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In 2005, the American Tort Reform Association (ATRA), a corporate front group, released a report attacking judges and juries in “South Florida, primarily Miami-Dade County; Also Palm Beach And Broward Counties.” ATRA called this area a “judicial hellhole,” listing it as this country’s “Hellhole #6.”

This “ranking” was based on no actual or scientific data but rather on intellectually dishonest criteria that ignores a wealth of evidence to the contrary, specifically that South Florida is booming and has an excellent business and health industry climate. This report describes the major flaws in the “Judicial Hellhole” report, presents a wealth of contradictory information, and concludes that ATRA has severely misled Florida’s lawmakers and the public with this report.¹

Hellhole? What “Evidence”?

ATRA cites four main reasons for identifying South Florida as a judicial “hellhole.”

1. Morgan Stanley vs. Ron Perelman. The first is a case in Palm Beach County, where the investment bank Morgan Stanley lost to financier Ron Perelman, hardly the typical case being heard in Florida courts today. The case is currently on appeal. ATRA seems to be taking the side of one financial giant over another in this litigation as a pretext to attack the judge in the case, Palm Beach County Judge Elizabeth Maass. Morgan Stanley did not like some rulings by Judge Maass, who found that the company had engaged in repeated discovery failings, stating in one order, “many of these discovery failings were done knowingly, deliberately and in bad faith.” Also, wrote the judge, “MS & Co.’s wrongful conduct has continued unabated.... In sum, MS & Co. has deliberately and contumaciously violated numerous discovery orders... The

¹The Center for Justice & Democracy has also condemned the report for attacking judges and juries in a number of poor communities in the United States, including the Hurricane ravaged Gulf Coast of Texas. In fact, ATRA brazenly called the Rio Grande Valley and Gulf Coast of Texas the worst so-called “Hellhole” in the country within months of the Hurricanes as people were struggling to survive. It also listed three of the top six “Hellholes” as in Illinois. Yet Illinois is the 13th most desirable state in the country to locate a business, according to *Site Selection Magazine’s* 2005 ranking of state business climates. Florida ranks #12. See., <http://www.siteselection.com/issues/2005/nov/p701/>

prejudice to CPH from these failings cannot be cured....The judicial system cannot function this way.”²

In fact, Judge Maass joins a long list of judges around the country trying reign in discovery abuse by corporations in litigation, which is an increasing problem.³ Certainly, like any litigant, Morgan Stanley has ample opportunity to appeal these rulings as well as the verdict if it believes they were unfair. But at a time the country is suffering through a wave of corporate scandals and abuse, one must wonder why ATRA has chosen to attack a judge whose rulings seek to hold accountable a company whose behavior the judge found was wrongful and undermined the ability of our courts to function properly. Such rulings certainly do not make South Florida a “judicial hellhole.”

2. Class Actions. ATRA’s second complaint with South Florida involves two class certifications that the defendant corporations in those cases did not like, appealed and then won on appeal. Aside from the obvious point – that the system worked for these defendants exactly as the system is set up to work – complaints about state class action certifications should now barely be an issue for corporate defendants. In 2005, at the behest of corporate America, Congress enacted legislation that now tosses into federal court virtually all consumer class actions. This law will result in severely overburdening the federal courts and creates new procedural class action hurdles.

It should be noted that class actions are vital for permitting consumers to gain access to the courts where a company may have acquired a large financial windfall by defrauding large numbers of people. For example, in Florida,

In recent years, class action lawyers in Florida have filed lawsuits against life insurance companies that allegedly charged blacks higher premiums than they charged whites, auto dealers that allegedly tricked customers into paying for extended warranties, and producers of weight loss products that allegedly made unfounded claims about how fast and painlessly their products could pare off pounds. More recently, [Ervin] Gonzalez and other South Florida plaintiff attorneys won their settlement of the class action against Service Corporation International as a result of the mishandling and desecration of the remains of hundreds of people at the company’s Menorah Gardens cemeteries in Broward and Palm Beach counties.⁴

Class actions are a critical tool for individual citizens to deter violations of individual rights and corporate misconduct. Yet Florida’s major industries continue on an unyielding mission to weaken Florida’s class action laws, making it more difficult for consumers to bring them. With corporate fraud and abuse at all-time high, perhaps at no moment in history have class actions

² Jaime Levy Pessin, “Chicago firm heavyweights clashed in Perelman case,” *Chicago Lawyer*, July, 2005.

³ See, David Halperin, “Discovery Abuse: How Defendants in Products Liability Lawsuits Hide and Destroy Evidence,” Public Citizen Congress Watch, July 1997.

<http://www.citizen.org/congress/civjus/tort/articles.cfm?ID=918>

⁴ “Gutting class actions,” *Daily Business Review*, April 18, 2005.

been more important than they are now. ATRA's attacks on Florida's class action lawsuits are unwarranted and particularly egregious given the current climate of corporate fraud.

3. Playgrounds. ATRA's third complaint about South Florida concerns the removal of unsafe playground equipment in Broward County and Miami-Dade, going so far as to grumble that "Broward County schools have reportedly posted 'no running' signs." ATRA apparently believes that safety innovations, spurned by litigation, has "taken the fun" out of playgrounds. This is absurd.

In fact, much upgrading of playground equipment stems from 1991, when the Consumer Product Safety Commission (CPSC) issued its "Handbook for Public Playground Safety," following guidelines first issued in 1981.⁵ The preface notes that hundreds of thousands of children are sent to emergency rooms each year with preventable playground equipment injuries, observing:

"Playgrounds are a fundamental part of the childhood experience. They should be safe havens for children. All of us have memories of playing on playgrounds in our neighborhood park and at recess in the schoolyard. Unfortunately, more than 200,000 children are treated in U.S. hospital emergency rooms each year for injuries associated with playground equipment. Most injuries occur when children fall from the equipment onto the ground. Many of these injuries can be prevented. To address the issue of falls, these guidelines emphasize the importance of protective surfacing around playground equipment."⁶

In many situations, insurance companies themselves have played a large role in forcing compliance with CPSC standards and other safety changes. One reason insurers have been particularly active in playground risk management is because many municipalities are now self-insuring. Because self-insuring local governments bear most of their own risk — they collect premiums and pay claims — they are starting to focus far more on minimizing risk and ensuring safety than their former insurers ever did.⁷ Use of safer shapes and materials, including soft surfaces and rounded edges, has hardly taken the "fun" out of playgrounds, particularly when they result in safer equipment that is less likely to send a child to the hospital.

4. Medical Malpractice Insurance Rates. And finally, ATRA makes an outdated argument about physicians' insurance rates, which have now stabilized and are dropping in Florida and everywhere in the country, irrespective to tort laws. Whatever one might have said about Florida's insurance crisis over the past five years, one thing is clear — rates are no longer going up. The total medical malpractice insurance premium paid in the state of Florida decreased by 3% in 2004.⁸

⁵ Wallach, Frances, found at The World Playground Park & Recreation, Products and Services Web Directory, <http://www.world-playground.com/Article.htm>. U.S. Consumer Product Safety Commission, Washington, D.C. 20207, Pub. No. 325.

⁶ U.S. Consumer Product Safety Commission, Washington, D.C. 20207, Pub. No. 325.

⁷ See, Center for Justice & Democracy, *Lifesavers, CJ&D's Guide to Lawsuits that Protect Us All*, 2002, <http://www.centerjd.org/free/Lifesavers.pdf>.

⁸ Medical Malpractice Financial Information Closed Claim Database and Rate Filings, *Florida Office of Insurance Regulation 2005 Annual Report*, October 1, 2005.)

In fact, the most recent data from the Council of Independent Agents and Brokers now confirms that the large medical malpractice insurance rate increases that took hold nationally in 2001 and 2002 have ended. The average rate hike for doctors nationally over the past six months has been 0 percent. This is following similar results for the last quarter of 2004, which saw rates rising only 3 percent at the end of that year. By comparison, rates jumped 63 percent during the same quarter of 2002.⁹

This is because the recent insurance crisis for doctors was caused by the economic cycle of the insurance industry, and not a tort law cost explosion as the insurance industry and others had claimed.¹⁰ As with every insurance cycle, rates have now stabilized and availability is improving around the country, irrespective of tort law restrictions enacted in particular states. In all commercial lines, rate increases have slowed to a standstill and in most cases are dropping. This is occurring whether or not a state has a “cap” on compensation for patients.¹¹

What’s more, there was never a so-called litigation “explosion” in medical malpractice cases in Florida. The most comprehensive look at closed claims data in Florida has revealed, “While the absolute frequency of paid claims did increase between 1990 and 2003, when the figures are adjusted for population growth or for number of licensed physicians, per capita claim frequency from 2000 through 2003 was not different than the first four years of the 1990s decade.”¹²

⁹ Council of Insurance Agents and Brokers, *Commercial Property-Casualty Market Survey*.

¹⁰ See, e.g., Baicker, Katherine; Chandra, Amitabh, “Defensive medicine and disappearing doctors? Evidence suggests that the malpractice crisis has more complex effects than are commonly assumed,” *Regulation*, Fall, 2005 issue (“First, increases in malpractice payments do not seem to be the driving force behind increases in premiums. Second, increases in malpractice costs do not seem to affect the overall size of the physician workforce, although they may affect some subsets of the physician population more severely.”) Black, Silver, Hyman, and Sage, “Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002,” *Journal of Empirical Legal Studies* (2005) (“the rapid changes in insurance premiums that sparked the crisis appear to reflect insurance market dynamics, largely disconnected from claim outcomes.”) Americans for Insurance Reform, *Stable Losses/Unstable Rates*, (2004), <http://www.insurance-reform.org/StableLosses04.pdf>. (“While insurer payouts directly track the rate of medical inflation, medical insurance premiums do not. Rather, they rise and fall in relationship to the state of the economy. Not only has there been no “explosion” in lawsuits, jury awards or any tort system costs at any time during the last three decades, but the astronomical premium increases that some doctors have been charged during periodic insurance “crises” over this time period are in exact sync with the economic cycle of the insurance industry, driven by interest rates and investments. ... In other words, insurance companies raise rates when they are seeking ways to make up for declining interest rates and market-based investment losses and reduction in interest rates.”) See also, Amitabh Chandra, Shantanu Nundy, Seth A. Seabury, “The Growth of Physician Medical Malpractice Payments: Evidence from the National Practitioner Data Bank,” *Health Affairs*, May 31, 2005.

¹¹ See, Center for Justice & Democracy, *Doctors' Insurance Rates are Falling; Caps Make No Difference*, 2005, http://centerjd.org/free/mythbusters-free/MB_ratesfalling.pdf.

¹² Neil Vidmar, PhD, School of Law, Duke University; Paul Lee, MD, JD, Duke Medical School, Duke University; Kara MacKillop, BS School of Law, Duke University; Kieran McCarthy, BA, School of Law, Duke University and Gerald McGwin, PhD, School of Public Health, University of Alabama, Birmingham, “Uncovering the “Invisible” Profile of Medical Malpractice Litigation: Insights from Florida,” 54 *DePaul L. Rev.* 315 (2005).

Moreover, even with the recent increase in rates, doctors have continued to flood into Florida. Since 2001, the number of actively licensed medical doctors and osteopathic physicians in Florida increased from 47,510 to 53,062.¹³ Diane Orcutt, Deputy Director of Medical Quality Assurance, Department of Health, testified under oath in 2003, “Given the general trend and the number of new applications that we are approving and licensing, I would say if you look at it, for five years ago, yes there would be an increase.”¹⁴

Indeed, due to increasing demand, health care industry in South Florida is robust and continues to grow. According to recent reports, “The largest not-for-profit healthcare organization in the region is already at capacity, so it has begun a \$1.3 billion capital expansion project that includes two new hospitals -- in West Kendall and Homestead -- to try to keep up with demand.”¹⁵

South Florida’s Strong Business Climate

One of the most deceptive aspects of ATRA’s “Judicial Hellholes” report is the suggestion that South Florida’s business climate is somehow being hurt by the area’s “litigation environment.” In fact, the South Florida economy is booming.

South Florida cities are ranked among the best cities to do business in America.

- ❖ According to *Inc. Magazines’* best cities for business in America, Florida cities dominated the list. “A remarkable six of the top 25 cities on the large list, including No. 5 West Palm Beach, No. 7 Fort Lauderdale, No. 8 Jacksonville, No. 11 Orlando, No. 14 Tampa-St. Petersburg, and No. 22 Miami, are from the Sunshine State...”¹⁶
- ❖ “For the second straight year, Miami ranked second behind Santiago, Chile, as the best city to do business with Latin America, according to a survey by Spanish-language magazine *America-Economia*.”¹⁷

South Florida’s gross regional product is growing.

- ❖ “Florida’s state domestic product, in real terms, grew 7 percent last year and he [Wachovia Corp. senior economist Mark Vitner] predicts 6.6 percent expansion in 2006. He estimated South Florida’s gross regional product growth at about 2.8 percent in 2005 and jumping about 4.4 percent this year.”¹⁸

¹³ The Florida Senate Interim Project Report, Review of Medical and Physician Licensure; Oct 2005.

¹⁴ Diane Orcutt, Deputy Director of Medical Quality Assurance, Department of Health, July 14, 2003.

¹⁵ Boodhoo, Niala, “Healthcare,” *Miami Herald*, Jan. 9, 2006.

¹⁶ “Top 25 Cities for Doing Business in America,” *Inc. Magazine*, March 2004

¹⁷ “Miami Herald Business briefs,” *Miami Herald*, May 30, 2005

¹⁸ “South Florida’s Economic Forecast,” *Miami Herald*, Jan. 9, 2006.

Real estate, construction, tourism and trade in South Florida continue to be strong.

- ❖ “After several years of gangbuster economic growth in South Florida, now the problem is how to manage it. Unemployment is at record lows, and the pace of job growth is expected to continue.... Still, there's little doubt that South Florida's economy has grown at an incredible rate over the past few years, and 2006 seems no different.”¹⁹
- ❖ Miami-Dade, Broward and Palm Beach counties accounted for almost a quarter of the 1.9 million new residents the state added from 2000 to 2005. About 90 percent of that growth is from people who move there, rather than from a natural increase.... That influx of people, as well as the popularity of the secondary home market, has helped fuel the real estate boom. Although single-family home sales have been slowing across the country, local analysts say South Florida is likely to see a slight cooling this year, rather than a sharp drop-off.²⁰
- ❖ “Malls and shopping centers reported double-digit growth last year, despite high gas prices and hurricanes. They expect the same in 2006.”²¹
- ❖ “Despite the hurricanes, 2005 was still a record-breaking year for tourism for both the state and the region. Visit Florida has forecast 3.2 percent growth this year, which is better than the national average, but 2 percent slower than last year.”²² Atlantic Sands hotel manager Dori Lynn Neuwirth said 2005 was the best ever in more than 40 years of business. She sees little change this year. ‘I wish I had more rooms,’ said Neuwirth of the Hollywood hotel.”²³
- ❖ As long as the global economy holds, South Florida will continue to thrive as a trade center. Passenger and cargo traffic at airports and seaports is expected to be strong.”²⁴

In 2004, *Site Selection Magazine* highlighted nine “Florida Markets to Watch in 2005.” These included Miami-Dade and Palm Beach Counties:²⁵

- ❖ Miami-Dade: “The Beacon Council scored a coup in March 2004 when it snagged the corporate headquarters relocation of Kraft Foods Latin America. The company moved its offices in June to Coral Gables from Rye Brook, N.Y. The move brought a \$2-million facility investment and 107 jobs to Miami. The average annual salary is \$76,000. ... Frank Nero, president and CEO of the Beacon Council, says the Kraft move ‘underscores Miami-Dade County and South Florida’s status as the business center of the Americas.’”

¹⁹ Boodhoo, Niala, “S. Fla.'s outlook on jobs good in '06”, *Miami Herald*, Jan. 9, 2006.

²⁰ *Ibid.*

²¹ Boodhoo, Niala, “Retail”, *Miami Herald*, Jan. 9, 2006.

²² Boodhoo, Niala, “Tourism”, *Miami Herald*, Jan. 9, 2006.

²³ Boodhoo, Niala, “S. Fla.'s outlook on jobs good in '06”, *Miami Herald*, Jan. 9, 2006.

²⁴ Boodhoo, Niala, “Trade & Transportation”, *Miami Herald*, Jan. 9, 2006

²⁵ <http://www.siteselection.com/features/2004/sep/fl/pg05.htm>

- ❖ Palm Beach County: “Palm Beach County, the entire Southeast Coast of Florida is poised to become a global player in biotechnology research and development. Scripps Florida [research complex in Sarasota Technology Park] is projected to create 6,500 jobs, generate \$1.6 billion in additional income to Floridians and boost the state's gross domestic product by \$3.2 billion in the next 15 years. ‘Scripps’ commitment to expand into Florida marks a milestone for the Sunshine State,” Gov. Jeb Bush said in May 2004. “Scripps Florida will be the catalyst for exponential growth going forward, complementing the foundation already in place here in biotechnology, pharmaceutical design and manufacturing, medical device manufacturing, health care, and overall research and development.”

ATRA And Its Attacks On Our Courts

The “Judicial Hellhole” report’s author, ATRA, is a Washington-DC-based group that was formed in 1986 to represent hundreds of U.S. and foreign corporations in their bid to overhaul civil liability laws at the state and national levels. Its members are largely Fortune 500 companies with a direct financial stake in restricting lawsuits. Members have included representatives of the tobacco, insurance, chemical, auto and pharmaceutical industries. Corporate giants like Philip Morris, Dow Chemical, Exxon, General Electric, Aetna, Geico and Nationwide have all supported ATRA.²⁶ *Legal Times* also reported that, “most of [ATRA’s] funding comes from large corporate donors. Insurance firms ... are each good for \$50,000 or \$75,000, one unnamed lobbyist familiar with the Association told the publication.”²⁷ The tobacco industry has supported ATRA, directly through Philip Morris, and indirectly through Covington & Burling, the law firm for the now-defunct Tobacco Institute and other major tobacco companies.²⁸

Since the mid-1990s, a principal focus of the “tort reform” movement has been to ensure the election of pro-industry state judges and attack judges who typically support consumers’ rights. Their tactics have included running issue ads, distributing biased evaluations of judges’ records and bogus studies. For example, in 1998, an organization known as “StateSource” contacted Florida attorneys for a survey about the performance of Florida’s judges. The survey was actually being done for a corporate front group called Citizens for a Sound Economy (CSE), which was acting as a funnel for major corporate money to influence judges and judicial

²⁶ Gannon, *Tort Deform - Lethal Bedfellows*, Essential Information, 1995, pp. 23-25.

²⁷ “Proponents of Reform,” *Legal Times*, April 17, 1995, cited in Silverstein, *Smoke & Mirrors*, Public Citizen Congress Watch, 1996, p. 11.

²⁸ See, Carl Deal and Joanne Doroshov, “*The CALA Files – The Secret Campaign by Big Tobacco and Other Major Industries to Take Away Your Rights*,” Center for Justice and Democracy and Public Citizen. Executive summary on-line at <http://www.centerjd.org/lib/cala.htm>. “Report Says Tobacco Industry Quietly Backed Tort Reform,” *Associated Press*, February 21, 1999; Tort Reform Project Budget, Covington & Burling, October 3, 1995, Document #2041201160 et seq. The budget indicates that by October 3, the project had already given about \$3 million to ATRA.

elections.²⁹ CSE was also pushing for legislation to stop lawsuits against negligent corporations. CSE concealed the fact that it was behind the survey.³⁰

ATRA has been equally focused on political attacks on our judges for a number of years. In 1994, ATRA officials told the group's annual legislative conference in Washington, D.C. that the groups would start to refocus its efforts on judicial elections.³¹ By 1998, this had become a major focus for ATRA.³² In fact, ATRA has been releasing so-called "Judicial Hellholes" reports for several years now, with its earlier versions focusing largely on juries and judges in minority communities.³³

These kinds of attempts to influence judges are a growing and extremely dangerous trend according to many in the judicial establishment, including conservative jurists. Judges who must look over their shoulder to calculate how their decisions might play with certain individuals or groups in the community cannot fulfill the basic role of what it is we expect of a judge. As the late Chief Justice William Rehnquist put it, "judges must be protected from political threats, including from conservative Republicans.... The Constitution protects judicial independence not to benefit judges, but to promote the rule of law."³⁴ Similarly, in a PBS *Frontline* documentary that aired November 23, 1999, called "Justice For Sale," U.S. Supreme Court Justices Stephen Breyer said, "Independence doesn't mean you decide the way you want. Independence means you decide according to the law and the facts... The balance has tipped too far, and when the balance has tipped too far, that threatens the institution. To threaten the institution is to threaten fair administration of justice and protection of liberty."

Conclusion

In May 1999, following passage of radical "tort reform" legislation in Florida, Enterprise Florida, a private-public partnership that works to bring out-of-state companies to Florida, told the, *Miami Daily Business Review*, "tort reform was never a big priority for the group.... The litigation environment isn't an issue that companies look at 'on a day-to-day basis' in deciding whether to relocate. If it were a frequent question, we would have been more active on this bill."³⁵

This statement speaks volumes about what a sham ATRA's Judicial Hellholes report is. The notion that judges and juries in South Florida are somehow hurting the area's business economy

²⁹ See, e.g., Fialka, "How Koch Industries Tries To Influence Judicial System," *Wall Street Journal*, August 9, 1999; Marcus, "Issues Group Fund Seminars for Judges," *Washington Post*, April 9, 1998.

³⁰ Hladky, "Mystery evaluation; Conservative group that backed poll lobbied hard for tort reform," *Miami Daily Business Review*, May 22, 1998.

³¹ "Tort Reformers Aim at Judicial Elections to Consolidate Gains," *Liability Week*, January 24, 1994.

³² "Tort Reformers Focus on State Supreme Court Elections," *Liability Week*, October 26, 1998.

³³ See, Center for Justice & Democracy, "Tort Reform" and Racial Prejudice: A Troublesome Connection," 2004, <http://www.centerjd.org/race.pdf>.

³⁴ David G. Savage, "Rehnquist Sees Threat to Judiciary," *Los Angeles Times*, January 1, 2004.

³⁵ Jim Oliphant, "For business, a high-stakes victory Legislators put big monetary limits on liability lawsuits," *Daily Business Review*, May 7, 1999.

or inhibiting new businesses from coming into this region is spurious. Indeed, the notion that lawmakers must restrict the rights of injured consumers to sue in order for a state's business economy to grow or even survive is one of most sensationalized fictions driving the "tort reform" movement today.

Judges are not supposed to be partisans or advocates of particular interests, neither beholden to them nor afraid of their wrath. We are right to expect that judicial decision-making will be apolitical. Accordingly, throughout much of our history, we have struggled to keep those who ascend to the bench insulated from political attack and reprisal by those who are dissatisfied with their decisions. Unfortunately, reports like ATRA's "Judicial Hellholes" threatens this tradition, which has served and protected us so well for over 200 years.