

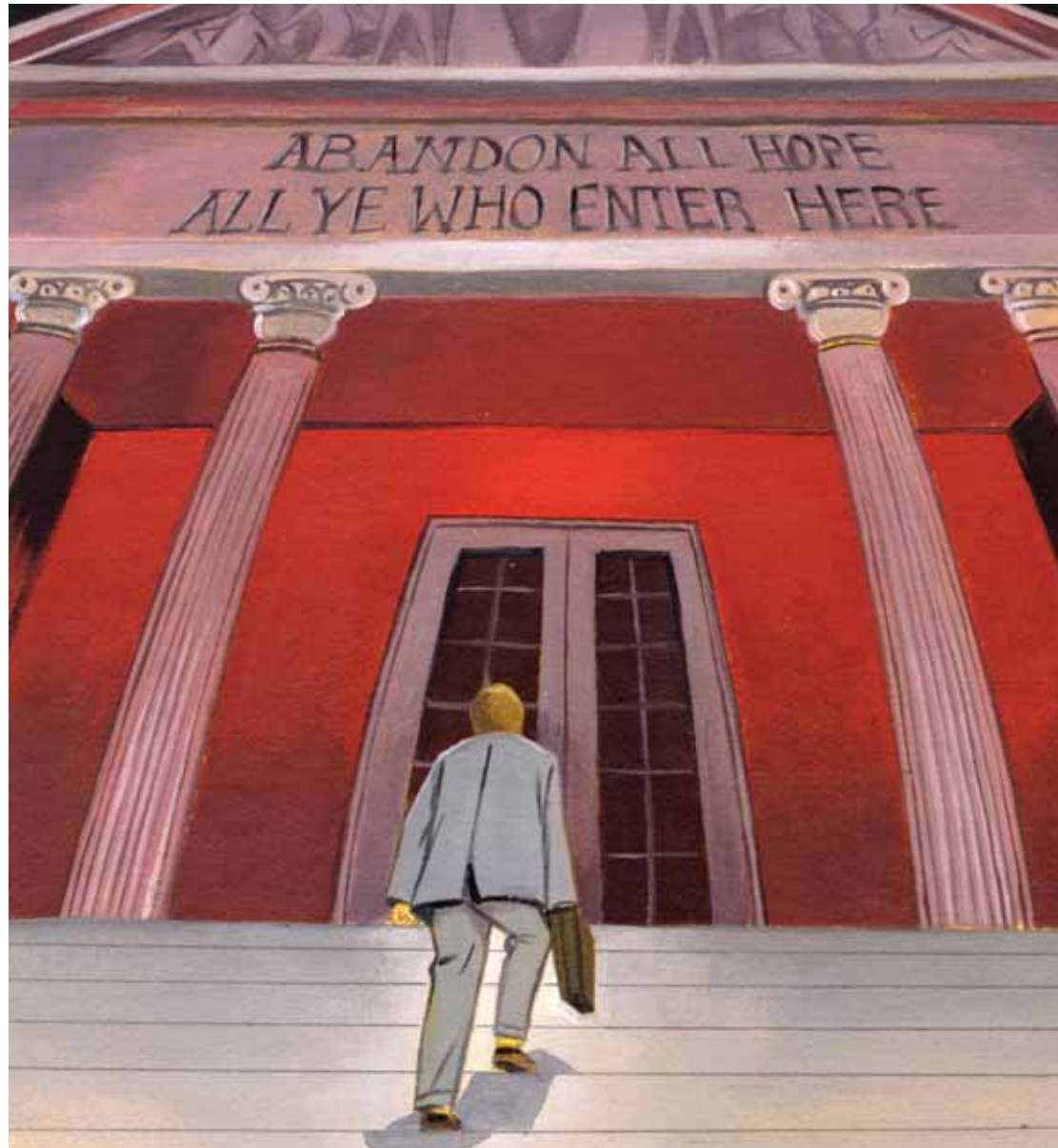
Directorship

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Dire States

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

Directorship

The cover story in this month's edition of *Directorship* features our Annual Boardroom Guide to State Litigation Climates. In light of the significant financial threats posed by states that have a bias toward plaintiffs' lawyers, I think you will find this article to be both urgent and useful to your board and officers.

Directorship has correctly identified the problem of worsening state legal climates as an issue for corporate directors. The aggressive efforts by the plaintiffs' bar to expand business liability is a direct threat to our business system. Corporate directors should be alert to how the legal climates of certain states impose disproportionately higher litigation costs because the plaintiffs' bar completely dominates a number of our state legislative and judicial systems.

This article was prepared by Steve Hantler, chairman of the American Justice Partnership Foundation (AJP), with help from AJP's state and national partners. The article includes expert commentary on the political, legislative and judicial dynamics in each state that cause the AJP and their research partners to label the state as red, green or yellow for business, and the article also indicates those states trending positively or negatively as yellow green and yellow red. As you may know, Steve is widely regarded as one of the nation's foremost experts on liability reform.

You can download a PDF of this article to share with your board members and management team at www.directorship.com – and you are welcome to email jcunningham@directorship for extra copies of this issue or for more information on the article. You can also visit the AJP website at www.AmericanJusticePartnership.org.

I am encouraged by the progress made recently in some states by AJP and other legal reform organizations in advocating for common sense liability reform and rule-of-law judicial standards. But it is clear from reading the state profiles in this article that the business community needs to do more to support the AJP coalition and other liability reform advocates if we are going to stop the plaintiffs' bar from destroying America's ability to compete in the global marketplace.

Sincerely,



Jeffrey M. Cunningham
Chairman & CEO
Directorship.com

TOMACDINE

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

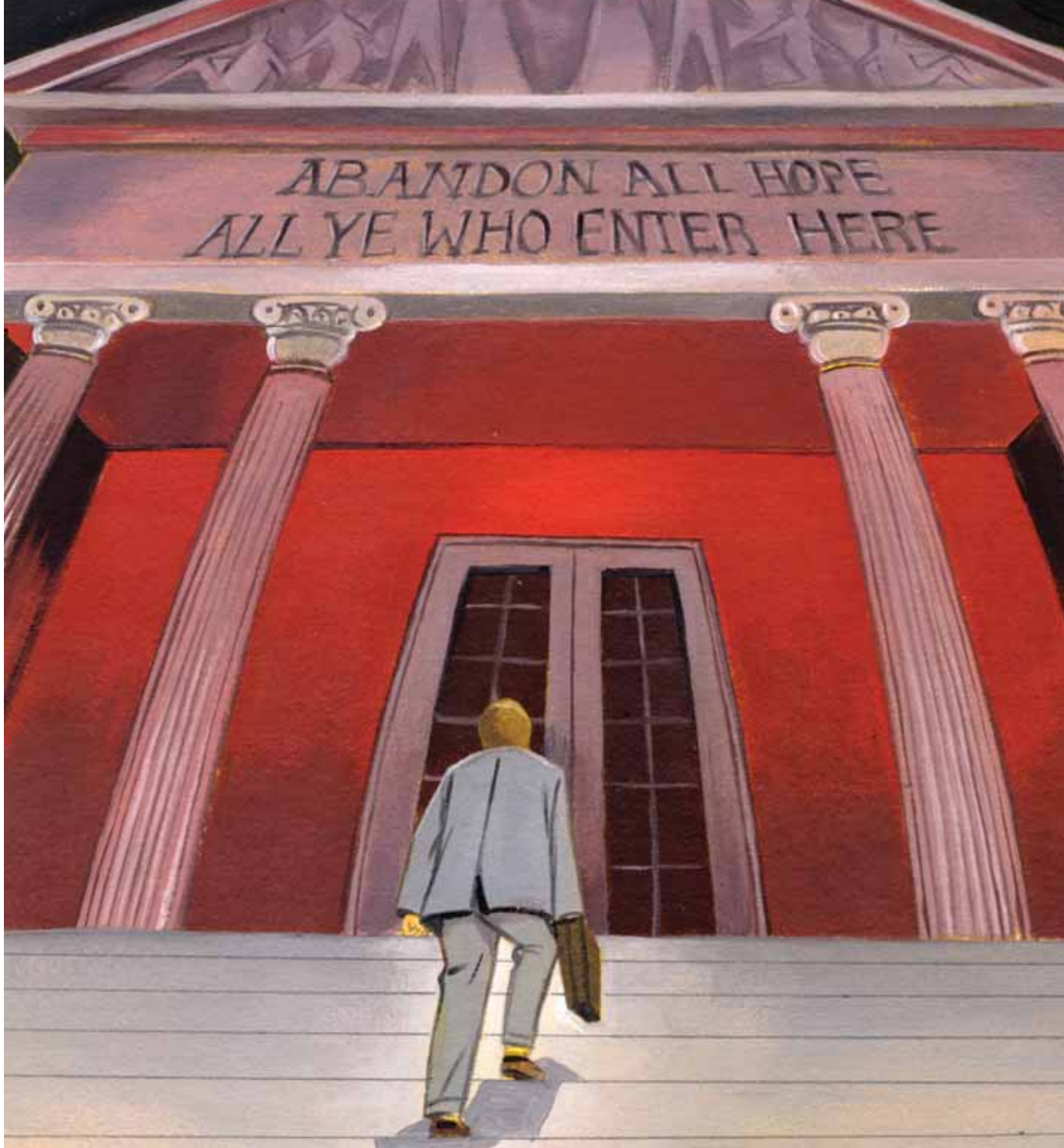
costs of our tort system are \$865 billion annually; Australia's GDP is only \$24 billion more than this.

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



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)*

MICHELLE CHANG

With these states slipping back, as well as other factors like the looming possibility of climate-change litiga-

tion 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).

Court overturned Governor Strickland's veto of a liability reform bill. Dann filed a lawsuit against 10 paint manufacturers in an effort to further expand state liability law on a public nuisance theory. Holding the line in the legislature against a robust trial bar and protecting hard-won gains from judicial activism will determine whether Ohio remains a promising state for growth and job creation. Ohio is a state to be watched.

5 NORTH DAKOTA

While North Dakota slipped from 3rd in last year's ranking, it continues to have one of the best liability climates. The state's insurance loss ratios remain the lowest in the nation. North Dakota has benefited from a relatively low number of civil cases filed in its courts. A bill allowing private attorneys to sue on behalf of the state was rejected by the state legislature in 2007. A rule-of-law majority on the state's Supreme Court is likely to protect existing punitive damage limits. North Dakota's liability climate promotes growth and job creation.

6 NORTH CAROLINA

The state has maintained a fair and pre-

dictable liability climate that leads to growth and job creation. It ranks among the three best states for monetary tort losses, improving from 7th in 2006. However, North Carolina's product liability losses rank 36th, which indicates heightened litigation activity and a rise in jury verdicts. Further, the state's plaintiffs' bar is very active in the state legislature: a bill defeated last year extending the statute of repose from 6 to 15 years would have made North Carolina one of three states with the longest period for filing claims. There is a rule-of-law majority on the state Supreme Court and the state business court serves as a model for the nation. North Carolina, however, is a state to be watched because of aggressive trial bar legislative efforts.

7 NEBRASKA

Nebraska's liability climate is conducive to growth and job creation. The state's ranking, however, fell from 1st last year to 7th this year. The state ranks 31st among the states for litigation risks and ranks 40th for product liability risks, reflecting an increase in the number of cases filed in the state. Governor David Heineman demonstrated his leadership on liability reform by publicly supporting a Nebraska court's dis-

missal of claims against state school districts. The Nebraska Supreme Court has a rule-of-law majority. Attorney General Jon Bruning is a strong rule-of-law advocate.

8 VIRGINIA

Slipping from 2nd in last year's ranking, Virginia continues to have one of the best liability climates in the nation. The Commonwealth ranks best for monetary tort losses and 26th among the states for litigation risks. Despite its stellar liability climate, Virginia has not enacted the tort reforms of other leading states. Based on disappointing 2007 election results, there is a one-vote pro-plaintiffs' lawyer majority in the state Senate. Governor Timothy Kaine is considered an activist and opponent of liability reform. He is, for example, pursuing state-level climate-change policy that may subject businesses to new areas of liability. As a member of the House of Delegates, current Attorney General Bob McDonnell introduced several liability reform bills that were signed into law.

9 MICHIGAN

Michigan slipped two spots in the rankings this year. The 2008 state Supreme Court election results will determine whether

Litigation Guide Glossary

A few concepts used in the state profiles may be unfamiliar and require definition.

A **rule of law** or **restrained legal environment** means a state's Supreme Court majority or attorney general respects the will of the legislature and resists legislating from the bench or regulating through litigation. Rule-of-law officeholders contribute to stable liability climates, while an activist Supreme Court majority or attorney general contributes to an unstable liability climate.

Punitive damages punish defendants for perceived reckless or malicious behav-

ior, depending upon the state standard. Limits on any damage awards result in fair and predictable litigation outcomes. States that do not limit damage awards become magnets for plaintiffs' attorneys and class-action lawsuits.

Non-economic damages compensate victims for conceptual losses, including pain and suffering.

Economic damages compensate victims for actual monetary losses, including wages and medical bills.

Statutes of repose set the time in which a lawsuit must be filed after the sale of a

product and differ from statutes of limitations, which set forth the time in which a lawsuit must be filed after a wrong has occurred.

Insurance loss ratios are the ratio of losses paid or accrued by an insurer to premiums earned.

Litigation risks comprise the five variables used in the PRI 2008 report to assess vulnerability to unwarranted litigation.

Monetary tort losses track tort losses across seven lines of insurance and two categories of self-insurance in the PRI 2008 report.

Michigan's liability climate remains favorable to growth and job creation. The plaintiffs' bar is expected to fund an effort to unseat rule-of-law Chief Justice Clifford Taylor. Michigan's liability climate benefits from the rule-of-law majority on the state Supreme Court and comprehensive tort measures enacted under former Governor John Engler. Product liability losses in Michigan are among the lowest in the nation. Anti-reform forces in the House have introduced bills to end the hard-won FDA defense properly extended to pharmaceutical companies. Attorney General Mike Cox is one of the nation's strongest supporters of the rule of law.

10 ● SOUTH DAKOTA

The liability climate in South Dakota is conducive to growth and jobs creation. It remains among the 15 best states for monetary tort losses and insurance loss ratios. The state Supreme Court enjoys a rule-of-law majority and Attorney General Larry Long continues to be a strong rule-of-law advocate. However, the state legislature has failed to enact substantive tort reform laws beyond limits on punitive damages. As a result, the state is vulnerable to plaintiff-driven litigation. In fact, the state has experienced an increase in the number of civil cases filed in the past two years. South Dakota is a state to watch.

11 ● ALASKA

The liability climate is on a positive trajectory for job growth and creation, thanks in large part to comprehensive liability reforms enacted in 1997 and upheld by the state Supreme Court in 2002. Alaska is one of the better performers in terms of liability climate and is a state now open for business.

12 ● WISCONSIN

Improving its rank from 22nd last year,

recent developments may stimulate further improvement in Wisconsin's liability climate. In April, rule-of-law Supreme Court candidate Michael Gableman upset activist incumbent Justice Louis Butler, marking the first time in 41 years that an incumbent justice has been defeated. The win transforms the high court from a 4-3 activist majority to a 4-3 rule-of-law majority and marks a big win for the legal reform community. There is room for improvement, however, particularly in the area of product liability law that unfairly favors plaintiffs. The state ranks 10th best for potential litigation risks. Wisconsin is on the right track.

13 ● TEXAS

Despite lingering problems with judicial activism in some state circuits, Texas' liability climate promotes growth and job creation. Comprehensive reforms enacted several years ago have resulted in major improvements in the state's healthcare delivery system and improved insurance loss ratios. PRI's 2008 report ranks Texas as 5th best in the nation for monetary tort losses. South Texas judicial circuits, however, continue to attract ATRA's "judicial hellhole" designation. While the plaintiffs' bar's influence in the state legislature is increasing, Governor Rick Perry vetoed legislation that would have undone medical liability reforms and limits on damages enacted in 2003. PRI's 2008 report finds Texas second best in the nation for "inputs," which suggests that the state remains committed to pro-growth liability reform.

14 ● IDAHO

Idaho's liability climate encourages growth and jobs creation, and reforms enacted in 2003 have contributed to its improvement. PRI's 2008 report shows that the state now ranks 30th overall for monetary tort losses, a significant improvement from 5th worst in 2006. The reforms have made the state

less vulnerable to an increase in lawsuits. The Idaho Supreme Court has a rule-of-law majority and Attorney General Lawrence Wasden has strong rule-of-law credentials. Idaho is likely to continue moving up in the rankings.

15 ● WYOMING

While Wyoming's liability climate encourages growth and job creation, PRI's 2008 report indicates that existing tort laws do not provide safeguards available in other states. Wyoming law, for example, provides a four-year period of limitations on tort claims, longer than most other states, and no limitations on damage awards. Wyoming now ranks near the worst 20 percent for increased lawsuit filings, a trend that should cause concern among state leaders. Its monetary tort loss ranking dropped from 3rd best in the nation in 2006 to 10th among the states in 2008. Wyoming should be watched as an at-risk state.

16 ● NEW HAMPSHIRE

The Granite State continues to have a liability climate that encourages growth and job creation. An activist Supreme Court majority and a vigorous anti-reform coalition in the state legislature, however, threaten New Hampshire's top 20 ranking. In 2007, pro-trial lawyer forces in the state legislature passed a measure limiting apportionment of fault to parties involved in a lawsuit, which threatened to undo established joint liability reforms. Governor John Lynch vetoed the bill. Attorney General Kelly Ayotte subscribes to the rule of law. The state Supreme Court has an activist majority and that alone makes New Hampshire a state to watch.

17 ● IOWA

Iowa's liability climate remains conducive to job creation and growth. Monetary tort

What Directors Need

■ An assessment of the company's total litigation costs, direct and indirect. Companies do not typically aggregate these costs. Doing so would provide a full understanding of the drain on company resources from liability lawsuits. These costs include: indemnities, legal fees, law department overhead, litigation reserves, liability insurance, marketing costs to repair damage to company and product reputation from litigation, decline in share value resulting from litigation, loss of executive time, and opportunities foregone because of litigation risks.

■ An evaluation of lawsuits against competitors by plaintiffs' lawyers. This may indicate the company's vulnerability to similar claims.

■ An understanding of the crisis communications plan that will be implemented in the event of a "share value killer" or "bet the company" lawsuit.

■ A litigation "hot spot" assessment, which is a 50-state comparison of the company's percentage of revenues earned in each state and the percentage of litigation costs paid in each state. This will reveal whether a company is subject to disproportionate legal risks in a state.

■ An awareness of the favorable effects of successful liability-reform efforts to the company's bottom line.

■ Periodic briefings on litigation risks and reform opportunities. (The American Justice Partnership can provide briefing materials and experts.)

■ An assessment of permissible opportunities for directors, officers, and the company to support rule-of-law candidates for state office, especially Supreme Court and attorney general.

■ The measurable results from the company's participation in liability-reform efforts and groups.

losses are 6th best in the nation despite an increase in the number of lawsuits filed in the state. Iowa ranks 24th for new lawsuit filings and there is a continuing upward trend in jury awards. Governor Chet Culver and Attorney General Tom Miller are both activists. The Iowa Supreme Court leans activist, particularly with the late-term appointments of two former presidents of the Iowa Trial Lawyers Association to the high court. Iowa remains a state to watch.

18 MAINE

Maine's ranking for its liability climate improved from 26th to 18th, due, in large part, to the state's improvement in monetary tort losses. Maine now is in the top 15 states for monetary tort losses. State lawmakers, however, have not enacted substantive liability reforms leading to PRI's conclusion in its 2008 report that Maine is vulnerable to an increase in plaintiff-driven lawsuits. With an activist Supreme Court majority and attorney general, Maine is likely to drop in future rankings.

19 DELAWARE

Delaware's ranking continues to fall and is no longer among the best states for monetary tort losses, dropping to 18th among the states in PRI's 2008 report. It ranks among the three worst states for medical malpractice losses. ATRA has designated Delaware as a "judicial hellhole" owing to a spike in asbestos lawsuit filings and pro-plaintiff rulings by trial courts in those lawsuits. It now ranks among the 10 worst states for new lawsuits per capita. The state has no limits on non-economic and punitive damages, and is one of a handful of states that allows joint liability. Attorney General Joseph "Beau" Biden is a former plaintiffs' asbestos lawyer. Delaware's liability climate is, at best, neutral to growth and job creation. Without substantive lia-

bility reforms, the liability climate in the "business state" will continue to deteriorate.

20 KANSAS

Kansas saw its ranking fall precipitously from 4th last year to 20th in this year's ranking. The state's liability climate, once one of the best in the country, is now only neutral. While the Kansas legislature continues to support fundamental liability reforms, Governor Kathleen Sebelius, the former executive director of the Kansas Trial Lawyers Association, opposes most of the current reform legislation. She has appointed a majority of activist justices to the Kansas Supreme Court. Sebelius appointed former plaintiffs' lawyer and judge Stephen Six as attorney general in January. If these trends continue, Kansas will be a state for businesses to avoid.

21 SOUTH CAROLINA

South Carolina's liability climate is improving thanks to a well-organized business community, consistent legislative reforms, and Governor Mark Sanford's leadership. Sanford signed worker compensation reforms into law in 2007 and issued two executive orders supporting worker compensation reforms and asked the South Carolina Supreme Court to declare their validity. The state's high court has approved the federal *Daubert* standard for expert witnesses in civil cases. Two new Supreme Court justices approved by the legislature are Justice Donald Beatty, considered an activist, and Justice John Kittredge, a rule-of-law strict constructionist. While South Carolina insurance loss ratios have improved to the middle of the pack among states, pro-plaintiffs' bar legislators continue to dominate the judicial nominations process and make further substantive legal reform gains unlikely.

22 COLORADO

Colorado saw its ranking fall sharply from 10th last year to 22nd this year. The state's liability climate, once one of the best, is now only neutral, and unfolding events further threaten its position. Anti-reform lawmakers and Governor Bill Ritter are moving forward with legislation that will tilt the courts in favor of plaintiffs. Ritter last year signed into law one provision that increases the limit on non-economic damages in general liability cases and a second that instructs judges in employment claims to award attorneys' fees and costs to prevailing plaintiffs, but not to prevailing defendants. Legal reform advocates are currently playing defense against a bill relaxing medical malpractice damage caps. Ritter continues to make judicial appointments that reflect a bias toward the plaintiffs' bar, and the Colorado Supreme Court has demonstrated a willingness to expand tort liability. Despite judicial obstacles, Attorney General John Suthers remains a strong rule-of-law advocate. Watch for Colorado's liability climate to further degrade and become hostile to growth and job development.

23 MINNESOTA

Minnesota's liability climate has soured in recent years. PRI's 2008 report ranks the state 27th for monetary tort losses, a huge drop from its 2006 ranking of 9th. The plaintiffs' bar has aggressively promoted an anti-reform agenda in the state legislature. The state Supreme Court has an activist majority; Attorney General Lori Swanson is an activist. The state legislature was considering a *qui tam* bill deputizing private attorneys to sue on behalf of the state related to Medicaid fraud claims. The state ranks 45th for product liability losses, an issue that must be addressed if state leaders want to stimulate growth. Minnesota's liability climate is, at best, neutral. Watch for the state to continue sinking in liability rankings.

24 MISSISSIPPI

Mississippi's legal climate continues to improve, based on aggressive reforms enacted in 2004. Governor Haley Barbour's pro-growth agenda has led to reforms on venue and joinder rules, reasonable limits on non-economic damages, punitive damage limits, and joint liability. The state's composite rankings, as well as its insurance loss ratios, have dramatically improved. Barbour, re-elected by a wide margin, continues to push for reasonable liability limits. Mississippi improved to 10th for product liability losses and 11th among the states for monetary tort losses. The 2007 elections resulted in rule-of-law candidates winning seven of eight statewide offices. However, the rule-of-law majority on the Mississippi Supreme Court will be tested this year with four justices standing for re-election and three appellate races to be decided. The outcome of this year's judicial elections will shape the liability climate for years to come. Mississippi is on a growth and job-creation trajectory.

25 LOUISIANA

Louisiana's liability climate is improving, due in part to the election last year of former U.S. Representative Bobby Jindal as governor. Jindal has committed to a reform agenda including bold initiatives to end government corruption. While the state continues to struggle with recovery efforts in the aftermath of Hurricane Katrina which struck in 2005, it has dramatically improved its monetary tort-loss ranking, rising from 39th in 2006 to 13th best among the states in 2008. Attorney General James "Buddy" Caldwell, a law-and-order former prosecutor, defeated incumbent activist Charles Foti in 2007. The state Supreme Court is currently balanced between activists and rule-of-law justices.

26 OKLAHOMA

Oklahoma's prospects for liability reform suffered a setback in 2007 with Governor Brad Henry's veto of comprehensive liability reforms, a complete reversal of his pledge to support "Texas Plus" tort reform. The business community is supporting a similar comprehensive bill intended to encourage Henry to negotiate a fair package of reforms. Attorney General Drew Edmondson is an activist and hostile to the rule of law. There is strong legislative support for a judicial-reform constitutional amendment requiring Senate confirmation of any judicial appointment or reappointment made by the governor. Medical malpractice losses have improved to 2nd best in the nation, and overall, monetary tort losses have improved to 16th best in 2008. The state has improved its overall litigation risk ranking from 6th-worst in 2006 to 33rd in 2008. While Oklahoma's liability climate discourages growth and job creation, there are signs of improvement.

27 ARIZONA

Arizona has fallen in various state rankings due to increasing litigation activity and its constitution, which does not allow limits on damage awards. PRI's 2008 report shows that Arizona dropped from 31st in 2006 to the worst 10 in 2008 among states for monetary tort losses. There is an activist majority on the Arizona Supreme Court, and Governor Janet Napolitano and Attorney General Terry Goddard are both activists. Arizona's liability climate discourages growth and job creation. Businesses should think twice before investing here.

28 GEORGIA

The Peach State's liability climate was, for a brief time, moving in the right direction and becoming more hospitable to business. Following the enactment of meaningful reform legislation in 2005, Georgia's insur-

ance loss ratios improved. That all changed when the state Supreme Court began dismantling the liability reform laws passed by the Georgia legislature and signed into law by Governor Sonny Perdue, a staunch reform advocate. The Georgia Supreme Court is one of the most activist high courts in the nation and routinely substitutes its policy judgments for those of the legislature. Members of the Supreme Court who want to make law and policy should leave the court and run for state legislature. While two incumbent justices will stand for re-election this November, sadly, there are so far no announced challengers. There is no pending legal reform legislation and Georgia's liability climate discourages growth and job creation.

29 NEVADA

Nevada lingers in the bottom half of states in terms of liability climate. PRI's 2008 report ranks the state 17th best for monetary tort losses, an improvement from its 29th rank in 2006. However, with the leg-

islature's failure to extend limits on punitive and non-economic damages to product liability cases and its failure to reform joint liability, Nevada is near the bottom in several liability category rankings. The state ranks dead last for auto losses, in the bottom 20 percent of states for product liability losses, and fourth worst for commercial multi-peril losses. The state Supreme Court has an activist majority, and Attorney General Catherine Cortez Masto is neutral to activist. Without liability reforms and political change, Nevada will remain hostile to growth and job creation.

30 MISSOURI

While Missouri's liability climate discourages growth and jobs creation, it is improving, thanks to a comprehensive liability reform package signed into law by Governor Matt Blunt in 2005. Missouri vaulted from 44th among the states in monetary tort losses in 2006 to 11th best in 2008. Its litigation-risk ranking has also improved to 14th in 2008, up from 25th

in 2006, indicating a decreasing threat of new lawsuits. Blunt is not seeking re-election this year. Activist Attorney General Jay Nixon is a candidate for governor in 2008. The state Supreme Court majority is activist and will consider challenges to the 2005 legislation.

31 CONNECTICUT

Connecticut's liability climate discourages job creation and growth. Despite a relatively high ranking in the 2008 Harris Poll (19th), the state remains a poor performer in terms of insurance loss ratios. Connecticut does not have reasonable limits on non-economic damages, and PRI's 2008 report ranks the state among the worst for monetary tort losses. The state is also ranked 3rd worst for medical malpractice losses. Attorney General Richard Blumenthal is one of the most activist attorneys general in the country and he is reasonable enough for the state to be in the bottom half of this year's liability ranking. Connecticut's liability climate is likely to continue its downward trend

Tort Reform Needs Funding

Now is simply not the time to be penny-wise and pound-foolish.

A six-figure contribution to support tort reform efforts by a company is a small price to pay, compared to multimillion-dollar settlements of questionable lawsuits filed in "judicial hellholes" that some CEOs approve without hesitation when advised to do so by counsel.

Dollars paid out in settlements rarely prevent the next lawsuit; in fact, such payments invite more lawsuits. Dollars that are invested in legal reform not only reduce lawsuit judgments and settlements, they can reduce lawsuit filings. For example, product liability filings in Michigan decreased by up to 70 percent after liabil-

ity reform in that state. Tort reform hits the bottom line.

What does this mean for directors?

The fight for tort reform still rages on and our opposition is as strong as ever. The results of November's elections, especially at the state level, will have a great effect on a company's bottom line. For example, there is a slim "rule-of-law" majority on the Michigan Supreme Court, and the plaintiffs' lawyers will do everything they can to unseat Chief Justice Clifford Taylor. If this occurs, the hard-fought gains in Michigan will be in serious jeopardy.

The policy issue that directors should address is whether their company will do

its fair share to support reform efforts or sit on the sidelines. In the face of an \$865 billion (and growing) annual lawsuit tax, corporations contribute less than \$75 million to reform efforts and organizations. This is plainly insufficient to protect American business (and consumers) from the plaintiffs' bar.

The high cost of defense

The cost of defending one medium-sized lawsuit through trial ranges from \$250,000 to \$1 million, depending on the jurisdiction. If companies would contribute annually to reform efforts what they spend defending one medium-sized lawsuit, Trial Lawyers Inc. would be on its heels.

32 ARKANSAS

Arkansas' liability climate is not conducive to growth and job creation. PRI's 2008 report ranks the state 33rd in monetary tort losses, a downgrade from 28th in 2006. An unpredictable and activist Supreme Court, combined with legislative inaction on liability reform, pushed a drop in ranking for liability risks from 11th in 2006 to 24th in 2008. Former activist Attorney General Mike Beebe was elected governor in 2006. Attorney General Dustin McDaniel is highly activist, filing several state lawsuits against pharmaceutical companies. The state is not expected to improve its liability climate in the near term.

33 WASHINGTON

Washington's tort liability ranking plummeted from 19th to 33rd. While the state's insurance-loss ratios remain in the lowest 20 percent among the states, the overall liability climate has worsened since 2006. PRI's 2008 report ranks Washington the worst among states for product liability losses. Anti-reform forces have added to their majorities in both chambers of the state legislature. Despite two strong pro-reform challenger races in 2007, the Washington Supreme Court has an activist majority. In addition to 2007 legislation that expanded liability in insurance, wrongful death, and employment discrimination law, voters approved a statewide referendum allowing triple damages against insurance companies that "unreasonably" delay or deny a claim. (Health insurers are exempt.) Although punitive damages are not allowed under state statute, the triple damages provision opens the door to punitive-like awards. Washington is on a downward slope for growth and job creation.

34 MASSACHUSETTS

The Commonwealth's liability climate has worsened in the past two years due, in large

part, to the anti-reform agenda of Governor Deval Patrick and a pro-trial lawyer state legislature. Patrick has a long history of animus to liability reform. PRI's 2008 report ranks Massachusetts 32nd for monetary tort losses, a sharp drop from 19th in 2006. Additionally, the Bay State is among the worst five states for liability risks, with an increasing number of lawsuits. Activist Attorney General Martha Coakley is currently considering a lawsuit against lead-paint manufacturers based on a multi-billion verdict in a similar case brought by Rhode Island's attorney general. The state's legal climate is not conducive to job creation and growth, and shows no signs of improvement.

35 NEW JERSEY

New Jersey's liability climate continues to deteriorate, and the state ranks next to last for monetary tort losses and medical malpractice losses. PRI's 2008 report also ranks the state next to last in terms of liability climate "output," reflecting the state's long-term pro-plaintiff orientation. Governor Jon Corzine this year signed a *qui tam* bill deputizing private attorneys to sue on behalf of the state on Medicaid fraud. On a positive note, he vetoed a bill that would have expanded the types of damages in wrongful death claims to include mental anguish, emotional pain, and loss of companionship. Aggressive efforts by anti-reform lawmakers threaten to undo past reforms. There is an activist majority on the state Supreme Court. Attorney General Anne Milgram is neutral to activist.

36 OREGON

Oregon's liability climate is not conducive to growth and job creation and the state's liability ranking has fallen from 27th to 36th. An activist Supreme Court majority has expanded limits on punitive damages and invalidated limits on non-economic damages in medical malpractice cases.

PRI's 2008 report ranks the state 37th for monetary tort losses, a drop of five spots from its 2006 ranking. Oregon ranks third worst among the states for product liability losses. Governor Ted Kulongoski, a former plaintiffs' lawyer, opposes liability reforms. The 2008 statewide ballot will offer two proposals to limit contingency fees and penalize frivolous lawsuits. Both proposals are strongly opposed by the plaintiffs' bar. Without significant change in the state's political environment, Oregon will continue to move down in the rankings.

37 VERMONT

Vermont's liability climate has improved somewhat, but continues to discourage growth and job creation. Vermont's legislature has taken no steps toward substantive legal reform. It ranks last in commercial self-insurance losses. Vermont's monetary tort-loss ranking, however, has improved slightly since 2006, now 29th among the states. Modest liability reforms enacted over the past decade include limits on punitive and non-economic damages in wrongful death cases. Vermont's prospects for improvement are dim, however, with activist Attorney General William Sorrell and an activist majority on the state Supreme Court.

38 NEW MEXICO

An activist majority on the state Supreme Court, combined with rising verdicts from trial courts, are significant threats to New Mexico's liability climate, which continues to discourage growth and jobs creation. The state has dropped to 30th among states for product liability losses and 25th for personal self-insurance losses. New Mexico's northern judicial circuits are on ATRA's watch list for "judicial hellholes." An Albuquerque court recently awarded the state's highest personal injury verdict. Governor Bill Richardson is an activist, signing into law a

2007 false claims bill deputizing private lawyers to sue on behalf of the state, primarily in healthcare-related matters.

39 HAWAII

Hawaii's failure to enact meaningful liability reform has led to a major drop in its ranking from 28th to 39th. State law allows joint liability and does not limit punitive or non-economic damages in product liability cases. The state ranks in the bottom 10 for product liability losses. Businesses operating in Hawaii are vulnerable to increased litigation, particularly in product liability. While Attorney General Mark Bennett has strong rule-of-law credentials, the Supreme Court has an activist majority. The state's liability climate is not conducive to growth and job creation.

40 KENTUCKY

Kentucky's liability climate discourages growth and job creation. Monetary tort losses are near the bottom 30 percent of all states. Personal self-insurance losses are among the 10 worst in the nation. The Kentucky Supreme Court has an activist majority. Former plaintiffs' lawyer Jack Conway, who in 2006 won one of the largest civil verdicts in the state history, was elected attorney general in 2007. Former activist Attorney General Steve Beshear was last year elected governor. The state legislature, particular the House, is hostile to liability reform. Without significant political changes, Kentucky's liability climate will continue its downward trend.

41 ALABAMA

Despite ranking 41st this year, Alabama's liability climate is neutral for growth and job creation. Alabama has a rule-of-law Supreme Court majority and the legislature

has enacted significant legislative liability reforms. The state has fallen backward in overall monetary tort losses, dropping to sixth worst among the states. An anti-reform majority controls the state legislature. The Supreme Court rule-of-law majority has been weakened somewhat by the election of two activist justices, including Chief Justice Sue Bell Cobb. Activist Deborah Bell Paseur and rule-of-law appellate court Judge Gregory Shaw are running for an open seat on the Supreme Court. The outcome of the race does not threaten the rule-of-law majority; however, a win by Paseur would continue to weaken that majority. The plaintiffs' bar will seek to undo the transformation of the state from "tort hell" in the early 1990s to a rule-of-law state. Retiring Justice Harold See, former Chief Justice Perry Hooper, and former Attorney General Bill Pryor led this rule-of-law transformation. Alabama remains a state to watch.

42 MARYLAND

Maryland's monetary tort loss ranking has dropped from 24th in 2006 to 31st in 2008, and its liability climate discourages job growth and creation. Maryland ranks near the bottom 20 percent for litigation risks. The plaintiffs' bar has vigorously supported an anti-reform agenda in the legislature with recent efforts to weaken medical liability and expert-witness reforms. State lawmakers, with the support of activist Attorney General Douglas Gansler, introduced legislation creating "market share" liability in lead-paint lawsuits. This dangerous legislation greatly expands the liability standard by allowing liability even when a plaintiff cannot identify the responsible party. In 2007, activist Governor Martin O'Malley approved a measure allowing for extended periods of limitations for new civil actions where a prior action was dismissed or terminated for reasons other than final

judgment. Maryland's liability climate is not expected to improve.

43 NEW YORK

New York's liability climate discourages growth and jobs creation. Slipping in PRI's 2008 report, New York now ranks among the worst four states for monetary tort losses and dead last for medical malpractice losses. Activist Governor Eliot Spitzer resigned in March in a scandal and was replaced by Lt. Gov. David Paterson, an activist lawyer. The state's high court has an activist majority and Attorney General Andrew Cuomo is an activist. New York law has no limits on damage awards. No reform legislation has been introduced this year, but last year legislation was introduced to establish a first-of-its-kind cause of action for the wrongful death of a companion animal, including pain and suffering damages. New York's liability climate will continue to remain one of the worst in the nation.

44 MONTANA

Despite its reputation as a conservative state, Montana continues to rank among the worst states for its liability climate. It ranks third worst for monetary tort losses and second worst for commercial multiperil losses and commercial self-insurance losses. Montana's Supreme Court has an activist majority and activist Attorney General Mike McGrath is a candidate for chief justice of the state's high court. The state Senate remains in the hands of an anti-reform majority. With little chance of improvement on the horizon, Montana's liability climate strongly discourages growth and job creation.

45 FLORIDA

Florida's liability climate strongly discourages growth and job creation. Its insurance

The Coming Global-Warming Litigation Onslaught

The plaintiffs' bar is raising the stakes in the global-warming debate through what AJP partner Southeastern Legal Foundation (SLF) describes as "the most dangerous litigation in America." By targeting American energy, commerce, and insurance in multibillion-dollar class-action lawsuits, plaintiffs' lawyers have seized the public concern (and confusion) over the environment with the hopes of cashing in big—at the expense of American companies, energy rate payers, and taxpayers.

As alleged in a \$400-million lawsuit filed by the City of Kivalina, Alaska, against 24 energy companies, the case by plaintiffs' attorneys for global-warming causation is simple. Energy companies produce carbon dioxide (CO₂) and other so-called greenhouse gases. These gases cause global warming, according to some scientific conclusions. The defendant companies "know they are responsible" for global warming and are working in concert to cover up the truth. Therefore, say the plaintiffs' lawyers, the defendant companies are part of a conspiracy to defraud the public and to create a public nuisance.

"Keep in mind that most greenhouse gases, including CO₂, are not regulated by the U.S. Environmental Protection Agency, precisely because the science is not at all clear," says Shannon Goessling, SLF's executive director. "That's why you don't see a single federal statute or regulation cited in these lawsuits. The plaintiffs' lawyers are attempting to regulate through the courts—a situation that raises the stakes for companies that follow the current environmental guidelines for clean air and water."

The stakes are staggering. In addition to tens of billions of dollars in alleged

damages, plaintiffs' lawyers and their allies in as many as 20 state attorneys general offices are seeking to compel some form of remediation for alleged global-warming causation. The Lieberman-Warner bill recently introduced in the U.S. Senate would create a so-called "cap-and-trade" program to penalize greenhouse-gas emitters.

According to a National Association of Manufacturers study, the bill would cost four million jobs in the United States by

prove that American industry is responsible for global-climate change," Lee says.

Understanding how to conduct business in the current environment will be critical for American corporations, says SLF's Goessling. "There are basic assumptions being made in global-warming litigation that are wide open for attack," she continues. "A majority of American corporations are developing 'green-friendly' marketing programs. Plaintiffs' lawyers are citing those programs as 'evidence' cor-



The village
of Kivalina,
Alaska

2030 and slash \$669 billion a year from the nation's economy.

Harvard University's Kennedy School of Government energy expert Henry Lee told *Time* magazine that the cost of climate change adaptations would absorb 2 to 3 percent of the nation's \$13 trillion GDP per year for the foreseeable future.

"The plaintiffs' bar is following the litigation strategies developed in the tobacco and asbestos mega-lawsuits. The difference is that the plaintiffs' bar is now adopting questionable science to

porations know they are causing global warming. It's a huge leap to blur the line between 'environmentally responsible' and 'causes global warming.' The two issues are distinct."

Taken in the context of massive lawsuits, the battle over climate-change responsibility and Corporate America's responses to it will be as much about the hearts and minds of the American public as it is about the credibility of climate-change science. The courtroom will be only one of many battlefields.

loss ratios and monetary tort losses are in the lowest 20 percentile. Its legislative leadership and Governor Charlie Crist have not made liability reform a high priority. The Florida Supreme Court has an activist majority. One bright spot is rule-of-law Attorney General Bill McCollum, a former member of the U.S. House. The plaintiffs' bar is supporting several legislative proposals that would further undermine Florida's liability climate, including a bill to abolish pre-dispute arbitration agreements and to impose stringent new reporting rules on private nursing homes. The Florida Supreme Court is considering a case that would overturn recently enacted reforms limiting attorneys' fees on worker compensation claims. Without much-needed support from executive and legislative leadership, and a reconstitution of the Supreme Court to a rule-of-law majority, Florida's liability climate will continue to strongly discourage growth and job creation.

46 CALIFORNIA

California's liability climate continues to decline. California ranks among the worst five states for product liability losses. The state now ranks near the bottom 10 percent in the nation for liability risks. The state Supreme Court is increasingly activist. The reinvigorated plaintiffs' bar is exercising political muscle in the state legislature and through a multi-million-dollar public-relations "makeover" campaign. Lawmakers also proposed extending and, in some cases, eliminating the statute of limitations for employee claims against employers. If these proposals become law, California will sink further and its liability climate will continue to strongly discourage growth and job creation.

47 PENNSYLVANIA

The Keystone State is experiencing a growing medical malpractice disaster,

described in a recent Harvard School of Public Health report as an "extreme-level" medical-liability crisis. Despite considerable posturing, activist Governor Edward Rendell has failed to address the growing liability crisis. The Pennsylvania Supreme Court has a slim rule-of-law majority and Attorney General Tom Corbett is a rule-of-law advocate. Inaction on much-needed legislative legal reform measures has kept Pennsylvania near the bottom among states in most liability categories, with no likelihood of improvement in the short term. Pennsylvania's liability climate strongly discourages job creation and growth.

48 RHODE ISLAND

Despite Governor Donald Carcieri's efforts to promote economic growth, Rhode Island's liability climate continues to deteriorate. A recent court decision in a case filed by the state against four lead-paint manufacturers resulted in a multi-billion dollar verdict against three of the defendants. Both Massachusetts and Connecticut are now considering similar lawsuits. Activist Attorney General Patrick Lynch has joined 16 other attorneys general in a petition to the U.S. Court of Appeals to compel the Environmental Protection Agency to adopt stringent new regulations related to greenhouse-gas emissions and alleged global warming. The state's liability climate strongly discourages growth and job creation.

49 WEST VIRGINIA

West Virginia continues to have one of the worst liability climates in the nation, despite efforts by a sometimes-fractious business community and Governor Joe Manchin to promote economic growth and liability reforms. The state ranks 35th in monetary tort losses, a further drop from its 2006 ranking. It ranks 3rd best among states for product liability losses, which is

one of the few bright spots in West Virginia's efforts to promote growth and job creation. PRI's 2008 report ranks West Virginia among the worst 10 at-risk states for increased litigation, and the entire state continues to be designated by ATRA as a "judicial hellhole." The Supreme Court has a decidedly activist majority. Justice Elliott Maynard, one of the two rule-of-law justices on the Supreme Court, was soundly defeated in the May primary election, coming in a disappointing third. Activist Attorney General Darrell McGraw continues to unfairly target out-of-state businesses, which further stymies growth.

50 ILLINOIS

Illinois' liability climate ranks at the bottom, despite successful efforts by the reform community to fend off legislative proposals favoring the plaintiffs' bar. Insurance loss ratios and monetary tort losses rank in the bottom 10 among states. PRI's 2008 report identifies Illinois as the highest at-risk state for new lawsuits. ATRA has designated two "judicial hellholes" in the state: Cook County (Chicago) and St. Clair County. Madison County was recently downgraded from hellhole status based on appellate court elections and the increasing frequency of rule-of-law-judicial challengers in key appellate races. Liability reform advocates have taken advantage of disarray in legislative leadership to prevent passage of two anti-reform measures. One bill would have reduced the degree of liability required under the state's joint liability standard; the other bill would have reduced the effect of Illinois' collateral-source disclosure rule.

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