDA had approved the medication, including how it is dispensed, and any change in the bottle would need to be examined and approved by federal regulators. While the First Circuit accepted the plaintiffs' allegations that they had experienced a financial loss, the court [ruled](#) that federal law preempts lawsuits that would require redesigning the bottles.

In the midst of these two cases, the **Third Circuit** in *Cottrell v. Alcon Laboratories, Inc.* [revived](#) an identical “no-injury” lawsuit. Despite the conflict between Third and Seventh Circuits, the U.S. Supreme Court denied certiorari in May 2018.

ATRA filed amicus briefs in [Eike](#), [Gustavsen](#), and [Cottrell](#), arguing that creative theories of damages are not a substitute alleging an actual injury, and has also filed amicus briefs in “no-injury” cases involving automobiles and other products.

### **TARGETING A REMOTE CHANCE OF FUTURE INJURY: AUTOMOBILE HACKING**

Another variety of “no-injury” lawsuits are claims that a product contains a flaw that has not materialized, but could lead to some future problem. Since tort law generally does not permit individuals to seek compensation for harms that have not yet occurred, these claims allege that consumers “paid too much” for a product or that the resale value of the product is lower than it should be. For example, plaintiffs’ lawyers have filed class actions against automakers alleging that their vehicles’ computer systems are susceptible to hacking, placing them at risk of theft, damage, serious physical injury, or death. Yet, this has never occurred.

In December 2017, the **Ninth Circuit** [affirmed](#) dismissal of one of these lawsuits, finding the plaintiffs experienced no injury. In *Cahen v. Toyota Motor Corp.*, the appellate court found that the plaintiffs alleged only speculative risks and defects, had not shown these risks affected the choice of consumers to buy the vehicles, and had not shown these risks had any impact on the value of the cars. A federal district court in Illinois, however, [certified](#) a similar case including classes of consumers in Illinois, Michigan, and Missouri who allege that infotainment systems in Jeep Grand Cherokees and other vehicles could be hacked and remotely controlled. The **Seventh Circuit** denied review of the trial court’s rulings finding standing and certifying the classes, and the automakers filed a petition for certiorari with the U.S. Supreme Court.

As more and more products from garage doors to home security systems connect to the internet, these types of cases threaten to open the floodgates to class action lawsuits alleging nothing more than a vulnerability that has never been breached in real world conditions.

### **CHALLENGING MARKETING WHERE NO ONE PERSON IS MISLED: THE “FOOD COURT”**

Plaintiffs’ lawyers are filing numerous lawsuits challenging how food is advertised and packaged when no one is actually misled. The lawyers who file these claims have developed a lucrative assembly-line practice that takes advantage of vague consumer laws and judges who are reluctant to promptly dismiss absurd claims.

Some judges have appropriately responded to ridiculous lawsuits. For example, federal courts in [California](#) and [New York](#) found that naming a soda “diet” does not lead reasonable consumers to believe a soft drink is a weight-loss product or health food. A New Yorker who filed a [\\$20 million](#) lawsuit after she bought an 8-piece bucket of chicken that was not filled above the rim as it looked on TV found herself [out of luck](#). The **Ninth Circuit** [affirmed dismissal](#) of a lawsuit claiming Starbucks deprived consumers of their due share of coffee when their iced coffee included, you guessed it, ice. These decisions follow the Seventh Circuit’s [rejection](#) of a class action settlement in which lawyers would have received over a [half million dollars](#) in fees for bringing class actions alleging that the bread in Subway’s “Footlong” sandwiches sometimes did not extend a full twelve inches. The court called the litigation “no better than a racket” that “should be dismissed out of hand.”

On the other hand, some judges have [refused to dismiss](#) cases as ludicrous as one [claiming](#) that consumers who buy “raspberry” donuts think it contains real fruit that would “help fight against cancer, heart and circulatory disease, and age-related decline.” Even when courts eventually dismiss a lawsuit, businesses incur thousands of dollars in legal fees. Often, companies settle meritless claims to avoid lengthy litigation. These needless costs are passed on to consumers.

Commonsense legislation has been proposed which would require private lawsuits filed under state consumer laws to allege consumers experienced an actual loss of money because of the allegedly misleading practice. Legislation also should reaffirm that courts may promptly dismiss implausible claims where no reasonable consumer would be misled by the practice at issue. As discussed earlier, such efforts are underway in Missouri.

## SUING OVER TECHNICALITIES: ACCESSIBILITY LAWSUITS

Lawyers and serial plaintiffs are visiting restaurants looking for lawsuits, rather than a burger and fries. They know there are [thousands of disability access requirements](#)—ranging from the height of a mirror in a bathroom to the angle at which water can come out of a drinking fountain. Trivial violations of Americans with Disabilities Act’s standards are not hard to find.

As Anderson Cooper [reported](#) on 60 Minutes, “drive-by” ADA lawsuits are plaguing businesses large and small. Plaintiffs’ lawyers have even taken to surfing the internet for violations, claiming [websites](#) that sell products or services do not incorporate features making them accessible to people who are blind or visually impaired. As a result, the number of ADA access lawsuits has nearly [tripled](#) over the past five years.

In one such lawsuit, disabled individuals visited two Steak ‘N Shake restaurants and found that the parking lots had slopes that exceeded the ADA limit of 2.1%. They did not bring the problem to the restaurant’s attention; they called their lawyers. The lawyers, who have [filed](#) numerous ADA accessibility lawsuits, then dispatched a paid “investigator” to additional restaurant locations to look for more violations. Nothing in the case indicated that anyone with a disability complained about the parking lots. Yet, a federal district court certified a class that would have imposed obligations on every Steak ‘N Shake location in the United States.

The **Third Circuit** [reversed](#). In a July 2018 ruling, the appellate court found that while the class representatives’ visits to the two locations alleged a sufficiently concrete injury to have standing to bring the claim, class certification was improper. The plaintiffs had made no showing that other people with disabilities had experienced difficulty in Steak ‘N Shake’s parking lots. The lawsuit’s reach was also problematic as it included any accessibility issue—whether it involved aisles, counters, doorknobs, bathroom stalls, or signage—about which no one had complained.

While this case eventually reached the right result, thousands of businesses receive letters from plaintiffs’ lawyers each year [demanding](#) extortionate payments to avoid or settle lawsuits alleging accessibility violations. ATRA supports [federal](#) and state [legislation](#) providing businesses with a reasonable amount of time to address an issue after a person brings it to the business’s attention before a lawsuit may be filed.

## ACTIVIST STATE ATTORNEYS GENERAL LOOKING TO REGULATE THROUGH LITIGATION

Activist state attorneys general are seizing the opportunity to use current “hot-button” issues, like the opioid crisis and climate change, to propel forward their personal careers and generate campaign dollars for future political aspirations.

Looking to regulate these industries through the use of litigation, state attorneys general have decided to pursue litigation at the urging of plaintiffs’ lawyers who stand to gain hundreds of millions of dollars if they are successful. Typically, these arrangements pay plaintiffs’ lawyers roughly one-third of the take plus their expenses. As a result, the incentive for these lawyers is to maximize their fees irrespective of the public interest.

Strong evidence of this problem can be found in investigations by the Wall Street Journal’s editorial board and a Pulitzer Prize-winning New York Times series. Such reporting has shown how personal injury lawyers often shop their ideas for potentially lucrative lawsuits against corporate defendants to friendly governmental officials, most prominently state attorneys general, whom they also support with generous campaign contributions.

Lawsuits brought by powerful state or local governments must serve the public interest, and not merely the profit-seeking interests of politically influential members of the plaintiffs’ bar.

## OPIOID LITIGATION

Americans are rightly concerned about the opioid crisis, as we lose more than 100 of our community members each day from drug overdoses. That is the equivalent of the death toll from September 11 every three weeks.

In October, President Donald Trump [signed a landmark bill](#) intended to address the nation’s opioid crisis. The bill was supported in Congress by wide bipartisan margins. The administration also announced additional funding— the Department of Health and Human Services awarded \$1 billion in grants to combat the opioid crisis. It is reassuring to see that even in highly partisan times our elected and appointed officials can put the interests of the American people ahead of political considerations.

Despite this progress, the opioid crisis is the basis for more than 1,000 lawsuits brought by state, county, municipal and tribal governments—and virtually all of them are represented by lawyers paid on a contingency basis. Under these arrangements, lawyers for these governmental entities are not paid unless their clients “win.” But winning does not necessarily solve the crisis at hand.

Governments and their lawyers point to the “success” of the tobacco litigation from a generation ago as a basis to justify litigation against drug manufacturers and distributors. A closer examination of the experience in Texas proves that corruption is a real problem when enormous sums of money are on the line, and litigation cannot assure that settlements are addressed entirely toward the underlying problem. According to the [Dallas News](#), then-**Texas Attorney General Dan Morales** spent four years in federal prison because he forged documents to get a personal friend of his a share of the enormous legal fees generated in the state’s case, even though he had done no work in the matter.

While Texas receives \$490 million each year under the tobacco settlement, only \$10.2 million was allocated toward anti-smoking efforts in 2016. **Matthew Myers** of the Campaign for Tobacco Free Kids stated that “measured against the potential successes and the potential good that could have been achieved, Texas and many other states fell far short of their objectives.” This is hardly surprising considering barely 2 percent of the annual settlement payment to the state supports smoking cessation. There is one group, however, that did exceedingly well: the personal injury lawyers. The “big five” Texas tobacco settlement lawyers receive about \$120 million each year for their work in the 1990s.

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– **Matthew Myers, Campaign for Tobacco Free Kids**

**Former Mississippi Attorney General Mike Moore**, who now [serves as a “consultant”](#) for **Ohio Attorney General Mike DeWine** in his opioid litigation, paid his private-sector associates in the tobacco litigation more than \$1.6 billion in fees without ever providing citizens a full accounting of the work they performed. With many of the same characters involved in the opioid litigation, it is hard not to expect similar mishandling of money this time around.

Another important contrast between the opioid crisis and tobacco is that prescription opioids are regulated from start to finish—from design and safety approval by the **Food and Drug Administration** to quantities that are manufactured, where they are distributed, and which doctors prescribe them—by the **Drug Enforcement Administration**. This is a legal, regulated product that works as intended, and can be used only after prescribed by a licensed physician. By contrast, tobacco largely was unregulated at that time, although health risks from smoking were plainly affixed on the side of every cigarette pack.

The reality is that this complicated problem requires a comprehensive solution. History shows that litigation against manufacturers and distributors will do nothing to stop the scourge of illegal opioids, particularly synthetic fentanyl, [shipped into the country from China](#). And we cannot ignore the fact that litigation seeks to lay all these problems at the feet of manufacturers and distributors who are subject to extensive government regulation.

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. As the sad tale in Texas demonstrates, lawyers’ relationships to elected officials can be problematic, to say the least.

Whether the legislative solution that emerges from Congress “solves” the problems with opioid abuse remains to be seen. But this is the right way for our country to address this critical national issue. Let’s not leave this to the courts—and the lawyers.



## CLIMATE CHANGE LITIGATION

Like the opioid crisis, climate change has become a vital issue for all Americans that should be addressed by our elected officials and duly appointed expert regulators. It is their responsibility to develop and execute appropriate public policy that serves the public interest. Exactly how that should be done is the subject of great dispute and controversy. Some believe that any and all activities that do or could harm the environment should be all but eliminated. Others put a far greater emphasis on the impact of regulation and mitigation on our economy and prospects for growth. Reasonable people can, and do, disagree about these issues.

One topic that should not be in dispute, however, is the role of litigation in this area. Courts are appropriate for settling legal disputes, not setting environmental policy that has a profound impact on countless aspects of our daily lives and the continuing prospects for a strong and vibrant economy.

In recent months, we have seen an increase in state and local climate litigation in several California counties, as well as New York and Massachusetts. Though the litigation may thus far seem to be sporadic attacks against the energy industry, in reality it is a highly coordinated effort. The **Competitive Enterprise Institute** recently issued a report detailing a “[secret meeting](#)” in 2016 at Harvard University between attorneys associated with various attorneys general offices across the country to discuss climate change litigation and holding oil companies liable. The [report](#) describes the climate change litigation as an “extensive and elaborate campaign using elective law enforcement offices, in coordination with major donors and activist pressure groups, to attain a policy agenda that failed through the democratic process.”

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The [primary claim](#) thus far is that energy companies have allegedly misled the public about climate change, in much the same way others have been targeted. Therefore, the argument follows, they should be forced to pay millions in settlements. Plaintiffs also are bringing claims under the [public nuisance theory](#), alleging that energy companies contribute to global warming-induced sea level rise. The lawsuits seek damages for both past and future natural disasters, including flooding.

Fortunately, judges in [California](#) and [New York](#) have dismissed some of the claims brought by the state and local governments, recognizing that the courts are [not the appropriate forum](#) for [addressing climate change](#). However, these developments have not deterred the efforts and more state attorneys general are expected to file similar lawsuits.

One of their main targets, ExxonMobil, has decided to [fight back](#) and has filed a lawsuit against a group of California municipalities and officials, as well as Matt Pawa, a Hagens Berman attorney who has been hired to work on the climate change litigation on a contingency fee basis. Exxon’s lawsuit alleges that these California municipalities have engaged in a civil conspiracy against energy companies and are operating off of Pawa’s “[playbook](#)” that includes the efforts by other state attorneys general.

This type of litigation has a profound and significant negative economic impact and should be called out for the sham that it is. State attorneys’ general must remain focused on protecting the interest of the public and serving their communities, and rebuff the advances of opportunistic plaintiffs’ attorneys. If allowed to continue unchecked, the costs will not be restricted to the companies so arbitrarily pursued. Rather, taxpayers will foot the bill and the trial bar will move on to another scapegoat to line its pockets.

# THE MAKING OF A JUDICIAL HELLHOLE:

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

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

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

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

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

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

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

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

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

## PRETRIAL RULINGS

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

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

## DECISIONS DURING TRIAL

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

## UNREASONABLE EXPANSIONS OF LIABILITY

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

## JUDICIAL INTEGRITY

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

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