SPECIAL FEATURE Directors to Watch: Jung, Gates, Murdoch, Yang, and more

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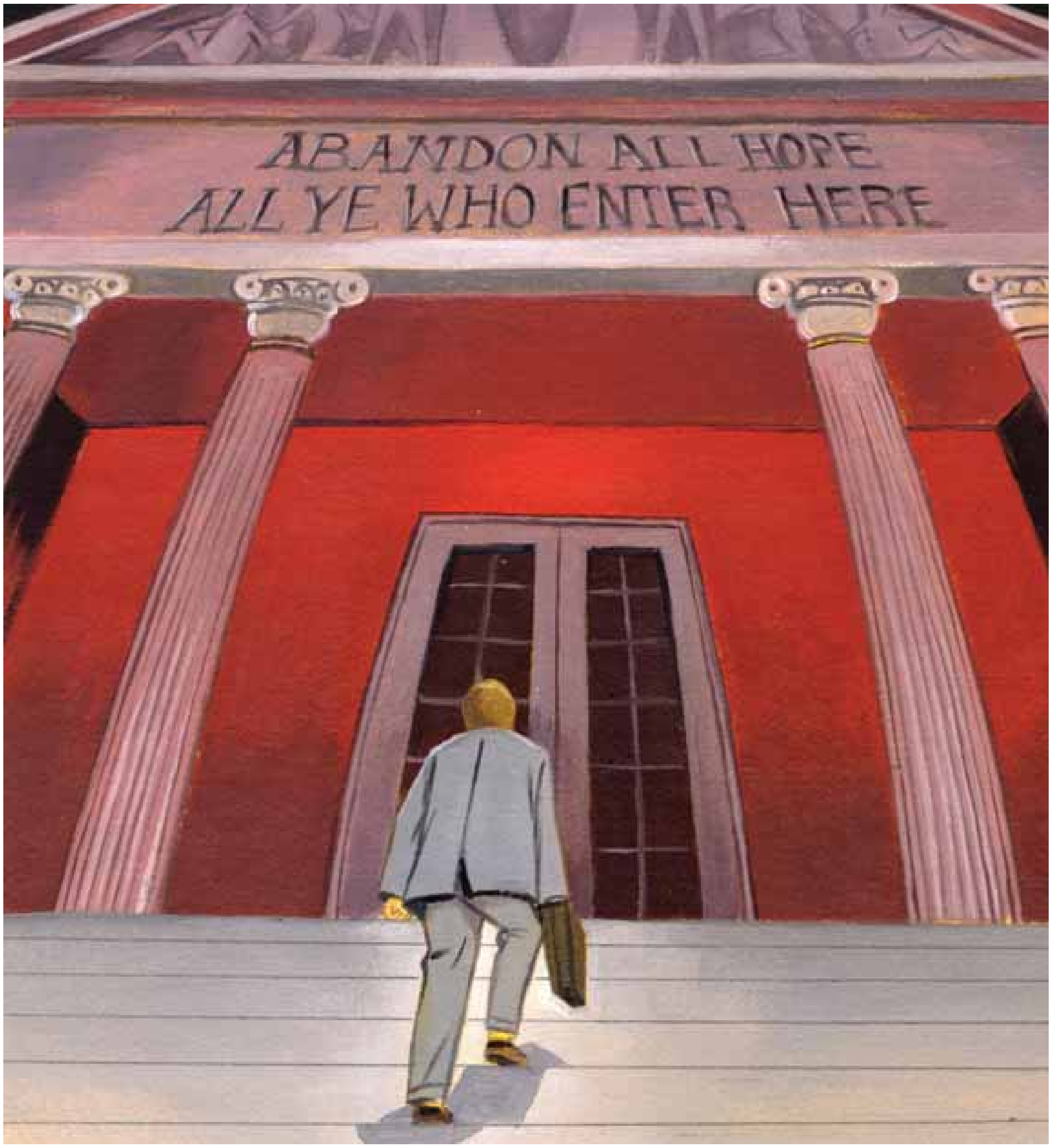


Dire States

Our Annual Guide to State Litigation. A review of the legal climates in all 50 states. *By Steven M. Hantler* 22

Dire States

By Steven B. Hantler

The annual boardroom guide to the litigation climates in all 50 states.

Commentators taking note of the recent felony convictions of several high-profile plaintiffs' lawyers, including Bill Lerach and Melvyn Weiss, have declared that the tort reform battle is over and the corporate defenders have won. Nothing could be further from the truth. While a few big guys may be cooling their heels in jail, it's still not safe to tread in America's litigation waters.

Even states considered to have favorable litigation climates might not stay that way. In fact, 10 of the 18 states in this year's *Boardroom Guide to State Litigation Climates* that have liability climates conducive to growth and job creation are also identified as "at-risk" states. In other words, the liability climates in these states are trending downward, while tort costs continue to rise.

The *Guide* is a collaboration of *Directorship* and the American Justice Partnership (AJP), a coalition of more than 70 state and national organizations that work together to achieve tort and other business-liability reform at the state level through legislative action and public support for pro-reform candidates for state office.

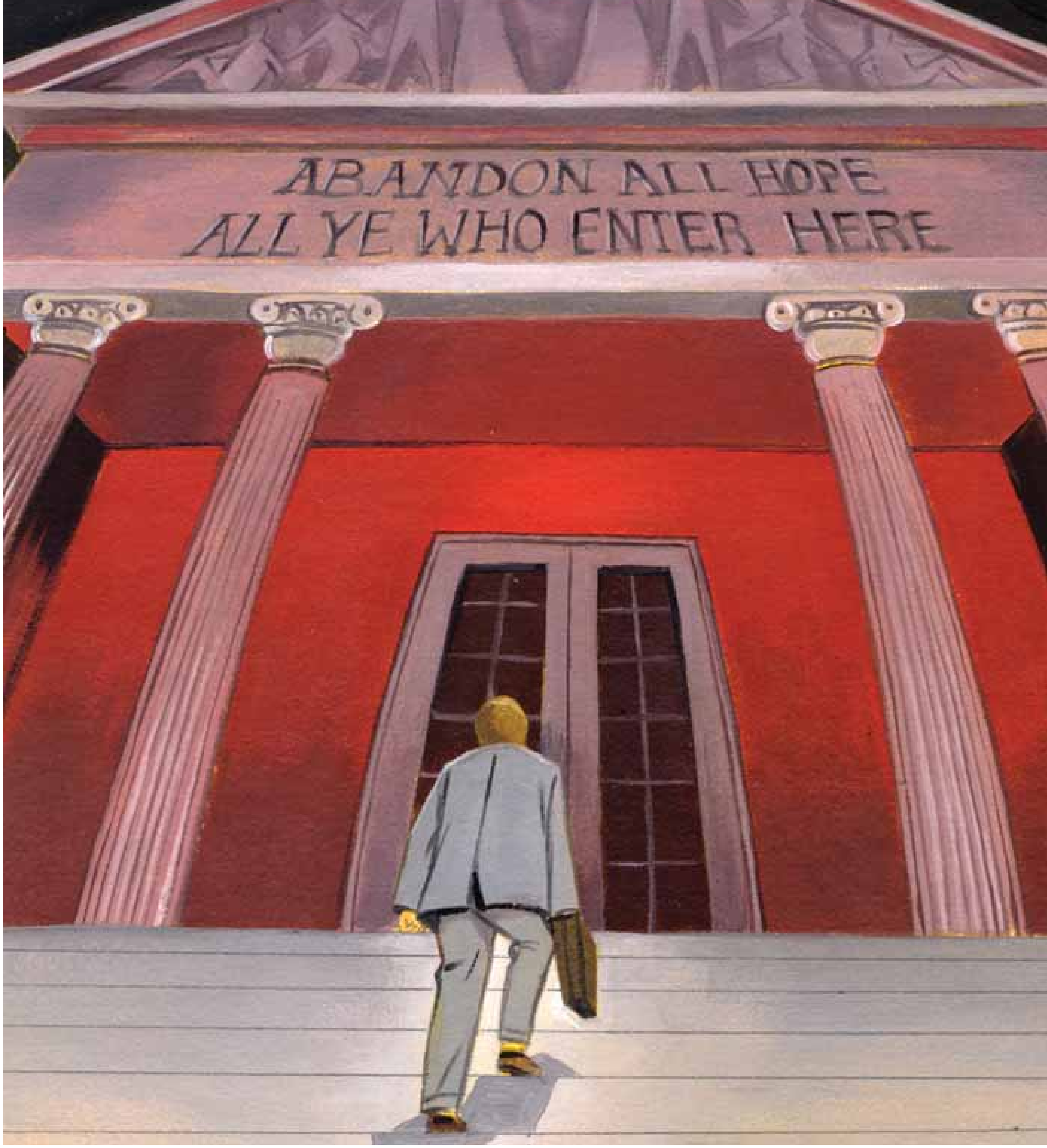
Why the mobilization? Trial Lawyers Inc. has created nearly a trillion-dollar tort industry. If America's tort system was a country and tort awards were its gross domestic product, our tort system would be the 17th largest economy. The total direct and indirect costs of our tort system are $865 billion annually; Australia's GDP is only $24 billion more than this.

Then there's the danger of the "litigation trifecta." The first stage was asbestos lawsuits, the longest-running mass-tort category in history. The second stage was the $265-billion national tobacco settlement between states and tobacco companies. The R&D arm of Trial Lawyers Inc. hopes to cash in on the third stage of the trifecta: global climate-change litigation. If the plaintiffs' lawyers hit the "litigation trifecta," U.S. tort costs could soon exceed Russia's GDP of $1.2 trillion.

One of the first of these lawsuits was recently filed in Alaska by an Eskimo village against 24 defendants representing most of the major global and U.S. energy companies. (*See related story: "The Coming Global-Warming Litigation Onslaught," page 37.*)

To make matters worse, the American Tort Reform Association, an AJP partner, reports a surge in anti-business and pro-plaintiff legislation being introduced in most states in the country. The AJP has mobilized in key states to defeat these legislative proposals, but in view of changes in the composition of state legislatures as a result of the 2006 elections, some of this legislation will almost certainly pass.

A number of states have made improvements and now have litigation climates that favor growth



MICHELLE CHANG

and job creation since this *Guide* was first presented last year. They include Tennessee, which topped our list this year, as well as Alaska, Oklahoma, and South Carolina. Yet other states slipped over the past year, meaning that their litigation climates have worsened. Nebraska dropped from first to seventh, while Colorado, Kansas, and Washington also fell in this year's rankings. *(For a complete list of states and their ranking, see page 30)*

With these states slipping back, as well as other factors like the looming possibility of climate-change litigation that could dwarf the tobacco settlement, opponents declaring victory over the plaintiffs' bar are wrong. Worse, the false perception of victory and a softening economy have caused cutbacks in corporate funding for tort reform, according to many reform advocates. Such cutbacks will only slow the pace of advancement on reform.

Directors, CEOs, and general counsel take heed: the tort liability climate remains unpredictable. Don't assume a few bright spots mean all is well: In many states, there's stormy weather ahead.

1 TENNESSEE

Moving up from 11th place in last year's rankings, Tennessee is now the top-ranked state. Pacific Research Institute's 2008 report listed Tennessee as the state with the lowest litigation risks in the country. While the state's liability climate encourages growth and job creation, it's also a state to watch because its tort laws do not place limits on non-economic and punitive damages and there are some plaintiff-friendly venues in Tennessee. The state Supreme Court is considered neutral on liability issues.

2 UTAH

Utah's liability climate encourages growth and job creation. The state maintains its top-10 ranking for its monetary tort losses. PRI's 2008 report indicates the state's overall litigation risks have improved from 24th in 2006 to 18th in 2008. Despite the state's high rankings, the Utah Supreme Court has an activist majority that has demonstrated a willingness to approve higher punitive damage awards than the U.S. Supreme Court benchmark. Unlike the state Supreme Court, Governor Jon Huntsman, Jr., Lt. Governor Gary Herbert, and Attorney General Mark Shurtleff are advocates for the rule of law with records of support for a fair and predictable liability climate in Utah.

3 INDIANA

Indiana maintains a liability climate conducive to growth and job creation. Despite middling rankings in PRI's 2008 report for monetary tort losses and litigation risks, Indiana juries are not known for excessive and unwarranted verdicts. The state Supreme Court has a rule-of-law majority. Governor Mitch Daniels is a rule-of-law advocate who stands for re-election this November. Attorney General Steve Carter, also a rule-of-law advocate, will not seek re-election in November, creating an open seat. It is important that another rule-of-law attorney general fill this vacancy.

4 OHIO

Ohio's liability climate continues to improve and promotes growth and job creation, despite a governor and attorney general hostile to liability reform. The state has a rule-of-law Supreme Court majority and a working reform coalition in its legislature. In December, its high court upheld important tort reforms enacted in recent years, including caps on non-economic and punitive damages in non-medical cases. However, Governor Ted Strickland and former Attorney General Marc Dann are both highly activist. The state Supreme

How the State Ranking Was Done

Many companies take into account state liability climates when making decisions about expansion and investment. The second annual *Boardroom Guide to State Litigation Climates* is prepared by the American Justice Partnership in collaboration with *Directorship*. Its analysis is based on two national indices—the Pacific Research Institute's 2008 U.S. Tort Liability Index and the 2008 ILR/Harris State Liability Systems Ranking—combined with the expertise of the AJP.

The Pacific Research Institute (PRI) report is a peer-reviewed econometric analysis of 41 variables, including insurance loss ratios and state laws that affect liability climates. Of the 41 variables, 28 determine an output ranking and 13 contribute to an input ranking for each state. The output ranking is a snapshot of the most recent empirical results, which include losses arising from product liability lawsuits. The input ranking, predictive of the results expected in the coming years, takes into account a state's current liability laws and how they are interpreted by the courts of that state. Other inputs include the existence of what the American Tort Reform Association (ATRA) calls a "judicial hellhole"—a jurisdiction in a state that is considered hostile to business defendants—composition of its legislature, and activism of its attorney general. Inputs, by their nature, are subjective.

The 2008 ILR/Harris State Liability Systems Ranking is a survey of some 957 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.

Composite Ranking

The final ranking in this *Guide* reflects the quantitative scores after combining PRI's output and index rankings with the Harris Poll rankings for each state, and the qualitative assessment and real-world expertise of the author of this *Guide*.

State Profiles

The numerical rankings 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 the state's liability climate encourages growth and job creation.
- A yellow light means the liability climate is neutral to growth and job creation.
- A red light means the liability climate discourages growth and job creation.

In some instances, emerging trends in a state's legal climate causes us to illustrate these changes as either cautionary (green, yellow lights), negative (yellow, red lights), or improving (red, yellow lights).