

**IN THIS ISSUE**

*This article discusses the American Tort Reform Foundation's Judicial Hellholes program, which began in 2002 to document in annually published reports various abuses within the civil justice system. The article explores common indicia of Judicial Hellholes and discusses some of the program's positive results.*

## Finding and Closing Judicial Hellholes

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## **ABOUT THE COMMITTEES**

The **Civil Justice Response Committee** works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection, and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect the outcome of the debate or controversy. If prompt, concerted action is taken. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article, contact:



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The **Corporate Counsel Committee** is composed of in-house counsel and others who, although in private practice, serve as general counsel for corporate clients. The Committee provides its members with educational programs and networking opportunities to address common concerns of corporate counsel. It also works to ensure that the IADC and its committees, through their work and offerings, meet the needs of corporate counsel. Learn more about the Committee at [www.iadclaw.org](http://www.iadclaw.org). To contribute a newsletter article contact:



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A “Judicial Hellhole” is a jurisdiction or court which applies the law unfairly and in a manner demonstrating a bias against corporate defendants. This label is not imposed at random; it is based on clear and understandable criteria that single out an unfair forum from a place where a particular defendant may simply be unhappy with the result of a case.

#### Criteria for Identifying Judicial Hellholes

Mississippi plaintiffs’ lawyer Dickie Scruggs once used the phrase “magic jurisdictions” to describe the types of places that are Judicial Hellholes. He said:

The trial lawyers have established relationships with the judges that are elected; they’re State Court judges; they’re populists. 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 the law is.<sup>1</sup>

Notwithstanding this colorful characterization, there are sound criteria to help spot Judicial Hellholes. For example, Judicial Hellhole courts often create an open door for forum shopping. They may welcome cases that involve a plaintiff who never lived, worked, or sustained injury in the jurisdiction. The only reason the plaintiff is singling out that particular court is that a savvy plaintiff’s lawyer believes the judge will give that plaintiff an advantage. The plaintiff’s lawyer realizes the court has little or no connection to the case. Nevertheless, the judge opens the door and hears the case. Another way Judicial Hellhole judges may tilt the playing field is through unfair evidentiary rulings, particularly with respect to the admission of expert testimony. The judges allow experts to testify based on unscientific factors, such as the prestigious school the person attended, not what actual scientific knowledge they possess that directly applies to the case or the expert’s methodology. The jury thus hears “junk science” testimony they often cannot properly evaluate and

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<sup>1</sup> Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New

York), June 11, 2002, at 5 (transcript of comments of Richard Scruggs).

reject. When the case involves a sympathetic plaintiff who is badly injured, the jury may render a large award based on the existence of an injury and a person with an Ivy League degree telling them damages are warranted. In such instances, the judges fail to fulfill their role as “gatekeepers” of proper evidence and provide a path to a plaintiff’s recovery.

In addition, Judicial Hellhole courts may be inclined to welcome novel and unsound tort theories. For example, they may allow plaintiffs to proceed even though they have suffered no actual injury at all. The Judicial Hellhole court may, for example, allow a plaintiffs’ lawyer to form a class action where a few class representatives have been injured, but the members of the class have no real injury. The judge finds legal words to certify what is a largely an empty class, and the plaintiff’s lawyer is given a powerful weapon to obtain a settlement.

Judicial Hellhole courts sometimes ignore their responsibility to exercise judicial restraint over what are clearly excessive damages. For instance, virtually the entire damages award may be for noneconomic damages, such as “pain and suffering,” in an amount that no reasonable jury would award. The Judicial Hellhole court, however, defers to the “wisdom” of the jury and resolves not to grant the defendant a new trial or reduce the excessive award. The same thing can happen with punitive damages.

Judicial Hellhole courts may also engage in grossly unfair trial procedures. For example, a Judicial Hellhole court may permit overly broad discovery sought by plaintiff’s counsel, which imposes a substantial burden in terms of costs and resources on a business. In addition, the court could schedule trials in such a way as to put undue pressure on defendants to settle.

Other unjust procedural maneuvering by a Judicial Hellhole court may include the consolidation of dissimilar cases for trial, the classic mixing of apples and oranges. Improper consolidation can occur when a few cases where a plaintiff has a strong case are allowed to become consolidated with, and leverage, weaker cases. Individual cases cannot be determined on their merits.

Additionally, Judicial Hellhole courts may impose sanctions on defendants far beyond what the law merits. For instance, in a case involving tens of thousands of documents, the court might focus on a business’s error in providing a few documents (regardless of their importance to the case) and impose penalties for what was just an oversight.

The foregoing are just some of the common indicia of a Judicial Hellhole; it is not a court that has simply allowed a plaintiff to win, or where the law itself is unfavorable to defendants. There are specific types of unfairness that cause a court or jurisdiction to be labeled a Judicial Hellhole.

### The Purpose Behind the Judicial Hellholes Program

The American Tort Reform Foundation began the Judicial Hellholes program in 2002 with a specific purpose in mind, namely to use sunlight to expose bad behavior and encourage constructive changes in select courts. Since that time, annual Judicial Hellholes reports have documented serious abuses in the civil justice system throughout the country.

Fortunately, the Judicial Hellholes report has often achieved its core goal. For example, in 2011, the report named Philadelphia the number one Judicial Hellhole in the country. The reporting help bring about reform. Chief Administrative Judge John Herron of the Philadelphia Court of Common Pleas, which handles the state's mass tort litigation, sent a letter to the American Tort Reform Association stating that procedures had been improved so that the court no longer needed to be deemed a Judicial Hellhole. The Philadelphia mass action court had stopped forum shopping by out-of-state plaintiffs' lawyers and created new, fair mass tort protocols.

In addition, the Judicial Hellholes program has helped bring about change in state legislatures that do not want the reputation of having Judicial Hellholes in their states. Many legislators and governors understand that having courts that do not render equal justice not only impacts the defendant in a

case but makes it difficult to attract new businesses that will provide jobs for people who live in the state. For example, when West Virginia was listed as a Judicial Hellhole over the course of more than a decade, the label generated op-eds in West Virginia papers and other media publicity seeking positive change. In recent years, the legislature has enacted many civil justice reforms to improve the reputation of the state's legal environment.

#### *Case Study: St. Louis, Missouri*

St. Louis, Missouri, was named the top Judicial Hellhole in the country in the 2016/2017 Judicial Hellholes report. The state's overly permissive venue law and lenient standard for the admission of expert testimony, among other issues, made St. Louis a magnet for lawsuits.

In 2017, the sunlight put on St. Louis by the Judicial Hellholes report and other media prompted the Republican-led legislature and reform-minded Governor to take a leadership role in addressing St. Louis's reputation. The state legislature responded by adopting several significant civil justice system reforms, including a more exacting standard for the admission of scientific expert evidence to curb "junk science."

The legislative reforms made an impact on St. Louis's designation as a Judicial Hellhole. The jurisdiction's Judicial Hellhole ranking was lowered to number three in the latest

report, signaling that although progress has been made, more is needed for St. Louis to no longer be considered a Judicial Hellhole. Pending legislative reforms in 2018 to amend Missouri's venue laws, address abusive consumer litigation, and make asbestos litigation fairer, among others, would go a long way toward the goal of improving the reputation of St. Louis courts in civil cases.

#### Getting Off of the Judicial Hellholes List

Fortunately, over the past decade many courts have improved to a point warranting removal from the Judicial Hellholes list. Unfortunately, some jurisdictions occasionally slip back into Judicial Hellhole territory. For that reason, the Judicial Hellholes report has a section called the "Watch List." Jurisdictions on the Watch List are places where past abuses appear to have been rectified or curtailed, but it is uncertain whether the change will last. The Watch List can also serve as a warning to courts where bad practices are starting that if they continue they may be labeled a full-blown Judicial Hellhole.

The Watch List has been an effective tool for encouraging more enduring judicial fairness. Many courts have been taken off of the Watch List because they have shown a consistent pattern of being fair to both sides in tort litigation.

#### Carrots as well as Sticks

After a few years of publishing the Judicial Hellholes report a decision was made to use carrots as well as sticks and praise positive efforts by courts or states to improve fairness in the civil justice system. The Judicial Hellholes report now includes a discussion of "Points of Light" to showcase such constructive efforts and encourage other jurisdictions to follow suit.

#### Preventing and Curing Judicial Hellholes

As indicated, there has been self-correction by judges in Judicial Hellholes as well as legislative intervention. But there is also a path toward prevention of Judicial Hellholes. In that regard, the selection of judges is important, regardless of whether a particular jurisdiction's judges are elected or appointed. Judicial Hellholes can be prevented by any judge who makes a concerted effort to apply the words engraved on the outside of the U.S. Supreme Court, "Equal justice under law." Sound judicial education can also help prevent Judicial Hellholes, as judges can benefit from learning more about the law and potential abusive practices. In doing so, judges are likely to render better decisions in the future.

The Judicial Hellholes report has been a positive vehicle in our society. It has helped bring about that sometimes elusive, but important, goal of justice and fairness.

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