

Directorship

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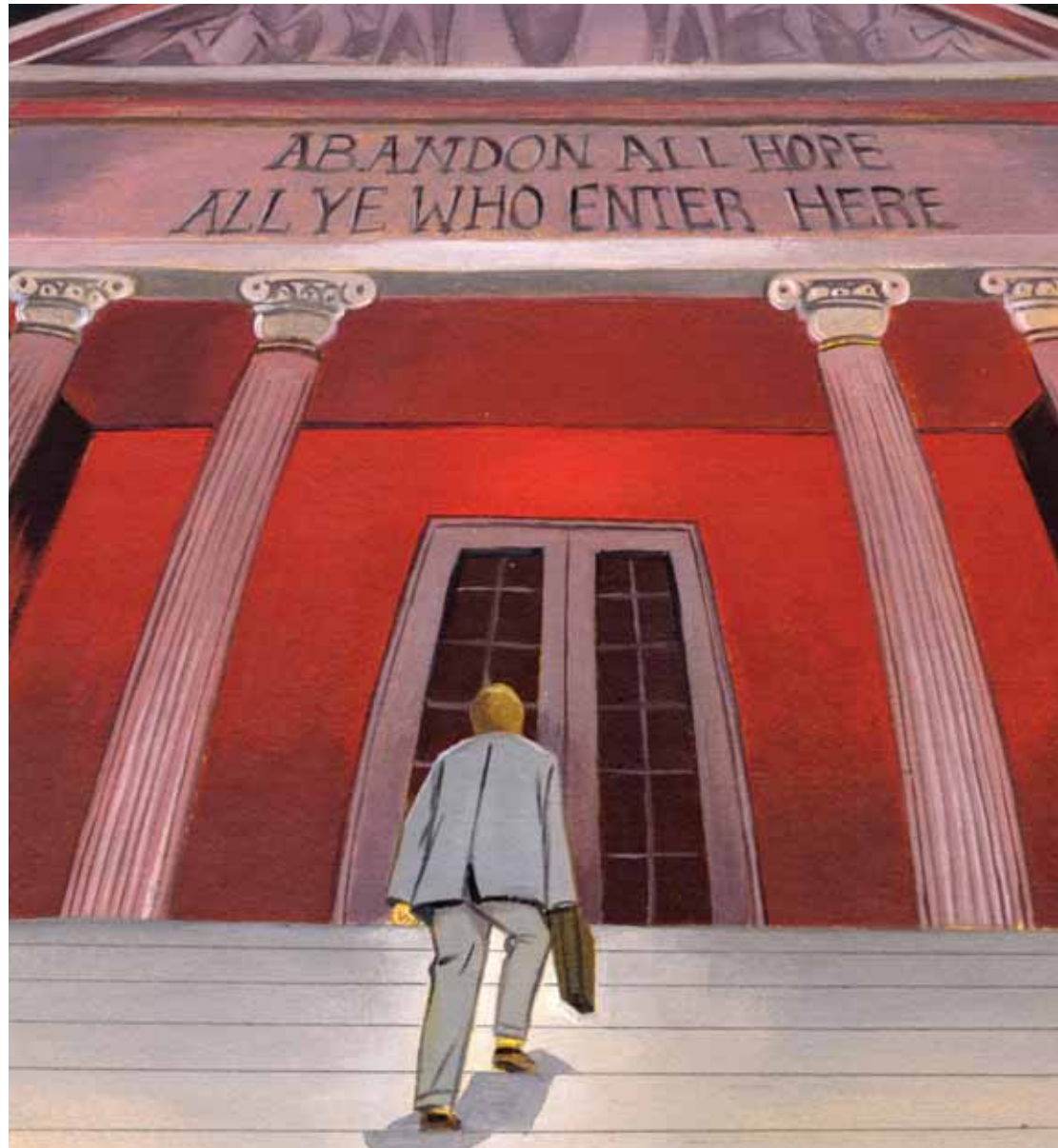
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Dire States

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Dire States

By Steven B. Hantler

The annual boardroom guide to the litigation climates in all 50 states.

Commentators taking note of the recent felony convictions of several high-profile plaintiffs' lawyers, including Bill Lerach and Melvyn Weiss, have declared that the tort reform battle is over and the corporate defenders have won. Nothing could be further from the truth. While a few big guys may be cooling their heels in jail, it's still not safe to tread in America's litigation waters.

Even states considered to have favorable litigation climates might not stay that way. In fact, 10 of the 18 states in this year's *Boardroom Guide to State Litigation Climates* that have liability climates conducive to growth and job creation are also identified as "at-risk" states. In other words, the liability climates in these states are trending downward, while tort costs continue to rise.

The *Guide* is a collaboration of *Directorship* and the American Justice Partnership (AJP), a coalition of more than 70 state and national organizations that work together to achieve tort and other business-liability reform at the state level through legislative action and public support for pro-reform candidates for state office.

Why the mobilization? Trial Lawyers Inc. has created nearly a trillion-dollar tort industry. If America's tort system was a country and tort awards were its gross domestic product, our tort system would be the 17th largest economy. The total direct and indirect

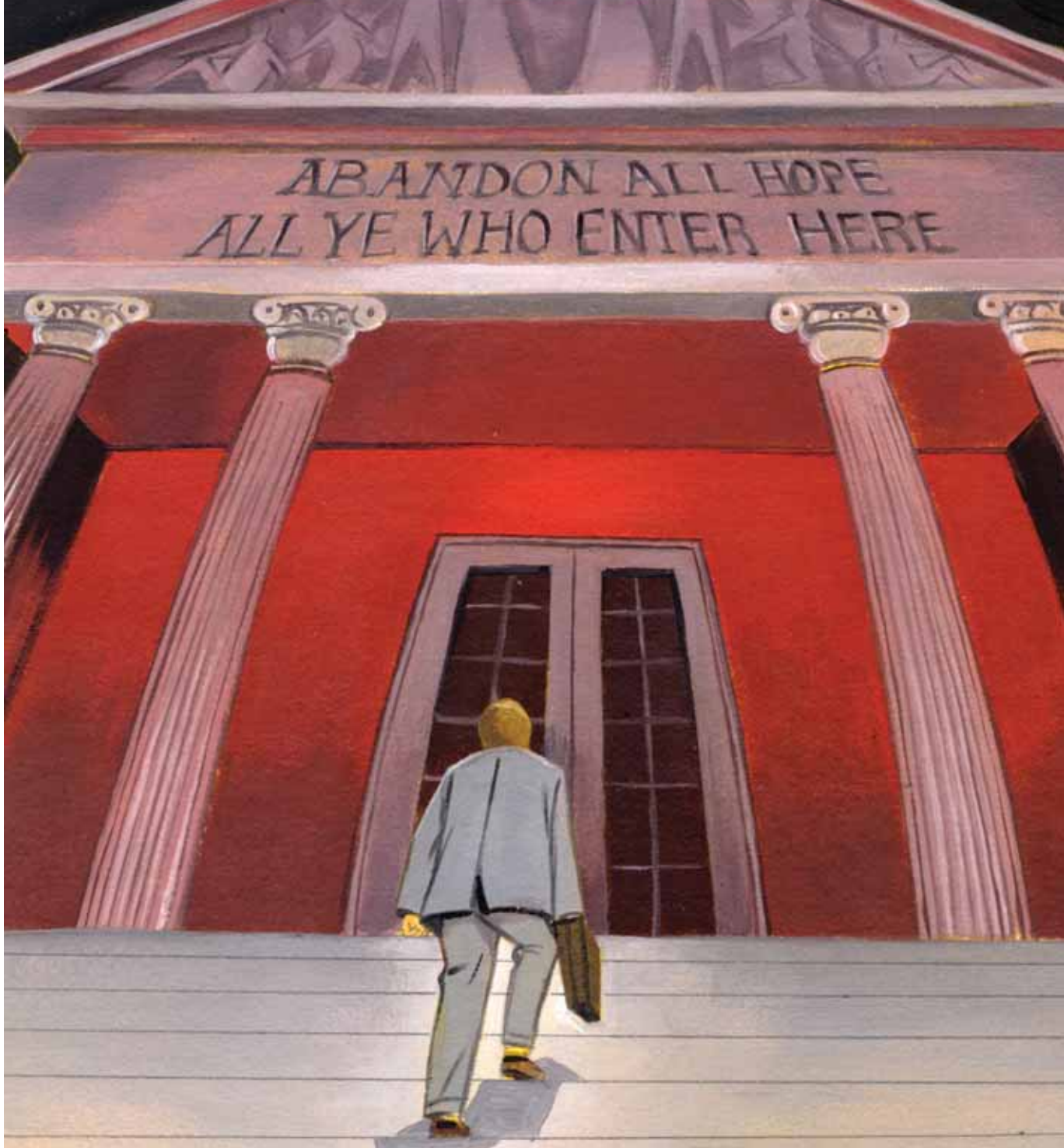
costs of our tort system are \$865 billion annually; Australia's GDP is only \$24 billion more than this.

Then there's the danger of the "litigation trifecta." The first stage was asbestos lawsuits, the longest-running mass-tort category in history. The second stage was the \$265-billion national tobacco settlement between states and tobacco companies. The R&D arm of Trial Lawyers Inc. hopes to cash in on the third stage of the trifecta: global climate-change litigation. If the plaintiffs' lawyers hit the "litigation trifecta," U.S. tort costs could soon exceed Russia's GDP of \$1.2 trillion.

One of the first of these lawsuits was recently filed in Alaska by an Eskimo village against 24 defendants representing most of the major global and U.S. energy companies. (See related story: "The Coming Global-Warming Litigation Onslaught," page 37.)

To make matters worse, the American Tort Reform Association, an AJP partner, reports a surge in anti-business and pro-plaintiff legislation being introduced in most states in the country. The AJP has mobilized in key states to defeat these legislative proposals, but in view of changes in the composition of state legislatures as a result of the 2006 elections, some of this legislation will almost certainly pass.

A number of states have made improvements and now have litigation climates that favor growth



and job creation since this *Guide* was first presented last year. They include Tennessee, which topped our list this year, as well as Alaska, Oklahoma, and South Carolina. Yet other states slipped over the past year, meaning that their litigation climates have worsened. Nebraska dropped from first to seventh, while Colorado, Kansas, and Washington also fell in this year's rankings. *(For a complete list of states and their ranking, see page 30)*

MICHELLE CHANG

With these states slipping back, as well as other factors like the looming possibility of climate-change litiga-

tion that could dwarf the tobacco settlement, opponents declaring victory over the plaintiffs' bar are wrong. Worse, the false perception of victory and a softening economy have caused cutbacks in corporate funding for tort reform, according to many reform advocates. Such cutbacks will only slow the pace of advancement on reform.

Directors, CEOs, and general counsel take heed: the tort liability climate remains unpredictable. Don't assume a few bright spots mean all is well: In many states, there's stormy weather ahead.

1 ● TENNESSEE

Moving up from 11th place in last year's rankings, Tennessee is now the top-ranked state. Pacific Research Institute's 2008 report listed Tennessee as the state with the lowest litigation risks in the country. While the state's liability climate encourages growth and job creation, it's also a state to

watch because its tort laws do not place limits on non-economic and punitive damages and there are some plaintiff-friendly venues in Tennessee. The state Supreme Court is considered neutral on liability issues.

2 ● UTAH

Utah's liability climate encourages growth

and job creation. The state maintains its top-10 ranking for its monetary tort losses. PRI's 2008 report indicates the state's overall litigation risks have improved from 24th in 2006 to 18th in 2008. Despite the state's high rankings, the Utah Supreme Court has an activist majority that has demonstrated a willingness to approve higher punitive damage awards than the U.S. Supreme Court benchmark. Unlike the state Supreme Court, Governor Jon Huntsman, Jr., Lt. Governor Gary Herbert, and Attorney General Mark Shurtleff are advocates for the rule of law with records of support for a fair and predictable liability climate in Utah.

3 ● INDIANA

Indiana maintains a liability climate conducive to growth and job creation. Despite middling rankings in PRI's 2008 report for monetary tort losses and litigation risks, Indiana juries are not known for excessive and unwarranted verdicts. The state Supreme Court has a rule-of-law majority. Governor Mitch Daniels is a rule-of-law advocate who stands for re-election this November. Attorney General Steve Carter, also a rule-of-law advocate, will not seek re-election in November, creating an open seat. It is important that another rule-of-law attorney general fill this vacancy.

4 ● OHIO

Ohio's liability climate continues to improve and promotes growth and job creation, despite a governor and attorney general hostile to liability reform. The state has a rule-of-law Supreme Court majority and a working reform coalition in its legislature. In December, its high court upheld important tort reforms enacted in recent years, including caps on non-economic and punitive damages in non-medical cases. However, Governor Ted Strickland and former Attorney General Marc Dann are both highly activist. The state Supreme

How the State Ranking Was Done

Many companies take into account state liability climates when making decisions about expansion and investment. The second annual *Boardroom Guide to State Litigation Climates* is prepared by the American Justice Partnership in collaboration with *Directorship*. Its analysis is based on two national indices—the Pacific Research Institute's 2008 U.S. Tort Liability Index and the 2008 ILR/Harris State Liability Systems Ranking—combined with the expertise of the AJP.

The Pacific Research Institute (PRI) report is a peer-reviewed econometric analysis of 41 variables, including insurance loss ratios and state laws that affect liability climates. Of the 41 variables, 28 determine an output ranking and 13 contribute to an input ranking for each state. The output ranking is a snapshot of the most recent empirical results, which include losses arising from product liability lawsuits. The input ranking, predictive of the results expected in the coming years, takes into account a state's current liability laws and how they are interpreted by the courts of that state. Other inputs include the existence of what the American Tort Reform Association (ATRA) calls a "judicial hellhole"—a jurisdiction in a state that is considered hostile to business defendants—composition of its legislature, and activism of its attorney general. Inputs, by their nature, are subjective.

The 2008 ILR/Harris State Liability Systems Ranking is a survey of some 957 in-house general counsel and senior lawyers based on their litigation experiences in the states. Harris Interactive conducted this poll for the U.S. Chamber Institute for Legal Reform.

Composite Ranking

The final ranking in this *Guide* reflects the quantitative scores after combining PRI's output and index rankings with the Harris Poll rankings for each state, and the qualitative assessment and real-world expertise of the author of this *Guide*.

State Profiles

The numerical rankings utilize a 1 to 50 scale: 1 being the state with the best liability climate and 50 being the state with the worst. The traffic light colors symbolize the liability climate of each state:

- A green light means the state's liability climate encourages growth and job creation.
- A yellow light means the liability climate is neutral to growth and job creation.
- A red light means the liability climate discourages growth and job creation.

In some instances, emerging trends in a state's legal climate causes us to illustrate these changes as either cautionary (green, yellow lights), negative (yellow, red lights), or improving (red, yellow lights).

Court overturned Governor Strickland's veto of a liability reform bill. Dann filed a lawsuit against 10 paint manufacturers in an effort to further expand state liability law on a public nuisance theory. Holding the line in the legislature against a robust trial bar and protecting hard-won gains from judicial activism will determine whether Ohio remains a promising state for growth and job creation. Ohio is a state to be watched.

5 NORTH DAKOTA

While North Dakota slipped from 3rd in last year's ranking, it continues to have one of the best liability climates. The state's insurance loss ratios remain the lowest in the nation. North Dakota has benefited from a relatively low number of civil cases filed in its courts. A bill allowing private attorneys to sue on behalf of the state was rejected by the state legislature in 2007. A rule-of-law majority on the state's Supreme Court is likely to protect existing punitive damage limits. North Dakota's liability climate promotes growth and job creation.

6 NORTH CAROLINA

The state has maintained a fair and pre-

dictable liability climate that leads to growth and job creation. It ranks among the three best states for monetary tort losses, improving from 7th in 2006. However, North Carolina's product liability losses rank 36th, which indicates heightened litigation activity and a rise in jury verdicts. Further, the state's plaintiffs' bar is very active in the state legislature: a bill defeated last year extending the statute of repose from 6 to 15 years would have made North Carolina one of three states with the longest period for filing claims. There is a rule-of-law majority on the state Supreme Court and the state business court serves as a model for the nation. North Carolina, however, is a state to be watched because of aggressive trial bar legislative efforts.

7 NEBRASKA

Nebraska's liability climate is conducive to growth and job creation. The state's ranking, however, fell from 1st last year to 7th this year. The state ranks 31st among the states for litigation risks and ranks 40th for product liability risks, reflecting an increase in the number of cases filed in the state. Governor David Heineman demonstrated his leadership on liability reform by publicly supporting a Nebraska court's dis-

missal of claims against state school districts. The Nebraska Supreme Court has a rule-of-law majority. Attorney General Jon Bruning is a strong rule-of-law advocate.

8 VIRGINIA

Slipping from 2nd in last year's ranking, Virginia continues to have one of the best liability climates in the nation. The Commonwealth ranks best for monetary tort losses and 26th among the states for litigation risks. Despite its stellar liability climate, Virginia has not enacted the tort reforms of other leading states. Based on disappointing 2007 election results, there is a one-vote pro-plaintiffs' lawyer majority in the state Senate. Governor Timothy Kaine is considered an activist and opponent of liability reform. He is, for example, pursuing state-level climate-change policy that may subject businesses to new areas of liability. As a member of the House of Delegates, current Attorney General Bob McDonnell introduced several liability reform bills that were signed into law.

9 MICHIGAN

Michigan slipped two spots in the rankings this year. The 2008 state Supreme Court election results will determine whether

Litigation Guide Glossary

A few concepts used in the state profiles may be unfamiliar and require definition.

A rule of law or restrained legal environment means a state's Supreme Court majority or attorney general respects the will of the legislature and resists legislating from the bench or regulating through litigation. Rule-of-law officeholders contribute to stable liability climates, while an activist Supreme Court majority or attorney general contributes to an unstable liability climate.

Punitive damages punish defendants for perceived reckless or malicious behav-

ior, depending upon the state standard. Limits on any damage awards result in fair and predictable litigation outcomes. States that do not limit damage awards become magnets for plaintiffs' attorneys and class-action lawsuits.

Non-economic damages compensate victims for conceptual losses, including pain and suffering.

Economic damages compensate victims for actual monetary losses, including wages and medical bills.

Statutes of repose set the time in which a lawsuit must be filed after the sale of a

product and differ from statutes of limitations, which set forth the time in which a lawsuit must be filed after a wrong has occurred.

Insurance loss ratios are the ratio of losses paid or accrued by an insurer to premiums earned.

Litigation risks comprise the five variables used in the PRI 2008 report to assess vulnerability to unwarranted litigation.

Monetary tort losses track tort losses across seven lines of insurance and two categories of self-insurance in the PRI 2008 report.

Michigan's liability climate remains favorable to growth and job creation. The plaintiffs' bar is expected to fund an effort to unseat rule-of-law Chief Justice Clifford Taylor. Michigan's liability climate benefits from the rule-of-law majority on the state Supreme Court and comprehensive tort measures enacted under former Governor John Engler. Product liability losses in Michigan are among the lowest in the nation. Anti-reform forces in the House have introduced bills to end the hard-won FDA defense properly extended to pharmaceutical companies. Attorney General Mike Cox is one of the nation's strongest supporters of the rule of law.

10 ● SOUTH DAKOTA

The liability climate in South Dakota is conducive to growth and jobs creation. It remains among the 15 best states for monetary tort losses and insurance loss ratios. The state Supreme Court enjoys a rule-of-law majority and Attorney General Larry Long continues to be a strong rule-of-law advocate. However, the state legislature has failed to enact substantive tort reform laws beyond limits on punitive damages. As a result, the state is vulnerable to plaintiff-driven litigation. In fact, the state has experienced an increase in the number of civil cases filed in the past two years. South Dakota is a state to watch.

11 ● ALASKA

The liability climate is on a positive trajectory for job growth and creation, thanks in large part to comprehensive liability reforms enacted in 1997 and upheld by the state Supreme Court in 2002. Alaska is one of the better performers in terms of liability climate and is a state now open for business.

12 ● WISCONSIN

Improving its rank from 22nd last year,

recent developments may stimulate further improvement in Wisconsin's liability climate. In April, rule-of-law Supreme Court candidate Michael Gableman upset activist incumbent Justice Louis Butler, marking the first time in 41 years that an incumbent justice has been defeated. The win transforms the high court from a 4-3 activist majority to a 4-3 rule-of-law majority and marks a big win for the legal reform community. There is room for improvement, however, particularly in the area of product liability law that unfairly favors plaintiffs. The state ranks 10th best for potential litigation risks. Wisconsin is on the right track.

13 ● TEXAS

Despite lingering problems with judicial activism in some state circuits, Texas' liability climate promotes growth and job creation. Comprehensive reforms enacted several years ago have resulted in major improvements in the state's healthcare delivery system and improved insurance loss ratios. PRI's 2008 report ranks Texas as 5th best in the nation for monetary tort losses. South Texas judicial circuits, however, continue to attract ATRA's "judicial hellhole" designation. While the plaintiffs' bar's influence in the state legislature is increasing, Governor Rick Perry vetoed legislation that would have undone medical liability reforms and limits on damages enacted in 2003. PRI's 2008 report finds Texas second best in the nation for "inputs," which suggests that the state remains committed to pro-growth liability reform.

14 ● IDAHO

Idaho's liability climate encourages growth and jobs creation, and reforms enacted in 2003 have contributed to its improvement. PRI's 2008 report shows that the state now ranks 30th overall for monetary tort losses, a significant improvement from 5th worst in 2006. The reforms have made the state

less vulnerable to an increase in lawsuits. The Idaho Supreme Court has a rule-of-law majority and Attorney General Lawrence Wasden has strong rule-of-law credentials. Idaho is likely to continue moving up in the rankings.

15 ● WYOMING

While Wyoming's liability climate encourages growth and job creation, PRI's 2008 report indicates that existing tort laws do not provide safeguards available in other states. Wyoming law, for example, provides a four-year period of limitations on tort claims, longer than most other states, and no limitations on damage awards. Wyoming now ranks near the worst 20 percent for increased lawsuit filings, a trend that should cause concern among state leaders. Its monetary tort loss ranking dropped from 3rd best in the nation in 2006 to 10th among the states in 2008. Wyoming should be watched as an at-risk state.

16 ● NEW HAMPSHIRE

The Granite State continues to have a liability climate that encourages growth and job creation. An activist Supreme Court majority and a vigorous anti-reform coalition in the state legislature, however, threaten New Hampshire's top 20 ranking. In 2007, pro-trial lawyer forces in the state legislature passed a measure limiting apportionment of fault to parties involved in a lawsuit, which threatened to undo established joint liability reforms. Governor John Lynch vetoed the bill. Attorney General Kelly Ayotte subscribes to the rule of law. The state Supreme Court has an activist majority and that alone makes New Hampshire a state to watch.

17 ● IOWA

Iowa's liability climate remains conducive to job creation and growth. Monetary tort

