

Grab the Bull by the Horns

Risk Management Strategies to Prevent or Prevail in Litigation

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Presenters



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Combined dollar value of top 100 verdicts by category

2018			2017		
1.	Product Liability	\$5,909,429,560	1.	Breach of Fiduciary Duty	\$8,039,179,404
2.	Intellectual Property	\$3,454,882,330	2.	Product Liability	\$1,416,782,796
3.	Medical Malpractice	\$1,301,096,782	3.	Motor Vehicle	\$851,202,116
4.	Worker/Workplace	\$1,274,667,825	4.	Fraud	\$839,400,772
5.	Intentional Torts	\$988,743,420	5.	Intellectual Property	\$813,989,529
6.	Motor Vehicle	\$897,168,430	6.	Worker/Workplace	\$480,967,458
7.	Antitrust	\$490,500,000	7.	Breach of Contract	\$441,996,425
8.	Contracts	\$146,029,781	8.	Medical Malpractice	\$366,808,925
9.	Government	\$123,014,337	9.	False Claims Act	\$345,411,285
10.	Employment	\$116,769,838	10.	Defamation	\$274,500,000

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2018 top 10 verdicts by dollar value

Rank	Trial Verdict	Case Name	Case Type	State	Court
1.	\$4,690,000,000	<i>Ingham v. Johnson & Johnson</i>	Product liability	MO	St. Louis County
2.	\$1,000,000,000	<i>Doe v. HACC Pointe South Inc.</i>	Worker/Workplace	GA	Clayton County
3.	\$845,114,000	<i>ASML US Inc. v. XTAL Inc..</i>	IP	CA	Santa Clara County
4.	\$706,200,000	<i>Title Source Inc. v. HouseCanary Inc.</i>	IP	TX	Bexar County
5.	\$538,641,656	<i>Apple Inc. v. Samsung Electronics Co.</i>	IP	CA	U.S. Northern District

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2018 top 10 verdicts by dollar value

Rank	Trial Verdict	Case Name	Case Type	State	Court
6.	\$502,567,709	<i>VirnetX Inc. v. Apple Inc.</i>	IP	TX	U.S. Eastern District
7.	\$473,500,000	<i>Artis v. Murphy-Brown, LLC</i>	Intentional torts	NC	U.S. Eastern District
8.	\$400,000,000	<i>KAIST IP US LLC v. Samsung Electronic Co. Ltd.</i>	IP	TX	U.S. Eastern District
9.	\$383,500,000	<i>White v. DaVita Healthcare Partners Inc.</i>	Med. mal.	CO	U.S. District
10.	\$315,000,000	<i>Shuffle Tech International LLC v. Scientific Games</i>	Antitrust	IL	U.S. Northern District

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One verdict in 2019



News

Phila. Jury Returns \$8 Billion Verdict Against Johnson & Johnson Over Risperdal

The Philadelphia jury deliberating in the first punitive damages trial over Johnson & Johnson's conduct in marketing the antipsychotic drug Risperdal has slammed the company with an \$8 billion verdict.

By Max Mitchell | October 08, 2019 at 06:07 PM



Law Firms Mentioned

Morgan Lewis Bockius

Trending Stories

1 Davis Polk, Cooley to Reward Associates With Special Bonuses

THE AMERICAN LAWYER

2 Wall Street Law Firms Join Corporate Clients in Letter to NYC Mayor

NEW YORK LAW JOURNAL

3 Winston & Strawn Eliminates Some Staff Positions, Opening Support Services Center

THE AMERICAN LAWYER

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One verdict in 2019

The New York Times

\$8 Billion Verdict in Drug Lawsuit Is Reduced to \$6.8 Million

A Philadelphia judge lowered the damages in a case that claimed Johnson & Johnson played down the risks of an antipsychotic drug.



This is the second time in recent months that Johnson & Johnson has had a verdict reduced in a high-profile court case. Mark Ralston/Agence France-Presse — Getty Images

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Dangerous venues



Lawsuit Climate Survey: Ranking the States



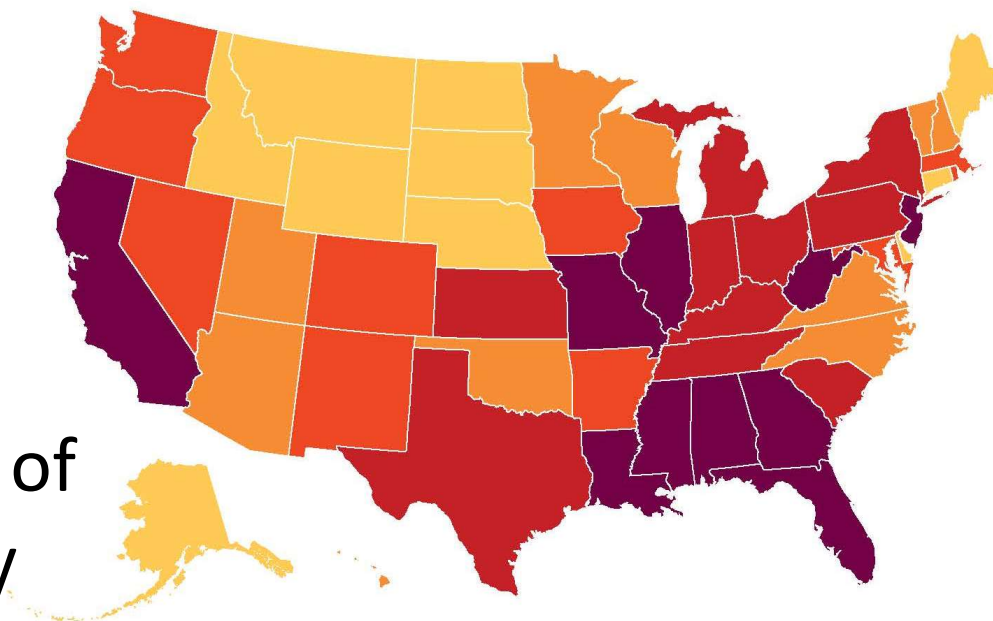
2019/2020 Executive Summary



**Top 10 "Judicial Hellholes" for 2019/2020 named by
American Tort Reform Association**

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2019 Rankings of State Liability Systems



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

Source: 2019 Lawsuit Climate Survey

Top 10 “Judicial Hellholes” for 2019-2020

The 2019-2020 top Judicial Hellholes are:

1. [Philadelphia Court of Common Pleas](#)
2. [California](#)
3. [New York City](#)
4. [Louisiana](#)
5. [St. Louis](#)
6. [Georgia](#)
7. [Illinois's Cook, Madison and St. Clair Counties](#)
8. [Oklahoma](#)
9. [Minnesota Supreme Court and the Twin Cities](#)
10. [New Jersey Legislature](#)

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Dangerous venues

Take the rankings and lists with a grain of salt.



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Dangerous venues

Do not assume your venue is branded accurately.



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Dangerous venues

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The whole state of California has been listed as a “Judicial Hellhole,” but it has good venues.



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Dangerous venues

Do not assume your venue is branded accurately.

Philadelphia tops the “Judicial Hellhole” list, but your case may be winnable there.



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Resources for assessing your venue

- Counsel on the ground
 - Local counsel assigned to the case, but don't stop there
 - Research recent trials and talk to trial counsel
- Research
 - Verdict reports
 - Your judge – go beyond anecdotal and research actual outcomes
 - Westlaw/LEXIS – developed good statistical data on judges' rulings – in Federal Court
- Jury consultants
 - The prominent ones pick juries frequently
 - In difficult jurisdictions, they might pick 3-4 juries a year, perhaps very recently
 - Some insight into judges

Venue considerations

- Enforcing meaningful venue requirements
- Overall treatment of tort and contract litigation
- Treatment of class action and mass consolidation suits
- Damages
- Proportional discovery
- Scientific and technical evidence
- Trial judges' impartiality
- Trial judges' competence
- Juries' fairness
- Quality of appellate review



Risk management strategy

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Your risk management strategy

- Objectives
- Means
- Plan and model
- Competitive advantage



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Legal team

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Legal team



- Team culture
- National counsel, regional counsel, or matter-specific
- Discovery coordinating counsel
- Legal team meetings

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Proactive risk management



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Proactive risk management

- Corporate structure and governance
 - Personal jurisdiction and veil piercing
 - Asset protection
 - Discovery
 - Legal department
- Policies and procedures
- Training personnel
 - Risk management
 - Defensive writing
- Document retention plan



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Personal jurisdiction and veil piercing

A court can force a foreign company to litigate in that court if:

The company's actions subject it to **personal jurisdiction**.

or

The company's interactions with an affiliated company subject to PJ in that venue allow the court to **pierce the corporate veil**.

Personal jurisdiction

general jurisdiction

A company can be brought into any lawsuit in a court that has general jurisdiction over it.

specific jurisdiction

A company can be brought into lawsuits arising from its activities in the court's territory.

Personal jurisdiction

general jurisdiction

A foreign company will be subject to the general jurisdiction:

1. Where it is incorporated;
2. where it has its principal place of business; and
3. anywhere its activities are so “systematic and continuous” that it is essentially considered “at home” there.

specific jurisdiction

A foreign company may be subject to the specific jurisdiction of a court for any claims arising from its activities in that court’s territory.

Veil piercing

Piercing the corporate veil is a legal doctrine used to break traditional rules of limited liability for owners, and to hold shareholders or affiliated entities accountable for the actions of a legally separate corporate entity.

Veil piercing

Each state has its own factors that determine when veil piercing is proper.



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Veil piercing

With no “comprehensive theories of veil piercing” to be found across jurisdictions, no single test or factor can inform any business that transacts in multiple states.



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Veil piercing

Courts generally “loo[k] to a combination of factors which suggest that the corporate entity attacked had no separate existence of its own, and was therefore the mere instrumentality of the dominant corporation.”

18 C.J.S. *Corporations* § 30.



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Veil piercing

By considering the general principles underlying when veil piercing occurs, a business can help minimize the risk of veil piercing in any jurisdiction.



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Veil piercing

The eight most commonly considered factors are:

1. Fraud or misrepresentation;
2. Control or dominance;
3. Commingling of funds;
4. Undercapitalization;
5. Non-functioning leadership;
6. Overlap in personnel, services, or business resources;
7. Unfairness or injustice; and
8. Non-existent leadership.

Veil piercing

Control or dominance of one company by another is the second-most common reason courts pierce the corporate veil.

- When courts found control/dominance, they pierced **76.4%** of the time.
- When they found no control/dominance, they pierced in only **4.7%** of cases.

Veil piercing

Relevant factors for **control or dominance**:

- the absence of corporate formalities;
- the amount of business discretion displayed by the allegedly dominated corporation;
- whether the allegedly dominated corporation lacks substantial business contacts independent of the other corporation;
- whether the subsidiary had property that was used by the parent as if it were its own;
- whether the corporations are treated as independent profit centers;
- whether related corporations deal with the dominated corporation at arm's length; and
- payment or guarantee of debts of the dominated corporation by other corporations in the group.

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Defensive writing training

- Executives
- Key managers
- New employees
- Frequent and likely custodians

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It's Your Job:

What is Attorney-Client Privilege?

- **Who Can Claim?** Client (of the Attorney)
- **What Relationship?** Between client & their attorney
- **Protects What?** the Communication (not the information);
- **From What?** Discovery/disclosure (including the court);
- **But MUST HAVE:**
Communication + Confidentiality + Relationship
→ to obtain legal advice

What is the Work-Product Doctrine?

- Attorney Work -Product is protected from requisite disclosure/discovery by opposing counsel/court if:
Materials + Prepared in anticipation of litigation + by (or at the direction of) counsel → Attorney-Work-Product protected

Right Writing

Ask yourself:

WHY am I writing this?

WHO is/are the intended recipient(s)?

COULD a Phone Call be a better starting point?

Communications MUST:

- further the objectives of the attorney-client relationship;
- (be made) for the purpose of seeking, obtaining, or providing legal assistance/ legal advice, and
- (be sent) in confidence (which means usually only to the attorney asked to provide the advice, or his/her assignee).

It is Your Job (as "Client") to NOT:

- Include another, non-legal-advice, purpose in the same communication;
- Include any non-client/non-attorneys on the communication; and
- Only Ask for Business Advice (requests on the legal consequences of business options will qualify as privileged, but only if the purpose is for Legal Advice)

Best Practices in Corporate Communications:

Avoid Speculation: Keep it to the facts, and just the facts as you personally experienced them.

Ask Yourself:

- Am I seeking legal advice?
- Is litigation reasonably anticipated to result from the facts of this situation?
- Have I engaged Legal? Am I working WITH Counsel, or AT THE DIRECTION of Counsel?
- Who "needs" to see this communication? (are NON-PRIVILEGED PARTIES being communicated to?)

Separate Legal Advice from Non-Legal content in DISTINCT & INDEPENDANT of the Legal communications: be specific about the legal questions/legal advice you want addressed by Counsel.

Send Separate Communications to parties who may be protected under attorney-client privilege: Do not copy parties who are not the "client" or working with counsel or involved with the legal questions addressed.

Clearly Indicate Legal Advice: use a standard phrase such as "Seeking Legal Advice for the following legal issues"

Mark Communications: intended as privileged as 'PRIVILEGED & CONFIDENTIAL' and include a disclaimer in case information is read by an unintended party

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More documents = higher litigation costs

- The costs associated with discovery, including electronic discovery, in some instances outweigh the total amount of liability associated with the claim.
- Data must go through many stages before being produced to the opposing side.



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Stages of document production

- Custodian Interviews and Collection
 - Identify potential sources of relevant documents.
 - Gather hard copy documents.
 - Image relevant computer files to the extent not collected centrally.
 - Outside counsel, relevant business people and internal legal counsel
- Central imaging and collection of e-documents
 - In-house IT staff
 - Forensic IT specialists

Stages of document production

- Process, filter and load electronic data onto a platform that can be used to review the documents.
 - \$250-\$500 per gigabyte for e-data
 - \$0.10 to \$0.15 per page to TIFF and OCR hard copies
 - Platform costs range from \$15-\$45 per gigabyte per month.
- Documents are reviewed for initial responsiveness and privilege.
 - \$1.50 per document (contract attorneys)
 - Additional attorney costs for QC and privilege logs

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Stages of document production

- Responsive and non-privileged documents are processed for production to requesting party.
- Privilege logs are created and finalized.

Costs of document production

- General estimate - \$70,000 - \$90,000 per custodian from collection to production
- Assumptions:
 - 20 custodians
 - Each custodian has 4 GB of E-mail; 10 GB of server and hard drive documents
 - 25% to 30% hit rate on documents based on search terms
 - 30 to 50 boxes of hard copy documents also collected

Costs of document production

- **Step 1:** Preprocessing Data
 - 280 GB total
 - \$90 per GB to flatten, de NIST and prepare electronic data for search terms
 - Subtotal: \$25,200
- **Step 2:** Scan, OCR and Bates Number hard copy documents
 - \$0.15 per page to scan and OCR
 - \$0.06 per page to Bates Number
 - Assuming 2500 pages per box
 - Subtotal: \$15,750

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Costs of document production

- **Step 3:** Process “hits” from applied search terms to a reviewable format
 - 70 GB (assuming 25% hit rate of 280 GB)
 - \$275 per GB to process
 - Subtotal: \$19,250
- **Step 4:** Review documents for responsiveness
 - Assume use of contract attorneys (\$1.50 per document)
 - 1,050,000 e-documents (75,000 pages per GB and 5 pages per document)
 - 7,500 hard copy documents (75,000 pages and 10 pages per document)
 - Subtotal: \$1,586,250

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Costs of document production

- **Step 5:** Process responsive e-documents for production
 - 3,150,000 pages responsive (assume 60% responsive)
 - \$0.04 per page to TIFF, \$0.01 per page to Bates number
 - Subtotal: \$157,000

Costs of document production

- Total cost for steps 1-5: **\$1,803,450**
- Does not include costs for collection or additional attorney time associated with QC or creation of a privilege log

Litigation strategy



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Litigation strategy

- Pre-suit claims
- Local counsel
- Personal jurisdiction
- Pre-trial discovery
- Removal?



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Pre-suit claims

- Litigation hold notice
- Retain outside counsel or handle in house?
- Confirm means of service. Registered agent in venue?
- Investigate claim
 - Identify representative
 - Identify (and interview?) likely witnesses
 - Get witnesses on record about key facts
- Research the claimant. Capture available social media content!

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Litigation strategy

- Corporate representative
- Other witnesses
 - Fact witnesses
 - Experts
 - Internal
 - External



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Litigation strategy

- Corporate representative
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Litigation strategy

- Settlement
- Mediation
- Trial
- Appeal



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Litigation strategy

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Litigation strategy

- Settlement
- **Mediation**
- Trial
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Litigation strategy

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Preparing for trial

- Your trial counsel should learn the lay of the land.
 - Get to know the community
 - The people, the culture and local pronunciations
 - The courthouse, the bailiff, the court reporter, and the courtroom clerk
- If possible, make the case about your corporate representative, not the company.
- Give the jury the answer they need to the question, “Why did you find against the plaintiff?”
- Themes that are highly technical or “follow the law” are not effective with jurors in tough venues.
- The Golden Rule

Litigation strategy

- Settlement
- Mediation
- Trial
- Appeal



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Questions? Comments?

McGuireWoods is setting – and raising – the standard for what clients expect from law firms.

-BTI Consulting