ABOUT THE AUTHOR

James R. Copland is a senior fellow at the Manhattan Institute and director of legal policy. In those roles, he develops and communicates novel, sound ideas on how to improve America’s civil- and criminal-justice systems. Copland has testified before Congress as well as state and municipal legislatures, and he has authored many policy briefs, book chapters, articles, and opinion pieces in a variety of publications, including the Harvard Business Law Review, the Yale Journal on Regulation, the Wall Street Journal, National Law Journal, and USA Today. Copland speaks regularly on civil- and criminal-justice issues; has made hundreds of media appearances in such outlets as PBS, Fox News, MSNBC, CNBC, Fox Business, Bloomberg, C-SPAN, and NPR; and is frequently cited in news articles in the New York Times, Washington Post, The Economist, and Forbes. In 2011 and 2012, he was named to the National Association of Corporate Directors “Directorship 100” list, which designates the individuals most influential over U.S. corporate governance.

Prior to joining MI, Copland was a management consultant with McKinsey and Company in New York. Earlier, he was a law clerk for Judge Ralph K. Winter on the U.S. Court of Appeals for the Second Circuit. Copland has been a director of two privately held manufacturing companies since 1997 and has served on many public and nonprofit boards. He holds a J.D. and an M.B.A. from Yale, where he was an Olin Fellow in Law and Economics; an M.Sc. in the politics of the world economy from the London School of Economics; and a B.A. in economics from the University of North Carolina at Chapel Hill, where he was a Morehead Scholar.
THE SUE ME STATE
Missouri Has Become a Magnet for Litigation Abuse

In most recent state economic rankings, Missouri has tended to be average, at best. Its economic growth has been a middling 26th and its population inflow 39th. But the state has ranked at or near the top for one dubious industry—the litigation business, which the Manhattan Institute has dubbed Trial Lawyers, Inc. In 2016, the American Tort Reform Foundation dubbed the City of St. Louis, Missouri, the worst “judicial hellhole” in the nation. In a 2017 survey of 1,300 corporate litigators and senior executives—conducted by Harris Interactive for the U.S. Chamber of Commerce Institute for Legal Reform—Missouri’s overall state liability system ranked 49th out of 50, trailing only Louisiana. Indeed, the Show Me State fell near the bottom in nearly every surveyed category.

Unfortunately for Missouri, 85% of the corporate executives surveyed in the Harris Poll said that a state’s litigation climate “is likely to impact their company’s decisions about where to locate or expand.” Fortunately, Missouri’s elected leaders seem to grasp the problem. Newly elected governor Eric Greitens called for legal reform in his state of the state address, and Missouri legislators introduced more than two dozen bills in 2017 designed to improve the state’s legal climate. Several of these were enacted into law. Political leaders’ ability to build on this positive momentum—and fight back a likely counter from Missouri’s lawyer-friendly courts (see sidebar on page 3, “Missouri’s Pro-Tort Courts”)—will determine the degree to which the state can shed its Sue Me State label and begin to attract more businesses outside the litigation industry.

Figure 1. Missouri’s Lawsuit Climate Trails Its Neighbors

Figure 2. Missouri Judicial System Rankings, by Category (out of 50)

Source: U.S. Chamber of Commerce Institute for Legal Reform, 2017 Lawsuit Climate Survey

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The Missouri courts have emerged as a major obstacle to reforming the state’s abusive legal system. In 2012, the Missouri Supreme Court, in a 4–3 decision, threw out the state law establishing a cap on noneconomic damages in medical-malpractice cases—a law that had been in place in some form since 1986. The court found that the law violated the “right to a jury trial” in the state’s 1820 constitution, overruling a 20-year-old precedent that had applied the damage cap. In 2014, the Missouri Supreme Court extended its 2012 holding to invalidate the state’s long-standing cap on punitive damages.

One reason that Missouri’s courts have been hostile to legislative efforts to rein in lawsuit abuse is that judges are essentially selected by lawyers—with only attenuated influence by voters or elected officials. Rather than having its chief executive appoint judges with legislative confirmation (the federal model) or in state judicial elections, Missouri relies on an “Appellate Judicial Commission” to select nominees for its state appeals judges and justices. Although the governor formally nominates jurists, he must select from among three nominees forwarded to him by the commission—and if he fails to select one of the commission’s three picks within 60 days, the commission selects one of them to fill the judicial vacancy.

Incredibly, among the commission’s seven members, three are appointed directly by the Missouri Bar—which is somewhat the case of the fox guarding the henhouse when it comes to lowering the costs of litigation. The governor does have the power to appoint three “citizen” members of the commission, but the governor’s appointees serve staggered six-year terms. The three current gubernatorial slots on the commission were appointed by former governor Jay Nixon, a Democrat who opposed tort reform; among these is a nurse who formerly did work for a plaintiffs’ law firm. (The seventh member of the commission is the chief justice—who was initially selected by the commission.) Missouri’s new governor, Eric Greitens, has signaled his support for changing the way the state selects its judges as part of his commitment to legal reform. Other advocates have lauded Missouri’s judicial selection model—including billionaire George Soros’s Open Society Institute, which has earmarked more than $40 million to efforts pushing the “Missouri Plan” as a template for other states around the country.
For decades, new parents have relied on Johnson & Johnson baby powder in changing their infants’ diapers. Though the American Cancer Society has broadly considered this everyday product to be safe, plaintiffs’ lawyers have seized on a speculated link between talcum powder and ovarian cancer. The theory behind this asserted causal link is less than wholly clear, but essentially the claim is that powder particles that may have been used on diaphragms, condoms, or genital wipes traveled “through the vagina, uterus, and fallopian tubes to the ovary,” where they had an effect.

Some studies—which relied on cancer patients’ memories of talcum-powder use—suggested a small increase in risk, but more reliable “prospective cohort” studies that eliminated potential bias showed no relationship between talcum powder usage and ovarian cancer. In 2014, the federal Food and Drug Administration denied a petition by advocacy groups to include a warning label about ovarian cancer on talcum powder, finding that there was insufficient “evidence of a causal association between talc use in the perineal area and ovarian cancer.”

Courts in New Jersey—where Johnson & Johnson is headquartered—rejected expert testimony in lawsuits alleging that plaintiffs’ ovarian cancer was caused by baby powder. But such plaintiffs found a more hospitable home in Missouri courts, which until 2017 did not apply the U.S. Supreme Court’s Daubert standards for reviewing scientific testimony in federal litigation. In the year ending in June 2016, the St. Louis media market—which houses just 1% of the national television audience—ran more ads seeking plaintiffs in talcum-powder lawsuits than any other market in the U.S.

This advertising blitz was part of Trial Lawyers, Inc.’s business model to attract plaintiffs, though the St. Louis focus also may have been part of a legal strategy to influence the jury pool—because Missouri’s loose venue rules have allowed Show Me State lawyers to sue in local courts on behalf of plaintiffs situated all over the country. By the summer of 2016, two-thirds of the 2,100 talcum-powder-ovarian-cancer claims filed in the U.S. were situated in the City of St. Louis Circuit Court. In 2016 and 2017, St. Louis juries considering these baby-powder cases returned four verdicts totaling $307 million against the New Jersey–based Johnson & Johnson, on behalf of plaintiffs from Alabama, California, South Dakota, and Virginia.
peer-reviewed studies. In Missouri, any “expert” with a credential could be certified to testify—no matter the underlying merits of the scientific claim being attested to. Thus, claims rejected by the scientific community, federal regulators, and other states’ courts—like those that Johnson & Johnson baby powder caused ovarian cancer (see sidebar on page 4, “A Lawsuit-Abuse Powder Keg”)—have been able to get a hearing in Missouri courts.

Plaintiffs’ lawyers also love to bring such cases in Missouri because they can count on hefty verdicts: in 2016, four of the eight largest product-liability verdicts in the U.S. were in Missouri courts. Those four cases alone had verdicts totaling almost $244 million. (Three of these cases involved baby-powder claims; the other claimed that food additives produced before 1977 by a company now owned by Monsanto caused non–Hodgkin’s lymphoma—a causal link disputed by the American Cancer Society. Each of the plaintiffs in these cases lived outside Missouri.)

Missouri’s loose evidentiary standards and large jury awards have also made St. Louis a magnet for claims involving asbestos exposure, America’s longest-running mass tort—long focused across the Mississippi in Madison County, Illinois. In 2016, St. Louis had 311 new asbestos-case filings—and the average complaint listed 79 defendants. The number of new claims had increased almost 32% over 2015; between 2014 and 2016, Gori Julian—the Madison County firm that is the nation’s most frequent filer of asbestos lawsuits—had increased its filings in St. Louis by more than 191%. St. Louis faces more asbestos lawsuit filings than any jurisdiction in the U.S., save Madison County, New York, and Baltimore—and the second-most new claims alleging that asbestos had caused lung cancer, almost 16% of all lung-cancer claims nationwide.

Asbestos cases target peripheral defendants—the actual manufacturers of asbestos products have long since passed through bankruptcy—which makes Missouri’s complete “joint and several liability” damages rule quite attractive: a defendant can be held responsible for 100% of a plaintiff’s damages even when minimally at fault. And Missouri courts’ outsize damages often bear little relationship to the economic cost of injuries being considered by juries—at least not since 2012, when the Missouri Supreme Court found a constitutional right to unlimited noneconomic and punitive damages. A 2015 asbestos verdict of $11.5 million included $10 million in punitive damages, against a manufacturer that sold asbestos-containing valves to the U.S. Navy that may have come into contact with the plaintiff when he worked in a World War II shipyard.

Missouri’s excessive damage awards were not limited to product liability cases. For example, in 2015, a Jackson County jury assessed $82 million in punitive damages against a debt-collection firm that had mistakenly tried to recover $1,130 from a Kansas City woman.
THE UPHILL FIGHT FOR TORT REFORM

Although Missouri’s legislature has periodically tackled tort reform—including by passing noneconomic and punitive damage caps subsequently invalidated by the state supreme court—Trial Lawyers, Inc. has donated heavily to state politicians’ campaigns to thwart positive change. The plaintiffs’ bar bet big on former governor Jay Nixon, a Democrat; lawyers contributed about one-third of the money in his campaign war chest, including several gifts exceeding $100,000 from individual plaintiffs’ litigation firms. Nixon proved to be a good bet: in 2016, as a lame duck, he vetoed legislation that would have adopted the federal courts’ Daubert evidentiary standard to weed out “junk science” courtroom claims. The trial bar also bundles campaign cash to legislative leaders; Jill Schupp (D-St. Louis) and Scott Sifton (D-Affton) are among the senators to compile more than $50,000 in trial-lawyer cash in the latest campaign cycle.

The litigation industry does not, however, limit its campaign largess to Democrats. In the 2015 session, the evidentiary-reform bill was scuttled by Senator Kurt Schaefer (later elected Majority Caucus Leader) and Senator Eric Schmitt (since elected state treasurer); the two Republicans filibustered the reform bill, reading Chinese food menus during their debate time. Schaefer and Schmitt were both partners in the law firm Lathrop Gage; over the last decade, they received $136,000 and $260,000, respectively, in political contributions from trial lawyers.

Fortunately, Eric Greitens made reforming Missouri’s legal system a feature of his successful 2016 gubernatorial campaign. In his state of the state address, he proclaimed: “Our judicial system is broken, and the trial lawyers have broken it. Well, their time is up.” The early returns are promising, as several tort-reform bills have passed the Missouri legislature and been signed into law by Governor Greitens—headlined by the decision, at last, to adopt the federal Daubert standard to assess evidentiary claims. Other legal-reform laws that have been enacted in 2017 include a law requiring that jurors consider evidence of economic damages actually paid by plaintiffs, including their health insurers (as opposed to initial medical billing charges); a law designed to curb bad-faith insurance lawsuits; and laws reversing recent plaintiff-friendly rulings by the state supreme court that apply to employment and workers’ compensation claims.

In addition to legislative efforts, the Missouri Supreme Court in February 2017 issued a ruling that should scale back some of the state courts’ hospitality to out-of-state claims, when it ruled that Missouri courts could not entertain suits against out-of-state companies concerning claims by out-of-state plaintiffs that have no relationship to Missouri. The court relied not on Missouri law but the standard applied by the U.S. Supreme Court in its 2014 Daimler decision. In June 2017, the U.S. Supreme Court issued another decision, Bristol-Meyers Squibb, which held that a California state court could not assert personal jurisdiction against an out-of-state corporate defendant on behalf of out-of-state plaintiffs with no connection to the state, merely by joining those claims to California residents. On the very next day, a St. Louis judge applied the decision to declare a mistrial in a case against Johnson & Johnson over baby powder, because the case included out-of-state plaintiffs with no connection to the Missouri case. However, not all judges presiding over pending cases in the jurisdiction have followed suit, and the St. Louis judge who declared a mistrial in the baby powder case later took the reverse position in another baby powder case.

Fully realizing the potential of Governor Greitens’s reform agenda, however, requires more comprehensive action:

- **Venue and joinder reform.** Ideally, the state legislature would amend the state’s venue and joinder laws to ensure that plaintiffs have a connection to the area in which their cases will be tried—not relying solely on the U.S. Supreme Court’s personal jurisdiction rulings, which, in any event, apply only to out-of-state plaintiffs. A series of such bills was introduced during the 2017 session and would be ripe for reconsideration.

- **Deceptive trade practices reform.** The Missouri Merchandising Practices Act—designed to deter consumer fraud—has facilitated shakedown class-action lawsuits over dubious labeling claims (see sidebar on page 7, “The Sweet-Tooth Suits”). Governor Greitens rightly called out abusive lawsuits under this act, but an aggressive fight by the plaintiffs’ bar blocked action on legislation in 2017 that would have required a showing of actual injury caused by alleged deceptive practices, avoided duplicative damage awards, and modified class-action procedures.

- **Asbestos claims transparency.** Another bill introduced but not enacted in 2017 would have required plaintiffs to turn over evidence of claims that they have submitted to recover from asbestos trusts. This bill would prevent “double dipping” abuses in which plaintiffs recover from bankruptcy trusts established by asbestos manufacturers while also suing companies with more peripheral claims from still-solvent companies that may have used asbestos products.
Other reforms will take more long-term planning—including, in some cases, constitutional amendments. An amendment would be required to make good on Governor Greitens’s proposal to reform the Missouri Plan for picking appellate judges, which has enabled trial lawyers to screen the judges who ultimately rule on their cases. A constitutional amendment could also undo the Missouri Supreme Court’s misguided decisions holding unconstitutional commonsense limits on noneconomic and punitive damages—though the legislature could act on its own to limit the apportionment of all damages to defendants judged by juries to be minimally at fault.

Much work remains to be done; but in less than a year, Missouri has taken many positive steps that should stem some of the state’s worst lawsuit abuse. In time, the Show Me State should start to shed its “Sue Me” label.

THE SWEET-TOOTH SUITS

In recent years, the Rolla, Missouri, law firm Steelman, Gaunt, and Horsefield has developed a sweet tooth. On a single day in October 2016, the firm filed nine class-action lawsuits in Missouri courts against the manufacturers of movie-theater and Halloween candy favorites, including Skittles, Reese’s Pieces, Junior Mints, and Bit-O-Honey.

The lawsuits claimed that the candy makers were engaged in “deceptive marketing” because their boxes weren’t filled to the brim with candy—i.e., the boxes had “slack fill” that made them appear to contain more candy than they actually did, notwithstanding that content weights clearly appeared on packaging. The sweet-tooth suits were filed under the Missouri Merchandising Practices Act, which prohibits “deception, fraud, false pretense, false promise, misrepresentation, [or] unfair practice” in “trade or commerce.”

The Steelman firm’s lawsuit and others like it received a big boost on Nov. 8, 2016, when the Court of Appeals for the Eastern District of Missouri announced its decision in Murphy v. Stonewall Kitchen, which articulated a loose standard for filing false-claim suits under the act. (The Murphy decision permitted a lawsuit against the producer of an “all natural” cupcake mix that contained the common leavening agent sodium acid pyrophosphate—rejecting the company’s defense that the ingredient was listed on the same packaging.) The law firm representing Murphy, the Armstrong Law Firm of St. Louis, has filed dozens of similar food-labeling lawsuits against the manufacturers of brownies, pancakes, biscuits, muffins, and similar baked wares. Another sweet-tooth lawsuit line brought by the Armstrong firm challenges labels that list “evaporated cane juice” as a sweetener; these suits have gone after the makers of protein bars, energy bars, granola products, macaroons, and cookies.
Endnotes


2. See U.S. News ranking, supra note 1.

3. Id.


5. U.S. Chamber of Commerce Institute for Legal Reform, 2017 Lawsuit Climate Survey: Ranking the States (last accessed Nov. 20, 2017).


14. See id.; see also Missouri, JUDICIAL.HELLHOLES.ORG, 2015–16 Report (“The lone newcomer [to the Appellate Judicial Commission] for 2015 is a nurse and former paralegal at a plaintiffs’ firm.”) (last accessed Dec. 20, 2017); Michelle Beckler, LINKED In profile (listing work experience as a “legal nurse consultant” with Brian May LLC and listing Personal Injury and Litigation Support as “featured skills”).


17. Margaret Cronin Fisk, Welcome to St. Louis, the New Hot Spot for Litigation Tourism, BLOOMBERG BUSINESSWEEK (Sept. 29, 2016).

18. In re Prempro Pro. Liab. Litig., 591 F.3d 613 (8th Cir. 2010).

19. State ex rel. Heartland Title Servs., Inc. v. Harrell, 500 S.W.3d 239 (Mo. 2016). (holding (at p.243) that when a company does not have a registered agent in the state, venue is proper in any county.) This essentially allows plaintiffs to forum shop for the most friendly courts.


22. Id.

23. Id.


26. See Daubert, supra note 20.

27. See Judicial Hellholes.org, supra note 4.

28. Id.


31. Juan Carlos Rodriguez, Monanto Hit with $46.5M Jury Verdict in Mo. PCB Suit, LAW360 (May 26, 2016).


36. See id.

37. Id.

38. Id.

39. In one example, in 2016, a Jackson County jury issued a $37.5 million judgment against a tractor trailer that had rear-ended a car and horribly paralyzed its driver; the defendant was held responsible for the whole sum even though the jury determined that the individual in front of the driver, whose car had suddenly stopped on the interstate, was 99% responsible for the accident. See Associated Press, Missouri Jury Awards $37.5M to Man Paralyzed by Crash, WASHINGTON TIMES (Nov. 15, 2016).

40. Sindhu Sundar, Crane Co. Hit with $11.5M Asbestos Verdict in Mo., LAW360 (July 6, 2015).


42. Associated Press, Jackson County Jury Awards $82M Verdict Against Firm, COLUMBIA DAILY TRIBUNE (May 18, 2015).
In June, 22nd Circuit Court Judge Rex Burlison declared a mistrial in a baby powder lawsuit against Johnson & Johnson, in light of the U.S. Supreme Court’s decision in *Bristol-Myers Squibb*. Where Companies Can Be Sued, *The Missouri Times* (May 11, 2017). In June, 22nd Circuit Court Judge Rex Burlison declared a mistrial in a baby powder lawsuit against Johnson & Johnson, in light of the U.S. Supreme Court’s decision in *Bristol-Myers Squibb*, but he subsequently allowed new trials to proceed on the theory that some talcum powder for Johnson & Johnson was sourced by the Georgia company Pharma Tech, which has a Missouri plant. See Amanda Bronstad, “Bristol-Myers” Disruptive Effect Nearly Instant in Missouri Talc Case, Transcript Shows, NAt’s. L. J. (Oct. 13, 2017). On November 29, Judge Burlison denied a motion by Johnson & Johnson to vacate a $110 million verdict in a baby powder case brought by a Virginia resident who bought her baby powder in Virginia. See Order, Lois Slemm v. Johnson & Johnson, No. 1422-CC09326-02 (Cir. Ct., City of St. Louis, Mo.); see also Nate Raymond, JEF Ordered to Pay $110 Million in U.S. Talc-Powder Trial, *Reuter*s (May 4, 2017).

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