

# JUDICIAL HELLHOLES, LAWSUIT CLIMATES AND BAD SOCIAL SCIENCE: LESSONS FROM WEST VIRGINIA

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The American Tort Reform Association (ATRA) was founded in 1986 by the American Medical Association and American Council of Engineering Companies, and now has hundreds of corporate members.<sup>1</sup> Every year, ATRA releases a list of “Judicial Hellholes<sup>®</sup>”—court systems alleged to be unfair to

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\* 2007-2008 John T. Copenhaver Visiting Chair, West Virginia University College of Law; Professor of Law, SMU Dedman School of Law. As an outsider coming to West Virginia to teach civil procedure, I was somewhat surprised to learn that the entire state of West Virginia had been named by the American Tort Reform Association as a “judicial hellhole.” It caused me to investigate the “hellhole” project generally and the treatment of West Virginia in particular. This essay is the result of that research.

<sup>1</sup> ATRA at a Glance (2007), <http://www.atra.org/about>; see also Sample List of ATRA Members (2007), <http://www.atra.org/about/members.php>. The American Tort Reform Foundation, established in 1997, publishes the Judicial Hellhole reports. All of the hellhole reports are available on ATRA’s website, at <http://www.atra.org/reports/hellholes>. They will be cited hereinafter as [year] Hellhole Report.

defendants. The name—which ATRA has trademarked—is definitely catchy: the thought of a “judicial hellhole” invokes images of Kafka, Satan and the Queen of Hearts. “Off with their heads!” one imagines those awful court systems saying to corporate defendants. No wonder ATRA’s hellhole campaign has embedded itself in media vocabulary. And no wonder state courts and state legislatures bend over backwards to get out from under the hellhole label.

Similarly, the U.S. Chamber of Commerce has spawned a spin-off organization—the Institute for Legal Reform (ILR)<sup>2</sup>—that issues an annual report on each state’s “lawsuit climate,” ranking states from 1 to 50 on their friendliness to business, based on a survey of general counsel of very large businesses and their outside lawyers.<sup>3</sup> Since no state wants to be found near the bottom of the list, the ILR report also creates pressure for legal change.

West Virginia has become one of the primary targets of both reports. Beginning as a “dishonorable mention” in the first hellhole report in 2002, West Virginia worked its way up the hellhole ladder until ranked #1 in 2006, and the state remains firmly on the hellhole list in the most recent (2007) report.<sup>4</sup> The state has also worked its way to the bottom of the ILR lawsuit climate list (starting at 49th but bottoming out in 2007). Yet since both reports began, the West Virginia legislature has enacted a number of significant pro-defendant changes in the law, most notably caps on medical malpractice damages,<sup>5</sup> limits on joint and several liability,<sup>6</sup> restrictions on lawsuits by out-of-state plaintiffs,<sup>7</sup> and

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<sup>2</sup> The *Wall Street Journal* reported in 2001 that ILR contributors included General Motors, Toyota North America, Daimler Chrysler, Ford, Wal-Mart, and insurers State Farm and Aegon, USA. See Jim VandeHei, *Political Cover: Major Business Lobby Wins Back its Clout by Dispensing Favors*, WALL ST. J., Sep. 11, 2001, at A1. Neither the Chamber nor the ILR releases a complete list of members or of contributors to particular projects.

<sup>3</sup> The ILR Lawsuit Climate reports (beginning in 2002) are all available on its website. The most recent (2007) is at <http://www.instituteforlegalreform.com/lawsuitclimate2007/index.cfm>. The hellhole reports and lawsuit climate reports sometimes reinforce each other, as when the 2003 Hellhole Report noted the ILR ranking of West Virginia or when the 2007 Hellhole Report relied on the ILR small business survey. See 2003 Hellhole Report at 9; 2007 Hellhole Report at 41 n.139.

<sup>4</sup> 2007 Hellhole Report.

<sup>5</sup> See W. VA. CODE § 55-7B-8 (Supp. 2007) (adopted in 2003 to lower cap on noneconomic losses in medical malpractice cases from \$1 million – the cap adopted in 1986 – to \$250,000 per occurrence or \$500,000 where the damages for noneconomic losses suffered by the plaintiff were for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities); see also *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991) (finding 1986 cap constitutional).

<sup>6</sup> See W. VA. CODE § 55-7-24 (Supp. 2007) (adopted in 2005).

<sup>7</sup> See W. VA. CODE § 56-1-1 & 1a (Supp. 2007) (adopted in 2005). Defendants preferred an earlier version of this statute, which was invalidated by the state supreme court in *Morris v. Crown Equip. Corp.*, 633 S.E.2d 292 (W. Va. 2006), *cert. denied*, 127 S. Ct. 833 (2006).

elimination of third-party bad faith claims against insurance companies.<sup>8</sup> West Virginians also voted out of office ATRA's most disfavored Justice of the West Virginia Supreme Court of Appeals.<sup>9</sup>

Despite these changes, the entire state retains the hellhole label. This should not surprise anyone: the point of the hellhole campaign is not to create an accurate snapshot of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants and their insurers, and to spur voters to vote for those judges and legislators who will do so. As long as ATRA believes that West Virginia politics is vulnerable to this type of pressure, and as long as it seeks additional changes in the law or the judiciary, West Virginia's hellhole stardom will continue.

In a recent newsletter to his members, the President of the Defense Trial Counsel of West Virginia asked, "why [do] national business leaders believe we are a judicial hellhole"?<sup>10</sup> This essay suggests an answer: because ATRA and the ILR and Citizens Against Lawsuit Abuse (CALA) and other related groups have been telling people it's a hellhole for years, and it is in the interest of those groups and their members to keep telling the public that West Virginia is a hellhole, and the very worst state environment for business. And so they do so, year after year. The sheer repetition of the claims then takes on an appearance of truth, in a process known as "social production of knowledge"—if you repeat something often enough, people will come to treat it as general knowledge.<sup>11</sup> Nor is this an isolated or recent event: the judicial hellhole campaign is only the latest chapter in a decades-long effort to convince American voters that the tort law system has gone seriously awry. Business people, many of whom have grown up listening to misleading anecdotes and fabricated data, come pre-programmed to accept the hellhole reports as true and to base their opinions in ILR surveys on this decades-long public media campaign.

Part I of this essay briefly traces the evolution of the patient and pervasive efforts to control the public perception of tort law, highlighting some of the ways in which it has played fast and loose with numbers and stories. Part II discusses the ATRA and ILR national campaigns, while Part III focuses on ATRA's treatment of West Virginia's judicial system as a way to demonstrate

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<sup>8</sup> W. VA. Code § 33-11-4a (Supp. 2007) (adopted in 2005).

<sup>9</sup> See Carol Morello, *W. Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15 (commenting on Warren McGraw's defeat by Brent Benjamin).

<sup>10</sup> Robert Massie, *President's Column: Is West Virginia A Judicial Hellhole?*, DEFENSE TRIAL COUNSEL OF WEST VIRGINIA NEWSLETTER 1 (Fall 2007).

<sup>11</sup> See Richard A. Brisbin, Jr. & John C. Kilwein, *The Future of the West Virginia Judiciary: Problems and Policy Options*, W. VA. PUB. AFFAIRS REP. 2, 5 (2007), available at [http://www.polsci.wvu.edu/ipa/par/reporter24\\_2.pdf](http://www.polsci.wvu.edu/ipa/par/reporter24_2.pdf). See also William Haltom & Michael McCann, *Distorting the Law* 1-25 (2004) (describing mechanisms of social production of knowledge). Other scholars refer to this phenomenon as using aggressive marketing to create a "pervasive reality" that influences the format of ideas covered by U.S. media. See DAVID RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS* 182-207 (1993).

the techniques of the hellhole reports. Part IV examines whether the limited amount of empirical data available for West Virginia supports the hellhole thesis, finding that it does not. The essay concludes by suggesting that West Virginia (and other states) begin collecting data about the operation of the court system and the insurance industry, and begin educating the media and the public to ask better questions when confronted with allegations about the judicial system.

As public relations ventures, the ATRA and ILR campaigns have been an astounding success. As well-founded, honest commentaries on judicial systems, however, they are a major failure. It's time for state courts and legislatures to seize the empirical high ground and base their lawmaking decisions on fact rather than fable.

### I. BACKGROUND: THE CAMPAIGN TO PROMOTE TORT "REFORM"

The industry campaign to transform the way Americans think about litigation began in the 1980s. Insurance companies and industry trade groups brilliantly invoked fundamental cultural images and associated them with individual lawsuits against corporate defendants. Thus personal injury claims got blamed for a litigation "explosion," involving "skyrocketing" damage awards by "run-away" juries. Collectively, these images became a "crisis" in immediate need of a return to "balance."<sup>12</sup>

The campaign was bolstered with false or misleading horror stories and fabricated or misleading numerical data (made more effective through eye-catching charts and graphs).<sup>13</sup> The strategists realized that the media and the public sometimes act like magpies—lured by shiny objects, in this case horrific-sounding anecdotes with catchy details like psychics, day care centers, and McDonald's coffee.<sup>14</sup> The stories came complete with victims and villains. Workers and other plaintiffs were portrayed not as persons trying to enforce the law and deter misbehavior, or even as injured victims of the wrongs of others, but as whiners who failed to take personal responsibility for their own problems. An even better scapegoat were the "plaintiffs' lawyers"—portrayed as greedy parasites trying to make an easy buck by scaring companies into settling frivolous claims.<sup>15</sup>

The anti-lawsuit rhetorical messages were repeated over and over by business-funded institutes and Fortune 500 companies and are now omnipresent in popular culture. Business executives themselves may believe the hype—

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<sup>12</sup> See, e.g., STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 4-9, 37-51 (1995) (discussing in detail the rhetorical devices used to sway public opinion).

<sup>13</sup> *Id.* at 51-57 (describing misuse of statistics).

<sup>14</sup> See Michael McCann, William Holtom & Anne Bloom, *Java Jive: Genealogy of a Juridical Icon*, 56 U. MIAMI L. REV. 113 (2001) (analyzing media treatment of *Liebeck v. McDonald's Restaurants* and media treatment of lawsuit stories generally).

<sup>15</sup> DANIELS & MARTIN, *supra* note 12, at 38.

they, too, have been listening to the campaign for almost thirty years.<sup>16</sup> One interesting result is that CEOs are significantly more likely to believe in the existence of litigation risk than are their risk managers—the people who deal with the actual risk data on a day to day basis.<sup>17</sup>

The rhetoric of crisis proved impervious to correction despite significant evidence to the contrary.<sup>18</sup> Empirical research by neutral scholars consistently shows that the claims are false or exaggerated. Studies of actual reported cases and court statistics—including caseloads, trials, awards, and settlements—show that:

- There is no “litigation explosion,” especially not of product liability and medical malpractice claims.<sup>19</sup>
- In cases that go to trial, plaintiffs win a moderate number of cases and both mean and median awards are modest. The same is true of settlements made “in the shadow” of jury awards.<sup>20</sup>
- Awards of punitive damages are rare, and even when they occur they are often small both in absolute terms and relative to actual damages.<sup>21</sup>
- Many of the oft-repeated horror stories are merely urban myths, others are distorted through omission of important information, and some are outrageous claims that were immediately dismissed by the trial courts.<sup>22</sup>

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<sup>16</sup> See John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1 (1998).

<sup>17</sup> Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 741-43 (1998) [hereinafter *Oil Strike*].

<sup>18</sup> Tort reformers' claims about West Virginia in particular are addressed in Part IV.

<sup>19</sup> Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1103-09 (1996). In fact, only a very small percentage of grievances result in litigation. See David M. Trubeck et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 85 (1983).

<sup>20</sup> See, e.g., Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE UNIV. L. R. 433 (1996) (discussing jury verdicts in various types of cases); Frank Cross & Charles Silver, *In Texas, Life is Cheap*, 59 VAND. L. REV. 1875 (2006) (insurance payout database reflects generally modest payments in death cases). Results in the courts of appeals are even less friendly to plaintiffs. See Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002) (analyzing a database of all federal trials and appeals since 1988 and concluding that that a defendants' advantage exists, probably because of appellate judges' misperceptions that trial level adjudicators are pro-plaintiff).

<sup>21</sup> Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 36-73 (1992); Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1411-17 (1993).

<sup>22</sup> Galanter, *Oil Strike*, *supra* note 17, at 726-33.

- Numbers used to show growth in caseloads or decrease in doctors assume rather than prove causation, and often ignore other important variables.
- Worse, some are merely fabricated and then repeated until they seem to be factual.<sup>23</sup>

More remarkable than creating a crisis mentality was the campaign to convince members of the public that they, personally (and not just corporations and their insurers) were being hurt by litigation. In 1986, the Insurance Information Institute launched its initial public relations effort, “We All Pay the Price.” A series of vivid print ads included “The Lawsuit Crisis is Bad for Babies,” “The Lawsuit Crisis is Penalizing School Sports,” and “Even the Clergy Can’t Escape the Lawsuit Crisis.”<sup>24</sup> Once again a catchy phrase brought home the message: all of us are paying a “lawsuit tax,” an increase in the price of goods and services that exists only because of the cost of defending and insuring against tort litigation and workers’ compensation claims. The Council on Competitiveness, chaired by Vice President Dan Quayle, claimed that the cost to the economy of litigation damaged the ability of American companies to compete in the global market. Empirical research again demonstrated that the message of cost to consumers and disappearance of innovative products was “fundamentally false—the product of dubious anecdotes, questionable research, concocted statistics, factual and legal misstatements, and willful disregard of contradictory evidence.”<sup>25</sup>

The most recent version of the anti-litigation story focuses on medical malpractice claims, where doctors have from time to time experienced sharp increases in medical malpractice premiums.<sup>26</sup> The campaign in this context blames plaintiffs (and “runaway” jury awards) for the increased costs of insurance and an alleged exodus of doctors. Research, however, tends to indicate that the increases in medical malpractice insurance premiums were caused at least as much by fluctuations in the stock market and insurance marketing practices as by the cost of paying malpractice claimants.<sup>27</sup> In addition, according to

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<sup>23</sup> DANIELS & MARTIN, *supra* note 12, at 57-58.

<sup>24</sup> *Id.* at 34, 267 n.32. These advertisements were published, for example, in *Newsweek* (April 28, June 9, and June 30, 1986); and *Time* (March 31, April 28, and June 9, 1986). *Id.* at 267 n.32.

<sup>25</sup> Kenneth Jost, *Tampering with Evidence: The Liability and Competitiveness Myths*, 78 A.B.A. J. 44, 45 (1992).

<sup>26</sup> For a discussion of the debate concerning West Virginia’s medical malpractice legislation in the 1980s, see Franklin D. Cleckley & Govind Hariharan, *A Free Market Analysis of Medical Malpractice Damage Cap Statutes: Can We Afford to Live With Inefficient Doctors?*, 94 W. VA. L. REV. 11 (1991).

<sup>27</sup> See GENERAL ACCOUNTING OFFICE, *Medical Malpractice (Excerpts from Medical Malpractice and Access to Health Care (GAO-03-836))* (Aug. 2003), available at [http://www.policyalmanac.org/health/archive/medical\\_malpractice.shtml](http://www.policyalmanac.org/health/archive/medical_malpractice.shtml). For the full report, see GENERAL ACCOUNTING OFFICE, *Medical Malpractice: Implications of Rising Premiums on Access*

the American Medical Association's own statistics, the number of doctors is increasing rather than decreasing (except in urban and rural areas that have been plagued by doctor shortages for decades).<sup>28</sup> As Tom Baker, director of the Insurance Law Center at the University of Connecticut, wrote in his recent book,

[B]uilt on a foundation of urban legend mixed with the occasional true story, supported by selective references to academic studies, and repeated so often that even the mythmakers forget the exaggeration, half truth, and outright misinformation employed in the service of their greater good, the medical malpractice myth has filled doctors, patients, legislators, and voters with the kind of fear that short circuits critical thinking.<sup>29</sup>

As is true in other areas, statistics with regard to medical malpractice and doctor supply are used out of context and, most importantly, simply assume the causation that they purport to prove: a link between the "tort reform" measures and malpractice premiums, the supply of doctors generally, or the availability of various medical specialties.

## II. THE HELLHOLE CAMPAIGN AND THE "LAWSUIT CLIMATE REPORT"

ATRA's hellhole campaign began in 2002, and it falls squarely within this tradition of scaring the public, but with a twist—this time the explicit goal is to appeal to the public as voters, to scare state politicians into making pro-defendant changes in the law in order to make the label go away, and to get rid of judges whose rulings made ATRA members unhappy.

Judicial Hellholes are selected in whatever way suits ATRA's political goals. The choice is not based on research into the actual conditions in the courts. Rather, the jurisdictions involved are "frequently identified by members of the American Tort Reform Association and other individuals familiar with litigation."<sup>30</sup> The reports use ATRA's collection of anecdotal information and

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to *Health Care* (GAO-03-836) (Aug. 2003), available at <http://www.gao.gov/new.items/d03836.pdf>.

<sup>28</sup> *Id.*; see also Neil Vidmar et al., "Judicial Hellholes": *Medical Malpractice Claims, Verdicts and the "Doctor Exodus" in Illinois*, 59 VAND. L. REV. 1309, 1335-41 (2006) (examining Illinois data in detail).

<sup>29</sup> TOM BAKER, THE MEDICAL MALPRACTICE MYTH 1 (2005); see also Michael Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. PA. L. REV. 1147, 1149 (1992); Douglas A. Kysar, Thomas O. McGarity & Karen Sokol, *Medical Malpractice Myths and Realities: Why An Insurance Crisis Is Not A Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785, 788 (2006) ("The best available empirical evidence suggests that the civil justice system is not inundated with baseless claims, that insurance companies' losses in malpractice lawsuits are not driving premium hikes, that doctors are not disappearing, and that there is no surge in 'defensive medicine' contributing to increased healthcare costs.").

<sup>30</sup> 2006 Hellhole Report at ii. The first report, in 2002, used a survey of ATRA members as a basis for its ratings. 2002 Hellhole Report at 3.

stories reported in the media to justify each state's hellhole status. Once again, empirical research tends to debunk the industry complaints. For example, a study of actual data from top hellholes Madison and St. Clair Counties in Illinois concluded that there was "no support for the 'hellhole' label." Similarly, the study found "absolutely no support for the claims that the net number of doctors in Illinois has decreased. In fact there has been a slow, sometimes faltering, but steady increase."<sup>31</sup>

ATRA's announced purpose is to motivate the hellholes to change their ways. No state wants to be labeled a "hellhole." This designation creates enormous pressure from local business to get rid of the laws or lawmakers identified by ATRA, and hellhole-related accusations become fodder for election contests. For example, after West Virginia was named a hellhole Don Blankenship, the Chief Executive of Massey Energy Company,<sup>32</sup> spent more than \$3 million of his own money in order to defeat the re-election of one of the Justices of the West Virginia Supreme Court.<sup>33</sup> The West Virginia Chamber of Commerce spent an estimated \$648,840 on television ads in the same judicial

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<sup>31</sup> Vidmar, *supra* note 28, at 1341; *see also* Douglas A. Kaysar, et al, *Medical Malpractice Myths and Realities: Why an Insurance Crisis is Not a Liability Crisis*, 39 LOY. L.A. L. REV. 785 (2006).

<sup>32</sup> Blankenship is on the Board of Directors of the U.S. Chamber of Commerce; *see* U.S. CHAMBER OF COMMERCE, *Board of Directors* (2008), <http://www.uschamber.com/about/board/all.htm>.

<sup>33</sup> Since there are only five justices on West Virginia's high court, it takes only a small change to tip the outcome. Blankenship's involvement has already begun to affect the court. In a recent case involving Massey Energy, the court on a 3 to 2 vote initially produced a victory for Massey. *See* Caperton v. A.T. Massey Coal Co., 2007 W. Va. LEXIS 119, 22-23 (Nov. 21, 2007). The court, despite commenting that "Massey's conduct warranted the type of judgment rendered in this case," threw out a \$50 million verdict against Massey by adopting an extremely broad reading of a choice of forum clause and a debatable application of the doctrine of full faith and credit. Later, however, Justice Maynard recused himself after photographs showed him vacationing with Blankenship while the case was pending, and Justice Starcher recused himself based on his public remarks critical of Blankenship's gigantic political contributions. *See* Adam Liptak, *Motion Ties W. Virginia Justice to Coal Executive*, N.Y. TIMES, Jan. 15, 2008; Adam Liptak, *West Virginia Judge Steps Out of Case Involving a Travel Companion*, N.Y. TIMES, Jan. 19, 2008, at 3; Associated Press, *Supreme Court to Rehear Massey-Caperton Case*, CHARLESTON GAZETTE, Jan. 24, 2008; Paul J. Nyden, *Starcher Recuses Himself from Massey Case*, CHARLESTON GAZETTE, Feb. 16, 2008. Justice Benjamin, the Justice elected with the help of Blankenship's contributions, however, remains on the case and as acting Chief appointed the substitute justices. On rehearing, the court once again held in favor of Massey on a 3-2 vote, with Justice Benjamin in the majority. *See* Caperton v. A.T. Massey Coal Co., 2008 W. Va. LEXIS \_\_\_ (April 3, 2008).

Interestingly, Justice Benjamin's law clerk (some time ago) wrote an opinion piece for CALA suggesting that judges who received sizable campaign contributions from people with pending cases should recuse themselves. *See* Charles McElwee, *Contributions to Judicial Candidates*, [http://www.wvcala.com/eye/cont\\_mcelwee.htm](http://www.wvcala.com/eye/cont_mcelwee.htm) (last visited Feb. 26, 2008). Perhaps ironically, Massey Energy had earlier filed a federal lawsuit seeking improved procedures (including decision by an impartial tribunal) on recusal motions. *See* Massey Energy Co. v. Supreme Court of Appeals of W. Va., Civil Action No. 2:06-0614, 2007 U.S. Dist. LEXIS 70330 (N.D. W. Va. Sep. 21, 2007).

race.<sup>34</sup> This was not an isolated event. A LEXIS search of the News database produces more than 900 articles referring to “judicial hellholes” from 2002 through March of 2008.<sup>35</sup> A large number of these articles reflect political pressure to support a judge who will end the state’s hellhole ways, a legislator who will work to create a friendlier environment for business, or a referendum that would enact part of the tort reform agenda.

Like ATRA, the ILR is not concerned with basing its “lawsuit climate” campaign on data that a social scientist would find convincing. Instead, the ILR hires Harris Interactive to poll selected corporate in-house counsel and senior corporate litigators representing companies with annual revenues of at least \$100 million. The lawyers are asked to grade states (A-F) on issues like treatment of mass torts, punitive damages, non-economic damages, judges’ impartiality, and juries’ predictability and fairness.<sup>36</sup> They are also asked, “How likely would you say it is that the litigation environment in a state could affect an important business decision at your company, such as where to locate or do business?” Not surprisingly, almost 60% of the corporate respondents answered that they were very likely (24%) or somewhat likely (33%) to consider this factor—a not-so-veiled threat to take their business elsewhere.<sup>37</sup>

The ILR’s message to voters in the low-ranked states: “demand your elected officials fix the legal system now.”<sup>38</sup> It has backed that message by spending millions on “voter education” programs and other means of financing judicial candidates who they expect to be pro-business. More recently, it has funded similar campaigns targeting state legislators. “Call your state legislators and tell them passing phony reforms won’t make West Virginia open for business,” said one TV ad.<sup>39</sup>

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<sup>34</sup> CENTER FOR POLITICAL ACCOUNTABILITY, *Hidden Rivers: How Trade Associations Conceal Corporate Political Spending, Its Threat to Companies, and What Shareholders Can Do* 28 (2006), available at <http://www.politicalaccountability.net/files/HR06.pdf>.

<sup>35</sup> LexisNexis Academic News Search for “Judicial Hellholes” (may be underinclusive).

<sup>36</sup> See Methodology (2007) at <http://www.instituteforlegalreform.com/lawsuitclimate2007/methodology.cfm>.

<sup>37</sup> See 2007 State Liability System Rankings at 5, [http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Climate\\_Report.pdf](http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Climate_Report.pdf). Similarly, the ATRA’s 2007 Hellhole Report actually contains a graphic in its discussion of Chicago area courts depicting two mock traffic signs. Under the headline “Cook County is a Judicial Hellhole,” one sign says, “DANGER: PERSONAL INJURY LAWYERS AHEAD!” while the other reads, “DETOUR TO OTHER BUSINESS VENUES.” 2007 Hellhole Report at 11.

<sup>38</sup> ILR Advertisement, at [http://www.instituteforlegalreform.com/lawsuitclimate2007/WV\\_CakeAd.pdf](http://www.instituteforlegalreform.com/lawsuitclimate2007/WV_CakeAd.pdf); see also similar campaigns supported by the National Association of Manufacturers (American Justice Partnership); and the Manhattan Institute (Trial Lawyers Inc.).

<sup>39</sup> Jake Stump, *U.S. Chamber Renews Attack on Legislators*, CHARLESTON DAILY MAIL, April 19, 2007 at 2A; see also Center for Political Accountability, *Hidden Rivers* 28 (2006), available at <http://www.politicalaccountability.net/files/HR06.pdf>.

In addition, the Chamber of Commerce has acted as a conduit for its members who want to anonymously oppose certain laws or lawmakers. In an important article (whose date—September 11, 2001—meant it got little attention), the *Wall Street Journal* reported:

Last summer, Philip Anschutz, chairman of Qwest Communications International Inc., wanted to defeat legislation that could have prevented his company from expanding overseas. But the billionaire investor, who shuns publicity, preferred to keep a low profile. Enter Thomas Donohue, president of the U.S. Chamber of Commerce. Mr. Donohue, who considered Mr. Anschutz a potential \$1 million donor to the chamber, eagerly proposed a solution: His organization would step up its efforts to derail the legislation, and it would keep Mr. Anschutz and his associates fully informed.

It wasn't the first time Mr. Donohue had helped a corporate chieftain out of a jam . . . . Internal chamber documents reviewed by *The Wall Street Journal* show that the organization has created several special accounts to take in money for projects on behalf of individual companies or groups of companies with a common policy goal. In some cases, the money is spent just days after it comes in the door. The chamber, like many nonprofit organizations, isn't required to report the sources of its funding, which makes it an attractive vehicle for those such as Mr. Anschutz who sometimes like to operate under the radar.<sup>40</sup>

The same device is available for companies wanting to influence judicial elections. For example, the article reports that in the fall of 2000, Wal-Mart, Daimler Chrysler, Home Depot, and the American Council of Life Insurers each contributed \$1 million dollars to the chamber's TV and direct mail advertising campaign to elect "business-friendly" judges.<sup>41</sup>

Although recent legislation called the Honest Leadership and Open Government Act of 2007<sup>42</sup> would require disclosure of contributors of over \$5,000, one legal blogger reports that the Chamber hopes to protect the anonymity of the corporate donors:

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<sup>40</sup> Jim VandeHei, *Political Cover: Major Business Lobby Wins Back its Clout by Dispensing Favors*, WALL ST. J., Sep. 11, 2001, at A1.

<sup>41</sup> *Id.* ("Many of the targeted judges had rendered verdicts against one or more of the companies contributing to the effort.")

<sup>42</sup> Pub. L. No. 110-81 (2007).

Under the threat of criminal penalties, the lobbying reform act requires trade groups to disclose members who contribute more than \$5,000 in a quarter and who are involved in planning or directing lobbying activities. Not surprisingly, big businesses are not happy about this, particularly the criminal penalty part. The U.S. Chamber of Commerce and the National Association of Manufacturers fired the first shot across the bow yesterday, sending a letter to the Secretary of the Senate and the clerk of the House asking for “guidance” on how to interpret the new reporting requirements. They’re essentially asking to exempt a lot of people who might otherwise be outed by the new law on the grounds that the law is an unconstitutional intrusion into their inner workings.<sup>43</sup>

It appears that the Chamber’s lobbying efforts, on its own, through the ILR, and on behalf of anonymous members will continue in the foreseeable future.<sup>44</sup>

### III. WEST VIRGINIA

#### A. *Background*

Even before the hellhole campaign began, ATRA had targeted West Virginia. One part of its website highlighted what it called “Horror Stories: Stories That Show A Legal System That’s Out of Control.” University of Wisconsin Law Professor Marc Galanter examined these anecdotes in 1998, and at that time the following tale was told of West Virginia:

West Virginia convenience store worker Cheryl Vanender was awarded an astonishing \$2,699,000 in punitive damages after she injured her back when she opened a pickle jar, according to

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<sup>43</sup> The Tortellini, *U.S. Chamber Won’t Disclose Donors Without a Fight*, Nov. 28, 2007, at [http://www.thetortellini.com/us\\_chamber\\_of\\_commerce/index.html](http://www.thetortellini.com/us_chamber_of_commerce/index.html). The actual letter is available on the chamber’s website at <http://www.uschamber.com/NR/rdonlyres/e7wqg5mffd6fhvkvbbvalzlm5vw7tsoy4nuxveln6l7fp2qs6g7r22d6bubneisgcxigwpzjcglmhiod5tphds7aqc/071128opengovt.PDF>.

<sup>44</sup> For a general discussion of the flow of money from corporations to trade associations to judicial campaigns, see CENTER FOR POLITICAL ACCOUNTABILITY, *Hidden Rivers* (2006), available at <http://www.politicalaccountability.net/files/HR06.pdf>. The Chamber’s effort to build an array of institutions designed to shift public attitudes and beliefs was foreshadowed in a memo written by Lewis F. Powell, Jr. shortly before he became a Supreme Court Justice. In August of 1971, Powell wrote a memo to his friend Eugene B. Sydnor, Jr., Chair of the Education Committee of the U.S. Chamber of Commerce, suggesting an expanded role for the Chamber and for business leaders, including coordinated efforts on college campuses, monitoring of news media, creation of think tanks, the development of conservative law firms, and involvement in political campaigns. See Lewis F. Powell, Jr., *Confidential Memorandum: Attack on American Free Enterprise System* (Aug. 23, 1971), available at <http://www.mediatransparency.org/story.php?storyID=22>.

the Charleston Daily Mail. She also received \$130,066 in compensation and \$170,000 for emotional distress. State Supreme Court Justice Spike Maynard called this award an “outrageous sum,” stating in his dissenting opinion: “I know an excessive punitive damages award when I see one and I see one here.”<sup>45</sup>

When Galanter investigated this story, however, he found that ATRA had mischaracterized the more complicated events and omitted claims about the defendant’s conduct. The court’s opinion reflects that Sheetz—the plaintiff’s employer—had misbehaved in a number of ways for a period of nearly five years, including refusing to accommodate plaintiff’s work restrictions, refusing to reinstate her after she suffered a compensable workplace injury, discharging her, refusing to rehire her, retaliating against a manager who testified contrary to Sheetz’s position, and retaliating against plaintiff upon her negotiated return to work by requiring her to perform work activities that her managers knew she could not perform without risking re-aggravating her injuries or causing new injury.<sup>46</sup> On appeal, the West Virginia court actually rejected the punitive damage awards based on the plaintiff’s unlawful termination and failure to rehire claims on the ground that the evidence was insufficient to show that these actions were prompted by malice or involved fraud, trickery or deceit. However, with regard to the retaliation claim, the court upheld the verdict’s high ratio because it found the evidence “crossed the line from reckless disregard of an individual’s rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm.”<sup>47</sup>

The rhetoric of the “horror story” is very effective—it emphasizes the pickle jar but omits the violation of state policy concerning reemployment of injured workers, the retaliation, and defendant’s stonewalling of the plaintiff’s early offer to settle for \$30,000 plus her job back. It also holds up one unusual case, and then treats it as if it were typical of conditions in the state’s judicial system. These methods of persuasion were carried forward into the tactics of the hellhole reports.

When the hellhole campaign began, then, ATRA was prepared with anecdotes such as this to point a finger at West Virginia. Unlike all the other “hellholes,” which are individually-identified counties, ATRA labels the entire state a hellhole. Why? Probably because in the case of West Virginia the re-

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<sup>45</sup> Galanter, *Oil Strike*, *supra* note 17, at 729-30 (quoting ATRA website). This section of the ATRA website is now called “Looney Lawsuits” and is available at <http://www.atra.org/display/13>.

<sup>46</sup> *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678, 689 (W. Va. 1997). ATRA got the plaintiff’s name slightly wrong. The same kind of factual error appears in the hellhole reports—as when ATRA labeled Gov. Joe Manchin as “Governor Bob Manchin III” and Ohio County Circuit Judge Arthur Recht as “Arthur Hecht,” or when it chastised West Virginia for a non-existent class action against DuPont.

<sup>47</sup> 490 S.E.2d at 693.

sults it seeks are changes at the state level: defendant-friendly legislation from the state legislature and a shift in the composition of the West Virginia Supreme Court of Appeals. West Virginia also makes a vulnerable target: almost all of its population centers are on or near the border with neighboring states, making the threat that businesses will choose to locate in other states all the more powerful.

*B. Recurring Issues*

Although West Virginia has moved up and down the hellhole rankings, there are a handful of issues that recur from year to year. All grow out of the complex and difficult substantive and legal issues raised by mass torts. The problems arise when a company or industry creates a product or process that has the potential to harm hundreds of thousands of people, whether employees, customers, or just people who breathe the air or drink the water. Reasonable scholars on all sides of the substantive and procedural issues raised have debated and will continue to debate the best ways to handle scientific uncertainty, industry's externalization of environmental costs, deterrence, insurance, proof of causation, procedural efficiency, the role of the courts, and best choice of decision maker. The hellhole reports add nothing to these thoughtful and nuanced debates, but instead merely caricature West Virginia's law in three areas: West Virginia awards damages to pay for the medical monitoring of plaintiffs who have been exposed to hazardous substances; allows suits by plaintiffs who are not West Virginia residents; and allows joinder of numerous plaintiffs and defendants in mass tort claims. This Part of the article addresses these persistent themes.

1. Medical Monitoring

Tort law has come a long way from its early English roots when the courts distinguished between "trespass" (a man throws a log and the log hits another man) and "case" (a man throws a log that lands in the road where another man trips over it).<sup>48</sup> Those comparatively simple one-on-one disputes are still the mainstay of the tort system, but technological advances have brought about the more complex phenomenon of the "toxic tort"—personal injury caused by exposure to a hazardous substance that may affect large groups of people (but not everyone in the group) and that may have extended latency periods between exposure and disease. Now the "log" may hurt someone—in fact a lot of someones—but not because of physical contact and not right away. How will the system handle that?

One traditional answer was to make those who were exposed to the hazard wait to see if they developed symptoms before they could bring suit against

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<sup>48</sup> Leame v. Bray, 3 East 593 (K.B. 1803), *reprinted in* WALTER WHEELER COOK ET AL., CASES ON PLEADING AT COMMON LAW 9-10 (1923).

the creator of the hazard. This approach, however, comes with a number of problems, particularly: 1) the plaintiff's claim could be barred by the statute of limitation or a statute of repose before there was a detectable physical manifestation of injury; and 2) over time sources of proof had a tendency to disappear. In addition, the exposure itself (along with any reasonable resulting fears) is itself a harm, albeit not the traditional physical injury—or at least not full-blown disease.

Courts therefore began to explore alternative ways to deal with toxic exposure cases, and one of those alternatives is called “medical monitoring.” Sometimes treated as a new cause of action, and sometimes as a new remedy, medical monitoring requires a defendant “to pay a plaintiff for the anticipated costs of checkups and procedures aimed at detection and early treatment of any disease that may arise in the future as a result of tortious exposure.”<sup>49</sup> The first case to award medical monitoring damages was *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*<sup>50</sup> A Lockheed plane carrying hundreds of Vietnamese orphans malfunctioned, lost oxygen, and crashed. Although many were killed, 149 of the infants survived and their guardians claimed that they would need regular medical monitoring to determine if the decompression and crash had caused residual brain dysfunction syndrome in the children. The trial court ordered Lockheed to pay for the diagnostic testing, and the D.C. Circuit affirmed based on the two guiding principles of tort law: “the deterrence of misconduct and the provision of just compensation to victims of wrongdoing.”<sup>51</sup>

Medical monitoring awards soon spread to toxic torts. The first such case was *Ayers v. Township of Jackson*.<sup>52</sup> In *Ayers*, a city's residents sued their town when toxic pollutants from the town's landfill leached into the water supply. The New Jersey Supreme Court held that the residents were entitled to recover medical monitoring expenses because the plaintiffs' exposure to the pollutants gave them an increased risk of future disease.<sup>53</sup> A number of similar cases followed which, though varying in detail, held that courts should provide for medical monitoring relief when a defendant's actions had exposed the plaintiffs to toxins that significantly increased the risk of contracting a serious future illness.<sup>54</sup>

Some states still require at least some type of physical injury before finding medical monitoring appropriate, while others do not. Some states only provide for medical monitoring when early detection would enhance survival or

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<sup>49</sup> Wood v. Wyeth-Ayerst Labs., 82 S.W.3d 849, 856 (Ky. 2002).

<sup>50</sup> 746 F.2d 816 (D.C. Cir. 1984).

<sup>51</sup> *Id.* at 825.

<sup>52</sup> 525 A.2d 287 (N.J. 1987).

<sup>53</sup> *See id.*

<sup>54</sup> Richard Bourne, *Medical Monitoring Without Physical Injury: The Least Justice Can Do for Those Industry has Terrorized With Poisonous Products*, 58 SMU L. REV. 251, 258-59 nn.27-30 (2005) (citing cases).

treatment options, while some find other justifications for medical surveillance. Some states provide the monitoring remedy in the form of a court-administered fund to pay (or reimburse) for the medical tests, while others award the money to the plaintiffs in the form of damages. But the recognition of the propriety of a medical monitoring remedy of some kind is nearly unanimous. According to a 2006 study, 14 states plus the District of Columbia (including Ohio, Pennsylvania, and West Virginia) allow medical monitoring claims even in the absence of traditional physical injury; 16 states (including Kentucky and Virginia) allow medical monitoring with proof of physical injury; and the remainder (including Maryland) either have not addressed the issue or have not articulated a test.<sup>55</sup> A study by the American Law Institute recommended that in order to “provide a vehicle for early litigation over tortious exposure creating substantial risk of long-latency disease, medical monitoring damages [should be awarded] to fund appropriate surveillance and investigation of the path followed by the disease within the exposed population.”<sup>56</sup>

Where does West Virginia fit in this continuum of medical monitoring relief? Its initial medical monitoring case creates significant proof requirements for the plaintiffs. In *Bower v. Westinghouse Electric Corp.*, the plaintiffs brought a claim in the Circuit Court of Marion County alleging they were exposed to a number of toxic substances because defendants maintained a “cullet pile” containing debris from the manufacture of light bulbs.<sup>57</sup> After determining that West Virginia law allows the award of damages for future medical monitoring expenses even in the absence of a present physical injury, the court set forth the following six-part test:

- (1) [a plaintiff] . . . has . . . been significantly exposed;
- (2) to a proven hazardous substance;
- (3) through the tortious conduct of the defendant;
- (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease;
- (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the

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<sup>55</sup> D. Scott Aberson, Note, *A Fifty-State Survey of Medical Monitoring and the Approach the Minnesota Supreme Court Should Take When Confronted with the Issue*, 32 WM. MITCHELL L. REV. 1095, 1114-16 (2006).

<sup>56</sup> Paul C. Weiler et al., *Enterprise Responsibility for Personal Injury*, 2 A.L.I. REPORTERS' STUDY 381-82 (1991).

<sup>57</sup> 522 S.E.2d 424, 426 (W. Va. 1999). The tests performed on the pile indicated the presence of thirty potentially toxic substances. *Id.* at 427.

absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.<sup>58</sup>

West Virginia goes farther than some other states in that it allows recovery of money damages rather than mandating a fund (although more recent cases have adopted a fund approach),<sup>59</sup> and that it supports medical monitoring even when the test results would not change the plaintiff's course of treatment or survival. As to the latter, the court did not want to deprive plaintiffs of information that might be helpful in the future as medical science advances. *Bower* also noted that allowing monitoring even without the prospect of a cure could allow the plaintiff a chance of "getting his financial affairs in order, making lifestyle changes, and even perhaps, making peace with estranged loved ones or with his religion."<sup>60</sup>

The hellhole reports, rather than treating West Virginia's handling of medical monitoring as within the mainstream, treats it as an aberration. In the 2002 report, in which West Virginia merely gets "dishonorable mention," *Bowers* (decided three years earlier) is used to explain why "West Virginia is viewed as statewide hellhole."<sup>61</sup> The report complains that the court reached the issue "even though it was not actually presented to the court." This gives the impression that the Justices reached out of nowhere to create a cause of action for medical monitoring. In fact, the justices—when asked to advise the federal district court as to West Virginia law—recast the issue. The district court worded the question this way: "In a case of negligent infliction of emotional distress absent physical injury, may a party assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic chemicals?" The West Virginia Supreme Court of Appeals found it more helpful to word the question like this: "Whether, under West Virginia law, a plaintiff who does not allege a present physical injury can assert a claim for the recovery of future medical monitoring costs where such damages are the proximate result of defendant's tortious conduct."<sup>62</sup> The court hardly pulled medical monitoring out of thin air.

Second, the 2002 hellhole report argues that the award of damages "almost assures that the funds will not be used in a carefully conducted medical

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<sup>58</sup> *Id.* at 432-33. The hellhole reports tend to ignore these requirements when discussing West Virginia's medical monitoring rules, as when the 2006 report (mis)characterized West Virginia law as allowing "a claimant to collect cash simply by showing that he was exposed to a potentially dangerous substance, even if he has no sign of injury." 2006 Hellholes Report at iv.

<sup>59</sup> *See, e.g., Judge Upholds \$196m Award Againsts DuPont*, CHARLESTON GAZETTE (Feb. 28, 2008). WVU also settled a claim alleging employee exposure to asbestos by creating an actual monitoring program. *See Ken Ward, Jr., West Virginia University Asbestos Testing Approved*, CHARLESTON GAZETTE (Dec. 23, 2005) at P1C.

<sup>60</sup> 522 S.E.2d at 434 (quoting Chief Judge Calogero's concurrence in *Bourgeois v. A.P. Green Indus., Inc.*, 716 So. 2d 355, 363 (La. 1998)); *see also Redland Soccer Club v. Dep't of the Army*, 696 A.2d 137, 146 n.8 (Pa. 1997).

<sup>61</sup> 2002 Hellhole Report at 18-19.

<sup>62</sup> *Bower*, 522 S.E.2d at 428-30.

monitoring program.” One wonders whether ATRA would have been mollified by an order creating a multi-million dollar fund—and funds may be preferable to individual damage awards, although they come with associated costs of administering the fund—but does that disagreement about the best shape of the remedy make the state a hellhole?

By 2003, West Virginia was named as a full-blown hellhole, *Bowers* was four years old, and ATRA was still upset about West Virginia allowing people to recover damages based on the future consequences of present exposure. The report complained first about a railway labor act case holding that workers who established a reasonable fear of cancer related to proven physical injury from asbestos were entitled to compensation for the fear as a part of damages awardable for pain and suffering.<sup>63</sup> The report states that the U.S. Supreme Court “allowed the ruling to stand.”<sup>64</sup> In fact, the Supreme Court *affirmed* the West Virginia court’s ruling, noting that “[m]any courts in recent years have considered the question presented here—whether an asbestosis claimant may be compensated for fear of cancer. Of decisions that address the issue, a clear majority sustain recovery.”<sup>65</sup>

The 2003 report also complains about a second West Virginia medical monitoring case. *In re West Virginia Rezulin Litigation*,<sup>66</sup> a case reviewed at the class certification stage, involved a claim that the makers of Rezulin had deliberately overstated the drug’s effectiveness in treating diabetes and suppressed information about its tendency to cause liver damage. In discussing class certification, the court notes that the class sought “to recover the costs of medical monitoring necessary to determine whether the plaintiffs have sustained, or will develop in the future, any injuries from using Rezulin. West Virginia law allows a cause of action for the recovery of medical monitoring costs, ‘where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant’s tortious conduct.’”<sup>67</sup> Rather than quote the case, the hellhole report instead quotes an op-ed piece in the Charleston *Daily Mail* by Robert Mauk, then-Chair of West Virginia CALA—but not even by reading endnote 115 can one tell that it was Mauk and not the court who said that the plaintiffs could “keep the cash and do not need to be monitored for any medical condition.”

The 2004 report ups the rhetorical ante on medical monitoring claims—this time the sub-head reads: “Doling Out Cash Awards to Those Without Injuries.”<sup>68</sup> The report claims that in September, Dupont was “forced to settle” a medical monitoring claim arising out of a chemical known as C8—“even though

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<sup>63</sup> 2003 Hellhole Report at 9-10.

<sup>64</sup> *Id.* at 10.

<sup>65</sup> *Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 151 (2003).

<sup>66</sup> 585 S.E.2d 52 (W. Va. 2003).

<sup>67</sup> *Id.* at 59 (citing *Bower*, 522 S.E.2d 424).

<sup>68</sup> 2004 Hellholes Report at 23-24.

the plaintiffs offered no evidence that the substance . . . is even dangerous or has the potential to cause any ill health effects.”<sup>69</sup> Dupont was, of course, not “forced” to do anything, and the nature of the lawsuit, and concerns about C8 (also known as PFOA), are conveniently omitted.<sup>70</sup> DuPont’s Washington Works plant, southwest of Parkersburg, uses C8 in manufacturing Teflon, and the chemical is found in the water supplies in the surrounding areas. A lawsuit was filed on behalf of 70,000 residents of West Virginia and Ohio, and it was settled for funds that will pay for a health study and, only if necessary, medical monitoring.<sup>71</sup> While medical science has not identified a cellular mechanism whereby C8 causes specific harm to humans, the following are true:

- In 2002, an EPA Science Advisory Board proposal noted, “Toxicological studies in rodents and primates have shown that exposure to [C8] can result in a variety of effects, including developmental/reproductive toxicity, liver toxicity and cancer.”<sup>72</sup>
- A document produced in the settled lawsuit showed that DuPont had discovered high levels of C8 in the blood of Parkers-

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<sup>69</sup> *Id.* at 23. It is also clear that this settlement will include medically helpful information gathering. See C8 Science Panel Website, <http://www.c8sciencepanel.org/index.html> (last visited Feb. 24, 2008); C8 Health Project, <http://www.c8healthproject.org/default.htm> (last visited Feb. 24, 2008).

<sup>70</sup> See 2004 Hellholes Report. The 2005 report repeats ATRA’s complaints about the DuPont class action settlement, which was approved by the court in February of 2005. 2005 Hellhole Report at 18. It also quotes a “consumer advocate” as saying that the C8 suits are a “scare campaign.” Terence Scanlon, the person identified in the endnote, was in fact a member of the Consumer Product Safety Commission—appointed by President Reagan—but few would characterize this former employee of the Heritage Foundation as a consumer advocate. 2005 Hellhole Report at 55.

<sup>71</sup> Spencer Hunt, *DuPont facing new suit over C8*, COLUMBUS DISPATCH, May 31, 2006, at 1E (“DuPont agreed . . . to pay at least \$107 million for a health study for the 70,000 area residents who drank water contaminated with C8. The company agreed to pay an additional \$235 million to help monitor residents’ health if C8 is found to be harmful.”).

<sup>72</sup> Ken Ward Jr., *EPA gears up to study DuPont chemical: In use since 1951, C8 exposure now alleged to be dangerous*, CHARLESTON GAZETTE, Nov. 18, 2002 at 1A. The EPA continues to study the issue of animal and human impacts of PFOAs. See, e.g., OFFICE OF POLLUTION PREVENTION AND TOXICS, *Draft Risk Assessment of the Potential Human Health Effects Associated with Exposure to Perfluorooctanoic and its Salts* (Jan. 4, 2005), available at <http://www.epa.gov/oppt/pfoa/pubs/pfoarisk.pdf>; Science Advisory Panel Review of EPA’s Draft Risk Assessment (May 30, 2006), available at [http://yosemite.epa.gov/sab%5Csabproduct.nsf/A3C83648E77252828525717F004B9099/\\$File/sab\\_06\\_006.pdf](http://yosemite.epa.gov/sab%5Csabproduct.nsf/A3C83648E77252828525717F004B9099/$File/sab_06_006.pdf); EPA, *Basic Information on PFOA*, available at <http://www.epa.gov/oppt/pfoa/pubs/pfoainfo.htm> (last updated Aug. 17, 2007).

burg area residents: levels between 12 and 20 times greater than the concentrations in the general U.S. population.<sup>73</sup>

- The EPA in 2006 asked the eight major manufacturers of C8 to globally reduce emissions and C8 product content by 95% no later than 2010 and work toward eliminating use of the chemical by 2015.<sup>74</sup>
- In December 2005, DuPont agreed to pay the EPA a record \$10.25 million fine to settle claims that it had violated federal environmental laws by repeatedly failing to report substantial risk information about C8 in a timely manner.<sup>75</sup>
- Researchers at Yale have shown a significant association between C8 levels and high total cholesterol, LDL and VLDL.<sup>76</sup>
- Exposure to C8 in the womb is statistically associated with lower weight and head circumference at birth, according to an analysis of nearly 300 umbilical cord blood samples led by researchers at the Johns Hopkins Bloomberg School of Public Health.<sup>77</sup>

DuPont still denies that C8 causes health problems, and in so doing it has repeatedly misrepresented the conclusions of its own scientific experts. For example, in 2005 the company announced to the employees at Washington Works and the general public that C8 has “no known human health effects.”<sup>78</sup> But one of the experts, Noah Seixas of the University of Washington, was “a bit shocked” by DuPont’s press statements.<sup>79</sup> Another, David Wegman of the University of Massachusetts at Lowell, was “quite uncomfortable” with the way the

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<sup>73</sup> Ken Ward Jr., *DuPont found high C8 in blood, study shows*, CHARLESTON GAZETTE, Nov. 18, 2004 at 2C. The report, done for DuPont by Exygen Research, is available at <http://www.ewg.org/files/exhibitA.pdf> (last visited Jan. 8, 2008).

<sup>74</sup> Liz Buckley, *Annual Progress Reports Show Companies Reducing PFOA Emissions*, PESTICIDE & TOXIC CHEMICAL NEWS, Nov. 12, 2007, at 11. See *2010/15 PFOA Stewardship Program*, <http://www.epa.gov/oppt/pfoa/pubs/pfoastewardship.htm>.

<sup>75</sup> *Id.* See EPA, *E.I. DuPont de Nemours and Company Settlement* (Dec. 14, 2005), <http://www.epa.gov/compliance/resources/cases/civil/tsca/duPont121405.html>.

<sup>76</sup> *Data on life sciences discussed by researchers at Yale University*, BIOTECH LAW WEEKLY (Dec. 7, 2007).

<sup>77</sup> *PFOS and PFOA Exposure Associated with Lower Birth Weight and Size*, HOSPITAL BUSINESS WEEK, Sep. 9, 2007, at 1236.

<sup>78</sup> Ken Ward Jr., *DuPont Distorted C8 Study: Scientists*, CHARLESTON GAZETTE, Oct. 14, 2007, 1A.

<sup>79</sup> *Id.*

company described the findings, and four members of the expert team agreed that the company's letter to employees "was somewhere between misleading and disingenuous."<sup>80</sup> In October 2006, DuPont held a press conference to release the results of the second phase of its worker study. This time, researchers were looking to see if C8 was linked to any worker deaths at the Wood County plant.<sup>81</sup> Again, the company's press release touted the results as good news. "No increased mortality in workers exposed to PFOA," the release said.<sup>82</sup> The company's internal review board again objected to the apparent certainty of the news release, especially since the study showed a small, if not statistically significant, increase in kidney cancer mortality.<sup>83</sup>

In light of this extensive concern about C8 and its health effects, the settlement of the West Virginia case—funding a study of whether residents are in fact experiencing health problems from the elevated C8 levels in their drinking water—also seems more reasonable than hellacious.

The 2005 Hellhole Report brought fresh complaints about West Virginia's approach to medical monitoring. "Most courts have rejected such claims," says the report, giving the impression that it is medical monitoring itself that is suspect.<sup>84</sup> It also reports that Michigan has recently joined the list of courts that reject West Virginia's approach.<sup>85</sup> The Michigan case, *Henry v. Dow Chemical*,<sup>86</sup> does affirm the requirement of a physical injury to support a monitoring claim. But in terms of "most courts," recall that the states are split almost exactly up the middle. It is on the question of the form of the medical monitoring remedy—money damages versus an administered fund—that West Virginia's initial approach differs most from other states. Here the hellhole report's authors show their disdain for West Virginia residents, suggesting in endnotes that the plaintiffs are spending their monitoring recoveries on flat screen

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *See id.* (quoting emails obtained through discovery in a New Jersey case involving C8); *see also* Email from Bernard Reilly, DuPont lawyer, to DuPont Lawyers and Scientists (Aug. 2000-Dec. 2001) available at <http://www.ewg.org/node/8740>. One email states,

We learned recently that our analytical technique has very poor recovery, often 25%, so any results we get should be multiplied by a factor of 4 or even 5. However, that has not been practice, so we have been telling the agencies results that surely are low. Not a pretty situation, especially since we have been telling the drinking water folks not to worry, results have been under a level we deem "safe" of 1 [parts per billion]. We now fear we will get data from a better technique that will exceed the number we have touted as safe. Ugh.

*Id.* (Reilly to his son).

<sup>84</sup> 2005 Hellhole Report at 19.

<sup>85</sup> *Id.*

<sup>86</sup> 701 N.W.2d 684 (Mich. 2005).

televisions rather than medical care.<sup>87</sup> The 2007 report, repeating ATRA's standard characterization of West Virginia law, echoed this accusation: the cash award can be spent on "a car or a stereo."<sup>88</sup>

2005 was also the year that DuPont resurfaced—but totally without justification. Suits were filed in fourteen states accusing DuPont of wrongfully exposing consumers to toxic chemicals used to make Teflon.<sup>89</sup> The 2005 hellhole report claimed that one such suit was filed in West Virginia, and, citing it, bumped the state up to #3 hellhole.<sup>90</sup> "Given that West Virginia is one of the few states that allow medical monitoring, it is easy to see why plaintiffs' lawyers were drawn to the state," the association said.<sup>91</sup> The problem: no such case was filed in West Virginia.<sup>92</sup> When the error was pointed out, ATRA retracted the accusation but did not adjust West Virginia's hellhole ranking.<sup>93</sup>

In sum, medical monitoring cases present a wealth of difficult issues worth discussing, but they are not discussed in the hellhole reports. Instead the public is presented with incomplete and misleading information. West Virginia's position on liability is completely mainstream. Its rule allowing recovery of money damages is more unusual, but instead of reasoned debate about the comparative costs and benefits of money damages and equitable relief (such as funds), the report provides name calling and visions of mountaineers lined up to buy flat screen TVs.

## 2. Choice of Forum

Given the ATRA membership's dislike of West Virginia law, it is not surprising that it would advocate limits on potential plaintiffs' ability to bring suit in the state. This is another perennial hellhole complaint. The 2002 and

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<sup>87</sup> 2005 Hellhole Report at 55 n.90 (citing *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999), which of course does not discuss flat screen televisions, and which was by then six years old). The Report also quotes Justice Maynard's view of West Virginians: "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." *Id.* at 19.

<sup>88</sup> 2007 Hellhole Report. The Report does note that in 2005 the West Virginia courts actually limited class treatment under West Virginia law to residents of West Virginia or other states with similar laws—but that decision did little to offset ATRA's general objection to West Virginia's recognition of medical monitoring claims. *W. Va. ex rel. Chemtall, Inc. v. Madden*, 607 S.E.2d 772 (W. Va. 2004).

<sup>89</sup> Ken Ward Jr., *Tort Reform Group Criticizes W. Va. for Fla. Lawsuit: Score Unchanged Despite Admission Error Was Made*, CHARLESTON GAZETTE, Dec. 15, 2005, at 14A.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

2003 reports raise the issue generally, calling on states to apply the doctrine of forum non conveniens (FNC) to ensure that cases are heard in a jurisdiction that has a logical connection to the claim.<sup>94</sup> FNC is a relatively recent common law doctrine that gives a court the discretion to decline to exercise jurisdiction over a case if it is a seriously inappropriate forum and if a substantially more appropriate forum is available to the plaintiff.<sup>95</sup> FNC may be invoked by the defendant or on the court's own motion. In deciding the motion, the court gives the plaintiff's choice of forum great deference (especially if the plaintiff is a forum resident), but the interests of both the private parties and the public for and against litigating elsewhere are part of the balance. Private factors include the residence of the parties and the relative ease of access to witnesses and evidence. Public factors include which state's law will apply, the relative burdens on the court systems, and the citizenry's comparative interest in deciding the case. If the ground grants a FNC motion the case is dismissed, and the plaintiff must refile it elsewhere.

It is important to remember that the doctrine of forum non conveniens is not invoked unless the court in fact has jurisdiction. Before it even considers a forum non conveniens argument, then, the court will already have decided that it has jurisdiction over the type of case, and that each defendant has sufficient contacts with the forum state so that forcing it to defend there does not "offend traditional notions of fair play and substantial justice."<sup>96</sup> In finding personal jurisdiction over the defendants, the court will already have considered the same type of factors as are relevant to the FNC decision: the burden on the defendant, the plaintiff's interest in the forum, the forum state's interest in hearing the case, the shared interest of the several states in furthering substantive social policies, and the interstate system's interest in the efficient processing of disputes.<sup>97</sup> FNC operates as a further limit on forum choice, and seeks to achieve a good fit between forum and dispute.

West Virginia has long had a very standard doctrine of forum non conveniens.<sup>98</sup> In 2003, however, West Virginia made ATRA happier by adopting a venue provision that replaced the balancing of interests with a per-se rule for out of state plaintiffs:

Effective for actions filed after the effective date of this section, a nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state: Provided,

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<sup>94</sup> See generally 2002 Hellhole Report; 2003 Hellhole Report.

<sup>95</sup> See, e.g., *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981).

<sup>96</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>97</sup> *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985).

<sup>98</sup> See *Cannelton Indus. v. Aetna Casualty & Sur. Co. of Am.*, 460 S.E.2d 1 (W. Va. 1994) (affirming Circuit Court's FNC dismissal); *Norfolk & Western Ry. Co. v. Tsapis*, 400 S.E.2d 239 (W. Va. 1990) (adopting doctrine).

That unless barred by the statute of limitations or otherwise time barred in the state where the action arose, a nonresident of this state may file an action in state court in this state if the nonresident cannot obtain jurisdiction in either federal or state court against the defendant in the state where the action arose. A nonresident bringing such an action in this state shall be required to establish, by filing an affidavit with the complaint for consideration by the court, that such action cannot be maintained in the state where the action arose due to lack of any legal basis to obtain personal jurisdiction over the defendant. In a civil action where more than one plaintiff is joined, each plaintiff must independently establish proper venue.<sup>99</sup>

ATRA's happiness was fleeting. In *Morris v. Crown Equipment Corp.*, the West Virginia Supreme Court of Appeals struck down the venue statute as a violation of the privileges and immunities clause of the U.S. Constitution.<sup>100</sup> Whether or not this decision was correct as a matter of constitutional law, the state legislature went to work and passed substitute legislation.<sup>101</sup> The 2007 Hellhole Report characterizes this law as “a modest reform that gives judges more discretion to dismiss claims by nonresidents based on a balancing of factors.”<sup>102</sup> The statute is, in substance, a codification of the common law of forum non conveniens—plain vanilla U.S. law—and includes a specific provision regarding non-West Virginia plaintiffs: “the plaintiff's choice of a forum is entitled to great deference, but this preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state.” That leaves West Virginia in the same place as the other states and the federal courts.<sup>103</sup> Where's the hellhole?

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<sup>99</sup> W. Va. CODE § 56-1-1(c) (Supp. 2003) (amended in 2007 omitting quoted language) (providing an example of “Firefighting in Judicial Hellholes”) (emphasis added).

<sup>100</sup> 633 S.E.2d 292 (W. Va. 2006), *cert. denied*, 127 S. Ct. 835 (2006).

<sup>101</sup> See W. VA. CODE § 56-1-1a (Supp. 2007).

<sup>102</sup> 2007 Hellhole Report at 12.

<sup>103</sup> The 2007 report also complains, “a couple from Arizona can waltz right in and file a lawsuit in West Virginia courts naming a mere 77 companies as defendants,” citing an article in the *West Virginia Record*. *Id.* at 11 (citing Cara Bailey, *Arizona couple names 77 companies in asbestos suit*, W. VA. REC. (May 9, 2007)). What it does not mention is that the “Arizona couple” are former West Virginians suing over asbestos exposure that took place largely in West Virginia. According to attorney James Stealey, “Those were companies which manufactured asbestos-related products while he worked here in West Virginia for more than 40 years . . . . He retired to Arizona, and came back to West Virginia to file the lawsuit. Where does he expect to file his lawsuit, but in the state where he was injured?” Todd Baucher, *Judicial “What”-Hole?*, WTAP.com (Dec. 18, 2007), <http://www.wtap.com/news/headlines/12610186.html>.

### 3. Joining Claims and Parties

A third persistent complaint about West Virginia stems from lawsuits that combine numerous plaintiffs and defendants in the same lawsuit and, in particular, one huge lawsuit arising out of asbestos exposure.<sup>104</sup>

Just as substances that can injure hundreds of thousands of people challenge substantive tort law, so do they complicate court procedures. U.S. courts abandoned the one plaintiff/one defendant/one cause of action limits on lawsuit structure long ago, replacing them with functional standards designed to maximize the courts' efficiency while avoiding prejudice to litigants. Generally, courts allow the joinder (that is, the joining together in one lawsuit) of claims and parties when they share some "common question of law or fact" and are connected as part of the same "transaction or occurrence, or series of transactions or occurrences."<sup>105</sup>

Mass torts raise competing concerns when it comes to joinder. On the one hand, trying every single case separately would be gigantically inefficient. Consider the duplication of effort for the courts and parties that would be involved in separate discovery, separate pretrial motions, separate trials with separate evidence and separate juries, all to decide identical questions such as "is asbestos a defective product," "does asbestos cause mesothelioma," and the like. It is not surprising that courts would like to find a way to combine claims with substantial legal and factual overlaps—and they are right to do so. In a related vein, it is also understandable that courts faced with hundreds or thousands of personal injury claims that fall into quite predictable patterns would like to find a way to combine them, or to try a representative sample in an effort to aid the parties in evaluating and settling their disputes. On the other hand, these same claims also involve factual disputes that do not overlap, and at some point it becomes less rather than more helpful to join them together. The efficiency gains of joinder can be lost, and less culpable defendants can be indirectly "tarred" by association with more culpable ones. Academic literature again abounds with discussions of the possible ways of dealing with these competing needs, and no one yet has found the magic bullet that will eliminate the need for policy trade-offs.<sup>106</sup>

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<sup>104</sup> See *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 421 (W. Va. 2002).

<sup>105</sup> See, e.g., Fed. R. Civ. P. 20(a); W. Va. R. Civ. P. 20(a). In addition, "A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded." *Id.*

<sup>106</sup> With regard to asbestos litigation specifically, see Deborah R. Hensler, *Asbestos Litigation in the United States: Triumph and Failure of the Civil Justice System*, 12 CONN. INS. L.J. 255 (2005-2006); Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925 (2002). With regard to mass torts generally, see MARK A. PETERSON & MOLLY SELVIN, INSTITUTE FOR CIVIL JUSTICE, RESOLUTION OF MASS TORTS: TOWARD A FRAMEWORK FOR EVALUATION OF AGGREGATIVE PROCEDURES (1988); American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis With Reporter's Study* (1994); Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923 (1998); *Symposium on Mass Torts*, 31 LOY. L.A. L. REV. 353 (1998) (various articles describing

It is in this context that one should approach ATRA's portrayal of West Virginia and other states. One of the mountain state's most daunting cases has been featured since the very first hellhole report. In a group of consolidated cases against Mobil Corporation and others, an extremely large group of plaintiffs (assumed to be in the thousands) sued a fairly large number of defendants for damages caused by asbestos.<sup>107</sup> The trial court, searching for a way to dispose of the cases efficiently but fairly, scheduled mediation and then began to work on a scheduling order that would allow common issues to be tried together and, if necessary, distinct issues to be tried to different juries or handled in other ways.<sup>108</sup> The defendants asked the West Virginia Supreme Court of Appeals to prohibit the trial judge from implementing his Trial Plan.<sup>109</sup> The court rejected Mobil's application as premature:

Because the trial court has yet to finalize the specifics regarding identification of the common issues that will be the focus of the initial liability phase of the litigation, Mobil's contention of a denial of Due Process predicated on the lack of commonality of the issues subject to the liability phase is simply premature. We cannot, in advance of any such final determination of these common issues, resolve Mobil's speculative, and possibly unrealized, claims of Due Process violations. Likewise, we cannot substantively address Mobil's concerns regarding the potential use of a matrix, or a punitive damage multiplier, because the trial court has not yet definitively ruled upon the use of either of these mechanisms.<sup>110</sup>

The court further indicated that the trial court should adjust its scheduling order to allow the parties more time, and explained that it could not yet review a plan that was still in a state of flux: "The trial court deserves to be accorded . . . the opportunity to reevaluate the trial plan during its operation and to make necessary modifications when it determines that alterations are warranted."<sup>111</sup>

Noting only the non-common features of the litigation, the 2002 Hellhole Report stated that the court allowed "a mass asbestos trial to proceed" and

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methods for resolving mass tort litigation, including mediation, settlement classes, Chapter 11 bankruptcy, special masters, claims-processing facilities, and arbitration); Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. REV. 879 (1995); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be, Part II: Non-Jurisdictional Matters*, 42 UCLA L. REV. 967 (1995); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 (1989).

<sup>107</sup> State ex. rel Mobil Corp. v. Gaughan, 563 S.E.2d 419, 421 (W. Va. 2002).

<sup>108</sup> *Id.* at 421.

<sup>109</sup> *Id.* at 422-23.

<sup>110</sup> *Id.* at 426.

<sup>111</sup> *Id.* at 427.

anticipated that the U.S. Supreme Court might choose to hear the case.<sup>112</sup> In 2003, the story was repeated, including an allegation that “the only commonality of the claims was the word ‘asbestos,’” and the news that when their stay was denied, many of the defendants chose to settle their claims. In 2005, the suit featured in the report’s general description of the state,<sup>113</sup> and it was noted again in the 2006 report.<sup>114</sup> Other than this, the reports provided no evidence of defendants harmed by irrationally-combined claims.<sup>115</sup>

### C. *Smoke and Mirrors: The Marketing of Anecdotes*

In addition to the persistent themes noted above, the hellhole reports contain fleeting and colorful tidbits, also with a tendency to omit information crucial to a meaningful understanding of the specific events described and the judicial system generally. While it is beyond the scope of this essay to address every allegation from all six hellhole reports, a few examples show the way in which the reports’ careful editing and truncated accounts tend to obscure rather than clarify the cases discussed.

#### 1. Treating Opinions As Facts

The anecdotes described above and below are written for maximum effect, as one would expect of the extremely capable framers of the hellhole reports. In addition, the stories are embedded in a framework of more general statements about West Virginia’s legal system—statements that are the opinions of the persons quoted but that appear to be statements of fact. The reports do this by using quotations (unattributed in the text, but identified in the end-notes)—often from the local leaders of ATRA affiliates<sup>116</sup>—characterizing West Virginia’s legal system as if they were providing a neutral empirical analysis.<sup>117</sup>

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<sup>112</sup> 2002 Hellhole Report at 19.

<sup>113</sup> 2005 Hellhole Report at 11.

<sup>114</sup> 2006 Hellhole Report at 43 n.86. The 2007 Hellhole Report remarks in passing that West Virginia has a reputation for “massive” lawsuits. 2007 Hellhole Report at iii.

<sup>115</sup> The 2006 Hellhole Report does cite a news story about an asbestos case filed in Kanawha County on behalf of sixteen plaintiffs against one hundred forty three defendants. 2006 Hellhole Report at 43 n.87.

<sup>116</sup> For a discussion of the relationship between CALA, ATRA, and other advocates of tort reform, see generally Carl Deal & Joanne Doroshov, *The CALA Files: The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights*, <http://www.centerjd.org/lib/cala.htm> (last visited Jan. 3, 2008); see also Terry Carter, *New Name, New Strategies*, A.B.A.J. (Feb. 2007), available at [http://www.abajournal.com/magazine/new\\_name\\_new\\_strategies/](http://www.abajournal.com/magazine/new_name_new_strategies/) (noting that documents released as part of the 1999 tobacco settlement show that “many of the citizen based, grassroots groups in a number of states, often called Citizens Against Lawsuit Abuse, were started and funded by ATRA or others largely using tobacco money”).

<sup>117</sup> Those quoted are often editorial or op-ed writers for the *Charleston Daily Mail* (or more recently the *State Journal* and the *West Virginia Record*), and the writers are often officers of the

ATRA is, in effect, quoting itself in order to prove that its views are generally held, and uses the quotations to state or imply that the opinions are factually-based.

For example, in the 2005 and 2006 reports the text states that West Virginia courts are a “favorite for wealthy personal injury lawyers.”<sup>118</sup> If the reader skips thirty-seven pages to the endnotes, she learns that this quotation is from a piece by Randy Coleman published in the Charleston *Daily Mail*.<sup>119</sup> If a person has access to Coleman’s op-ed piece or does independent research, she can learn that Coleman was affiliated with West Virginia Citizens Against Lawsuit Abuse (WVCALA), a group whose extensive public relations campaign has done much to popularize the perception that the state is a judicial hellhole. The same reports also assert that “[p]eople sued in West Virginia often settle rather than take a chance in our unfair and unpredictable courts.” The relevant endnote cites another *Daily Mail* editorial, this one written by Bill Bissett. The footnote does not mention that Bissett was then the executive director of WVCALA.<sup>120</sup>

The 2007 Hellhole Report adds an additional level to the use of opinion, this time by indirectly relying on an opinion poll. The text of the report states that “businesses large and small continue to fear the unfair litigation climate in the state.”<sup>121</sup> The corresponding endnote shows that this statement comes from an article in *The Record*.<sup>122</sup> The article, in turn, reports on a survey commissioned by the ILR, carried out by Harris Interactive, entitled “Small Businesses: How the Threat of Lawsuits Impacts Their Operations: West Virginia Sample.” The report, citing the article, which cites the survey, claims that “a survey of the state’s small business owners found that 85% were concerned and 60% were “very” or “somewhat” concerned about the impact of frivolous lawsuits and that many altered business decisions as a result.<sup>123</sup>

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West Virginia chapter of Citizens Against Lawsuit Abuse. See, e.g., 2003 Hellhole Report at 34-35; 2004 Hellhole Report at 50-51; 2005 Hellhole Report at 55-56; 2006 Hellhole Report at 42-43; 2007 Hellhole Report at 41-42. Wikipedia notes that the *Daily Mail* historically had a “moderate to conservative viewpoint and described itself as an ‘independent Republican’ newspaper”; that the *West Virginia Record* is largely staffed by former employees of the *Mail* and “takes an editorial viewpoint that is generally conservative and favors tort reform”; and that in 2002 the *State Journal* expanded and began to “cover legal and government news and introduce conservative editorial content on subjects other than business.” See also Wade Goodwyn, *Texas Newspaper Accused of Tort-Reform Bias* (May 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=9958273> (Chamber of Commerce runs *West Virginia Record*, *Madison Record*, and *South-east Texas Record*); Jeffrey H. Birnbaum, *Advocacy Groups Blur Media Lines*, WASH. POST, Dec. 6, 2004, at A1.

<sup>118</sup> 2006 Hellhole Report at 11; 2005 Hellhole Report at 18.

<sup>119</sup> 2005 Hellhole Report at 18, 55 n.80.

<sup>120</sup> *Id.* at 55 n.80.

<sup>121</sup> 2007 Hellhole Report at 11.

<sup>122</sup> *Id.* at 41 n.139 (citing Chris Dickerson, *West Virginia Small Business Owners Fear ‘Unfair Lawsuits,’ Study Finds*, THE RECORD, May 27, 2007).

<sup>123</sup> 2007 Hellhole Report at 41 n.139.

The ILR's Small Business Report deserves a closer look. First, like the lawsuit climate reports it is merely an opinion survey, not information about the actual operation of the court system. Second, the research objectives and design skewed the results from the beginning. The objective: "To examine the attitudes and experiences of small business owners and managers in West Virginia who are concerned about frivolous and unfair lawsuits and to learn how the legal environment, specifically the tort system, impacts their businesses."<sup>124</sup> Because of this objective, no one qualified for inclusion in the survey unless they told the interviewer that they were "somewhat or very concerned about the liability system in West Virginia."<sup>125</sup> Here's how that impacted the sample: Harris Interactive contacted 1304 small business people. Of those 1304, only 237 "qualified." In other words, only 18% of the people contacted (who were identified through Dun & Bradstreet listings) ran businesses of the correct size and were somewhat or very concerned about the liability system in West Virginia. And all of the findings in the report—all of the percentages—are derived from the 237 "concerned" respondents.<sup>126</sup>

Even given this sample, the results that reflect actual experience are underwhelming. The survey reports that less than 35% of the small businesses had actually been sued in the past ten years.<sup>127</sup> Of the sixty-two small business owners who had been sued, 23% (about 14 cases) were premises slip and fall cases; 9% (about 6 cases) were personal injury claims resulting from an accident with a company vehicle; 7% (about 4 cases) were disputes with employees; 4% (2 cases) were financial claims made by suppliers; and 26% (about 16 cases) were "some other type" or the respondent was not sure of the type of lawsuit involved.<sup>128</sup> That leaves 19% of the lawsuits against the small businesses (about 12 cases) that were based on customer financial complaints and 13% (8 cases) growing out of personal injuries resulting from the company's product or service.<sup>129</sup> While that means that 45% of the lawsuits can be characterized as personal injury claims, only a tiny number are the kind of product liability claims

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<sup>124</sup> Harris Interactive, *Small Businesses: How the Threat of Lawsuits Impacts Their Operations: West Virginia Sample 3* (May 10, 2007), available at <http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1046>.

<sup>125</sup> The interviewers asked, "How concerned are you that in the next few years your business, or you as a person responsible for the business, might be sued in a frivolous or unfair lawsuit? That is a lawsuit that is brought against you that you believe does not have merit or is baseless and should not be the subject of a lawsuit." Unless the person answered that they were very concerned or somewhat concerned, the interview was terminated. *Id.* app. at 4.

<sup>126</sup> In order to qualify as a "small" business, the company had to have revenues of \$10 million or less and employ at least one person in addition to the owner. Of the West Virginia businesses surveyed, 51% had annual revenues of more than \$1 million (22% had more than \$5 million) and 53% had more than 15 employees (20% had more than 50 employees). *Id.* at 34.

<sup>127</sup> *Id.* at 7, 28. For almost all of the categories studied, "larger" small businesses had significantly greater concern about litigation than did "smaller" small businesses.

<sup>128</sup> *Id.* at 31.

<sup>129</sup> *Id.*

about which ATRA is usually concerned. Questions asking about a ten year period elicited stories of only eight personal injury cases related to allegedly defective products.

The survey went on to ask those business owners who had been sued about the impact on the company of the lawsuit, suggesting 8 possible responses (only one of which reflected a positive impact on the business).<sup>130</sup> Seventy two percent of the businesses sued responded that they “feel more constrained in making business decisions generally”—although the responses do not tell us whether that means the businesses began to comply more fully with legal requirements or whether they went beyond the requirements of the law.<sup>131</sup> The “constraints” may in fact be decisions of which the public might approve, such as offering taxi rides to drunken patrons, checking employee driving records, or placing protective matting on grocery store floors. Similarly, sixty three percent reported that the lawsuit had caused them to make a business decision they would not otherwise have made—but again that answer fails to reveal whether that business decision was one that we would view as positive.<sup>132</sup> For example, more than half (55%) of the businesses that had been sued reported that they had “changed business practices in ways that benefit” their customers.<sup>133</sup> Since the survey did not ask what, specifically, the small businesses were doing differently, the information is not very helpful in assessing the nature of the litigation’s impact on the welfare of West Virginia businesses or citizens of the state.

So what about those numbers from the endnote in the 2007 Hellhole Report, where it claimed that “a survey of the state’s small business owners found that 85% were concerned and 60% were ‘very’ or ‘somewhat’ concerned about the impact of frivolous lawsuits”?<sup>134</sup> The 60% number reflects Harris’s conversion of its 237 respondents into a percentage of the state’s small businesses (not a percentage of the people polled). In discussing its methodology, Harris contends that “[a]fter correctly weighting the data, the qualified sample represents 60% of small businesses in West Virginia.”<sup>135</sup> Harris does not explain its weighting process, so it is difficult to know the basis for the claims about percentages of small businesses, as opposed to percentages of respondents.<sup>136</sup> In any case, it is not accurate to suggest, as do *The Record*’s article

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<sup>130</sup> *Id.* app. at 11.

<sup>131</sup> *Id.* at 32.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> 2007 Hellhole Report at 41 n.139.

<sup>135</sup> *Id.* at 3.

<sup>136</sup> The report does note that data “were weighted using Dun and Bradstreet data to ensure a representative sample.” *Id.* The survey questions appended to the online version of the report show that respondents were asked in what industry they currently worked; it is possible that the weighting compared the distribution of the 237 qualified respondents to the overall industry percentages for West Virginia small businesses. *Id.* app. at 11.

and the 2007 Hellhole Report, that 60% of those *surveyed* were worried about being the subject of a frivolous lawsuit.<sup>137</sup>

## 2. Giving the Wrong Impression: Former Justice Richard Neely

From 2004 through 2007, the Hellhole Reports prominently featured a quote from the Honorable Richard Neely who was, until 1995, a Justice of the West Virginia Supreme Court of Appeals. Here's the quote: "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>138</sup> The implication: it's practically official policy in West Virginia to award judgments against those out-of-state corporations. The quotation, in isolation, is certainly a disturbing one. Closer examination, however, shows that Justice Neely was neither speaking of himself nor endorsing the attitude portrayed in the quotation.

The quote comes from Neely's 1998 book, *The Product Liability Mess*. Writing after he left the bench, Neely was speaking generically about the incentives of elected state judges.<sup>139</sup> Further, the book is anti-product liability and pro-corporate defendant, designed to show how "the courts themselves can be used to achieve major product liability reform."<sup>140</sup> Use of the quotation in isolation gives a misleading impression of the attitude of this judge who left the bench seven years before the first hellhole report was issued.

Neely is correct in pointing out the political nature of judicial selection (whether elected or appointed) and the potential impact of campaign contributions on judges who depend on such contributions for their election campaigns. ATRA, in turn, has noted that West Virginia judicial officials, notably Attorney General McGraw, have accepted campaign contributions from members of the plaintiff's bar.<sup>141</sup> However, ATRA does not note that campaign contributions come from both directions. As journalist Adam Liptak points out, "if judges can be bought with money from the plaintiffs' bar, there is no reason to think that businesses cannot compete in that marketplace as well."<sup>142</sup> In addition to

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<sup>137</sup> The source of the 85% number is less clear as it is never used in the small business report. It appears that the reporter for the *Record* added Harris's weighted 60% to the weighted 25% who said they were "not too concerned," to arrive at 85% who were "concerned." The "not too concerned" group were considered non-qualified and were not included in Harris's results.

<sup>138</sup> 2007 Hellhole Report at 14; 2006 Hellhole Report at i; 2005 Hellhole Report at i; 2004 Hellhole Report at i.

<sup>139</sup> RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988).

<sup>140</sup> *Id.* at 10. Neely even recommends a "propaganda" program to convince lawyers and the public of the need to reform product liability law and to hand control of these issues to the federal courts and federal common law. *Id.* at 143.

<sup>141</sup> See 2005 Hellholes Report at 19.

<sup>142</sup> Adam Liptak, *The Worst Courts for Business? It's a Matter of Opinion*, N.Y. TIMES, Dec. 24, 2007, at A10, available at <http://www.nytimes.com/2007/12/24/us/24bar.html>.

Blankenship's contributions noted above, the Chamber of Commerce and ILR contribute significant amounts to legislative and judicial races. In 2000, for example, "the Chamber claimed it spent \$6 million on judicial races and took credit for winning 15 out of 17 state supreme court contests. In 2002, the Chamber said it planned to spend \$40 million on political campaigns, divided equally between congressional and state-level attorneys general and judicial races."<sup>143</sup> For both campaign contributions and issue advertising, the money flows from all sides.<sup>144</sup>

### 3. Mis-Stating the Issues: Cocaine and the Company Safety Director

What a great story:

When a local company fired its safety director for on-the-job cocaine use, the state Supreme Court ruled in April 2004 that the company could do no such thing. Apparently, the employee's contract said that he could only be let go for "dishonesty." Even though he lied about his drug use . . . the state Supreme Court said that there was no contractual violation.<sup>145</sup>

Sort of true, as far as it goes, except that the Supreme Court did *not* say that the employee could not be fired and did *not* find that there was no contract violation.

The lawsuit arose out of a dispute between the buyer of a business and his seller's son. That son, who was a management-level employee whose job included safety issues, tested positive for drugs in his system. Testing positive for drugs was a violation of company policy and was cause for termination. After the testing (but before the results were available), the owner asked a group of employees—including Benson, the son—whether they expected any tests to come back positive. Benson did not lie, but did remain silent in response to this

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<sup>143</sup> Public Citizen, *U.S. Chamber of Commerce Failed to Report Electioneering Spending and Grants* (Oct. 31, 2006), available at <http://www.citizen.org/pressroom/release.cfm?ID=2305>.

<sup>144</sup> See generally Terry Carter, *Mud and Money: Judicial Elections Turn to Big Bucks and Nasty Tactics*, 91 A.B.A. J. 40 (Feb. 2005). Although money related to elections extends beyond actual contributions to a particular candidate's campaign, contribution records for many West Virginia elections are available online through the state Secretary of State's office. See CAMPAIGN FINANCE REPORTS ONLINE, <http://www.wvsos.com/elections/cfreports/> (last visited Feb. 24, 2008).

<sup>145</sup> 2004 Hellhole Report at 23. The Report again quoted Justice Maynard: "This court says that [the company] was wrong to fire a deceitful, coke-head safety director in a plant where tanks of acetylene, oxygen, and other explosives are everywhere! The irony is that if there had been some explosion or other accident which killed or seriously injured another employee, the victim of that accident could have successfully [sued] under our workers' compensation deliberate intent statute and obtained a large verdict." *Id.* at 23-24, citing Justice Maynard's dissent in *Benson v. AJR, Inc.*, 599 S.E.2d 747, 752 (W. Va. 2004) (Maynard, J., dissenting)).

question. When the company discharged Benson, it cited only drug use, not dishonesty, to explain the termination.

The hellhole report leaves the impression that the West Virginia court insisted that Benson be left on the job. That is absolutely untrue. No one argued that Benson could not be fired. The only question before the court was whether Benson was entitled to be *paid* for the remainder of his contract term; more specifically, the question was whether the trial judge erred in granting summary judgment in favor of the employer. This issue turned on the terms of the contract for sale of the business and a related factual issue: Why was Benson fired?

The contract at issue was no ordinary employment contract. As part of his agreement buying AJR, Inc., the new owner entered into a contract promising to pay Benson for a period of eight years unless Benson quit, was convicted of a felony, or was guilty of dishonesty. The contract recited that this deal was made because it was “in the best interests of the Company that key management employees, including [Benson], continue to be employed by the Company upon the sale of AJR.”<sup>146</sup> While the new owner undoubtedly regretted having made that deal, his buyer’s remorse did not change the terms of the contract. The West Virginia court held that the parties’ dispute involved genuine issues of material fact. Summary judgment was therefore improper, because fact issues need to be determined by juries following a trial on the merits, not by a judge based on a paper record. The court therefore remanded the case to the trial court for a jury to decide whether Benson was fired for “dishonesty.”<sup>147</sup>

Like the pickle jar in ATRA’s early West Virginia story, the cocaine-using security director subjecting fellow employees to dangers of disaster makes a catchy, dramatic and seemingly outrageous tale. But it’s just not true.

#### 4. Leaving Out the Bad Facts: Defense Stripping and Punitive Damages

Also in 2004, the hellhole report accused West Virginia courts of unfairly depriving a company of all defenses and arbitrarily awarding punitive damages against it. The story:

In Wetzel County, a jury was told by the trial judge to award a plaintiff punitive damages against Oxford Insurance Company after the judge stripped the company of its defenses and held a damages-only trial. The jury returned a \$39 million verdict, including \$34 million in punitive damages. While the West Virginia Supreme Court of Appeals said the judge could not require punitive damages, it upheld the judge’s decision to strip

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<sup>146</sup> *Benson*, 799 S.E.2d at 749 n.2.

<sup>147</sup> *Id.* at 747-51. The court also affirmed the trial court’s grant of summary judgment for the employer on Benson’s false light invasion of privacy claim.

the company of its defenses and remanded the case for a special hearing on punitive damages.<sup>148</sup>

It sounds like just the kind of thing that happens in a hellhole: a company deprived of the very opportunity to present a defense. But there is again a larger story behind the sanction imposed on Oxford Insurance Company.

*Kocher v. Oxford Life Insurance Company*<sup>149</sup> arose out of a tragedy for Kocher – he was seriously injured in a tractor accident, and one of his legs had to be amputated – above the ankle but below the knee. One saving grace came from the credit life and disability policy that Kocher had purchased from Oxford when buying his truck. In the event of the loss of his foot at or above the ankle joint, Oxford would pay off the entire loan balance. At that point, a payment on the policy would have cost only about \$12,000. Oxford, however, denied the claim. Eventually, Kocher filed suit against Oxford for breach of contract, unfair claim settlement practices, and breach of the implied covenant of good faith and fair dealing. Whatever the merits of Oxford’s denial of the claim,<sup>150</sup> the trial court’s sanction came instead from its litigation behavior.

The Supreme Court’s opinion begins by noting Oxford’s pattern of discovery misconduct, including failure to respond to requests, providing false information, and improper deposition conduct. Most important, though, was a dramatic episode of improper behavior involving unethical direct contact with Kocher and repeated lies about the incident. This is the counter-story, missing from the hellhole report:

Oxford’s Senior Vice President, Larry Goodyear, the company’s second-in-command, traveled from the company’s office in Arizona to West Virginia . . . for Mr. Goodyear’s deposition. . . . In connection with that trip, Mr. Goodyear’s secretary in Arizona called Mr. Kocher’s home and pretended to be a Federal Express employee who was seeking directions to deliver a package to Mr. Kocher. Using this ruse, the secretary obtained driving directions to Mr. Kocher’s house, and relayed those directions to Mr. Goodyear, who paid a visit to Mr. Kocher at Mr. Kocher’s home . . . . According to Mr. Kocher, Mr. Goodyear characterized Oxford as a “mom-and-pop” insurance company, and asked Mr. Kocher, “I don’t suppose there’s anything I can

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<sup>148</sup> 2004 Hellhole Report at 24.

<sup>149</sup> 602 S.E.2d 499 (W. Va. 2004).

<sup>150</sup> One account of Oxford’s actions can be found in Justice McGraw’s dissenting opinion. See 602 S.E.2d at 504-05 (McGraw, J., dissenting).

do here tonight to resolve this matter, or has it went too far with your attorneys?”<sup>151</sup>

Unfortunately for Oxford, it was a serious breach of ethics to contact Kocher directly when it knew that Kocher was represented by counsel. Further, at an earlier point in the case Oxford had been specifically reminded to direct any settlement discussions to counsel. As is so often the case, things went from bad to worse when Oxford proceeded to deny its misconduct. At Goodyear’s deposition, he denied that anyone at Oxford had called Kocher’s home or pretended to be a Federal Express employee. Later, Oxford advised the court that the testimony was false; at trial Goodyear claimed he did not know what the secretary had done (although he was in extended communication with the secretary by cell phone as he drove to Kocher’s house). When ordered to produce the secretary to testify, Oxford failed to do so, explaining that the secretary had “resigned.” As the court notes,

The record does not disclose any plausible reason why anyone at Oxford—Mr. Goodyear, his secretary, or anyone else—would either want or need to lie in order to obtain directions to the Kocher home, except in furtherance of the purpose that Mr. Goodyear would arrive at Mr. Kocher’s house without Mr. Kocher’s (or his attorney’s) prior knowledge. The evidence before the circuit court supports the conclusion that Mr. Goodyear’s visit to Mr. Kocher was for the purpose of influencing Mr. Kocher to settle the case—without his counsel being present.<sup>152</sup>

On the basis of this cumulative record of litigation misconduct, as a sanction for that misconduct, the trial judge struck Oxford’s defenses on the merits and required the plaintiff only to prove damages. While such sanctions are not common, the West Virginia procedural rules (as well as the rules of the federal courts and most if not all other states) allow serious sanctions in order to deter willful, bad faith violations of the standards for pretrial conduct.<sup>153</sup> In addition, courts have the inherent authority to sanction litigants for egregious, bad-faith conduct that undermines the judicial process.<sup>154</sup> This case is an example of the kind of calculated behavior that qualifies for “death penalty” sanctions. “Oxford’s misconduct was a deliberate effort to subvert and circumvent both the attorney-client relationship and the ordinary rules and procedures of

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<sup>151</sup> *Id.* at 501-02. According to the court, “Mr. Goodyear testified that he did not dispute most of what Mr. Kocher said about the meeting. Evidence presented at trial indicated that Oxford has \$770 million in assets and is owned by a larger company with \$3.1 billion in assets.”

<sup>152</sup> *Id.* at 502 n.2.

<sup>153</sup> *See, e.g.*, W. Va. R. Civ. P. 37; Fed. R. Civ. P. 37.

<sup>154</sup> *Given v. Field*, 484 S.E.2d 647 (W. Va. 1997) (default judgment, jury determination on punitive damages); *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (federal courts).

litigation. This relationship and these rules and procedures are central to the fair working of our legal system and to the public's confidence in the courts."<sup>155</sup>

Despite this well-documented record of purposeful misconduct at the highest levels, the West Virginia court actually ruled in favor of Oxford—the trial court had erroneously instructed the jury that it was required to assess punitive damages against Oxford. The appellate court vacated the jury's punitive damage award and remanded to give a jury the chance to exercise its discretion, including the possibility that it might award no punitive damages at all.

#### IV. WEST VIRGINIA BY THE NUMBERS

The stories are misleading and de-contextualized. The metaphors are powerful but based on false premises. What about the numbers? Does West Virginia have a lawsuit crisis? Existing statistical information is incomplete and not particularly helpful, but it clearly does *not* provide support for the ATRA and ILR characterization of West Virginia. A recent article by Brisbin and Kilwein, two WVU political science professors, looks at the data available from the state and through the National Center for State Courts. In terms of the caseload numbers, they found:

- Circuit Court caseloads have not increased dramatically but, rather, have been stable or diminishing for many years. Plaintiffs filed or reopened 53,730 cases in 1984, but only 48,535 in 2005. In 2005, only four states had a lower number of cases filed per capita.<sup>156</sup>
- The number of tort cases (those about which ATRA and the ILR are most concerned) has declined, and the decline began before the state enacted the tort reform measures sought by industry advocates (and before the first hellhole and lawsuit climate reports). The numbers:

1997	1015
1998	1349
1999	1050
2000	2604
2001	1287
2002	669
2003	627 <sup>157</sup>

<sup>155</sup> Kocher, 602 S.E.2d at 503 n.3.

<sup>156</sup> Brisbin & Kilwein, *supra* note 11, at 6 (citing state statistics and the National Center for State Courts).

<sup>157</sup> *Id.* (citing National Center for State Courts Court Statistics Project (2006), *State Court Caseload Statistic: 2005*, available at [www.ncsonline.org/d\\_research/csp/2005\\_files/State Court](http://www.ncsonline.org/d_research/csp/2005_files/State Court)

- The limited evidence available suggests that the majority of these tort cases involve car wrecks and slip-and-fall cases, not the product liability, medical malpractice, and mass tort cases that most worry tort reform advocates.<sup>158</sup>

Available data also tend to disprove a link between supply of doctors or malpractice premiums and state tort law. For example, an investigation by the *Charleston Gazette* found that even before the imposition of a cap on medical malpractice awards, the number of doctors in the state was *increasing* by 14.3% at a time when the population was growing by only 0.7%. Further, a *Gazette-Mail* study of medical malpractice case resolutions found that between 1993 and 2001 the number of claims decreased, and that the average payment was less than or equal to those in neighboring states.<sup>159</sup> Data from the National Practitioner Databank also shows that medical malpractice payouts declined from \$49.3 million in 2001 to \$34.1 million in 2002 (a 30.8% decrease). The mean payout per claimant decreased 22%, and the number of payouts dropped by 11%. The number of payouts over \$1 million dropped from 8 to 0.<sup>160</sup>

Occasionally, advocacy groups put numbers to their claims that personal injury suits hurt the state's economy and drive away business. These numbers, though they give the illusion of neutrality, are as flawed as the anecdotes. First, the numbers do not even attempt to include the benefits of tort litigation: compensation of those who have been injured through the fault of others, and the deterrence of behavior that negligently causes injuries or death. In other words, they treat tort claims as one big transaction cost with no offsetting value (and they ascribe all of the costs to the plaintiffs). Second, the projections are often based on hypothetical data crunched through proprietary formulae and unavailable for review by other social scientists. For example, the Perryman Group (from Texas) did a study of West Virginia, commissioned by the state Chamber of Commerce. As Brisbin & Kilwein point out, this study:

provides only an inferential "estimate" of the economic costs of personal injury litigation by a comparison of West Virginia economic performance in reputed tort-litigation sensitive eco-

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Caseload Statistics 2005.pdf). This is consistent with national data studied by the National Center for State Courts. *Id.*

<sup>158</sup> *Id.* This is also consistent with the types of lawsuits reported in the West Virginia small business survey.

<sup>159</sup> Morgan Kelly, *W. Va. No Longer 'Judicial Hellhole,' Insurer Says*, CHARLESTON GAZETTE 6A (Aug. 20, 2005). The 2001 study was based on the records of the state Board of Medicine and the U.S. Census Bureau. See Martha Leonard, *State Has Seen Sharp Increase in Number of Doctors*, SUNDAY GAZETTE-MAIL 7A (Feb. 25, 2001).

<sup>160</sup> Public Citizen, *New 2002 Government Data Disputes Malpractice Lawsuit "Crisis" in West Virginia* (July 8, 2003), available at [http://www.wvcag.org/victimrights/docs/2003\\_07\\_08\\_pubcit.pdf](http://www.wvcag.org/victimrights/docs/2003_07_08_pubcit.pdf).

conomic sectors to national economic performance in those sectors before and after unidentified national tort reforms. However, the study includes *no analysis of data on insurance costs or damage awards*—the direct costs of personal injury claims.<sup>161</sup>

Nor is it only West Virginia academics who question Perryman's methodology. The *Wall Street Journal* noted as early as 1995 that his genius was "more for marketing than economics." The article noted cases in which his data had been rejected as "unreliable" (and his testimony about his billing in the case "not credible"—as he billed clients an average of 21 hours a day for three weeks straight). Most important was the critique of the secrecy behind Perryman's numbers:

"When I do a study, I lay out assumptions so people can say, 'I disagree.' A lot of times Ray [Perryman] doesn't do that," says Jared Hazleton, director of the Center for Business and Economic Analysis at Texas A&M University. "There's not much sex appeal to [the more academic approach]. People don't want to hear that, and Ray gives them what they want." Dr. Perryman says he presents adequate documentation for his studies, but doesn't show the model because it is "proprietary."<sup>162</sup>

Third, reports claiming to quantify the impact of tort claims tend to use statistics that are ill-suited to "prove" anything about the link, if any, between tort litigation and the state's economic fortunes. For example, a 2007 study by Hicks, claiming that personal injury litigation in West Virginia leads to high costs, is based on data indicating that the total cost of legal services is growing faster than the state's domestic product. Brisbin & Kilwein point out the flawed empirical basis for this conclusion: Hicks' data includes not just personal injury claims but also legal services relating to all the other areas of practice—contract, property, family law, administrative law, bankruptcy, trusts and estates, tax, and criminal law.<sup>163</sup>

Finally, arguments about a lack of tort reform as the cause of a state's economic woes ignore other more plausible influences on the rate of business

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<sup>161</sup> Brisbin & Kilwein, *supra* note 11, at 9 (emphasis in original).

<sup>162</sup> Laura Johannes, *Economist Ray Perryman Is Hailed As a Genius – for Self-Promotion*, WALL ST. J. T1 (May 10, 1995) (also discussing allegations of client-friendly but false forecasts involving San Antonio's Alamodome, Austin's environmental efforts, and largely false claims to have predicted the Texas oil bust in the 1980s).

<sup>163</sup> Brisbin & Kilwein, *supra* note 11, at 9 (criticizing Michael J. Hicks, *Reduce the Cost of Civil Litigation and Depoliticize the Courts*, in RUSSELL S. SOBEL (ED.), UNLEASHING CAPITALISM: WHY PROSPERITY STOPS AT THE WEST VIRGINIA BORDER AND HOW TO FIX IT (2007)). For a more detailed critique of national claims of a "tort tax," see Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83-90 (1993).

growth. ATRA's 2007 Hellhole Report includes lovely charts for each state. West Virginia's compares percentage change in total GDP growth from 2001-2006 in the US as a whole (15%) with that of West Virginia (7%)—with an inflammatory box noting that this differential is -53%. In the same sidebar, the report compares percentage growth in employment—with the U.S. at 3.3% and West Virginia at 2.8%. These factoids not only show that West Virginia has, in fact, experienced growth in both GDP and in employment, they also imply that it is the state's hellhole qualities that explain the difference. It is far more plausible that the numbers are explained by factors identified by earlier economic analyses of West Virginia:

[T]he low educational level of the workforce, a small labor pool dispersed across a rural landscape, the lack of usable land for commercial and manufacturing facilities, the lack of a major airport, the lack of a seaport, the lack of a major banking center, an aging population living on limited incomes, and other social and geographical factors contribute significantly to the economic problems of the state.<sup>164</sup>

#### V. CONCLUSION: WHAT'S A STATE TO DO?

If the stories are misleading, and numbers fail to document abuses, why are the hellhole stories so widely reported and so dominant? In part this reflects how little we really know about the operation of our legal system. The kind of basic information that we demand in discussions of other policy issues like the economy, or employment, or education, simply does not exist. In the absence of real data, there is little to offset the media's selective reporting of seemingly outrageous claims and huge awards. While numbers don't make a sexy story for the evening news—caseload statistics are not nearly as much fun as pickle jars and cocaine-snorting safety officers—at least data can help lawmakers base their decisions on something other than bizarre fables and slanted opinion polls.

At the national level, the federal court system has kept fairly good records for a number of years. For state systems, the National Center for State Courts has initiated a project to help each state record and track data in a more helpful and uniform way. Its Court Statistics Project provides guidance to state courts and also provides useful information about the structure and behavior of all of the state court systems.<sup>165</sup> Unfortunately, a researcher's ability to draw conclusions from this data is only as good as the data itself, and that information is often incomplete. Further, the ability to make comparisons across systems is hampered by differences in categories and record keeping. More detailed in-

<sup>164</sup> Brisbin & Kilwein, *supra* note 11, at 10 (citing ROBERT JAY DILGER & TOM STUART WITT (EDS.), *WEST VIRGINIA IN THE 1990S: OPPORTUNITIES FOR ECONOMIC PROGRESS* (1994)).

<sup>165</sup> See National Center for State Courts, *Court Statistics Project*, [http://www.ncsonline.org/D\\_Research/csp/CSP\\_Main\\_Page.html](http://www.ncsonline.org/D_Research/csp/CSP_Main_Page.html) (last visited Jan. 3, 2008).

formation is also needed. For example, for questions regarding particular types of litigation—such as product liability cases, asbestos cases, mass tort cases, class actions, antitrust claims, securities fraud claims, employment claims, or whatever is in issue—the numbers need to be disaggregated. Counts of all civil cases are not helpful for most purposes (and are even less helpful if family law matters are included in the totals).

Better data could be tremendously revealing. For example, even the small amounts of data now available have allowed researchers to test certain hypotheses and litigation folklore. One study found little support for the belief that race, poverty, or urban locations correlate with higher damage awards.<sup>166</sup> Another found that, contrary to the image of the “runaway jury,” in a number of types of cases judges actually award higher damages than do juries.<sup>167</sup> Yet another was able to identify factors that influence the time to disposition for civil cases, an important determinant in the cost of litigation.<sup>168</sup>

Fortunately for West Virginia, the state supreme court is about to inaugurate a state-wide system of record keeping, using uniform categories and standardized software. Once in use statewide, state lawmakers should have more detailed information about the nature of the business of the state courts. Information kept in databases can also be grouped and analyzed in a number of ways. If the state chooses to use narrower categories (e.g. “product liability” rather than “civil”) the resulting information will provide a more reliable basis for identifying problems or trends. In addition to information about cases filed and disposed of, it would be helpful to track statewide information about various kinds of pretrial activity such as use of discovery devices, and the making and disposition of Rule 11 motions, class certification motions, motions for summary judgment, motions for judgment as a matter of law, and motions for new trial. Collection of information about jury verdicts, including any amounts awarded as damages, is also extremely important when studying lawsuit trends. As electronic filing becomes more and more a reality, a system like the federal PACER system that puts most lawsuit papers online can allow quite nuanced research and, for a small-ish state like West Virginia, could provide a useful and manageable amount of information.

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<sup>166</sup> Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839 (2002); see also Michael J. Saks, *Trial Outcomes and Demographics: Easy Assumptions Versus Hard Evidence*, 80 TEX. L. REV. 1877, 1878 (2002) (discussing lack of data supporting presumption of association).

<sup>167</sup> Kevin M. Clermont & Theodore Eisenberg, *Trial By Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992); see also Theodore Eisenberg et al., *Juries, Judges and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743 (2002) (reporting that data covering one year of judge and jury trial outcomes from forty-five large trial courts, comprising nearly nine thousand trials, yield no evidence that judges and juries differ significantly in their rates of awarding punitive damages, or in the relation between the size of punitive and compensatory awards).

<sup>168</sup> Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813 (2000).

The policy issues raised by the hellhole debates require more than just information about the court system. Some of the data required is in the hands of private parties. For example, because the vast majority of lawsuits throughout the country are settled rather than tried, information about payments to plaintiffs is not generally part of the court record. This information is often in the hands of insurance companies, and they have not been anxious to share these numbers with researchers. Some information is available, however, and its uses help demonstrate how much *more* helpful fuller information would be. For example, the Texas Department of Insurance requires commercial liability insurers to report all closed claims involving bodily injury, and these reports are cumulated in the Texas Closed Claims Database. Although the data does not include many things a researcher would find helpful—personal automobile insurance, homeowners' insurance, workers' compensation, and mass torts—it has nonetheless provided the basis for some valuable insights into the tort system. Using the data, Professors Charles Silver and Frank Cross of the University of Texas determined the average payment in death cases, the stage at which the payments were made, and the effect of a number of variables on payments to claimants.<sup>169</sup> Also using this data, Professor Bernard Black and others were able to study medical malpractice claim outcomes, learning that payments had actually been quite stable over a number of years.<sup>170</sup>

Unfortunately, statistics will never be able to provide all the information needed to answer all of the questions about the tort system that motivate the ATRA and ILR reports. Most fundamentally, statistics may show a correlation between different factors, but they do not prove causation. This is particularly problematic when potentially relevant information is omitted from a study. Suppose data indicate that a county's number of doctors has gone down at the same time that malpractice premiums have increased. Does that show that it was the premiums that caused the exodus, or that a few aging doctors have retired or that a number of medical students have left town? Suppose data indicate that a county's number of doctors has gone up following a state's adoption of a cap on non-economic losses in medical malpractice cases. Does that show that the cap has attracted new doctors to the area, or that the number of doctors was already increasing for some other reason? Does either example show anything about the cause of the increase or decrease in premiums? Suppose data show that a state's economy is growing more slowly than that of other states, or of the country as a whole. Does that show that the state in question allows too much personal injury litigation, or that its population or geography or economic base put it at a disadvantage?

Data, then, can provide a useful counterpoint to outrage stories, but cannot, either emotionally or mathematically, end anyone's campaign to label

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<sup>169</sup> Frank Cross & Charles Silver, *In Texas, Life is Cheap*, 59 VAND. L. REV. 1875 (2006).

<sup>170</sup> See Bernard S. Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005).

West Virginia a hellhole. In addition to data gathering, West Virginians would be well advised to educate themselves about the information that *is* available and to demand more and better information when presented with horror stories. Members of the press could learn to ask more probing questions when presented with an ATRA or ILR report, and the result could be a vast improvement on the current system—quoting the press release, and then interviewing the local CALA director (who will agree with the report) and the local head of the American Association for Justice (who will disagree), leaving the public remembering only the pickle jar and the coke head. As ATRA so well understands, those members of the public are voters who will choose the judges and legislators who will be making policy decisions that affect the state and its citizens.

Neither the tort system nor the civil justice system is perfect.<sup>171</sup> Many legitimate claims are never filed. People with small injuries may be overcompensated, while those with serious injuries are almost certainly undercompensated. Insurance premiums for malpractice coverage and workers' compensation insurance can be very high. Health care costs can be overwhelming, and too many people lack health insurance. It can be difficult to determine whether government oversight, private litigation, or the market is the most efficient way to achieve optimum levels of safety in particular contexts. Litigation itself can be slower or more expensive than necessary, and state governments often fail to fund the court system so that it can fairly and expeditiously deal with the cases before it.

None of these real issues are helped by misleading and manipulative media campaigns, threatening state lawmakers with loss of their leadership positions and threatening the public with loss of money, jobs, and medical care. Real empirical research is complicated stuff—and a different world from opinion polls. Real state legislators deserve real information rather than name-calling and threats as they try to find reasonable and targeted solutions to the problems of making the injured whole, deterring meritless claims, and encouraging businesses to provide safe workplaces and safe products for the benefit of us all.

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<sup>171</sup> For highlights of some of the real problems raised by the current tort system, see Marc Galanter, *Real World*, *supra* note 19, at 1158-60.