

Judicial Hellholes: Don't Get Burned

Risk Management Techniques and Defense Strategies for Litigating in Plaintiff Friendly Jurisdictions

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Presenter



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- Marc Perry is a principal with Post and Schell P.C.
- Mr. Perry has successfully represented members of the hospitality industry and health care industry in litigation in state and federal courts.
- Mr. Perry has tried and litigated complex premises liability, catastrophic injury and wrongful death claims on behalf of the hospitality and health care industries, including claims for slip/trip and fall, criminal conduct of third parties on the premises, negligent security and bed bug claims.

I. What is a Judicial Hellhole?

- A judicial hellhole is defined as: a jurisdiction where “judges systematically apply laws and court procedures in an unfair and unbalanced manner, generally against defendants in civil law suits.”
- The judicial hellhole designation is compiled in a publication of the American Tort Reform Association. The report is an annual snapshot of where the Associations’ membership is most concerned with the fact that the “scales of justice have been tipped against them.”

II. What are the factors that are considered in defining a judicial hellhole?

- Judicial hellholes are the subject of considerable controversy
- Defendants affectionately call them “plaintiff friendly jurisdictions”
- Plaintiff’s attorneys call them “a field of dreams”

What are the factors that are considered in defining a judicial hellhole? (cont'd.)

- Permissive forum shopping
- No caps on non economic damages
- New and expansive legal theories
- Excessive awards
- Irrational, unsound evidentiary rulings
- Elected judiciary
- Relationships between elected judiciary and star lawyers

III. Ranking of the 2011 Judicial Hellholes

1. Philadelphia, Pennsylvania
2. California (particularly Los Angeles and Humboldt Counties)
3. West Virginia
4. South Florida
5. Illinois (Cook County)
6. Nevada (Clark County)

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes

- **Philadelphia, Pennsylvania:**
 - Number 1 Judicial Hellhole in 2010 and 2011
 - Complex Litigation Center where judges virtually advertise their willingness to accept litigation from other courts around the nation
 - Host to an especially large number of cases
 - Receptive to litigation tourism
 - Joint and several liability
 - *Daubert vs. Frye (Junk Science)*
 - Unusually large verdicts
 - Reverse bifurcation of trials
 - Elected judges

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- California court system (particularly Los Angeles and Humboldt County)
 - Excessive punitive damages are permitted *Bullock v. Philip Morris*. Court upheld punitive damage award (16 times larger than a compensatory award).
 - The court awarded punitive damages of \$13.8 million on a \$850,000.00 compensatory award (contrary to US Supreme Court's decision regarding punitive damages that cannot exceed compensatory damages by more than a single digit ratio). *State Farm v. Campbell*, 538 U.S. 408.
 - *Rosenberg v. Encino Tarzana Medical Center*, \$65 million dollars in punitive damages.

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- West Virginia
 - Lack of appellate review
 - In 48 states, and the District of Columbia and the Federal Court system, parties have the right to at least one appeal as a right. In West Virginia, appellate review is discretionary
 - Elected judges
 - Novel legal theory, medical monitoring cases

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- West Virginia (cont'd.)

- Judge Richard Neely served as a West Virginia Court of Appeals Justice, including several terms as Chief Justice, for over 22 years until 1995. He has spoken candidly of West Virginia as a plaintiff friendly jurisdiction in the book “The Product Liability Mess...How Businesses Can Be Rescued From The Politics of State Courts.”

- **Judge Neely wrote:** *“As long as I am allowed to redistribute wealth from out of state companies to in state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away but so is my job security because the instate plaintiffs, their families and friends will reelect me.”*

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- West Virginia (cont'd.)
 - **Justice Neely stated further:** *“What do I care about the Ford Motor Company? To my knowledge Ford employs no one in West Virginia in its manufacturing processes and except for selling cars in West Virginia, it is not a West Virginia taxpayer. The best thing I can do, and I do it all of the time, is to make sure that my own state’s residents get more money out of Michigan than Michigan residents get out of us”.*

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- West Virginia (cont'd.)
 - Bowers v. Westinghouse, a medical monitoring case. Plaintiffs had simply been exposed to a toxic substance but had no symptoms of disease.
 - The Court permitted recovery financially and rejected precedent that establishes that a claim for medical expenses must rest upon the existence of a physical harm or actual disease, not a speculative one. In Bowers, all that had to be established is that the plaintiff has a significantly increased risk of contacting a particular disease relative to what would be the case absent exposure.

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- West Virginia (cont'd.)
 - Practical effect of Bowers, in West Virginia is that the medical monitoring cases reach every industry, and the practical effect is that it permits individuals from any industry to bring a medical monitoring claim, including the hospitality industry where individuals who launder linens and are exposed to some type of toxic substance can bring a claim even if they did not have an immediate injury.

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- South Florida
 - Notoriously large verdicts
 - Low standard of proof for slip and fall liability
 - Resort destination – resort torts

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- Chicago (Cook County)
 - Litigation tourism
 - Syngerta case judicial hellhole defense
 - Lawsuit abuse

Ranking of the 2011 Judicial Hellholes

Characteristics of Judicial Hellholes (cont'd.)

- Nevada (Clark County)
 - Civil “death penalty”
 - Bahena vs. Goodyear Tire and Rubber Co.,
Case No. 49207 (Nev. 2009)

IV. How to survive if your litigation has fallen into a judicial hellhole

- Retain good local trial counsel:
 1. Familiarity with courts and judges
 2. Intimately familiar with rules and jurors
 3. Familiar with relationships between judges and attorneys and who has influence
 4. While influential local counsel will not guarantee you will win the case, it will insure that your arguments will be heard properly and effectively
 5. Managing expectations

How to survive if your litigation has fallen
into a judicial hellhole (cont'd.)

Jackpot Justice Judicial Hellholes

By: Pacific Research

V. Litigation Techniques

- Federal Removal:
 - Diversity jurisdiction – 28 U.S.C. § 1332
- Why Federal Court?
 - Rule 11:
 - Lawyers are held to higher standard in order to deter frivolous law suits
 - Rule 16:
 - Admitted to enhance judicial control of litigation in order to reduce costs and delay – lesser litigation burden
 - Rule 56:
 - Summary Judgment is viewed as far more potent to rule on short cut cases

Litigation Techniques (cont'd.)

- Daubert vs. Junk Science, in state court
- Supreme Court in 1990s made certain decisions making the Federal District Court Judge the gate keeper of expert evidence to keep “junk science” out of the courtroom. General Electric v. Joiner, 522 U.S. 136 (1997) (Supreme Court undertook the task of clarifying the standard of appellate review of Summary Judgment Motions) Daubert v. Merrell Dow, 509 U.S. 579 (1993) (District Court as gate keeper who must assess the admissibility of expert evidence.
- Cumo v. Carmichael, 526 U.S. 137 (1999) Daubert applies to all experts.

Litigation Techniques (cont'd.)

- Early surveillance on first notice of claim
- Pre-litigation medical and vocational evaluations
- Self-surveillance social media research and surveillance once the claim comes in the door
- Don't wait for suit to be filed

Thoughts?

Questions?

Comments?



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