

## **POKING HOLES IN “JUDICIAL HELLHOLES,” ATRA’S ANNUAL FAKE NEWS STORY**

The American Tort Reform Association (ATRA), a Washington-DC-based group formed in 1986 to represent hundreds of U.S. and foreign corporations in their bid to overhaul civil liability laws,<sup>1</sup> publishes an annual “study” it calls “Judicial Hellholes” (a term the group has actually trademarked for some reason). The goal of the “study” is to discredit judges and juries willing to hold reckless corporations accountable for the harm they cause.

There’s no actual methodology behind this annual effort. Indeed, the publications amount to little more than whining by industries that have been hauled into court for hurting or killing people, and who have a direct financial stake in restricting lawsuits. That is why, over the years, observers and scholars have issued scathing indictments of the integrity, validity and impact of this document.

When any group systematically attacks local judges and juries like this, the very foundations of our judicial system are threatened. The 2016 report disturbingly pictures the faces of judges they dislike, as well as (bizarrely) an ISIS beheading image.<sup>2</sup> Judges who must look over their shoulder to calculate how their decisions might play with certain individuals or groups cannot fulfill the basic role of what it is we expect of a judge.

Here’s a sampling of other problems with “Judicial Hellholes” annual reports:

### **EXPERTS DISCREDIT THE REPORT’S INTEGRITY**

- In her 2008 academic study of Judicial Hellholes,<sup>3</sup> Professor Elizabeth Thornburg of the Southern Methodist University Dedman School of Law wrote, “Judicial Hellholes are selected in whatever way suits ATRA’s political goals. The choice is not based on research into the actual conditions in the courts....[T]he point of the hellhole campaign is not to create an accurate snapshot of reality. The point of the hellhole campaign is to motivate legislators and judges to make law that will favor repeat corporate defendants and their insurers, and to spur voters to vote for those judges and legislators who will do so. ... As well-founded, honest commentaries on judicial systems, [ATRA’s hellhole reports] are a major failure.”
- In 2007, *New York Times* Supreme Court reporter Adam Liptak, critiqued the Judicial Hellholes report by noting, “It is, for starters, a collection of anecdotes based largely on newspaper accounts. It has no apparent methodology.”<sup>4</sup> Mr. Liptak obtained a response to his story from ATRA’s spokesperson Darren McKinney, who told him, “We have never

claimed to be an empirical study ... It's no more or less subjective than what appears in *The New York Times*."

- Two West Virginia University professors published a 2007 article noting in reference to Judicial Hellholes, "business interest groups and the media produce stories about abusive litigation that neglect important contradictory information, rely on erroneous information, make assumptions based on inaccurate anecdotes, or use inadequate evidence and slogans generated by the 'research' arms of interest groups who neglect normal standards and practices of empirical social scientific inquiry."<sup>5</sup>

Indeed in its 2005 hellhole report ATRA "ranked" West Virginia's as its third worst "hellhole" based, in large part on a class action lawsuit brought against DuPont over toxic exposure caused by Teflon. ATRA forgot to check if the lawsuit was even filed in West Virginia. It wasn't. When confronted with its factual error, ATRA dismissed it as inconsequential, posted a correction on its web site, and then refused to adjust its "rating" of West Virginia.<sup>6</sup>

## **ATRA'S SOURCING IS A JOKE**

According to an American Association for Justice analysis of the 2016 Judicial Hellholes report:

- "More than two dozen of ATRA's sources turn out to be 'newswires' owned by the U.S. Chamber of Commerce Institute for Legal Reform, including the Madison Record, the West Virginia Record, the Florida Record, the Louisiana Record, the Cook County Record, and Legal NewsLine."<sup>7</sup> Notably, the U.S. Chamber, the nation's largest corporate lobby group,<sup>8</sup> issues similar and equally discredited state "rankings" each year.<sup>9</sup>
- "ATRA cites prior editions of Judicial Hellholes as a source two dozen times, leading to incidences where a fact in this year's Judicial Hellholes is supported by a statement in a previous Judicial Hellholes, which is itself based on an overheard and unquoted conversation by an unnamed defense attorney (see p.38's discussion of Allegheny County procedural matters)."
- "ATRA relies on opinion pieces dressed up to look like news, and written not by journalists but by ATRA affiliates and insurance executives,<sup>10</sup> or by similar faux news pieces by allied groups like the U.S. Chamber's National Chamber Litigation Center, the U.S. Chamber's Institute for Legal Reform, the National Federation of Independent Businesses, and a variety of regional 'Lawsuit Abuse Watch' and 'Civil Justice Association' that have ties to ATRA (and were largely founded on money from the tobacco industry)."<sup>11</sup>
- "What you have in total becomes a collection of disingenuous and outright misrepresented anecdotes. A bank made to pay millions for mistaking a customer for a robber turns out to involve bank employees taking no action while watching a man they know is innocent be beaten by a SWAT team. Or an outrageous denial of a nursing home's arbitration contract turns out to involve a senior who lost an eye and later his life, and a contract he never even signed. Fortunately, the authors helpfully signal when they are about to misrepresent or spin

facts by using the phrase ‘effectively’ or ‘essentially.’ In this report they do so 24 separate times (in 2015 the phrases popped up 12 times, in 2014 9 times, in 2013 7 times, and 2012 4 times – or as the authors might say, ‘effectively a five-year 500% increase!’).”

## ALARMINGLY, ATRA IS ATTACKING JURIES AGAIN

In earlier years, ATRA’s “hellhole” reports attacked the competence of jurors quite specifically, in addition to that of judges from these communities. (“[J]uries[] is St. Louis tend to disfavor large corporations.”<sup>12</sup>) Seemingly after being stung by criticism that “minorities made up most of the populations in the judicial hellholes” identified by ATRA,<sup>13</sup> the organization switched its focus exclusively to judges.

However, the 2016 report is a full-throttle attack on juries again, in fact identifying St. Louis as a new #1 “hellhole” based largely on three different verdicts against Johnson & Johnson, whose powder caused ovarian cancer. Of course, these are cases where J&J’s teams of corporate defense lawyers had full opportunity to refute the scientific evidence against it and present their case. They repeatedly lost. ATRA’s only explanation is to malign and belittle the jurors’ integrity and intelligence, falsely alleging they were all “preconditioned” and “tricked” - something that should insult all Americans.

## NOTES

<sup>1</sup> Fact Sheet: American Tort Reform Association, Center for Justice & Democracy, <https://centerjd.org/content/fact-sheet-american-tort-reform-association>

<sup>2</sup> See, e.g., American Tort Reform Association, *Judicial Hellholes 2016-2017*, p. 16.

<sup>3</sup> Thornburg, Elizabeth G., *Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia* (2008). *West Virginia Law Review*, Vol. 110, No. 3, 2008. Available at SSRN: <http://ssrn.com/abstract=1123808>

<sup>4</sup> Adam Liptak, “The Worst Courts for Businesses? It’s a Matter of Opinion,” *New York Times*, December 24, 2007, <http://www.nytimes.com/2007/12/24/us/24bar.html?pagewanted=all&r=0A> 2008

<sup>5</sup> Richard A. Brisbin Jr. and John C. Kilwein, “The Future of the West Virginia Judiciary: Problems and Policy Options,” *West Virginia Public Affairs Reporter*, Institute for Public Affairs, West Virginia University, October 2007, <http://ipa.wvu.edu/r/download/43223>

<sup>6</sup> Adam Lynch, “Barbour: Hands Off Damages Cap,” *Jackson Free Press*, December 23, 2009, <http://www.jacksonfreepress.com/news/2009/dec/23/barbour-hands-off-damages-cap/>

<sup>7</sup> Chamber-Owned News Service Reports On Supreme Court Case Without Disclosing Parent's Role, *Media Matters*, June 9, 2012, <http://mediamatters.org/blog/2012/06/19/chamber-owned-news-service-reports-on-supreme-c/184135>.

<sup>8</sup> See, Center for Responsive Politics, *Business Associations*, <https://www.opensecrets.org/lobby/indusclient.php?id=N00&year=2016>

<sup>9</sup> Fact Sheet: “U.S. Chamber Of Commerce Liability Survey - Inaccurate, Unfair And Bad For Business,” Center for Justice and Democracy, <https://centerjd.org/content/factsheet-us-chamber-commerce-liability-survey-inaccurate-unfair-and-bad-business>.

<sup>10</sup> For instance see the Tribtalk articles on p.38, which are actually opinion pieces written by the President of Rio Grande Valley Citizens Against Lawsuit Abuse and an executive at SafeGuard Insurance Agency, <https://www.tribtalk.org/2015/05/09/hailstorm-lawsuits-are-threatening-texas-homeowners/>.

<sup>11</sup> Fact Sheet: “Citizens Against Lawsuit Abuse” Groups, Center for Justice and Democracy, <https://centerjd.org/content/fact-sheet-citizens-against-lawsuit-abuse-groups>.

<sup>12</sup> See, American Tort Reform Association, *Bringing Justice To Judicial Hellholes* (2002) at 17; “The Racial Implications of Tort Reform” by Joanne Doroshow and Amy Widman, 25 *Wash. U. J.L. & Pol'y* 161 (2007), [http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1206&context=law\\_journal\\_law\\_policy](http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1206&context=law_journal_law_policy)

<sup>13</sup> “Tort reform debate turns ugly,” *Fort Smith Times Record*, January 11, 2005.