



Navigating the Most Litigious US Venues

Litigation and Dispute Resolution



This article provides corporate counsel with a snapshot of the 2019-2020 worst jurisdictions for corporate defendants — famously dubbed “Judicial Hellholes®” by the American Tort Reform Foundation. Regardless of what you may call them, keeping a finger on the pulse of these dangerous

jurisdictions is crucial for strategically evaluating and resolving legal disputes.

The article identifies and analyzes the legal climate and key issues plaguing these inhospitable jurisdictions and provides advice for corporate counsel in navigating US Judicial Hellholes.

Some may say that we live in a litigious society, but just how litigious?

A [recent study](#) estimated that the US litigation system (cost and compensation paid) totaled a staggering US\$429 billion — the equivalent of 2.3 percent of US gross domestic product. Put otherwise, the average household in the United States is taxed an additional US\$3,329 a year to account for this hidden “litigation tax.”

But not every state is a hotbed for litigation. There are significant variations in the legal climate and litigiousness within the 50 states. It is not surprising that 89 percent of senior lawyers and executives at companies with at least US\$100 million in annual revenue feel that the litigation climate of a state is likely to impact important business decisions, such as where to expand or constrict business.

Top 10 Judicial Hellholes of 2019-2020

Every year the American Tort Reform Association (ATRA) publishes its list of the top 10 Judicial Hellholes®. Without a doubt, 2019 marked the year of large asbestos and opioid verdicts against pharmaceutical giant Johnson & Johnson.

The latest ATRA report identifies the following jurisdictions as the most dangerous venues for corporate defendants:

1. Philadelphia Court of Common Pleas

Why? This year’s “winner” was the home of the US\$8 billion Risperdal verdict against J&J alleging that the anti-psychotic drug Risperdal, prescribed to treat autism, caused boys to grow breasts. Philadelphia replaced California as the worst place to get sued in the United States due to [a flood](#) of asbestos litigation and big-pharma class actions.

2. California

Why? California’s reputation as a breeding ground for class actions and anti-arbitration measures routinely lands the state at the very top of the Judicial Hellholes list. California’s latest claim to fame was the codification of a new legal standard for determining whether workers are classified as independent contractors for purposes of California wage orders. This [legislation](#) vastly expands the definition of an employee, opens the floodgates for wage and hour lawsuits, and targets gig economy companies like Uber, Lyft, and [Instacart](#).

3. New York City

Why? New York remained at the top of this list, noting an unprecedented [US\\$300 million punitive damages verdict against Johnson & Johnson](#) — one of the highest verdicts to date in the Johnson & Johnson talc powder litigation.

4. Louisiana

Why? Louisiana has been included in the rankings for the past seven years largely due to an excessive volume of litigation (Louisiana ranks fifth in the United States in litigation costs) and [“shakedown” lawsuits](#) against the energy industry — the state’s top employer. The 2019 *Wall Street Journal* editorial board called Louisiana the [“trial-lawyer state.”](#) criticizing the longstanding cozy relationships between the state, the courts, and the plaintiff’s bar.

5. City of St. Louis, Missouri

Why? “The Show-Me-State” showed us once again that it deserves a spot on the Judicial Hellholes list. Despite moving down from the number one spot in 2016-2017, St. Louis continues to deliver [jaw-dropping verdicts](#) for out-of-state plaintiffs. Missouri recently put in place legal measures to reduce its rampant forum-shopping by passing a venue and joinder [reform bill in 2019.](#)

6. Georgia

Why? A drastic spike in [“nuclear verdicts”](#) (verdicts in excess of US\$10 million) and the unprecedented expansion of liability imposed on property owners for third-party crime, propelled this newcomer directly to spot number six of the ATRA’s Judicial Hellholes list. To make matters worse, in March 2020, the [Georgia Court of Appeals](#) opened Pandora’s Box by permitting claims under Georgia’s anti-gang statute, which allows property owners to be sued for treble damages.

7. Illinois (Cook, Madison, and St. Clair counties)

Why? Illinois has long been a magnet for biometric privacy class-actions, such as Facebook’s face-scanner class-action. In 2019, the number of class actions brought under the state’s biometric [privacy laws tripled](#) following an [Illinois Supreme Court decision](#) holding that a consumer no longer had to prove injury/harm to recover under the state’s biometric and cyber privacy laws.

8. Oklahoma

Why? Newcomer Oklahoma made the list in large part due to a [US\\$572 million judgment against Johnson & Johnson](#) (later reduced to US\$465 million) in the first trial over the state’s opioid crisis. Oklahoma’s AG demanded reparation damages for allegedly creating a public nuisance — Oklahoma’s opioid crisis.

9. Minnesota Supreme Court/Twin Cities

Why? In 2019, Minnesota’s high courts continued to issue liability-expanding decisions that impact several industries, including the automotive and healthcare industries. Notably, in Minnesota, a physician may be held [liable for malpractice](#) even in the absence of a traditional physician-patient relationship. Minnesota has also drastically expanded the [parameters of personal jurisdiction](#) in a decision holding Ford ‘at home’ in Minnesota despite no connection to the forum other than general marketing efforts. The [decision is on appeal](#) to the US Supreme Court, with oral arguments set for July 2020.

10. New Jersey

Why? New Jersey is another first-timer on the list, largely due to legislative limits imposed on mandatory arbitration agreements. In the last few years, New Jersey has served as a key

battleground in the fight over mandatory arbitration clauses in a few [high-profile lawsuits](#) against Uber, Amazon and Pfizer. In addition, New Jersey passed one of the nation's [toughest “wage theft” bills](#).

The ATRA is not alone in ranking venues from best to worst for litigation. The [US Chamber Institute for Legal Reform \(ILR\)](#) publishes annual “Lawsuit Climate Surveys,” which provide another beneficial tool for corporate counsel in evaluating the temperature of any given venue. Unlike the ATRA's list, the ILR focuses on surveying senior executives and in-house counsel on a variety of business health factors.

Last year's ILR Survey seemed to agree with the ATRA that Illinois, Louisiana, California, Missouri, New Jersey and Georgia are among the top 10 worst jurisdictions for corporate defendants. In addition to these six states, the ILR identified Mississippi, Florida, Alabama, and West Virginia atop its top 10 list — jurisdictions that were not identified by the ATRA but have appeared on the ATRA list in years past.

You found yourself in a Judicial Hellhole... now what?

“In preparing for battle I have always found that plans are useless, but planning is indispensable.”

– Dwight D. Eisenhower

Navigating the top US Judicial Hellholes requires preparation, strategy, and expert advice. In this case, two of the article's authors are outside counsel at a firm that has practiced in every state, has lawyers who are licensed in more than 26 states, and have litigated via pro hac vice in all of them. Below, they offer guidance to corporate counsel finding themselves on the battlefield of a legal landmine venue.

1. Where your registered agent is located may cost you millions

The first (and perhaps most overlooked) line-of-defense against landing in a Judicial Hellhole involves a consideration of where to register a business. In several jurisdictions, a company can be sued in any county, district, or state where a company does business and has a registered agent — often leading to forum shopping.

Businesses can guard against forum shopping, to some extent, by making informed decisions regarding where to register agents. Yet, even in states like Georgia, a jurisdiction that the ATRA and ILR agree deserves a top-10 designation, there are counties that are safer for corporate defendants than others. Assuming no other jurisdictional hurdles exist, with reasoned legal advice, a business can change the location of a registered agent to a more favorable county.

Unfortunately, companies often wait until it is too late and large-exposure litigation is filed before they realize they should have considered their options. Our advice: Call lawyers with sufficient trial experience to help you navigate where your registered agent should be located. Changing the location of your registered agent could save you a fortune when litigants come knocking.

2. The personal jurisdiction battlefield may require a fight-or-flight response

Over the last decade, the US Supreme Court has issued several landmark opinions, which collectively limit the exercise of general and specific jurisdiction over corporate defendants based on due process concerns. The overall impact of these decisions places restrictions on forum shopping in Judicial Hellhole jurisdictions. Practitioners and corporate counsel should closely monitor developments on the personal jurisdictional front and consider aggressive motions practice from the outset of litigation to get out and stay out of Judicial Hellholes if at all possible.

3. Have your ammunition and resources ready

Understanding the legal climate of your state, county and specific jury pool is crucial. Call counsel with actual trial experience across many jurisdictions. In addition, the following links and resources provide centralized venue analysis that is updated annually:

- [Judicial Hellholes® annual reports](#)
- [The ILF annual reports](#)
- [CNBC annual business friendliness reports](#)

4. Demand verdict and settlement research to identify Judicial Hellholes early

Early and frank discussions with your local counsel are important. Verdict and settlement research for the particular state, county, and plaintiff's counsel can provide a strategic advantage not only in trial but also at the negotiation table.

5. Incorporate Judicial Hellholes into your reserve calculations

For the corporate counsel with a multi-state practice, consider implementing a ranking system (1 through 10) for various venues, and potentially for frequent flyer opposing counsel. This ranking system, which should be updated by outside counsel on a routine basis, can provide a meaningful tool in setting reserves for any given case.

6. If all else fails, humanize the company

We all know the legal mantra — “humanize the company.” But, really, help your outside counsel find the “face of the company” who will tell “the story” and spare no costs on developing the narrative. We leave you with a heartfelt example of how Trevor Newberry, assistant general counsel at PruittHealth, Inc., successfully humanized a nursing home chain by simply discussing an actual event concerning one of its many great employees:

“As assistant counsel for a large-chain nursing home, I am mindful of the fact that Pruitt has a big target on its back. When stories like Ashlyn Broderick’s make the news, it is a reminder of just how powerful the human touch can be in telling the corporate story. Ashlyn Broderick is an administrator at a nursing home in Georgia. She chose to have her wedding at the facility, surrounded by her patients, who served as her bridesmaids, with some patients walking her down the aisle. Stories like Ashlyn’s diffuse the ‘corporate’ persona and help tell a different story — one of commitment to caring, one that jurors can get behind.”

For better or worse, knowing your jurisdiction and understanding how to navigate the unique challenges of a Judicial Hellhole venue is crucial for successfully resolving a case. But you don’t

have to do it alone. Oftentimes, the best insight comes from competent and connected outside counsel with cross-jurisdictional experience as well as ties to the region. We believe it is prudent, and potentially a tremendous cost-saver, to consider these issues before you are served with a complaint in a bad venue, or even immediately thereafter.

Further Reading

“Judicial Hellholes” is a registered trademark of ATRA used by ATRF under license.

The ATRA also included seven states on its “watch list,” which include: Colorado, Florida, Maryland, Montana, Pennsylvania, South Carolina, and West Virginia.

Risperdal lawsuits make up two-thirds of the caseload in the Philadelphia Court of Common Pleas.

A San Diego court recently enjoined Insta cart from classifying its workers as independent contractors.

The impact of this hidden “tort tax” on the Louisiana economy ranks among the top 5 states in the nation, with litigation costs equaling almost 3 percent of the state’s Gross Domestic Product (GDP).

St. Louis is at the center of controversial litigation alleging talcum powder causes cancer. Juries there have returned massive verdicts as high as US\$4.7 billion in a single case in which 17 of the 22 plaintiffs were from out of state.

State legal systems were ranked on several key elements, including: the competence and impartiality of its judges and juries, the treatment of tort and class action litigation, and enforcement of venue requirements and standards for scientific evidence.

Last year’s ILR Survey includes six of the ten venues on ATRA’s Judicial Hellhole list, including: (1) Illinois, (2) Louisiana, (3) California, (4) Mississippi, (5) Florida, (6) West Virginia, (7) Missouri, (8) New Jersey, (9) Alabama, and (10) Georgia.

See *Bristol-Myers Squibb v. Superior Court of California San Francisco*, 137 S. Ct. 1773 (2017) (BMS); *BNSF Railway v. Tyrrell*, 137 S. Ct. 1549 (2017); *Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *J. McIntyre Machinery v. Nicastro*, 564 U.S. 873 (2011); and *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915 (2011).

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