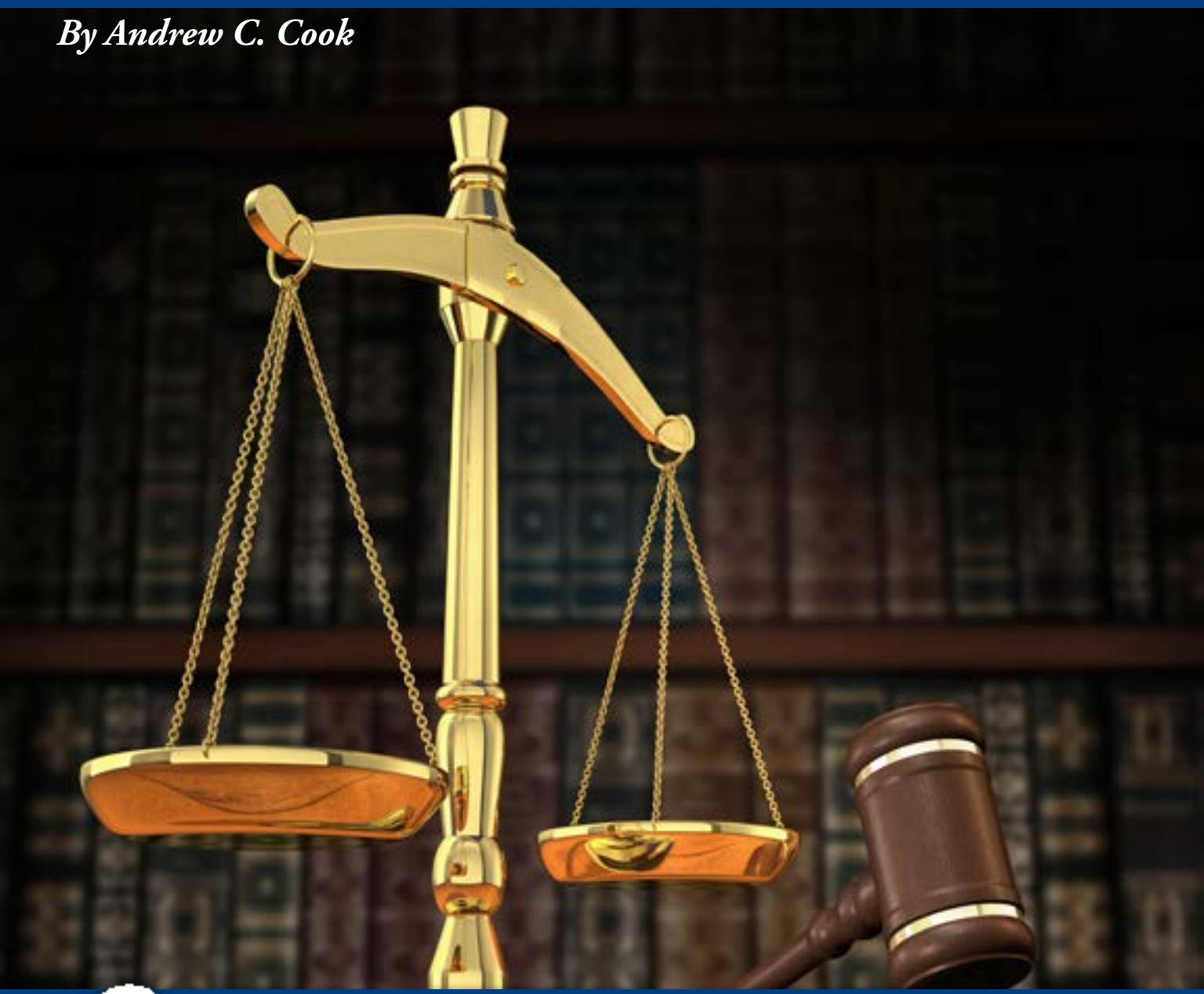
2013 Civil Justice Update: Recently Enacted State Reforms and Judicial Challenges

By Andrew C. Cook



THE FEDERALIST SOCIETY MARCH 2014

ABOUT THE FEDERALIST SOCIETY

The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Federalist Society takes no position on particular legal or public policy questions, but is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our constitution and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We occasionally produce "white papers" on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, and not reflective of an organization stance. This paper presents a number of important issues, and is part of an ongoing conversation. We invite readers to share their responses, thoughts, and criticisms by writing to us at info@fed-soc.org, and, if requested, we will consider posting or airing those perspectives as well.

For more information about the Federalist Society, please visit our website: www.fed-soc.org.

2013 Civil Justice Update: Recently Enacted State Reforms and Judicial Challenges

Andrew C. Cook

Proponents of civil justice reform, or tort reform, have made significant gains in recent years passing comprehensive legislation limiting the size and scope of civil liability damages. [1] In response to these recently enacted reforms, opponents of these measures have turned to the courthouse to challenge these laws with varying degrees of success.[2]

The purpose of this paper is to provide a comprehensive national survey of both recent court decisions ruling on challenges to existing civil justice laws and the newly enacted civil justice reforms.[3] This paper has two main parts: Part I describes state and federal court rulings in 2013 and Part II describes legislation passed during the year's legislative session.

Part I describes three state cases and two federal cases that each address a different civil liability issue. There is a special focus on the Oklahoma Supreme Court decision striking down a 135-page tort reform bill enacted in 2009, which was perhaps the year's the most significant court ruling in this area.

Part II describes about twenty newly enacted civil justice laws passed in the states and the specifics of each bill. 2013 proved to be a particularly active year legislatively, with a dozen states enacting some form of civil justice legislation. The bills that were passed covered a wide range of issues; common themes include government retention of private attorneys (Alabama and Wisconsin), class action reform (Arizona and Louisiana), expert witness testimony (Florida and Virginia), asbestos litigation (Oklahoma, Ohio, and Texas), trespasser liability (Utah and Virginia), among others described in full in Part II.

I. Judicial Challenges to Previously Enacted Civil Justice Reforms in 2013

A. State Supreme Court Decisions

Oklahoma

On June 4, 2013, the Oklahoma Supreme Court issued two decisions significantly altering the state's civil liability laws. In *Douglas v. Cox Retirement Properties, Inc.*,[4] the court struck down the state's comprehensive tort reform law enacted in 2009 (H.B. 1603) as an unconstitutional violation of the "single-subject" rule of article 5, section 57 of the Oklahoma Constitution. In a second opinion, *Wall v. Marouk*,[5] issued the same day, the court struck down a law requiring a plaintiff alleging professional negligence to attach an affidavit to their petition attesting that they have consulted with a qualified expert before proceeding with the case.

Douglas v. Cox Retirement Prop., Inc.—Striking Down Oklahoma's Tort Reform Law

The court's decision in *Douglas* was sweeping, striking down the entire Comprehensive Lawsuit Reform Act (CLRA), which contained 90 sections covering 135 pages. Twenty-four sections of the CLRA amended and created new laws within Oklahoma's Code Civil Procedure.[6] Another 66 sections created new acts, covering a number of substantive civil liability areas.

Although the legislation is too large and complex to discuss in full detail, this summary highlights some of the major provisions contained in the CLRA.

- **Expert Affidavits in Professional Negligence Lawsuits**[7]: Required a plaintiff[8] filing a civil action for professional negligence to first consult with a qualified expert and obtain a written opinion from the expert that a "reasonable interpretation" of the facts "supports a finding that the acts or omissions of

1 *See* Andrew C. Cook, The Federalist Society, Tort Reform Update: Recently Enacted Legislative Reforms and State Court Challenges 7 (Dec. 2012), http://www.fed-soc.org/doclib/20130110_CivilJusticeTortReformUpdateWP2012.pdf.

2 *Id.*

3 This paper is the author's update to his December 2012 Federalist Society White Paper on the same topic.

4 302 P.3d 789, 2013 OK 37.

5 302 P.3d 775, 2013 OK 36.

6 Okla. Stat. Ann. tit. 12, § 19 (2011).

7 Okla. Stat. Ann. tit. 12 § 19.

8 This law was challenged separately in *Wall v. Marouk* (discussed in greater length in the next section).

the defendant" constituted professional negligence.[9]

•**Forum non conveniens**[10]: Allowed the court to decline to exercise jurisdiction under the doctrine of forum non conveniens and transfer to another jurisdiction or dismiss or stay the action based on a party filing or on the court's own motion.

•**Pre- and Post-judgment Interest**[11]: Lowered pre- and post-judgment interest to the United States Treasury Bill rate of the preceding calendar year. In personal injury cases, prejudgment interest did not start until 24 months after the filing of the lawsuit.

•**Service of Process**[12]: Provided that if service of process is not made upon the defendant within 180 days after filing the petition, the action would be deemed dismissed without prejudice.

•**Expert Testimony**[13]: Codified and incorporated Federal Rules 702 and 703—the test for expert testimony adopted by the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*.[14]

•**Damages**[15]: Capped noneconomic damages at $400,000, regardless of the number of parties against whom the action is brought or the number of actions brought. The law did contain a number of exceptions to the $400,000 cap on noneconomic damages, such as in cases where:

- The plaintiff has suffered permanent and substantial physical abnormality or disfigurement, loss of use of a limb, or loss of (or substantial impairment to) a major body organ or system;
- The plaintiff has suffered permanent physical functional injury which prevents them from being able to independently care for themselves and perform life sustaining activities;
- The defendant's acts or failures to act were: in reckless disregard for the rights of others, grossly negligent, fraudulent, or intentional or with malice.

•**Seat Belts**[16]: Amended existing law by providing that evidence of the use or nonuse of a seatbelt may be admissible in a civil action, except for children under the age of 16.

•**Uniform Emergency Volunteer Health Practitioners Act**[17]: Provided immunity to a health care provider as defined by statute while an emergency declaration is in effect.

•**Common Sense Consumption Act**[18]: Stated the intent of the Act is to "prevent frivolous lawsuits against manufacturers [and others in the business] that comply with applicable statutory and regulatory requirements." More specifically, the law protected distributors and sellers from claims arising out of weight gain, obesity, or a health condition associated with weight gain or obesity.

•**Oklahoma Livestock Activities Liability Limitation Act**[19]: Provided property owners who participate in "Agritourism" activities greater protection from lawsuits.

•**Firearms**[20]: Provided that no firearm manufacturer, distributor, or seller who lawfully manufacturers, distributes or sells a firearm is liable to any person for any injured suffered—including wrongful death and property damages, because of use of such firearm by another person.

•**Product Liability**[21]: Adopted the *Restatement of Torts* and codifies existing Oklahoma case law pertaining to product liability. Specifically, the law provided that in a product liability case a manufacturer or seller is not liable if the product is inherently unsafe and known to be unsafe by the ordinary consumer who "consumes the product with the ordinary

9 Okla. Stat Ann. tit. 12 § 19.A.1.b.

10 Okla. Stat. Ann. tit. 12, § 140.2 (2011).

11 Okla. Stat. Ann. tit.12 § 727.1. (2011).

12 Okla. Stat. Ann. tit. 12 § 2004 (2011).

13 Okla. Stat. Ann. tit. 12 § 2702 & 2703 (2011).

14 509 U.S. 579 (1993).

15 Okla. Stat. Ann. tit. 23 § 61.2. (2011).

16 Okla. Stat. Ann. tit. 47 § 11-1112 (2011).

17 Okla. Stat. Ann. tit. 63 § 684.15. (2011).

18 Okla. Stat. Ann. tit. 76 § 33–34 (2011).

19 Okla. Stat. Ann. tit. 76 § 50.2. (2011).

20 Okla. Stat. Ann. tit. 76 § 52 (2011).

21 Okla. Stat. Ann. tit. 76 § 57 (2011).

knowledge common to the community." In order for this affirmative defense to apply, the law required the defendant must demonstrate that:

- The product was a common consumer product intended for personal consumption.
- The product's utility outweighs the risk created by its use.
- The risk posed by the product was one known by the ordinary consumer with ordinary knowledge common to the community.
- The product was properly prepared and reached the consumer without substantial change in its condition.
- Adequate warning of the risk posed by the product was given by the manufacturer or seller.

- **Asbestos and Silica Claims Priorities Act**[22]: Comprehensive provision that provided a procedural remedy allowing for supervision and control of asbestos and silica litigation by giving priority to claimants with demonstrable physical impairment caused by exposure to asbestos or silica.

- **Innocent Successor Asbestos-Related Liability Fairness Act**[23]: Limited the liability of an innocent successor corporation of asbestos-related liabilities to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation. The innocent successor corporation does not have any responsibility for successor asbestos-related liabilities in excess of this limitation.

- **School Protection Act**[24]: Provided teachers, principals, and other school professionals protection to use "the tools to undertake reasonable actions to maintain order, discipline, and an appropriate educational environment."

- **Joint and Several Liability**[25]: Amended the existing joint and several liability statutes by providing that the liability of joint tortfeasors is several unless:
  - A defendant is greater than 50 percent responsible, or
  - A joint tortfeasor acted willfully and wantonly or with reckless disregard, in which case all defendants are jointly and severally responsible.

22 Okla. Stat. Ann. tit. 76 § 60 (2011).

23 Okla. Stat. Ann. tit. § 76 O.S. 66–73 (2011).

24 Okla. Stat. Ann. tit. 70 § 6-141 (2011).

25 Okla. Stat. Ann. tit. 23 O.S. 15 (2011).

Oklahoma Supreme Court Decision: Comprehensive Lawsuit Reform Act Violates the Constitution's Single-Subject Rule

The Oklahoma Constitution provides in pertinent part: "Every act of the Legislature shall embrace but one subject, which shall be clearly expressed in its title . . . ."[26] In the *Douglas* opinion, the court stated the purpose of this rule is to prevent "logrolling" whereby multiple unrelated bills are consolidated together forcing legislators to vote for all or none of the proposals. Specifically, the provision is designed to "prevent the Legislature from making a bill 'veto proof' by combining two totally unrelated subjects in one bill."[27] The court then discussed the legislation's numerous provisions and determined that many were unrelated to one another. The majority determined that by containing so many provisions in one bill it forced legislators "with an all-or-nothing choice to ensure the passage of favorable legislation," and thus violated the Oklahoma Constitution.[28]

In a prior single-subject decision, *Thomas v. Henry*,[29] the court severed only the offending provisions.[30] Yet in this case the majority struck down all of H.B. 1603 because, according to the court, unlike *Thomas*, which only had 13 provisions, the CLRA had too many provisions.

The majority concluded that it was "mindful of the practical consequences" of its decision, but nonetheless struck down the entire law because, "the Legislature should be well aware of the [Oklahoma Constitution's] single-subject requirements."[31]

26 Okla. Const. art. 5, § 57.

27 Douglas v. Cox Ret. Prop., Inc., 302 P.3d 789, 793, 2013 OK 37.

28 *Id.* at 793.

29 2011 OK 53, 260 P.3d 1251.

30 *Douglas*, 302 P.3d at 793.

31 *Id.* at 794.

Shortly after the decision, Governor Mary Fallin issued an executive order calling the Legislature into a special session to reenact provisions of H.B. 1603.[32] During the special session in September, the Oklahoma Legislature enacted 23[33] separate bills reinstating the reforms struck down by the supreme court.

32 http://www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=223&article_id=12392.

33 SB 1 (Affidavit of Merit), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%201; SB 2 (Dismissal of Actions), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%202; SB 4 (Procedures for Recovery of Medicaid Payments), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%204; SB 6 (Expert Testimony), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%206; SB 7 (Obligation of Good Faith for Uniform Commercial Code), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%207; SB 10 (Emergency Powers of the Governor), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2010; SB 11 (Volunteer Liability), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2011; SB 12 (Common Sense Consumption Act), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2012; SB 13 (Products Liability), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2013; SB 14 (Asbestos/Silica Claims), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2014; SB 15 (Successor Asbestos Liability), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2015; SB 16 (Class Action Procedure), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=SB%2016; HB 1003 (Forum Non Conveniens), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201003; HB 1004 (Firearms Manufacturer Liability), available at http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201004; HB 1005 (Emergency Volunteer Health Practitioners Act), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201005; HB 1006 (Definition of Frivolous Lawsuit), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201006; HB 1007 (Peer Review Information Subject to Discovery), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201007; HB 1008 (Livestock Liability), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201008; HB 1009 (School Protection Act), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201009; HB 1010 (Due Process for Teachers), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201010; HB 1011 (Pleading Requirements), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201011; HB 1013 (Class Action Procedure), *available at* http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201013; HB 1015 (Seat Belts, Admissibility of Evident), available at http://www.oklegislature.gov/BillInfo.aspx?Bill=HB%201015.

Wall v. Marouk—Striking Down Law Requiring Plaintiffs to File Affidavits

In a separate decision filed the same day as *Douglas*, the court in *Wall v. Marouk*[34] held that an Oklahoma law[35] requiring plaintiffs to file an affidavit of merit in actions for professional negligence also violated the Oklahoma Constitution.

Wall is a follow-up case to a 2006 decision, *Zeier v. Zimmer*,[36] where the Oklahoma Supreme Court struck down a similar statute[37] requiring plaintiffs to file an affidavit of merit in medical malpractice cases. In *Zeier*, the court held[38] that the statute requiring the plaintiff to file an affidavit of merit violated the Oklahoma Constitution's prohibition on "special laws."[39]

Following *Zeier*, the Oklahoma Legislature amended the statutes. However, unlike the law struck down in *Zeier*, which required an affidavit in any action for medical liability, the new law required such an affidavit in any professional negligence case. The new law, however, did not specifically define "professional negligence." Instead, that definition is found under the Affordable Access to Health Care Act, which encompasses negligent acts or omissions by health care providers.[40]

Oklahoma Supreme Court Decision: Law Violates Two Clauses of Oklahoma's Constitution by Imposing an Unconstitutional Burden on Plaintiffs and Violating the Prohibition on Special Laws

In *Wall*, the court noted that the previous medical affidavit requirement struck down as unconstitutional was also part of the same law. The court concluded that the Legislature "re-enacted the affidavit requirement in a different title using the words professional negligence rather than medical liability but otherwise left the language essentially the same."[41] Therefore, because

34 302 P.3d 775, 2013 OK 36.

35 Okla. Stat. Ann. tit. 12 § 19 (2011).

36 152 P.3d 861, 2006 OK 98.

37 Okla. Stat. Ann. tit. 63 §1-1708.1E. (2011).

38 152 P.3d at 862.

39 Okla. Const. art. 5, § 46.

40 Okla. Stat. Ann. tit. 63 §1-1708.1C. (2011).

41 *Wall*, 302 P.3d at 781.

the court found that the current law was "functionally the same as the previous unconstitutional provision analyzed in *Zeier*," the court once again struck down the new affidavit requirement for professional negligence cases.

The court held that the new law, similar to law struck down in *Zeier*, violated two provisions of the Oklahoma Constitution.

First, under article 2, section 6, the Oklahoma Constitution provides that:

> The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay, or prejudice.

As in *Zeier*, where the court calculated that the cost of obtaining a professional's opinion to support the affidavit of merit could range from $500 to $5,000, the court in *Wall* determined that the affidavit requirement under the new law similarly imposed an unconstitutional burden on plaintiffs to access the courts.

In addition, the court held that the affidavit requirement violated the Oklahoma Constitution's[42] prohibition on special laws. The court, citing to prior case law, held that a special law "confers some right or imposes some duty on some but not all the class of those who stand upon the same footing and same relation to the subject of the law."[43]

According to the court, the affidavit requirement for professional negligence created a new subclass of tort victims and tortfeasors known as "professional tort victims and tortfeasors."[44] As a result, the law placed "an out of the ordinary enhanced burden on these subgroups to access the courts by requiring victims of professional misconduct to obtain expert review in the form of an affidavit of merit prior to proceeding" and requires the victims of professional misconduct to pay the cost of expert review.[45]

Maryland

Coleman v. Soccer Association of Columbia—Court of Appeals of Maryland Upholds Common Law Doctrine of Contributory Negligence

In *Coleman v. Soccer Association of Columbia*,[46] the court was presented with the question of whether the common law doctrine of contributory negligence should be judicially abrogated and replaced with the doctrine of comparative negligence.

The case involved a lawsuit filed by James Coleman, an assistant youth soccer coach with the Soccer Association of Columbia. During one of the practices Coleman retrieved a ball he had kicked into one of the soccer nets. While passing under the goal's metal top rail, Coleman jumped up and grabbed the top of the net with his two hands. The goal was not anchored to the ground, and as a result Coleman fell backwards drawing the weight of the crossbar onto his face. Coleman suffered multiple facial fractures requiring surgery and the placing of three titanium plates in his face.

Coleman sued the Association alleging that he was injured by the defendant's negligence. The Association asserted the defense of contributory negligence. During the trial the jury concluded that the Association was negligent and that its negligence caused Coleman's injuries. The jury also found that Coleman was negligent and that his negligence contributed to his own injuries. Therefore, Coleman was barred from any recovery.

Coleman appealed the case, which went directly to the Court of Appeals of Maryland, the state's highest court. The sole issue was whether the court should abrogate the doctrine of contributory negligence.

In a 5-2 decision, the court rejected Coleman's request, holding that "although this Court has the authority to change the common law rule of contributory negligence, we decline to abrogate Maryland's long-established common law principle of

42 Okla. Const. art. 5, § 46.

43 *Id.* at 779 (citing Oklahoma City v. Griffin, 403 P.2d 463, 1965 OK 76 (1965)).

44 *Id.*

45 *Id.*

46 __A.3d__, 2013 WL 3449426 (Md. 2013).

contributory negligence."[47]

The court concluded that to "change the common law and abrogate the contributory negligence defense in negligence actions, in the face of the General Assembly's repeated refusal to do so, would be totally inconsistent with the Court's long-standing jurisprudence."[48]

B. Federal Court Decisions

1. United States Court of Appeals for the Fifth Circuit

***Learmonth v. Sears et. al.*—U.S. Federal Court Upholds Mississippi's Cap on Non-economic Damages in Medical Malpractice Cases**

On February 27, 2013, in *Learmonth v. Sears, Roebuck and Co.*[49] the United States Court of Appeals for the Fifth Circuit upheld Mississippi's statutory cap on noneconomic damages of $1 million in civil liability cases.[50]

A federal jury found Sears, Roebuck and Co. ("Sears") liable for causing plaintiff Lisa Learmonth's injuries in an automobile accident. The jury awarded Learmonth $4 million in compensatory damages and $2.2 million in noneconomic damages. The court reduced this portion of the award to $1 million pursuant to Mississippi's statutory cap on noneconomic damages.[51]

Sears requested a new trial or remittitur, while Learmonth challenged Mississippi's statutory cap on noneconomic damages as a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Mississippi Constitution's jury trial Clause, separation of powers clauses, due process clause, and remedy clause.[52] The U.S. District Court denied Sears' request for a new trial and reduced noneconomic damages to $1 million pursuant to Mississippi's statutory cap.

Sears appealed the district court's denial of a new trial, and the court of appeals affirmed. Learmonth cross-appealed, once again arguing Mississippi's statutory cap violated the Mississippi Constitution's jury trial guarantee and separation of powers provisions.[53] The court's response to each argument is summarized below.

Jury Guarantee

The court first addressed Learmonth's argument that Mississippi's $1 million cap on noneconomic damages violates the Mississippi Constitution's jury guarantee, which provides in relevant part: "The right of trial by jury shall remain inviolate . . . ."[54] Specifically, Learmonth argued that the statute infringed upon two rights encompassed by the jury guarantee: 1) the right to have a jury alone find the proper compensatory damages amount, and 2) the right to have that factual finding converted, undisturbed, into a legally binding judgment of equal value.[55]

The court noted that while the "first right surely exists within the jury guarantee, Learmonth has failed to establish 'beyond a reasonable doubt' that it exists as part of the jury guarantee."[56] In reaching its decision, the court concluded that the statutory cap on noneconomic damages "can be interpreted not to alter a jury's factual damages determination, but instead to impose a strictly legal limitation on the judgment that provides the remedy for a noneconomic injury."[57]

The court noted that because Mississippi's statute places a limit on the jury's act of "awarding" noneconomic damages, it may appear at "first blush" to interfere with the jury's fact finding procedure. However, according to the court, when "viewing the statute as a whole" the legislature did not use the term "award" in the "technical or legal sense of finding a damages amount."[58] The court explained that the statute provides that the jury shall not be advised of

47 *Id.* at *2.

48 *Id.* at *8.

49 631 F. 3d 724 (5th Cir. 2013).

50 Mississippi also limits recovery of noneconomic damages in medical negligence cases at $500,000. Miss. Code Ann. § 11-1-60(2)(a). *See infra* note 64.

51 Miss. Code Ann. § 11-1-60 (2)(b).

52 U.S. Const. amend. XIV, § 1; Miss. Const. art. I, §§ 1, 2; Miss. Const. art. III, §§ 14, 24, 31.

53 Learmonth did not renew her other constitutional challenges to Miss. Code Ann. § 11-1-60(2)(b).

54 Miss. Const. art. III, § 31.

55 *Learmonth*, 631 F.3d at 258.

56 *Id.* at 258–59.

57 *Id.* at 260.

58 *Id.*

the statutory cap and concluded that a jury that is unaware of the cap on noneconomic damages cannot apply the limitation when determining the facts and thus does not invade the jury's fact-finding process. Moreover, the statute provides that the judge is to reduce any award that exceeds the cap and therefore "comports with a judge's role of applying the law to the jury's factual findings."[59]

Separation of Powers

Learmonth further argued that the statute violates the Mississippi Constitution's separation of powers provision and conflicts with remittitur (the ability of the judge to lower the amount of damages awarded by the jury), but the court rejected this argument.

Under Mississippi law, remittitur is permitted if the jury's verdict has been influenced by "bias, passion, or prejudice," or is contrary to the "overwhelming weight of credible evidence."[60] The court explained that remittitur applies only if there is strong reason to question the integrity of the jury's factual findings. However, the court noted that the statutory cap on noneconomic damages does not alter a jury's deliberations or its factual findings, but instead sets a non-discretionary limit on the permissible legal remedy."[61] Thus, according to the court, because the statute does not apply to the verdict, "it cannot affect a trial court's application or non-application of remittitur."[62]

The court also rejected the plaintiff's other arguments and held that Mississippi's statutory cap on noneconomic damages does not violate the Mississippi Constitution.

2. United States District Court for the Southern District of Mississippi

***Clemons v. United States*—U.S. District Court Upholds Mississippi's Statutory Cap on Noneconomic Damages in Medical Malpractice Cases**

A few months after the *Learmonth* decision upholding Mississippi's statutory cap on noneconomic damages for civil liability cases, the United States District Court for the Southern District of Mississippi, Eastern Division, upheld another section of the same law which sets limits on noneconomic damages in medical negligence cases.

Clemons[63] involved a medical negligence lawsuit brought against the United States of America for the negligence of an emergency room physician employed by the government who in refusing to provide medical care to a woman caused her death and the death of her unborn 30-week old baby. The government admitted liability and the case proceeded to a bench trial on damages only.

The trial court awarded the plaintiff approximately $1.8 million in economic damages and $5.45 million in noneconomic damages.

The U.S. government sought to reduce the $5.45 million noneconomic damages award to the $1 million limit stipulated by statute.[64] The law caps a plaintiff's recovery of noneconomic damages in medical negligence cases to $500,000 per person.

The court noted that "the Fifth Circuit's reasoning in *Learmonth* applies here with equal force, such that the plaintiff's jury trial guarantee and separation of powers arguments need not be considered anew."[65]

In its analysis, the court first addressed the plaintiff's argument that the defendant waived the statutory affirmative defense.[66] The plaintiff argued that the defendant failed to raise this defense and therefore was waived. However, the court rejected this argument and held that while the defense was not raised in the defendant's Answer, the defense was preserved by its inclusion in its Pretrial Order.[67]

Second, the court addressed the plaintiff's argument that the statute's extra benefit to health care providers violated the Mississippi Constitution's prohibition on "special legislation." Specifically, the plaintiff argued

59 *Id.*

60 *Id.* at 264 (citing Miss. Code Ann. § 11-1-55).

61 *Id.*

62 *Id.*

63 Clemons v. United States, No. 4:10-CV-209-CWR-FKB (S.D. Miss. June 13, 2013).

64 Miss. Code Ann. § 11-1-60(2)(a).

65 *Clemons*, No. 4:10-CV-209-CWR-FKB at 2.

66 Miss. Code Ann. § 11-1-60(2)(a).

67 *Clemons*, No. 4:10-CV-209-CWR-FKB at 8.

that the statute is discriminatory because: 1) health care providers are favored over and above all other defendants, and 2) patients who suffer due to negligence caused by medical providers can receive awards of only half as much as persons injured in other ways.

The court also rejected this argument, stating that the law benefits an entire industry (the health care industry), not a specific person, corporation, partnership, or association.[68]

Third, the court addressed the plaintiff's argument that section 11-1-60(2)(a) causes disparate treatment of both medical negligence plaintiffs and tortfeasors other than health care providers and thus violates the Equal Protection Clause of the Fourteenth Amendment and substantive due process guarantees of the United States Constitution.

The court determined that because the plaintiff failed to show that the statute interferes with her fundamental rights or disadvantages a suspect class, rational basis review applied.[69] Applying this standard, the court noted that the Mississippi Supreme Court "would likely hold that an effort to reduce medical malpractice insurance premiums is a legitimate legislative purpose and that the limitation of health care provider's noneconomic damages to $500,000 was rationally related to achieving that goal, even though the statute without question creates significantly imperfect and unequal classifications."[70]

II. Civil Justice Reforms Enacted in 2013

Alabama

H.B. 227: Government Retention of Private Plaintiff Attorneys on Contingency Fee Basis

In 2013, Alabama became the latest state to enact legislation imposing stricter parameters and transparency when state Attorneys General hire private plaintiff attorneys on a contingency fee basis.[71] Proponents of this legislation have noted that as the roles played by state Attorneys General continue to increase in civil litigation there has been an uptick in the hiring of outside plaintiff attorneys.[72] In many instances, the private plaintiff attorneys have received significant attorney fees, which, according to proponents, have led to a perception of impropriety.[73]

Alabama's new law, similar to legislation enacted in other states, limits contingency fees to:

- 25 percent of any recovery up to $10 million; plus
- 20 percent of any recovery between $10 million and $15 million; plus
- 15 percent of any recovery between $15 million and $20 million; plus
- 10 percent of any recovery between $20 million and $25 million; plus
- 5 percent of any recovery between $25 million and $50 million; plus
- 1 percent of any recovery exceeding $50 million.[74]

Additionally, before the state can enter into a contingency fee contract the state must first make a written determination that contingency fee representation is both cost-effective and in the public interest.[75] The Attorney General is allowed to certify in writing to the Governor that an issue affecting the public health, safety, convenience, or economic welfare exists justifying that the contingency fee limitations be suspended in the particular lawsuit.[76]

The law further provides that the state may only enter into a contingency fee contract if certain requirements are met, such as the government retaining complete control over the course and conduct of the case and ensuring that the government attorneys maintain veto power over any decisions made by private attorneys.[77]

68 *Id.* at 10.

69 *Id.* at 12.

70 *Id.* at 15.

71 The other states that have enacted similar laws include Arizona, Indiana, Iowa, Mississippi, and Missouri. *See* Cook, *supra* note 1.

72 Bill McCollum, *States and Lawyers' Fees: Transparency Needed*, Wall St. J., Mar. 8, 2011.

73 *Id.*

74 Ala. Code § 41-16-72(1)(f)(3) (2013).

75 Ala. Code § 41-16-72(1)(f)(2) (2013).

76 Ala. Code § 41-16-72(1)(f)(4) (2013).

77 Ala. Code § 41-16-72(1)(f)(5) (2013).

The law further requires private attorneys to maintain detailed records of time spent working on the case, expenses, disbursements, and other financial transactions.[78] These records are available to the public upon written request.[79]

Lastly, copies of the contingency fee contract and the written determination to enter into the contingency fee contract must be posted on the state's website.[80]

Arizona

S.B. 1346: Class Action Reforms

The Arizona Legislature enacted legislation[81] modifying procedures for appealing class certification in class action lawsuits. Notably, the legislation allows class members more oversight of the litigation by signifying whether they consider the representation to be fair and adequate and whether to join the lawsuit. Below are the specific changes to Arizona's class action statute.

Class Certification

Class certification is the prerequisite to any class action lawsuit. S.B. 1346 amends Arizona's class action law by requiring, after commencement of the action and a hearing, the court to determine by order whether the action is to be maintained as a class action. The new law further allows the court to condition, alter, amend or withdraw its order to maintain the class action at any time before the decision on the merits of the case.

Once the court determines that the action should be maintained as a class action, it must: 1) certify the action in writing; 2) set forth its reasons why the action should be maintained as a class action; and 3) describe all evidence in support of its determination.

Court Orders Relating to the Conditions on the Parties in Class Action Suit

Senate Bill 1346 also amends existing law by allowing the court greater authority to impose conditions on the parties in the class action lawsuits. For example, the new law grants the court the authority to issue court orders that:

1) determine the course of the proceedings;

2) prescribe measures to "prevent undue repetition or complication in the presentation of evidence or argument";

3) require notice to be given to some or all the members of any step in the action or the proposed entry of judgment;

4) require notice to be given of the opportunity of members to signify whether they consider the representation to be fair and adequate, and to intervene and present claims and defenses or otherwise come into the action;

5) require that the pleadings be amended to eliminate allegations as to representation of absent persons; and

6) impose conditions on the representative parties or intervenors.

Appeals

Finally, S.B. 1346 amends the class action law by allowing a party to appeal the court's certification or refusal to certify in the same manner as a final order or judgment. If an appeal of the court's certification or refusal to certify is filed, then all discovery and other proceedings are to be stayed. In addition, the new law requires interlocutory appeal of a court's certification or refusal to certify a class to be entitled to preference. Finally, the court may allow discovery to continue during the interlocutory appeal.

Florida

H.B. 7015: Expert Witnesses

For three decades Florida courts used the standard established in *Frye v. United States*[82] to determine whether scientific and expert testimony could be admitted into evidence. Under the *Frye* test, in order to introduce expert testimony deduced from a scientific principle or discovery, the principle or discovery "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[83] The *Frye* test further required judges to decide whether the basic underlying principles of scientific evidence

78 Ala. Code § 41-16-72(1)(f)(8) (2013).

79 *Id.*

80 Ala. Code § 41-16-72(1)(f)(7) (2013).

81 Ch. 241, Senate Bill 1346 (Arizona 2013).

82 293 F. 1013 (D.C. Cir. 1923).

83 *Id.* at 1013.

have been tested and accepted by the scientific community.

In 1993, however, the Supreme Court of the United States replaced the standard for expert testimony in all federal courts in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[84] In 2000, Rule 702 of the Federal Rules of Evidence was amended to reflect the holdings in *Daubert*. Federal Rule 702 provides in pertinent part that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue:
>
> b) The testimony is based on sufficient facts or data;
>
> c) The testimony is the product of reliable principles and methods; and
>
> d) The expert has reliably applied the principles and methods to the facts of the case.

The Florida Legislature adopted[85] this language into its existing statutes.[86] Florida joins the other approximately 30-plus states to have replaced the *Frye* test with the *Daubert* standards for expert evidence and testimony.[87]

Louisiana

H.B. 589: Civil Procedure Reform

House Bill 589 made a number of changes to Louisiana's existing civil procedure statutes regarding summary judgment.

Prior to enactment of H.B. 589, Louisiana law[88] stated that the court could render a decision only as to those issues raised in the motion under consideration. H.B. 589 amended the law by specifying that the pleadings, depositions, answers to interrogatories, and admissions and affidavits that the court considers in ruling a motion for summary judgment be admitted for the purposes of the motion for summary judgment.

In addition, H.B. 589 clarifies existing law by stating that summary judgment on a particular issue may be rendered in favor of one or more parties even if the granting of the summary judgment does not dispose of the case as to that party or parties.

Prior to H.B. 589, Louisiana law also required the court to consider only evidence admitted for the purposes of the motion for summary judgment in its ruling. H.B. 589 retains the current law and further provides that evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for the purposes of the summary judgment unless it has been excluded in response to an objection.

H.B. 589 provides that a defendant shall not be entitled to a jury trial when a petitioner stipulates that his cause of action is less than $50,000 if: 1) the stipulation occurs more than 60 days before trial, or 2) when an individual petitioner stipulates that his or her cause of action is less than $50,000 as a result of a compromise or dismissal of one or more claims or parties which occurs less than 60 days prior to trial.

Finally, H.B. 589 amends existing law pertaining to rendering a final judgment. Prior to H.B. 589, Louisiana law provided a number of ways in which the court could render a final judgment. H.B. 589 retains the current law but deletes the existing prohibition of terminating an action if a partial judgment or partial summary judgment does not adjudicate all claims or the rights of all parties.

H.B. 472: Class Action Reform

Under existing Louisiana law, five prerequisites had to be satisfied prior to bringing a suit as a class action: 1) numerosity of the class, 2) commonality of law or facts, 3) typicality of the claims or defenses, 4) adequate protection of the interests of the class, and 5)

84 509 U.S. 579 (1993).

85 House Bill 7015, Ch. 2013-107, Laws of Florida.

86 Fla. Stat. Ann. § 90.704 (2013).

87 David Berstein, *Friday Daubert Panel in New Jersey*, The Volokh Conspiracy (Feb. 26, 2013, 11:09 AM), http://www.volokh.com/2013/02/26/friday-daubert-panel-in-new-jersey/.

88 La. Code Civ. Proc. Ann. art. 996.

ascertainability of the class.[89] H.B. 472 amends existing law by providing that the ascertainability shall not be satisfied if the court has to inquire into each member's cause of action to determine whether they are members of the class.

Existing Louisiana law provides certain procedures for certifying an action as a class action.[90] H.B. 472 keeps in place the existing law, but adds that the proponent of the class has the burden of proof to establish that all prerequisites have been satisfied to maintain a class action.[91]

Lastly, existing Louisiana law provides the court with discretion to make certain procedural orders pertaining to the class. H.B. 472 amends the law by prohibiting the court from ordering a trial on an issue that would require proof that is individual to a member of the class when the outcome of the trial would have an effect on the entire class.[92]

New Hampshire

S.B. 96: Frivolous Lawsuits

The New Hampshire Legislature enacted Senate Bill 96, which places parameters on "vexatious litigants," which are defined as someone who has been determined by a "judge as filing three or more frivolous lawsuits which the judge determines, by clear and convincing evidence, were initiated for the primary purpose of harassment."[93]

Once determined as a vexatious litigant, the court may require the person to: 1) retain an attorney or other person of good character to represent him or her in all actions, or 2) post a cash or surety bond sufficient to cover all attorney fees and anticipated damages.[94]

New Jersey

A.B. 3123: Derivative Proceedings and Shareholder Class Actions

Assembly Bill 3123[95] repealed the existing law regarding civil actions brought in the right of a corporation by shareholders and amended the New Jersey Business Corporation Act regarding derivative proceedings.

Under the new law, a shareholder may not commence or maintain a derivative proceeding unless the shareholder: 1) was a shareholder of the corporation at the time the act or omission took place and remains a shareholder throughout the derivative proceeding, and 2) fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.[96]

The shareholder cannot file the action until: 1) they make a written demand to the corporation to take "suitable action," or 2) 90 days have expired from the date the demand was made (unless the shareholder has earlier been notified that the demand has been rejected by the corporation or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period).[97]

The court must dismiss the derivative proceeding if a corporation files a motion and the court finds: 1) the person or group has determined that the maintenance of the derivative proceeding is not in the best interests of the corporation, or 2) the shareholders have voted to terminate the derivative proceeding.[98]

The determination by the corporation shall be made in one of the following ways: 1) A majority vote of independent directors, or 2) a vote of the holders of a majority of the outstanding shares entitled to vote.[99]

The new law also provides upon the termination of a derivative proceeding or shareholder class action, the court may order the losing party to pay the other party's expenses.[100]

In addition, if the shareholders bringing the class action lawsuit hold less than five percent of the outstanding shares, the corporation in whose right the

89 La. Code Civ. Proc. Ann. art. 591(A).

90 La. Code Civ. Proc. Ann. art. 592.

91 Act. No. 254, H.B. 472 (2013); La. Code Civ. Proc. Ann. art. 592(A)(3)(b).

92 Act. No. 254, H.B. 472 (2013); La. Code Civ. Proc. Ann. art. 592(E)(5).

93 N.H. Rev. Stat. Ann. § 507:15-a (2013).

94 N.H. Rev. Stat. Ann. § 507:15-aII. (2013).

95 New Jersey P.L. 2013, C.42.

96 N.J. Rev. Stat. § 14A:3-6.2 (2013).

97 N.J. Rev. Stat. § 14A:3-6.3 (2013).

98 N.J. Rev. Stat. § 14A:3-6.5(1)(a)-(b) (2013).

99 N.J. Rev. Stat. § 14A:3-6.5(2) (2013).

100 N.J. Rev. Stat. § 14A:3-6.7 (2013).

action is brought is entitled to require the plaintiff(s) to give security for the reasonable expenses, including attorney fees, incurred as a result of the lawsuit.[101]

Ohio and Oklahoma

Asbestos Trust Fund Transparency

Over the past three decades over 40 asbestos trust funds were created by defendant companies through the federal bankruptcy law to compensate victims of asbestos-related cancer.[102] According to the U.S. Government Accountability Office, the trusts had paid about 3.3 million claims at the end of 2010 valued at $17.5 billion. These payments are made outside of the judicial system.

In addition to seeking compensation from the trust funds, plaintiffs and their attorneys also file lawsuits in courts against still viable companies. With the rise of asbestos-related lawsuits and the amount of money paid out through the trust funds, a few legislatures are beginning to introduce and pass legislation requiring plaintiffs to provide more evidence about the amount of money they have received, or could receive, from existing companies.

Ohio and Oklahoma became the first two states to enact legislation requiring plaintiffs to divulge such information about potential compensation received from trust funds. Below is a discussion of the specific laws enacted in those two states.

H.B. 380: Ohio's Trust Fund Transparency Law

In December 2012, Ohio became the first state to adopt this type of legislation. Central to the law is the provision requiring plaintiffs to provide evidence to the court about compensation received from trust funds created to compensate victims by bankrupt companies.

House Bill 380 requires plaintiffs within 30 days of filing an asbestos tort action against a solvent company in court to provide all parties a sworn statement identifying all existing asbestos trust claims made by or on behalf of the claimant and all trust claims material pertaining to each identified asbestos trust claim.[103]

If, after filing a lawsuit against the defendant(s), the plaintiff submits additional trust claims with other trusts not previously disclosed to the parties to the case, the law requires the plaintiff to provide all parties an amendment updating the previously sworn statement identifying the additional asbestos trust claims.[104] The law further requires the plaintiff to file the asbestos trust claims materials within 30 days of filing or submitting each additional asbestos trust claim.[105]

The law allows defendants to file a motion with the court seeking a stay of the case if the defendant is able to demonstrate the existence of other asbestos trust funds with which the plaintiff could make a successful asbestos trust claim, but has at the time of trial not yet filed with the particular trust (within 75 days prior to commencement of the trial).[106] The purpose of this provision is to prevent plaintiffs from not filing with trust funds until after the case against the solvent defendant(s) has been completed. If the plaintiff produces additional asbestos exposure information that supports filing of additional asbestos trust claims, the defendant may then file a motion to stay the proceedings.[107]

When responding, the plaintiff has three options. The plaintiff may: 1) file the asbestos trust claims with the asbestos trusts identified in the defendant's motion seeking the stay; 2) file a response to the defendant's motion requesting a determination by the court that the information supporting the asbestos trust claims against the asbestos trusts identified in the defendant's motion should be modified prior to filing or that there is insufficient information to file with the trust funds identified by the defendant; or 3) file a response requesting a determination by the court that the plaintiff's fees and expenses to prepare the trust fund claim form identified in the defendant's motion exceed the plaintiff's reasonably anticipated recovery from the

101 N.J. Rev. Stat. § 14A:3-6.8 (2013).

102 Dionne Searcey & Rob Barr, *As Asbestos Claims Rise, So Do Worries about Fraud*, Wall St. J., Mar. 11, 2013, at A1.

103 Ohio Rev. Code Ann. § 2307.952(A)(1)(a) (2013).

104 Ohio Rev. Code Ann. § 2307.952(A)(2) (2013).

105 *Id.*

106 Ohio Rev. Code Ann. § 2307.953(A) (2013).

107 Ohio Rev. Code Ann. § 2307.953(B) (2013).

trust fund.[108]

If the defendant has met his burden and if the plaintiff files a response to the defendant's motion seeking a stay, the court is required to determine by a preponderance of the evidence if a successful asbestos trust claim could be submitted by the plaintiff to each of the trust funds identified by the defendant in its motion.[109]

However, if the court determines that the plaintiff's fees and expenses to prepare and file a claim with the trusts exceed his or her reasonably anticipated recovery from the trust fund, the plaintiff is required to file with the court a statement of the plaintiff's exposure history to the asbestos products covered by the particular asbestos trust.[110]

If in fact the court determines that there is a good faith basis for the plaintiff to file a claim with the trust fund(s) identified by the defendant, the court shall stay the proceedings until the claimant files the asbestos trust claims with the trusts in the defendant's motion.[111]

The Ohio law provides further protections in the event the plaintiff were to file a claim with another asbestos trust fund after obtaining a judgment in the court action. If this were to occur, the defendant may seek a motion with the court for sanctions and the court has jurisdiction to reopen its judgment in the prior asbestos tort action and do one of the following:

1) Adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the plaintiff; or,

2) Order any other relief to the parties that the court considers just and proper.[112]

S.B. 404: Oklahoma Trust Fund Transparency Law

Similar to Ohio's law, the Oklahoma law requires the plaintiff to disclose any funds received from asbestos trust funds, or any potential claims the plaintiff may have with additional funds.

Specifically, Senate Bill 404 requires the plaintiff to provide all parties a sworn statement identifying all "personal injury trust claims" that plaintiff has or anticipates filing against the trust funds within 90 days after filing the lawsuit in the court. The plaintiff must also supplement the information and materials he or she provided within 30 days after the plaintiff files an additional claim with other trust funds.[113]

The law also stipulates how the trust fund materials and documents may be used in the trial. For example, the law provides that the trust fund materials and documents "shall be presumed to be relevant and authentic, subject to the Rules of Evidence governing admissibility."[114] In addition, any party may present trust claims materials "to prove alternative causation for a plaintiff's injuries or to allocate liability for the plaintiff's injury" and that "no claims of privilege may apply to trust claims materials or . . . documents."[115]

Furthermore, a defendant may seek discovery against a trust fund identified by the plaintiff and the plaintiff may "not claim privilege or confidentiality to bar discovery" and shall provide consent or other expression of permission that may be required by the trust fund to release information and materials sought by the defendant.[116]

The trial may not commence until 180 days after the plaintiff makes the required disclosures discussed above.[117] In addition, if the plaintiff anticipates filing a claim against another trust fund, all proceedings must be stayed until the plaintiff files the trust claims.[118]

Similar to the Ohio law, the defendant may file a motion with the court seeking a stay of the case if the defendant identifies another trust fund(s) against which the defendant in good faith believes the plaintiff can file a successful claim.[119] For each trust fund, the defendant must produce or describe evidence to prove that the

108 Ohio Rev. Code Ann. § 2307.953(C)(1)(a)-(c) (2013).

109 Ohio Rev. Code Ann. § 2307.953(D)(1) (2013).

110 Ohio Rev. Code Ann. § 2307.953(D)(2) (2013).

111 Ohio Rev. Code Ann. § 2307.953(E) (2013).

112 Ohio Rev. Code Ann. § 2307.954(E)(1)(a)-(b) (2013).

113 Okla. Stat. Ann. tit. 76, § 83A (2013).

114 Okla. Stat. Ann. tit. 76, § 84A (2013).

115 *Id.*

116 Okla. Stat. Ann. tit. 76, § 84B (2013).

117 Okla. Stat. Ann. tit. 76, § 85A (2013).

118 Okla. Stat. Ann. tit. 76, § 85B (2013).

119 Okla. Stat. Ann. tit. 76, § 86A.1 (2013).

plaintiff could file a valid claim.[120]

If the plaintiff does produce additional information that supports filing additional trust fund claims, the defendant may file a motion to stay the proceedings.[121] Similar to the Ohio law, the plaintiff in Oklahoma then has the option to:

1) File a claim with the trust fund;
2) File a written response with the court setting forth reasons why there is insufficient evidence to permit the plaintiff to file a claim in good faith; or
3) File a written response with the court requesting a determination that the plaintiff's fees and expenses to prepare and file the trust fund claim exceed the plaintiff's reasonably anticipated recovery from the personal injury trust.[122]

The court must then determine whether there is a good faith basis for the plaintiff to file a claim against a trust fund identified by a defendant.[123] When damages are awarded to the plaintiff in the court action, the defendant is entitled to a setoff or credit in the amount the plaintiff has been awarded from a trust fund.[124]

Oklahoma

S.B. 1016: Consumer Litigation Lending Reform

To address the rising number of litigation loans, the Oklahoma Legislature enacted legislation subjecting consumer lawsuit lenders to the state's Uniform Consumer Credit Code.

Senate Bill 1016 establishes special disclosure requirements, such as the funded amount to be paid to the consumer by the consumer litigation funder, an itemization of one-time charges, the total amount to be assigned by the consumer to the funder, and a payment schedule.[125]

The law also allows the consumer the right of rescission to cancel the contract without penalty no later than five business days after the funding date if the consumer returns to the lender the full amount of the disbursed fund.[126]

In addition, S.B. 1016 provides that the litigation lender may not participate in deciding whether to settle or determine the amount of the settlement, nor is the lender allowed to interfere with the professional judgment of the attorney handling the case.[127]

In order to issue consumer litigation funds, the lender must obtain a license from the state. The law prohibits[128] certain conduct or activities, such as:

- Paying a commission to an attorney or law firm for referrals;
- Accepting a commission or fee from an attorney for referrals;
- Intentionally advertising false or misleading information about the lender's services;
- Failing to promptly provide a copy of the executed contract to the consumer's attorney; or
- Paying or offering to pay using funds from the litigation funding transaction to cover court costs, filing fees, or attorneys' fees during or after the resolution of the lawsuit

Texas

H.B. 1325: Asbestos and Silica Claims

House Bill 1325 was enacted to clear the asbestos and silica dockets in Texas, which had become increasingly cluttered. The legislation amends current laws allowing the dismissal of inactive claims by plaintiffs who have failed to provide the proper proof of impairment.

Some background is necessary before discussing House Bill 1325. In 2005, Texas enacted Senate Bill 15 creating multi-district litigation asbestos and silica pre-trial (MDL) courts. Senate Bill 15 required plaintiffs claiming asbestos- or silica-related injuries to serve a compliant medical report to pursue their claim in court.[129] The law also required a report by a board

120 *Id.*

121 Okla. Stat. Ann. tit. 76, § 86A.2 (2013).

122 Okla. Stat. Ann. tit. 76, § 86B.1-3 (2013).

123 Okla. Stat. Ann. tit. 76, § 86D (2013).

124 Okla. Stat. Ann. tit. 76, § 88 (2013).

125 Okla. Stat. Ann. tit. 14A, § 3-707 (2013).

126 Okla. Stat. Ann. tit. 14A, § 3-706 (2013).

127 Okla. Stat. Ann. tit. 14A, § 3-707D (2013).

128 Okla. Stat. Ann. tit. 14A, § 3-714 (2013).

129 Tex. Civ. Prac. & Rem. Code Ann. Ch. 90 (2005).

certified physician stating that specific medical criteria exist proving the plaintiff's injury. Senate Bill 15 also created a system to ensure that the sickest claimants had their cases tried before those who had been exposed to asbestos or silica and but do not suffer significant impairment. In addition, S.B. 15 established a two-year statute of limitations providing that a claim accrues on the claimant's death or service of a compliant medical report, whichever is earlier.

As mentioned, the MDL courts handle pre-trial matters before they remand a case back to a trial court. Approximately 60,000 to 80,000 plaintiffs with asbestos-related claims and roughly 5,000 to 6,000 plaintiffs with silica-related claims are pending in the MDL courts.[130]

To move along these pending cases, House Bill 1325 requires the MDL courts to dismiss each action for an asbestos- or silica-related injury that was pending on August 31, 2005, unless a compliant report was served on or after September 1, 2013.[131]

If a claimant subsequently refiles an action for an asbestos- or silica-related injury that was dismissed under the new law, the refiled action is treated as if the claimant's action had never been dismissed but, instead, had remained pending until the claimant served a compliant report.[132] A claimant whose action was dismissed under the new law may serve the petition and citation for any subsequently filed action for an asbestos- or silica-related injury on a person who was a defendant in the dismissed action.[133] The dismissals are without prejudice to the claimant's right to file a subsequent action seeking damages arising from an asbestos or silica-related injury.[134]

Utah

H.B 135: Arbitration in Medical Liability Cases

This legislation[135] amends Utah's medical malpractice action or arbitration proceedings by providing that a certificate of compliance must be issued for a health care provider or health care entity to allocate fault in a pre-litigation medical malpractice arbitration hearing. Specifically, the legislation provides that any party may request a pre-litigation panel review as to a health care provider and obtain a certificate of compliance for the purpose of allocating fault to that health care provider.[136]

In addition, the new law requires that evidence from a medical review panel remain unreportable to a health care facility or health insurance plan.[137]

H.B. 347: Trespasser Liability

Along with Virginia, Utah joined other states adopting trespasser liability protection.[138] As with other states, Utah codified current Utah common law as it pertains to trespasser liability such that a possessor of land does not owe a duty of care to a trespasser except in certain circumstances.

For example, a possessor of land is still liable for injuries to trespassers where the trespasser is a child under the age of 16 and an artificial condition on the property poses an unreasonable risk of serious physical injury or death to the child. [139]

Virginia

Virginia so far has led the nation in 2013 in terms of the number of civil liability reforms enacted into law. Below is a summary of each bill signed into law.

H.B. 1545: Expert Witness Certification

Similar to the law struck down in Oklahoma in the *Wall* decision, Virginia's legislation[140] requires the plaintiff in a medical malpractice case to provide a written opinion signed by an expert witness that, "based upon a reasonable understanding of the facts, the defendant . . . deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed."[141]

130 Texas House Research Organization Bill Analysis (4/19/2013).

131 Tex. Civ. Prac. & Rem. Code Ann. § 90.010(d-1) (2013).

132 Tex. Civ. Prac. & Rem. Code Ann. § 90.010(n) (2013).

133 Tex. Civ. Prac. & Rem. Code Ann. § 90.010(o) (2013).

134 Tex. Civ. Prac. & Rem. Code Ann. § 90.010(d-1)(1) (2013).

135 House Bill 135 (Utah 2013).

136 Utah Code Ann. § 78B-3-418(c) (2013).

137 Utah Code Ann. § 78B-3-419 (2013).

138 House Bill 347 (Utah 2013).

139 Utah Code Ann. § 57-14-301 (2013).

140 H.B. 1545, Chap. 65; S.B. 699, Chap. 610 (2013).

141 Va. Code Ann. § 8.01-20.1 (2013).

The law does provide an exception where the plaintiff in "good faith[] alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience."[142] If the plaintiff fails to obtain a necessary certifying expert opinion the court shall impose sanctions and may dismiss the case with prejudice.[143]

The same expert certification provisions apply to wrongful death claims against health care providers[144] and medical malpractice actions.[145]

H.B. 1618: Venue

Under previous Virginia law, Category B venue existed where the president or other chief officer of a defendant that is a corporation resided.[146] The legislation[147] amends current law by providing that Category B venue exists where a defendant that is not an individual has its principal office or principal place of business.[148] In addition, the new law provides that Category B venue exists where a defendant regularly conducts substantial business activity[149] or where such activity was conducted before the defendant's withdrawal from the Commonwealth, provided there exists a nexus to the forum.[150] Prior to the law change there was no requirement for "practical nexus."

H.B. 1708: Summary Judgment

This legislation[151] allows that requests for admission for which the responses are submitted in support of a motion for summary judgment may be based, in whole or in part, upon discovery depositions and may include admitted facts learned or referenced in such a deposition.[152] The legislation qualifies this by stating that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.[153]

In addition, the new law allows that a motion for summary judgment seeking dismissal of any claim or demand for punitive damages may be sustained when based, in whole or in part, upon discovery depositions.[154] This provision does not apply to cases involving driving under the influence.[155]

H.B. 1709: Dismissal of Action by Nonsuit

This legislation[156] clarifies existing law relating to nonsuits, which occur when a plaintiff voluntarily dismisses a case or a defendant in the case. Specifically, the law provides that if notice to take a nonsuit is given to the opposing party during trial, the court may assess against the nonsuiting party reasonable witness fees and travel costs of expert witnesses scheduled to appear at trial.[157] In addition, the law provides that invoices, receipts, or confirmation of payment shall be admissible to prove reasonableness of expert witness costs, and may be used to satisfy the reasonableness requirements without the need for further testimony.[158]

H.B. 2004: Trespasser Liability

Virginia joined a number of other states[159] when it adopted trespasser liability legislation.[160] H.B 2004 provides owners and possessors of land liability protection from injuries to trespassers. Specifically, the legislation codifies existing case law by providing that a possessor of real property (owner, lessee, or other lawful occupant) owes no duty of care to a trespasser except in those circumstances where a common law right of action, statutory right of action, or judicial exception

142 *Id.*

143 *Id.*

144 Va. Code Ann. § 8.01-50.1 (2013).

145 Va. Code Ann. § 16.1-83.1 (2013).

146 Va. Code Ann. 8.01-262.1 (2013).

147 H.B. 1618, Chap. 71 (2013).

148 Va. Code Ann. § 8.01-262.1 (2013).

149 *Id.*

150 Va. Code Ann. § 8.01-262.2 (2013).

151 H.B. 1708, Chap. 76 (2013).

152 Va. Code Ann. § 8.01-420.A (2013).

153 *Id.*

154 Va. Code Ann. § 8.01-420.B (2013).

155 *Id.*

156 H.B. 1709, Chap. 274 (2013).

157 Va. Code Ann. § 8.01-380 (2013).

158 *Id.*

159 Cook, *supra* note 1, at 7.

160 H.B. 2004, Chap. 217 (2013).

existed as of July 1, 2013.[161]

Wisconsin

A.B. 27: Government Retention of Private Plaintiff Attorneys on Contingency Fee Basis

Similar to Alabama, Wisconsin enacted legislation capping attorneys' fees for private plaintiff attorneys hired by the state on a contingency fee basis.

Unlike most states, the Governor, not the Attorney General, hires private plaintiff attorneys to represent the state in litigation. Assembly Bill 27 amends Wisconsin's current law by placing certain restrictions in the hiring of private plaintiff attorneys hired on a contingency fee basis.[162]

Under the new law, the executive branch cannot contract for legal services on a contingent fee basis unless the Governor makes a written determination that contracting for legal services for the state on a contingent fee basis is cost-effective and in the public interest.

The governor's written determination must including the following:

- A finding that the attorney general's office lacks sufficient and appropriate legal and financial resources;
- The estimated amount of time and labor required to perform the legal services, including the novelty, complexity, and difficulty of the legal issues involved and the required skill;
- The venue in which the litigation would likely occur;
- The amount of experience with similar legal issues or cases need for the particular type of legal services to be provided.

Once the Governor makes a written determination that there is a need for legal services on a contingent fee basis, the Governor shall request the department of administration to invite bids. Following the bidding process, the Department of Administration shall recommend a responsible bidder to the Governor, who shall then make a determination.

The law allows the Governor to determine that inviting bids is not feasible, the must be in writing setting forth the basis for the determination.

A.B. 200: Lemon Law Reforms

Prior to enactment of A.B. 200, Wisconsin had one of the strictest lemon laws in the nation for automobile manufacturers.[163] Under Wisconsin's previous lemon law, the owner of the vehicle was awarded automatic double damages, which included twice the cost of the vehicle.[164] Wisconsin also had one of the longest statute of limitations (six years) and shortest timeframe for manufacturers to provide a comparable vehicle or refund (30 days).

In 2013, the Wisconsin Legislature enacted A.B. 200 in reaction to a high-profile case[165] where the car owner and plaintiff were paid over $618,000 in damages for a vehicle that originally cost $56,000.[166]

The most significant revision to the lemon law under A.B. 200 is the elimination of the automatic double damages, which includes the cost of the vehicle.[167] Assembly Bill 200 also reduces the statute of limitations from six years to three years for the time within which an owner could file a lawsuit.[168] The new law also allows manufacturers to provide a refund of the vehicle when no comparable new vehicle exists or is otherwise available.[169] In addition, A.B. 200 adds a good faith requirement by allowing the court to extend deadlines, reduce damages, attorney's fees and costs, and provide other remedies if it finds that a party has failed

161 Va. Code Ann. § 8.01-219.1 (2013).

162 Wis. Stat. § 14.11(2)(b).

163 Tim Morrissey, *Wisconsin Attorney: Don't Change Our Lemon Law*, Wis. Pub. News Serv., May 21, 2013, *available at* http://www.publicnewsservice.org/2013-05-21/consumer-issues/wi-attorney-dont-change-our-lemon-law/a32518-1.

164 Hughes v. Chrysler Motors Corp., 197 Wis. 2d 974, 542 N.W.2d 148 (1996) (Pecuniary loss under Wis. Stat. 218.0171(7) includes the entire purchase price of the vehicle).

165 Marquez v. Mercedes-Benz USA, LLC, 2012 WI 57, 342 Wis. 2d 119, 815 N.W.2d 314 (2012).

166 "Mercedes Benz pays $618,000 judgment in Wisconsin lemon law case," Wis. St. J., Jul. 30, 2012, *available at* http://host.madison.com/business/mercedes-benz-pays-judgment-in-wisconsin-lemon-law-case/article_1b8fa498-da87-11e1-964d-0019bb2963f4.html.

167 Wis. Stat. § 218.0171(7)(a).

168 *Id.*

169 Wis. Stat. § 218.0171(2)(cg)1.

to reasonably cooperate with another party's efforts to comply with the law.[170]

The new law also provides manufacturers additional time for delivery of a comparable vehicle. Under prior law, a manufacturer was required to provide the owner a comparable vehicle within 30 days. A.B. 200 now allows 120 days for heavy-duty vehicles and 45 days for all other types of vehicles.[171]

A.B. 139: Medical Liability

Assembly Bill 139 amends Wisconsin's current law[172] regarding the duty of physicians to inform patients of treatment options. The law was introduced in response to a 2012 Wisconsin Supreme Court decision[173] where the court implemented a "reasonable patient" standard even though the statutes did not include such a standard. Specifically, the court held that "Wisconsin law requires that a physician disclose information necessary for a reasonable person to make an intelligent decision with respect to the choices of treatment or diagnosis."[174]

Assembly Bill 139 overturns the court's "reasonable patient" standard and replaces it with a "reasonable physician" standard. The legislation also requires a physician to inform the patient about the availability of "reasonable alternate medical modes of treatment" instead of "all alternate, viable medical modes of treatment." Under the new law, the reasonable physician standard only requires disclosure of information that a reasonable physician in the same or similar medical specialty would know and disclose under the circumstances.

Furthermore, Assembly Bill 139 requires a physician to inform the patient about the availability of reasonable alternate medical modes of treatment, instead of all alternate, viable medical modes of treatment. The bill specifies that the "reasonable physician standard is the standard for informing a patient under this provision. The bill provides that the reasonable physician standard requires disclosure only of information that a reasonable physician in the same or similar medical specialty would know and disclose under the circumstances."[175]

III. Conclusion

On the judicial front, proponents of tort reform had both wins and losses in 2013. They lost two significant cases in the Oklahoma Supreme Court—the first of which overturned the state's extensive tort reform legislation. However elsewhere, the Court of Appeals of Maryland (the state's highest court) upheld contributory negligence and two federal courts in Mississippi each upheld caps on noneconomic damages in medical malpractice actions.

On the legislative front, 2013 proved to be particularly productive for proponents of tort reform, as a dozen states collectively passed over twenty new civil liability laws. The laws covered a wide breadth of civil liability issues, such as government retention of private plaintiff attorneys on contingency fees (Alabama and Wisconsin), class action reform (Arizona and Louisiana), standard for admitting expert witness testimony (Florida and Virginia), frivolous lawsuits (New Hampshire), asbestos litigation (Ohio, Oklahoma, and Texas), trespasser liability (Utah and Virginia), and even lemon laws (Wisconsin). Looking ahead to 2014, it may be challenging for the tort reform movement to experience similar success because legislative sessions are shorter and less active during election years.

170 Wis. Stat. § 218.0171(7)(b).

171 Wis. Stat. § 218.0171(2)(cg)1. & .2.

172 Wis. Stat. § 448.30.

173 Jandre v. Wisconsin Patients and Families Compensation Fund, 2012 WI 39 (2012).

174 *Id.* at ¶¶ 7–8.

175 Wis. Stat. § 448.30

The Federalist Society for Law & Public Policy Studies
1015 18th Street, N.W., Suite 425 • Washington, D.C. 20036