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JUDGING OHIO

Legal Reforms are Steering Ohio's Struggling Economy in the Right Direction

Today's economic picture is not pretty in Ohio, where the average annual income of a family of four is $12,000 below the national average[1] and its unemployment rate was 6.3 percent in May 2008, up from 5.6 percent a year ago and well above the 5.5 percent national average.[2] From 2000 to 2005, Ohio's economy generated some 300,000 fewer jobs than it would have done if it had grown as fast as the United States as a whole.[3] And by preserving a combined state and local tax burden that is fifth-highest in the country,[4] the state's politicians are not making economic recovery any easier.

There is a bright spot for Ohioans, however, and it is the state's legal climate. With a court system now making reasonably predictable rulings and a legislature that was able to pass broad tort reforms in 2002, 2003, and 2004, Ohio's litigation climate has become less hostile to economic development than it had been for years. Moreover, the state's asbestos-litigation docket is clearing, and doctors' malpractice-insurance bills are falling. Absent such positive developments, the state's prospects would be much worse than they are.

Less than a decade ago, Ohio's legal system was in the grip of personal-injury attorneys, whom the Manhattan Institute calls Trial Lawyers, Inc. Jury verdicts were skyrocketing, and the state supreme court was repeatedly turning back the legislature's efforts to rein in the state's out-of-control tort system. Today, however, Ohio's once-threatening legal environment is looking friendlier and fairer, thanks in no small part to the electorate's decision to install new judges who are less willing to substitute their policy preferences for the legislature's political will. Still, the newly restrained judiciary could easily revert to its former ways and make the state a haven for lawsuit abuse once more, should the plaintiffs' bar succeed in defeating two supreme court justices up for reelection this fall.

THE OHIO COURT'S ACTIVISM

Today, Ohio's judicial elections are hotly contested, but they were not always so. They became that way after 1999, when the state supreme court made headlines by thoroughly rejecting the legislature's broad 1996 tort-reform law. In an extraordinary maneuver, the court—by a four-to-three majority—accepted "original jurisdiction" and took up a direct frontal challenge to the new legislation from the Ohio Academy of Trial Lawyers without waiting for any lower court to apply it.[5] The court ruled that the reform measure violated the separation of powers—in other words, that the legislature could not intrude substantially upon the legal system, which was, in the court's opinion, the purview of the judges.

In addition, the court said that the legislation violated the state constitution's "one-subject rule," which mandates that "[n]o bill shall contain more than one subject, which shall be clearly expressed in its title."[6] Essentially, the court's opinion argued that even though the sole subject of the new law was tort reform, it was too comprehensive to be in compliance with the requirement. The dissent forcefully noted that under the one-subject rule, there was a "strong presumption of constitutionality" and that historically, the court had invoked the rule only when there was "a gross and fraudulent violation"[7]—that is, "when there is an absence of common purpose or relationship between specific topics in an act and when there are no discernible practical, rational or legitimate reasons for combining the provisions in one act."[8] Ignoring this historical restraint in order to invoke the constitutional provision, the supreme court

OHIO'S PRINCE OF TORTS

Ohio plaintiffs' lawyer Stanley Chesley has been dubbed the "prince of torts."[11] He claims to have won over $7 billion for his clients, and the contingency fees from those winnings support a lifestyle that would make even Robin Leach blush: Chesley lives in a 27,000-square-foot château on a 300-acre estate outside Cincinnati, and he has more than twenty cars, including Rolls-Royces, Bentleys, and Ferraris. In order to extend Trial Lawyers, Inc.'s political influence, Chesley has raised millions of dollars for the Democratic Party, much of it at three fund-raisers that Chesley hosted at his home for President Bill Clinton.[12]


Stanley Chesley

AP Photo/Ed Reinke

Chesley rose to prominence in 1977 in the aftermath of a fire that burned down the Beverly Hills Supper Club in Kentucky and killed 165 people inside. The club was chiefly at fault for failing to comply with lifesaving provisions of the local fire code, but because it had only $1 million in insurance, far too little to compensate the estates of so many people, Chesley sued the entire aluminum electrical wire industry, ultimately winning $49 million in verdicts and settlements.[13] Chesley parlayed this victory into numerous additional disaster suits, including one of many resulting from the downing by terrorists of Pan Am Flight 103 over Lockerbie, Scotland, in 1988.[14]

Although the legal theory holding wire manufacturers and Pan Am heavily responsible for those disasters is tenuous, at least there is some causal link between the wires and the airline's conduct and the tragedies themselves. Many of Chesley's lawsuits, however, rest on far flimsier claims of causality, relying instead on what has come to be known as "junk science," including claims against the morning sickness drug Bendectin, which is no longer available in America but remains on the market in the rest of the world.[15] Chesley was also a leader of the group of lawyers who left Dow Corning bankrupt after winning $5 billion through lawsuits making the now-discredited claim that breast implants caused connective-tissue disease.[16]

More recently, Chesley was involved in litigation over another medical product, the recalled diet drug Fen-Phen; that litigation has given rise to a criminal prosecution. Lawyers suing on behalf of 440 plaintiffs in Kentucky chose Chesley to lead negotiations that culminated in a settlement of $200 million.[17] Federal prosecutors charged the three original attorneys in that case with taking some $65 million in excess of the fees they had agreed were their share. Because Chesley's fee was calculated as a percentage of the total fees paid, Chesley stood to benefit from any improper increase in their total amount. Chesley testified in court that he had no knowledge of the alleged wrongdoing, and he has not been charged with any crime.[18] In July, a jury acquitted one of the three defendants but deadlocked over the other two, who remain in jail.[19]

made the bold claim that the law was unsalvageable, even in part, and threw it out in its entirety.

Legal observers were not kind to the court's aggressive action. The *Harvard Law Review* opined that "the court [had] misappropriated both the separation of powers doctrine and the state constitution's 'one-subject rule' "; indeed, that the decision "may have undermined the Ohio Supreme Court's valued position as defender of the state's constitution."[9] Although the state's activist court had overturned legislatively enacted tort-reform laws before,[10] the procedural boldness of the 1999 decision—in considering the law under an exceptional writ of mandamus, absent an actual case or controversy—as well as its sweep sent shock waves through the legal community.

BUSINESS FIGHTS BACK

Supreme Court Justice Alice Robie Resnick, who had authored the court's outrageous 1999 decision, faced reelection in 2000, along with Justice Deborah L. Cook, who had dissented. The contests were record-setting affairs, as business groups poured money into efforts to defeat Resnick and reelect Cook, while trial lawyers devoted funds to producing the opposite outcome. All told, the campaigns featured 11,907 tele-

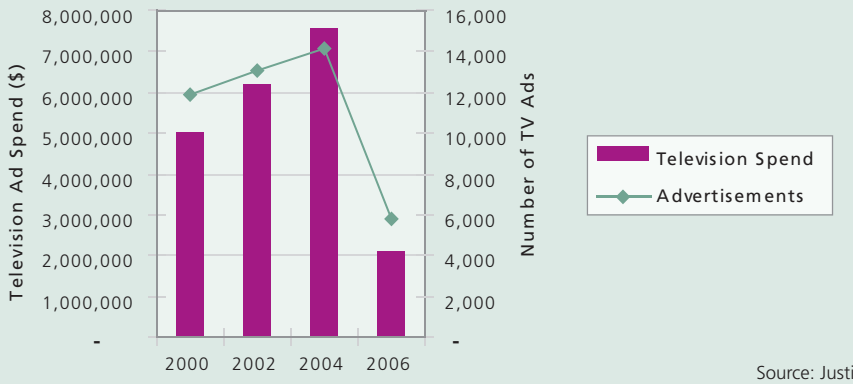
vision advertisements—more than the number of advertisements for supreme court races in all other states combined.[20] The candidates themselves raised a combined $3,273,506, and outside groups spent as much as $8 million.[21] Total television advertising expenses were $5,010,292.[22]

Ultimately, both Resnick and Cook were reelected, perhaps a testament to the power of incumbency. In 2002, supreme court electoral spending went even higher. Justice Andrew Douglas—one of two Republicans on the court to join in Resnick's anti-tort-reform opinion—announced his retirement, and Lieutenant Governor Maureen O'Connor declared for the open seat and won it, after a campaign in which the candidates raised $6.2 million and 13,105 television ads aired—again, more than half the total nationwide.[23] Three years after the supreme court's bold assault on the legislature, there was a new majority on the court that supported the rule of law.

Another record-setting state supreme court campaign was waged in 2004, when Court of Appeals Judge Judith Ann Lanzinger, a strict constructionist, was elected to the seat vacated by Francis Sweeney, a trial-lawyer-friendly activist justice. In the 2004 supreme court races, the candidates raised over $6.3 million, and the candidates, parties, and outside groups spent over $7.5 million on 14,139 advertisements.[24]

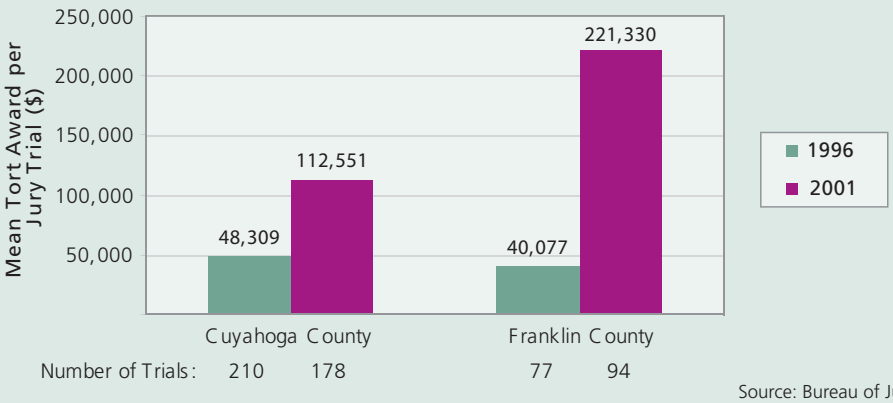
In 2006, Justice Resnick's seat was again contested, but this time it was open, because of Resnick's decision not to run for reelection after having been caught driving drunk. At

Ohio Supreme Court Election Spending Has Hit Record Levels



Source: Justice at Stake

As the Ohio Supreme Court Invalidated Legislative Tort Reforms, Jury Awards Exploded in Ohio Metro Areas



Source: Bureau of Justice Statistics

THE RANDY GENERAL DANN

On May 14, 2008, Ohio's attorney general of only sixteen months, Democrat Marc Dann, resigned in scandal.[32] By the time he left office, forty-two of forty-five House Democrats had called for his impeachment, and Democratic governor Ted Strickland and all the state's major newspapers—including the *Columbus Dispatch*, the *Cleveland Plain Dealer*, and the *Cincinnati Enquirer*—had called for his resignation.[33]

In March, two female employees in the attorney general's office made sexual-harassment complaints against Anthony Gutierrez, Dann's director of general services. Gutierrez was suspended and ultimately fired, as was Dann's director of communications, Leo Jennings.[34] In May, Dann admitted to having had an extramarital affair with his scheduler. Those trysts occurred in a condominium apartment that he sometimes shared with Gutierrez and Jennings and used for drinking parties with female staffers. The rent was paid with campaign funds.[35]

As salacious as the details surrounding Dann's departure were, Dann arguably did Ohioans more harm in his capacity as the state's prosecutor in chief.

Shortly after taking office, Dann advised Governor Strickland that it would be constitutional to veto a tort-reform bill that the legislature had passed during the governorship of his predecessor, Bob Taft.[36] The Ohio Supreme Court later determined Strickland's veto to be unconstitutional.[37]


Marc Dann

AP Photo/Kiichiro Sato

Later, following the lead of the most activist attorneys general in the nation, Dann pursued spurious legal theories on behalf of the state. For example, in April 2007, at the prodding of the left-wing activist group ACORN (Association of Community Organizations for Reform Now), Dann's office filed a "public nuisance" lawsuit against paint manufacturers for harms attributed to lead paint—which had not been sold since 1978.[38] One of the chief defendants in the suit, the paint company Sherwin-Williams, is one of Cuyahoga County's ten largest employers.[39] The tendentious legal theory underlying the lead-paint nuisance action has since been rejected by the supreme courts of Missouri, New Jersey, and Rhode Island.[40]

least as damaging as the arrest itself was what she was recorded telling the arresting officers: "My God, you know I decide all these cases in your favor. And my golly, look what you're doing to me."[25] Although Democratic candidates were scoring other victories in the state, Resnick's arrest tilted the election in favor of Republican Court of Appeals Judge Robert R. Cupp, another strict constructionist. Expenditures in the 2006 supreme court elections were relatively modest: "only" 5,763 advertisements, costing just over $2 million, were aired.[26]

A MAJOR STEP FORWARD

Although supreme court elections had become more competitive, the state legislature still saw the need to establish clear legal rules and scale back Ohio's system of jackpot justice. One reason was that between 1996 and 2001, the average jury verdict had more than doubled in Cuyahoga County, to $112,551; and had risen more than fivefold in Franklin County, to $221,330 (see graph).[27] One result was that doctors in the state were getting squeezed by medical-malpractice-insurance rates, which rose by 30 percent in both 2002 and 2003 and by 20 percent in 2004.[28]

So in 2002, in order to preserve a defendant's effective right of appeal, the legislature limited to $50 million the size of the bond that a defendant must first post.[29] Later that year, the legislature, concerned about the impact of noneconomic damages (such as pain and suffering) on medical-malpractice liability-insurance rates, passed a bill that capped them at $350,000 to $1 million, depending on the type of injury.[30] This legislation, enacted the following year, also required medical injury lawsuits to be filed within one year of an injury's occurrence, or within four years of the underlying cause of the injury.[31]

In 2004, the legislature passed another set of reforms, which was signed in January 2005 and went into effect in April of that year. The new legislation expanded the limitations on non-economic damage awards to tort claims other than medical malpractice actions; added limitations on the size of punitive damages; made it more difficult to file suits claiming that some product caused a plaintiff's obesity; and urged the supreme court to adopt a Legal Consumer's Bill of Rights setting out attorneys' and clients' rights and responsibilities.[41] The legislation also mandated that juries be presented evidence as to whether the plaintiff in a case involving a vehicular accident was wearing a seat belt and was entitled to insurance payments on top of the damages being sought.[42]

Also, in 2004 the legislature passed another bill making it harder for individuals to avoid jury duty, to ensure that jury pools were genuinely reflective of the general population. Two more bills required the medical monitoring of asbestos claimants and silica claimants, respectively.[43] A legal commentator called the asbestos law "comprehensive and forward-thinking" and noted that it influenced similar legislation subsequently adopted in Texas, Florida, and Georgia.[44] The reform in effect "eliminated the claims of those who are not sick and allows them to file suit only after they show symptoms of an asbestos-related illness."[45]

The new laws that have been challenged to date have been upheld by the reconstituted supreme court. On December 27, 2007, in a landmark ruling, the court determined (by a vote of five to two) that the noneconomic and punitive-damages provisions of the reform legislation were not unconstitutional.[46] Then, in February 2008, the court ruled, six to one, that the comprehensive 2004 legislation did not violate the one-subject rule.[47]

LEGAL REFORMS GET RESULTS

After Ohio's medical-malpractice-liability reform went into effect in April 2003, previously skyrocketing insurance rates

DOCUMENTING DOUBLE-DIPPING

In January 2007, Cuyahoga County Court of Common Pleas Judge Harry Hanna did something unusual: he barred the Brayton Purcell law firm from practicing in his courtroom.[48] The California-based firm, which specializes in asbestos litigation, had been before the judge representing the estate of Harry Kananian, a World War II veteran who had died in 2000 from mesothelioma, a deadly form of lung cancer linked to asbestos exposure.[49] The firm claimed that Kananian's cancer had been caused by filters containing asbestos that the defendant, the Lorillard tobacco company, had put on its cigarettes for a short period in the 1950s.[50]


Harry Hanna

Plain Dealer/Lisa DeJong

The problem that Brayton Purcell posed for Judge Hanna was that it and other firms had filed *other* claims on behalf of Kananian with various asbestos trusts,[51] the entities set up to pay out claims against the 80 companies forced into bankruptcy by asbestos litigation. These other claims gave different accounts of where Kananian was exposed to asbestos: that exposure occurred on navy ships, in navy shipyards, or in a factory where he worked as a teenager.[52] Under these alternative theories, Kananian's lawyers had already collected $700,000.[53]

The double-dipping scandal before Judge Hanna highlighted the lack of transparency in the ongoing asbestos litigation as well as the asbestos trusts, which have some $17 billion in assets. The trusts are managed by committees led by large asbestos plaintiffs' firms, such as Texas's Baron & Budd and New York's Weitz & Luxenberg;[54] little wonder that the trusts' own rules prohibit disclosure of prior asbestos claims.

The American Legislative Exchange Council (ALEC), an advocacy group for state legislatures, has drafted a model bill requiring full and timely disclosure of all actual and potential asbestos claims.[55] The Ohio legislature would be well advised to adopt the Asbestos Claims Transparency Act, or comparable legislation, if it wants to address the problem made clear in Judge Hanna's courtroom.

began to stabilize. Medical-malpractice insurance rates in Ohio rose only 6.7 percent in 2005; in 2006, average medical-malpractice rates actually *fell* by 1.7 percent, and the largest insurer in the state, American Physicians Assurance Corporation, cut its rates by 3.6 percent.[56] In 2006, the number of medical-malpractice claims fell to 4,006, from 5,051 in 2005.[57] Reductions of this size not only hold down health-cost increases but also help improve access to medical care by attracting and retaining physicians, especially those in high-risk specialties.

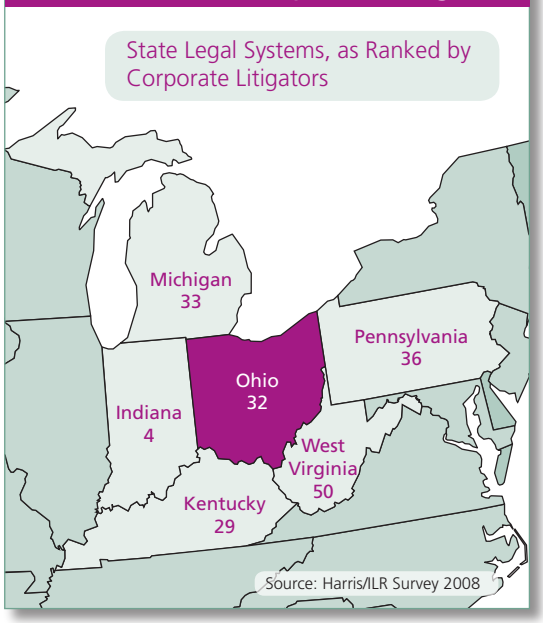
In nonmedical cases, the new reforms have also started to produce significant results. Ohio had long been one of the nation's centers of asbestos litigation, but the number of asbestos-related cases in the state has been falling faster than it has been nationally.[58] The state's supreme court has yet to affirm the constitutionality of the asbestos-litigation reform statutes; assuming that it does so, Ohio is likely to put its dubious distinction even further behind it.

In less than a decade, Ohio's legal system has gone from being a major drag on the economy to offering a significant competitive advantage. In his 2008 guide to state litigation climates for company directors, Steven Hantler, former assistant general counsel of the Chrysler Corporation and chairman of the reform-minded American Justice Partnership, ranked Ohio the fourth-best legal environment in the nation.[59] The state's collective tort costs are eleventh-lowest of the 50 states, and the state's legislative tort reform has been ranked third-best in the nation by an independent think tank.[60] Given the state's recent history, corporate litigators remain understandably nervous and rank the state's climate no higher than thirty-second nationally, which at least places it in the same league as its neighbors (see graph).[61]

WHERE DOES OHIO GO FROM HERE?

The state's legal system is on the right track, but work remains to be done. The asbestos double-dipping scandal uncovered last year by Judge Harry Hanna indicates a need for legislation demanding greater transparency from asbestos claimants and the asbestos trusts (see box, left). The executive branch, however, remains hostile to legal reform: trial-lawyer-friendly governor Ted Strickland attempted to veto tort-reform legislation that had been passed while his predecessor, Robert Taft, was still in office, but the supreme court decided that the action was unconstitutional.[62] In addition, it is unclear as to who will permanently replace disgraced former attorney general Marc Dann, a major ally of trial lawyers, and what his replacement's attitude toward them will be (see box, page 5). Finally, should Trial Lawyers, Inc. recapture the state supreme court, the legislature's hard-earned reforms could be reversed in short order. With incumbent justices Maureen O'Connor and Evelyn Lundberg Stratton up for reelection this year, all eyes will be on what promises to be another hotly contested battle.

Ohio's Legal System Is Improved But Still Worries Corporate Litigators



The Buckeye State faces a daunting task in restructuring its industrial economy. Fortunately, it has already embarked on that task by making improvements in its legal climate. The people of the state, having finally been exposed to both sides of the issue in heavily publicized races, have reclaimed their justice system; they can ill afford to let it return to the days when it was a paradise for Trial Lawyers, Inc.

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Endnotes

[1] *See* Mark D. Partridge et al., *Growth and Change: Employment Growth, Future Prospects, and Change at the Ohio Rural-Urban Interface* (Swank Program in Rural-Urban Policy, Sept. 2007), *available* at http://aede.osu.edu/programs/Swank/Employment_growth_and_change_final.pdf.

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[41] *See* Act of Jan. 6, 2005, S.B. 80, 2004 Ohio Laws 144.

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