

# Judicial HELLHOLES® 2005



*“What I call the ‘magic jurisdiction,’ . . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re popul[ists]. They’ve got large populations of voters who are in on the deal, they’re getting their [piece] in many cases. And so, it’s a political force in their jurisdiction, and it’s almost impossible to get a fair trial if you’re a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money. . . . These cases are not won in the courtroom. They’re won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn’t matter what the evidence or law is.”<sup>1</sup>*

—Richard “Dickie” Scruggs,

Mississippi trial lawyer, whose firm will collect \$1.4 billion in legal fees from the tobacco settlements.

*“You may not like it . . . but we’ll find a judge. And then we’ll find a jury that will find restaurants liable for their customers’ overeating.”<sup>2</sup>*

—John Banzhaf,

George Washington University Law School Professor and personal injury lawyer.

*“As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so.”<sup>3</sup>*

—Hon. Richard Neely,

who served as a West Virginia Supreme Court of Appeals Justice, including several terms as Chief Justice for more than 22 years until 1995, and is now in private practice at a firm primarily handling personal injury cases.

*“There’s some merit to the accusations of bias in Madison County. I don’t know if it’s a Judicial Hellhole, but just figure it out. When people come from hither and thither to file these cases, there’s gotta be an inducement, doesn’t there? They’re not coming to see beautiful Madison County.”<sup>4</sup>*

—Hon. Judge John DeLaurenti,

who heard cases in Madison County for 27 years until 2000

*“West Virginia was a ‘field of dreams’ for plaintiffs’ lawyers. We built it and they came.”<sup>5</sup>*

—West Virginia Judge Arthur Recht

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# Preface

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This report documents litigation abuses in areas identified by the American Tort Reform Foundation (ATRF) as “Judicial Hellholes®.” The purpose of this report is (1) to identify areas of the country where the scales of justice are radically out of balance, and (2) to provide solutions for restoring balance, accuracy and predictability to the American civil justice system.

Most state and federal judges do a diligent and fair job at modest pay. Their solid and well-deserved good reputation, as well as the goal of fair justice in America, is undermined by the very few jurists who may not dispense justice in a fair and impartial manner. We call those places Judicial Hellholes.

In Judicial Hellholes, judges systematically apply laws and court procedures in unfair and unbalanced ways, generally against defendants in civil lawsuits. The jurisdictions discussed in this report are not the only Judicial Hellholes in the United States; they are the worst offenders. These cities, counties, or judicial districts are frequently identified by members of the American Tort Reform Association (ATRA) and individuals familiar with the litigation.

The Judicial Hellholes report has been covered in nearly every major U.S. newspaper since the first report published in 2002. The term “Judicial Hellhole” firmly entered the American lexicon when on January 5, 2005, President George W. Bush personally visited the Number 1 Judicial Hellhole, Madison County, Illinois, to draw attention to the detrimental impact of litigation abuse on the local area.<sup>6</sup> The Judicial Hellholes report also was central in the debate on the Class Action Fairness Act, which was ultimately enacted after languishing in Congress for nine years.

While some have suggested that entire states may be labeled Judicial Hellholes, it is usually only specific counties or courts in a state that deserve this title. In many states, including some that have

received national attention, the majority of the courts are fair and the negative publicity is a result of a few bad apples. Because judges generally set the rules in personal injury lawsuits, and judicial rulings are so determinative in the outcome of individual cases, it may only take one or two judges who stray from the law in a given jurisdiction to earn it a reputation as a Judicial Hellhole.

Although ATRF surveys ATRA members and others familiar with various jurisdictions annually as part of the report’s research process, Judicial Hellholes has become so popular that ATRF receives and gathers information throughout the year from a variety of sources.

ATRF has tried to be specific in explaining why defendants are unable to achieve fair trials within these jurisdictions. Because ATRA members may face lawsuits in these jurisdictions, some members are justifiably concerned about reprisals if their names and cases were identified in this report – a sad commentary about the Judicial Hellholes in and of themselves.

This concern is not hypothetical or speculative. As reported in the 2003 Judicial Hellholes report, leaders of ATRA, the Illinois Civil Justice League, the Illinois Chamber of Commerce and the U.S. Chamber of Commerce were subpoenaed in a class action product liability lawsuit in Madison County, Illinois.<sup>7</sup> The subpoena served on ATRA sought to compel the organization to release confidential financial information and membership lists, and require it to either appear for a deposition in Madison County or fight the subpoena.<sup>8</sup> ATRA had no knowledge of the facts or other involvement in this case. After ATRA was forced to spend thousands of dollars in legal costs to defend against the assault on its First Amendment rights, the subpoena was withdrawn.

In 2004, several businesses defending against a lawsuit in Madison County experienced a similar

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

intimidation tactic. They were served with a series of interrogatories in a product liability lawsuit requiring that they disclose their membership and support for any “tort reform” group and any tort reform-related activities. Further, in its series on Madison County courts, the *St. Louis Post-Dispatch* noted that defense lawyers are “loathe” to get on the bad side of the local trial bar and “almost always ask to remain anonymous in newspaper stories.”<sup>9</sup>

ATRF interviewed individuals familiar with litigation in the Judicial Hellholes and verified their observations through independent research of press accounts, studies, court dockets and judicial branch statistics, and other publicly available information. Citations for these sources can be found in the nearly 500 endnotes following this report.

The focus of this report is squarely on the conduct of judges who do not apply the law evenhandedly to all litigants and do not conduct

trials in fair and balanced ways. ATRF’s Judicial Hellhole project is not an effort to obtain a special advantage for defendants or to criticize the service of those who sit on juries. The report applies only to civil cases, not criminal cases.

ATRF welcomes information from readers with additional facts about the Judicial Hellholes in this report, as well as on questionable judicial practices occurring in other jurisdictions. Information can be sent to:

Judicial Hellholes  
American Tort Reform Foundation  
1101 Connecticut Avenue, N.W., Suite 400  
Washington, D.C. 20036  
Email: [judicialhellholes.atrf@atra.org](mailto:judicialhellholes.atrf@atra.org)

*To download a copy of this report in pdf format, visit [www.atra.org](http://www.atra.org).*

## About the American Tort Reform Foundation

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

the American civil justice system operates, the role of tort law in the civil justice system, and the impact of tort law on the private, public and business sectors of society.

# Executive Summary

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The 2005 Judicial Hellholes report found interesting trends. First, the report and other efforts to improve the civil justice system have led to a remarkable number of positive reforms. For example, in South Carolina, both the courts and the legislature acted this year to stem “litigation tourism” - the practice of personal injury lawyers who file lawsuits in favorable courts in areas with little or no relationship to the claim or claimant. Second, plaintiffs’ lawyers are assessing the litigation landscape and moving cases into new areas in the hope of developing new Judicial Hellholes. Third, even where legislative reform has been successful, such as in Texas, judges can still misapply the law and make procedural rulings that favor local plaintiffs’ lawyers and their clients over out-of-state defendants.

**The 2005 Judicial Hellholes:** The 2005 report focuses attention on six areas identified as Judicial Hellholes:

- 1) Rio Grande Valley and Gulf Coast, Texas
- 2) Cook County, Illinois
- 3) West Virginia
- 4) Madison County, Illinois
- 5) St. Clair County, Illinois
- 6) South Florida

Being “awarded” the Judicial Hellhole title is nothing to celebrate as litigation abuse ultimately hurts the people who live in those jurisdictions—from the economic impact to access to health care.

After repeatedly celebrating their hold on the top spot as the nation’s Number 1 Judicial Hellhole for two years in a row, Madison County plaintiffs’ lawyers will be disappointed that the County has earned a slight reprieve. The judicial climate has improved, but, after hitting rock bottom there was nowhere to go but up. We welcome the change and hope it will continue to improve.

Meanwhile, down in Texas, courts continue to prove why high-profile plaintiffs’ lawyer Richard Scruggs calls Judicial Hellholes “magic jurisdictions”

— they seemingly pull million or billion dollar verdicts out of a hat and, despite important civil justice reforms, implement procedural rules foreign to due process.<sup>10</sup>

While high-profile issues such as class action abuse, medical malpractice, pharmaceutical liability, asbestos lawsuits and extraordinary awards often dominate headlines in Judicial Hellholes, the examples within this report indicate a broader lack of fairness that is occurring in numerous cases in these courthouses. We detail this lack of fairness in a section titled, “The Making of a Judicial Hellhole.”

**The “Watch List”:** In addition to Judicial Hellholes, the report calls attention to nine other areas that either have been cited in previous Judicial Hellholes reports or are new areas we have been watching due to suspicious or negative developments in the litigation environment:

- California
- Eastern Kentucky
- Eastern Alabama
- Philadelphia, Pennsylvania
- New Mexico: Appellate Courts Show No Improvement
- Delaware: Are Asbestos Lawyers Colonizing the State?
- Other jurisdictions of continuing concern include Oklahoma; Orleans Parish, Louisiana; and the District of Columbia.

**Dishonorable Mention:** This year’s “Dishonorable Mention” goes to the Wisconsin Supreme Court for four decisions in 2005 that demonstrate judicial activism and a disrespect for the legislature. Dishonorable mentions are awarded to recognize particularly abusive practices or unsound court decisions.

**Points of Light:** A hallmark of the Judicial Hellholes report is the “Points of Light” section, examples of judges and legislators who have intervened to stem abusive practices:

- Congress’s enactment of the Class Action Fairness Act;
- South Carolina’s cracking down on litigation tourism;
- The Michigan Supreme Court’s demonstrated respect for the separation of powers between the legislative and judicial branches, as shown most recently by its rejection of creating a new cause of action for medical monitoring;
- The Illinois Supreme Court tossing the infamous *Avery* decision;
- Four states’ enactments of asbestos and silica medical criteria litigation; and
- U.S. District Court Judge Janis Graham Jack’s investigation and action stemming the fraudulent filing of silica claims generated by for-profit medical screening companies.

**Solutions:** Finally, this report suggests several reforms that can restore balance to Judicial Hellholes, including:

- Tighten venue and *forum non conveniens* laws to rein in forum shopping in Judicial Hellhole jurisdictions;
- Ensure that pain and suffering awards serve a

- compensatory purpose only and are not used to evade statutory or constitutional safeguards on other damages;
- Address the asbestos crisis by prioritizing claims to the truly sick and setting aside claims from people with no physical injury;
- Address abuse of private lawsuits under state consumer protection statutes;
- Enhance the reliability of expert testimony by encouraging courts to be “gatekeepers” in keeping “junk science” out of the courtroom; and
- Enact common-sense medical liability reforms that include a reasonable limit on noneconomic damages, a sliding scale for attorneys’ contingency fees, periodic payment of future costs and abolition of the collateral source rule.

Experience shows that one of the most effective ways to improve the litigation environment in a Judicial Hellhole is to bring the abuses to the surface so everyone can see them. By issuing its Judicial Hellholes report, ATRF hopes that the public and the media can persuade the courts in Judicial Hellholes to provide “Equal Justice Under Law” – for all.

# Judicial HELLHOLES® 2005

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| <ol style="list-style-type: none"> <li>1. Rio Grande Valley and Gulf Coast, Texas</li> <li>2. Cook County, Illinois</li> <li>3. West Virginia</li> </ol> | <ol style="list-style-type: none"> <li>4. Madison County, Illinois</li> <li>5. St. Clair County, Illinois</li> <li>6. South Florida</li> </ol> |
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**DISHONORABLE MENTION:** Wisconsin Supreme Court



# The Making of a Judicial Hellhole

## The Devilish Details

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*Question: What makes jurisdictions “Judicial Hellholes”?*

*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 hallowed 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, a few judges in Judicial Hellholes do not. A few judges may simply favor local plaintiffs’ lawyers and their clients over corporations. Some, in remarkable moments of candor, have admitted their biases.<sup>11</sup> 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 being places where legitimate victims can seek compensation from those whose wrongful acts caused their injuries.

Weaknesses in evidence are routinely overcome by pre-trial and procedural rulings. Product identification and causation become “irrelevant because [they know] the jury will return a verdict in favor of the plaintiff.”<sup>12</sup> Judges approve novel legal theories so that plaintiffs do not even have to be injured to receive “damages.” Class actions are certified regardless of the commonality of claims. Defendants are named, not because they may be culpable, but

because they have deep pockets or will be forced to settle at the threat of being subject to the jurisdiction. Local defendants also may be named simply to oust federal courts of jurisdiction. Extraordinary verdicts are upheld, even when they are unsupported by the evidence and in violation of constitutional standards. And, often, judges allow cases to proceed even if the plaintiff, the defendant and the witnesses do not live in the Judicial Hellhole jurisdiction, and the allegations of the lawsuit have little or no connection to the area in which it is filed.

Not surprisingly, personal injury lawyers have a different name for these courts. They call them “magic jurisdictions.” Personal injury lawyers are drawn to these jurisdictions like magnets and look for any excuse to file lawsuits there. Rulings in Judicial Hellholes often have national implications because they involve parties from across the country, can result in excessive awards that bankrupt business and cost jobs, and can result in a local judge regulating an entire industry.

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

### Pre-Trial Rulings

- **Forum shopping:** Judicial Hellholes are known for being plaintiff friendly, so many personal injury lawyers file cases there even if no connection to the jurisdiction exists. Judges in these jurisdictions often do not stop this forum shopping.
- **Novel legal theories:** Judges allow lawsuits to go forward that are not supported by the law. Instead of dismissing these lawsuits, the judges adopt new legal theories, which often have inappropriate national ramifications.
- **Discovery abuse:** Judges allow unnecessarily broad, invasive and expensive discovery requests to increase the burden on a defendant litigating the case. Judges also may apply discovery rules in an unbalanced manner that deny 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 one notorious example, in 2002, West Virginia courts consolidated more than 8,000 claims and 250 defendants in a single trial. 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 certification:** Judges certify classes that do not have sufficient commonality of facts or law, which may confuse a jury and make the case 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. In Madison County, Illinois, for example, judges are known for scheduling numerous cases against a defendant to start on the same day or only giving defendants a week or so notice of when a trial is to begin.

### Decisions During Trial

- **Junk science:** Judges do not act as gatekeepers to ensure that the science admitted in a courtroom

is credible. Rather, they allow plaintiffs' lawyers to introduce highly questionable "expert" testimony that purports to link the defendant to the plaintiffs' injuries, but has no credibility in the scientific community.

- **Uneven application of evidentiary rules:** Judges allow plaintiffs greater flexibility in the kinds of evidence that can be admitted at trial while rejecting evidence that might be favorable to a defendant.
- **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 allow to stand extraordinary punitive or pain and suffering awards that are not supported by the evidence, are tainted by passion or prejudice or influenced by improper evidentiary rulings.

### Judicial Integrity

- **Trial lawyer contributions:** Trial lawyer contributions make up a disproportionate amount of donations to locally elected judges. In a recent poll, 46% of judges said donations influenced their judicial decisions.<sup>13</sup>
- **Cozy relations:** There is a revolving door among jurists, plaintiffs' lawyers and government officials.

# Firefighting in Judicial Hellholes

## Dousing Hot Spots, Spotting Brushfires, Turning Up the Heat

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This year's 2005 Judicial Hellholes report discovered new trends.

**Dousing Hot Spots:** Since the Judicial Hellholes report was first published in 2002, the civil justice reform movement has won important victories at both the state and federal levels. The report has contributed to the reform effort by pinpointing specific jurisdictions, abuses and solutions.

Consider the example of Hampton County, South Carolina. Hampton County had been named a Judicial Hellhole (Number 3 in 2004) or received a Dishonorable Mention in each of the past three reports for being a destination of litigation tourism, a place where plaintiffs only go to file their lawsuits. Local judges were abusing South Carolina's loose venue laws and allowing plaintiffs' lawyers – who serve as travel agents to these litigation tourists – to file cases in Hampton County that had no relation to the County itself. This year the South Carolina Legislature and Supreme Court strengthened the state's venue rules (See Points of Light, page 41).

**Spotting Brushfires:** As the civil justice reform movement gains significant victories and douses the flames in some Judicial Hellholes, plaintiffs' lawyers have been packing their bags in hopes of establishing new Judicial Hellholes.

Among the most interesting of choices is Delaware, a state that has been widely recognized as having a fair judiciary. We hope that it will remain so. Nevertheless, the Madison County firm SimmonsCooper, the Texas firm Baron & Budd, and Baltimore personal injury lawyer Peter Angelos are opening offices or filing cases in Delaware. Companies incorporated in Delaware, of which there are many, may find it harder to challenge venue or remove class actions to federal court (See Delaware, page 36).

**Turning Up the Heat:** Even where legislative reform has been successful, such as in Texas, Judicial Hellhole judges can still misapply the law and make procedural rulings that favor local personal injury lawyers and their clients. (See Number 1 Judicial Hellhole, page 13). These jurisdictions sadly remain Judicial Hellholes – prisoners of the local judges and plaintiffs' lawyers that have skewed the civil litigation system against corporate defendants.

Parts of Texas have returned to Judicial Hellhole status, a trend that validates the premise of the Judicial Hellholes report: judges have significant decision-making powers to influence the way cases are heard, and likely resolved. (See The Making of a Judicial Hellhole, page 8).

### Judicial Hellhole Success Stories:

When the Judicial Hellholes reports spotlight specific abuses, courts, legislatures and voters often fix the problems:

#### Illinois

Madison County has been the poster child of the Judicial Hellholes program for its systematic bias against out-of-state defendants in civil lawsuits, uneven application of the law to litigants, favoritism for local plaintiffs' lawyers, creating causes of action previously unknown and implementing procedures foreign to due process. Last year, Madison County neighbor St. Clair County was ranked the Number 2 Judicial Hellhole for some spillover class action abuse and medical malpractice woes.

- President Bush visited Madison County, using the courthouse as a backdrop for announcing his civil justice reform agenda. Soon thereafter, Congress enacted the Class Action Fairness Act.
- Citizens, tired of living in the worst Judicial Hellhole, began rebelling. They rejected a Madison County judge for the Illinois Supreme Court, and have begun raising questions during jury selection of the legitimacy of out-of-state claims.

- The legislature enacted medical malpractice reforms, placing limits on noneconomic damages awarded against doctors and hospitals.
- The local asbestos judge stepped aside after being criticized for abusive techniques against corporate defendants. His replacement has thrown out a number of asbestos cases that should have been filed elsewhere.
- Madison and St. Clair County courts have adopted inactive dockets for those who have been exposed to asbestos but have not developed any injury in order to give priority to the claims of the truly sick.

### Mississippi

Mississippi has been transformed from the “jackpot justice capital of America” to America’s number one reformer. The 2002 and 2003 Judicial Hellholes reports cited problems in several Mississippi counties including Copiah, Claiborne, Holmes, Hinds and Jefferson. The reports spotlighted numerous problems, including the abuse of the state’s venue laws, the permissive joinder rule allowing for “mass actions,” and the naming of the same local drug store in pharmaceutical litigation to stop out-of-state manufacturers from properly removing the cases to federal court.

- The legislature protected local retailers, such as the local drug store, by providing that a defendant whose liability is based solely on its status as a product seller may be dismissed if there is another defendant from whom the plaintiff may recover.
- The Governor ushered through a comprehensive reform package that curbed venue and joinder abuse by requiring a “substantial” connection between the lawsuit and the county in which it is filed and that venue be proper for each plaintiff. It also included limits on noneconomic damages, limits on punitive damage awards against small businesses, the abolition of joint and several liability, innocent seller protections and better jury service rules.
- The Mississippi Supreme Court strengthened the state’s venue, mass action and joinder rules by dismissing claims of out-of-state plaintiffs and requiring the claims of Mississippi residents to be heard in a county with a connection to their claims.

- Voters elected justices to the state supreme court who have campaigned against out-of-control litigation.

### Texas

Most notable among the named Judicial Hellholes are Jefferson, Starr, Nueces and Hidalgo Counties, with Jefferson County being known as the “Barbary Coast of Class Action Litigation.” Jefferson, as well as the other counties, has seen a disproportionate amount of asbestos litigation and outrageous verdicts.

- The federal Class Action Fairness Act was enacted to help end many of the class action abuses in Texas. For example, a number of cases ended with plaintiffs getting coupons and their lawyers taking millions of dollars in fees.
- The state legislature enacted medical criteria laws for asbestos cases in order to give priority to the claims of the truly sick.
- Voters passed Proposition 12, which gave the legislature authority to limit excessive noneconomic damage awards in medical liability lawsuits.
- The Civil Justice Reform Act of 2003 reduced abuse in venue, *forum non conveniens* and state class actions. It also meaningfully reformed product liability, proportionate liability, appeal bonds and multi-district litigation.

### West Virginia

Named in every Judicial Hellhole report, West Virginia is known for its cozy relations between plaintiffs’ lawyers, judges and the attorney general. It also was home to one of the largest asbestos mass consolidations, where 8,000 plaintiffs – most of whom were from out of state – were joined in one lawsuit against 250 defendants. The state supreme court also has created loose criteria for new causes of action for medical monitoring and fear of cancer.

- The legislature closed the state’s loose venue law by requiring an out-of-state resident to be injured in the state to file a suit in the state.
- The legislature also limited noneconomic damages in medical liability cases, enacted new laws on joint and several liability and curbed third-party, bad faith insurance suits.

- The citizens voted out Justice Warren McGraw, who authored the medical monitoring decision and was widely considered to be part of the lawsuit abuse problem in the state.

### **Pennsylvania**

Philadelphia has been spotlighted the last three years for its unpredictability and high verdicts in medical malpractice litigation. Early on, it became a magnet for the state's medical malpractice claims, causing malpractice costs and insurance premiums around the state to skyrocket.

- To minimize Philadelphia courts' impact on the state's medical care, the legislature required medical malpractice claims to be filed where the care was received. It also required an independent expert to certify a claim.
- While Philadelphia is on the Watch List, reports indicate that controversial and complex civil cases have been handled more fairly in 2005; there also have been fewer filings and large verdicts than in past years.

### **Florida**

South Florida has been included as a Judicial Hellhole for the past three years due to its high verdicts, improper class certifications, asbestos litigation "rocket docket" and medical malpractice woes.

- In 2004, Judge Timothy McCarthy, who presides over all the asbestos cases in South Florida, dismissed numerous lawsuits that had no connection with the area.
- In 2005, the legislature enacted medical criteria reform for asbestos and silica claims so that a person would have to show credible evidence of an asbestos or silica-related injury in order to file a claim.

### **Missouri**

St. Louis was named a Judicial Hellhole in 2002 and 2003 for being home to the state's highest verdicts and disproportionate share of the state's personal injury and medical malpractice claims. In 2005, the legislature enacted statewide comprehensive reforms to reduce unfair joint and several liability, put reasonable limits on noneconomic damages in medical liability lawsuits and restrict venue laws to stop unreasonable forum shopping, among other things.

# The 2005 Judicial Hellholes

## HELLHOLE #1 RIO GRANDE VALLEY AND GULF COAST, TEXAS

Areas of Texas, specifically the Rio Grande Valley and Gulf Coast, continue to be considered unfair to civil defendants, even after Texas' enactment of comprehensive civil justice reform in 2003. This area's inclusion at the top spot in the Judicial Hellholes list is a reminder that legislation can help, but it does not always quench the fires of Judicial Hellholes. Judicial Hellholes most often are characterized by unfair day-to-day practices by individual courts – in class certification, in discovery, in evidentiary rulings and in jury instructions – that routinely disfavor civil defendants, especially out-of-state employers.

### Jefferson County: A History of Litigiousness, Classless Actions and Good Living for Personal Injury Lawyers

Jefferson County courts have a reputation for astounding awards, such as last year's \$1.013 billion verdict for one family in a fen-phen lawsuit against Wyeth. The court also attracts an inordinate amount of litigation: class actions, medical malpractice lawsuits, silica and asbestos lawsuits, and on and on.

An ATRF report released earlier this year looked closely at Jefferson County's Judicial Hellhole status.<sup>14</sup> According to the report, in 2002, there were 117 civil lawsuits for every 10,000 people in Jefferson County, the highest per capita total among Texas counties with populations over 200,000.<sup>15</sup> The number of personal injury lawsuits over the period from 2003 to 2004 was the highest in Texas as well.<sup>16</sup> Of the personal injury claims filed between September 1, 2002 and August 31, 2003, nearly half were claims alleging medical malpractice or asbestos or silica related injuries.<sup>17</sup> Plaintiffs' lawyers also are naming more defendants in each lawsuit. In 1996, the average number of defendants per lawsuit was 2.4.<sup>18</sup> In 2004, the average number of defendants per lawsuit increased to 6.37.<sup>19</sup> "Adding defendants

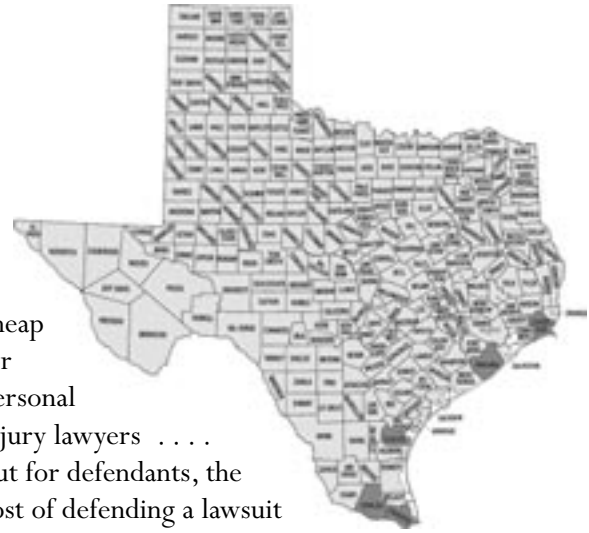
is cheap for personal injury lawyers . . . . But for defendants, the cost of defending a lawsuit – even a frivolous one – can be tens of thousands of dollars."<sup>20</sup>

Jefferson County is a notorious class action magnet. Between 1998 and 2002, the number of class action lawsuits filed in Jefferson County increased by 82%.<sup>21</sup> Only 13% of defendants and 64% of the named plaintiffs in these class actions were residents of Jefferson County. Trial courts regularly grant class certification in these cases when it is improper. In the last year alone, the Texas Court of Appeals for the Ninth District reversed at least four class certifications in Jefferson County. One class action involved insurance policy renewals,<sup>22</sup> one involved a particular model of desktop computers,<sup>23</sup> another involved late charges at a rent-to-own store,<sup>24</sup> and the fourth involved warranties for laptop computers.<sup>25</sup>

*"There are few places in the country that offer lawyers a better opportunity to make a lot of money than Beaumont, an industrial town of 114,000."*

— Nathan Koppel, *The American Lawyer*

In the class action involving desktop computers, the proposed class consisted of approximately *three million* people from all over the United States; the class alleged breach of warranty.<sup>26</sup> Plaintiffs' lawyers guessed correctly that a Jefferson County



trial court would be willing to certify this national class. A Texas appellate court, however, found that the trial court abused its discretion by granting class certification because there existed substantial conflicts between Texas law and the law of other states; common issues did not predominate over individual issues.<sup>27</sup> In the class action involving late charges at a rent-to-own store, the appellate court reversed the trial court and found that “[i]ndividual damage issues ‘will be the object of most of the efforts of the litigants and the court.’”<sup>28</sup>

The real winners of Jefferson County’s litigation bonanza are the plaintiffs’ lawyers. About every quarter-mile in the west end neighborhood of Beaumont, the Jefferson County seat, there is a massive home belonging to a plaintiffs’ lawyer.<sup>29</sup> “They’re not homes,” according to plaintiffs’ lawyer Wayne Reaud of Reaud, Morgan & Quinn, “They’re mansions.”<sup>30</sup> Nathan Koppel of *The American Lawyer* reports that “[s]ome practically look like campuses, with a main building backed by miniature replicas that serve as guest houses or pool houses.”<sup>31</sup> One Beaumont lawyer has a gymnasium, complete with an indoor basketball court.<sup>32</sup>

Reaud himself owns a Gulfstream G-4 jet and homes in Santa Fe, New Mexico; Beaver Creek, Colorado; and Austin, Texas.<sup>33</sup> Reaud’s Beaumont-based firm of 13 lawyers alone “earned over \$100 million in revenue in 2003 and was on track to bring in a similar amount in 2004 from cases spanning from asbestos, to medical malpractice, to product liability class actions.”<sup>34</sup>

### Beyond Jefferson County

Aside from Jefferson County, several other counties in the Rio Grande Valley and Gulf Coast merit special attention because of their reputation for uneven justice. Some have expressed concern over the ability of defendants to receive a fair trial in counties including Brazoria, Cameron, Hidalgo, Nueces and Starr. Each of these counties, with the exception of Brazoria, has been featured in past Judicial Hellhole reports. Improvement in the Texas litigation climate, including the enactment of comprehensive civil justice reform legislation in 2003, led ATRF to leave only Jefferson County, the worst Lone Star offender, among its Judicial

Hellholes last year. Yet, the other counties continue to be named as a source of concern, reminding readers that Judicial Hellholes are primarily a result of unbalanced rulings by judges, a factor that cannot be completely remedied through legislation.

This year, in the first ever Vioxx case to go to trial, a Brazoria County jury awarded a single plaintiff \$253.5 million – \$24.5 million in economic damages and a whopping \$229 million in punitive damages.<sup>35</sup> Members of the jury declared that they wanted to “send a message” to Merck, the manufacturer of the painkiller.<sup>36</sup> Under Texas law, which places limits on punitive damages, the \$229 million punitive damage award must be reduced to \$1.6 million, putting the total award at \$26.1 million.<sup>37</sup> Merck has indicated that it will appeal the verdict.

The extraordinary award came after the plaintiffs’ attorney in the case, Mark Lanier, reportedly was permitted by the judge to make highly prejudicial and improper statements during the trial and in his summation to the jury, such as “let ‘em know you can think Merck money.”<sup>38</sup> This first Vioxx case was widely regarded as weak, since the plaintiff’s husband died of cardiac arrhythmia, a condition not linked to Vioxx.<sup>39</sup> Merck was not given an opportunity to cross examine in person the primary defense witness, the coroner who initially attributed the plaintiff’s cause of death to an irregular heartbeat, but then changed her story to pin responsibility on the drug.<sup>40</sup> Mr. Lanier was able to track her down in the United Arab Emirates and introduce her videotaped deposition.<sup>41</sup> One juror admitted finding the medical evidence confusing. “We didn’t know what the heck they were talking about.”<sup>42</sup> According to Merck, the plaintiff did not take the drug long enough to have an increased risk and did not die from a heart attack or stroke – the conditions for which taking Vioxx increases the risk.<sup>43</sup> Lanier indicated that his team was “just getting warmed up.”<sup>44</sup>

Not surprisingly, the case had almost nothing to do with Brazoria County: the plaintiff lives almost 300 miles north in Keene, near Fort Worth, and Merck’s only facility in Texas is in Dallas.<sup>45</sup> The complaint originally named a Brazoria County researcher and his company because they did some studies on Vioxx. Naturally, they were dropped as defendants as the lawsuit got underway, and the



case was allowed to continue in Brazoria County.<sup>46</sup> Recently, a federal appeals court in another state refused to allow use of such tactics to keep a case in another plaintiff-friendly state court when it should have been heard in a neutral federal forum.<sup>47</sup>

Lanier knew that Brazoria County was the right place to sue. “If there’s one thing Mark Lanier knows, it’s where to find a receptive audience. Seldom do they come any friendlier than on the fourth floor of the Brazoria County Courthouse.”<sup>48</sup> In 1999, Lanier filed suit in Brazoria County on behalf of 21 Alabama steelworkers who had been exposed to asbestos. “He left with a \$115 million damage award, one of the largest ever given in an asbestos case.”<sup>49</sup> Pleased with the lucrative result, Lanier is now leading a group of personal injury attorneys trying to replicate the award by filing Vioxx cases in favorable state courts around the country.<sup>50</sup> The federal judge who is trying to impartially resolve those claims in a coordinated manner commented that such an effort is “counterproductive” and will allow litigation to “linger for years.”<sup>51</sup> It is interesting to note that on November 3, 2005, a New Jersey jury found that Merck was not liable for the heart attack of an Idaho postal worker that occurred after he took the painkiller. The jury found that Merck had not failed in its duty to warn. This is a stark contrast to the Texas decision.<sup>52</sup>

Texas Appellate Courts must continually overrule questionable decisions and excessive verdicts from these counties. For example, the Texas Supreme Court reversed an \$18 million award from Cameron County in October 2004.<sup>53</sup> The plaintiff in the case claimed that a bank maliciously prosecuted him by complaining to Texas authorities about a debt the plaintiff owed to the bank. The bank only complained to authorities after the plaintiff had sold a substantial amount of the collateral for the debt and kept the money for himself. Texas authorities indicted the plaintiff, but later dismissed the charges. The Texas Supreme Court reversed the \$18 million award, finding that “[a]s a matter of law, [the plaintiff] owes the Bank, not the other way around.”<sup>54</sup>

This year, an appellate court found that a Hidalgo County trial court improperly certified a class action in a case involving a dispute between teachers and their insurer over interest rates paid on an annuity.<sup>55</sup> The court ruled, “individualized

determinations of reliance would not predominate over common questions of law or fact.”<sup>56</sup> A Nueces County trial court also was reversed on appeal after it awarded damages for medical expenses and pain and suffering despite a lack of evidence to justify such a payment.<sup>57</sup> At the hearing, the “appellees did not provide an expert to establish

*If there’s one thing Mark Lanier knows, it’s where to find a receptive audience. Seldom do they come any friendlier than on the fourth floor of the Brazoria County Courthouse.*

— *Houston Chronicle*, Oct. 3, 2004

the reasonableness and necessity of the past medical expenses.”<sup>58</sup> And “[t]he only evidence presented by appellees to establish mental anguish was a ‘yes’ response to counsel’s questions to the respective appellees: *i.e.*, ‘did [plaintiff/appellee] endure mental anguish in the past’ and ‘will [plaintiff/appellee] continue to suffer mental anguish in the future?’”<sup>59</sup> This was clearly insufficient under Texas law.

## HELLHOLE #2 COOK COUNTY, ILLINOIS

Cook County, overshadowed in the past by its Southern Illinois neighbors Madison and St. Clair Counties, joins the list this year as a Judicial Hellhole. Cook County has a long and growing reputation as a friendly place for lawsuits<sup>60</sup> and “a known hostility toward corporate defendants.”<sup>61</sup> As its more infamous Illinois neighbors begin to address judicial abuses, there are strong signs that problems are mounting and Cook County is further gaining in popularity among plaintiffs’ lawyers.





## Asbestos Lawsuits on the Rise

Asbestos filings in the Cook County Circuit Court rose sharply in 2004 when compared to the previous year. A total of 236 asbestos lawsuits were filed in Cook County in 2004, a near 40% increase over 2003 and slightly more than those filed in 2002.<sup>62</sup>

*“I think you [will] find more of them filed here because [of] the pressure to dismiss cases where it should be under forum non conveniens. In other words, cases where they have no connection with Madison County.”*

— Law Division Presiding Judge  
William D. Maddux, commenting on the influx  
of asbestos cases in Cook County

It appears that the increase in Cook County may be due at least in part to a recent change in philosophy against forum shopping by the judge handling asbestos claims in plaintiff-favorite Madison County.<sup>63</sup> Cook County judges and lawyers agree that with asbestos cases being kicked out of Madison County for having no connection to the area, more plaintiffs’ lawyers appear to be trying their luck in Cook County.<sup>64</sup>

## Popular for Class Actions

Cook County is also a popular forum for class action lawsuits, though not as magnetic as Madison and St. Clair Counties. For example, when plaintiffs’ lawyers decided where to file the first Vioxx class action in the state, they chose Cook County – beating their litigious neighbors in Madison County to the courthouse by one day.<sup>65</sup> When filed, the Cook County lawsuit included just one named plaintiff purporting to represent 300,000 Illinois residents who took Vioxx for everything from arthritis pain to menstrual symptoms.<sup>66</sup> One would think that the first individual to sue would be someone claiming to be severely hurt by the drug. But not the case in Cook County where the plaintiff, a woman who took Vioxx for four years to combat osteoarthritis, told the press, “My experience with Vioxx was great; it really helped me.”<sup>67</sup> She was solicited by a plaintiffs’ lawyer who knew she took Vioxx and had experienced no injury.<sup>68</sup>

The number of class action lawsuits filed in Cook County is high but relatively stable: 254 in 2002, 323 in 2003, and 276 in 2004.<sup>69</sup> Some of the spike in 2003 may have been due to a particular Cook County law firm’s self-created niche of suing senders of unsolicited facsimiles under federal law.<sup>70</sup> One Cook County judge has presided over more than 100 of such lawsuits, at least half of which sought class action status, since 2002.<sup>71</sup> Some of these class actions have been brought on behalf of plaintiffs in multiple states.<sup>72</sup> The firm, Edelman Combs Lattuner & Goodwin LLC, discovered a lucrative business in the little-known law that provides for \$500 per violation (per unsolicited fax) regardless of actual damages.

## Litigation Tourism: Lawyers Pack Their Bags for Cook County

Plaintiffs’ lawyers and their clients often arrive at the Cook County Courthouse from other Illinois counties and other states with a briefcase and a lawsuit in hand. Cook County Circuit Court judges often decline to dismiss the case for lacking a connection to the county. Here are a few recent examples where Cook County judges were found to have abused their discretion by refusing to transfer the case:

- In a lawsuit arising from a car accident that occurred in DuPage County, the plaintiffs were residents of DuPage County, medical and law enforcement witnesses were located in DuPage County, and most medical treatment for injuries was provided in DuPage County. Yet, the lawsuit was filed against Enterprise Rent-A-Car in Cook County. The only tie to the county was that one of the injured was transferred to a Cook County hospital by air just before his death and the medical examiner was located in Cook County. In December 2004, the appellate court found the trial court should have transferred the case.<sup>73</sup>
- In a medical malpractice action, the treatment, all 20 witnesses, the medical records, and the defendants were located in McHenry County. The plaintiffs lived in Lake County. The plaintiffs tried to hook their claim into Cook County by alleging that an affiliate of one of the defendants had a medical facility and served part of Cook County. In October 2004, the appellate court found the

trial court should have transferred the case.<sup>74</sup>

- In a lawsuit brought by a person struck by a train while he was lying between the rails of the train track, the accident site, responding police and paramedics, police and medical reports, the hospital at which the plaintiff was treated, and the physician who provided follow-up treatment were all located in DuPage County. None of the witnesses lived in Cook County and those who were not residents of DuPage County lived closer to DuPage County than Cook County. Nevertheless, the trial court refused to transfer the case from Cook County, applying an “its close enough” rationale due to the short distance between the two counties. In April 2004, the appellate court found the trial court erred and remanded the case to the state court for further consideration of whether the case should be transferred.<sup>75</sup>
- Even when there is absolutely no connection between a defendant and the State of Illinois, it can find itself blown into the Windy City. For instance, a trial court allowed an Illinois couple to sue in a Cook County court when one was injured by a mirror that fell from a wall during their stay as guests at a California resort. The company had its primary place of business in LaQuinta, California, and was incorporated in Delaware, but the plaintiffs claimed the company “did business” in Illinois essentially because it owned a company that owned another company that had a Chicago office wholly unrelated to the injury. An appellate court dismissed the case, finding the trial court had no jurisdiction over a company with such an absence of contact with the state.<sup>76</sup>
- To be fair, the Cook County Circuit Court did dismiss a case in March 2004 brought by Taiwanese citizens and residents relating to a plane crash at an airport in Taipei, Taiwan, against Singapore Airlines<sup>77</sup> – demonstrating there is some extreme limit to what degree of forum shopping Cook County courts will tolerate.

### Double Standards?

Compare these two cases, both from Cook County. In the first case, the trial court found that it was not

prejudicial for a plaintiffs’ lawyer to show the jury a “day-in-the-life” video of a driver who was injured in a collision with a freight train.<sup>78</sup> The defense claimed they were “ambushed” by the plaintiffs, who first disclosed the existence of the video the day the case was scheduled for trial, and then refused to provide outtakes from the video. The result: the trial court upheld a jury award of \$42.5 million to the driver, the driver’s husband and a passenger, and the appellate court affirmed in November 2004.

*“My experience with Vioxx was great; it really helped me.”*

— not what one would expect to hear from the single-named plaintiff in the first Vioxx class action lawsuit filed in Illinois. The uninjured plaintiff was solicited by a plaintiffs’ lawyer

In the second case, a worker who suffered a knee injury while riding in the back of a truck during a construction project sued the truck driver and owner claiming disability and continued pain.<sup>79</sup> The defendants sought to introduce a videotape showing the employee in the front and back yard of his home walking without a cane, moving a ladder, bending over, operating a chain saw, removing a tree stump, walking up and down stairs, swinging an ax and pushing a wheel barrow after the accident. The plaintiffs argued the video was disclosed late and that the tape lacked foundation because the recording company was no longer in business. The trial court did not allow the jury to view the tape and they returned a \$3.3 million award. In June 2004, the appellate court found that the trial court properly excluded the tape as prejudicial because the edited footage gave the impression that the plaintiff’s activity was constant. Despite argument that the \$2.2 million portion of the award for pain and suffering “makes no sense” when compared to jury awards in similar cases, the court refused to even consider such cases and upheld the award.

There appears to be a double standard in Cook County: selective day-in-the-life videos are admissible when they invoke sympathy for the plaintiff, but prejudicial and excluded when they might help a defendant challenge a plaintiff’s claims.

## HELLHOLE #3 WEST VIRGINIA

West Virginia continues its distinction as the only statewide Judicial Hellhole. West Virginia courts are considered “a favorite for wealthy personal injury lawyers.”<sup>80</sup>



Numerous multi-million dollar settlements occurred in West Virginia this year, likely spurred on by West Virginia’s Hellhole status. “With our national reputation for unfair courts, most lawsuits are settled long before they ever have a chance of going to trial. People sued in West Virginia often settle rather than take a chance in our unfair and unpredictable courts.”<sup>81</sup>

*“West Virginia was a ‘field of dreams’ for plaintiffs lawyers. We built it and they came.”*  
— West Virginia Judge Arthur Recht<sup>82</sup>

Some reasons why plaintiffs’ lawyers prefer “Wild, Wonderful, West Virginia,” is their ability to pick and choose where they file claims, a legal rule that allows monetary compensation simply if one might have been exposed to a toxic substance regardless of the absence of actual injury, the lack of any reasonable limits on damages and the potential for a defendant who is only partly responsible for an injury to be forced to pay 100% of the damages.<sup>83</sup> West Virginia is also a place where lawyers often earn significantly more in legal fees than their clients receive in compensation.<sup>84</sup>

### Hostility Toward Corporate Defendants

To understand the hostility corporate defendants feel in West Virginia, one needs to look no further than the state’s highest court. Imagine if a state supreme court justice called the Chief Executive Officer of your company “stupid,” “a clown” and “an outsider,” in comments at a public meeting, and then refused to recuse himself when a case involving

that company’s affiliate, as a defendant, came before the court. That is precisely what occurred in West Virginia, where Justice Larry Starcher called Massey Energy CEO Don Blankenship such unflattering names at the annual meeting of the West Virginia Political Science Association.<sup>85</sup> Massey affiliate Marfork Coal Co. filed a petition with the court arguing that “the volatile and antagonistic comments made by Justice Starcher” create “at the very least, a serious appearance of partiality that disqualifies Justice Starcher from deciding any matter involving Massey or its subsidiaries.” Nevertheless, Justice Starcher will decide the case, despite the ongoing feud between him and the corporation’s principal. *The Charleston Daily Mail* points out that the Judicial Code of Ethics says judges cannot hear cases in which “their impartiality might be questioned.” “The code either means what it says, or it means nothing – in which case, ‘judicial hellhole’ is an accurate description,” said the daily.<sup>86</sup>

### Does Teflon Stick in West Virginia?

This year, West Virginia hosted a multimillion settlement stemming from a chemical used in the popular nonstick coat, Teflon<sup>®</sup>. Residents living in the vicinity of DuPont’s Washington Works plant in Parkersburg, West Virginia, had alleged that a miniscule concentration of the same chemical made its way into the state’s water supply and could pose a health threat. A Wood County Judge approved the settlement in February 2005, which includes \$70 million upfront. This amount includes funds for a panel to see if there is a link to health effects<sup>87</sup> – something the plaintiffs generally have to show before filing a suit. The settlement also includes a potential \$235 million for a medical monitoring program for area residents and millions more in lawyers’ fees, regardless of what the study shows.<sup>88</sup> Yet, the level of the chemical was well below EPA standards and considered a “scare campaign” by some consumer advocates.<sup>89</sup>

### Medical Monitoring: Cash Without Injury

As noted above, the West Virginia Supreme Court of Appeals has ruled that state law permits lawsuits where people with no injury collect cash awards by claiming that they should get regular checkups

for disease because they may have been exposed to a dangerous substance.<sup>90</sup> West Virginia is the only state where people can collect cash awards in these suits without showing that there is a reasonable probability that they will become ill and there is no medical benefit to the checkups. Use of the cash awards is not restricted to health care purposes, and plaintiffs can use them as they please.

Most courts have rejected such claims, with the Michigan Supreme Court joining the list and criticizing the West Virginia approach this year.<sup>92</sup> (See Michigan Supreme Court, page 42).

There is some hope that the tide in West Virginia may be changing. Recognizing the numerous public policy problems spawned by the *Bower* ruling, the West Virginia Supreme Court of Appeals in December of 2004 limited its potential damage.<sup>93</sup> In *Chemtall Inc. v. Madden*, the court essentially ruled that trial lawyers cannot use the class action device as a way to export West Virginia's liberal medical monitoring standard to nonresidents living and injured in states where medical monitoring has not been adopted or is applied in a more restrictive manner. The court held that a class involving claimants from multiple states that recognize medical monitoring as a cause of action can only be certified if the circuit court can, "in detailed and specific fashion," make a finding that the various class members' state medical monitoring causes of action are "reasonably co-extensive with the medical monitoring causes of action in West Virginia."<sup>94</sup>

### **A Strong Alliance Between Plaintiffs' Lawyers, the Attorney General, and the Courts**

West Virginia personal injury lawyers have the help of the state's Attorney General, Darrell McGraw, in extracting large settlements. The latest example of this unholy alliance is the \$3.7 million in contingency fees that a group of West Virginia and Washington, D.C. lawyers will share coming from the Attorney General's \$10 million settlement of a state lawsuit related to the marketing of the painkiller, OxyContin™. Many of the local lawyers had reportedly contributed over \$70,000 to Attorney General McGraw's election campaigns over the past eight years. "The concern here is there is appearance of thousands being contributed

to campaigns and millions being returned in legal fees," observed Bill Bissett of West Virginia Citizens Against Lawsuit Abuse. "It looks bad."<sup>95</sup>

*The court said, in effect, "if you live in West Virginia, boy have we got a deal for you. We are going to give you a lump sum of money and you are going to get it now, and there is no restriction on how it is spent. Originally, I referred to this in my dissent as 'the pick-up truck fund,' but my clerk, a bright young man, suggested we should call it the 'Myrtle Beach improvement fund' because so many of our folks go to Myrtle Beach when they vacation. At any rate, this windfall of cash will not be spent for medical tests. This is what our tort law has come to."*

— West Virginia Justice Elliot Maynard, discussing one of the reasons behind his dissent in the case permitting medical monitoring.<sup>91</sup>

Attorney General McGraw's brother, former West Virginia Supreme Court of Appeals Justice Warren McGraw, also had close ties to the plaintiffs' bar. Justice McGraw received a record-setting \$2.5 million in contributions from personal injury lawyers to fund his reelection campaign in 2004, according to reports.<sup>96</sup> Some have fairly observed that such contributions "give the appearance of impropriety, and raise significant questions regarding the impartiality of our state Judiciary," particularly when those making such contributions appear before the court.<sup>97</sup> Despite such strong support from the plaintiffs' bar, political newcomer Brent Benjamin unseated Justice McGraw in November 2004,<sup>98</sup> demonstrating that West Virginia voters are not happy with the poor reputation of the state's civil justice system.

### **Voters Want Change**

A 2005 survey found that nearly eight in ten West Virginia voters, regardless of political affiliation, believe that the number of lawsuits in state courts is a "serious problem" with one-third finding the problem is "very serious."<sup>99</sup> Three-quarters believe the lawyers benefit most from the current civil justice system in West Virginia, with only 4% and 7% believing that consumers and victims

benefit most, respectively. A substantial majority of respondents supported civil justice reforms including:

- elimination of joint and several liability that allows a company that is partly responsible to pay the entire award if other defendants do not pay their fair share;
- elimination of the collateral source rule that allows a plaintiff to recover again for injuries even if they have already been fully compensated by their insurance; and
- prioritization of the asbestos claims of those who are sick over those who have been exposed to asbestos but who are not ill.

### Reasons for Optimism

The spotlight on West Virginia as a Judicial Hellhole has encouraged the state to improve some aspects of its judicial system. For example, West Virginia has made progress in medical malpractice reform. “The number of medical malpractice lawsuits and settlements in West Virginia has fallen by more than 50% since the Legislature began revising laws involving such cases.”<sup>100</sup> Several leading insurers, who had pledged to reduce rates if West Virginia passed medical malpractice reform, said they would begin rolling back insurance rates for state consumers this year.<sup>101</sup> In August of 2005, the President of West Virginia Physician’s Mutual, the state’s largest medical malpractice insurer, said that West Virginia is beginning to free itself from its reputation as a Judicial Hellhole in the area of medical malpractice and starting to attract new doctors.<sup>102</sup>

West Virginia also was one of a handful of states that allowed third-party, bad-faith lawsuits, allowing people to collect, in some cases, from the insurance company of a negligent driver as well as their own.<sup>103</sup> This year, West Virginia enacted a reform measure preventing this practice.<sup>104</sup> While these lawsuits were few in number (about 120 per year) they resulted in costs of \$167 million a year, which consumer’s paid for in the form of high premiums.<sup>105</sup> This change, combined with improvements in the medical malpractice area recently led the head of the state’s chamber of commerce to observe that “a turnaround seems to be in the making.”<sup>106</sup>

## HELLHOLE #4 MADISON COUNTY, ILLINOIS

Times may be changing for Madison County, the Number 1 Judicial Hellhole for the past two years. Evidence shows that class action and asbestos filings are down, and some indication that doctors may be slowly returning to the Metro-East. Although Illinois has not yet changed its “sue-anywhere” venue law, some local judges have shown an increased willingness to transfer or dismiss cases that have no relationship to the county. In addition, the enactment of the federal Class Action Fairness Act and the Illinois Legislature’s passage of medical malpractice reform are likely to improve Madison County’s litigation climate. These are reasons for cautious optimism.



Madison County continues to host a disproportionate amount of litigation compared to other areas of the state and nation. It remains a place where lawsuits are an industry. Moreover, some of the decreases in filings can be attributed to personal injury lawyers’ fleeing the spotlight shined by the Judicial Hellholes report, and filing their cases instead in other favorable areas. Last year there was evidence that cases were being sent to St. Clair; this year Cook County and Delaware appear to be the recipients. It is not clear whether this is no more than a temporary reprieve.

Madison County hosts an extraordinary amount of litigation – more than four times that of some more populous Illinois counties.<sup>108</sup> It is a place where lawyers don’t just file a lawsuit on behalf of an individual, but instead file the same claim on behalf of all people in the state or country. It is a place where lawyers don’t just bring claims against a tobacco company, but sue the local convenience store operators who sell cigarettes.<sup>109</sup>



When President Bush went on the road to draw attention to the effects of medical liability litigation, he arrived in Madison County, Illinois,<sup>110</sup> and when he discussed abusive class action lawsuits, he talked about Madison County.<sup>111</sup> While Madison County without a doubt remains a Judicial Hellhole, over the past year there have been some encouraging signs of change stemming from the intense spotlight on this small county with an immense amount of litigation.

*“Madison County . . . is legendary for its outsized and outlandish jury awards.”*

— Crain’s *Chicago Business Daily*<sup>107</sup>

### Forum Shopping

Illinois’ weak venue law is what allows lawsuits to flood Madison County. Efforts to address the problem took off in 2005, but ultimately did not result in a legislative reform despite strong public support.

According to a poll of 800 Illinois voters, 80% expressed a need to reform the civil justice system in Illinois and 70% supported the provisions of a bill that would have greatly reduced forum shopping, known as the Common Sense Courts Act.<sup>113</sup>

### Class Actions: The Diamonds of Madison County

Madison County is commonly known as “the prime example of class-action lawsuits run amok.”<sup>114</sup> As the *Belleville News-Democrat* recognized, “Madison County is the class-action capital of the United States. . . . The attorneys behind those cases didn’t come to Illinois looking for fairness. They came hoping for favoritism.”<sup>115</sup>

Two class actions were filed in Madison County in 1998. Then, between 1998 and 2000, more class actions were filed in Madison County than any other county in the United States except for Los Angeles and Cook County, Illinois, both of which have substantially larger populations than Madison County.<sup>117</sup> The number of class actions in “Mad County” continued its climb to 106 in 2003, before leveling off at 82 in 2004.<sup>118</sup> Madison County judges certified over 200 class actions between 2003 and 2004, more than any other jurisdiction in the country.<sup>119</sup> The vast majority of defendants named in such lawsuits are not from Madison County.

*Venue reform “could do a great deal to speed up legal cases and make the system more equitable for defendants. Illinois should not be known as the Land of Lawsuits.”*

— *Chicago Sun Times*<sup>112</sup>

Just before signing of the Class Action Fairness Act (CAFA), lawyers made a rush on the Madison County courthouse in February 2005, filing at least 34 class actions in the week prior to the new law taking effect.<sup>120</sup>

Already, plaintiffs’ lawyers are filing new class actions that routinely claim no more than \$75,000 per class member and a grand total of \$5 million in damages, the trigger for a federal court to hear the claim under CAFA, so that they can remain in the friendly Madison County court.<sup>122</sup> Thus far this year, lawyers have filed class actions in Madison County including a suit against international diamond company, De Beers of Luxembourg, for controlling the worldwide diamond supply;<sup>123</sup> Madison County lawyers, working with local judges, would like to set the price of diamonds worldwide by applying its very own vague Illinois Consumer Fraud Act. Lawyers also were quick to file a Vioxx lawsuit in

*“[T]he minute the lawyers start talking about a class action and they send a demand letter, the companies know they are dead if the case is brought in Madison County, IL. No matter how right they may be, they are dead because the judges in that particular jurisdiction are in the pockets of the local lawyers with whom the out-of-state lawyers who have these class actions align themselves in order to go in there and get these outrageous verdicts that would not be obtained in any fair court of law. So what do the companies do? They have no choice. They will settle for what they estimate the defense costs to be because why should they take a chance on jackpot justice? And it then becomes, in the eyes of many, a broken system of extortion, extortion by attorneys, extortion by the judges over companies that probably have little or nothing to do with Madison County, IL. . . .”*

— Senator Orrin G. Hatch, during debate on the Class Action Fairness Act<sup>116</sup>

Madison County, which does not allege that those using the drug suffered any injury, but merely that they were misled into believing the drug was more safe than it was.<sup>124</sup> And, in a case filed prior to CAFA that demonstrates the types of abuses that often occur, plaintiffs' attorneys will receive \$9.5 million while their "clients" receive just \$5 to \$132

CLASS ACTION FILLINGS	
1998	2
1999	16
2000	39
2001	50
2002	77
2003	106
2004	82
2005	34 prior to signing for CAFA on Feb. 18, 43 total as of Aug. 2 <sup>121</sup>

under a settlement with a computer software company and several insurance companies in which it was alleged that a computer program undervalued cars that were totaled in accidents.<sup>125</sup>

### Big Money and Questionable Claims

Madison County has a history of doling out excessive awards where the evidence does not support the outcome, such as the \$12 billion verdict against Philip Morris in a lawsuit claiming that it was deceptive to market cigarettes as "light." This trend continues. For example, this

year, a Madison County trial resulted in a \$43.8 million judgment against Ford, including \$15 million in punitive damages.<sup>126</sup> The case involved a tragic accident in which a Lincoln Town Car exploded after it was rammed from behind by a 21-year-old college student while stopped for construction on an Illinois highway. There were no similar incidents reported involving that model car.<sup>127</sup> Ordinarily, one would collect from the driver of the vehicle responsible for the accident and his or her insurance. For example, in stark contrast to the Madison County court, a Kansas court this year found that the driver of

the vehicle, and the company that employed the driver, was responsible, not Ford, in a very similar lawsuit.<sup>128</sup> Even the owner of the small business that was found responsible commented, "Do I think Ford should pay? No, I do not," he said. "That's a freak accident, and Ford should not be held responsible for it."<sup>129</sup> But in Illinois, vehicle manufacturers may find themselves on the hook for the irresponsible conduct of others.

### Welding Rod Litigation Finds a Home

Welding rod litigation is another area where Madison County continues to distinguish itself. These multimillion-dollar suits, which are increasingly being referred to as "the next asbestos," claim that exposure to fumes let off during welding result in neurological injuries. The first time a plaintiff prevailed in such a suit was in Madison County in 2003, where a 65-year-old retired worker received a \$1 million award.<sup>130</sup> Madison County is at it again. In 2005, nine welding rod cases were reportedly filed there in a one-month period.<sup>131</sup> The lawsuits name dozens of companies as defendants and claim they conspired to conceal the potential health affects of the fumes from workers and failed to instruct them about proper ventilation.

### Jurors are Questioning Abuses

It was in one such welding rod case in May 2005, that Madison County Judge Nicholas Byron declared a mistrial after the plaintiff's attorney "complained of bias among the members of the jury pool. . . ."<sup>132</sup> Apparently, Judge Byron decided that the jurors were biased because "[m]any in the jury pool had demanded to know why the plaintiff, from southern Missouri, had filed the suit in Madison County rather than in his hometown."<sup>133</sup> "I think [the plaintiff's attorney] filed it [in Madison County] because he knows juries here tend to make big payouts, millions of dollars,"<sup>134</sup> said one juror, a registered nurse. "I don't like when I feel like somebody is trying to pull something over on me."<sup>135</sup> "My whole point is, you live in Cape Girardeau [Missouri]," the juror continued.<sup>136</sup> "Don't they have a good court system there?"<sup>137</sup> The plaintiff's lawyer in the case said that the plaintiff "worked extensively in Wood River and around the county in the 1970s."<sup>138</sup> As this case



shows, jurors in Madison County are beginning to fight their county's reputation as a Judicial Hellhole by questioning forum shopping and other abuses, and some judges are likely to exclude such citizens from participating in jury service or declare a mistrial if jurors appear skeptical of plaintiffs' claims. "It's a sign that people don't want to have an abusive and abused court system," said Ed Murnane of the Illinois Civil Justice League.<sup>139</sup>

### Asbestos Central

For years, Madison County has taken in asbestos claims from around the country. Since 1985, plaintiffs have filed well over 9,000 asbestos suits in the Circuit Court.<sup>140</sup> The number of asbestos filings rose sharply from 65 in 1996, to 176 in 1998, to 411 in 2000, to 884 in 2001.<sup>141</sup> In 2003 and 2004, over 1,400 asbestos cases were filed in Madison County compared to 379 in Cook County, which is 20 times its size.<sup>142</sup> Madison County developed a reputation for moving cases quickly, and its efficiency attracted outsiders with lawsuits with little or no relation to the state. The county also is perceived as rarely, if ever, granting summary judgment for a defendant when the evidence did not support the claim, allowing limitless discovery, providing defendants with little notice to prepare for trial, and then making unfair rulings on admission of evidence at trial.<sup>143</sup> When a defendant refused to settle and the case went to trial, the result was often a huge multi-million dollar verdict.<sup>144</sup> All of these factors strongly pressure defendants to settle, regardless of the merits of their case.<sup>145</sup>

### Availability of Health Care

Illinois is one of 20 states that the American Medical Association deems as being in a medical liability crisis.<sup>146</sup> Its epicenter, as detailed in past Judicial Hellholes reports, is the Metro-East area, including Madison and St. Clair Counties, where reports document more than 180 doctors leaving for less litigious areas to practice.<sup>147</sup> All the brain surgeons are long gone and if you are having a baby, you better be prepared for an hour drive to a doctor.<sup>148</sup> Doctors who stay say that rising insurance premiums have caused them to cut back hours and services and stop performing high-risk procedures, leaving people with

less health care options and forcing some to travel farther for treatment.<sup>149</sup> St. Elizabeth's Hospital in Belleville has broken ground on a new facility in Monroe County in part because, in the words of the hospital administrator, Tim Brady, "It's not as litigious an area as St. Clair and Madison Counties."<sup>150</sup>

### A Meeting of the Judicial Hellholes: West Virginia and California, Meet Madison County

Is it possible that Madison County's Lakin Law Firm has completely exhausted the supply of potential plaintiffs in the State of Illinois? In 2005, the *West Virginia* Supreme Court barred L. Thomas Lakin, the owner and manager of the firm, from appearing in their state for a one-year period. The sanction was in response to the firm's attempt to poach already-represented clients living in West Virginia from local attorneys with the promise of larger awards.<sup>151</sup> One member of the court felt that a one-year suspension against Mr. Lakin was not nearly enough and the court should have taken action against the firm as a whole. "When Governor Joe Manchin said 'West Virginia's Open for Business,' I do not think he meant that out-of-state lawyers were free to come into West Virginia and attempt to steal the clients of our State lawyers while violating our rules of Professional Conduct," Justice Starcher commented in a separate opinion.<sup>152</sup>

In another example of the merging of Judicial Hellholes, Barbie™ has been released from a prolonged stay in a Madison County courthouse and is free to return to her home in California. In 1999, Mattel was named in a nationwide class action lawsuit filed in Madison County. The lawsuit was certified as a class action not under Illinois law, but under California's infamous "shakedown" consumer law, Section 17200, because Mattel was headquartered in California. Section 17200, one of the reasons behind Los Angeles' Hellhole status until it was amended in 2004, had allowed people to sue even if they were not injured. The class action alleged that Barbie's portraying characters such as Scarlett O'Hara in "Gone With the Wind" were not truly a "limited edition" as advertised. After the case was decertified upon passage of Proposition 64 in California leaving only two individual plaintiffs, the case settled. The case lasted more than six years in

court and generated a case file four feet thick.<sup>153</sup> Pitch to Mattel: A limited edition “Madison County Barbie” could be a big seller among plaintiffs’ lawyers and civil justice reform advocates.

*“[L]awsuits are the major industry in Madison County. Business is good.”*<sup>154</sup>

— William Tucker,  
*American Enterprise*

### Litigation is Good Business for Some, But Not Others

The lawsuit industry is profitable for some sectors of Madison County’s economy, while bringing down most of the rest of the state.

For example, court filing fees in asbestos lawsuits generated \$3.1 million for the county’s general fund in 2003 and \$2.6 million in 2004.<sup>155</sup> This led the judge now handling the docket to criticize the litigation as “a cash cow” for the county – when the function of the courts is to administer justice, not make money.<sup>156</sup> In fact, the interest mounting on a \$1.4 billion bond that Philip Morris was required to post in order to appeal the \$10 billion verdict in the 2003 light cigarette class action has generated over \$3 million for Madison County.<sup>157</sup> Ironically, a portion of this revenue was used to fund a quarter of the construction costs of a new \$6.6 million courthouse.<sup>158</sup>

Not only are lawsuits funding local government, but lawyers are doing fine as well. As one publication reported, “Law firms are expanding to occupy former banks, former oil company headquarters, and other facilities of the old economy. Firms from other parts of the country are opening branch offices here. While the downtown shopping districts of most other small towns are all but abandoned, Edwardsville thrives. Lawyers act as the new captains of industry. One has revived a local steel mill. Another is buying a minor league baseball team.”<sup>159</sup>

While local government and lawyers may benefit from Madison County’s litigation industry, the losers are the remainder of the state’s economy and Illinois residents. Over the past decade, Illinois’ top 20 companies have been sued a whopping 226 times in Madison County, a figure that excludes asbestos cases.<sup>160</sup> A 2005 survey found that attracting

new jobs and businesses and making health care more affordable are two top priorities of Illinois voters, with three-quarters of respondents pointing to lawsuits as an important factor in the state’s economic problems.<sup>161</sup> As the *Belleville News-Democrat* has recognized, “until the state’s legal fairness issues are addressed, many doctors and businesses will continue to steer clear” of the Metro-East.<sup>162</sup>

*“[T]he climate that used to be so warm and welcoming for plaintiffs is now unpredictable. Maybe it’s global warming from the spotlight shined on the courts. . . . The attorneys are finding out that in Madison County they can still sue, but it’s no longer a sure thing they will win big.”*

— *Belleville News-Democrat*,  
commenting on two asbestos verdicts in 2005.<sup>163</sup>

### Cautious Optimism

Over the past year, there have been several signs of modest improvement in the Madison County litigation environment.

Lawsuit filings were down in Madison County in 2004. Lawsuit filings reached their peak in Madison County with over 2,100 cases seeking over \$50,000 in 2003. Last year, lawsuits fell to near their pre-2001 level to 1,436. That is still more than three times the number of lawsuits in Illinois counties with comparable populations, and in which class actions are almost unknown.<sup>165</sup> As noted in the 2004 Judicial Hellholes report, the reduction in suits may simply be a result of Metro-East lawyers avoiding the spotlight by bringing cases in neighboring St. Clair County or, as this report shows, in Cook County.

The asbestos litigation environment is changing. After three years of the number of asbestos claims exceeding 800 in Madison County, the number of lawsuits filed in 2004 dropped significantly to 477.<sup>166</sup> Halfway through 2005, only 122 asbestos cases had been filed.<sup>167</sup> But the possible decline in asbestos filings may be short lived. In a two-day period in September 2005, a Beaumont, Texas, law firm reportedly filed 139 asbestos lawsuits and 35 silica claims in Madison County naming dozens of companies as defendants.<sup>168</sup>

In addition, Madison County asbestos trials held between 2000 and 2003 returned verdicts of \$16 million, \$34 million, and \$250 million.<sup>169</sup> But in 2005, rare trials resulted in a defense verdict in a case against General Electric and a \$500,000 award against two of three named defendants in a mesothelioma case where the plaintiffs' lawyer had sought \$50 million in 2005.<sup>170</sup> And, although the \$500,000 award may not seem like a defense victory, since the plaintiff in that case had already received over \$500,000 in settlements from other companies, Illinois law would subtract that earlier compensation from the verdict.<sup>171</sup> In both cases, it was reported that plaintiffs' lawyers rejected significant settlement offers, opting instead to place their bets on Madison County roulette.<sup>172</sup>

There may be three reasons contributing to the change. First, Circuit Judge Daniel Stack, since taking over the asbestos docket from Judge Nicholas Byron, has dismissed suits of some out-of-state plaintiffs, discouraging plaintiffs' lawyers from forum shopping their cases to Madison County.<sup>173</sup> Second, Judge Byron's establishment of a "deferred docket" in 2003, which places on hold the asbestos claims of individuals who claim they have been exposed to asbestos but do not have an impairment, discourages people from filing unless they are sick.<sup>174</sup> Finally, plaintiffs' lawyers are taking their asbestos cases elsewhere, such as Delaware (See page 36).

Madison County Judges may be showing more willingness to transfer cases when there is no connection to the county. For example, in one case, the plaintiff brought a class action complaining about his cell phone in Madison County against Samsung Electronics, even though the company did not have an office or business in the county. Judge Andy Matoesian rejected the plaintiffs' argument that he should be permitted to sue in Madison County simply because he may have used the phone in the county.<sup>175</sup> Judge Stack recently dismissed an asbestos claim brought by a New Jersey plaintiff on behalf of her husband who never lived or worked in Illinois. "It is clear to the court . . . plaintiffs have resided in New Jersey and have no connection with the State of Illinois whatsoever," scolded Judge Stack.<sup>176</sup>

During the past year, two new judges joined the Fifth District, the appellate court that decides

cases coming from Madison County. Those judges were appointed upon the recommendation of Justice Lloyd A. Karmeier, who was sworn in to the Illinois Supreme Court in December 2004 after defeating Justice Gordon Maag of Madison County in a race that was viewed a referendum on civil justice and medical liability reform.<sup>177</sup> The new appellate court judges, who are well-respected by their peers, are likely to closely and fairly review cases out of Madison and St. Clair Counties.

In 2005, Illinois enacted legislation to protect the availability of health care in the state.<sup>178</sup> The new law places a \$500,000 limit on noneconomic damages for doctors and a limit of \$1 million for hospitals. It also provides that a doctor can say "I'm sorry" to a patient without fear that it will be used against him as evidence in a malpractice suit. The limit on noneconomic damages is likely to be challenged in court. But for now, there are some positive signs for health care in the Metro-East area.<sup>179</sup>

The Class Action Fairness Act is beginning to have an impact (See Points of Light, page 40). At the time of publication of this report, at least two class action lawsuits have been removed from the local Madison County court to federal court under the new provisions of the Class Action Fairness

### LAWSUIT FILINGS (OVER \$50,000)<sup>164</sup>

1999	1,246
2000	1,313
2001	1,876
2002	1,729
2003	2,102
2004	1,436

### ASBESTOS FILINGS

1996	65
1998	176
2000	411
2001	884
2003	953
2004	477

Act.<sup>180</sup> But CAFA is not expected to solve all of the problems with the class action free-for-all in Madison County. Instead, lawyers predict more geographically limited class actions, such as those including only Illinois residents.<sup>181</sup>

*“If you see a team of trial lawyers spending time in the Collinsville area, you can be pretty sure they are not looking for horseradish.”*

— President George W. Bush<sup>182</sup>

## **HELLHOLE #5**

### **ST. CLAIR COUNTY, ILLINOIS**

In 2004, St. Clair County, infected by its legally ailing northern neighbor Madison County, debuted at Number 2 on the Judicial Hellhole list. It earned this dubious distinction due to a surge in class action lawsuits (an 1100% spike between 2002 and 2004), general lawsuit filings vastly out of proportion to its small population and an exodus of doctors from the Metro-East area. As the spotlight shined on St. Clair County, it appears that plaintiffs’ lawyers may be moving to greener pastures, choosing instead to file lawsuits in other counties. For this reason, as well as those leading to Madison County’s drop on the list, St. Clair County has moved down as well.

#### **Lots of Lawsuits**

Lawsuits are an industry in St. Clair County. Court records show that plaintiffs’ lawyers filed 768 new lawsuits seeking more than \$50,000 in damages in the St. Clair Circuit Court in 2004.<sup>183</sup> This year, St. Clair saw its 400th lawsuit on July 7,<sup>184</sup> putting it at the same pace as last year. That’s a slight improvement for St. Clair, which saw 832 of such suits in 2003,<sup>185</sup> 909 in 2002,<sup>186</sup> and 797 in 2001.<sup>187</sup> Yet, it is still double the number of lawsuits seen by trial courts in Illinois counties with similar populations, such as McHenry (419), Sangamon (388), and Winnebago (352).<sup>188</sup> The St. Clair clerk’s office took in nearly \$4 million in filing fees in 2004, just slightly less than its peer, Madison County, and far more than the \$2.56 million cost of operating the court, including all personnel salaries and administrative expenses.<sup>189</sup> Only four substantially

larger counties in Illinois took in more filing fees from lawyers than each of St. Clair and Madison Counties.<sup>190</sup> St. Clair also continues to be a popular place for nonresidents of Illinois or other Illinois counties to file claims.<sup>191</sup>



#### **A Class Act**

Multi-state class actions are popular in St. Clair County and the same law firms that bring suits in Madison County often bring them in St. Clair. As last year’s report documented, St. Clair County saw a blossoming of class actions from two in 2002 to 24 in 2004. This year, St. Clair is on track for another record-breaking year. In the days leading up to enactment of the Class Action Fairness Act, local lawyers made a run on the St. Clair County Circuit Court to beat the clock.<sup>192</sup> At least ten class action lawsuits were filed in St. Clair the week before the bill was signed.<sup>193</sup> As of September 8, 28 class action lawsuits were filed in the county, the latest being a suit against the promoters of the video game, “Grand Theft Auto: San Andreas,” claiming that the promoter failed to fully disclose the content of the game leading it to be labeled “M” for Mature rather than “AO” for Adults Only.<sup>194</sup> These are the types of suits where class members across the United States receive a few free video rental coupons while their lawyers take one-third of the total value, millions of dollars.<sup>195</sup>

Filings slowed since enactment of the Class Action Fairness Act, and many of the new filings seek to avoid being moved to a more neutral federal court by limiting total damages to no more than \$5 million. For example, the first class action filed after CAFA could apply Illinois’ infamous Consumer Fraud and Deceptive Practices Act (the law that resulted in multibillion judge-entered awards in recent years) on behalf of residents in 31 states against a title insurance company.<sup>196</sup>

## Is There a Doctor in the House?

As this report noted last year, the Metro-East area, including Madison and St. Clair Counties, lost a substantial number of physicians over the past few years. “It’s clear that the loss of physicians translates into a direct lack of access to key areas of specialized medicine, and that’s reason enough for concern,” said Jim Pennekamp, Executive Director of the Leadership Council Southwestern Illinois, reacting to a study that found the Metro-East lost 15% of its physicians between 2002 and 2004.<sup>197</sup>

*“I have limited many services I formerly offered in an attempt to lower potential risk exposure. . . . In the first seven or eight years of my practice, I rarely needed to refer patients out of the Metro-East for needed medical devices. Now it has become a matter of routine, and sometimes there are considerable distances required and time delays involved for patients to get the care that several years ago they would have acquired right here.”*

— Neurologist Stephen Burger, M.D.,  
President of the St. Clair County  
Medical Society.<sup>198</sup>

As discussed in the Madison County section of this report (See page 20), there are some positive signs for hope in St. Clair. These include enactment of medical liability reform in 2005, a leveling of premium rates, and an apparent plug in the dam of doctors leaving the state. As with other areas of improvement, this may simply be a result of plaintiffs’ lawyers choosing to file in other areas of the state due to increased public scrutiny of St. Clair County’s legal system. According to the President of the St. Clair County Medical Society, plaintiffs’ lawyers are “starting to ply their trade in other areas,” such as Centralia, Effingham and Jacksonville.<sup>199</sup>

In addition, the St. Clair County Circuit Court created an “Asbestos Deferred Registry” in February 2005 to help ensure that a flood of claims “systematically generated by for-profit litigation screening companies” would not flood the

courthouse and undermine the fair administration of justice.”<sup>200</sup> The order, signed by Circuit Chief Judge Jan Fiss, found the court’s action “is justified to control its docket and to manage cases involving asbestos-related conditions that have not progressed to a state of measurable physical impairment or disability.”<sup>201</sup> The new system, however, does not apply to cases filed before December 20, 2004, when the court held a hearing to decide whether to move forward with the plan.<sup>202</sup>

## A Reputation Earned Takes Time to Overcome

Some have challenged St. Clair County’s listing as a Judicial Hellhole, such as St. Clair County Circuit Court Judge Milton Wharton and Illinois State Bar Association President Robert K. Downs.<sup>203</sup> In fact, it was reported that the lawyers’ group spent \$28,000 this year to attempt to counter Madison and St. Clair’s inclusion in the report.<sup>204</sup>

*“[J]udicial Hellhole” encapsulated all the problems into one phrase. It resonated because so many people already believed the worst about their courts. . . . [S]aying the hellhole label is wrong doesn’t necessarily make it so. Just as the negative reputation built up over the years, a new one will be earned over time.”*

— *Belleville News Democrat*<sup>205</sup>

Judge Wharton correctly points out, “We have at times had some aspects and some people on the bench called into question. Individual judges should be individually accountable. I don’t think we should all be painted with the same brush.”<sup>206</sup> This report does *not* intend to imply that all judges serving on the bench in Judicial Hellholes are applying the law in an unfair or bias manner. Rather, it is more likely the actions of a few in a given jurisdiction inspire personal injury lawyers to flock to that area and create skepticism among civil defendants as to whether they can receive a fair trial.

Each year, this report takes a “fresh look” at each jurisdiction in deciding whether it warrants continued inclusion as a Judicial Hellhole. This year, St. Clair County falls from Number 2 to Number 5. If it is indeed a “new day” for the St. Clair judiciary, as Judge Wharton suggests, it will continue to move



down or off the Judicial Hellholes list. As the *Bellville News-Democrat* points out, “Just as the negative reputation built up over the years, a new one will be earned over time.”<sup>207</sup>

## HELLHOLE #6 SOUTH FLORIDA

PRIMARILY MIAMI-DADE COUNTY;  
ALSO PALM BEACH AND BROWARD COUNTIES

South Florida remains a Judicial Hellhole for another year, but Floridians would like that to change. Associated Industries of Florida Service Corporation surveyed voters’ attitudes on tort reform in 2005.<sup>208</sup> According to the survey, more than two-thirds of respondents support significant legal and tort reform.<sup>209</sup> Governor Jeb Bush has expressed his desire to reform Florida’s legal system, encouraging the legislature to address unfairness in the legal system. “Lawsuit abuse is one of the greatest threats to Florida’s robust business climate. Several states have enacted tort reform recently, and without significant action, Florida risks falling behind and jeopardizing its jobs-friendly business climate.”<sup>210</sup>



### Billions for Billionaires

It was a Palm Beach County court that awarded billionaire financier Ron Perelman \$1.45 billion (\$604.3 million in compensatory damages and \$850 million in punitive damages) after finding that Morgan Stanley defrauded Perelman in the sale of Coleman, a camping equipment company, to Sunbeam.<sup>211</sup> According to the *Miami Herald*, “Morgan Stanley vowed to appeal the verdict, blaming Judge Elizabeth Maass for issuing a default judgment in which she told the jury that Morgan Stanley helped Sunbeam, an investment banking client, defraud investors. Because of that judgment, Perelman only had to prove that he was swayed into making his decision regarding the Coleman sale by Morgan

Stanley’s advice.”<sup>212</sup> “Morgan Stanley was not permitted to defend itself on the merits. As a result, the jury heard allegations, instead of true facts, and Morgan Stanley was denied a fair trial.”<sup>213</sup> According to a Morgan Stanley statement, the investment firm lost \$300 million when Sunbeam collapsed – another fact that the jury was not permitted to hear.<sup>214</sup>

### Class Action Redux

Last year’s report noted South Florida’s penchant for improper class certification.<sup>215</sup> This year is no different. For example, an appellate court found that a Miami-Dade County circuit court improperly granted class certification in a case involving an alleged design defect on the bumpers of Volkswagen Jettas.<sup>216</sup> The appellate court found in July 2005 that “the trial court abused its discretion in certifying the class because the key element of causation mandates individual inquiry into each plaintiff’s claim.”<sup>217</sup> In March, 2005, an appellate court also overturned a Palm Beach County Circuit Court’s class certification in a case involving late fees for mortgage payments.<sup>218</sup> The court held that the class failed because an individual issue – the timing of each plaintiff’s payment – would predominate.<sup>219</sup> Despite continued decertification by appellate courts, plaintiffs’ lawyers continue to file class actions in South Florida, tempted by large settlements and friendly trial courts.

### No Playing Around in South Florida

Fear of lawsuits seems to mean “no fun” for kids in South Florida. Broward County schools have reportedly posted “no running” and other warning signs on playgrounds and removed swings, teeter-totters, cement crawl tubes, sandboxes, and merry-go-rounds due to liability concerns.<sup>220</sup> Miami-Dade and Palm Beach Counties also have removed much of their traditional playground equipment. “We sometimes get a letter from the attorney before we even get an accident report from the school.”<sup>221</sup> Since 1999, Broward County has paid out \$561,000 to settle 189 claims for playground accidents. “Play is one of children’s chief vehicles for development,” according to University of Texas Professor Joe Frost, who runs the University’s Play and Playgrounds Research Project. “Right now it looks like we’re developing a nation of wimps.”<sup>222</sup>

## Medical Malpractice... Again

Last year's report focused on the medical malpractice crisis that has engulfed South Florida. High insurance premiums due to unwarranted litigation and large awards continue to plague South Florida's health care system. In 2004, Florida's average malpractice premium was \$195,000.<sup>223</sup> Miami-Dade County had an average premium of \$277,000.<sup>224</sup> By comparison, physicians in Oklahoma, one of the lowest premium states, pay \$17,000.<sup>225</sup>

These excessive premiums continue to have a dramatic impact on the availability of doctors in several practice areas. Florida had 50,003 doctors in 1999, but only 32,683 in 2004, according to the state health department.<sup>226</sup> "You're seeing enormous pressure on the primary care practitioner," according to Tad Fisher of the Florida Academy of Family Physicians. "It's very difficult to operate in this business environment. We see a big shortage coming in Florida, especially when you look at the aging of baby boomers."<sup>227</sup> A Palm Beach County Medical Society report found that the majority of the doctors surveyed think patient care has been affected by the diminished supply of physician specialty services in Palm Beach County emergency departments.<sup>228</sup> Neurosurgeons, hand surgeons, and pediatric neurologists are among the critical specialty groups that are in short supply.<sup>229</sup>

High insurance premiums are not the only factor affecting Florida's health care providers. "In Florida, we're caught in a triple whammy,"<sup>230</sup> according to one Florida doctor. High malpractice insurance rates, medical school enrollment, and Amendment

8, which pushes doctors to settle rather than risk loss of their license should they accumulate three unfavorable malpractice decisions, combine to make Florida a bad place for doctors.<sup>231</sup>

*"Medical practices are virtually worthless right now."*

— Mark Rosenthal, M.D.  
*Miami Herald*, Mar. 29, 2005

Along with Amendment 8, which was approved in November of 2004, Florida voters also approved Amendments 3 and 7.<sup>232</sup> Like Amendment 8, Amendment 7 was pushed by the Academy of Florida Trial Lawyers and will exacerbate Florida's malpractice crisis. Amendment 7, which *seems* innocuous, creates a constitutional right for patients to access any hospital records that have anything to do with any act that could have caused injury or death. Nevertheless, "it is very unclear as to how that information can be used and whether a physician participating in peer review can be found liable for damages for acts discovered as a result of information obtained by the patient."<sup>233</sup> Amendment 3, unlike the others, eases Florida's crisis by slightly limiting attorney contingency fees in malpractice cases. "By limiting the compensation potential for attorneys, this amendment removes the financial incentive to take on meritless litigation. The effect will be to weed out non-meritorious claims, ultimately saving patients' access to quality health care."<sup>234</sup> Clearly, the 2004 amendments were a mixed bag for health care and for doctors in Florida. The full impact of the new laws remains to be seen.



# The “Watch List”

This report calls attention to several other areas that either have been cited in previous Judicial Hellholes reports or are new areas that are being closely monitored due to suspicious or negative developments in the litigation environments.

## CALIFORNIA

Los Angeles County has been named a Judicial Hellhole in past reports. There is some indication that changes in the Los Angeles Superior Court, referred to as “The Bank” due to a string of multimillion-dollar awards, have lessened our concern. In fact, some have praised the Central Civil West division of the court for its fair handling of complex civil litigation. While it appears that court-centered litigation abuses are not as concentrated in Los Angeles as in past years, strong evidence remains about the unfairness of California’s litigation climate.

### Shakedown Lawsuits Continue

Last year’s Judicial Hellholes report spotlighted the abuse of California’s Unfair Competition Law, Section 17200,<sup>235</sup> which allowed lawyers to bring lawsuits against businesses on behalf of the general public for allegedly deceptive practices, even if no one had been injured. The law was abused throughout the state.<sup>236</sup> It allowed lawyers to “shakedown” businesses for purported technical violations of obscure regulations.



On November 2, 2004, however, public outrage over Section 17200 lawsuits led California voters to

overwhelmingly pass Proposition 64, which reduced the potential for abuse of Section 17200.<sup>237</sup>

While legislators have been able to successfully defend Proposition 64 against subsequent attack,<sup>238</sup> they have not been successful in all efforts to curb abuse. A bill that would have reasonably provided businesses with 120 days to cure alleged violations of the Americans with Disabilities Act (ADA) before being hit with a lawsuit failed this year.<sup>239</sup> Without such reform, small businesses, often restaurants, hotels, bars and retail stores, continue to face suits, sometimes from professional plaintiffs, who seek out minor discrepancies from ADA regulations, such as installing a sink one inch too high or an access ramp that is just barely too steep.<sup>240</sup> One man has filed more than 400 lawsuits under the law, including lawsuits in Los Angeles County, against “three Lamplighter Family Restaurants, the Gardena Bowling Center, Crocodile Cafe in Glendale, Sizzler, TGI Friday’s, Canoga Park Bowl and Cables.”<sup>241</sup> “[U]nfortunately, members of the [California Senate Judiciary Committee, who killed the bill,] sided with self-described professional plaintiffs over the testimony of small business owners, members of the disabled community and other victims of ADA lawsuit abuse who support reasonable reform,” said Sen. Chuck Poochigian (R-Fresno), the bill’s sponsor.<sup>242</sup>

### A Reputation for Big Awards

A report on California’s litigation environment released this year by the Center for Legal Policy at The Manhattan Institute underscores the need for continued reform and concerted effort to defeat bills that would open new loopholes akin to former Section 17200.<sup>243</sup> According to the report, “from 1996 to 2001, the average jury award in California tort cases grew 144%.”<sup>244</sup> Construction defect lawsuits have slowed housing growth and led to less affordable housing.<sup>245</sup> Employment lawsuits have negatively affected California’s job market – “nearly 40% of surveyed companies plan to move jobs out of the state, and 50% ‘have explicit policies to halt employment growth in California.’”<sup>246</sup> The report

also noted that “Los Angeles stands out with an eye popping list of verdicts.”<sup>247</sup> Among these verdicts is a \$4.1 million dollar verdict against a store for selling a dietary supplement that allegedly caused a stroke, an award reported in the 2004 Judicial Hellhole report.<sup>248</sup>

A more recent example is that this year a Los Angeles County Superior Court awarded \$15.6 million to a schoolteacher who found a portion of his face on a Taster’s Choice coffee can.<sup>249</sup> The 58 year-old teacher, who had posed for the job in 1986, had earned \$250 with the understanding that the company would pay him an additional \$2,000 if his picture was selected to promote the coffee in Canada. The company mistakenly believed that they had permission to use the photo, which was placed on cans in several countries between 1997 and 2003. Although the jury estimated that he would have earned \$330,000 if Nestle had fairly paid him, the jury nonetheless awarded the model a full 5% of Taster’s Choice sales during that period because he had become “as much a part of the [Nestle] brand as Taster’s Choice.”<sup>250</sup>

The Supreme Court of California has stepped in to reduce Los Angeles County’s excessive verdicts. On June 16, 2005, the court struck down a punitive damages verdict from Los Angeles County as excessive under *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>251</sup> the U.S. Supreme Court case that limited the size of punitive damage awards.<sup>252</sup> The \$1.5 million punitive damages award in a case involving a failed real estate transaction was 340 times the size of the \$5,000 compensatory award. The Supreme Court of California properly found that a punitive damage award is presumed excessive if it is more than ten times the actual harm to the plaintiff.<sup>253</sup> The court remanded the case with instructions to reduce the punitive damages award to \$50,000.<sup>254</sup>

## EASTERN KENTUCKY

Defendants in civil trials routinely expressed concern over the ability to receive a fair trial in some parts of Eastern Kentucky. Pike County is the most frequently named area, but we sometimes hear concern with respect to neighboring areas. Among its problems, Eastern Kentucky has a reputation for

egregious awards. For example, a Pike County jury returned the third largest verdict in the country in 2002: \$270 million (\$250 million of which were punitive damages) in a lawsuit against a gas company over an explosion in a home that injured a man.<sup>255</sup> The jury deliberated for just two hours.<sup>256</sup> It was the state’s largest-ever jury award at that time.<sup>257</sup> The case was reportedly settled for a confidential amount.<sup>258</sup> In another case, the Kentucky Supreme Court had to vacate a \$15 million punitive damage award from Clay County in a case involving a man who died when his Ford pickup slipped into reverse and crushed him.<sup>259</sup> Ford had already paid \$5,596,425 in compensatory damages. According to the Supreme Court, the jury was improperly allowed to hear evidence of Ford’s conduct outside of Kentucky. “It is clear that the jury was encouraged to punish Ford for its conduct throughout the country.”<sup>260</sup>

Aside from large awards, Eastern Kentucky, like Kentucky generally, is racked by a medical malpractice crisis. “[E]ven doctors who have never been sued are facing premiums that can reach \$85,000 a year in Kentucky.”<sup>261</sup> “We’ve lost a lot of our physicians who were practicing, active parts of our community taking care of numerous patients,” said Dr. Baretta Casey, who is the chairwoman of the board of trustees for the Kentucky Medical Association and director for residency programs and a professor at the University of Kentucky’s Center for Rural Health.<sup>262</sup> The problem is particularly bad in Eastern Kentucky, according to Casey. “If you take an OB-GYN out of an Eastern Kentucky Community, not only are you affecting a huge number of patients, but also a huge amount of our most needed population that are our Medicaid patients.”<sup>263</sup> OB-GYNs, like other high-risk specialists, are especially vulnerable in hostile legal environments, such as Kentucky. Kentucky lost about one third of its OB-GYNs from 1999 to 2003.<sup>264</sup> There are now 70 counties without them.<sup>265</sup>



## Wildcat Filings

Personal injury lawyers generally view Eastern Kentucky as a good place to file lawsuits. For example, when personal injury lawyers filed Kentucky's first Vioxx class action lawsuit in October 2004, they chose to file it in Pike County.<sup>266</sup> The lawsuit was not filed on behalf of people alleging they were actually injured by the drug. Rather, it was the country's second class action asserting on behalf of unharmed consumers that the manufacturer, Merck, did not fully inform them of the risks of the drugs, despite FDA approval, under the state's consumer protection law (the first such lawsuit was filed in Oklahoma).<sup>267</sup> The lawsuit seeks \$75,000 per Kentucky resident who took the drug, regardless of actual injury, to avoid being moved to a more neutral federal court.<sup>268</sup> Unfortunately, this strategy was successful: the Eastern District of Kentucky found it did not have jurisdiction and remanded the case to state court in March of 2005.<sup>269</sup>

Eastern Kentucky's litigation culture is exemplified by a lawsuit against the Pike County School Board, which claimed it did not sufficiently accommodate the needs of a student with asthma. What incorrigible act warranted the lawsuit? Apparently, the school refused to adopt a policy prohibiting all students from possessing cologne, body spray, perfume or other aerosol products.<sup>270</sup> Due to an isolated incident in which an asthmatic student had an attack allegedly set off by such a product, the lawyer sought a complete ban.<sup>271</sup> One local newspaper editorialized that, "while we sympathize with the asthmatic teen-age girl whose mother initiated the proposal [to ban the products], we also understand the majority of school board members' concern that such a policy likely would be unenforceable. In fact, we can only imagine teachers and other school officials stealthily sniffing to detect whether a student recently squirted Eternity or Drakkar."<sup>272</sup> "Needless to say, that's a distraction from the learning environment our children and, for that matter, teachers could do without."<sup>273</sup>

Lawyers also attacked manufacturers of industrial respiratory masks in 2004, filing a suit in Pike County claiming that the masks did not adequately protect several miners from contracting various lung diseases.<sup>274</sup> "There will be more," said

plaintiffs' attorney John Kirk. "It looks like it's going to be a really big case, in Kentucky and in West Virginia."<sup>275</sup>

## EASTERN ALABAMA



Alabama is on the Watch List this year because of its general reputation as a place defendants do not want to end up in court. The state is not a newcomer to this report, as it was the recipient of a Dishonorable Mention in 2002. These problems appear to continue. As a local activist recently commented, "Once known for collegiate football championships, Alabama now draws national attention in the field of lawsuit abuse."<sup>276</sup>

## Never Ending PCB Litigation

For years, companies have tried to address claims stemming from their production of Polychlorinated Biphenyls, or PCBs, but they are learning that there is no stop to lawsuits in Alabama. PCBs were once known as a "miracle chemical" because of their fire resistant qualities and ability to conduct heat without conducting electricity. They were used to insulate electrical transformers and capacitors, and in a variety of common products. In recent years, some scientists believe, and plaintiffs in lawsuits claim, that PCBs cause a variety of health conditions in humans. Monsanto stopped PCB production in 1971, nine years before a government ban.

The companies involved entered into several multimillion-dollar settlements with thousands of residents in recent years.<sup>277</sup> They undertook a multitude of cleanup and economic development activities in the Anniston area.<sup>278</sup> The companies thought their litigation woes were truly over when the court approved a global \$700 million settlement of two massive lawsuits in August

2003. The settlement addressed the claims of over 20,000 plaintiffs.<sup>279</sup> It also included a broad array of community health initiatives, such as establishment of a clinic that provides free medical screenings and some free prescription drugs to area residents, with an estimated value of \$75 million over 20 years.<sup>280</sup> So far, one of the companies involved, Solutia, reportedly spent over \$90 million on cleanup costs and continues its remediation efforts despite a federal court order relieving it of its obligation under an agreement with the EPA.<sup>281</sup>

Given the settlement of these thousands of claims, the hundreds of millions of dollars already distributed to residents, and the economic development and clean up projects underway, one would think the companies could begin to put PCBs behind them. In fact, in reporting the 2003 settlement, the front page of the *Birmingham Post-Herald* read, “PCB Settlement Marks End of Firm’s ‘Toxic Legacy’.”<sup>282</sup> Yet, in 2005, just as millions in payments from a medical trust fund were mailed to local residents,<sup>283</sup> some of the same plaintiffs lawyers filed over 1,000 new PCB claims in Jefferson County, Alabama. Most of the lawsuits were filed in neat packages of just under 100 plaintiffs to avoid any attempt to move them to federal court. It appears that the lawyers, who have been harshly criticized as benefiting more from past settlements than their clients, are looking for another pay day.<sup>284</sup>

### Vioxx Case ‘Lies’ Dormant

It is probably not a coincidence that the first ever Vioxx case was scheduled to begin last May in Ashland, Alabama, a rural town of 2,500 about 75 miles east of Birmingham. As this report shows over and over again, plaintiffs’ lawyers file their cases where they expect a favorable result. For good reason, that trial has been postponed, indefinitely. Merck claims that the plaintiff’s husband, who died in 2001, could not have taken the Vioxx the plaintiff claims her husband took because Merck had not distributed the drug until *several months* after his death.<sup>285</sup> As *The New York Times* reported, “Merck’s [motion to dismiss] depicts an increasingly comical series of implausible statements by [the plaintiff] as she struggled to prove her claim that

her husband took Vioxx in the month before he died.”<sup>286</sup> Nevertheless, the court denied Merck’s motion to dismiss and the trial has been postponed indefinitely.<sup>287</sup>

### A History of the Nation’s Largest Verdicts

Alabama has the distinction of hosting the nation’s highest verdicts in both 2003 and 2004. In 2003, a Montgomery trial court awarded the state \$11.9 billion in a case involving a royalty dispute with ExxonMobil Corporation over drilling operations in Mobile Bay. The verdict was larger than the rest of the top 100 verdicts in the nation *combined*.<sup>288</sup> Ironically, ExxonMobil filed the lawsuit to settle the dispute, but an Alabama court reversed the parties’ roles, allowing the defendant, Alabama, to become the plaintiff.<sup>289</sup> In 2004, a Macon County jury, after a three-day trial and just one hour of deliberations, awarded \$1.6 billion (including \$20 million in compensatory damages) to an individual plaintiff who had lost \$3,000 after an insurance agent continued to pocket her monthly payments on a lapsed life insurance policy.<sup>290</sup> The award was split against both the agent and his employer, Southwest Life Insurance Co., who the plaintiff claimed was negligent in hiring the agent and not discovering the fraud.<sup>291</sup> The case was settled for an undisclosed amount, though Alabama law would have limited punitive damages to three times compensatory damages (\$60 million).<sup>292</sup> Even the plaintiff’s lawyer, who asked for a billion dollars in closing arguments, did not expect to receive more than \$50 to \$100 million each.<sup>293</sup>

One recent study groups Alabama with California and Texas as traditionally having higher punitive damage awards and more of them than other states, noting that “[t]he time-honored phrase, ‘location, location, location’ with regard to real estate is also applicable with regard to punitive damages.”<sup>294</sup>

Alabama is also a place where a small injury can result in a big award. For example, a woman who allegedly injured her ankle on a piece of iron protruding from a bed frame while she was using the bed as an ironing board sued an Anniston, Alabama motel. She testified that she experienced a sharp pain and a “speck” of blood, and saw 14 doctors 99 times.<sup>295</sup> In December 2003, the

Alabama Supreme Court upheld a Calhoun Circuit Court punitive damage award of \$500,000, in addition to a substantial compensatory award of \$176,572, even though the defendant had taken possession of the property after purchasing it from the former owner just one day before the injury.<sup>296</sup> In addition, the court refused to apply a \$250,000 limit on punitive damages to the case, finding that the law had been invalidated by the court and repealed by implication when the legislature later amended the statute – a decision with which four justices strongly disagreed.<sup>297</sup>

And late in 2003, the Bullock County Circuit Court ruled that the protection from bankrupting punitive damage awards that the Alabama Legislature provided to small businesses did not apply to individual employees of that small business.<sup>298</sup> That law limits punitive damages against a small business to the greater of \$50,000 or 10% of the business's net worth.<sup>299</sup> In applying the law to a \$2 million punitive damage award, the trial court judge reduced punitive damages against an insurance company to \$50,000, but then placed the full \$2 million punitive damage judgment on its employee, an insurance adjuster.<sup>300</sup>

## PHILADELPHIA, PENNSYLVANIA



Philadelphia's claim to shame – an abysmal medical malpractice environment and high awards – continues to distinguish it from jurisdictions throughout the country. It is important to note, however, that the litigation environment in Philadelphia, and Pennsylvania in general, has improved under the spotlight of criticism, leaving us to change Philadelphia's Judicial Hellhole status and place it on the Watch List.

## Medical Malpractice: Filings and Awards Have Declined, But Trepidation Remains

Since 2002, plaintiffs' lawyers have named 7,295 doctors in medical malpractice lawsuits in Pennsylvania.<sup>301</sup> Philadelphia continues to host 41% of these lawsuits,<sup>302</sup> while its population makes up only 12% of the state. The founder of "Doctor's Advocate," Robert B. Surrick, contends that lawyers in these cases typically name everyone on the medical chart, attempting to extract financial settlements from doctors who want to avoid trials.<sup>303</sup>

*"I wish I had never come to Philadelphia, 'City of the Lawsuit.' I cannot believe I have dedicated my entire life to medicine just to be sued twice during my residency. I warn all students that I meet not to become a doctor, not to go into surgery, and above all, not to go to Philadelphia."*

— Unnamed Medical Resident<sup>304</sup>

According to the Administrative Office of Pennsylvania Courts, the number of medical malpractice lawsuits filed in Pennsylvania has declined 34% since 2002, when state law was changed to make it more difficult to file frivolous lawsuits.<sup>305</sup> In 2004, plaintiffs' attorneys filed 1,815 medical malpractice suits, down from 2,917 in 2002 and 2,660 in 2000.<sup>306</sup> In Philadelphia, the decline exceeded 50% from 1,085 filings in 2000 to 559 in 2004.<sup>307</sup> In addition, medical malpractice awards appear to be down this year – with 11 awards as of August averaging \$994,000 per lawsuit.<sup>308</sup> In comparison, there were 42 medical malpractice verdicts averaging \$2.25 million in 2004 and 56 verdicts averaging \$2.6 million in 2003.<sup>309</sup>

Regardless of the improved statistics, doctors and medical residents continue to view Philadelphia and Pennsylvania as unfair, affecting the availability of care in the state. A 2005 study of Pennsylvania doctors who specialize in fields at high risk of litigation found that 93% practice defensive medicine due to fear of lawsuits.<sup>310</sup> 42% of doctors have restricted their practices since 2000 due to liability concerns, and 50% are likely to do so over



the next two years.<sup>311</sup> In a two-year period including 2002 and 2003, 3,466 physicians moved into Pennsylvania, but 3,973 left – a net loss of over 500 physicians.<sup>312</sup>

While some say the situation has since improved, it appears that many soon-to-be doctors do not agree. A 2005 study of Pennsylvania medical residents found that one-third planned to leave the state due to lack of affordable malpractice coverage.<sup>313</sup> Residents named malpractice costs over three times more often than any other factor as the reason to leave Pennsylvania.<sup>314</sup> As one resident commented, “I wish I had never come to Philadelphia, ‘City of the Lawsuit.’ I cannot believe I have dedicated my entire life to medicine just to be sued twice during my residency. I warn all students that I meet not to become a doctor, not to go into surgery, and above all, not to go to Philadelphia.”<sup>315</sup>

And despite the decline in the number of lawsuits filed, total malpractice payouts jumped to an all time high in Pennsylvania of \$448 million in 2004, a 13.5% increase from 2003. In 1991, payouts were just \$182.5 million.<sup>316</sup> In response to the ever-increasing size of awards, Pennsylvania hospitals spent \$636 million for medical liability coverage in 2004 – a figure that does not include data from independent physicians, nurse midwives or nursing homes.<sup>317</sup>

### A Reputation for High Awards – Can it Be Changing?

Philadelphia has a reputation for excessive awards, as previous Judicial Hellholes reports have noted. This reputation was recently confirmed by a 2004 Bureau of Justice Statistics report. The report examined the number of tort lawsuits in the 75 largest counties in the United States in 2001 (the most recent data available). According to the report, Philadelphia had the largest number of trials, 500, and the highest award total, \$378,447,000, of those 75 counties.<sup>318</sup>

Philadelphia continues its tradition of attracting litigation and doling out big awards. For example, in May 2005, a Philadelphia jury found that two plaintiffs were entitled to \$200 million in a fen-phen diet drug lawsuit against Wyeth.<sup>319</sup> The court had the jury determine damages before even considering whether the pharmaceutical company

was responsible for the injury to scare the defendant into settling.<sup>320</sup> The award was almost 100 times the size of any prior fen-phen verdict in Philadelphia.<sup>321</sup>

### It's Improving

Despite Philadelphia's reputation as a magnet for litigation and the core of the state's medical malpractice woes, ATRF has received some reports that Philadelphia courts have handled controversial and complex civil cases in a fair manner. In addition, the number of large verdicts in 2005 is reported to be significantly less than in past years. Through August of 2005, there were 9 verdicts greater than \$1 million and 2 greater than \$5 million.<sup>322</sup> For the same time period in 2003, there were 27 in the \$1 million-plus category and 7 greater than \$5 million.<sup>323</sup> And from January through August 2004, there were 28 greater than \$1 million and 10 greater than \$5 million.<sup>324</sup> Finally, as noted above, the medical malpractice situation appears to have improved markedly in Philadelphia over the past two years. According to Civil Branch Supervising Judge William J. Manfredi, “part of the reason [for the downward trend] is that Philadelphia has a pool of fair minded, sophisticated people serving as jurors.”

### NEW MEXICO:

#### APPELLATE COURTS SHOW NO IMPROVEMENT

New Mexico appellate courts earned a Dishonorable Mention in both 2003 and 2004 for consistently expanding liability. There does not appear to be any significant improvement. Two recent studies substantiate this concern, leaving New Mexico appellate courts on the Watch List.

The first study, which was completed by the Judicial Evaluation Institute (JEI), a non-partisan organization in Washington, D.C., analyzed several cases over a seven-year period, tracking the individual decisions of judges on New Mexico's Supreme Court and Court of Appeals in six areas of law: workers' compensation, employment law, insurance law, medical malpractice, product liability, and 'other' liability.<sup>325</sup> The study assigned a score to each judge. Lower scores indicated that the judge was more likely to expand liability. The New Mexico Supreme Court judges who had served for long enough to be evaluated – Judge Petra Maes, Pam

Minzner and Patricio Serna (3 of the 5 Supreme Court judges) – scored “uniquely low.”<sup>326</sup> Each scored in the thirties – out of a possible 100 points – evidencing a high tendency towards expanding liability.<sup>327</sup> In fact, New Mexico is the only state among the 20 states studied by the JEI where none of the Supreme Court judges scored above a 50.<sup>328</sup> New Mexico’s Court of Appeals Judges did not score much better. Of the eight judges (there are 10 total) evaluated, only two scored above 50 and the highest score was 62.<sup>329</sup>

The second study, undertaken by the Association of Commerce & Industry Judicial Review Committee, evaluated all of the 2004 cases decided by the New Mexico Supreme Court and Court of Appeals.<sup>330</sup> In cases that had the most impact on the New Mexico business community, the study found that, on average, Supreme Court judges ruled against the business interest at issue nearly two-thirds of the time.<sup>331</sup> Judges at the intermediate appellate level were significantly more business-friendly in 2004, however, ruling against business interests, on average, only one-third of the time.<sup>332</sup> This is an encouraging sign, but whether or not 2004 was an aberration in an otherwise unfriendly record remains to be seen.

## **DELAWARE: ARE ASBESTOS LAWYERS TRYING TO COLONIZE THE STATE?**

Delaware’s inclusion as a place to watch might come as a surprise considering The First State’s reputation as a jurisdiction with a fair legal system.<sup>333</sup> And, according to one Delaware products liability and toxic tort attorney, “Delaware has never really been seen as a jurisdiction where plaintiffs have wanted to file class action suits.”<sup>334</sup> Nevertheless, Delaware has begun to attract a considerable amount of attention from the plaintiffs’ bar as a place to file asbestos claims. We believe that the honorable judges in Delaware will construe and uphold the state’s reputation as having a fair and balanced legal system.

As the judge handling the asbestos docket in Madison County, Illinois, has stopped letting anyone, from anyplace, file suit in the county, and shown more even-handed application of the law, plaintiffs’ lawyers have sought other jurisdictions to continue

their boondoggle. Delaware appears to be one of these new targets. According to one report, “While the number of new asbestos lawsuits has dropped precipitously in Madison County, a deluge of filings is keeping clerks in a Delaware court working nights and weekends to keep up.”<sup>335</sup>

Mike Angelides, an attorney with the prominent Madison County law firm SimmonsCooper, attributes the drop in the number of Madison County asbestos filings to the firm’s expansion, which recently opened an office in Delaware.<sup>336</sup> “We’re just filing them in different places,” said Angelides.<sup>337</sup>

*“Delaware’s judges will face down their new caseload as asbestos rookies. But as they’re universally appointed by the state’s trial bar-friendly Governor, look for them to catch on quickly.”*

— Editorial,  
*The Record (Madison/St. Clair Cty., Ill.)*

Plaintiffs’ lawyers are filing in Delaware because many businesses are incorporated in Delaware.<sup>338</sup> This allows out-of-state plaintiffs to file in Delaware without fear of dismissal or removal.<sup>339</sup> For instance, of the 21 lawsuits bearing the Angelides name filed in Delaware, all state that “[o]ne or more defendants are citizens of the state of Delaware and this action is not properly removable on any theory or jurisdictional basis.”<sup>340</sup>

Asbestos lawyers clearly have their eye on becoming major players in the state. “After investing more than a million dollars on judicial campaigns in Madison County, SimmonsCooper and several other high-profile plaintiffs firms donated the maximum contributions allowed under Delaware’s campaign finance system to Governor Ruth Ann Minner. An Illinois Civil Justice League examination of Delaware campaign finance records revealed 24 contributions at the maximum level of \$1,200 made to Minner’s campaign by top asbestos and plaintiffs firms, a majority made in the three weeks prior to the November 2004 election.”<sup>341</sup> “[A]s [Delaware Judges are] universally appointed by the state’s trial bar-friendly Governor, look for them to catch on [to asbestos litigation] quickly.”<sup>342</sup>



In addition, because SimmonsCooper attorneys are not licensed to practice in Delaware, they have teamed up with Bifferato, Gentilotti, and Biden (the third named partner being the son of Delaware Senator Joe Biden), and filed most of the asbestos lawsuits in Delaware.<sup>343</sup> SimmonsCooper is listed on the filings as “of counsel.”<sup>344</sup>

SimmonsCooper is not the only out-of-state firm looking to bombard Delaware with asbestos litigation. After SimmonsCooper began filing lawsuits, Baron and Budd of Dallas, Texas, a firm that also was involved in asbestos suits in Madison County and around the country, linked with local firm Jacobs and Crumplar to file claims in Delaware as well.<sup>345</sup> And the law firm of Peter Angelos, who owns the Baltimore Orioles, has also filed suits in Delaware.<sup>346</sup>

According to one report, in a six-month period between November 2004 and April 2005, plaintiffs filed 22 asbestos suits – less than one a week – in Delaware.<sup>347</sup> Soon after the outside firms moved in, they filed 40 asbestos lawsuits over a seven-week period – an average of almost six a week.<sup>348</sup>

## OTHER AREAS OF CONTINUING CONCERN:

### OKLAHOMA, ORLEANS PARISH, AND D.C.

Last year’s Judicial Hellhole report drew attention to several other areas of the country where judicial fairness remains a concern.

- **Oklahoma:** Following enactment of comprehensive civil justice reforms in Texas in 2003, Oklahoma attorney Stratton Taylor sent a letter to Texas lawyers that stated: “With recent events that have occurred in Texas, you may be looking to file cases in Oklahoma.” This now famous letter notes that Mr. Taylor has offices in several Oklahoma cities, has expertise in class action litigation and offers his firm’s services, presumably to act as local counsel. Business leaders consider Oklahoma “at a crossroads because of frivolous lawsuits and abuse of the legal system”

and a possible future class action capitol of the United States.<sup>349</sup> Many others have expressed concern as well, among them small business owners and doctors.<sup>350</sup> Tort reform is a top priority for Governor Brad Henry, but he expressed disappointment after the Oklahoma Legislature did not act to create a more fair litigation environment during its 2005 session.<sup>351</sup>

- **Orleans Parish, Louisiana:** Before being devastated by Hurricane Katrina, Orleans Parish was on its way to making the Judicial Hellholes list for the fourth time in a row. Now is the time to spotlight the rebuilding effort there, not the civil justice system, and we join the country in wishing New Orleans a speedy recovery. We hope to honor the rebuilt system of civil justice as embracing “Equal Justice Under Law.”
- **District of Columbia:** In 2004, this report documented an increase in medical malpractice premiums in the nation’s capitol over the past several years. The rise in premiums has led the American Medical Association and others to list the District as an area on the verge of a medical malpractice crisis,<sup>352</sup> and doctors, particularly in some specialty areas, to consider moving from the District.<sup>353</sup> According to the Medical Society of the District of Columbia, the average malpractice award in the District is more than twice that of neighboring Maryland and Virginia, resulting in significantly higher annual insurance premiums.<sup>354</sup> The District, unlike Maryland and Virginia,<sup>355</sup> has no limit for pain and suffering awards in medical malpractice cases. Mayor Anthony A. Williams proposed legislation providing a comprehensive plan to protect health care access in 2004, but the Council of the District of Columbia failed to act on the bill.<sup>356</sup> The legislation, which would limit noneconomic damages to \$250,000 and expand the District’s “Good Samaritan” law that protects health professionals who provide free care, was reintroduced in May 2005, and appears to face opposition from some Council members.<sup>357</sup>

# “Dishonorable Mention”

ATRF awards Dishonorable Mentions in recognition of a particularly abusive practice or unsound court decision. This year, the Wisconsin Supreme Court is the recipient of this dubious honor.

## **WISCONSIN SUPREME COURT: FOUR MONTHS, FOUR BAD DECISIONS**

The Wisconsin Supreme Court earns this Dishonorable Mention because of several decisions this year that epitomize regulation through litigation and judicial activism.

In two decisions on March 18, 2005, the Wisconsin Supreme Court overruled a lower court’s sound interpretation of Wisconsin’s punitive damages statute and adopted a weaker standard.<sup>358</sup> Wisconsin’s punitive damages law states that “[t]he plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.”<sup>359</sup> Nevertheless, the court held that “the legislature did not intend an ‘intentional disregard of the rights of the plaintiff to require intent to cause injury to the plaintiff.’”<sup>360</sup> Justice Jon P. Wilcox, the lone voice of dissent, found that the majority “has written a duly enacted law of this state out of existence.” “It is undisputed that the clear intent of the legislature in enacting [the punitive damages statute] was to restrict the number of cases in which punitive damages could be awarded by imposing a threshold for the recovery of such damages higher than that which was set under our common law,” wrote Justice Wilcox. “However, as [these cases] illustrate, the majority has interpreted and applied [the statute] in a manner that is indistinguishable from our common-law standard. In doing so, the majority has thwarted the will of the people of this state (as represented by the legislature) to make recovery of punitive damages more difficult.”<sup>361</sup>

Then, in July 2005, the court did a complete about-face from an earlier decision in respecting the authority of the legislature to make public policy

decisions, and struck down a limit on noneconomic damages. As noted in the Points of Light section in the 2004 Judicial Hellholes report, the Wisconsin Supreme Court had firmly rejected a challenge to a reasonable limit on subjective pain and suffering damages in a wrongful death case stemming from medical malpractice.<sup>362</sup> This year, while not reversing its earlier decision, the same court struck down a similar law that limited noneconomic damages in medical malpractice cases to \$350,000<sup>363</sup> in *Ferdon v. Wisconsin Patients Compensation Fund*, needlessly jeopardizing Wisconsin’s health care system. Substituting its judgment for that of the Wisconsin State Legislature, the court in *Ferdon* found that the law violated the equal protection guarantee of the Wisconsin Constitution because the decision to enact the award limit was irrational.<sup>364</sup>

*“This court is not meant to function as a ‘super-legislature,’ constantly second-guessing the policy choices made by the legislature and governor.”*

— Justice David T. Prosser, dissenting<sup>365</sup>

The dissent, joined by three justices, demonstrated that the majority’s analysis of the legislature’s objectives for enacting the limit was “wrong on every count,” and “systematically minimizes the importance of facts that support the constitutionality of the legislation.”<sup>366</sup> “[T]he majority ignores the fact that certain types of malpractice insurance premiums have actually decreased in Wisconsin, while similar premiums have climbed in other states,”<sup>367</sup> said the dissenting justices.

“[T]his could be a disaster in one or two years,” said Eric Borgerding, Senior Vice President for the Wisconsin Hospital Association.<sup>368</sup> Premiums in Wisconsin are sure to rise without a limit on awards. One clinic received a call from an attorney within days of the *Ferdon* ruling.<sup>369</sup> “The attorney informed us that he was doubling the amount of the plaintiff’s demand as a result of the *Ferdon* decision.”<sup>370</sup>

A majority of state high courts, including those

in Alaska, California, Colorado, Indiana, Louisiana, Maine, Maryland, Michigan, Missouri, Nebraska, Ohio, Virginia and West Virginia have, unlike Wisconsin, determined that reasonable limits on damages do not violate equal protection under a rational basis test.<sup>371</sup>

One day after its decision in *Ferdon*, the Wisconsin Supreme Court vastly expanded liability for manufacturers of lead paint and possibly any industry that manufactures a potentially harmful product. In *Thomas v. Mallett*, the court ruled that manufacturers could be liable despite the inability of the plaintiff to point to which company's paint caused the injury, applying a "risk contribution theory."<sup>372</sup>

This theory essentially holds "that as between the plaintiff, who probably is not at fault, and the defendants, who may have provided the product which caused the injury, the interests of justice and fundamental fairness demand that the latter should bear the cost of injury."<sup>374</sup> But this is a theory for no fault compensation systems, which have no pain and suffering damages or punitive damages, not for civil tort cases. As Justice Wilcox recognized in dissent, "The majority's decision renders Wisconsin the

*"[T]he majority proclaims that if a plaintiff is sympathetic enough and the 'industry' of which a defendant was a part is culpable enough, a plaintiff may dispense with proof [of causation] and recover against a party even though it has not been shown that the party reasonably could have contributed in some way to the plaintiff's actual injury. Simply put, the majority opinion amounts to little more than this court dictating social policy to achieve a desired result."*

— As Justice Jon P. Wilcox wrote in his dissent<sup>373</sup>

only state to apply some form of collective liability in lead paint suits under similar facts."<sup>375</sup> "Such a decision could clearly be extended to ensnare other unpopular industries in a web of liability."

Lawmakers and business organizations in Wisconsin already have begun to push for legislation that would nullify the decision. Commenting on this effort, one observer remarked that Wisconsin's "liability climate has now become one of the worst in the country."<sup>376</sup> "We can't afford to wait until we are declared a judicial hellhole."

# “Points of Light”

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There are five ways to douse the fires in Judicial Hellholes and to keep jurisdictions from developing an out-of-balance legal climate:

- (1) Constructive media attention can encourage change;
- (2) Trial court judges can engage in self-correction;
- (3) Appellate courts can overturn improper local decisions and confine future judicial malfeasance;
- (4) Legislatures can enact statutory cures; and
- (5) Voters can reject lawsuit-friendly judges or enact ballot referenda to address the problems.

In the Points of Light section, this report highlights jurisdictions where judges, legislators, the electorate, and the media intervened to stem abusive judicial practices. These jurisdictions set an example for how a courthouse, city, county or state can emerge from the depths of being a Judicial Hellhole or stop itself from sinking into Judicial Hellhole status.

## Hope in Judicial Hellholes

Where Points of Light exist in a particular Judicial Hellhole or area on the Watch List, this report indicates that there are reasons for optimism in the discussion of that jurisdiction. Here are just a few highlights discussed at length earlier in this report:

- In **Madison County, Illinois**, the number of lawsuit filings, including class actions and asbestos cases, appear to be down from their historic highs. There are indications that local judges are less likely to permit forum shopping. The Illinois Supreme Court sent a strong message against class action and consumer protection law abuse when it struck down the \$1.2 billion decision in *Avery* this year. And, state medical malpractice damage limits and the federal Class Action Fairness Act provide further reason for optimism.
- In **West Virginia**, medical malpractice lawsuits and settlements appear to be down since legislative action in 2004. The state’s largest medical

malpractice insurer believes that the state may be beginning to shed its reputation as a Judicial Hellhole in that area.

- In **St. Clair County, Illinois**, lawsuit filings generally appear to be down from their historic high, though St. Clair continues to see much more litigation than comparable counties, and the number of class actions continues to rise. Statewide medical liability reform has helped plug the dam of physicians leaving the Metro-East and adoption of an “Asbestos Deferred Registry” should keep the area from becoming a magnet for unimpaired claimants in the future.
- In **Philadelphia, Pennsylvania**, the number of medical malpractice lawsuits and amount of awards appears to have significantly declined, though fear remains among area doctors and medical residents. In addition, the number of large awards appears to have subsided. Some report that state courts fairly handle complex civil litigation.
- In **California**, voter passage of Proposition 64 has taken effect and curbed shakedown lawsuits under the state’s unfair competition law, which had permitted lawsuits by uninjured people for obscure violations of law.

Several other events in 2005 provide reason for optimism that the civil justice system is becoming more fair and predictable.

## Congress Enacts the Class Action Fairness Act

This year, Congress passed the Class Action Fairness Act with strong bipartisan support, nearly a decade since variations of the bill were first introduced. President Bush signed the bill into law on February 18, 2005. Members of Congress discussed the Judicial Hellholes report at length during the CAFA debate, and the documentation of class action abuse included in the report was central to the Act’s enactment.<sup>377</sup>

This straightforward piece of legislation addresses one abuse in Judicial Hellholes – the deciding of class action lawsuits involving

plaintiffs from numerous states by a local judge in a jurisdiction with a reputation for a lack of fairness toward out-of-state defendants. Under its provisions, more interstate class action lawsuits should be heard in a neutral federal court. CAFA allows defendants to remove what were formerly “non diverse” state law class actions if one member of the class and one defendant are citizens of different states, the class involves more than 100 people, and the aggregate amount in controversy exceeds \$5 million. This effectively will foreclose the fraudulent naming of local businesses or individuals as defendants, such as retailers or distributors, to keep a class action that would more appropriately be heard in a federal court before a friendly state judge. The bill also will foreclose the tactic of pleading damages of less than \$75,000 per class member (the trigger for a federal court to hear a claim involving plaintiffs and defendants of different states) to block moving the suit to federal court. Exceptions included in the law allow cases involving mostly local plaintiffs against a defendant in its home state to remain in state court. This provision could be subject to abuse in the future.

CAFA also reins in abusive “coupon” settlements, under which wealthy personal injury attorneys receive millions in fees while their purported clients, who may not even know of the litigation on their behalf, receive very little — sometimes a discount on products from the very same business with which they were allegedly unsatisfied. CAFA approaches the problem in a very practical way — unredeemed coupons may not be used to bolster an attorney’s fee. Attorneys may not receive a contingency fee based on potential aggregate value of the coupons available to class members. Instead, attorneys’ fees would be based on the value of coupons actually redeemed by the class members.

In addition, the Act establishes a class action “bill of rights” that includes various protections for class members such as judicial review and approval of non-cash settlements, protection against loss by class members because of payments to class counsel, standardized settlement notification information, and specific requirements regarding proposed settlement notifications to federal and state officials, among others.

Although CAFA is helping to stem forum

shopping of class actions to Judicial Hellholes, CAFA is not a fix-all to the problem of class action abuse. Personal injury lawyers have already found several ways to avoid having their lawsuit moved to a more neutral federal forum. Some of these tactics include seeking less than \$5 million, filing multiple lawsuits each on behalf of less than 100 plaintiffs (See Eastern Alabama, page 34), and limiting the scope of the class to residents of a single state.

### South Carolina: Cracking Down on Litigation Tourism

In 2004, Hampton County, South Carolina, joined the report as the Number 3 Judicial Hellhole, after being awarded Dishonorable Mentions in the report in the two previous years, primarily because of the abusive forum shopping that allowed many out-of-state claims to be filed in the county. According to a study of court filings by Jim Daniel, Executive Director of the Hampton County Economic Development Commission, about two-thirds of civil lawsuits filed in Hampton County in 2002 were filed by residents of other counties and other states and nearly half included alleged incidents that did not occur in Hampton County. The Judicial Hellholes report also found that, according to South Carolina Judicial Department statistics, in 2003-04, two to four times as many lawsuits were filed in Hampton County than in other South Carolina counties of comparable size. Between fiscal year 1998-1999 and 2003-2004, there was a 43% increase in the number of lawsuits filed in Hampton County, substantially higher than the 30% increase in lawsuits statewide during that period. In 2002, *Forbes* magazine reported that the now-rejected interpretation of the South Carolina venue law was “deftly exploited [to turn this] small, poor county into a litigation machine.”

This year, due to significant action from both the Supreme Court of South Carolina and state legislature, Hampton County is no longer on the list.

On February 2, 2005, the Supreme Court of South Carolina issued a decision that will significantly reduce forum shopping in a case stemming from Hampton County. *Whaley v. CSX Transportation, Inc.* involved a locomotive engineer whose lawyer filed a complaint for an alleged

work-related injury 145 miles away from where the plaintiff lived and worked, and where each and every fact witness lived. There was another courthouse just 13 miles away from the plaintiff's home in a county in which his employer maintained an office and agent. The almost predictable result was a verdict for an extraordinary \$1 million in compensatory damages, which the trial court refused to reduce. At issue was where a defendant "resides" for the purpose of where a lawsuit can be properly filed in South Carolina – anywhere the business "owns property and transacts business," a lax standard routinely applied by South Carolina allowing personal injury lawyers to pick and choose the most plaintiff-friendly courts in the state or where it has an office and agent for the transaction of corporate business, a test supported by longstanding South Carolina law. The Supreme Court adopted the later position, which ATRA supported in a "friend of the court" brief filed in the case. The Supreme Court also reaffirmed a trial court's traditional discretion to transfer a case when it serves the convenience of witnesses and the interests of justice, another position asserted in ATRA's brief.

One month later, the South Carolina General Assembly passed and Governor Mark Sanford signed legislation that further builds upon the South Carolina Supreme Court decision. H. 3008 reins in litigation tourism by providing that a case can only be heard in the jurisdiction where the alleged injury took place or in the jurisdiction of the defendant's principal place of business, except if the defendant is a foreign corporation or nonresident defendant. The new law also contains several other meaningful provisions that will make the system more fair and predictable, including joint and several liability reform that limits a defendant's liability for the responsibility of other co-defendants, a limit on bringing lawsuits against a manufacturer more than eight years after sale of a product, a reduction in the interest rate applied to judgments and sanctions for attorneys who file frivolous lawsuits.

### Michigan Supreme Court: Demonstrating Respect for the Separation of Powers

The Michigan Supreme Court is considered by many, including *The Wall Street Journal*, to be the

"finest court in the nation"<sup>378</sup> for its thoroughly reasoned decisions and a judicial philosophy that appropriately respects the separation of powers between the judicial and legislative branches. Michigan's Supreme Court Justices express frustration that some state judiciaries have "muscle the legislature out of the way" and "displaced the people's policy choices with the courts."<sup>379</sup> In a recent interview with his law school alma mater, Justice Clifford W. Taylor commented:

[O]ne of the greatest issues here, and in the country, is whether courts are improperly usurping legislative authority. I believe our court is on the forefront of this discussion. We strive to not engage in policymaking from the bench. When any court gets into policymaking, outside the common law, it becomes inevitably partisan and is usually crowding out the legislature. This is unfortunate as it miscomprehends the proper delegations of power to both us and the legislature in the Constitution.<sup>380</sup>

Justice Robert Young has expressed similar views in the proper role of the judiciary vis-à-vis the legislature and observed that the judiciary is "institutionally incompetent" to make legislative social policy decisions, as they decide cases on particular facts and cannot hold hearings or engage in the public debate and compromise.<sup>381</sup>

The court recently applied this judicial philosophy in *Henry v. Dow Chemical Co.*<sup>382</sup> In that case, the five justices signing the majority opinion refused to legislate from the bench to create a new legal claim for medical monitoring absent present physical injury. People living and working near a chemical plant in Michigan who did not claim a present physical injury filed the case. The Court recognized that many public and private interests had to be considered in deciding whether to create a new medical monitoring cause of action. For example, allowing uninjured people to recover could create a potentially limitless pool of plaintiffs, clog court dockets and "drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care." Judicial



administration of a medical monitoring trust fund would strain court resources. On the other hand, plaintiffs could easily spend a lump-sum award on a new car or flat-screen television instead of on medical monitoring. Recognizing that courts have little expertise or objective guidance on how to set up medical monitoring programs, and would be “craft[ing] public policy in the dark,” the court decided not to create this potentially problematic new cause of action. It explained that “the people’s representatives in the Legislature . . . are better suited to undertake the complex task of balancing the competing societal interests at stake.” It was for the Michigan Legislature, not the court, to decide whether to create a claim that would be “a new and potentially societally dislocating change to the common law.” The Michigan Court’s opinion in *Henry* echoed post-*Bower* opinions rejecting medical monitoring by the Nevada, Kentucky and Alabama Supreme Courts, all of which noted the longstanding requirement of actual physical injury and declined to, as the Alabama court put it, “stand . . . tort law on its head in an attempt to alleviate [plaintiffs’] concerns about what might occur in the future.”<sup>383</sup>

The Michigan Supreme Court also has demonstrated its respect for the separation of powers in upholding rational civil justice reforms. Unlike some state courts that have struck down limitations on liability on the basis of obscure or vague state constitutional provisions, engaging in “judicial nullification” of state policy choices,<sup>384</sup> the Michigan Supreme Court has respected legislative authority.<sup>385</sup> In 2004, for example, the court upheld a law that was intended to help assure that Michigan citizens pay less for rental cars by limiting the absolute liability of the car rental company for acts of those who rent their vehicles.<sup>386</sup> “Damage caps are constitutional in causes of action springing out of the common law because the Legislature has the power under our Constitution to abolish or modify nonvested, common-law rights and remedies,” the court explained.<sup>387</sup> The Michigan Supreme Court observed that “economic regulation, such as the measure we deal with today, has consistently been held to be an issue for the political process, not for the courts.”<sup>388</sup>

### Illinois Supreme Court: Tossing the Infamous *Avery* Decision

The Supreme Court of Illinois foiled an attempt at “regulation through litigation” this year when it unanimously ruled that a trial judge improperly certified a nationwide class action against State Farm.<sup>389</sup> In so doing, the court’s ruling in *Avery v. State Farm Mutual Automobile Insurance Co.* overturned a \$1.2 billion judge-issued verdict, including \$600 million in punitive damages.<sup>390</sup> At the time of the verdict in 1999, it was the largest award in Illinois history.

The case was brought in state court in Williamson County – not far from Madison County – as a nationwide class action covering 4.75 million State Farm policyholders in 48 states.<sup>391</sup> The plaintiffs alleged breach of contract and violations of the Illinois Consumer Fraud and Deceptive Trade Practices Act because of the insurer’s practice of specifying the use of non-original equipment manufacturer parts (“non-OEM parts”) in auto repairs.<sup>392</sup> Non-OEM parts are repair parts made by other companies that are not affiliated with the automobile companies, the “original equipment manufacturers.”<sup>393</sup> Specifying non-OEM parts reduces repair costs and allows insurers to hold down the cost of automobile insurance premiums.<sup>394</sup> According to one industry observer, non-OEM parts can be as much as 40% cheaper.<sup>395</sup> For this reason, Illinois and many other states expressly allow, and some states require, insurance companies to specify non-OEM parts, and no state prohibits the specification of non-OEM parts.<sup>396</sup>

The Illinois Supreme Court rejected nationwide class certification on the contract claims because the language of the insurance policies at issue varied from state to state and from policyholder to policyholder.<sup>397</sup> The court also rejected class certification on the consumer protection claims primarily because the class included out-of-state plaintiffs and repairs that occurred outside of Illinois: “The only putative class that can exist in this case under the Consumer Fraud Act is a class consisting of policyholders whose vehicles were assessed and repaired in Illinois.”<sup>398</sup>

After admonishing the plaintiffs for simply repeating the same allegations relevant to their contract claim as a consumer protection claim, the

court found that a remaining individual consumer protection claim should be dismissed.<sup>399</sup> The plaintiff did not show that he was deceived by any practice of the insurer. Nor did he incur any damage since he sold his truck with the non-OEM part at market rate.<sup>400</sup>

Finally, the court found “a serious question” as to whether failing to disclose non-OEM parts are not as good as OEM parts.<sup>401</sup> “Under plaintiffs’ reasoning, it would appear that to avoid liability under the Act, every knowing sale of a brand of product which is not the top brand would have to carry the disclaimer: ‘Notice, our brand is not, on the whole, as good as our competitor’s.’ Thus, adopting plaintiffs’ argument would appear to work a significant expansion of liability under the Act.”<sup>402</sup> The court also recognized that State Farm’s disclosure was required by, and complied with, the state insurance code. “Taken together, the [Illinois] cases stand for the proposition that the state [Consumer Fraud Act] will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations.”<sup>403</sup>

“If this case went the other way, it would have affected [insurance] premiums,” according to Robert Hurns, counsel to the Property Casualty Insurers Association of America.<sup>404</sup> “We would have gone back to the stone age with the OEM parts.”<sup>405</sup> *Avery* sends a strong message to trial and appellate courts in Madison and St. Clair Counties, and throughout Illinois, that class action and consumer protection law abuse will not be permitted.

#### Four States Enact Asbestos and Silica Minimum Medical Criteria Legislation

Following Ohio’s lead, Florida, Georgia, and Texas passed legislation this year that establishes minimum medical criteria for asbestos and silica claims.<sup>406</sup> This legislation helps address what the United States Supreme Court has called an asbestos litigation “crisis.” (See *Asbestos Crisis*, page 49).<sup>407</sup> Currently, up to 90% of asbestos claimants have no medically cognizable injury or impairment.<sup>408</sup> These claimants “are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media.”<sup>409</sup>

As courts and legislatures have clamped down on mass filings of asbestos claims, personal injury lawyers have begun filing such claims as purportedly resulting from exposure to silica. One of the most explosive revelations that recently emerged from the federal silica MDL proceeding in the Southern District of Texas is that Judge Janis Graham Jack found that nearly every one of the 10,000 silicosis claims was “manufactured for money.”<sup>410</sup> In her 249-page decision, Judge Jack found that the lawyers “recklessly disregarding the fact that there is no reliable basis for believing that every Plaintiff has silicosis” and their “obvious motivation” was “overwhelming the system to prevent examination of each individual claim and to extract mass settlements.”<sup>411</sup>

*“For too long, trial lawyers looking to get rich quick have played the asbestos lawsuit lottery, filing claims for individuals who are not, and in some cases never will become ill. These laws will ensure the rights of all parties, both the victims and the accused, are honored and protected.”*<sup>412</sup>

—Texas Governor Rick Perry  
*Houston Chronicle*, May 19, 2005

The presence of unimpaired claimants in courts and settlement negotiations “inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now.”<sup>413</sup>

Legislation enacted in Florida, Georgia, Ohio and Texas requires silica and asbestos claimants to show an asbestos or silica related injury at the beginning of a lawsuit.<sup>414</sup> Claimants also must provide a history of their exposure in the workplace.<sup>415</sup> The legislation stops use of reports generated by plaintiffs’ lawyer-driven mass screening programs. The Florida statute, for example, states that the evidence relating to physical impairment must not “be obtained through testing or examinations that violate any applicable law, regulation, licensing requirement, or medical code of practice” or “be obtained under the condition that the exposed person retain legal services in exchange for the examination, test, or screening.”<sup>416</sup>

Experts observe that “[a]fter thirty years of a downward spiral, recent actions by state courts and legislatures in key jurisdictions that have experienced large numbers of asbestos filings provide hope that a major fuel behind the recent explosion in the litigation – mass filings by the non-sick – may be waning.”<sup>417</sup> Medical criteria laws adopted in 2004 and 2005, combined with court rulings, orders and laws that prioritize asbestos cases by filtering out or suspending the claims of the unimpaired now apply to an area covering approximately 58% of jurisdictions where asbestos claims were filed between 1998 and 2000.<sup>418</sup> This is significant progress, however, a federal solution ultimately is needed to provide a global solution to the litigation, as other issues remain and forum shopping can allow claims to migrate to areas with more lenient laws.

### Judge Blasts Lawyers for Filing Questionable Silica Claims

In June 2005, the judge managing silica lawsuits filed in federal court, U.S. District Court Judge Janis Graham Jack of the Southern District of Texas, issued a scathing 249-page opinion in which she recommended that all but one of the 10,000 claims on the Multi-District Litigation (MDL) docket be dismissed on remand because the diagnoses were fraudulently prepared by for-profit medical screening companies.<sup>419</sup> The extraordinary ruling is expected to curtail the mass screening practices used by personal injury lawyers throughout the country to generate asbestos and silica lawsuits on behalf of individuals who have no present injury.

“[T]hese diagnoses were driven by neither health nor justice,” Judge Jack said in her opinion.<sup>420</sup> “[T]hey were manufactured for money.”<sup>421</sup> As Judge Jack appreciated, there has been no explosion in the number of people who have contracted silicosis, the condition that can result from inhalation of silica sand,<sup>422</sup> and, in fact, instances of silicosis have significantly declined over the past decades.<sup>423</sup> Yet, Judge Jack observed that the volume of silicosis lawsuits suggests an

epidemic that is not recognized by America’s public health agencies.<sup>424</sup>

Already, Judge Jack’s findings have had an enormous impact. In September 2005, Claims Resolution Management Corporation, which manages the Manville Personal Injury Settlement Trust, stated that it would no longer accept reports prepared by the doctors and screening facilities that were the subject of Judge Jack’s opinion.<sup>425</sup> The Eagle-Picher Personal Injury Settlement Trust reached the same decision in October 2005. The U.S. Attorney’s Office in the Southern District of New York has convened a federal grand jury to consider possible criminal charges arising out of the federal silica litigation.<sup>426</sup> Federal prosecutors in Manhattan also may be investigating the conduct of three plaintiffs’ asbestos law firms involved in the bankruptcy case of G-1 Holdings, formerly GAF Corporation.<sup>427</sup> Congress also may investigate the screening abuses. In August 2005, U.S. Rep. Joe Barton (TX), Chairman of the House Energy and Commerce Committee, and Oversight and Investigations Subcommittee Chairman Ed Whitfield (KY) sent a letter to the plaintiffs’ medical experts involved in the silica MDL litigation seeking records and information regarding public health concerns arising from various medical practices conducted in support of that litigation.<sup>428</sup>

Although the Judicial Hellholes report typically focuses on state courts, Judge Jack’s decision and its aftermath are likely to make personal injury lawyers think twice about using mass screening tactics and filing bogus claims on behalf of people who are not injured in both state and federal courts. The handful of physicians who are paid by these lawyers also may not be as quick to stamp a signature on an unsupportable diagnosis to earn a quick buck. State court judges should consider Judge Jack’s findings when they address asbestos and silica claims generated by for-profit mass screening companies. “Phantom epidemic[s],” as Judge Jack called them,<sup>429</sup> should not consume judicial resources and be used to extract unfair settlements from employers, while lining the pockets of plaintiffs’ lawyers.

# Addressing Problems in Judicial Hellholes

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The Judicial Hellholes initiative seeks not only to identify the problems in Hellhole jurisdictions, but also to suggest ways in which to change the litigation environment so that these jurisdictions can shed the Hellhole label and restore the fundamental concept of “Equal Justice Under Law.”

## State Venue and *Forum Non Conveniens* Reform

Venue and *forum non conveniens* are two concepts that relate to ensuring that lawsuits have a logical connection with the jurisdiction in which they are heard. Venue rules govern where, within a state, an action may be heard. As our Judicial Hellhole examples demonstrate, certain areas in a state may be perceived by plaintiffs’ attorneys as an advantageous place to have a trial. As a result, plaintiffs’ attorneys become the “travel agents” for the “litigation tourist” industry, filing claims in jurisdictions with little or no connection to their clients’ claims. Fair venue reform would require plaintiffs’ lawyers to file cases where the plaintiffs live, where they were injured or where the defendant’s principal place of business is located. This reform would help stop the forum shopping that allows Judicial Hellholes to become magnet jurisdictions.

*Forum non conveniens*, a related concept, allows a court to refuse to hear a case if there is a more appropriate forum in which the case could and should be heard. Although similar to venue, *forum non conveniens* contemplates that the more appropriate forum will be in another state, rather than in a different area of the same state. *Forum non conveniens* reform would oust a case brought in one jurisdiction where the plaintiff lives elsewhere, the injury arose elsewhere and the facts of the case and witnesses are located elsewhere. By strengthening the rules governing venue and *forum non conveniens*, both legislatures (who pass the rules) and courts (who apply the rules) can ensure that the cases are heard in a court that has a logical connection to the claim, rather than a court that will produce the highest award for the plaintiff.

## A Federal Solution to Forum Shopping and Frivolous Lawsuits

The Lawsuit Abuse Reduction Act (LARA), H.R. 420, provides a federal solution to forum shopping and frivolous lawsuits – two factors that largely contribute to the development of Judicial Hellholes.

LARA provides a nationwide solution to unjust and unreasonable forum shopping. LARA’s authors appreciated that if one state improves its tort law, for example, Texas, plaintiffs’ lawyers will simply move to another jurisdiction in their forum shopping legal tour, for example, Oklahoma. The concentration of lawsuits in Judicial Hellholes adversely affects interstate commerce. Often, these lawsuits are filed against out-of-state businesses and can lead to the loss of jobs both within and outside the state. Litigation tourists do not help the states that they visit. They pay no taxes, only burdening the courts of that state that are paid for by local taxpayers. They delay justice to those who live there. LARA provides a national means of stemming unfair forum shopping. It would limit personal injury lawyers to filing their clients’ lawsuits where they live, where they were hurt, where they worked, or where the defendant has its principal place of business.

LARA also addresses the frivolous lawsuits that leave small businesses including mom and pop stores, restaurants, schools, dry cleaners and hotels with thousands of dollars in legal costs. For plaintiffs’ lawyers, it takes little more than a \$100 filing fee and often no more time than generating a form complaint to begin a lawsuit. Additional defendants, who may have nothing to do with the case, can be named at no charge. Plaintiffs’ lawyers realize that the cost of defending a case for a small business or its insurer, even when it has no factual or legal basis, will typically be more than \$10,000. Thus, a plaintiffs’ lawyer may suggest a settlement amount less than the expected defense costs to make the case “go away.” The defendant’s insurer is then placed in a dilemma – if it fights the case and a judge allows the case to go to a jury, and the jury renders a verdict above policy limits, the insurer could be

subject to a claim by its insured for wrongful failure to settle. On the other hand, if the insurer settles such a case, over time such action will cause the defendant's insurance costs to increase exponentially. Under the current system, small businesses can be subject to legal extortion and have no effective recourse when hit with a frivolous lawsuit.

The weaponry against frivolous lawsuits was considerably weakened when Federal Rule of Civil Procedure 11 was modified in 1993. Many states tie their rules of civil procedure to the federal rules, meaning that many state sanctions were weakened by the 1993 modifications as well. These changes allowed the bottom feeders in the personal injury bar to commit legal extortion. Plaintiffs' lawyers could bring frivolous claims, knowing that they would not be penalized, because a new "safe harbor" provision allowed them to simply withdraw their claim within 21 days and escape any sanction. Even if sanctioned, Rule 11 no longer required the offending party to pay the litigation costs of the party burdened by a frivolous lawsuit, motion or other pleading. Thus, plaintiffs' lawyers could safely force defendants to settle cases for amounts just under defense costs. Ultimately, small businesses paid more for insurance, and the public at large ended up with the bill. The weakening of Rule 11 has led to an almost total failure of attorney accountability. As officers of the court, personal injury lawyers should be accountable to basic, fair standards: they should be sanctioned if they abuse the legal system with frivolous claims.

LARA would eliminate the "safe harbor" for frivolous lawsuits. The bill would restore mandatory federal sanctions on attorneys, law firms or parties who file frivolous lawsuits. In addition to paying the fines, the sanctioned lawyers also would have to pay all costs associated with sanction proceedings. LARA also allows a court to impose sanctions for frivolous or harassing conduct during discovery. The sanctions available under Rule 11 would apply in federal courts, as well as in state cases that affect interstate commerce. The House Judiciary Committee added a "three-strikes" provision to the bill to suspend an attorney from practicing before that court for one-year if he or she files more than three frivolous claims in that court.

On October 27, 2005, LARA passed the House of Representatives by a vote of 228-184. This marked the second time the House passed the bill, having approved it by a similar margin in the closing days of Congress's 2004 session. Again, however, it is unlikely that the Senate will be able to consider LARA in 2005, given the short time left in the session, the need to confirm a Supreme Court Justice and other pending business. But LARA should have a good chance for enactment in the future. The Act deserves strong bipartisan support. Both Senator Kerry and former Senator Edwards are on record as supporting "tough, mandatory sanctions" and a "three strikes" provision in the medical malpractice context.<sup>430</sup> Small businesses and other employers merit the same protection as doctors. No litigant should be subject to frivolous claims.

### Ensuring that Pain and Suffering Awards Serve a Compensatory Purpose

How much does it take to compensate for a person's pain and suffering? \$1 million? \$20 million? How about \$100 million dollars or more? These are levels of actual "compensatory" awards reached by juries in 2004.<sup>431</sup> Do such awards truly serve a compensatory purpose or are they really a form of punitive damages masquerading under the veneer of pain and suffering awards?

Given the lack of standards for setting pain and suffering awards, it is imperative that judges properly instruct the jury on the purpose of pain and suffering awards. Each jury must understand that these awards serve a compensatory purpose and may not be used to punish a defendant or deter future bad conduct. When a jury reaches an extraordinary compensatory damage award, both trial and appellate level judges must closely review the decision to ensure that it was not inflated due to the consideration of inappropriate evidence. Without proper oversight by the court, the jury can be directed away from the plaintiff and toward the wrongdoing of the defendant by a carefully constructed maze of "guilt evidence." As a result, the fundamental purpose of pain and suffering awards – to compensate the plaintiff – is upended. Moreover, the inflated award may not be subject



to the extensive constitutional and statutory controls that help assure that real punitive awards are based on the appropriate evidence, serve their proper function and are not excessive. The inflated “compensatory” award can then be used to justify and uphold a higher punitive damage award than would otherwise be constitutionally permissible.<sup>432</sup> A prominent judge on the U.S. Court of Appeals for the Fourth Circuit, Paul Niemeyer, has recognized this problem and called for legislative reform.<sup>433</sup>

The Mississippi Supreme Court also has recognized this problem in a lawsuit against a pharmaceutical company in which ten plaintiffs were initially awarded \$100 million in compensatory damages.<sup>434</sup> The plaintiffs’ emphasis on the need to “send a message” to the defendants’ “bosses up north” regarding the out-of-state defendant’s “guilty” conduct almost certainly inflamed and influenced the jury to award extraordinarily high pain and suffering damages.<sup>435</sup> After a month-long trial, jurors took only about three hours to reach their verdict. They awarded the same amount of compensatory damages (\$10 million) for each plaintiff, even though the plaintiffs’ complaints, medical expenses, pre-existing medical conditions, exposures and expected life spans were vastly different.<sup>436</sup> Although the trial judge reduced the total award from \$100 million to \$48.5 million, plaintiffs with little medical expenses still received extraordinary sums.<sup>437</sup> Despite all of counsel’s talk about the defendant’s wrongdoing, the court found that there was insufficient evidence that the defendants acted maliciously to allow the jury to consider punitive damages. In reversing the decision, the Mississippi Supreme Court recognized precisely what had occurred at trial:

Essentially, Plaintiffs’ counsel was making a punitive damages argument for intentional fraud when the only issue before the jury was a compensatory damages claim for negligent failure to warn. Such statements made by counsel were intended to inflame and prejudice the jury. In awarding each Plaintiff \$10 million across the board, the jury responded to this inflammatory and improper argument.

We have condemn[ed] the use of inflammatory language calculated to mislead the jury and which has no relation to the issues of fact which are being presented to the jury for determination. The only legitimate purpose of the argument of counsel in a jury case is to assist the jurors in evaluating the evidence and in understanding the law and in applying it to the facts. Appeals to passion and prejudice are always improper and should never be allowed.<sup>438</sup>

The American Legislative Exchange Council (ALEC) has developed a model “Full and Fair Noneconomic Damages Act” that would preclude the improper use of “guilt” evidence in the calculation of pain and suffering damages. ALEC’s model bill also would enhance the opportunities for meaningful judicial review of such awards. Ohio became the first state to adopt such legislation, which went into effect on April 7, 2005.<sup>439</sup>

### **Abuse of Private Lawsuits Under State Consumer Protection Statutes**

In 1914, Congress established the Federal Trade Commission (“FTC”) and, over time, empowered it to regulate unfair and deceptive trade practices. At the FTC’s encouragement, states developed so-called “little FTCs” to stop fraudulent acts within their jurisdictions. Unlike the federal FTC Act, however, most of these state consumer protection acts (“CPAs”) provided consumers with the ability to bring private lawsuits for any conduct that could be considered “unfair” or “deceptive,” in addition to government enforcement of the statute. These laws often permit private litigants to recover statutory damages – a minimum amount per violation regardless of a litigant’s actual injury – and most permit or require an award of three times the amount of actual or statutory damages as well as attorney’s fees and legal costs.

As the legislative history of these acts make clear, they were meant to provide citizens with a means for recovery in claims involving typical consumer transactions, which usually involve everyday products having small dollar values.



Today, however, a few judges have turned CPAs into a springboard for a “universal tort,” providing a claim in any lawsuit involving conduct that could possibly be categorized as unfair or deceptive. When a plaintiff cannot prove what would ordinarily be a product liability, environmental or contract claim, the lawsuit is recast as involving “unfair acts” to circumvent otherwise applicable well-reasoned legal safeguards. This allows plaintiffs’ lawyers and judges who follow their lead to regulate entire industries. CPAs are being frequently used to stretch tort law and expand liability in unanticipated and unpredictable ways.

When states passed these CPAs, legislators did not foresee the consequences of allowing individuals to sue for conduct that a business might have no reason to consider improper. Nor did they consider the impact of allowing plaintiffs to recover damages without proving otherwise fundamental elements of tort law. Government agencies can and should be able to stop unfair or deceptive conduct before individuals are actually injured and impose penalties if a business fails to correct its practices. But allowing private rights of action under state CPAs, which have low thresholds for bringing claims and offer potentially enormous awards and fees without traditional proof requirements, has led to incredible abuse.

For example, some courts have interpreted CPAs to not require proof of actual injury, allowing unharmed individuals to recover potentially large sums of money. Other states do not require those who sue to show that they actually relied on the allegedly impermissible conduct. Plaintiffs may recover awards despite the fact that they never saw or heard the allegedly deceptive statement and no reasonable person would have relied on such a statement. CPAs sometimes place mandatory triple damages on defendants, effectively punishing businesses regardless of whether they inadvertently violated the statute, did not know their conduct was wrong or had no intention of deceiving the public. Finally, some courts permit otherwise untenable CPA class actions, exacerbating the problems noted above by aggregating claims and creating windfalls for plaintiffs attorneys.

Private citizens have used CPAs to attack the fast food industry for the nation’s obesity problem.<sup>440</sup>

Plaintiffs have attempted to bring nationwide class actions, regardless of state statutes that vary widely in their requirements and remedies, in cases claiming “light” cigarette advertisements and packaging imply that they are healthy.<sup>441</sup> No business or industry is immune. For instance, lawyers recently filed CPA claims against the dairy industry for its claims that milk is part of a healthy weight loss program and for failing to warn about the effects of lactose intolerance on milk cartons and other dairy products.<sup>442</sup>

Judges should apply commonsense interpretations to CPAs that recognize the fundamental requirements of private claims, discourage forum shopping and extraterritorial application, and protect against CPAs morphing into a universal cause of action. When courts find that statutory language does not permit them to apply the law based on sound public policy distinguishing between public law and private claims, state legislators should intervene. This year, ALEC adopted model legislation, the Model Act on Private Enforcement of Consumer Protection Statutes, to address the problems associated with private actions under state CPAs. The model bill restores fair, rational tort law requirements in private lawsuits under CPAs without interfering with the state’s authority to stop unfair or deceptive practices.

### Addressing the Asbestos Crisis

Forum shopping, mass consolidations, expedited trials, multiple punitive damages awards against defendants for the same conduct and the overall lack of due process afforded to defendants are problems within the asbestos litigation context. What is more, since the Supreme Court of the United States described the litigation as a “crisis,”<sup>443</sup> the litigation has mushroomed. Right now, trial courts are clogged with more than 300,000 pending cases, and more than 100,000 claims were filed last year alone. The RAND Institute for Civil Justice has said that as many as 1 million more claims may be filed.<sup>444</sup>

The heart of the problem is that, according to recent reports, as much as 90% of new asbestos-related claims are filed by plaintiffs who have no impairment.<sup>445</sup> Lawyers who represent cancer claimants have expressed concern that trends in

the litigation may have the effect of threatening the ability of their clients to obtain adequate timely compensation.<sup>446</sup>

Payments to individuals who are not impaired also have had the effect of encouraging more lawsuits, setting off a chain reaction of liability in the business community. These filings already have forced dozens of so-called “traditional” asbestos defendants into bankruptcy. With more than 70 defendants in bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider to sue more defendants. Now, more than 8,400 defendants have been named in asbestos cases – up from 300 in 1982.<sup>447</sup> Many have only a peripheral connection to the litigation, such as engineering and construction firms, and plant owners.<sup>448</sup> These defendants have only become targets of litigation because they provide fresh “deep pockets.”

These dynamics have led lawmakers and jurists on both the federal and state levels to explore with even greater urgency ways to enhance the asbestos litigation environment.

Thus far, the U.S. Congress has failed to address the asbestos litigation crisis. In the 109<sup>th</sup> Congress, the Fairness in Asbestos Injury Resolution Act (“FAIR Act”) proceeded further than any asbestos bill in the past decade.<sup>449</sup> That bill would establish a trust fund financed by contributions from insurers and defendant companies, and would pay compensation to claimants who meet certain medical criteria. Lengthy discussions among Democrats and Republicans, insurers and corporate defendants, labor and the trial bar, however, did not yield a compromise bill with the support necessary for Senate approval this year. Other lawmakers have introduced a bill with a more narrow approach.<sup>450</sup> It would provide that courts must dismiss asbestos claims of those who do not meet a set of objective medical criteria until such time as they meet the standards provided in the legislation. Both approaches have merit and would greatly help curb out-of-control asbestos litigation.

State courts increasingly are looking to inactive dockets and similar docket management plans to help preserve resources for the truly sick. Under these plans, the claims of individuals who cannot

meet objective minimum medical criteria specified by the court are suspended. Otherwise applicable statutes of limitations are tolled so that claimants may sue later should they develop an asbestos-related impairment. Claimants on the inactive docket can have their cases removed to the active docket and set for trial when they develop an impairing condition. Boston, Chicago, Baltimore and the federal Multi District Litigation<sup>451</sup> were the first to adopt such plans in the late 1980s and early 1990s.<sup>452</sup> A few years ago, New York City, Syracuse and Seattle followed.<sup>453</sup> In 2004, they were joined by Madison County, Illinois; Cuyahoga County, Ohio; and Portsmouth, Virginia. This year, St. Clair County, Illinois, adopted such a system.<sup>454</sup> Other jurisdictions have adopted innovative case management orders that simply dismiss claims of unimpaired plaintiffs without prejudice with the understanding that they can re-file should they develop a disease.<sup>455</sup>

State legislatures are also addressing out-of-control asbestos litigation on a statewide basis. Ohio became the first state to enact legislation setting minimum medical requirements for asbestos and silica/mixed dust claims in 2004.<sup>456</sup> This approach is modeled after the judicially created asbestos docket management plans. This year, Florida, Georgia and Texas followed Ohio’s lead (See Points of Light, page 44).

While a comprehensive solution to the asbestos litigation crisis will have to come from the U.S. Congress, state legislative and judicial actions help reduce litigation abuse in some jurisdictions.

### **Addressing Medical Liability and Protecting Access to Health Care**

The inequities and inefficiencies of the medical liability system have negatively affected the cost and quality of health care, as well as access to adequate health care for many Americans. Increasing medical liability claims have forced doctors to retire early, stop performing high-risk procedures or move to states with fair laws. Consequently, in some areas of the country, certain medical specialists simply are not available. According to the American Medical Association, there are only five states nationwide that are not in an access-to-health care crisis or

showing signs of crisis. The situation is bound to worsen as the practice of “defensive medicine” as a means of reducing or avoiding tort liability for individual doctors, when aggregated, is a major contributor to America’s rising health care costs.

The only way to stabilize the current medical liability system is to enact common sense medical liability reforms that include: (1) a reasonable limit on noneconomic damages; (2) a sliding scale for attorneys’ contingency fees; (3) periodic payment of future costs; and (4) abolition of the collateral source rule, so that juries may consider compensation that a plaintiff receives from sources other than the defendant for his or her injury in determining damages.

Medical liability reform can be achieved state-by-state, though congressional action certainly would be the most sweeping and effective vehicle for reform.

### Strengthening Rules to Preserve Good Science in Expert Testimony

Junk science pushed by pseudo “experts” has tainted tort litigation for decades. The more complex the scientific matters, the more trials tend to be determined by which “experts” the jury likes the best or believes the most – not on the sound principles of science. Typical trial lawyer tactics include the following: using statistics and anecdotes to cover up the scientific flaws in their theories, using family doctors to testify on matters completely unrelated to their expertise and trying unreliable scientific techniques to engineer studies in their favor.<sup>457</sup>

The result is large-scale injustice. Contrary to in-court findings, it is now accepted scientific fact that silicon breast implants do not cause systematic disease, and there is no connection between Bendectin and birth defects. Another example is Dalkon Shield litigation, where the plaintiffs’ experts “showed almost [sic] complete disregard for epidemiologic principles in its design, conduct, analysis and interpretation of results.”<sup>458</sup> Nevertheless, billions of dollars were lost, products were taken off the market and thousands of innocent workers lost their jobs.

Ten years ago, the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*<sup>459</sup>

told courts that it was their responsibility to act as gatekeepers to ensure that junk science stays out of the courtroom. The *Daubert* standard provides that, in determining reliability, the court must engage in a “preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue.”<sup>460</sup> In addition, when determining scientific reliability the trial judge should consider: (1) whether the proffered knowledge can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the theory or technique has gained general acceptance in the relevant scientific discipline.<sup>461</sup>

A Federal Judicial Center survey of federal judges just prior to *Daubert* and again five years after *Daubert* found that “[j]udges were more likely to scrutinize expert testimony before trial and less likely to admit expert testimony” after *Daubert*...<sup>462</sup> Judges are also more likely to hold pretrial hearings regarding admissibility of expert testimony.<sup>463</sup> A RAND Institute for Civil Justice study of federal district court decisions has similarly found, “Standards for reliability tightened in the years after the *Daubert* decision” and “the success rate for challenges rose.”<sup>464</sup> That study concluded that “following *Daubert*, judges scrutinized reliability more carefully and applied stricter standards in deciding whether to admit expert evidence. After *Daubert*, the proportion of challenged evidence in which reliability was discussed and the proportion of expert evidence found unreliable rose.”<sup>465</sup>

Still, 22 states have not adopted anything close to the *Daubert* principles.<sup>466</sup> Even in courts where *Daubert* governs, some judges are not effectively fulfilling their gatekeeper role, as they have difficulty distinguishing between real and fake science<sup>467</sup> – the same problems that juries have faced for years. *Bitler v. A. O. Smith Corp.* provides an example of the draining of *Daubert* in some of our nation’s courts.<sup>468</sup> In that case, the U.S. Court of Appeals for the Tenth Circuit upheld a trial court’s application of *Daubert* to the experts’ methodology, but not the experts’ conclusions. Under such a ruling, an expert’s conclusions do not have to flow from the facts. In

addition, the court applied the minimal relevancy requirement for the admission of ordinary evidence, rather than the heightened *Daubert* requirement that the expert testimony “fit” the specific case. The court also permitted the plaintiffs’ experts to testify despite the fact that they had failed to test their theory, even though it was readily verifiable. The Supreme Court of the United States, which grants certiorari in only a few of the thousands of petitions for review,

unfortunately, declined to review the case. When courts like the Tenth Circuit refuse to adhere to their gatekeeper role, *Daubert* is drained of its meaning and junk science gains admission to the courts.

By adopting *Daubert*, taking their gatekeeper roles seriously, and seeking competent independent science experts, judges can take more control over their courts and restore the essential burden on plaintiffs to prove causation in tort cases.

# Conclusion

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The trends in the 2005 Judicial Hellholes are somewhat different than in years past. First, there have been a remarkable number of positive reforms that have elevated the judicial climate in many of the nation's Judicial Hellholes. Second, plaintiffs' lawyers are adjusting to the new realities in those Judicial Hellholes and are beginning to move cases into new locations in an effort to cultivate new Judicial Hellholes. Third, even where legislative reform has been successful, Judicial Hellhole judges can still misapply the law and make procedural rulings that favor local plaintiffs' lawyers and their clients. In these areas, the ATRF's goal is to continue to shine the spotlight in hopes that the judges will act in accordance with the letter and intent of the laws and rules of jurisprudence.

As indicated in the preface, ATRF is not seeking

to tip the scales of justice in any direction. Rather, by using this report to highlight specific areas of judicial concern, ATRF is calling attention to the few jurisdictions where those scales are fundamentally uneven. Justice should be served, regardless of which side prevails.

As in previous years, this report also provides discussion of reasonable measures that if applied or enacted might help salvage the availability of even-handed justice in some parts of the country. In some instances no changes to the actual laws or procedural rules are necessary. Judges just need to decide to begin applying existing procedures and laws in a fair and unbiased manner. Ultimately, the judges and legislators in these Judicial Hellhole jurisdictions must decide that, indeed, all litigants deserve "Equal Justice Under Law."



# Endnotes

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- 430 See The Kerry-Edwards Plan: A Stronger America Through More Affordable Health Care, at [http://www.johnkerry.com/issues/health\\_care/kit/plan\\_kerry.htm](http://www.johnkerry.com/issues/health_care/kit/plan_kerry.htm) (in support of "preventing and punishing frivolous lawsuits by putting in place tough, mandatory sanctions, including a 'three strikes and you're out' provision that forbids lawyers who file three frivolous cases from bringing another suit for the next 10 years"); Transcript of Vice Presidential Debate, Oct. 5, 2004 (in which Vice Presidential Candidate John Edwards stated "have a three-strikes-and-you're-out rule so that a lawyer who files three of these cases without meeting this requirement loses their right to file these cases").
- 431 See *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004) (sustaining a \$1 million award for emotional distress on remand from the Supreme Court of the United States); *Coffey v. Wjeth*, No. E-167-334 (Jefferson Co., Tex., Dist. Ct. Apr. 27, 2004) (awarding \$100 million in damages for pain and suffering, in addition approximately \$1.6 million in special damages and a \$900 million punitive damages award); *Rankin v. Janssen Pharmaceutica, Inc.*, No. 2000-20 (Miss. Cir. Ct., Jefferson County, verdict rendered Sept. 28, 2001), discussed in *Nation's First Rezulin Trial Ends in Settlement*, 6 No. 22 MEALEY'S EMERGING DRUGS AND DEVICES 19 (Nov. 15, 2001) (reversing a \$100 million compensatory award to ten plaintiffs in a lawsuit against the makers of the heartburn drug Propulsid); Myron Levin, *Jury Orders Ford to Pay \$122.6 Million*, L.A. TIMES, June 3, 2004, at C1. (reporting an award of \$123 million in compensatory damages including \$4.6 million for economic losses including medical expenses and lost income, \$105 million for pain and suffering, and an additional \$13 million to the plaintiff's husband for loss of consortium).
- 432 In *Campbell*, 538 U.S. at 425 (2003), the Supreme Court of the United States recognized that "few awards exceeding a single digit ratio between punitive and compensatory damages . . . will satisfy due process," and that a ratio of 4:1 is "close to the line of constitutional impropriety." Thus, when a pain and suffering award is inflated, a court may find that this higher amount of compensatory damages permits a higher punitive award.
- 433 See Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Center Piece of Our Tort System*, 93 U. Va. L. Rev. 1401 (2004).
- 434 *Rankin v. Janssen Pharmaceutica, Inc.*, No. 2000-20 (Miss. Cir. Ct., Jefferson County, verdict rendered Sept. 28, 2001), discussed in *Nation's First Rezulin Trial Ends in Settlement*, 6 No. 22 MEALEY'S EMERGING DRUGS AND DEVICES 19 (Nov. 15, 2001).
- 435 See *id.*
- 436 Plaintiffs Robert Bailey and Macy Beth Johnston, for example, each received \$10 million, although Mr. Bailey was 79 years old and had been on disability since the 1960s, and Macy Beth was 4 years old and, according to her treating physicians, did not have any cardiac damage. See *Rankin*, Defendants' Motion for Relief from Judgment, at 2 (filed Oct. 9, 2001). Ms. Johnston's award was reduced by the trial court to \$7.5 million. The plaintiff whose verdict was read first, Mary Williams, had only \$535 in medical bills, yet received \$10 million in compensatory damages — more than \$18 thousand for every \$1 of medicals. See *id.* Ms. Williams' award was reduced to \$2.5 million by the trial court — which amounts to nearly \$4,700 for each \$1 in actual damages. See *Rankin*, Order Granting Remittitur, Mar. 28, 2002, at 3.
- 437 Although the judge reduced the award to \$48.5 million, the ratio of pain and suffering to actual economic damages amounted to as much as more than \$4,500 per \$1 of medical expenses for Ms. Williams, whose \$10 million award was reduced to \$2.5 million. See *id.* at 3; see also *Rankin*, Transcript of Proceedings, Mar. 4, 2002, at 28-29. Mr. Bailey, who introduced no evidence of medical expenses, received an adjusted award of \$2.5 million. See *id.* at 29.
- 438 *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 62 (Miss. 2004) (internal citations and quotations omitted). The Mississippi Supreme Court also reversed on the grounds that the ten plaintiffs, whose injuries were due to varying facts and circumstances, were improperly joined in a single lawsuit, and that the trial court had improperly transferred the case to an neighboring venue in which the defendants could not receive a fair trial.
- 439 See OHIO REV. CODE ANN. § 2315.19 (West 2005).
- 440 *Pelman v. McDonalds*, 396 F.3d, 508 (2d Cir. 2005).
- 441 *Price v. Philip Morris, Inc.*, 793 N.E.2d 942 (Ill. App. 2003) (appeal from \$10.1 billion verdict); *Blue Cross & Blue Shield of New Jersey v. Philip Morris USA Inc.*, 344 F.3d 211 (2d Cir. 2003).
- 442 *Physicians Comm. for Responsible Medicine et al. v. Kraft Foods, Inc. et al.* (Cir. Ct. for the City of Alexandria, Va., filed June 28, 2005); *Physicians Comm. for Responsible Medicine et al. v. International Dairy Foods Ass'n et al.* (Cir. Ct. for the City of Alexandria, Va., filed June 28, 2005); see also Donna De Marco, *Group Pushes Lactose Lawsuit*, WASH. TIMES, June 27, 2005, available at <http://www.washingtontimes.com/business/20050626-114352-8572r.htm>. According to the report, the lactose lawsuit will seek monetary compensation and a court order mandating that warning labels about lactose intolerance be placed on milk sold in the city. See *id.*; see also <http://www.milkmakesmesick.org>.
- 443 *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997).
- 444 See STEPHEN CARROLL ET AL., ASBESTOS LITIGATION COSTS AND COMPENSATION 77 (RAND Inst. for Civil Justice, Feb. 2004).
- 445 See Roger Parloff, *Asbestos*, FORTUNE, Sept. 6, 2004, at 186 (reporting that "according to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaired'"); see also Mark D. Taylor & Scott Alberino, *Who is Authorized to Vote on a Plan of Reorganization?*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 2, No. 6, Jan. 2003, at 1.

- 446 *See, e.g.*, Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7 (“solution is simple: defer the non-sick claims unless and until the claimants actually suffer an asbestos-related disease.”).
- 447 Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, WALL ST. J., Jan. 27, 2003, at B1; Carroll, *supra* note 449, at 49.
- 448 *See* Richard B. Schmitt, *Burning Issue: How Plaintiffs’ Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1.
- 449 S. 852, 109<sup>th</sup> Cong. (2005).
- 450 H.R. 1957, 109<sup>th</sup> Cong. (2005).
- 451 In 1992, Judge Weiner adopted procedures, which although not technically an inactive docket, had the purpose of prioritizing “malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury.” *In re: Asbestos Prod. Liab. Litig. (No.VI)*, MDL 875, Admin. Order No. 3, at 1 (E.D. Pa. Sept. 8, 1992).
- 452 *See Mass. State Ct. Asbestos Pers. Injury Litig.*, Order (Mass., Middlesex Super. Ct., Sept. 1986) (adopting adopted the Massachusetts Inactive Asbestos Docket); *In re: Asbestos Cases* (Cir. Ct., Cook County, Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters); *Asbestos Pers. Injury and Wrongful Death Asbestos Cases*, File No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases).
- 453 *See In re: New York City Asbestos Litig.*, Order Amending Prior Case Mgmt. Orders (S. Ct. N.Y. City, N.Y. Dec. 19, 2002); *In re Fifth Jud. Dist. Asbestos Litig.*, Am. to Am. Case Mgmt. Order No. 1 (N.Y. Sup. Ct. Jan. 31, 2003); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties, at 1 (Dec. 3, 2002).
- 454 *See supra* notes 205 to 207 and accompanying text.
- 455 *See, e.g.*, *In re: Wallace & Graham Asbestos-Related Cases*, Case Mgmt. Order (Greenville County, SC 2002); *In re: Cuyahoga County Asbestos Cases*, Gen. Pers. Injury Asbestos Case Mgmt. Order No. 1 (as amended Jan. 4, 2002).
- 456 H.B. 292, 125<sup>th</sup> Gen. Assem., Reg. Sess. (Ohio 2004).
- 457 *See* David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 ALB. L.J. SCI. & TECH. 517, 526 (2003).
- 458 *Id.* at 527-28.
- 459 *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993).
- 460 *Id.* at 593-94.
- 461 *See id.* at 593-95.
- 462 MOLLY T. JOHNSON ET AL., EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 1 (Fed. Jud. Ctr. 2000), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/\\$file/ExpTesti.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ExpTesti.pdf/$file/ExpTesti.pdf).
- 463 *Id.*
- 464 LLOYD DIXON & BRIAN GILL, Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the Daubert Decision 29 (Rand Inst. for Civil Justice 2001), available at <http://www.rand.org/publications/MR/MR1439/MR1439.pdf>.
- 465 *Id.* at 61; *see also* David E. Bernstein, *The Admissibility of Scientific Evidence After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 15 CARDOZO L. REV. 2139, 2147 (1994) (recognizing the strengthening of expert testimony standards in several areas soon after *Daubert*).
- 466 Some of these states, such as Alabama, California, Florida, and Illinois, continue to apply the less rigorous *Frye* “general acceptance” test, which the federal courts abandoned with the adoption of the *Daubert* standard in 1993. *See, e.g.*, *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000); *People v. Leahy*, 882 P.2d 321 (Cal. 1994); *Flanagan v. State*, 625 So. 2d 827 (Fla. 1993); *Donaldson v. Ill. Pub. Serv. Co.*, 767 N.E.2d 314 (Ill. 2002). Other states apply their own standard to determine the admissibility of expert testimony. *See, e.g.*, *In re: Robert R.*, 531 S.E.2d 301, 303 (S.C. 2000).
- 467 Kathleen Burge, *Science of Evidence Puts Judges to the Test*, BOSTON GLOBE, May 19, 2002, at B1.
- 468 *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114 (10th Cir. 2004), *clarified on reh’g*, 400 F.3d 1227 (10th Cir. 2004), *cert. denied*, *White-Rodgers v. Bitler*, 126 S. Ct. 395 (2005).













1101 Connecticut Avenue, NW, Suite 400  
Washington, DC 20036  
(202) 682-1163

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

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