

# How to Find a Toxic Tort Case in Your Own Backyard

## Rhon E. Jones

### I. Introduction

Large toxic tort cases can be lengthy, expensive, and complicated to pursue. Few lawyers who have not litigated such cases appreciate the complex issues that arise and the practical solutions to those issues. As with any case, identification and selection are key. Due to the amount of resources these cases demand, mistakes on either front can cause big problems. While the risks may be high, these cases have the largest upside for verdict/settlement of any case litigated today with successful recoveries in the tens if not hundreds of millions of dollars.

### II. Case Identification

You are probably already familiar with Hollywood's version of these cases. They were depicted in *Erin Brockovich* and *A Civil Action*. Both of these movies are based on real cases and can provide pragmatic insights. The lawyer in *Erin Brockovich*, which is based on the case of *Anderson, et al. v. Pacific Gas & Electric Co.*, originally got involved in a real-estate case. Due in large part to the curiosity and tenacity of his newly hired filing clerk, the case resulted in a settlement for \$333M with the average recovery per plaintiff of \$300,000. The lesson here is these cases can lurk behind traditional legal complaints. Lawyers need to listen to their existing plaintiffs and look for neighborhood patterns of illnesses, livestock issues, or other signs of contamination such as unusual odors or tastes.

The lawyer in *A Civil Action*, which is based on the case of *Anderson v. Cryovac, Inc.*, originally declined the case despite stories of obvious pollution. After a would-be plaintiff bullied and/or shamed him into looking into the case further on a radio talk-

show, he traveled to the community. There he witnessed the signs of contamination and its disastrous effects on the families. After refusing a \$20M settlement, he eventually accepted an \$8M settlement recovering roughly \$375,000 per family.

You may also be familiar with the record-breaking settlement of \$700 million in the Monsanto case here in Alabama. Beasley Allen first got involved after other suits had been filed. Two lawsuits had already been initiated; however, residents outside the geographic boundaries of the first suits were concerned about their health. Prompted by lawyers like yourself, we looked into the environmental documentation and discovered the contamination was much broader than the first two suits covered.

Another interesting case is our Continental Carbon (CCC) case. After many lawyers in Columbus, Georgia said no to residents wanting to pursue CCC for emitting carbon black onto their homes, we took on the case. After extensive discovery, we tried the case and obtained a \$20.7 million verdict. It remains on appeal with the United States Supreme Court.

Other “under the radar” cases are leaking underground storage tanks at gasoline stations. Adjacent property owners often have good property damage claims when these tanks leak gasoline.

However, not all of these cases go as anticipated. 32,000 Alaskan fishermen learned this first-hand.<sup>1</sup> They brought suit against Exxon for the oil spill by the Exxon Valdez in 1989 and were awarded punitive damages of \$5B dollars in 1994. However, the case was remanded by the Ninth Circuit Court of Appeals twice and finally remitted

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<sup>1</sup> *In re The Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007).

by it to half the original award in 2007. The case is due to be decided by the United States Supreme Court sometime this year.

Other horror stories include lengthy trials with awards for the plaintiffs that get reversed later on. A 3.5-year long Illinois trial based on a dioxin spill in 1979 ended with a \$16.28M award; it was reversed and vacated because of issues with causation.<sup>2</sup> A 2002 class action suit from which plaintiff's claims were severed in 2005 ended with a \$15.5 million award; it was reversed and remanded after expert evidence and testimony was excluded; the new trial found for the defendant.<sup>3</sup> A 17-year long litigation effort by the Pennsylvania Department of General Services regarding asbestos and PCB endured a 2-year long trial only to see the \$90M award overturned due to issues with liability and damages assessment; the new trial found for the defendant.<sup>4</sup> Just last year Mississippi decided it would not recognize medical monitoring awards absent proof of current physical injuries in the course of a 3-year long case where workers claiming exposure to beryllium saw their dismissal affirmed.<sup>5</sup>

Each of these cases highlights ways to identify toxic tort cases and potential issues. The first possible way to indentify these cases is simply to be aware as you and your staff review traditional cases. The second is to identify areas of contamination and then look for viable defendants and traceable injuries. The third is to keep an eye on other cases, both on-going and completed, and look for places where the plaintiff class excludes contaminated areas. Key sources of information are news articles covering allegations of pollution or related legal actions, neighborhood activists or leaders who

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<sup>2</sup> *Kemner v. Monsanto Co.*, 576 N.E.2d 1146 (Ill. App. 1991).

<sup>3</sup> *E.I. DuPont de Nemours and Co. v. Strong*, 968 So.2d 410 (Miss. 2007).

<sup>4</sup> *Pennsylvania Dept. of General Services v. U.S. Mineral Products Co.*, 927 A.2d 717 (Pa.Cmwlth. 2007.).

<sup>5</sup> *Paz v. Brush Engineered Materials, Inc.*, 483 F.3d 383 (5th Cir. 2007).

often gather the grassroots information which reveal the patterns, legal sources for type-specific cases, and environmental sources for contamination.

Nothing beats a personal contact with a story of community-wide issues. To that end, you should develop and maintain relationships with community leaders, environmental activists, and local attorneys. Beyond that, you must recognize the power of the internet. A web presence which offers services in this area is a basic first step. However, a more proactive approach is more likely to produce results.

Web search engines are incredibly powerful tools. Google, Yahoo, Ask, AOL, and Dog Pile are just some of the engines available. Sites like [www.allmyfaves.com](http://www.allmyfaves.com) can identify general search sites. While the use of a variety of engines is more likely to give you complete coverage, Google is a good, free tool. Not only will it do a general search of the web with a broad selection of parameters, you can specifically search news items, scholarly literature<sup>6</sup>, and blogs<sup>7</sup>. Some of these sites, Google included, allow you to set up notifications that run the search and email you any results - freeing up your staff for other tasks.

Other resources that allow you to set up notifications are legal databases such as Westlaw and LexisNexis. Both of these databases have a host of information on environmental law, though some resources may also be found looking in the general tort law area. Most of the publications can be accessed other ways, but these databases allow you to automatically run a single search across multiple sources and notify you or your

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<sup>6</sup> Google Scholar, available at <http://scholar.google.com/schhp>, searches "peer-reviewed papers, theses, books, abstracts and articles, from academic publishers, professional societies, preprint repositories, universities and other scholarly organizations. Google Scholar helps you identify the most relevant research across the world of scholarly research".

<sup>7</sup> Available at <http://blogsearch.google.com/>. Blogs offer unique access to proactive individuals with specific interests or concerns.

staff of any results. Useful databases on LexisNexis include Emerging Toxic Torts: Mealey's Litigation Report and Environmental News Stories - Current. Westlaw offers Andrews Toxic Torts Litigation Reporter and Westlaw Topical Highlights - Environmental Law.

When looking for areas of concern, don't forget the activists and the environmentalist. As an example, the Sierra Club<sup>8</sup> hosts a website that will give you environmental news both nationally and by state. Environmental Link<sup>9</sup> is just one example of other news sources on the internet.

No discussion of resources would be complete without mention of the vast amount of data on federal and state regulatory websites. The Right to Know<sup>10</sup> laws have prompted these governmental agencies to increase their already extensive web presence. By performing searches on the provided database, you can identify sites in violation of their permits and sites that simply produce an abundance of waste. Due to the sheer amount of data available, the results are more manageable if you narrow your focus. There are a number of ways to do this to include geographic location, type of industry, business, chemical released, and amount released.

The Environmental Protection Agency's Toxics Release Inventory (TRI)<sup>11</sup> contains information about more than 650 toxic chemicals that are being used, manufactured, treated, transported, or released into the environment. Manufacturers of these chemicals are required to report the locations and quantities of chemicals stored on-site. The EPA compiles this data in an on-line, publicly accessible national

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<sup>8</sup> Available at <http://www.sierraclub.org/>.

<sup>9</sup> Available at <http://www.envirolink.org/categories.html?do=shownews>.

<sup>10</sup> List of numerous data access points available at <http://www.epa.gov/epahome/r2k.htm>.

<sup>11</sup> Available at <http://www.epa.gov/tri/>.

computerized database. The database currently goes from 1988 through 2006 with 2007 data expected to be posted shortly. Other ways to search this data can be found through RTK-Net<sup>12</sup> and Scorecard<sup>13</sup>.

Superfund<sup>14</sup> is the federal government's program to clean up the nation's uncontrolled hazardous waste sites. The EPA's Superfund database contains hazardous waste sites, potentially hazardous waste sites and remedial activities across the nation, including sites that are on the National Priorities List (NPL)<sup>15</sup> or being considered for the NPL. This is an excellent source to find clearly hazardous sites.

The EPA also provides a host of compliance and enforcement data sources<sup>16</sup>. These are prime tools to identify violators and chronic violators. The EPA provides sources that are specific to the type of impact (air, hazardous waste, modernization, pesticides, and water) as well as sources spanning all types of facilities. One example is the Enforcement and Compliance History Online<sup>17</sup> (ECHO). ECHO provides public access to compliance and enforcement information for approximately 800,000 EPA-regulated facilities. Updated monthly, this database allows users to find permit,

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<sup>12</sup> A network funded by several philanthropic and government agencies (including EPA) and jointly operated by two nonprofit organizations: Unison Institute and OMB Watch. Includes information on many EPA programs, regulations and tools and is the site for the RTK-Net LEPC/SERC Network. Available at <http://www.rtknet.org/>.

<sup>13</sup> The Environmental Defense Fund's Chemical Scorecard summarizes information about health effects, hazard rankings, industrial and consumer product uses, environmental releases and transfers, risk assessment values and regulatory coverage. Available at <http://www.scorecard.org/>.

<sup>14</sup> Overview available at <http://www.epa.gov/superfund/>. Search capability available at <http://cfpub.epa.gov/superfund/cursites/srchsites.cfm>.

<sup>15</sup> <http://www.epa.gov/superfund/sites/npl/npl.htm>

<sup>16</sup> List of data access points available at <http://www.epa.gov/Compliance/data/systems/index.html>.

<sup>17</sup> Overview available at <http://www.epa.gov/Compliance/data/systems/multimedia/echo.html>. Search capability available at <http://www.epa-echo.gov/echo/index.html>.

inspection, violation, enforcement action, and penalty information covering the past three years to include facilities regulated as Clean Air Act stationary sources, Clean Water Act direct dischargers, and Resource Conservation and Recovery Act hazardous waste generators/handlers.

These national databases are complimented by a variety of state databases offered through the individual state regulatory websites. As an example, reports of leaking underground storage tanks can be found on both Alabama and Georgia's website. The amount and type of data will depend on the sophistication of the agency's website. However, every state's website has some data. One helpful way of searching a particular website is by using a commercial web search engine and restrict the search to a particular site. The success of this depends on the structure of the website to be searched. However, a search on Google of "leak underground storage tank" list site:<http://www.adem.state.al.us/> pulls a list of sites from Alabama's regulatory website. The fourth site listed has a link to the UST Release Incident List, a spreadsheet with information regarding reported leaks current as of last month. Replacing the Alabama regulatory site with Georgia<sup>18</sup> pulls a list whose first site contains a similar list for Georgia.

### **III. Case Selection**

Armed with how to find potential cases, the critical step is determining which cases are viable. With cases routinely costing more than \$1M and more (much more) to prepare for trial, case selection becomes a primary consideration.

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<sup>18</sup> Search string would be - leak "underground storage tank" list site: [www.gaepd.org](http://www.gaepd.org)

One of the first things to consider is the number of clients. Once viable clients are identified, you must assess the client base. This includes several factors. You must consider the number of clients you reasonably believe will seek your representation. Normally firms cannot afford to do this type of litigation on contingency agreements for a small number of individuals. Property damage claims can be easier to prove and, therefore, supported by a smaller number of clients. However, personal injury claims require many more resources. If your case will include a large number of clients, you need to consider the client base's proximity to each other, organization, and leadership. This will allow you to judge the logistical issues of managing the plaintiffs. Finally, you need to consider how much of the defendant's overall pollution problem is represented by this group of plaintiffs. Almost all defendants will be more inclined to resolve cases if more of its problem can be resolved with your suit. These factors can not be fully assessed initially but must be considered throughout the pre-filing phase of the suit.

Another thing to consider is the known history of the toxin or suspected toxin. You must learn everything you can about the toxin. For property-based claims, the existence of the toxin on the land must be either a nuisance or constitute a compensable trespass. For personal injury, the toxin must be a (and perhaps *the*) cause of the injury. You must also be able to prove the toxin came from the defendant and into your client's body. Science can be used to prove such things<sup>19</sup>, but prior litigation is a better indicator

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<sup>19</sup> The EPA's National Center for Environmental Assessment, including their IRIS (Integrated Risk Information System) database, is a good source for technical information about various chemicals. List of data access points available at <http://cfpub.epa.gov/ncea/>.

of the probability of a favorable ruling. If the toxin has previously been found to legally cause this specific type of injury, it is more likely a different court will follow suit.<sup>20</sup>

The next thing to consider is the suspected site. *This is very important.* Has the site been identified by government authorities? Has it been the subject of previous litigation? As with the harmful properties of the toxin itself, prior litigation of the suspected site adds weight to the plaintiff's claims. However, with both of these, be aware of the possible impact on the commencement of the time allowable under the applicable statute of limitations. While state law will dictate the statute of limitation, CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) will preempt earlier state law accrual rules for cases that are or *could have been* brought under the act.<sup>21</sup>

Getting your arms around the whole problem can be a difficult but very rewarding task. Not only do you put yourself in the driver's seat in mapping out the litigation strategy, but, as previously mentioned, the more of the problem you can get a handle on, the better your claims should be. The two main factors you need to consider in this area are pending cases and the number of total plaintiffs.

While past litigation or litigation well underway can be a positive sign for case selection, pending similar cases may be more of a negative. In order to achieve judicial economy, the judge may order the cases consolidated. Now you have a partner whether you wanted one (or that particular one) or not. You must now work together in a case

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<sup>20</sup> A good place to use Westlaw and/or LexisNexis for searching cases, law reviews, and legal newsletters for prior cases. Be aware that most lawyers consider settlement preferable to verdicts due to the time to recovery for clients and the risks of proving causation.

<sup>21</sup> 42 U.S.C. §§ 9612(d)(2), 9658.

involving numerous clients with varied but related claims that are, themselves, complex.<sup>22</sup>

Additionally, if there exists a smattering of cases, the likelihood of resolution is diminished. A defendant has motivation at this point to either resolve them all or see that the first one fails on the merits. Unlike a class or mass action, multiple cases may favor the defendant because they are allowed to concentrate on smaller groups and apply lessons learned to subsequent suits.

One thing to be wary of in a toxic tort case, especially one involving personal injury, is “toxic soup.” This is a tongue-in-cheek term for a situation where more than one toxin is present and/or there is more than one source of the toxin. This exacerbates the already complex and difficult task of proving causation and liability. In the form of causation, you must now prove both that this toxin can cause this type of injury *and* that these other toxins are not to blame for your client’s injury. This quagmire only thickens when you add multiple producers of the toxin at issue. Now you must prove whose toxin it is. To avoid some of these issues, look for areas where there is only a single source of contamination like a lone landfill, leaking storage tank, or solitary factory. Highly industrialized areas will normally suffer from toxic soup. Another way around this problem, however, is by being able to single out a certain chemical. Asbestos is a great example. The only thing that will cause mesothelioma is exposure to

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<sup>22</sup> While good to consider, other pending cases are not always determinative of whether the case is viable. In the *Monsanto* case, no case had been decided on the merits and there was a case well on its way to trial. However, based on the advanced stage of that case and the different jurisdictions (our case was filed in federal court while the pending case was in state court) we believed it unlikely the cases would be judicially consolidated.

asbestos. A plaintiff who can prove they have mesothelioma only needs to prove who is responsible for the pertinent exposure.

#### **IV. Why Trespass and Nuisance is preferred over Personal Injury**

Any personal injury case can be fraught with causation and liability issues. Where the injury is acute, possible causes can be limited by proximity in time and place. However, toxic tort cases normally involve injuries that do not manifest until years after the exposure. This impedes your ability to prove your case. A lawyer litigating a personal injury toxic tort case must show the quantity and timing of all exposure, that the toxin at issue can cause injuries like the plaintiff's, that the plaintiff's injury was not caused by other events or exposures, and that the defendant was responsible for the exposure. These issues of causation are the most expensive portion of the case to litigate.

One contentious portion of personal injury is the issue of medical monitoring<sup>23</sup>. Medical monitoring is periodic medical examinations and screening to test for illness or disease. These "damages" are awarded prior to the plaintiff becoming sick in an effort to detect (and thereby treat) any future illnesses the plaintiff may suffer due to the exposure to the toxin. This is becoming a more litigated issue as more jurisdictions begin to recognize it as a recovery option. States that will recognize medical monitoring even without proof of current physical injury include Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Illinois, New Jersey, New York, Ohio, Pennsylvania, Utah, and West Virginia.<sup>24</sup> Other jurisdictions will only recognize it when the plaintiff can show some current physical injury as well as the increased likelihood of

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<sup>23</sup> Anthony G. Hopp, *Bad Medicine: The Legal, Policy and Medical Arguments Against Medical Monitoring*, 23 *Toxics L. Rep.* (BNA) 436 (2008).

<sup>24</sup> 34 COA2d 249.

other illnesses in the future. These include Alabama, Delaware, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Mississippi, Nebraska, Nevada, North Carolina, South Carolina, Texas, Virginia, and Washington.<sup>25</sup> Jurisdictions such as Alaska, Hawaii, Idaho, Maine, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming have yet to decide.<sup>26</sup>

Opponents of medical monitoring will question the wisdom of the testing. They will cite the risks associated with some types of testing<sup>27</sup>, the policy concerns that it will clog the overworked court system and lead to defendant-funded health maintenance organizations, and that it allows an award of damages based solely on future, speculative harm. However, advocates will counter with a logical approach like weighing factors such as the seriousness of the potential disease, the increase in the likelihood the plaintiff will suffer from it due to the exposure, and the value of early detection<sup>28</sup>, as well as the impact the polluters have on predominantly poor neighborhoods and the inability of the people exposed to pay for the testing themselves. While these types of awards are possible and, in some circumstances needed, even courts that will recognize them may do so grudgingly. A case decided this June in New Jersey, a state that recognizes medical monitoring without the need to show current physical injury, saw a reversal of such awards in a Vioxx case.<sup>29</sup> The New Jersey

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<sup>25</sup> *Id.*; *Paz v. Brush Engineered Materials, Inc.*, 483 F.3d 383 (5th Cir. 2007) (Establishing Mississippi's stance)

<sup>26</sup> Anthony G. Hopp, *Bad Medicine: The Legal, Policy and Medical Arguments Against Medical Monitoring*, 23 *Toxics L. Rep. (BNA)* 436, 437 (2008).

<sup>27</sup> Resource cited to say screening not recommended for many potential illnesses in *The Guide to Clinical Preventative Services*. The pocket guide is available at [www.ahrq.gov/clinic/pocketgd.htm](http://www.ahrq.gov/clinic/pocketgd.htm).

<sup>28</sup> *Sinclair v. Merck & Co., Inc.*, 913 A.2d 832 (N.J. Super.A.D. 2007) (N.J. case reversing dismissal of medical monitoring claims absent physical injury).

<sup>29</sup> *Sinclair v. Merck & Co., Inc.*, 913 A.2d 832 (N.J. Super.A.D. 2007) (Claims dismissed on remand. June 4, 2008).

Supreme Court held the plaintiff must show current physical injury if they had been exposed to other confounding toxins.

Personal injury cases, however, can pull at the heartstrings of juries. If you are thinking about one of these, you must do some basic research on the toxin before deciding to select the case. The EPA's National Center for Environmental Assessment<sup>30</sup> has some excellent sources to include their Integrated Risk Information System (IRIS)<sup>31</sup>. Other options include searching ChemBioFinder<sup>32</sup>, the National Center of Biotechnology information's PUBMED<sup>33</sup>, and the Center for Disease Control: National Institute of Occupational Safety and Health's Pocket Guide to Chemical Hazards<sup>34</sup>. These sites are very technical; a less technical resource is the Agency for Toxic Substances and Disease Registry's (ATSDR) ToxFAQs<sup>35</sup>. The Federal Judicial Center<sup>36</sup> has downloadable resources to help you understand how the science works with the court system to include such titles as the Reference Manual on Scientific evidence and the Manual for Complex Litigation.

In contrast to the complexity of personal injury claims, claims based on property damages are much easier to prove. Causation in this context is comprised of showing

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<sup>30</sup> Available at <http://cfpub.epa.gov/ncea/>.

<sup>31</sup> Available at <http://cfpub.epa.gov/ncea/iris/index.cfm>.

<sup>32</sup> Very technical site based on chemical compound searchable using either the chemical name or chemical number. This site links to various sites which discuss exposure and other issues. Available at <http://www.chemfinder.com>.

<sup>33</sup> Search by chemical name and mortality, morbidity, or specific symptom. Available at <http://www.ncbi.nlm.nih.gov/entrez/query.fcgi>.

<sup>34</sup> Available at <http://www.cdc.gov/niosh/npg/npgd0000.html>.

<sup>35</sup> Available at <http://www.atsdr.cdc.gov/toxfaq.html>.

<sup>36</sup> Available at [http://www.fjc.gov/library/fjc\\_catalog.nsf](http://www.fjc.gov/library/fjc_catalog.nsf).

the toxin at issue is “bad” (showing what illness it could cause or just how awful the odor really is), the toxin is present on the plaintiff’s property in sufficient quantities, and that the defendant is responsible for its presence. Showing a sufficient quantity is relatively simple where the government has set maximum concentration levels (MCL) for the toxin<sup>37</sup>. However, standards have not been adopted for all chemicals. Some claim there is a growing trend for courts to use the MCL as a threshold showing; barring the claim if the contamination does not exceed it.<sup>38</sup> If the level at issue does not exceed the standard, and even where no standard exists, you must proceed with caution.

Explaining to your client that their personal injury claim will not be pursued requires careful handling. Though it may not initially be received well by the plaintiff, this route will often lead to similar if not better awards than including the personal injury claim. The first reason is the questionable outcome of filing such a claim. As previously discussed, personal injury cases are difficult and expensive to prove. These claims are more likely to fail and litigation costs will be greater. The second reason is jury members are better able to grasp and judge the validity of the scientific evidence of property cases. Without the complex issues involved in proving which toxin did what to whom, the jury is able to focus on these simple steps: the toxin is on the plaintiff’s property, the toxin is bad, the defendant caused the toxin to be there, and the defendant is bad. Too often in personal injury cases, the focus shifts from how bad the defendant is to the science as the experts battle it out. By streamlining the claims, you keep the jury focused on the bad actor. Additionally, as the indignation of the jury is more closely

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<sup>37</sup> These can be found by searching the Toxicology Data Network’s Hazardous Substances Databank available at <http://toxnet.nlm.nih.gov/cgi-bin/sis/htmlgen?HSDB>.

<sup>38</sup> Joseph F. Madonia and Alison C. Conlon, *The MTBE Multidistrict Litigation – Has the Bar Been Lowered for Toxic Tort Claims?*, 20-7 Mealey’s Poll. Liab. Rep. 28 (2007).

related in time to when they make their decisions, they are more likely to be favorable with pain and suffering and punitive damage awards. These can equate to or exceed what may have been recovered if all the claims had been litigated.

### **V. Conclusion**

These are difficult cases to find and difficult cases to litigate. However, the profit-making activities of the defendant caused real hardship to people and families who were probably already struggling. While the risks for law firms may be high, remember that with great risk comes the potential for great reward. The alternative is to do nothing. That's a risk we can't afford.