

It was brought to our attention by Ken Ward Jr., a staff writer for *The Charleston Gazette*, that there is an error in the West Virginia section of the Judicial Hellholes 2005 report. The report states that “West Virginia is one of a handful of states in which personal injury lawyers from two Florida law firms have filed class action lawsuits against DuPont stemming from its use of the popular nonstick coating, Teflon®.” No such lawsuits have been filed in the state. While we regret and apologize for the error, this does not affect the ranking of West Virginia as the third worst Judicial Hellhole. We are thankful to Mr. Ward for bringing this to our attention. We will be correcting the report by republishing with the new text for West Virginia as follows:

### **HELLHOLE #3**

#### **WEST VIRGINIA**

West Virginia continues its distinction as the only statewide Judicial Hellhole. West Virginia courts are considered “a favorite for wealthy personal injury lawyers.”<sup>80</sup> Numerous multi-million dollar settlements occurred in West Virginia this year, likely spurred on by West Virginia’s Hellhole status. “With our national reputation for unfair courts, most lawsuits are settled long before they ever have a chance of going to trial. People sued in West Virginia often settle rather than take a chance in our unfair and unpredictable courts.”<sup>81</sup>

*“West Virginia was a ‘field of dreams’ for plaintiffs lawyers. We built it and they came.” — West Virginia Judge Arthur Recht<sup>82</sup>*

Some reasons why plaintiffs’ lawyers prefer “Wild, Wonderful, West Virginia,” is their ability to pick and choose where they file claims, a legal rule that allows monetary compensation simply if one might have been exposed to a toxic substance regardless of the absence of actual injury, the lack of any reasonable limits on damages and the potential for a defendant who is only partly responsible for an injury to be forced to pay 100% of the damages.<sup>83</sup> West Virginia is also a place where lawyers often earn significantly more in legal fees than their clients receive in compensation.<sup>84</sup>

#### **Hostility Toward Corporate Defendants**

To understand the hostility corporate defendants feel in West Virginia, one needs to look no further than the state’s highest court. Imagine if a state supreme court justice called the Chief Executive Officer of your company “stupid,” “a clown” and “an outsider,” in comments at a public meeting, and then refused to recuse himself when a case involving

that company's affiliate, as a defendant, came before the court. That is precisely what occurred in West Virginia, where Justice Larry Starcher called Massey Energy CEO Don Blankenship such unflattering names at the annual meeting of the West Virginia Political Science Association.<sup>85</sup> Massey affiliate Marfork Coal Co. filed a petition with the court arguing that "the volatile and antagonistic comments made by Justice Starcher" create, "at the very least, a serious appearance of partiality that disqualifies Justice Starcher from deciding any matter involving Massey or its subsidiaries." Nevertheless, Justice Starcher will decide the case, despite the ongoing feud between him and the corporation's principal. *The Charleston Daily Mail* points out that the Judicial Code of Ethics says judges cannot hear cases in which "their impartiality might be questioned." "The code either means what it says, or it means nothing – in which case, 'judicial hellhole' is an accurate description," said the daily.<sup>86</sup>

### **Does Teflon Stick in West Virginia?**

This year, West Virginia hosted a multimillion dollar settlement stemming from a chemical used in the popular nonstick coat, Teflon®. Residents living in the vicinity of DuPont's Washington Works plant in Parkersburg, West Virginia, had alleged that a miniscule concentration of the same chemical made its way into the state's water supply and could pose a health threat. A Wood County Judge approved the settlement in February 2005, which includes \$70 million upfront. This amount includes funds for a panel to see if there is a link to health effects<sup>87</sup> – something the plaintiffs generally have to show before filing a suit. The settlement also includes a potential \$235 million for a medical monitoring program for area residents and millions more in lawyers' fees, regardless of what the study shows.<sup>88</sup> Yet, the level of the chemical was well below EPA standards and considered a "scare campaign" by some consumer advocates.<sup>89</sup>

### **Medical Monitoring: Cash Without Injury**

As noted above, the West Virginia Supreme Court of Appeals has ruled that state law permits lawsuits where people with no injury collect cash awards by claiming that they should get regular checkups for disease because they may have been exposed to a dangerous substance.<sup>90</sup> West Virginia is the only state where people can collect cash awards in these suits without showing that there is a reasonable probability that they will become ill and there is no medical benefit to the checkups. Use of the cash awards is not restricted to health care purposes, and plaintiffs can use them as they please. Most courts have rejected such claims, with the Michigan Supreme Court joining the list and criticizing the West Virginia approach this year.<sup>92</sup> (See Michigan Supreme Court, page

42). There is some hope that the tide in West Virginia may be changing. Recognizing the numerous public policy problems spawned by the *Bower* ruling, the West Virginia Supreme Court of Appeals in December of 2004 limited its potential damage.<sup>93</sup> In *Chemtall Inc. v. Madden*, the court essentially ruled that trial lawyers cannot use the class action device as a way to export West Virginia's liberal medical monitoring standard to nonresidents living and injured in states where medical monitoring has not been adopted or is applied in a more restrictive manner. The court held that a class involving claimants from multiple states that recognize medical monitoring as a cause of action can only be certified if the circuit court can, "in detailed and specific fashion," make a finding that the various class members' state medical monitoring causes of action are "reasonably co-extensive with the medical monitoring causes of action in West Virginia."<sup>94</sup>

*The court said, in effect, "if you live in West Virginia, boy have we got a deal for you. We are going to give you a lump sum of money and you are going to get it now, and there is no restriction on how it is spent. 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. This is what our tort law has come to."* — West Virginia Justice Elliot Maynard, discussing one of the reasons behind his dissent in the case permitting medical monitoring.<sup>91</sup>

### **A Strong Alliance Between Plaintiffs' Lawyers, the Attorney General, and the Courts**

West Virginia personal injury lawyers have the help of the state's Attorney General, Darrell McGraw, in extracting large settlements. The latest example of this unholy alliance is the \$3.7 million in contingency fees that a group of West Virginia and Washington, D.C. lawyers will share coming from the Attorney General's \$10 million settlement of a state lawsuit related to the marketing of the painkiller, OxyContin™. Many of the local lawyers had reportedly contributed over \$70,000 to Attorney General McGraw's election campaigns over the past eight years. "The concern here is there is appearance of thousands being contributed to campaigns and millions being returned in legal fees," observed Bill Bissett of West Virginia Citizens Against Lawsuit Abuse. "It looks bad."<sup>95</sup>

Attorney General McGraw's brother, former West Virginia Supreme Court of Appeals Justice Warren McGraw, also had close ties to the plaintiffs' bar. Justice McGraw received a record-setting \$2.5 million in contributions from personal injury lawyers to fund his reelection campaign in 2004, according to reports.<sup>96</sup> Some have fairly observed that such contributions "give the appearance of impropriety, and raise significant questions regarding the impartiality of our state Judiciary," particularly when those making such contributions appear before the court.<sup>97</sup> Despite such strong support from the plaintiffs' bar, political newcomer Brent Benjamin unseated Justice McGraw in November 2004,<sup>98</sup> demonstrating that West Virginia voters are not happy with the poor reputation of the state's civil justice system.

### **Voters Want Change**

A 2005 survey found that nearly eight in ten West Virginia voters, regardless of political affiliation, believe that the number of lawsuits in state courts is a "serious problem" with one-third finding the problem is "very serious."<sup>99</sup> Three-quarters believe the lawyers benefit most from the current civil justice system in West Virginia, with only 4% and 7% believing that consumers and victims benefit most, respectively. A substantial majority of respondents supported civil justice reforms including:

- elimination of joint and several liability that allows a company that is partly responsible to pay the entire award if other defendants do not pay their fair share;
- elimination of the collateral source rule that allows a plaintiff to recover again for injuries even if they have already been fully compensated by their insurance; and
- prioritization of the asbestos claims of those who are sick over those who have been exposed to asbestos but who are not ill.

### **Reasons for Optimism**

The spotlight on West Virginia as a Judicial Hellhole has encouraged the state to improve some aspects of its judicial system. For example, West Virginia has made progress in medical malpractice reform. "The number of medical malpractice lawsuits and settlements in West Virginia has fallen by more than 50% since the Legislature began revising laws involving such cases."<sup>100</sup> Several leading insurers, who had pledged to reduce rates if West Virginia passed medical malpractice reform, said they would begin rolling back insurance rates for state consumers this year.<sup>101</sup> In August of 2005, the President of West Virginia Physician's Mutual, the state's largest medical malpractice insurer, said that West Virginia is beginning to free itself from its reputation as a Judicial Hellhole in the area of medical malpractice and starting to attract new doctors.<sup>102</sup> West Virginia also was one of a handful of states that allowed third-party, bad-faith lawsuits,

allowing people to collect, in some cases, from the insurance company of a negligent driver as well as their own.<sup>103</sup> This year, West Virginia enacted a reform measure preventing this practice.<sup>104</sup> While these lawsuits were few in number (about 120 per year) they resulted in costs of \$167 million a year, which consumer's paid for in the form of high premiums.<sup>105</sup> This change, combined with improvements in the medical malpractice area recently led the head of the state's chamber of commerce to observe that "a turnaround seems to be in the making."<sup>106</sup>

80 Randy Coleman, Editorial, *Lawsuit Abuse State Needs to Change Jackpot Justice Culture*, CHARLESTON DAILY MAIL (W. Va.), Sept. 26, 2005, at 5A.

81 Bill Bissett, *Let's Pursue Further Civil Justice Reform*, CHARLESTON DAILY MAIL (W. Va.), May 27, 2005, at 4A.

82 AEI-Brookings Joint Center for Regulatory Studies, *Judicial Education Program: Critical Issues In Toxic Tort Litigation*, Washington, D.C., April 28-29, 2004.

83 Coleman, *supra* note 80; Editorial, *W. Va. Needs to Change This*, CHARLESTON DAILY MAIL (W. Va.), Mar. 25, 2005, at 4A.

84 Ken Ward Jr., *Chrysler Calls Case New 'Poster Child' For Lawsuit Reform*, CHARLESTON DAILY MAIL (W. Va.), Sept. 1, 2005, at 3A (discussing a lawsuit against DaimlerChrysler involving an allegedly defective car, in which a West Virginia judge found for the plaintiffs and awarded them \$4,500 in costs to repair the car and \$2,450 in damages for the plaintiffs' inconvenience and annoyance, while awarding the plaintiffs' lawyers \$140,000 in fees and costs).

85 George Hohmann, *Massey Wants Starcher Off Case Company Says Justice's Remarks Make Fair Trial Impossible*, CHARLESTON DAILY MAIL, Nov. 1, 2005, at <http://www.dailymail.com/news/News/2005110124/>.

86 Editorial, *Temperament Counts in Judges; Justice Starcher Has Demonstrated an Overt Prejudice Against a Litigant*, CHARLESTON DAILY MAIL, Nov. 3, 2005, at 4A.

87 *C8 Settlement Terms*, CHARLESTON DAILY MAIL, Mar. 6, 2005, at 7B.

88 *See id.*

89 *See* Terrence Scanlon, *The Attack on Teflon Won't Stick*, CHARLESTON DAILY MAIL, Mar. 4, 2005. The author, a former chairman of the Consumer Products Safety Commission, wrote that the "health and safety concerns were unfounded then and now." Personal injury lawyers from two Florida law firms have also filed class action lawsuits in at least eight states against DuPont stemming from its use of the popular nonstick coat, Teflon®. The lawsuits allege that a chemical used in Teflon® is dangerous and DuPont failed to adequately warn consumers of the risk, despite no hard evidence that the chemical is harmful to humans when used in cookware. *See* Amy Cortese, *Will Environmental Fear Stick to DuPont's Teflon*, N.Y. TIMES, July 24, 2005, at 34; *see also* Michael Fumento, *Accusations Against Teflon Don't Stick*, DAILY BREEZE (Torrance, Cal.), July 23, 2005, at A15 (discussing research of perfluorooctanoic acid (PFOA), the chemical used in Teflon). The lawsuits seek a mere \$5 billion. While this sounds like a typical product liability lawsuit, plaintiffs' lawyers have used the state's consumer protection statutes so that they do not have to show Teflon is unreasonably dangerous, the general standard for a product defect claim. In fact, plaintiffs' lawyers quickly point out "I don't have to prove that it causes cancer," under consumer protection laws. John Heilprin, *DuPont Hit With \$5 Billion Suit Over Teflon Risks*, ASSOC. PRESS, July 20, 2005, available at <http://www.law.com/jsp/article.jsp?id=1121763922530> (quoting plaintiffs' attorney Alan Kluger). The lawsuits seek compensation to replace the pots and pans of most Americans and to establish two funds to pay for medical monitoring and scientific research. *See* Dawn McCarty, *DuPont Sued Over Data on Teflon*, PHILA. INQUIRER, July 20, 2005, at C7 (quoting plaintiffs' attorney Alan Kluger as stating, "[t]he class of potential plaintiffs could well contain almost every American that has purchased a pot or pan coated with DuPont's nonstick coating"); Heilprin, *supra*.

90 The West Virginia case, *Bower v. Westinghouse Electric Corp.*, 522 S.E.2d 424 (W. Va. 1999), dispensed with a cost-benefit analysis approach and rejected the professional medical perspective that medical monitoring only should be implemented where the early detection of potential future symptoms could prevent, treat, or cure disease. Instead, focusing on "the subjective desires of a plaintiff for information concerning the state of his or her health," *id.* at 434, the court held that a suit could be filed even if the level of exposure to a toxic substance does not correlate with a level sufficient to cause injury or if no effective treatment for the disease exists. *Id.* at 433-34. The court allowed payments to go directly to plaintiffs in a lump sum, without

- follow-up to ensure that the money was in fact used for medical monitoring, or was instead spent on consumer items such as cars or flat-screen television sets. *Id.* at 434.
- 91 The Federalist Society for Law and Public Policy Studies, Transcript, Medical Monitoring, Nat'l Press Club, Washington, D.C., Dec. 1, 1999.
- 92 See Victor E. Schwartz, Leah Lorber & Emily J. Laird, *Medical Monitoring, The Right Way and the Wrong Way*, 70 MO. L. REV. 349 (2005).
- 93 *Chemtall, Inc. v. Madden*, 607 S.E.2d 772 (W. Va. 2004).
- 94 *Id.* at 784.
- 95 *OxyContin Lawsuit Is Settled Purdue Pharma To Pay State \$10 Million*, CHARLESTON DAILY MAIL, Nov. 6, 2004, at 1A; Toby Coleman, *Lawyers to Get Large Chunk of OxyContin Settlement*, CHARLESTON DAILY MAIL, Mar. 29, 2005.
- 96 Bill Bissett, *Plaintiffs' Lawyers Were Spending, Too; They Put More Than \$2.5 Million in Court Contest*, CHARLESTON DAILY MAIL, Dec. 29, 2004, at 4A.
- 97 *Id.*
- 98 See Christian Giggenbach, *Benjamin Unseats McGraw*, REGISTER HERALD (Beckley, W. Va.), Nov. 3, 2004.
- 99 PUBLIC OPINION STRATEGIES, ATTITUDES TOWARD CIVIL JUSTICE REFORM IN WEST VIRGINIA (2005), at [http://www.instituteforlegalreform.com/pdfs/WV\\_Key\\_Findings.pdf](http://www.instituteforlegalreform.com/pdfs/WV_Key_Findings.pdf). The U.S. Chamber of Commerce's Institute for Legal Reform commissioned the survey.
- 100 Assoc. Press, *Med-Mal Lawsuits Drop by More Than Half in Three Years*, CHARLESTON DAILY MAIL, Feb. 5, 2005, at 6D.
- 101 Lawrence Messina, *Insurers Reaffirm Pledge To Manchin, Governor Urged Insurance Companies To Begin Reducing Rates For State Consumers*, CHARLESTON DAILY MAIL, Apr. 15, 2005, at 10A.
- 102 *W.Va. No Longer 'Judicial Hellhole,' Insurer Says*, CHARLESTON DAILY MAIL, Aug. 20, 2005, at A6.
- 103 Editorial, *Our Views State Must End Third-Party Suits West Virginians Pay For Them In High Premiums And Fewer Choices*, CHARLESTON DAILY MAIL, Feb. 10, 2005, at 4A [hereinafter *Third Party Suits*].
- 104 Lawrence Messina, *Third-Party Bad Faith Ban Among Slew Of Laws Taking Effect*, ASSOC. PRESS, July 7, 2005.
- 105 *Third-Party Suits*, *supra* note 108.
- 106 Steve Roberts, Editorial, *Welcome Improvements: Legal Reforms Begin to Bear Fruit in W. Va. Economic Climate*, CHARLESTON GAZETTE, Oct. 10, 2005, at 5A.