



THE BOARDROOM GUIDE TO LITIGATION

An Analysis of the Legal Climates In All 50 States

New evidence shows litigation reform works, but reformers are fighting a new political landscape.

By Steven B. Hantler

Following the lead of the 2008 federal elections, recent state elections have ushered in a new wave of pro-plaintiffs' bar lawmakers and judges. These changes are reflected in *Directorship's Boardroom Guide to State Litigation Climates*, the third annual collaboration of *Directorship* and the Foundation for Fair Civil Justice, a national coalition of more than 70 organizations working together to achieve business liability reforms at the state level.

Several of the states identified in previous *Guides* that had liability climates conducive to job creation and growth are now "at-risk," owing in large part to changing politics. To exploit this opportunity, plaintiffs' lawyers and their allies in state legislatures are moving aggressively to undo legal reforms and expand liability through court challenges and new legislation. This is certainly not good news for directors, who are already dealing with a debilitating recession and likely new waves of business regulation on several fronts.

As a result, we're now moving into the "second generation" of legal reform, identifying specific reforms that work better than others, where reforms are working, and what arguments and information best influence the reform process. By developing a 21st century "legal reform tool kit," our goal is to empower business leaders to work efficiently and intelligently toward specific reforms that produce

the best results for consumers and business alike.

Fortunately, new empirical evidence demonstrates that tort and business liability reforms enacted over the past 20 years created jobs, lowered consumer costs, reduced insurance costs, and increased business investment and innovation. Legal reform advocates are now better equipped to prove that state liability reforms decrease litigation costs and awards, lower insurance premiums, and thus support efforts to reduce customer prices. Solid data indicate that the cumulative effect of tort reforms in various states has been a 47 percent reduction in overall losses and a 16 percent drop in annual insurance premiums for consumers as a direct result of reduced losses.

In fact, several states have made improvements and now have litigation climates that favor growth and job creation since this *Guide* was first presented in 2007. They include North Dakota, which tops our list this year, as well as Alaska, Nebraska, Wisconsin, and Texas. Yet other states have slipped over the past years. North Carolina dropped from sixth last year to eleventh, while the litigation environments in Wyoming, New Hampshire, and Iowa are also on the decline. Pennsylvania, which has generally lagged in its litigation environment, is the poorest performer in the survey, beating out Illinois, which held that dubious distinction last year.

With a re-emboldened plaintiffs' bar and a political environment that is less willing to head the call for litigation reform, more states could retreat from the progress that has been made over the last few years. To stave off the coming wave of new and dangerous state liability legislation, it is critical that companies become more involved in convincing state legislatures that legal reform accelerates economic recovery while producing benefits for consumers and business alike.

Published this spring, the Pacific Research Institute's (PRI) watershed *2009 Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums* provides key tools for risk managers and insurance providers—and evidence that tort reform works.

The study offers econometric proof that reforms reduce insurance losses, attorneys' fees, judgments, settlements and administrative expenses and, therefore, also decrease the need for massive litigation reserves which can be released directly to the bottom line. The study provides a detailed assessment of the top 18 reforms and their effect on losses and costs, revealing which tort reform laws are most effective at reducing costs. The PRI study and proposals aligned with it provide a road map for legal reform advocacy and litigation management strategies in addition to guiding legislators on where to focus their limited time in legislative sessions.

Nevertheless, the Association of Trial Lawyers of America, now cleverly renamed the American Association for Justice, is spending vast sums to convince the American people and state lawmakers that tort reform simply doesn't work.

At the state level, plaintiffs' bars are exploiting the cutbacks in corporate support experienced by legal-reform advocates. Using these efforts and their 2008 election successes, they are forcefully pushing to overturn caps on damages, expand global warming lia-

bility, reinstate joint and several liability where it has been limited, expand personal liability, liberalize discovery rules, broaden scientific evidence standards, and extend statutes of repose, among other proposals. They are constantly testing new causes of action and currently seek to take control of the courts through a national campaign to eliminate judicial elections in states where they exist in favor of a nomination process controlled by plaintiffs' attorneys.

So while companies are generally preoccupied with economic problems and financial cutbacks, the plaintiffs' bar recognizes this as the ideal time to outflank business in the state capitols of America. The danger is that if companies allow this to happen by cutting their support for legal reform, the same companies will wind up paying out exponentially more in coming years due to a legal environment that has been fully captured by the plaintiffs' bar. The consequences for legal budgets and the reputation costs to brands will be astronomical.

It may be tempting now for corporate directors to preserve profits at the expense of legal reform efforts, but the plaintiffs' bar will extract these savings and more in the years to come in state after state where the pro-reform infrastructure has been mothballed or worse.

1 NORTH DAKOTA 2007-2009 Performance ↑

North Dakota continues to have one of the best liability climates in the nation. A rule-of-law majority on the state's Supreme Court is likely to protect existing punitive damage limits. North Dakota's John Hoeven is the nation's longest-serving active governor and continues to be a strong leader on liability reform. The North Dakota House and Senate maintain healthy pro-business majorities, and Attorney General Wayne Stenehjem adheres to the rule of

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 that 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.

law. North Dakota's liability climate promotes growth and job creation.

2 INDIANA 2007-2009 Performance ⇨

Indiana maintains a top-tier liability climate conducive to growth and job creation. The state Supreme Court has a rule-of-law majority. Governor Mitch Daniels is a rule-of-law advocate and was re-elected in 2008. Rule-of-law candidate Greg Zoeller was elected attorney general in 2008. He previously served as the chief deputy to outgoing Attorney General Steve Carter. The rule-of-law majority in the state Senate offsets the plaintiffs' bar-controlled state House.

3 TENNESSEE 2007-2009 Performance ⇨

Tennessee enjoys one of the best liability climates in the nation. The state Supreme Court is considered neutral on liability issues. The state legislature is pushing a series of medical liability reforms, including caps on damages against nursing homes. Governor Phil Bredesen and his appointee and former legal counsel, Attorney General Robert Cooper, oppose these measures. Nevertheless, the Tennessee House and Senate maintain healthy pro-business majorities. Overall, Tennessee's liability climate promotes growth and job creation.

4 UTAH 2007-2009 Performance ⇨

Utah's liability climate encourages growth and job creation. Governor Jon Huntsman and Lieutenant Governor Gary Herbert were re-elected with 77 percent of the vote in 2008. Huntsman and Herbert have strong records of support for a predictable liability climate, and Attorney General Mark Shurtleff adheres to the rule of law. A strong pro-business majority in the state Senate and House supports common sense legal reform. The only blemish on the state's liability trend line is that 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.

5 ALASKA 2007-2009 Performance ↑

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. The Alaska Supreme Court has a rule-of-law majority. Alaska Governor Sarah Palin, brought into national prominence as the Republican Party's vice-presidential nominee in 2008, is a rule-of-law advocate. Attorney General Richard Svobodny, who was

appointed by Governor Palin and confirmed by the state legislature, adheres to the rule of law. In the Alaska State Senate, Democrats gained a seat during the 2008 elections and joined with three Senate Republicans to form a new coalition, giving the plaintiffs' bar a majority in Alaska's upper chamber. The state House of Representatives maintains a pro-business majority.

6 NEBRASKA 2007-2009 Performance ↗

Nebraska benefits from a favorable liability climate that has improved in recent years. Appointed by the Governor, the Nebraska Supreme Court has a rule-of-law majority. Nebraska Governor David Heineman has continued to demonstrate his support for common-sense legal reform and the state Senate and House maintain strong pro-business majorities. Attorney General Jon Bruning adheres to the rule of law. Nebraska's pro-business liability climate encourages growth and job creation.

7 OHIO 2007-2009 Performance ⇨

Ohio's liability climate continues to be conducive to promoting growth and job creation. Recent election results suggest gains for plaintiffs' bar allies. Richard Cordray, who received support from the plaintiffs' bar, was elected as Ohio's attorney general in 2008 to replace his predecessor, activist Marc Dann. The 2008 election results also netted seven seats for the Democrats in the state House and, for the first time in 14 years, changed the majority in the state's lower chamber. The rule-of-law majorities were retained in the state Senate and on the state Supreme Court. With a challenging political landscape, Ohio is a state that should be watched for potential rollbacks of hard-won legal reforms.

8 VIRGINIA 2007-2009 Performance ⇨

Still considered among the best liability climates in the nation, Virginia's appetite for legal reform has waned recently due to electoral gains by allies of the plaintiffs' bar. Activist Supreme Court Chief Justice Leroy Hassell and the Republican-controlled General Assembly are feuding over proposed reforms to the judicial reappointment process. The Commonwealth's Supreme Court has a rule-of-law majority. Virginia is the only state in the country this year with highly competitive statewide races for governor, lieutenant governor, and attorney general. Republican Attorney General Bob McDonnell recently resigned after securing his party's nomination for governor. The entire House of Delegates is up for election in 2009, with Republicans holding a slim six-seat majority. Virginia's current political uncertainty makes this a state to watch for future liability performance.

9 WISCONSIN 2007-2009 Performance ↗

Wisconsin remains a top-tier state for low potential litigation risks. Due in large part to last year's hard-fought election of rule-of-law Justice Michael Gableman to the state Supreme Court, the plaintiffs' bar is fully engaged with an aggressive anti-reform legislative agenda. The agenda includes a proposed repeal of past reforms to joint and several liability, repeal of non-economic damages limits in medical malpractice cases, and watering down the standard used by courts for awarding punitive damages. Although Chief Justice Shirley Abrahamson is up for re-election this year, the slim rule-of-law majority on the Supreme Court will likely remain intact. Attorney General J.B. Van Hollen is a bright spot, proving that moderates who support common-sense legal reform can win statewide in Wisconsin. Democratic Governor Jim Doyle is running for a third term in 2010 and has maintained a mixed record on legal reforms. Democrats hold slim margins in both the State House and Senate and have demonstrated a mixed appetite for comprehensive reforms.

10 TEXAS 2007-2009 Performance ↗

Texas' liability climate continues to improve due to the comprehensive reforms enacted several years ago and the continued pressure by the Texas business community and legal reform organizations to protect the reforms. These reforms have resulted in improved insurance loss ratios. South Texas judicial circuits' reputation as "judicial hellholes" has waned recently, as appellate courts keep lower court decisions in check. Governor Rick Perry continues to be a strong leader on liability reform and is poised to run for an unprecedented third term in 2010. Although the Texas legislature has enacted comprehensive liability reforms over the past decade, many expect bills during the current session that aim to weaken or overturn a number of these reforms. The initiatives include legislation that will weaken the causation standard in asbestos claims, provide a path to remove certain asbestos cases from the multi-district litigation court, grant broad *qui tam* authority to private plaintiffs to seek damages against businesses for "false claims," and repeal the "paid or incurred" rule that limits reimbursement for medical expenses to those expenses actually paid by an insurer or other third party. In spite of these efforts and in light of previous reforms, Texas' liability climate continues to encourage growth and job creation. The Texas Supreme Court maintains a rule-of-law majority, and state Attorney General Greg Abbott adheres to the rule of law.

11 NORTH CAROLINA 2007-2009 Performance ↓

The state has maintained a fair and predictable liability climate that leads to growth and job creation. There is a rule-of-law majority

on the state Supreme Court. In 2008, Democrat Beverly Perdue, a former hospital administrator, was elected governor. Perdue previously served as lieutenant governor under former Governor Mike Easley, and defeated pro-business candidate and former Charlotte Mayor Pat McCrory. North Carolina Attorney General Roy Cooper, who has a mixed record on comprehensive liability reform, was re-elected to a third term in 2008. Aggressive plaintiffs' bar efforts in the state legislature make North Carolina a state to watch.

12 IDAHO 2007-2009 Performance ↑

Liability reforms enacted in 2003 have improved Idaho's liability climate. The Idaho Supreme Court has a rule-of-law majority.

How the State Ranking Was Done

Corporate officers and directors should pay close attention to the climate for liability in those states where they choose to do business. The third annual Boardroom Guide to State Litigation Climates is prepared by the Foundation for Fair Civil Justice (FFCJ), formerly known as the American Justice Partnership Foundation, in collaboration with *Directorship*. This annual analysis employs new econometric data from the Pacific Research Institute (PRI) 2009 Tort Law Tally and the FFCJ's assessment of both improvements and declines in various states based on tort insurance losses and premiums in several categories.

This year, the FFCJ also analyzed political trends in the states based on the 2008 and more recent election results, which provide solid indicators of current and future performance, particularly related to the postures of state supreme courts, governors, and attorneys general.

Based on the combined results of the new statistical data and political factors, plus solid reference points from recent PRI tort rankings and the U.S. Chamber of Commerce's Institute for Legal Reform 2008 Harris Poll survey of corporate general counsel, the 2009 Boardroom Guide provides a snapshot of the business legal environments and a best-to-worst ranking of all 50 states.

SOURCES: *Tort Law Tally: How State Tort Reforms Affect Tort Losses and Tort Insurance Premiums* (2009), Pacific Research Institute.

Defrocking Tort Reform: Stopping Personal Injury Lawyers from Repealing Existing Tort Reforms and Expanding Rights to Sue in State Legislatures www.atra.org/reports/Defrocking_Tort_Deform.pdf, ATRA, 2007.

Judicial Heliholes: 2008/2009, American Tort Reform Foundation (ATRF).

U.S. Tort Liability Index: 2006 Report, PRI.

U.S. Tort Liability Index: 2008 Report, PRI.

Trial Bar Watch, Volumes 1, 2, 3, and 4, AJPF.

"Dire States. The Annual Boardroom Guide to Litigation Climates in all 50 States," *Directorship*, June/July, 2008.

Institute for Legal Reform/Harris Poll, 2008 State Legal Climate Survey Rankings

The online version of *Directorship's Boardroom Guide to State Litigation Climates Guide* [www.directorship.com/litigation09] will be updated to reflect new developments.

Idaho's Governor C.L. "Butch" Otter is a strong rule-of-law advocate and Attorney General Lawrence Wasden adheres to the rule of law. Both the Idaho Senate and House of Representatives maintain strong pro-business majorities. Idaho's liability climate encourages growth and job creation and is likely to continue improving.

13 MICHIGAN 2007-2009 Performance ⇔

Michigan's liability climate has slipped recently due to aggressive trial bar legislative efforts and unfortunate election results. The U.S. Supreme Court's recent ruling in *Wyeth v. Levine* rekindled anti-reform attacks on Michigan's FDA preemption law. The ruling spurred three freshman legislators in the Michigan State House to introduce a legislative package aimed at dismantling the hard-fought reforms. The rule-of-law majority in the state Senate offsets the trial bar-controlled state House. In unfortunate election results, plaintiffs' bar candidate and former Wayne County Circuit Court Judge Diane Hathaway defeated rule-of-law Chief Justice Clifford Taylor. The election adversely modifies the rule-of-law majority on the state Supreme Court. Attorney General Mike Cox, who is one of the nation's strongest supporters of the rule of law, has announced his intention to run for governor in 2010. Michigan's liability climate has been conducive to growth and job creation, but Michigan is a state to be watched because of aggressive legislative efforts by the trial bar, coupled with a shift away from a rule-of-law majority on the state Supreme Court.

14 LOUISIANA 2007-2009 Performance ↑

Louisiana's liability climate is improving, due in part to the strong leadership of Governor Bobby Jindal. Pro-reform groups are pursuing a robust package that includes asbestos reform in the areas of bankruptcy transparency, discovery in exposure cases, and venue; a \$25-million appeal bond cap; limits on damages to those medical expenses actually paid or incurred; and electronic discovery reform. In 2008, Louisiana voters elected rule-of-law candidate Greg Guidry to the Supreme Court, replacing the retiring activist Chief Justice Pascal Calogero. The Louisiana Supreme Court is currently balanced between activists and rule-of-law justices. Attorney General James "Buddy" Caldwell is a law-and-order former prosecutor. The plaintiffs' bar controls both chambers of the legislature. Given recent political trends and aggressive pro-reform agendas tied directly to economic development and improvement, Louisiana's liability climate should improve.

15 SOUTH DAKOTA 2007-2009 Performance ⇔

The liability climate in South Dakota is conducive to growth and job creation. Governor Mike Rounds continues to be a strong

rule-of-law advocate. Attorney General Larry Long adheres to the rule of law and the state Supreme Court has a rule-of-law majority. The South Dakota House and Senate maintain healthy pro-business majorities. But due to an increase in the number of civil cases filed in the past three years, South Dakota is a state to watch for potential problems.

16 MISSISSIPPI 2007-2009 Performance ↗

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 2008 elections results solidified and strengthened the rule-of-law majority on the Mississippi Supreme Court with the re-election of Justice Ann Lamar and the defeat of two activist incumbents, Justices Oliver Diaz and Charles Easley. The plaintiffs' bar scored a victory with the defeat of incumbent rule-of-law Chief Justice James Smith by activist Jim Kitchens. Republicans lost three seats in the 2008 elections, along with their majority, giving the plaintiffs' bar control of both the Senate and House of Representatives. Nonetheless, strong political leadership and an engaged business community have put Mississippi on a growth and job-creation trajectory.

17 SOUTH CAROLINA 2007-2009 Performance ↑

South Carolina's liability climate is improving, thanks in large part to consistent legislative reforms and executive action that began in 2005. Governor Mark Sanford has been a leader on liability reform and workers' compensation, and South Carolina Attorney General Henry McMaster has a mixed record. Although South Carolina is the only state in the country in which lawmakers alone select judges, the South Carolina Supreme Court maintains an activist majority. After 2005, additional comprehensive tort-reform legislation has stalled in the South Carolina General Assembly, despite the fact that pro-reform majorities control both chambers. It is highly likely that a legislative study committee will begin to consider current reform proposals this summer and will then revisit the effort in the 2010 legislative session. The 2009 bills include items like caps on non-economic and punitive damages, economic-loss rule reform, appeal bond waiver, and regulatory compliance preemption from suits. Plaintiffs' bar allies in the legislature control the judicial selection process and have already demonstrated the ability to hold up pro-reform legislation. As a result, it will be difficult for South Carolina to significantly improve its climate for job growth and creation.

18 WYOMING 2007-2009 Performance ↓

Currently, the state's liability climate encourages job creation and growth. The Wyoming Supreme Court maintains a slender rule-of-law majority. Governor David Freudenthal and his appointee, Attorney General Bruce Salzburg, are considered plaintiffs' bar allies. Although the Democrats picked up two seats in the Wyoming House of Representatives during the 2008 election cycle, both chambers still maintain healthy pro-business majorities. Wyoming should be watched as an at-risk state.

19 OKLAHOMA 2007-2009 Performance ⇔

Oklahoma's prospects for liability reform still suffer from a setback in 2007, when Governor Brad Henry vetoed comprehensive liability reforms in a complete reversal of his pledge to support "Texas Plus" tort reform. The Oklahoma Supreme Court is highly activist, as is Governor Henry. Attorney General Drew Edmondson, an activist who is hostile to the rule of law, recently announced his intention to run for governor in 2010. In the 2008 election cycle, Republicans picked up four seats in the House of Representatives and two seats in the Senate, giving both chambers pro-reform majorities. Pending reform legislation, which enjoys wide support, would modify venue requirements. While Oklahoma's liability climate discourages growth and job creation, Oklahoma business leaders are providing excellent reform advocacy linking economic growth and job creation with legal reforms.

20 GEORGIA 2007-2009 Performance ⇔

While lawmakers have been silent since the 2005 passage of Georgia's omnibus tort reform legislation, Governor Sonny Perdue introduced meaningful legal reform legislation in early 2009. The legislative package, which enjoys some support in both lawmaking chambers, included an FDA "preemption" measure providing liability protection for pharmaceutical and medical device manufacturers in Georgia (patterned after a similar provision in Michigan), but it did not pass a Senate committee. A second provision provides liability protection for landowners who make property available for "agri-tourism," while a third provision prevents people who sue from seeing company files until a judge has ruled that the suit has merit. Both measures passed the legislature and were awaiting the Governor's signature at the time this article was completed. Another step in the right direction was the surprise retirement announcement of Georgia Supreme Court's Chief Justice Leah Ward Sears, the leading activist vote on the state's seven-member high court. Perdue will appoint her replacement in late June. The appointment will prove timely, as Fulton County State

Court Judge Diane Bessen recently struck down medical malpractice damages caps as unconstitutional. The decision will be appealed to the state's Supreme Court. Georgia's state courts have been receptive to some of the numerous challenges to the 2005 reforms. Nevertheless, Perdue, along with a strong pro-business majority in the Georgia Senate and House, supports common sense legal reform, and Attorney General Thurbert Baker adheres to the rule of law. Medical malpractice insurance premiums have been trending downward as a result of the reforms enacted in 2005. Despite modest progress, the neutral liability climate in the Peach State mildly discourages growth and job creation.

21 MAINE 2007-2009 Performance ⇔

Maine's liability climate is somewhat conducive for job creation and growth. The Maine Supreme Court has an activist majority and Maine's Governor John Baldacci is highly activist. The Maine legislature selected Attorney General Janet Mills in January, succeeding former activist Attorney General G. Steven Rowe. A former prosecutor, Mills' record is neutral to activist. In the 2008 elections, Democrats picked up two seats in the Senate and six in the House of Representatives. These unfortunate election results expand the influence of the pro-plaintiff's bar majority in the legislature. These factors combine for a liability climate that is likely to sour in coming years.

22 NEW HAMPSHIRE 2007-2009 Performance ↓

The Granite State continues to have a liability climate that encourages growth and job creation, but recent trends threaten the traditionally pro-growth business environment. The state Supreme Court maintains an activist majority. Governor John Lynch is currently serving his third two-year term and has demonstrated a mixed record on comprehensive liability reform. Kelly Ayotte, the first woman to serve as Attorney General, is a strong rule-of-law advocate. The activist Supreme Court majority and a vigorous anti-reform coalition in the state legislature make New Hampshire a state to watch.

23 DELAWARE 2007-2009 Performance ⇔

Delaware's liability climate remains favorable to neutral for growth and job creation. While its liability climate and the caliber of its judiciary have always been major points of differentiation, Delaware is clearly a state to watch to see what direction it will ultimately go, particularly with regard to its stance on class action lawsuits, based at least in part on its retention of a joint and several liability standard. For instance, although Attorney

General Joseph “Beau” Biden, son of Vice President Joseph Biden, is considered by some to be activist, former State Treasurer Jack Markell was elected governor in 2008, and his tenure as state treasurer and his extensive private-sector experience lead some to believe that Markell will help support a liability climate more conducive to business. The Supreme Court maintains a rule-of-law majority.

24 IOWA 2007-2009 Performance ↓

Iowa’s liability climate remains relatively favorable for job creation and growth. With the lame-duck appointments by former activist Governor Tom Vilsack of two former presidents of the Iowa Trial Lawyers Association to the state Supreme Court, the high court leans activist. Governor Chet Culver and Attorney General Tom Miller continue the recent trend of pro-plaintiffs’ bar activism among top officials in the state. Plaintiffs’ bar allies hold majorities in both the state Senate and state House. Iowa remains a state to watch, and is expected to decline in terms of its liability ranking.

25 KANSAS 2007-2009 Performance ↓

The liability climate in Kansas has continued to decline over the past few years, impeding job creation and growth. The activist majority on Kansas’ Supreme Court was further solidified at the beginning of 2009 with the retirement of rule-of-law Chief Justice Kay McFarland. Activist Governor Kathleen Sebelius, former executive director of the Kansas Trial Lawyers Association, appointed her successor in an unprecedented fourth appointment to the state’s seven-member high court. Sebelius, who opposes most legal reform efforts, was nominated by President Obama and confirmed for Secretary of Health and Human Services. Sebelius’ 2006 running mate, activist Lieutenant Governor Mark Parkinson, has assumed office. Kansas Attorney General Stephen Six, a former plaintiffs’ lawyer, was appointed by Sebelius and has demonstrated his disfavor for legal reform. The bright spot in Kansas is the strong, pro-business majority in the state legislature.

26 COLORADO 2007-2009 Performance ↓

Recently one of the best liability climates in the nation, Colorado is now neutral for job creation and growth due to electoral changes. Governor Bill Ritter has a suspect record on comprehensive reform and the state Supreme Court is highly activist. The one bright spot, rule-of-law Attorney General John Suthers, has indicated an interest in running for the U.S. Senate seat currently held by Ken Salazar, who resigned to become the Interior Secretary in the Obama Administration. If Suthers resigns to run for the U.S.

Senate, legal reform advocates will continue to play defense against recent political trends. In 2008, Republicans picked up two seats in the state House and lost one in the state Senate. Neither result spoiled the strong pro-plaintiffs’ bar majorities held in both chambers. Watch for Colorado’s liability climate to further degrade and become hostile to growth and job creation.

27 NEVADA 2007-2009 Performance ⇔

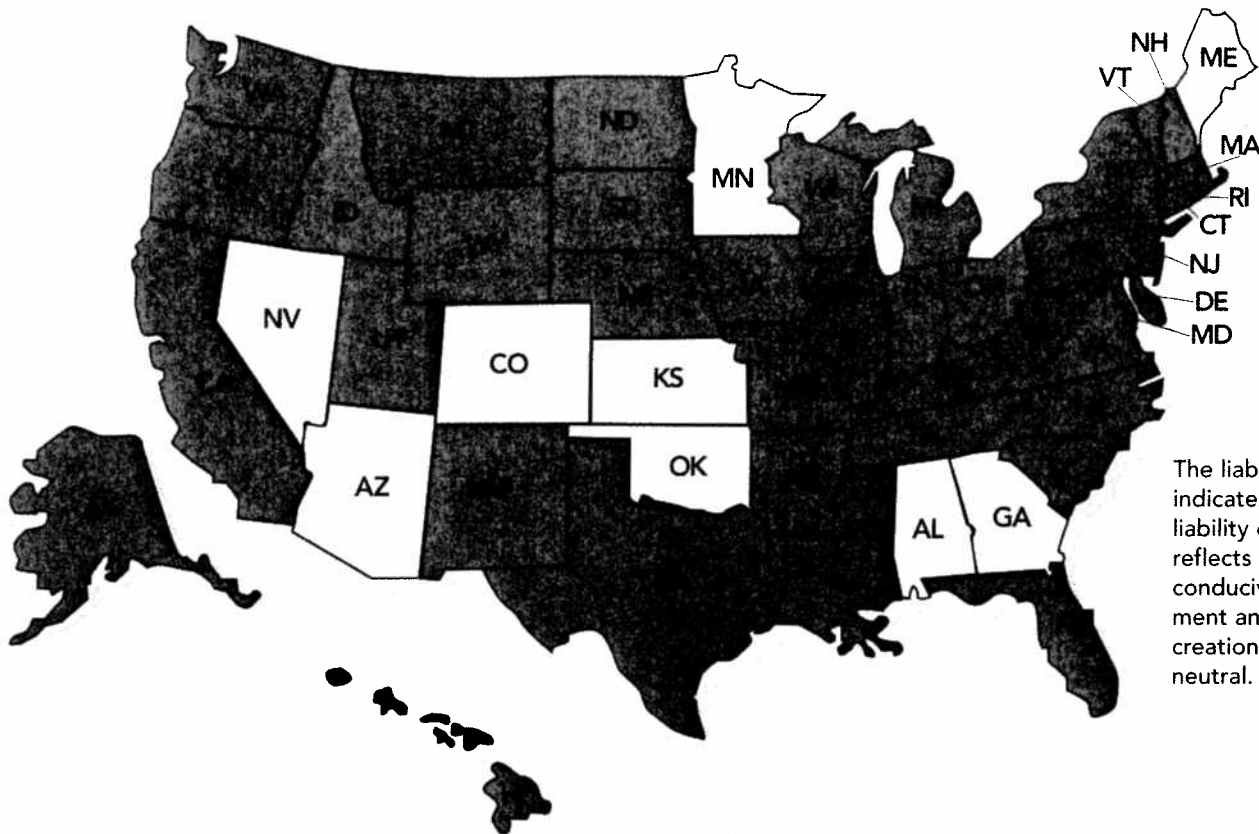
Nevada lingers in the bottom half of states in terms of liability climate. In 2008, Nevada voters elected law-and-order Supreme Court candidate May “Kris” Pickering to replace retiring Justice A. William Maupin. The election tipped the balance of the previously activist Court in favor of a more balanced judicial approach. Nevada Governor Jim Gibbons is a strong supporter of the rule of law, but Attorney General Catherine Cortez Masto is neutral to activist. In the 2008 elections, Democrats gained two seats in the Nevada Senate and one seat in the Nevada Assembly, adding to the pro-plaintiffs’ majorities in both the upper and lower chambers. While there are a few bright spots on Nevada’s liability horizon, without new liability reforms, the state will remain a hindrance to growth and job creation.

28 ARIZONA 2007-2009 Performance ↓

Arizona’s liability climate has waned in recent years due to increasing litigation activity in a state that constitutionally does not allow caps on damages. There is an activist majority on the Arizona Supreme Court. Rule-of-law Governor Jan Brewer succeeded Democratic Governor Janet Napolitano when she resigned in January to become U.S. Secretary of Homeland Security. Attorney General Terry Goddard is highly activist. Republicans did add one seat in the Arizona Senate and three seats in the state House, adding to the pro-business majorities in both chambers. Arizona’s recent decline in national surveys as a place to do business puts the state on our reform watch list.

29 MISSOURI 2007-2009 Performance ↑

While Missouri’s liability climate discourages growth and jobs creation, the state’s liability climate has improved, thanks to a comprehensive liability reform package signed into law in 2005. Although former Governor Matt Blunt appointed rule-of-law Justice Zel Fischer in 2008, the Missouri Supreme Court still maintains an activist majority. Former activist Attorney General Jay Nixon was elected governor in 2008 to replace the retiring Blunt. Chris Koster, former chairman of the Republican Caucus in the Missouri Senate, switched parties and was elected attorney general



The liability map: Red indicates a hostile liability climate. Green reflects a climate conducive to investment and job creation. Yellow is neutral.

State Rankings

Alabama	31	41	Indiana	2	3	Nebraska	6	7	Rhode Island	48	48
Alaska	5	11	Iowa	24	17	Nevada	27	29	South Carolina	17	21
Arizona	28	27	Kansas	25	20	New Hampshire	22	16	South Dakota	15	10
Arkansas	32	32	Kentucky	41	40	New Jersey	44	35	Tennessee	3	1
California	43	46	Louisiana	14	25	New Mexico	38	38	Texas	10	13
Colorado	26	22	Maine	21	18	New York	46	43	Utah	4	2
Connecticut	33	31	Maryland	42	42	North Carolina	11	6	Vermont	35	37
Delaware	23	19	Massachusetts	45	34	North Dakota	1	5	Virginia	8	8
Florida	39	45	Michigan	13	9	Ohio	7	4	Washington	34	33
Georgia	20	28	Minnesota	30	23	Oklahoma	19	26	West Virginia	49	49
Hawaii	40	39	Mississippi	16	24	Oregon	36	36	Wisconsin	9	12
Idaho	12	14	Missouri	29	30	Pennsylvania	50	47	Wyoming	18	15
Illinois	47	50	Montana	37	44						

in 2008, and is neutral to activist. The Missouri Senate and House of Representatives maintain pro-business majorities. In spite of previous reforms, Missouri's changing political climate makes it a state to watch.

30 MINNESOTA 2007-2009 Performance ↓

Minnesota's liability climate has soured in recent years. The state Supreme Court maintains an activist majority. Minnesota Governor Tim Pawlenty is a rule-of-law advocate while, conversely, Attorney General Lori Swanson is highly activist. Minnesota's Senate and House have activist majorities that favor the plaintiffs' bar. The state's liability climate is, at best, neutral. Watch for Minnesota's liability rankings to deteriorate.

31 ALABAMA 2007-2009 Performance ↑

Alabama's liability climate is neutral for growth and job creation. Rule-of-law appellate court Judge Gregory Shaw won an open seat on the Supreme Court in 2008 and helped solidify the rule-of-law majority on Alabama's highest court. Governor Bob Riley has been a strong rule-of-law supporter. Governor Riley

appointed Attorney General Troy King in 2004 when William Pryor resigned to accept a federal judgeship. King has a mixed record on rule-of-law issues. An anti-reform majority controls the state legislature, and it is expected that the trial bar will attempt to expand tort liability and rewrite the state campaign finance laws to restrict the ability of the business community to participate in judicial elections. Alabama remains a state to watch.

32 ARKANSAS 2007-2009 Performance ⇔

Arkansas' liability climate is not conducive to growth and job creation. The Arkansas Supreme Court has an unpredictable and activist majority. 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. Although Republicans picked up three seats in the Arkansas House of Representatives during the 2008 elections, pro-plaintiffs' bar allies maintain majorities in both chambers of the Arkansas General Assembly. Given the current political climate and with no real reforms on the horizon, the state is not expected to improve its liability climate in the near term.

'Wacky Warning' No Laughing Matter

Grabbing the attention of American consumers is no easy task. So, how do you engage a media-weary population with the message that lawsuit abuse has a terrible cost attached to it? One way is through humor. Despite its 12-year track record of making millions of Americans laugh, the Wacky Warning Label Contest turns out to be "no laughing matter," according to Foundation for Fair Civil Justice spokesman and contest creator, Bob Dorigo Jones.

The WWL Contest this year will reach an estimated 100 million Americans through newspaper, TV, radio, and blog coverage with the message that crazy warning labels are symptoms of a lawsuit-happy culture. "Outrageous warning labels confirm that the American civil justice system is out of whack," says Dorigo Jones.

The author of the bestselling *Remove Child Before Folding: The 101 Stupidest, Silliest and Wackiest Warning Labels Ever*, Dorigo Jones is the quintessential everyman: a husband, father, and small-business owner and one of the nation's leading legal-reform advocates. "In today's economy, Wacky Warning Labels demonstrate the tax we all pay for lawsuit abuse, and the cost imposed on our quality of life."

This year's WWL winners include "Not for use when vehicle is in motion," a label attached to a portable toilet seat for outdoorsmen called "The Off Road Commode" because it is designed to attach to a vehicle's trailer hitch.

Other winners:

- A wart removal product instruction guide that warns, "Do not use if you cannot see clearly to read the information in the information booklet."

- A label on the underside of a cereal bowl that warns, "Always use this product with adult supervision."

- A warning label on a bag of livestock castration rings that warns, "For animal use only."

- A warning label on a 1" x 4" LCD panel that warns, "Do not eat the LCD panel."

"What the labels represent is a failure of personal responsibility in many instances," says Dorigo Jones. "The 'hot coffee in the lap' story that everyone knows is one of a million examples that underscore the need for Americans to take responsibility for their own actions and not always look to the courts to assess blame."

As he points out, the costs of lawsuit abuse are staggering – and not just to the American wallet. "Almost every community in America is faced with pools closing, ball fields limiting access, physicians leaving medical practice, and reduced fire/police and emergency services," Dorigo Jones says. "The evidence is pretty clear that lawsuit abuse is a primary cost and liability driver that often pushes the wrong result." –S.H.

33 CONNECTICUT 2007-2009 Performance ↓

Connecticut's liability climate discourages job creation and growth. The Connecticut Supreme Court has a slim activist majority. Governor M. Jodi Rell is a rule-of-law advocate. Attorney General Richard Blumenthal is one of the most activist attorneys general in the country, boldly undertaking class-action lawsuits on behalf of the state against industry. The plaintiffs' bar controls both chambers of the state legislature. Connecticut's liability climate is likely to continue its downward trend.

34 WASHINGTON 2007-2009 Performance ↓

Washington is on a downward track for growth and job creation as its legal climate continues to deteriorate. Despite two strong pro-reform challenger races in 2008, the Washington Supreme Court maintains an activist majority. Pro-plaintiffs' bar Governor Christine Gregoire appointed activist Justice Debra L. Stephens to the high court in December 2007. Stephens was re-elected to a full six-year term in 2008. A bright spot is Attorney General Rob McKenna, who won a re-election bid in 2008 and remains a staunch rule-of-law advocate. The state House and Senate are both controlled by anti-reform majorities. The flourishing tech sector in Seattle provides a lure to plaintiffs' lawyers seeking deep pockets and, coupled with the activist majorities in the legislature and on the Supreme Court, makes Washington a state to watch.

35 VERMONT 2007-2009 Performance ⇨

Vermont's liability climate continues to discourage growth and job creation. The Vermont Supreme Court has an activist majority and Attorney General William Sorrell, originally appointed by former Governor Howard Dean, is adverse to liability reforms. Governor Jim Douglas supports the rule of law. Vermont's legislature has taken no steps toward substantive legal reform and is controlled by pro-plaintiffs' bar majorities. Given the political realities, Vermont's prospects for improvement are dim.

36 OREGON 2007-2009 Performance ↓

Oregon's liability climate is not conducive to growth and job creation. The state Supreme Court has an activist majority. Governor Ted Kulongoski, a former plaintiffs' lawyer, opposes liability reforms. Attorney General John Kroger was elected to his first term in 2008, facing no opposition in the general election. A former aide to President Clinton and New York Senator Charles Schumer, Kroger is believed to favor the plaintiffs' bar. Democrats picked up five seats in the state House during 2008 elections.

Democrats have gained a total of nine seats in the Oregon House over the past two election cycles, strengthening the pro-plaintiffs' bar majorities in both chambers of the Oregon legislative assembly. There was some good news from Oregon's 2008 elections, as the voters supported two statewide ballot initiatives that aim to limit contingency fees and penalize frivolous lawsuits. Without significant change in the state's political environment, Oregon will continue to move down in the rankings.

37 MONTANA 2007-2009 Performance ⇨

Despite its reputation as a conservative state, Montana continues to rank among the worst states for its liability climate. Activist Governor Brian Schweitzer was reelected in 2008. Former activist Attorney General Mike McGrath easily won election as Chief Justice and joined the activist majority on Montana's Supreme Court. Activist Attorney General Steve Bullock was elected last year to replace McGrath. In 2008, Republicans picked up three seats in the state Senate and gained a pro-reform majority in the upper chamber. The House of Representatives is evenly split, but a Montana statute allows the party of the governor to control the chamber. With little chance of improvement on the horizon, Montana's current climate does not favor job creation and growth.

38 NEW MEXICO 2007-2009 Performance ↘

An activist majority on the state Supreme Court, combined with rising verdicts from the state courts, poses significant threats to New Mexico's liability climate. Governor Bill Richardson is an activist, signing into law a false claims bill in 2007 deputizing private attorneys to sue on behalf of the state, primarily on healthcare-related matters. First elected in 2006, Attorney General Gary King is highly activist. In the 2008 election cycle, plaintiffs' bar allies added three seats in both the New Mexico Senate and House of Representatives, solidifying their control over both chambers. New Mexico's liability climate continues to discourage growth and jobs creation.

39 FLORIDA 2007-2009 Performance ↗

Despite continued efforts by Florida's business community and legal reform organizations, the state continues to hover near the bottom of all 50 states in insurance loss ratios. Florida also remains in the lowest 20 percentile of the states for monetary tort losses. Governor Charlie Crist and Florida's legislative leaders have yet to make substantive legal reform a top priority. Although Governor Crist appointed two conservative Justices—Ricky Polston and Charles Canady—to the Florida Supreme Court this past year, the judicial

body still retains an activist majority. Attorney General Bill McCollum remains a bright spot since he adheres to the rule of law. The plaintiffs' bar attempt to abolish pre-dispute arbitration agreements failed in the state's 2008 legislative session, as did contingency fee reform legislation. Recent legislative efforts also threatened to undo hard-won reform of the state's joint-and-several liability standard. Until the executive and legislative leadership make reform a priority and the Florida Supreme Court develops a majority devoted to the rule of law, the prospects for a fair legal climate that encourages growth and job creation in the Sunshine State will remain bleak.

40 HAWAII 2007-2009 Performance ↓

Hawaii's failure to enact meaningful liability reform has led to a drop in the state rankings. Initially appointed to 10-year terms by the governor of Hawaii, the composition of the activist majority on Hawaii's Supreme Court has not been altered in a number of years. Governor Linda Lingle is a strong supporter of the rule of law and Attorney General Mark Bennett has strong rule-of-law credentials. However, there is currently legislation moving through that proposes to limit medical malpractice awards. The plaintiffs' bar maintains a crippling grip on both chambers of the Hawaii state legislature. Unless meaningful liability reforms are enacted, the state's liability climate will continue to impede growth and job creation.

41 KENTUCKY 2007-2009 Performance ↓

Kentucky's liability climate is not conducive to growth and job creation. The Kentucky Supreme Court has an activist majority. Former activist Attorney General Steve Beshear was elected governor in 2007. Current Attorney General Jack Conway, a former plaintiffs' lawyer, is an activist. The state legislature, particularly the House, which is controlled by a pro-plaintiffs' bar majority, is hostile to liability reform. Without significant political changes, Kentucky's liability climate will continue its downward trend.

42 MARYLAND 2007-2009 Performance ↓

Maryland's liability climate discourages growth and job creation. In 2007, activist Governor Martin O'Malley approved a measure allowing for extended statutes of limitations for new civil actions where a prior action was dismissed or terminated for reasons other than final judgment and appointed Joseph Murphy, an activist, to the Supreme Court. In 2008, O'Malley appointed another activist, Sally Adkins, further strengthening the activist majority on the state's high court. Attorney General Douglas Gansler recently joined a group of attorneys general opposing the XM-Sirius merger on anti-competition grounds, but has a mixed

record overall trending to rule of law. The plaintiffs' bar has vigorously supported an anti-reform agenda in the legislature with recent efforts to roll back the reforms in the state's medical malpractice insurance policies enacted in 2004, including a bill to raise the non-economic damage cap. Maryland's liability climate is not expected to improve.

43 CALIFORNIA 2007-2009 Performance ⇔

Despite being one of the first states to enact comprehensive liability reform, California continues to foster a negative liability climate. The state Supreme Court is increasingly activist, and the governor appoints its members. In spite of his support for the rule of law, Governor Arnold Schwarzenegger has done little to assuage the adverse business climate in California. The reinvigorated plaintiffs' bar is exercising political muscle in the state legislature. It is pushing legislation to invalidate mandatory choice of the law and forum selection clause in employment contracts as well as expanding the False Claims Act, allowing government to take over individual lawsuits and add claims regardless of the statute of limitations. Conversely, pro-reform legislators have introduced bills that expand class-action certification rights to defendants, extend Good Samaritan protections for non-medical acts, and limit attorneys' fee awards. Los Angeles County continues to grace the "judicial hellhole" list compiled annually by the American Tort Reform Association (ATRA). Businesses in California continue to be mired in litigation surrounding Americans With Disabilities Act (ADA) compliance. Despite a vigorous legal reform community, California is likely to sink further in national ratings and its liability climate will continue to strongly discourage growth and job creation.

44 NEW JERSEY 2007-2009 Performance ↓

New Jersey's liability climate continues to deteriorate, hovering at the bottom of state rankings. There is an activist majority on the New Jersey Supreme Court. Governor John Corzine and his appointee, Attorney General Anne Milgram, are both activists. The New Jersey Senate and General Assembly maintain pro-plaintiffs' majorities, and anti-reform lawmakers are threatening to undo past reforms. New Jersey's environment is not conducive to job creation and growth.

45 MASSACHUSETTS 2007-2009 Performance ↓

The Commonwealth's liability climate has worsened in the past two years, due in part to the pro-plaintiffs' bar state legislature and the anti-reform agenda of Governor Deval Patrick. In 2008, Governor Patrick nominated Superior Court Judge Ralph Gants as an associate justice of the Supreme Judicial Court to replace retiring

Justice John M. Greaney. While the Supreme Court has a rule-of-law majority, AG Martha Coakley has a mixed record. The plaintiffs' bar maintains large majorities in both the Massachusetts Senate and House of Representatives. The state's legal climate is not conducive to job creation and growth, and shows no signs of improvement.

46 NEW YORK 2007-2009 Performance ↓

New York's liability climate discourages growth and job creation. Plaintiffs' bar allies won 32 of 62 seats in the New York Senate in the 2008 election, capturing a majority for the first time in more than four decades and control of both legislative chambers. Governor David Paterson, an activist lawyer, replaced activist Governor Eliot Spitzer, who resigned in 2008. The Court of Appeals, New York State's highest court, has an activist majority, and Attorney General Andrew Cuomo is highly activist. New York's liability climate continues to remain one of the worst in the nation.

47 ILLINOIS 2007-2009 Performance ⇨

Illinois' liability climate ranks near the bottom, despite successful efforts by the reform community to fend off legislative proposals favoring the plaintiffs' bar. The Illinois Supreme Court has an activist majority. Activist Governor Pat Quinn assumed office upon the vote of the Illinois Senate to remove Rod Blagojevich as governor. Attorney General Lisa Madigan is highly activist, and has indicated she might run for governor. The trial bar enjoys anti-reform majorities in both chambers of the General Assembly. Reform advocates report that plaintiffs' bar allies will attempt to mitigate reforms in pre-judgment interest payments in civil cases and rewrite the workers' compensation laws. ATRA continues to designate Cook County (Chicago) as a "judicial hellhole," but recently downgraded Madison and St. Clair Counties, despite a spike in asbestos and pharmaceutical filings. In lieu of substantive legal reforms, Illinois' liability will continue to discourage growth and job creation.

48 RHODE ISLAND 2007-2009 Performance ⇩

Rhode Island's liability climate continues to deteriorate despite Governor Donald Carcieri's efforts to promote economic growth. 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. Activist state Supreme Court Chief Justice Frank J. Williams retired at the end of 2008. Justice Maureen McKenna Goldberg is acting chief, pending a permanent appointment from Governor Carcieri, which may help tip the balance on the court

away from its current activist majority. Although plaintiffs' bar allies maintain majorities in both chambers of the Rhode Island General Assembly, there is legislation pending to abolish the "rent-a-judge" law, which allows private civil trials that can then be appealed to the state Supreme Court. The Ocean State's liability climate is not conducive to growth and job creation.

49 WEST VIRGINIA 2007-2009 Performance ⇨

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 decidedly activist majority on the West Virginia's Supreme Court was bolstered as two activist candidates, Menis Ketchum and Margaret Workman, won seats on the high court. The U.S. Supreme Court is now hearing arguments in *Caper-ton v. A.T. Massey Coal*, regarding whether Chief Justice Brent Benjamin's failure to recuse himself from a case in which he received substantial campaign donations from one of the parties violates the due process rights of the litigants. Activist Attorney General Darrell McGraw, who continues to unfairly target out-of-state businesses, was reelected in 2008. Both the state Senate and House of Representatives are controlled by pro-plaintiffs' bar majorities. West Virginia's liability climate continues to stymie growth and job creation.

50 PENNSYLVANIA 2007-2009 Performance ↓

The Keystone State's poor legal climate discourages job creation and growth. Activist Governor Ed Rendell appointed Jane Cutler Greenspan to the Pennsylvania Supreme Court in 2008. Her appointment tips the balance on the court, providing for an activist majority, which helps the Commonwealth earn its dead-last ranking this year. Attorney General Tom Corbett, a rule-of-law advocate, is considered the Republican frontrunner for governor in 2010. Both chambers of the state General Assembly maintain anti-reform majorities. Various medical associations list the Commonwealth as "extreme crisis" for health care, owing in large measure to exorbitant liability insurance fostered by medical malpractice lawsuits. Particularly hard hit is the ob-gyn specialty, with 11 of 19 maternity units closed in greater Philadelphia in the last 10 years. The state's liability climate strongly discourages job creation and growth and shows no signs of improvement in the near future. ❧

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