

What If Every State



Were California?

By Steven B. Hantler

Financial cutbacks forced on legal-reform advocates stand in stark contrast to ramped-up spending by the plaintiffs' bar. The result? Greater public support for pro-plaintiff legislation and the election of more pro-plaintiff candidates to state office. Legal reform advocates in state after state are conducting defensive campaigns, barely holding on to hard-won gains or watching them slip away. Boards of directors are in the bulls-eye, and would do well to heed the warning that in this war of attrition, the plaintiffs' bar may succeed in worsening the legal climate for business across the country. How has this happened? It's partly a political shift, partly an anti-business sentiment, and frankly, too many companies sitting on the sidelines or looking the other way. The plaintiffs' bar knows this and is aggressively pursuing opportunities everywhere, as illustrated in the Foundation for Fair Civil Justice's Annual State Litigation Guide, produced in conjunction with *NACD Directorship*. The selected profiles that follow were chosen to provide an illustration of those states doing well and those like California, that have plummeted to the bottom of the list. Directors can get a quick glimpse of the future by asking their general counsel, "How bad would it be if in 10 years our state's legal environment became just like California's?"



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CALIFORNIA

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 41st

California is largely viewed as the most difficult and expensive legal environment among all the states. Although it enacted

medical liability reforms in the 1970s, the predatory tactics of today's trial bar and the snarled nature of civil liability law make California a hostile environment for business.

In 2009, reformers successfully enacted new laws that expedite processing and set-

tlement of insurance claims and extend liability protections for "Good Samaritans" in emergency situations. Plaintiffs' bar allies have expressed interest in challenging California's landmark \$250,000 cap on non-economic recoverable damages and pursuing a ban on arbitration agreements.

Drastic fiscal issues have resulted in the state courts closing one day a month to resolve the \$410-million gap in court budgets. Republican governors have

Methodology

The U.S. Tort Liability Index: 2010 Report measures which states impose the highest and lowest tort liability costs and risks. Lawrence J. McQuillan, PhD, and Hovannes Abramyan, MA, researchers with the Pacific Research Institute (PRI) co-authored the biannual report, now in its third edition. The rankings (see *full map and chart, page 24*) are free of subjective bias of the authors and are based solely on the best outside, independent data primarily from A. M. Best Co., VerdictSearch, American Tort Reform Foundation, American Bar Association and National Center for State Courts.

The ranking provides an accurate snapshot of each state's current tort-liability system, a timely and useful tool for business decision makers. It matters greatly whether your state is towards the top or bottom of the tort-climate ranking.

Looking at recent data, job growth was 57 percent greater in the top 10 tort states than in the worst 10; state GDP growth was 25 percent greater, tax revenues grew 24 percent more because of better performing economies; and there was a 232 percent difference in migration rates between the top states (net inflow of people) and bottom states (net outflow of people).

The report uses 13 variables—adjusted to account for differences in the size of each state—to rank states from best to worst in terms of relative monetary tort losses and relative tort-litigation risks. The authors selected the variables after consulting with dozens of legal scholars, economists, university professors, insurance experts and lawyers, and after an exhaustive review of the scholarly academic literature.

Nine variables track liability losses for private and commercial automobiles, farm owners, commercial general liability, other general liability, homeowners, medical malpractice, product liability, personal self-insurance and commercial self-insurance. Liability losses measure the expected total cost of new claims incurred in a given year. Four variables track litigation risks: outlier jury awards, the presence of plaintiff-skewed "Judicial Hellholes" (as defined by the American Tort Reform Association), number of attorneys and tort caseload.

The authors collected data for each state across these 13 variables. Once all variables were ranked from best to worst across all 50 states, an average ranking was calculated for each state by adding together the ranks it earned on the 13 variables and dividing by 13. The average rankings were used to compile the final, overall ranking from 1 to 50. The state with the best average ranking across all 13 variables received an overall ranking of 1, while the state with the worst average ranking received an overall ranking of 50.

Very small differences in average scores matter greatly because they determine the ordinal, or relative, rank. Economic studies demonstrate that relative differences among states, not absolute differences, primarily determine the inter-state allocation of capital, labor and entrepreneurship—the ingredients of economic growth.



Supreme Court of California
Main Courthouse

appointed six of the seven judges to the California Supreme Court, which generally adheres to rule-of-law principles. Supreme Court Chief Justice Ronald George has appointed a statewide commission on impartial courts, and it also initiated a working group to deal with asbestos litigation issues.

The state Supreme Court's 2009 majority opinion regarding *In re Tobacco II* muddled the process for bringing class-action cases under the Unfair Competition Act. Reformers warn that the ruling, which addressed individual causation requirements for each member of a plaintiff class, could result in protracted class-action litigation.

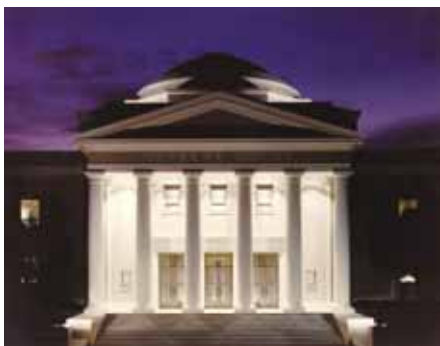
Until a rule-of-law majority is elected to the legislature, businesses will be mired in litigation surrounding Americans with Disabilities Act (ADA) compliance. As a result, the state's current liability climate discourages growth and job creation.

FLORIDA

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 48th

Modest changes in law improve some aspects of Florida's liability climate for business, but overall it remains dismal. The plaintiffs' bar spends millions of dollars to recruit candidates, fund policy initiatives and exercise significant control over the judicial selection and retention process.

In April 2010, Governor Charlie Crist signed two liability reform bills that will help level the litigation field somewhat. The first bill, Fairness in Slip and Fall Lawsuits, shifts the burden of proof to the plaintiff in a slip-and-fall case originating in a business, an important change that streamlines Florida liability law with its neighboring states. Florida Attorney General Bill McCollum and the business community supported the second bill, Transparency in Private Attorney Contracting. This prohibits the attorney general's office from hiring outside trial



Florida Supreme Court

lawyers on a contingency fee basis. In order to hire outside attorneys, the attorney general will have to provide written determination stating that the representation is cost-effective and in the public interest.

In 2009, workers' compensation reforms were enacted that reinstate strict cap fees on a claimant's attorneys. Florida's reform success list includes the elimination of

joint-and-several liability in 2006, and asbestos/silica litigation reform in 2005.

In addition to ongoing legislative efforts to protect previous reform gains, reformers will need to counter the plaintiffs' bar control exercised over judicial appointments, retention elections and coordinated court challenges against reform laws.

GEORGIA

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 28th



Georgia Supreme Court

Since the 2005 passage of Georgia's omnibus tort reform legislation, legislators have remained relatively silent on civil justice reform. In response to the well-organized reform effort that included a strong coalition of medical, business and advocacy organizations, by contrast the plaintiffs' bar is now actively engaged on multiple fronts to water down, undo legislatively or defeat in court various reform provisions.

The state Supreme Court, which only recently shifted to a rule-of-law majority based on the appointment of former U.S. Attorney David Nahmias by Governor Sonny Perdue, nevertheless in March unanimously struck down the state's medical-malpractice damages caps as unconstitutional. Two weeks earlier, the high court upheld offer of judgment and emergency-room malpractice protections as constitutional, thus producing a mixed result in

the multiple legal challenges against the 2005 reforms.

In 2009, Governor Perdue introduced FDA "preemption" legislation to provide liability protection for pharmaceutical and medical-device manufacturers in the state, as well as a "loser pays" civil-litigation bill patterned after Alaska. Neither bill succeeded. The Georgia General Assembly has not enacted any new reforms in 2010.

The organized legal attacks against the 2005 reform provisions will succeed in direct proportion to the temperament of the judges who hear the cases, from the lower courts to the Georgia Supreme Court. This motivates the plaintiffs' bar to try to elect an anti-reform governor who appoints judges and a pro-plaintiff attorney general. Because the Courts have been chipping away at the 2005 reforms, Georgia's liability climate has slipped in recent years.

ILLINOIS

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 47th



Illinois Supreme Court

The liability climate in Illinois is among the worst, despite successful efforts by the reform community to fend off recent legislative proposals favoring the plaintiffs' bar. In February, the Illinois Supreme Court struck down limits on jury awards in medical malpractice cases enacted four years earlier by the Illinois legislature amid
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Top Plaintiffs' Law Firms

The SCAS 50 lists the top 50 plaintiffs' law firms ranked by the total dollar amount of final securities class action settlements occurring in 2009 in which the law firm served as lead or co-lead counsel.

Rank	Law Firm	Settlement Total (dollars)	# of Settlements
1	Coughlin Stola Geller Rudman & Robbins	1,580,599,000	34
2	Milberg	1,440,849,996	10
3	Bernstein Liebhard	1,018,499,996	4
4	Barroway Topaz Kessler Meltzer & Check	889,094,996	15
5	Barrack Rodos & Bacine	887,250,000	6
6	Grant & Eisenhofer	863,500,000	6
7	Berman Devalerio	767,900,000	4
8	Bernstein Litowitz Berger & Grossmann	764,375,000	14
9	Johnson & Perkinson	750,000,000	1
10	Stull Stull & Brody	669,774,996	4
11	Wolf Haldenstein Adler Freeman & Herz	593,249,996	3
12	Howard B. Sirota, Esq.	585,999,996	1
13	Kaplan Fox & Kilsheimer	547,544,000	7
14	Berger & Montague	508,050,000	3
15	Labaton Sucharow	447,750,000	6
16	Nix Patterson & Roach	285,198,500	3
17	Patton Roberts	195,098,500	2
18	Abraham Fruchter & Twersky	80,225,000	3
19	Kohn Swift & Graf	78,000,000	2
20	Gold Bennett Cera & Sidener	61,275,000	1
21	Motley Rice	51,000,000	4
22	Lovell Stewart Halebian Jacobson	50,000,000	1
22	Sonn & Erez	50,000,000	1
22	Stamell & Schager	50,000,000	1
25	Zwerling Schachter & Zwerling	46,850,000	2

Top Firms Number of Settlements

Top 25 Rank	Law Firm	# of Settlements
1	Coughlin Stola Geller Rudman & Robbins	34
4	Barroway Topaz Kessler Meltzer & Check	15
8	Bernstein Litowitz Berger & Grossmann	14
2	Milberg	10
13	Kaplan Fox & Kilsheimer	7

Top Firms Settlement Average

Top 25 Rank	Law Firm	Settlement Average
3	Bernstein Liebhard	\$254,624,999
11	Wolf Haldenstein Adler Freeman & Herz	\$197,749,999
7	Berman Devalerio	\$191,975,000
14	Berger & Montague	\$169,350,000
10	Stull Stull & Brody	\$167,443,749

SOURCE: RISKMETRICS GROUP
SECURITIES CLASS ACTION SERVICES

(Continued from page 23)

“spiking liability costs” for medical providers. The state Supreme Court ruling is likely to trigger significant insurance cost increases, and establishes a dangerous precedent for other states where caps are being challenged in court.

The influence of the plaintiffs’ bar in Illinois permeates not only the state bar but also the state legislature. With anti-reform majorities in both chambers of the Illinois General Assembly, the state’s pro-reform advocates have been forced to fight back a multitude of anti-business initiatives. Legal reform advocates, such as the Illinois Civil Justice League (ICJL), successfully fought 2009 legislation that would have allowed prejudgment interest to accrue from the time the defendant was served.

The plaintiffs’ bar appears to be most interested in the three Illinois Supreme Court retention elections this year. Activist Justice Thomas Kilbride looks to be the most vulnerable of the three and is the recipient of a lion’s share of the plaintiffs’ bar support.

The American Tort Reform Association continues to designate Cook County (Chicago) as a “Judicial Hellhole.” Madison was moved to ATRA’s “Watch List” and St. Clair County was cited as a jurisdiction to watch, despite a spike in asbestos and pharmaceutical filings. In lieu of substantive legal reforms, Illinois’ liability climate will continue to discourage growth and job creation.

MICHIGAN

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 43rd

Michigan’s liability climate has dramatically slipped due to aggressive trial bar legislative efforts and state election results favoring anti-reform legislators. Unlike most other states, Michigan’s legislature meets all year, giving plaintiff

forces ample time to work the system.

Newly invigorated with 2008 election gains in the state House of Representatives, plaintiffs’ bar allies are maneuvering to: repeal the Food and Drug Administration preemption defense; expand the Consumer Protection Act to allow for more causes of action; dilute or eliminate previously enacted medical-liability reform, including expert witness standards, affidavit of merit and statute of limitations; and erode automobile no-fault.

Following the U.S. Supreme Court decision in *Wyeth v. Levine*, which left the authority to each state to determine which lawsuits challenging FDA decisions would be allowed, the Michigan General Assembly debated several bills sponsored by activist legislators, all of which threaten earlier reform gains.



Michigan Supreme Court

Attorney General Mike Cox, a strong rule-of-law advocate, is running for the governor’s spot in 2010. Since the 2008 elections, the rule-of-law majority on the state Supreme Court was lost. Another seat on the bench is up for election in 2010.

Although Michigan’s liability climate has been conducive to growth and job creation, it is now a state to be watched because of both the very aggressive plaintiffs’ bar legislative efforts and new control of the state Supreme Court by an activist majority.

MISSISSIPPI

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 21st



Mississippi Supreme Court

Mississippi’s legal climate is improving, mostly because of the Tort Reform Act of 2004 that included reforms relating to product liability, joint-and-several liability, jury service, medical liability and non-economic damages. Not surprisingly, the plaintiffs’ bar is pushing to undo these reforms.

The plaintiffs’ bar unsuccessfully sought legislation to change the definition of the term “trade secret” so only the “most distinctive” part or parts would qualify. This would have made it more difficult and expensive for companies to protect trade secrets.

A “loser pays” reform measure was defeated; it would have enabled defendants to recover litigation costs from the plaintiff if the defendant won. This would have limited value, as most cases are settled. Another defeated reform was the Lawsuits Reduction Act, which provided that a legislative or regulatory act does not create a private right of action unless specifically stated in the legislation.

Reformers support private attorney retention sunshine legislation that would make public the process by which state contracts with private attorneys is open to public scrutiny. However, political losses by reform advocates have led to a continuing impasse.

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The Seven Myths of Business, According to Highly Effective Plaintiffs' Lawyers

By Steven B. Hantler

From 1996 through 2005, plaintiffs' lawyers filed an average of 52,000 lawsuits each day in state courts. Of these, 7,800 were tort cases. According to the Pacific Research Institute's "Jackpot Justice" economic analysis, the tort system "imposes an annual 'excess tort tax' of about \$2,000 for each American." A conservative estimate by PRI's economists is that excessive tort costs in 2006 were \$589 billion, about equal to a 7 percent tax on consumption or a 10 percent tax on wages.

To understand the roots of America's legal crisis, we have to look at the deeper currents of American culture. Television dramas about the law and courts continue to be a national addiction, the way Westerns once were. Just like those Westerns, today's legal drama needs a good guy and a bad guy, and these legal thrillers are invariably told from the side of the plaintiffs' bar. Saturated in this drama, our culture is in danger of forsaking the rule of law. To understand what is really going on, we need to move behind the sound stage and address the seven fictions that some on the plaintiffs' bar use to frame their cases and exploit the law.

MYTH NO. 1: Corporations put profits ahead of safety and honesty, and large damage awards are the only way to get corporations to act responsibly.

The executives that run corporations are like the rest of the individuals in our world. Some are bad actors, some are not. There are exceptions—Enron and WorldCom readily come to mind—but most corporate managers care about the safety of their customers. They are not, as Ralph Nader would say, "moving on all fronts to advance narrow profit motives at the expense of civic values."

Yet, the belief is that corporations routinely harm customers for profit, and only punitive damages can set things straight.

The compelling evidence, though, is that punitive damage awards do not make the marketplace any safer. This is confirmed by the research of W. Kip Viscusi, a law and economics professor at Vanderbilt University Law School. While at Harvard in 1998, Viscusi wrote: "States with punitive damages exhibit no safer risk performance than states without punitive damages." Moreover, there were no overall differences with regard to safety and environmental performance, and "there is no deterrence benefit that justifies the chaos and economic disruption inflicted by punitive damages."

Since punitive damages don't work, there is, Viscusi found, no need to augment the safety incentives that are already provided by the market, government regulation and compensatory damages. Any penalties that go beyond those needed to create an efficient level of safety will produce redundant levels of safety, which add costs. The higher costs, of course, lead to higher prices and other adverse economic effects.

We also learn from Viscusi's work that punitive damages are applied so capriciously that they are regarded by companies as random visitations of disaster, like tornadoes.

MYTH NO. 2: The so-called "liability crisis" is an invention of corporations to limit their liability for wrongdoing.

The American Association for Justice, formerly the Association of Trial Lawyers of America, has argued that "tort claims do not clog our courts." But that flies in the

face of every civil attorney's experience.

In 2002, a report from the Council of Economic Advisers revealed that the United States has the most expensive tort liability in the world. The cost is more than double the average of other industrialized nations that have been studied. The CEA report also noted that the cost of lawsuits in America "is far more than enough money to solve Social Security's long-term financing crisis." For an American family of average income, excessive tort costs would provide \$8,000 toward their annual mortgage bill.

Nowhere does lawsuit abuse inflict more harm than in the arena of medicine. According to Jury Verdict Research, Inc., the medical malpractice median jury award in 2007 was \$1 million, 43 percent higher than the \$700,000 median in 1999. For the years 2006 and 2007, 17 percent of all awards exceeded \$1 million and the average medical malpractice jury award in 2007 was \$4,043,416. Hospitals pay hundreds of thousands in defense costs even when they win at trial.

These costs and awards increase the premiums that doctors pay for malpractice insurance, which in some states range up to \$200,000 and more annually. One Pennsylvania medical college pays 15 percent of its annual budget just for liability premiums. Those inflated costs are passed on to patients. In some cases, the higher premiums cause doctors to give up their practices, limit their services to patients without health conditions that raise litigation risks, or move to a state where the tort system isn't as punitive and the malpractice insurance is more affordable.

Tort costs restrict Americans' access to

health care. Doctors weary of paying high malpractice premiums have left their practices. Several states face a growing crisis, with medical centers closing and doctors leaving their states by the thousands.

Clearly, there is a runaway tort problem in this country and no amount of denial can change that.

MYTH NO. 3: Punitive damages are rarely awarded; those that are awarded are almost always substantially reduced in post-trial proceedings.

There is some truth to this. But it is grossly misleading. Most cases do not result in punitive damages for the simple

inspires other plaintiffs to seek similarly large amounts. Each eye-popping verdict has an unseen but powerful effect on the greater mass of settlements.

The system also coerces defendants to settle through laws that require the posting of an appeal bond that for many is unaffordable. These bonds are a holdover of archaic state laws, enacted at a time when verdicts were much smaller. "In the new world of billion-dollar verdicts," writes legal reform analysts Victor E. Schwartz and Leah Lorber, "the bond requirements have brought about a new and unanticipated result: They may deprive a defendant of his or her right to an appeal. The

tion. The character of U.S. class-action law underwent a radical transformation in 1966 when jurists reversed the "opt-in" rule. In other words, people could suddenly be dragooned as plaintiffs in a lawsuit unless they affirmatively notified the plaintiffs' attorneys they wanted out.

The result has been the practice of clientless law. In Florida's Pinellas County, Circuit Judge W. Douglas Baird described one class-action case as the legal "equivalent of the 'squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off."

Not only do class actions often address specious "injuries," they often cheat the very clients they purport to serve. The exemplar of class-action abuse remains the infamous BancBoston case. In this suit, one of the bank's customers, who didn't know he was a plaintiff in the case, was awarded a \$2.19 refund on his account, allegedly to compensate him for the bank having overcharged escrow account customers. He was also hit with a \$91.33 charge from the bank to cover the legal fees it incurred in the suit. The plaintiffs' attorneys were awarded more than \$8.5 million. The largest award to any BancBoston plaintiff was \$8.76, which isn't much, but is worth more than a lot of class-action plaintiffs get: nearly worthless coupons.

MYTH NO. 5: Litigation protects consumers when regulators fail to act.

In the federal regulatory process, safety policy is developed by an expert-led investigation of risks. In the tort process, where the stakes are the titanic profits of the blame industry, the investigative process is anything but scientific.

It is also a process in which pertinent facts are concealed through the arcane and discriminatory rules of evidence of the

A Florida judge described one class-action case as the legal equivalent of the "squeegee boys" who expect payment for the uninvited service of window cleaning.

reason that most defendants are terrified of going to trial with the possibility that they might get hit with unmerited and unpredictable heavy punitive damages. The system coerces defendants to settle, so rather than fight, they opt to pay the blackmail.

According to Bureau of Justice data, only about 2 percent of tort, contract and real property cases make it to jury trials in state courts. Cases are often settled before they reach that stage and they are settled on the terms demanded by plaintiffs. According to Yale Law School Professor George Priest, the mere specter of "unlimited punitive damages affect 95 to 98 percent of cases that settle out of court before trial. It is obvious and indisputable that a punitive damage claim increases the magnitude of the ultimate settlement and, indeed, affects the entire settlement process, increasing the likelihood of litigation."

While some large punitive damages are indeed reduced on appeal, their size

defendant, no matter how large, simply cannot afford to post a bond, so he settles for a lesser amount and gives up his right to an appeal."

MYTH NO. 4: Class-action lawsuits always serve the public good by marrying efficiency with justice.

Class actions allow for the convenient and efficient grouping of plaintiffs sharing a common complaint to link up in a single lawsuit. When used correctly, class actions allow courts to resolve in one action many smaller, similar claims that might otherwise remain unheard because the cost of any particular suit would exceed the possible benefit to the claimant.

Class actions also allow defendants to focus their energies on resolving all claims in one lawsuit, and prevent courts from being flooded with duplicative claims.

But the perverse incentive of contingency fees has warped class-action litiga-

legal system. In 26 states and the District of Columbia, for example, juries are not allowed to hear that a plaintiff injured in a car failed to wear a seatbelt. Incredibly, the fact that the driver at fault was drunk or drove through a red light is not admissible in many courts.

Even when scientific research and policy decisions from the regulatory arena are included in a trial, they are often presented in a haphazard and skewed manner. On the basis of courtroom polemics, juries with no expertise are asked to render verdicts that, in effect, set new safety benchmarks.

For example, regulators can determine that a given component is either safe or defective. Twelve juries can find that component to be safe. But if the 13th jury finds it defective, and reinforces that decision with a staggering verdict, then it sweeps away the methodical deliberations of the

taking power away from the proper deliberative, legislative and regulatory authorities. One-time Alabama Attorney General Bill Pryor, now a federal judge on the 11th Circuit of the U.S. Court of Appeals, has warned that regulation through litigation has the power to “shift the awesome powers of legislative bodies—the powers to control commercial regulation, taxation, and appropriation—to the judicial branch of government.”

Rather than protect consumers where regulation fails, litigation undermines the very safety that it supposedly promotes.

MYTH NO. 6: Corporations settle lawsuits to cover up their wrongdoing.

This is a popular theme spread by movies, books and the press, and has caused corporate defendants to labor under the perception of guilt. This is especially true when

entities to be feared. The irony here is that it is the legal system itself that can be a heartless, monolithic monster.

MYTH NO. 7: Like David against Goliath, the trial lawyer is outgunned and outclassed by powerful and resourceful corporations.

This is the most cherished trial lawyer myth: that there are a few Robin Hoods out there struggling against the armed might of the powerful sheriff (*see related charts, page 25*). But Robin Hood gave to the poor. Six trial lawyers and their firms took more than \$5 billion as fees for their firms from tobacco litigation—money that many believe belong in state treasuries for health care and education.

The plaintiffs’ bar is no outgunned underdog. The American Association of Justice offers courses in how to sue particular companies. The lawyers themselves have become quite wealthy. Joe Jamail of Texas has a *Fortune* 500-sized net worth of \$1.2 billion. Another trial lawyer, Frederick Furth of San Francisco, owns his own 1,200-acre vineyard in Sonoma County. Another, Wayne Reaud of Beaumont, Texas, owns a newspaper. And, of course, Peter Angelos owns the Baltimore Orioles.

The plaintiffs’ bar is a power lobby like none other. Over the last 10 congressional election cycles, the legal profession has led all other groups in campaign contributions with the exception of 2008, when it was second. In that cycle alone, it gave more than \$233 million in political contributions. More than three-fourths—76 percent—went to the Democratic Party. The legal profession is also the top political contributor in the current campaign cycle, having given more than \$31 million, 82 percent of it to Democrats. It’s dishonest for plaintiffs’ lawyers to liken themselves to a little guy going up against a giant.

Rather than protect consumers where regulation fails, litigation undermines the very safety net that it supposedly promotes.

other juries and federal regulators alike.

While regulators look ahead so that they might save lives, tort law looks back, seeking to use hindsight bias to assign blame for accidents that have already happened. That, of course, is exactly what it was designed to do. The problem arises when plaintiffs’ attorneys adopt the guise of regulators and pretend that they are seeking to make products safer. In fact, they often threaten the safety of products—by dictating design changes based on a single accident—while ignoring (as regulators cannot) the whole universe of data.

While a tort system can never be an effective regulator, it is quite effective in

defendants are forced to settle rather than face a ruinous class-action judgment. Few people, other than lawyers, know that virtually every certified class action ends in settlement: to face a class action is to risk the corporate death penalty.

In a world where punitive damages of \$100 million or more are no surprise, corporations tend to settle class actions before they get to juries. To go to a jury trial can make a game of Russian roulette seem like a reasonable gamble.

The plaintiffs’ lawyers and their proponents have convinced much of the national jury pool that corporations are not a collection of hard-working people with kids to put through college, but rather monolithic

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The state's business community is closely watching *Double Quick, Inc. vs. Ronnie Lee Lymas*, now before the Supreme Court of Mississippi on the question of the constitutionality of caps on non-economic damages.

Mississippi's overall climate trend is conducive to growth and job creation, but this trend is fragile and depends on the future election successes by pro-reform advocates.

NEW JERSEY

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 50th

New Jersey's liability climate is consistently among the worst of the 50 states. There have been some recent reform successes, however. Governor Chris Christie is signaling that he understands that liability laws are hurting the state economically. However, significant liability reform pro-

posals have not been announced.

The plaintiffs' bar and its allies in the state legislature unsuccessfully supported



New Jersey Supreme Court - Hughes Complex

legislation expanding wrongful death actions that would have allowed unlimited damages, as well as legislation that would have expanded strict liability under the

state's consumer fraud law. As a result of the weak state consumer-fraud law, businesses are in jeopardy of becoming lawsuit targets for something as minor as an invoicing error. Of note, more than 93 percent of tort lawsuits in New Jersey originate out of state.

Reformers are supporting legislation that would establish qualification standards for expert witnesses, a measure that would have significant impact in the medical malpractice arena. Additionally, the New Jersey Lawsuit Reform Alliance is working with lawmakers to establish a reasonable appeal bond cap. Currently, New Jersey requires defendants to post the entire amount of a court award as bond for the appeal.

It is unlikely New Jersey's liability climate will be favorable to economic growth and job creation in the foreseeable future.

OHIO

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 15th

Ohio continues to serve as a business and legal harbinger for the Midwest and a central battleground for legal reform in its legislature and courts. The state has a highly active and motivated plaintiffs' bar and an equally motivated business community focused on specific tort-reform measures to strengthen the state's economy and medical community. The 200-member Ohio Alliance for Civil Justice has advocated for comprehensive tort-reform initiatives including medical criteria for asbestos, silica and mixed-dust cases.

A 2010 Ohio Insurance Department report shows that the state has realized significant benefits since state-level medical malpractice reforms in 2003 put a \$350,000 cap on non-economic damages. The report details a 21 percent drop in medical liability-related lawsuits between 2005 and 2006. An additional result is the influx of new physicians practicing in the state, a similar development experienced

How to Rein in the Plaintiff Plutocrats

1. Eliminate the doctrine of joint-and-several liability, at least for non-economic damages.
2. Congress and the courts need to impose and follow rational guidelines for punitive damage awards, so the greater interests of workers and shareholders can be taken into account. The United States Supreme Court has strengthened and clarified constitutional guidelines on the award of punitive damages. Lower courts should heed those rulings.
3. Congress or the courts should reverse the "opt-out" provision, so that people must affirmatively choose to join a class-action lawsuit.
4. There should be a return to the original understanding of the rule of law. Congress or the courts should rely on the implied power to roll back the ability of a single jury to tax and regulate the entire United States.

5. Congress needs to act on asbestos law reform. Our courts are clogged with lawsuits filed by people who, while they may have been exposed to asbestos, have absolutely no illnesses. These claims prevent those with real illnesses from having their day in court.
 6. Government lawsuits should be restricted so that regulation through litigation becomes a thing of the past.
 7. A Legal Consumer's Bill of Rights should be enacted that would give clients the vital element of any functional marketplace—disclosure and honest information.
- These seven measures would go a long way toward reforming the stranglehold the plaintiffs' bar has on our society. But one more area still needs to be addressed: Before we can free our political system from the grip of a special interest, we must free our culture from the distorted myths told by the plaintiffs' bar.

by Texas after enacting its recent reforms.

The outlook for the state Supreme Court is unclear. In a controversial move, Governor Ted Strickland appointed Franklin County Probate Court Judge Eric



Ohio Supreme Court

Brown to fill the remaining months of Chief Justice Thomas J. Moyer, who died unexpectedly in April. Brown will face current Justice Maureen O'Connor, a Republican, on the ballot in November for a full term as chief justice. Governor Strickland could have appointed a caretaker or elevated a lower court judge on a temporary basis: Some worry Brown's appointment is an unnecessary politicization of the Supreme Court. This will be one of the nation's most closely watched court elections.

PENNSYLVANIA

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 46th

Pennsylvania's liability climate remains one of the worst in the country. Lame duck Governor Ed Rendell's support of several critical pieces of legislation that would expand liabilities, along with the pro-plaintiffs' bar imbalance in the state House and Senate, point to the 2010 elections as nearly the only hope for meaningful change.

Rendell's most famous flip-flop was support for, then later veto of, the Fair Share Act reforming joint-and-several liability. The original 2002 Fair Share Act was passed and later struck down by the courts

on procedural grounds, not substance, which had been remedied by the newer legislation. Pennsylvania remains one of a small handful of states not to enact this important reform.

Recently introduced legislation would have driven up jury awards by allowing plaintiffs' lawyers to quantify damages by suggesting lump sum figures to a jury, thereby tainting the discretion of a jury.

Many studies and medical associations have in recent years declared the Commonwealth's healthcare system in extreme crisis based on the number of physicians leaving medical practice or moving from the state, as well as the closing of critical specialty facilities, particularly maternity units. Employee health insurance is among the most expensive in the country.



Pennsylvania Supreme Court in the State Capitol

The 2010 elections will highlight many issues related to the civil-justice imbalances that have created quality-of-life and cost hardships for the people of Pennsylvania.

TEXAS

2010 U.S. Tort Liability Index Output Rank (Pacific Research Institute): 18th

Texas maintains a favorable liability climate, even while the plaintiffs' bar spends millions to put forward hundreds of bills intended to roll back tort reforms enacted in recent years. Two recent bills, both of which passed at least one legislative chamber, would have exempted asbestos-related

mesothelioma lawsuits from scientifically sound standards of causation and weakened workers' compensation law.

Other plaintiffs' bar bills called for sweeping *qui tam* expansion for targeting Texas businesses; requirements for



Texas Supreme Court

employers to reimburse for "phantom" medical expenses allegedly incurred in personal-injury matters; lowered standards of liability protection for emergency-room treatment; eliminated the right to contract for arbitration as an alternative dispute resolution in many kinds of cases; expanded class-action lawsuit provisions to allow the state Attorney General to bring suit on behalf of individuals; and eliminated certain liability protections for physicians who practice in rural hospitals.

The Texas Trial Lawyers Association is investing heavily in the state's election cycles. According to *The Wall Street Journal*, plaintiff lawyers spent \$9 million in 2008's state legislative elections to gain support and it is likely this funding will increase in 2010.

Thanks to continued pressure from the Texas business community and legal reform advocates, the state's economy has fared better and will rebound sooner because of a legal and regulatory environment encouraging investment and job creation. **D**

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