



Risky Business

The annual boardroom guide to litigation in the 50 states

By Steven B. Hantler

Steven B. Hantler is Assistant General Counsel of Daimler Chrysler and Chairman of the American Justice Partnership

Home Depot co-founder Bernie Marcus believes that the biggest competitors for capital that business has are America's plaintiff trial lawyers. They siphon off billions of dollars that would be invested in R&D, growth, and jobs creation, or would be returned to shareholders. Trial lawyers also increase the cost of capital for those companies whose ratings are downgraded as a direct result of trial lawyer briefings to financial analysts or press conferences about their litigation portfolios—all part of the trial bar's new business model.

Despite the threats to capital formation and, at times, the sustainability of many businesses, most companies fail to accurately account for the total costs of lawsuits and underestimate the importance of a state's liability climate when they make employment, plant location, and operating decisions. In today's unpredictable legal environment, the accounted costs of litigation—legal fees, settlements, judgments, and G&A—are just a starting point. The unaccounted costs are often far higher and far more

dangerous: share value loss, damage to company and product reputation, higher litigation reserves, higher insurance costs, and poorer litigation results.

Most chief executives measure the performance of their general counsel in terms of accounted costs only, which can result in undermanagement of the risks to share value, company and product reputation, and other unaccounted costs.

To heighten the awareness of corporate leaders of the liability risks their companies face, this guide provides a state-by-state profile of liability climates based on both empirical and experiential studies. The profiles indicate that there are vast differences in liability climates from state to state—differences that should contribute to strategic decisions about where to do business. This should also stimulate business leaders to demand that state officials are held to task for allowing their states to become hostile legal environments, while at the same time courting business through economic development programs.

CHRIS HERS

Corporations were complacent when years ago the impact of litigation was confined to paying legal fees and enduring the occasional adverse verdict. Corporations could survive this competitive disadvantage against the trial bar. That is no longer true. Today, verdicts reflect an antibusiness sentiment and many juries have a lottery mentality when doling out awards. Now, a company's share value, brand equity, and even its very solvency are at risk. That's why successful companies must study the trial bar's new business model, and develop sound, effective, and preemptive opposition strategies.

Making the Rules and Selecting the Referees
Plaintiff lawyers are among the most politically astute and media-savvy entrepreneurs in America today. For the past 20 years or more, the trial bar has outflanked business in electing tort-friendly public officials and lobbying legislators to either enact pro-plaintiff liability laws or block liability reform efforts. This is a major reason that today, to give just one example, in 32 states automakers cannot introduce evidence in product liability trials that a plaintiff was not wearing a seat belt. Worse yet, trial lawyers have greatly influenced the process in which judges are appointed or elected.

Unlike many corporations that shy away from the political process, the trial bar isn't afraid to invest in partisan politics. According to the Center for Responsive Politics, since 1990, lawyers and law firms have contributed a staggering \$780 million to finance federal candidates. That figure far outstrips the contributions of many of the trial bar's favorite litigation targets: It represents about five times the contributions of the pharmaceutical industry, four times the oil and gas industry, and three times the insurance industry. At the state level—where the judicial, legislative, and executive races that shape a state's legal climate are decided—the trial bar's dominance is likely even greater.

All of this is part of the trial bar's business model, which is not to try lawsuits, but to settle them quickly to increase their inventory turns. Their business is growing: U.S. tort costs have increased 46 percent over the past five years. A recent study by Pacific Research Institute calculates the total direct and indirect costs of lawsuits at \$865 billion annually, of which \$589 billion is unwarranted.

How State Rankings Were Done

A growing number of savvy boards, chief executives and general counsel are taking into account state liability climates when making crucial decisions about expansion and investment. To inform those decisions, two national indices have been published using different methodologies to rank states by liability climate.

The 2006 U.S. Tort Liability Index prepared by Pacific Research Institute (PRI) is a peer-reviewed econometric analysis of 39 variables, including insurance loss ratios and state laws that affect liability climates. The 2007 ILR/Harris State Liability Systems Ranking is a survey of more than 1,500 in-house general counsel and senior lawyers based on their litigation experiences in the states. Harris Interactive conducted this poll for the U.S. Chamber Institute for Legal Reform.

The two indices produced somewhat different results. For example, there is only one state in common on the top 10 list of each index—Utah. The state ranked most differently in the two studies is Texas, which PRI ranked first and Harris ranked 44.

These differences are explained by the fact that the indices measure different things. The Harris Poll measures perceptions based on the respondents' experience in these states. The PRI Index analyzes empirical data for a range of variables that may or may not relate to a company's experience in a given state.

Of the 39 variables analyzed by PRI for Texas, 11 are insurance loss ratios and Texas has the sixth lowest (or best) insurance loss ratio of all states. Of four other variables—limits on non-economic damages, limits on punitive damages, joint liability reform, and venue reform—Texas ranks among the best states in the country. Despite these positive characteristics, the American Tort Reform Association designated the Rio Grande Valley and the Gulf Coast of Texas as "Judicial Hellholes." There's no doubt that experience in these venues shaped the perceptions of some Harris Poll respondents, causing Texas to be ranked 44th in its poll.

Each study has its critics. The Harris Poll is susceptible to outdated state reputations and isolated bad experiences. The PRI Index is criticized by non-economists for giving equal weight to all 39 variables. These criticisms do not detract from the value of these studies, but they do help us understand their limitations.

continued on page 52

How State Rankings Were Done

continued from page 51

The Hantler Weighted Variable Index

In light of these limitations, I developed a third index—the Hantler Weighted Variable (HWV) Index—that incorporates the effects of Judicial Hellholes and 16 of the 39 variables in the PRI Index that affect the broadest range of companies. Unlike the PRI Index, the HWV Index does not give equal weight to the 16 variables and is biased toward states with “rule of law” supreme court majorities and states with reasonable limits on damage awards. These two factors were most highly correlated with insurance loss ratios (a surrogate for litigation outcomes). The HWV Index was developed to moderate the effects of the different methodologies used in the other two studies.

Composite Ranking

Combining the numerical rankings for each state under the three indices—HWV Index, PRI Index and Harris Poll—produces a composite score, which I used to rank the states. For example, the three indices rank Nebraska 5, 11 and 3, respectively, and the sum of these rankings is 19, which is the lowest sum or composite score for any state. For this reason, Nebraska ranks as the state with the most favorable liability climate.

State Profiles

The numeric rankings listed in the following state profiles are derived from the three indices and composite ranking mentioned above. All utilize a 1 to 50 scale: 1 being the state with the best liability climate and 50 being the state with the worst.

The traffic light colors symbolize the liability climate of each state:

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

In some cases, an emerging trend in a state’s legal climate causes us to illustrate this change as either being positive, for which we use both a yellow and green light, or negative, for which we use yellow and red.

Business Going on Offense

Fortunately, business has begun to fight back. An increasing but still small number of companies are engaged in liability reform efforts. One of these efforts is the American Justice Partnership (AJP), a coalition of more than 70 state and national organizations working together for the first time to obtain state liability reform. The AJP partner organizations include: National Association of Manufacturers, Council of State Chambers, Council of State Manufacturing Organizations, American Tort Reform Association (ATRA), Manhattan Institute, Pacific Research Institute, state chambers of commerce, state manufacturing organizations, state civil justice reform committees, and state consumer groups. The AJP and its partners are working to enact legal reforms that remove incentives for lawsuit abuse in statutes and court rules, ensure the selection of judges who follow the rule of law, and reverse America’s lawsuit-happy culture by motivating the public to take action supporting liability reform.

Many companies are learning that liability reform has a strong bottom-line impact. For example, product liability lawsuit filings in Michigan declined by 67 percent after liability reforms were enacted. A property and casualty insurer reported that it was able to release more than \$50 million from reserves to income after lawsuit reforms in Ohio weeded out junk lawsuits.

1 NEBRASKA

Nebraska enjoys the top ranking for its favorable litigation climate. Its liability laws lead to fair and predictable litigation results. Nebraska law does not allow punitive damages, places limits on medical malpractice lawsuits, has a 10-year statute of repose for product liability lawsuits, and does not allow joint liability for non-economic damages. The Supreme Court is led by a rule-of-law majority and Attorney General Jon Bruning is a staunch defender of the rule of law. Nebraska’s liability climate is conducive to growth and job creation.

2 VIRGINIA

The liability climate in Virginia is conducive to growth and job creation. Virginia has the second lowest insurance loss ratios in the nation. The Common-

wealth abolished joint liability and enacted reasonable limits on punitive damages among other reforms. The Virginia Supreme Court, which is elected by the General Assembly, has a rule-of-law majority. Since 1993, Virginia has elected attorneys general who were all active legal reform leaders, including the incumbent Attorney General Bob McDonnell. As a member of the House of Delegates, General McDonnell introduced several liability reform bills that were signed into law.

3 NORTH DAKOTA

Insurance loss ratios are the lowest in the country in North Dakota. The state's liability climate encourages growth and job creation. The Legislature established reasonable limits on punitive damages and abolished joint liability. There is a rule-of-law majority on North Dakota's Supreme Court and Attorney General Wayne Stenehjem adheres to the rule of law.

4 KANSAS

Insurance loss ratios in the state are fifth best in the country. The Legislature supports common sense liability reform, having passed reasonable limits on both non-economic and punitive damage awards. Silica and asbestos reform and a "cheeseburger bill" (prohibiting obesity lawsuits) also have been enacted. There are some risks, however, that this favorable legal climate may deteriorate. Governor Kathleen Sebelius, the former executive director of the Kansas Trial Lawyers Association, has appointed the majority of the Supreme Court. Attorney General Paul Morrison's campaign was heavily financed by the trial bar. The state's trial lawyers have developed an aggressive lobbying effort—"Trial Lawyer of the Day" program—where a different trial attorney is dispatched to the state house, along with a paid lobbyist, to visit legislators and their staffs every day. Kansas may be a state in

which currently favorable insurance loss ratios and the HWV and PRI indices might decline as a result of trial lawyer initiatives in the state.

5 UTAH

Utah has the fourth lowest insurance loss ratios in the country. The liability climate in the state encourages growth and job creation. Although Utah has somewhat conservative jury pools and some modest liability reform, it is a state to watch. Utah's Supreme Court is unpredictable and led by an activist majority that ignored the U.S. Supreme Court's precedent-setting decision on punitive damages and initially upheld a punitive damage award far greater than the benchmark established by the U.S. Supreme Court.

6 NORTH CAROLINA

The liability laws of the "Tar Heel State" lead to fair and predictable litigation results, and its business court is a model for other states. Insurance loss ratios in North Carolina are among the seventh lowest in the country. There is a rule-of-law majority on the Supreme Court. However, the AJP partner that assisted in the preparation of this profile advises that the state's liability climate could worsen if the trial bar is successful in obtaining legislation that would reverse North Carolina's reform laws.

7 MICHIGAN

Michigan's liability climate is conducive to growth and jobs creation. Former Governor John Engler transformed Michigan's liability climate from one of the nation's worst to one of the best by appointing, and also promoting the election of, a rule-of-law majority to the Supreme Court and working with the Michigan Legislature to enact common sense legal reforms. Michigan law does not allow punitive damages,

places limits on non-economic damages in product liability and medical practice lawsuits, and does not allow joint liability. Michigan product liability law provides the government-standards defense in lawsuits against the pharmaceutical industry. Insurance loss ratios in Michigan are eighth lowest in the country. Attorney General Michael Cox is one of the leading rule-of-law advocates in the country. The trial lawyers, however, are executing a strategy to roll back these reforms. The trial lawyers and their allies have elected a pro-trial lawyer majority in the House of Representatives. Fortunately, the rule-of-law majority in the Michigan Senate can block anti-reform legislation. The trial lawyers now have their sights on the 2008 Supreme Court and legislative elections. Michigan is a state to watch in the next two years.

8 INDIANA

The "Hoosier State's" liability laws lead to fair and predictable litigation results. The Supreme Court has a rule-of-law majority. Indiana juries are not known for excessive and unwarranted verdicts. Attorney General Steve Carter is a leader in promoting the rule of law. The state's insurance loss ratios are among the best 20 in the nation.

9 OHIO

Insurance loss ratios in the "Buckeye State" are 12th lowest in the nation and its liability laws lead to fair and predictable results. While Ohio's liability system encourages growth and job creation, there are several threats to its liability climate. Governor Ted Strickland is hostile to legal reform having pulled, on his first day in office, a significant reform bill previously filed by former Governor Bob Taft. The bill made important clarifications in Ohio law regarding lead paint lawsuits and non-economic damages under the state's Consumer Sales Practices Act. Attorney General Marc Dann supported

Governor Strickland's action and recently filed a lawsuit against ten paint manufacturers in an attempt to expand Ohio law on public nuisances. While there are several cases pending before the Ohio Supreme Court challenging the constitutionality of recent liability reform legislation, the high court has a rule-of-law majority that respects the will of Ohio's Legislature. In view of these threats, there is a possibility that Ohio liability law might worsen in coming years.

10 COLORADO

Colorado scored high in the two econometric studies, but only toward the middle of the Harris Poll. While its liability laws are conducive to a fair, predictable litigation climate, there are several threats to its high ranking. The Legislature has begun to chip

away at the reform legislation, especially since the departure of pro-reform Governor Bill Owens. Current Governor Bill Ritter's judicial appointments are troubling and include a former plaintiff lawyer who was opposed by liability-reform proponents. Worse yet, the Colorado Supreme Court has an activist majority that is open to expanding tort liability. For the time being, however, reasonable limits on non-economic and punitive damages, elimination of joint liability, and medical malpractice and product liability reforms remain in place. Attorney General John Suthers is a strong advocate for the rule of law.

11 TENNESSEE

Despite its high ranking, determining whether Tennessee's liability climate en-

courages or is neutral to growth and job creation was a close call. Insurance loss ratios in the state are only 22nd best in the country. Although the Legislature abolished joint liability except in limited instances, there are no limits on non-economic or punitive damages in Tennessee. The Supreme Court is regarded as having neither a rule of law nor an activist majority and there are some plaintiff-friendly venues in the state.

12 SOUTH DAKOTA

Insurance loss ratios in South Dakota are among the lowest 15 in the country. South Dakota's liability climate favors growth and job creation. The Legislature has established limits on punitive damages. There is a rule-of-law majority on the

Judicial Hellholes, Other Concepts Defined

Some concepts discussed in the state profiles may be unfamiliar and require definition:

- **A Rule of Law** or "restrained" state Supreme Court majority or attorney general respects the will of state legislatures and resists legislating from the bench or regulating through litigation. Rule-of-law officeholders contribute to stable liability climates, while an activist supreme court, state supreme court majority, or attorney general contributes to an unstable liability climate.

- **Economic damages** compensate victims for actual monetary losses including wage loss and medical bills. "Non-economic damages" compensate victims for conceptual losses, including pain and suffering. "Punitive damages" punish defendants for perceived reckless or malicious behavior depending upon the state standard. Limits on any damage awards contribute to fair and predictable litigation outcomes. States that do not limit dam-

age awards become magnets for plaintiff lawyers.

- **Insurance loss ratios** are the ratio of losses paid or accrued by an insurer to premiums earned. The two econometric studies take insurance loss ratios into account in their analyses. The HWV Index

"It's almost impossible to get a fair trial if you're a defendant in some of these places."

—Dickie Scruggs, trial lawyer

utilizes a 1 to 50 scale for ranking the loss ratios: 1 being the state with the lowest (or best) ratios and 50 being the state with the highest (or worst) ratios.

- **Judicial Hellholes** are the jurisdictions designated by the American Tort Reform Association, an AJP partner, where equal justice under law is too often not available to business defendants in civil lawsuits.

Dickie Scruggs, one of the foremost

plaintiff trial lawyers in the country, not surprisingly calls these places "magic jurisdictions." According to Scruggs, these are places "where the judiciary is elected with verdict money. It's almost impossible to get a fair trial if you're a defendant in some of these places. Any

lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is."

- **Statutes of repose** set the time in which a lawsuit must be filed after the sale or manufacture of a product depending upon the state. These are different from statutes of limitations, which set forth the time in which a lawsuit must be filed after a wrong has occurred.

Supreme Court and Attorney General Larry Long is a strong supporter of the rule of law.

13 ● DELAWARE

Delaware's insurance loss ratios are among the 10 best of all states. Although its liability climate is generally conducive to growth and job creation, Delaware earned a spot on the Judicial Hellholes watch list of the American Tort Reform Association. Once thought to have the best business liability climate, Delaware is becoming a magnet for asbestos litigation. The state's liability laws allow joint liability and have no limits on non-economic or punitive damages. Newly elected Attorney General Joseph "Beau" Biden is a former plaintiff asbestos lawyer who many believe will become an activist attorney general. Delaware is clearly a state to watch and will likely fall in future composite rankings, if venue reforms are not enacted to counter the influx of out-of-state asbestos lawsuits.

14 ● MINNESOTA

While the AJP partner that assisted in preparing this profile rated Minnesota's liability climate as neutral to growth and jobs creation, insurance loss ratios in Minnesota are ninth lowest in the country. The Minnesota Supreme Court has an activist majority and Attorney General Lori Swanson is an activist attorney general. There is a possibility that the liability climate will deteriorate with several anti-reform bills that are pending in the Minnesota Legislature, including one that allows bad faith claims against insurers. Minnesota is a state to watch.

15 ● IOWA

Iowa's liability climate encourages growth and job creation, yet several factors make it a state to watch. The Harris Poll ranks

Iowa as having the fourth best liability climate in the country, while the two econometric studies rank Iowa 21 and 19 – a variance explained by the state's changing political climate. According to the AJP partner that helped prepare this profile, Iowa has experienced a noticeable upward trend in jury awards. Iowa's insurance loss ratios are 15th best in the country. The Iowa Legislature has enacted some reform legislation in recent years, including a 15-year statute of repose and elimination of joint liability for non-economic damages in product liability cases. However, former Governor Tom Vilsack appointed two former presidents of the Iowa Trial Lawyers Association to the Supreme Court before leaving office and current Governor Chet Culver also appears to be sympathetic to the trial bar. Attorney General Tom Miller is regarded as a highly activist attorney general. Iowa is a state to watch.

16 ● WYOMING

Insurance loss ratios in Wyoming are third lowest in the country. The AJP partner that helped with this profile reports the state's liability climate is encouraging growth and job creation. Despite having no limitations on damages and a four-year period of limitations in which to bring claims, Wyoming juries are considered conservative, and personal responsibility is an accepted theme.

17 ● NEW HAMPSHIRE

New Hampshire's liability climate encourages growth and job creation. The state has enacted some reforms, including the elimination of punitive damages, medical malpractice reform, and modest joint liability reform. New Hampshire juries are not known for excessive, unwarranted verdicts. Having said this, the state's insurance loss ratios are in the bottom 30 percent of all states, which explains the 24 ranking in the

HWV Index. The Supreme Court majority is activist and the AJP partner that helped with this profile suggests the state's liability climate could deteriorate as the New Hampshire Legislature considers a bill to reverse reform legislation.

18 ● TEXAS

Texas's liability climate encourages growth and job creation with one caveat—the Judicial Hellholes in South Texas. These Hellholes account for the most significant variance of all states in the three national rankings. The two econometric studies rank the state at 7 and 1, while the Harris Poll ranks the state at 44. Texas has a rule-of-law majority on the Supreme Court; Governor Rick Perry and Lt. Governor David Dewhurst are strong leaders on liability reform; and the Legislature has enacted comprehensive liability reforms over the past decade. These include reasonable limitations on punitive damages, some joint liability reform, a government standards defense, reasonable limits on non-economic damages in medical malpractice cases, asbestos and silica lawsuit reforms, and a 15-year statute of repose. Insurance loss ratios in Texas are sixth lowest in the country. If fairness and predictability return to the Judicial Hellholes in the Rio Grande Valley and the Gulf Coast, Texas should move up in the rankings.

19 ● WASHINGTON

Views appear mixed on Washington, with the two econometric studies each ranking the state 14 while the Harris Poll ranks it 25. While the state's insurance loss ratios are 13th lowest in the country, the AJP partner that helped prepare this profile reported the state's liability climate discourages growth and job creation. Washington does not allow punitive damages except in consumer protection actions where treble damages are available but generally capped. The

State Rankings

	State Rank	HMV Index	PRI Index	Harris Poll		State Rank	HMV Index	PRI Index	Harris Poll
Alabama	40	26	40	47	Montana	47	43	45	40
Alaska	20	13	15	43	Nebraska	1	5	11	3
Arizona	23	27	31	15	Nevada	30	31	33	28
Arkansas	31	23	29	41	New Hampshire	17	24	18	6
California	42	35	35	45	New Jersey	32	41	26	26
Colorado	10	15	2	21	New Mexico	41	38	37	39
Connecticut	24	16	44	14	New York	39	44	48	19
Delaware	13	25	16	1	North Carolina	6	4	9	16
Florida	48	50	42	36	North Dakota	3	2	3	20
Georgia	21	30	10	31	Ohio	9	8	4	24
Hawaii	28	18	22	42	Oklahoma	44	46	38	38
Idaho	25	22	23	30	Oregon	27	37	27	17
Illinois	46	49	32	46	Pennsylvania	45	48	47	32
Indiana	8	9	17	8	Rhode Island	49	45	49	35
Iowa	15	21	19	4	South Carolina	36	33	36	37
Kansas	4	6	7	13	South Dakota	12	11	20	11
Kentucky	38	39	39	33	Tennessee	11	19	12	7
Louisiana	37	34	25	48	Texas	18	7	1	44
Maine	26	36	34	5	Utah	5	12	6	9
Maryland	35	29	46	29	Vermont	43	40	50	27
Massachusetts	29	28	41	18	Virginia	2	1	8	12
Michigan	7	3	5	23	Washington	19	14	14	25
Minnesota	14	17	24	2	West Virginia	50	47	43	50
Mississippi	33	30	21	49	Wisconsin	22	32	30	10
Missouri	34	42	28	34	Wyoming	16	10	13	22

Texas's liability climate encourages growth and job creation with one caveat—the Judicial Hellholes in South Texas, which account for the most significant variance of all states in the rankings.

23 ARIZONA

Arizona's liability climate is, at best, neutral to growth and job creation and appears to be trending downward. Insurance loss ratios in the state are in the bottom 40 percent of all states. The two econometric studies rank Arizona's liability climate in the bottom half of all states. Although the Arizona Legislature abolished joint liability in most tort cases, the Arizona Constitution does not permit limits on damage awards. Attorney General Terry Goddard and the Supreme Court majority are regarded as activists.

24 CONNECTICUT

While Connecticut's composite ranking is 24, there is a significant variance among the three indices. The HWV Index and the Harris Poll rank the state at 16 and 14 while the PRI Index ranks it at 44. Despite some liability reform legislation in the mid-1980s, including reasonable limits on punitive damages and elimination of joint liability, the AJP partner that helped prepare this profile rated the state's liability climate as discouraging growth and job creation. Supporting this assessment are insurance loss ratios (especially for product liability, medical malpractice and auto, and self-insurance), which rank Connecticut in the bottom half of all states. The absence of reasonable limits on non-economic damages may help explain the poor ranking on insurance loss ratios. Another negative factor is activist Attorney General Richard Blumenthal, who, along with former New York Attorney General (now Governor) Eliot Spitzer, led the movement for regulation through litigation. Connecticut's liability climate may be trending downward.

25 IDAHO

Although liability reforms were passed in 2003, they are yet to be reflected in insurance loss ratios; Idaho ranks near the bot-

tom of all states on insurance loss ratios. The Supreme Court maintains a rule-of-law majority. Attorney General Lawrence Wasden subscribes to the rule of law. When insurance loss ratios improve, Idaho will move up in the rankings.

26 MAINE

There is a significant variance among the three national rankings with the two econometric studies ranking Maine at 36 and 34 and the Harris Poll ranking the state at 5. Insurance loss ratios in Maine rank 26th in the nation. The Supreme Court majority and Attorney General Steven Rowe are viewed as activists. The Maine Legislature has not enacted any significant liability reform legislation. The state's liability climate is, at best, neutral to growth and job creation. Maine may well become a "red light" state in the next ranking.

27 OREGON

The state's liability climate discourages growth and job creation. Insurance loss ratios in the state are in the bottom 40 percent of all states. The Supreme Court has an activist majority, which has been unwilling to limit punitive damages and invalidated reasonable limits on non-economic damages in medical malpractice cases. The 2008 ballot contains two proposals that will draw strong opposition by the trial bar: limitations on contingency fees and penalties for frivolous lawsuits. Governor Ted Kulongoski, a former plaintiff trial lawyer, and the Legislature do not support common sense liability reforms. Although Oregon is ranked one spot lower than Hawaii (28), which is a "yellow light" state, Oregon well deserves its "red light" state designation.

28 HAWAII

The AJP partner that assisted in preparing this profile rated Hawaii's liability climate

as neutral to growth and job creation. Insurance loss ratios in the state are in the top 25 percent of all states. Attorney General Mark Bennett is a strong supporter of the rule of law. Hawaii's liability laws, however, allow joint liability and, in product liability lawsuits do not limit non-economic or punitive damages. In addition, the Supreme Court has an activist majority. Hawaii is a state to be watched as are the opinions of its Supreme Court.

29 MASSACHUSETTS

There is a significant variance in the PRI Index ranking of 41 and the Harris Poll ranking of 18 for the "Bay State." Although total insurance loss ratios in the state are in the top 40 percent of all states, the product and general liability insurance loss ratios are in the bottom 20 percent. Instead of fairly balancing the interests of consumers and business, the Commonwealth's liability climate is decidedly anti-business. With the election of Governor Deval Patrick and an antireform legislature, the prospects for improving the liability laws of Massachusetts are dim.

30 NEVADA

While there are limits on non-economic and punitive damages in some areas of Nevada law, they do not apply to manufacturers, distributors or sellers of allegedly defective products. Nevada law allows joint liability. Insurance loss ratios in the state are in the bottom half in the country. There is an activist majority on the Supreme Court.

31 ARKANSAS

Determining whether the liability climate of Arkansas is neutral or discouraging to growth and job creation was a close call. The AJP partner that assisted in preparing this profile rated the state's liability climate

as either neutral or conducive to growth and job creation. While that partner also rated the Supreme Court as balanced, the Supreme Court is unpredictable and for this reason the Court should be regarded as activist. Two of three indexes ranked Arkansas in the bottom half of all states. With insurance loss ratios also in the bottom half of all states, Arkansas's liability climate should be viewed as discouraging to growth and jobs creation.

32 NEW JERSEY

New Jersey has a neutral-to-discouraging liability climate when it comes to growth and job creation. The Legislature has enacted modest reform legislation. However, insurance loss ratios in the state are 43rd worst in the nation and the New Jersey Supreme Court is led by an activist majority, which contributed to the state being ranked 41 in the HWV Index.

33 MISSISSIPPI

Mississippi's composite ranking is low, but it is a state in transition. Once ranked among the five worst states for liability climate, the state now boasts common sense legal reforms, an emerging rule-of-law majority on its Supreme Court, and a stalwart liability reformer in Governor Haley Barbour. Attorney General Jim Hood, however, is an activist attorney general who sued several insurers in connection with Hurricane Katrina. While Mississippi's insurance loss ratios are still among the worst in the nation, they should improve with the reforms enacted. Mississippi is clearly a state to watch because of Governor Barbour's continuing efforts to make the state attractive for growth and jobs creation.

34 MISSOURI

While Missouri's liability climate historically discouraged growth and job cre-

ation, it is a state in transition. A strong liability reform package was passed by the Missouri Legislature and signed into law by pro-reform Governor Matt Blunt. These reforms included reasonable limitations on punitive and non-economic damages, venue reform, and modest reform to joint liability. However, the state Supreme Court has an activist majority and Attorney General Jay Nixon, an ally of the trial bar, is an activist attorney general. Nevertheless, Missouri is a state to watch for possible improvement of its liability climate.

35 MARYLAND

Maryland has reasonable limits on non-economic damages, medical liability reform, and some modest punitive damage reforms. Insurance loss ratios in the state rank 24th in the nation. Nonetheless, the three indices rank Maryland's liability climate at 29, 46 and 29, indicators that the state's liability climate discourages growth and jobs creation. The Supreme Court has an activist majority and the trial bar is pushing aggressively for "market share" liability standards in lead paint litigation. With trial lawyer-friendly majorities in both houses of the legislature and the Governor's mansion, Maryland's liability climate should not be expected to improve.

36 SOUTH CAROLINA

Despite Governor Mark Sanford's support of liability reform and the enactment of modest reforms in 2005, South Carolina's liability climate does not favor growth and job creation. While the AJP partner that assisted in preparing this profile rated the state's liability climate as neutral to growth and job creation, more reform is needed before South Carolina can move up in the rankings. Legislators supported by the trial bar dominate the judiciary committees in both houses of the South Carolina Legisla-

ture; additional reforms in the near future are doubtful.

37 LOUISIANA

Insurance loss ratios in Louisiana are near the bottom 20 percent of all states. Although the Supreme Court is currently balanced, Attorney General Charles Foti is an activist attorney general. Louisiana law does not permit punitive damages except in limited situations (e.g., intoxicated drivers, pollution lawsuits) or joint liability. There are no limits on non-economic damages other than in medical malpractice lawsuits.

38 KENTUCKY

Insurance loss ratios in Kentucky are in the bottom 30 percent of all states. The Supreme Court is controlled by an activist majority and Attorney General Greg Stumbo is an activist attorney general. The AJP partner that assisted with this profile rated Kentucky's liability climate as discouraging growth and job creation. While Governor Ernie Fletcher has made liability reform a priority, the leadership of the Kentucky House is hostile to reform, making the passage of any effective legislation difficult.

39 NEW YORK

Insurance loss ratios in New York are 38th worst in the country. Although there has been modest joint liability reform in New York, there are no limitations on damage awards. There is an activist majority on New York's high court and an activist attorney general in Andrew Cuomo. The liability climate in New York discourages growth and job creation.

40 ALABAMA

Despite a rule-of-law majority on its Supreme Court and comprehensive liability

reform legislation, Alabama's liability climate is not conducive to growth and job creation. Insurance loss ratios in the state are in the bottom 20 percent of all states. The rule-of-law majority on its high court may be weakening with the election of two activist justices, including the Chief Justice, in 2004 and 2006. The AJP partner that assisted in the preparation of this profile, however, rated the state's liability climate as neutral to growth and jobs creation. This is consistent with the HWV Index rating (26), which is biased toward states with restrained majorities on their supreme courts.

41 NEW MEXICO

The state's liability laws do not lead to fair and predictable results and its Supreme Court is led by an activist majority. The American Tort Reform Association may soon declare New Mexico a Judicial Hellhole.

42 CALIFORNIA

Unwarranted, large jury verdicts are the gold now being struck in California courts. The current gold rush is fueled by tort laws that are badly tilted toward plaintiffs. Although Los Angeles County is no longer designated

a Judicial Hellhole, it remains one of the most unpredictable and inhospitable venues for business defendants in the country. Although the Supreme Court does not have a rule-of-law majority, it is generally hesitant to ignore the will of the state legislature and rewrite legislation the court may think unwise. Attorney General Edmund Brown, former mayor of Oakland and former governor of California, should understand that an abusive legal system kills jobs and investment, providing hope he will display a more even hand than his predecessor on issues important to both consumers and business. Attorney General Brown deserves credit for lifting the veil of secrecy used by his predecessor to shield from public view the 1,700 no-bid contracts awarded to outside lawyers, many, if not most of them, plaintiff lawyers. Some of his initial public statements about litigation, however, give some pause.

43 VERMONT

With insurance loss ratios among the five worst in the nation, Vermont's liability climate discourages growth and job creation. The Legislature has enacted some modest liability reforms, such as reasonable limits on punitive and non-economic damages in wrongful death cases. The Supreme Court majority and Attorney General William Sorrell are regarded as activists.

44 OKLAHOMA

Insurance loss ratios in Oklahoma are in the bottom 30 percent of all states. Sequoia County is fast becoming a class action magnet. While the Oklahoma Legislature passed comprehensive liability-reform legislation this session, it was vetoed by Governor Brad Henry despite his pledge four years ago for "Texas Plus" tort reform. Governor Henry turned his back on Oklahoma voters and also on growth and jobs creation. Attorney General Drew Edmondson is a highly activist attorney general.

Trial Bar's Playbook

Smart companies would be wise to study the trial bar's new business model—and develop opposition strategies. Here's how the trial bar gets it done, page by page.

■ **Page One** Research and Development: Pour over every successful company's government filings, press releases, and public documents. The purpose? To find the next billion-dollar "mistake"—a product recall, warranty issue, or any corporate decision that can be grist for the litigation mill.

■ **Page Two** Dress Rehearsal: Test the alleged mistake on mock juries and the media. If the story sells, the trial bar moves to Page Three.

■ **Page Three** Bring the issue to government regulators, including federal agencies and state attorneys general, to persuade them to open an official investigation and use their subpoena power to comb through internal documents for more evidence.

■ **Page Four** Friendly Domiciles: File the lawsuit, if possible, in one of those "magic jurisdictions" where corporate defendants have little chance of a fair trial—the

courtrooms that the American Tort Reform Association has rightly spotlighted as "Judicial Hellholes."

■ **Page Five** The Media Frenzy: Work the media, especially the network news magazines, to generate incendiary coverage about their lawsuits. As far as the unlucky corporate target goes, these media events are properly seen, in Old West parlance, as "necktie parties"; that is, public hangings before the trial has even started. Then, work the Street. Plaintiff lawyers have been known to brief financial analysts in an effort to drive down share price. Some plaintiff lawyers even have television production facilities in their offices.

The goal of this coordinated campaign is to create a perfect storm of adverse media coverage, government subpoenas, share value loss, and blows to product reputation to overwhelm companies and their boards, driving them to the expediency of the bargaining table. The result is often a settlement reaching tens of millions of dollars (or more), even though the lawsuit is without merit.

45 PENNSYLVANIA

Insurance loss ratios in Pennsylvania are third worst in the country. The state's liability climate discourages growth and job creation. The legislature is not expected to pass any reform legislation, and Governor Edward Rendell would surely veto any that passed. While the rule-of-law majority on the Pennsylvania Supreme Court appears to be weakening, Attorney General Tom Corbett is a staunch defender of the rule of law.

46 ILLINOIS

Illinois consistently ranks as having one of the worst liability climates in the nation largely because three of ATRA's Judicial Hellholes are located in the state: in Cook County (Chicago), St. Clair County, and Madison County, which has become a magnet for lawsuits. Retired Madison County Judge John DeLaurenti acknowledged this when he said, "There's some merit to the accusations of bias in Madison

County. I don't know if it's a judicial hell-hole, but just figure it out. When people come from hither and thither to file these cases, there's gotta be an inducement, doesn't there? They're not coming to see beautiful Madison County." Despite the election of a rule-of-law Supreme Court Justice in 2004 and some moderate opinions from that court and the courts in Madison County, insurance loss ratios are in the bottom 40 percent of all states. Attorney General Lisa Madigan is an activist.

47 MONTANA

Montana ranks fourth worst in the country. Although the state is regarded as a conservative state, its liability laws decidedly favor plaintiffs. Insurance loss ratios are the second worst of all states. Montana's Supreme Court is led by an activist majority and Attorney General Mike McGrath is regarded as an activist attorney general. With reform opponents controlling the Senate and the governor's mansion, Montana's legal climate is not expected to improve.

48 FLORIDA

Despite an engaged business community and enactment of liability reform legislation, including asbestos reform and the elimination of joint liability, Florida's legal climate discourages growth and job creation. Insurance loss ratios are dead last of all 50 states. ATRA designates South Florida a Judicial Hellhole. The Supreme Court is one of the most activist high courts in the country and has invalidated liability reform legislation. While neither Governor Charlie Crist nor the leadership of the Florida Legislature have made liability reform a priority, Attorney General Bill McCollum is a strong defender of the rule of law. Having previously served in the U.S. House, McCollum understands fully that legislatures, not courts or attorneys general, make the law. Unless the Supreme Court develops a majority

devoted to the rule of law instead of the rule of lawyers, the prospects for a fair legal climate in Florida are dim.

49 RHODE ISLAND

While Rhode Island juries are not known for excessive verdicts, and punitive damage awards are rare, the AJP partner that helped with this profile reports a noticeable upward trend in recent jury awards. The state's lawsuit against four lead paint manufacturers under a public nuisance theory was the first attempt by a state to hold the industry responsible for the dangers of lead paint in old buildings. Three of the four companies were found liable by a Rhode Island jury—a verdict that could cost the companies billions of dollars unless it is reversed on appeal. The Supreme Court has an activist majority and Attorney General Patrick Lynch is regarded as an activist. Its liability climate is not conducive to growth and job creation.

50 WEST VIRGINIA

Despite the best efforts of Governor Joe Manchin, the state's liability climate is the worst in the nation. Insurance loss ratios are in the bottom 40 percent of all states. ATRA declared it a Judicial Hellhole, the only state to earn statewide designation. Despite the recent election of rule-of-law Justice Benjamin and the presence of Justice Maynard, the Supreme Court's majority is decidedly activist. Attorney General Darrell McGraw is highly activist. Former Chief Justice Neeley's comment sums up West Virginia's ongoing problem attracting investment, growth and jobs: "As long as I am allowed to redistribute wealth from out-of-state companies to in-state plaintiffs, I shall continue to do so." **D**

To learn more about the American Justice Partnership, please visit www.AmericanJusticePartnership.org or www.directorship.com.