

2017 Civil Justice Update

by Mark A. Behrens & Sarah Goggans

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This paper reviews key civil justice issues and reforms in 2017. Part I focuses on broad trends, Part II provides an overview of state reforms adopted in 2017, and Part III highlights key court cases in 2017 that addressed the constitutionality of state civil justice reforms.

I. LEGAL REFORM TRENDS IN 2017

Judgment interest rate reform was enacted in several states in 2017. There was also substantial asbestos litigation reform activity, particularly to allow factfinders in civil cases to be more fully informed about all of a plaintiff's exposures to asbestos as reflected in asbestos bankruptcy trust claims. Codification of the traditional common law duties owed by land possessors to trespassers continued to progress. In addition, states are beginning to align state court procedures for civil discovery with amendments to the Federal Rules of Civil Procedure that took effect at the end of 2015.

Other trends in areas of importance to the business and civil justice communities include expert evidence (*Daubert*) reform in state courts, preventing recovery of "phantom damages," setting reasonable limits on appeal bonds, and passing Transparency in Private Attorney Contracts (TiPAC) laws.¹ Leading business, civil justice, and defense lawyer organizations have also called for an amendment to the Federal Rules of Civil Procedure to require disclosure of third-party litigation funding in a case.

A. Interest Rate Reform

Many state laws provide for interest on court judgments to compensate plaintiffs for the considerable delay that can occur from the time of an injury or loss to the entry of judgment (prejudgment interest) and from the time judgment is entered until it is paid (post-judgment interest).² In some states, judgment interest rates are so high that they are essentially punitive in nature.³ State legislatures are increasingly addressing the inequities that can arise for civil defendants when statutory interest rates are far out of alignment with prevailing market rates. In 2017,

Kentucky, Montana, and West Virginia enacted judgment interest reforms.⁴

B. Asbestos Litigation Reform

1. Trust Claim Transparency

Section 524(g) of the Bankruptcy Code provides a path for companies with asbestos-related liabilities to reorganize, channel those liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related personal injury lawsuits.⁵ In 2011, the U.S. Government Accountability Office estimated that over sixty trusts (each representing a former defendant company) collectively held some \$37 billion to pay claimants *completely outside the tort system*.⁶ Plaintiffs typically obtain compensation both "from the trusts and through a tort case."⁷ For instance, in a bankruptcy proceeding involving gasket and packing manufacturer Garlock Sealing Technologies, a typical mesothelioma plaintiff's recovery was estimated to be \$1-1.5 million, "including an average of \$560,000 in tort recoveries and about \$600,000 from 22 trusts."⁸

By intentionally delaying the filing of asbestos trust claims until after a personal injury case settles or is tried to a verdict, plaintiffs' counsel can suppress evidence of a plaintiff's trust-related exposures and effectively thwart efforts by still-solvent defendants to apportion fault to bankrupt entities or obtain set-offs.⁹ These tactics inflate plaintiff recoveries at the expense of tort defendants and potentially at the expense of future asbestos claimants. Also, the tort and trust system disconnect has led to inconsistent claiming activity by plaintiffs.¹⁰

These concerns came to the fore in Garlock's bankruptcy, where the judge documented how plaintiffs' lawyers abuse the

1 See Victor E. Schwartz & Cary Silverman, *101 Ways to Improve State Legal Systems* (U.S. Chamber Inst. for Legal Reform, 5th ed. Sept. 2017) [hereinafter *101 Ways Report*], available at <http://www.instituteforlegalreform.com/research/101-ways-to-improve-state-legal-systems-a-users-guide-to-promoting-fair-and-effective-civil-justice---fifth-edition-2017>.

2 See American Tort Reform Association, *Judgement Interest Reform*, available at <http://www.atra.org/issue/judgement-interest-reform/>.

3 See *101 Ways Report*, supra note 1, at 46.

4 See Ky. H.B. 223 (Reg. Sess. 2017) (codified at Ky. Rev. Stat. §§ 360.040; 342.040); Mont. S.B. 293 (Reg. Sess. 2017) (codified at Mont. Code §§ 25-9-205; 27-1-210); W. Va. H.B. 2678 (Reg. Sess. 2017) (codified at W. Va. Code § 56-6-31).

5 See 11 U.S.C. § 524(g); Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* (Rand Corp. 2010), available at https://www.rand.org/content/dam/rand/pubs/technical_reports/2010/RAND_TR872.pdf.

6 See U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011), available at <https://www.gao.gov/assets/590/585380.pdf>; see also Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011), available at <https://www.rand.org/pubs/monographs/MG1104.html>.

7 See Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* iii (Rand Corp. 2015), available at https://www.rand.org/pubs/research_reports/RR907.html.

8 *In re Garlock Sealing Techs., LLC*, 504 B.R. 71, 96 (W.D.N.C. Bankr. 2014).

9 See Editorial, *The Double-Dipping Legal Scam*, WALL ST. J., Dec. 25, 2014, at A12, available at <https://www.wsj.com/articles/the-double-dipping-legal-scam-1419535915>.

10 See Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 TUL. L. REV. 1071, 1088 (2014); William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update—Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 WIDENER L.J. 675, 679 (2014).

opaqueness between the trust and tort systems to gain an unfair advantage. The court found that after virtually all major asbestos producers filed bankruptcy, “the focus of plaintiffs’ attention turned more to Garlock as a remaining solvent defendant,” and “evidence of plaintiffs’ exposure to other asbestos products often *disappeared*.”¹¹ This “occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants’ asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants).”¹²

The trove of discovery data released in the Garlock case became fodder for further study to explore inconsistent claiming activity by plaintiffs. For instance, a comprehensive analysis of the publicly available discovery data from Garlock’s bankruptcy case in relation to asbestos defendant Crane Co. showed “a similar pattern of systemic suppression of trust disclosures that was documented on the Garlock bankruptcy.”¹³ The study examined 1,844 mesothelioma lawsuits resolved by Crane Co. from 2007 to 2011 that could reliably be matched to the Garlock data. The study found that eighty percent of trust-related claims or exposures were not disclosed by plaintiffs or their counsel to Crane Co. in tort litigation.

In April 2017, a sample of 100 asbestos cases filed in Illinois revealed that only eight disclosed having made trust claim submissions, even though, on average, each plaintiff in the sample could have made 16 trust claims, and 37 plaintiffs could have made more than 20 trust claims. This showed that claims were being intentionally delayed.¹⁴

State legislatures are responding to these problems by providing defendants with greater access to asbestos bankruptcy trust claim submissions by plaintiffs.¹⁵ These materials contain important exposure history information, giving tort defendants a tool to identify fraudulent or exaggerated exposure claims, and to establish that trust-related exposures were partly or entirely responsible for the plaintiff’s harm. In 2017, Iowa, Mississippi, North Dakota, and South Dakota enacted laws to require plaintiffs

to file and disclose their asbestos bankruptcy trust claims before trial.¹⁶ Twelve states now have such asbestos bankruptcy trust transparency laws.

2. Medical Criteria

In an earlier era in the asbestos litigation, it is estimated that two-thirds to ninety percent of claimants were not sick.¹⁷ Countless lawsuits were filed by such individuals. Legislatures and courts in many states responded by requiring plaintiffs to present credible evidence of impairment in order to bring or maintain an asbestos-related personal injury lawsuit. In 2017, Iowa enacted a medical criteria law to give priority to asbestos and silica claimants with impairing conditions.¹⁸

3. Successor Asbestos-Related Liability

Twenty-five states have enacted laws to limit successor asbestos-related liabilities for certain deserving corporations. In 2017, Iowa became the latest state to enact such a law.¹⁹

C. Duties Owed by Land Possessors to Trespassers

Traditionally, land possessors owe no duty of care to trespassers except in narrow and well-defined circumstances.²⁰ In contrast, the Restatement Third of Torts: Liability for Physical and Emotional Harm requires possessors to exercise reasonable care with respect to *all* entrants on their land,²¹ except for undefined “flagrant trespassers.”²² The Restatement’s approach would dramatically expand the ability of trespassers to successfully sue landowners. In recent years, almost half of the states have enacted laws to “freeze” the common law in this area and preempt courts

11 *In re Garlock Sealing Techs.*, 504 B.R. at 73 (emphasis added).

12 *Id.* at 84.

13 Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30 Mealey’s Litig. Rep.: Asbestos 1, 1 (Nov. 4, 2015).

14 See Mark A. Behrens et al., *Illinois Asbestos Trust Transparency: The Need to Integrate Asbestos Trust Disclosures with the Illinois Tort System* (Ill. Civil Justice League Apr. 2017), available at <http://www.icjl.org/IllinoisAsbestosTrustTransparencyReport.pdf>; see also Mark A. Behrens, *Disconnects and Double-Dipping: The Case for Asbestos Bankruptcy Trust Transparency in Virginia* (U.S. Chamber Inst. for Legal Reform Dec. 2016), available at http://www.instituteforlegalreform.com/uploads/sites/1/DisconnectsDoubleDipPaper_WebReady.pdf.

15 At the federal level, the Furthering Asbestos Claims Transparency (FACT) Act would require asbestos trusts to file quarterly reports that would be available on the bankruptcy court’s public docket. The reports would describe the name and exposure history of claimants, any payments made to claimants, and the basis for such payments. The Act further requires trusts to provide information related to payment from, and demands for payment from, the trusts (subject to appropriate protective orders) to any party in a civil asbestos action.

16 See Iowa S.F. 376 (Reg. Sess. 2017) (codified at Iowa Code §§ 686A.1 et seq.); Miss. H.B. 1426 (Reg. Sess. 2017) (codified at Miss. Code §§ 11-67-1 et seq.); N.D. H.B. 1197 (Reg. Sess. 2017) (codified at N.D. Cent. Code §§ 32-46.1 et seq.); S.D. S.B. 138 (Reg. Sess. 2017) (codified at S.D. Codified Laws §§ 21-66-1 et seq.).

17 See Roger Parloff, *Welcome to the New Asbestos Scandal*, FORTUNE, Sept. 6, 2004 (“According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmaligants are ‘unimpaired’— that is, they have slight or no physical symptoms.”), available at http://archive.fortune.com/magazines/fortune/fortune_archive/2004/09/06/380311/index.htm; see also Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1 (“Very few new plaintiffs have serious injuries, even their lawyers acknowledge.”), available at <http://www.nytimes.com/2002/04/10/business/a-surge-in-asbestos-suits-many-by-healthy-plaintiffs.html>.

18 See Iowa S.F. 376 (Reg. Sess. 2017) (codified at Iowa Code §§ 686B.1 et seq.).

19 See Iowa S.F. 376 (Reg. Sess. 2017) (codified at Iowa Code §§ 686C.1 et seq.).

20 See Restatement (Second) of Torts §§ 333-339 (1965).

21 See Restatement Third of Torts: Liability for Physical and Emotional Harm § 51 (2012).

22 See *id.* at § 52 (2012).

from adopting the Restatement Third's approach. Iowa joined the list in 2017.²³

D. Civil Discovery Reform

In December 2015, a number of amendments to the Federal Rules of Civil Procedure took effect. The overarching goal of these amendments—the product of years of discussion and debate—was to improve early case management and the scope of discovery in civil litigation. Important changes were made regarding obligations for preserving evidence, proportionality of discovery, and standards for imposing sanctions. Among other things, the amendments:

- Redefine the scope of discovery from a broad standard of any information “reasonably calculated to lead to the discovery of admissible evidence” to discovery that is “proportional to the needs of the case” (Rule 26(b)(1));
- Permit court-issued protective orders to shift costs of discovery to limit overly burdensome discovery requests (Rule 26(c)(1)(B)); and
- Establish a uniform standard for sanctions and curative measures where electronically stored information has not been properly preserved (Rule 37(e)).²⁴

Resource materials and further details regarding the amendments are available on the Lawyers for Civil Justice website.²⁵

In 2017, Oklahoma became the first state to adopt legislation to bring state court civil discovery into closer conformity with the current federal rules approach.²⁶ Wisconsin is considering similar changes.²⁷

E. Expert Evidence

Expert evidence can be both powerful and misleading. An expert witness presents information that is beyond the common knowledge of the average person. Experts have special privileges that other witnesses lack: they can testify on matters beyond their firsthand knowledge or observation, rely on hearsay or other inadmissible evidence, and opine on the ultimate legal issue in the

case, such as whether a product caused the plaintiff's injury. Given these powers and the potential consequences of unjust imposition of liability, judges have a special responsibility to act as gatekeepers when it comes to expert testimony. They should conduct a preliminary assessment of whether the proposed testimony is consistent with the scientific method or relies on subjective beliefs or unsupported speculation. The U.S. Supreme Court adopted this approach for federal courts in *Daubert* and its progeny.²⁸ *Daubert* “changed [the] deference-to-the-field approach . . . [and] brought [a] scientific culture to the courtroom.”²⁹

The federal court approach codified in Federal Rule of Evidence 702 has gained broad acceptance. The vast majority of states now follow an approach that is consistent with the federal rule. Missouri adopted expert evidence reform in 2017.³⁰

F. Phantom Damages

“Phantom damages” are recoveries by personal injury plaintiffs for medical expenses *billed* by their health care providers, “even when the providers accepted a substantially lower amount as payment in full.”³¹ It is not uncommon for billed amounts that appear on invoices to be several times the amounts actually paid by patients or their insurers (including private insurers, Medicare, or Medicaid) due to negotiated rates, discounts, and write-offs. As a result, civil “defendants typically pay significantly inflated awards to reimburse a plaintiff for nonexistent medical expenses.”³² Missouri enacted phantom damages reform in 2017.³³

G. Appeal Bond Limits

A supersedeas bond, also known as a defendant's appeal bond, provides security that a civil defendant who suffers an adverse judgment at trial will have assets sufficient to satisfy the judgment if efforts to challenge the verdict on appeal fail.³⁴ Appeal bond statutes were first enacted at a time when judgments were generally smaller—before the creation of novel and expansive theories of liability, and before the emergence of government-sponsored lawsuits and class actions. In the modern era, uncapped appeal bond requirements have the potential to force a defendant into bankruptcy before it can have its day in an appellate court.³⁵ To avoid this fate, a defendant may be forced to

23 See Iowa S.F. 260 (Reg. Sess. 2017) (codified at Iowa Code § 462.1).

24 Other changes that took effect (1) require parties, as well as courts, to cooperate and employ the FRCP in a manner “to secure the just, speedy, and inexpensive determination of every action and proceeding” (Rule 1); (2) reduce the time period to serve a summons and complaint from 120 days to 90 days (Rule 4(m)) and the time period to enter scheduling orders to the earlier of 90 days (previously 120 days) after a defendant has been served or 60 days (previously 90 days) after a defendant has made an appearance (Rule 16); and (3) allow requests for production (RFPs) of documents prior to a Rule 26(f) conference (Rule 26(d)(2)) and require specificity in objections to RFPs (Rule 34(b)(2)).

25 See Lawyers for Civil Justice, *Changes to Discovery Rules Now In Effect for One Year*, available at <http://www.lfcj.com/the-2015-discovery-amendments.html>.

26 See Okla. H.B. 1570 (Reg. Sess. 2017) (codified at 12 Okla. Stat. § 3226).

27 See 2017 Wis. A.B. 773, available at <https://docs.legis.wisconsin.gov/2017/related/proposals/ab773>; 2017 Wis. S.B. 645, available at <https://docs.legis.wisconsin.gov/2017/related/proposals/sb645/> 12.

28 See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

29 David L. Faigman et al., *How Good is Good Enough?: Expert Evidence Under Daubert and Kumho*, 50 CASE W. RES. L. REV. 645, 655-56 (2000).

30 See Mo. H.B. 153 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. § 490.065).

31 101 Ways Report, *supra* note 1, at 77.

32 *Id.*

33 See Mo. S.B. 31 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. § 490.715).

34 See Glenn G. Lammi & Justin P. Hauke, *State Appeal Bond Reforms Protect Defendants' Due Process Rights*, 19:42 Legal Backgrounder (Wash. Legal Found. Nov. 12, 2004).

35 The problem of oppressive bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. One law professor observed, “if multi-billion dollar judgments had been

settle on unfavorable terms and pay a “premium” because it has been placed over a barrel. A majority of jurisdictions have enacted legislation or changed court rules to limit appeal bonds in cases involving large judgments.³⁶ In 2015, appeal bond limits were enacted in Maryland and Nevada; Mississippi enacted similar legislation in 2016.³⁷

H. Transparency in Private Attorney Contracts (TiPAC)

In the late 1990s, coordinated Medicaid recoupment litigation against the tobacco industry by state attorneys general working with private contingency fee law firms resulted in a landmark Master Settlement Agreement. The agreement included payments to the states on the order of a quarter of a trillion dollars, marketing restrictions on tobacco products, and enormous fees for the private law firms.³⁸ A new era of “regulation through litigation” was born.³⁹ The tobacco litigation model has inspired state and local governments to advance policy preferences against firearms manufacturers, former manufacturers of lead pigment and paint, alleged contributors to global warming, gasoline refiners, health maintenance organizations, pharmaceutical manufacturers, credit card companies, and mortgage lenders, among others. Policy-focused lawsuits give state executives the ability to bypass legislatures to achieve regulatory objectives that the majority of the electorate may not support. Clinton Administration Labor Secretary Robert Reich said, “This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy.”⁴⁰ Former Alabama Attorney General William Pryor, Jr., now a judge on the United States Court of Appeals for the Eleventh Circuit, once described

government-sponsored lawsuits as “the greatest threat to the rule of law today.”⁴¹

In the absence of reform, fee agreements between public officials and private contingency fee lawyers have been negotiated behind closed doors without a competitive bidding process. Because there is no public oversight, the attorney selection process can create the appearance of contracts being awarded for personal gain and political patronage.

Many states have enacted laws to improve the handling of policy-focused litigation involving private contingency fee lawyers. The first enactments occurred in the immediate wake of the tobacco Master Settlement Agreement, when it was revealed that the plaintiffs’ firms involved in that litigation would collectively receive billions of dollars in fees. In 1999, Texas became the first state to enact legislation to improve the state’s private attorney selection process. A second wave of enactments began after Florida passed a law in 2010 known as the Transparency in Private Attorney Contract (TiPAC) Act. TiPAC laws generally subject state contracts with private lawyers to public bidding, require posting of contracts on public websites, provide recordkeeping requirements, limit attorneys’ fees to a sliding scale based on the amount of recovery, and mandate complete control and oversight of the litigation by government attorneys.

Many states now have rules in place to promote transparency and accountability in the contracting process.⁴² These laws do not ban government-sponsored lawsuits by private law firms, but they do move contingency fee contracts in these cases into the public light. In 2015 and 2016, a number of states (Arkansas, Nevada, Ohio, Utah, and West Virginia) enacted TiPAC laws to regulate and provide transparency when state officials engage private attorneys to work on a contingency fee basis.⁴³

I. Third-Party Litigation Funding Disclosure

Investors are pumping unprecedented sums of money into financing litigation, lured by the prospect of payoffs untied to economic or market conditions.⁴⁴ The litigation finance industry

entered against the tobacco manufacturers in the states’ lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy.” Richard L. Cupp, *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?*, 27 PEPP. L. REV. 685, 689-90 (2000).

- 36 Some appeal bond reforms apply to all civil defendants, while others are limited to signatories to the state attorneys general tobacco Master Settlement Agreement, generally including their successors and affiliates. Some appeal bond reforms apply to total damages, while others apply only to punitive damages. See American Tort Reform Association, *Appeal Bond Reform*, available at <http://www.atra.org/issues/appeal-bond-reform>.
- 37 See Md. H.B. 164 (Reg. Sess. 2015) (codified at Md. Code, Cts. & Jud. Proc. § 12-301.1); Nev. S.B. 134 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. §§ 17.370, 20.037); Miss. H.B. 1529 (Reg. Sess. 2016) (codified at Miss. Code § 11-51-31).
- 38 See Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments’ Tobacco Litigation*, 33 CONN. L. REV. 1143 (2001).
- 39 Robert B. Reich, Editorial, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at A15 (stating “The era of big government may be over, but the era of regulation through litigation has just begun.”), available at <http://prospect.org/article/regulation-out-litigation>.
- 40 Robert B. Reich, Editorial, *Don’t Democrats Believe in Democracy?*, WALL ST. J., Jan. 12, 2000, at A22, available at <http://prospect.org/article/dont-democrats-believe-democracy>.

- 41 Victor E. Schwartz & Christopher E. Appel, *The Plaintiffs’ Bar’s Covert Effort to Expand State Attorney General Federal Enforcement Power*, 24:24 Legal Backgrounder (Wash. Legal Found. July 10, 2009) (quoting William H. Pryor, Jr., *Fulfilling the Reagan Revolution by Limiting Government Litigation*, Address at the Reagan Forum 2 (Nov. 14, 2000)).
- 42 See State Lawsuit Reform, *Government Contracts With Private Lawyers*, available at http://www.statelawsuitreform.com/factor_category/government-agency-hirings-of-private-lawyers/; 101 Ways Report, *supra* note 1, at 7; American Tort Reform Association, *Private Attorney General Sunshine/Attorney General Sunshine*, available at <http://www.atra.org/issue/sunshine-attorney-general-sunshine/>.
- 43 See Ark. S.B. 204 (Reg. Sess. 2015) (codified at Ark. Code §§ 25-16-714, 25-16-715); Nev. S.B. 244 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. §§ 228.110-.1118, 228.140, 228.170, 218E.405); Ohio S.B. 38 (Reg. Sess. 2015) (codified at Ohio Rev. Stat. §§ 9.49-.498); Utah S.B. 233 (Reg. Sess. 2015) (codified at Utah Code §§ 63G-6a-106, 67-5-33); See W. Va. H.B. 4007 (Reg. Sess. 2016) (codified at W. Va. Code §§ 5-3-3, 5-3-4).
- 44 See Lisa Rickard & Mark Behrens, *Transparency Needed as Third-Party Litigation Funding Enters the Mainstream*, Int’l Ass’n of Def. Counsel, Civil Justice Response Comm. Newsletter (Sept. 2016), available at https://www.iadclaw.org/assets/1/19/Civil_Justice_Response_September_2016.pdf.

has transformed from “a fringe investment community into a \$5 billion market in the U.S. in less than two decades.”⁴⁵

In January 2017, the U.S. District Court for the Northern District of California “became the first court in the nation to require routine disclosure of [third-party litigation funding] involvement in a broad class of cases.”⁴⁶ The court added to its “Standing Order For All Judges” a provision requiring that “in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.”⁴⁷

In June 2017, some thirty organizations, including the U.S. Chamber Institute for Legal Reform, Lawyers for Civil Justice, DRI-The Voice of the Defense Bar, and International Association of Defense Council, wrote to the federal Advisory Committee on Civil Rules to renew a proposal to amend Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court.⁴⁸ The Advisory Committee met in early November 2017 and reportedly plans to look into third-party litigation funding disclosure, perhaps as part of a subcommittee studying changes to multidistrict litigation procedures.⁴⁹

II. 2017 REFORMS

A. Arizona

Arizona extended the state’s innovative lengthy-trial fund to mid-2027.⁵⁰ The lengthy-trial fund gives more citizens the opportunity to serve on juries by reducing the economic hardship associated with lengthy trials.⁵¹

B. Arkansas

The Arkansas deceptive trade practices statute was amended to require plaintiffs to prove “actual financial loss” caused by

“reliance” on an unlawfully deceptive practice.⁵² Additionally, the amendments generally preclude private class actions for deceptive trade practices claims, give courts discretion whether to award reasonable attorney’s fees to prevailing parties, and provide for jury trials in cases covered by the statute.

C. Iowa

Iowa codified the traditional common law rule that land possessors owe only limited duties to trespassers.⁵³ Iowa also enacted asbestos bankruptcy trust claim transparency legislation,⁵⁴ medical criteria for asbestos and silica cases so claimants with impairing conditions do not have to compete for resources with the non-sick,⁵⁵ and limited asbestos-related liabilities for innocent successor corporations.⁵⁶

In addition, Iowa enacted the most sweeping medical malpractice reform package in the state in more than a generation.⁵⁷ The new law includes a \$250,000 cap on noneconomic damages in medical malpractice cases; strengthens expert witness standards to require plaintiff experts in medical malpractice cases to be licensed in good standing in the same or a substantially similar field as the defendant and in active practice or academia within the five years preceding the incident at issue; and requires plaintiffs to file a certificate of merit signed by an expert witness with respect to the issue of standard of care and an alleged breach of the standard of care within sixty days of the defendant’s answer and prior to the commencement of discovery.

In other legislation, Iowa lowered the statute of repose applicable to improvements to real property from fifteen years to eight years for commercial construction and ten years for residential construction.⁵⁸ Iowa enacted workers’ compensation reform as well.⁵⁹

D. Kentucky

Kentucky enacted legislation lowering the state’s interest rate in most civil judgments from twelve to six percent.⁶⁰

E. Minnesota

Minnesota enacted legislation to require notice at least sixty days before an attorney files a lawsuit alleging noncompliance

45 See Natalie Rodriguez, *Going Mainstream: Has Litigation Finance Shed its Stigma?*, Law360, Dec. 12, 2017, available at <https://www.law360.com/articles/992299>.

46 Tripp Haston, Editorial, *The Missing Key to 3rd-Party Litigation Funding*, Law360, Feb. 7, 2017, available at <https://www.law360.com/articles/888716/the-missing-key-to-3rd-party-litigation-funding>.

47 Standing Order for all Judges of the Northern District of California, *Contents of Joint Case Management Statement*, § 19 (effective Jan. 17, 2017), available at https://cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges_1.17.2017.pdf.

48 See generally John H. Beisner, Editorial, *Shine A Light On 3rd-Party Litigation Funding*, Law360, Feb. 7, 2017, available at <https://www.law360.com/articles/992417/shine-a-light-on-3rd-party-litigation-funding>.

49 See Amanda Bronstad, *Federal Rules Advisory Panel to Eye Litigation Financing—Sort Of*, NAT’L L.J., Nov. 8, 2017, available at <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/08/federal-judicial-panel-to-consider-litigation-financing-sort-of/?slreturn=2017-1116172346>.

50 See Ariz. H.B. 2246 (Reg. Sess. 2017) (codified at Ariz. Rev. Stat. §§ 12-115, 21-222).

51 See G. Thomas Munsterman & Cary Silverman, *Jury Reforms in Arizona: The First Year*, Judges’ J., Winter 2006, at 18.

52 See Ark. H.B. 1742 (Reg. Sess. 2017) (codified at Ark. Code §§ 4-88-101(3), 4-88-102, 4-88-113(f), 4-88-116).

53 See Iowa S.F. 260 (Reg. Sess. 2017) (codified at Iowa Code § 462.1).

54 See Iowa S.F. 376 (Reg. Sess. 2017) (codified at Iowa Code §§ 686A.1 et seq.).

55 See Iowa S.F. 376 (Reg. Sess. 2017) (codified at Iowa Code §§ 686B.1 et seq.).

56 See Iowa S.F. 376 (Reg. Sess. 2017) (codified at Iowa Code §§ 686C.1 et seq.).

57 See Iowa S.F. 465 (Reg. Sess. 2017) (codified at Iowa Code §§ 147.136A et seq.).

58 See Iowa S.F. 413 (Reg. Sess. 2017) (codified at Iowa Code § 614.1).

59 See Iowa H.F. 518 (Reg. Sess. 2017) (codified at Iowa Code §§ 85.16 et seq.).

60 See Ky. H.B. 223 (Reg. Sess. 2017) (codified at Ky. Rev. Stat. §§ 342.040, 360.040).

with the Minnesota Human Rights Act’s architectural accessibility requirements.⁶¹

Democrat Governor Mark Dayton vetoed several other civil justice reforms. He became the first governor in the nation to veto a bill that would have codified the traditional limited duties owed by land possessors to trespassers—even though the legislation would not restrict current causes of action for plaintiffs, enjoys widespread bipartisan support, and is law in about half the country.⁶² Governor Dayton also vetoed a budget bill that would have reduced the state’s prejudgment interest rate.⁶³ And he vetoed a bill that would have allowed jurors to be informed if an automobile accident plaintiff was not wearing a seatbelt.⁶⁴

F. Mississippi

Mississippi enacted asbestos bankruptcy trust claims transparency legislation.⁶⁵

G. Missouri

The American Tort Reform Foundation (ATRF) named the City of St. Louis the nation’s #1 Judicial Hellhole in its 2016-17 report. Judicial Hellholes are forums where defendants perceive the laws are being applied by the courts in an unfair or arbitrary manner.

But in 2017, Missouri enacted expert evidence reform, essentially aligning Missouri state courts with the *Daubert* standard applied in all federal courts and the vast majority of other states.⁶⁶ Missouri also enacted “phantom damages” reform, allowing a defendant to introduce evidence of the actual cost of medical care or treatment to the plaintiff.⁶⁷

Another new Missouri law requires workers who claim discrimination in wrongful-termination suits to prove that bias was “the motivating factor” for their dismissal.⁶⁸ The law also modifies Missouri’s whistleblower laws, limits punitive damages in

cases involving workplace discrimination, and protects employees from being sued in their individual capacity.⁶⁹

In addition, Missouri enacted workers’ compensation reform legislation that reverses a 2014 Missouri Supreme Court decision, *Templemire v. W & M Welding, Inc.*,⁷⁰ and raises the bar for a discharged employee to sue a former employer for being fired in retaliation for bringing a workers’ compensation claim.⁷¹ *Templemire* allowed such lawsuits when the worker’s filing of a claim was a contributing factor to the person being fired. The new law requires the filing of the workers’ compensation claim by the worker to be “the motivating factor” in the employer’s decision to terminate that person. The law also ends temporary worker’s compensation benefits once a physician determines that the employee has reached maximum medical improvement, and it makes it easier for employers to enforce penalties on workers who were injured while intoxicated or under the influence of illegal drugs.

Another new Missouri law protects insurers from bad faith claims by imposing specific requirements for time-limited settlement demands.⁷² The new law further protects an insurer’s right to participate in the defense of its insured, which can help the insurer defend its coverage position in subsequent garnishment or declaratory proceedings.⁷³

H. Montana

Montana enacted legislation changing the state’s judgment interest rate from ten percent to the rate for bank prime loans published by the Federal Reserve System plus three percent.⁷⁴

I. North Dakota

North Dakota enacted asbestos bankruptcy trust claims transparency legislation.⁷⁵

J. Oklahoma

Oklahoma enacted legislation to more closely align the state’s Discovery Code with the current Federal Rules of Civil Procedure.⁷⁶ The law includes a new proportionality requirement. Now, a party may obtain discovery of any matter, not privileged,

61 See Minn. H.F. 1542 (Reg. Sess. 2017) (codified at Minn. Stat. § 363A.331).

62 See *Dishonorable Mentions 2017-2018*, Judicial Hellholes (2017) available at <http://www.judicialhellholes.org/2017-2018/dishonorable-mentions/>.

63 *Id.*

64 *Id.*

65 See Miss. H.B. 1426 (Reg. Sess. 2017) (codified at Miss. Code §§ 11-67-1 et seq.).

66 See Mo. H.B. 153 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. § 490.065); see generally Missouri Chamber of Commerce and Industry, Press Release, *Gov. Greitens Signs Expert Witness Reform Into Law*, Mar. 28, 2017, available at <https://mochamber.com/news/gov-greitens-signs-expert-witness-reform-law/>.

67 See Mo. S.B. 31 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. § 490.715); see generally Missouri Chamber of Commerce and Industry, Press Release, *Collateral Source Reform Passes: Legislature Continues Focus on Improving Missouri’s Legal Climate*, May 11, 2017, available at <https://mochamber.com/news/collateral-source-reform-passes-legislature-continues-focus-improving-missouris-legal-climate/>.

68 See Mo. S.B. 43 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. § 213.010).

69 See Mo. S.B. 43 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. §§ 213.111, 285.575).

70 See *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo. banc 2014).

71 See Mo. S.B. 66 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. §§ 287.020 et seq.).

72 See Mo. H.B. 339/714 (Reg. Sess. 2017) (codified at Mo. Rev. Stat. §§ 537.058, 537.065).

73 See William Clayton Crawford & Scott Hofer, *Missouri’s Fair Settlements Bill & The Repeal & Replacement of RSMO. 537.065*, May 8, 2017, available at <https://fwplaw.com/practices/bad-faith-law/missouris-new-fair-settlements-bill-the-repeal-replacement-of-rsmo-537-065/>.

74 See Mont. S.B. 293 (Reg. Sess. 2017) (codified at Mont. Code §§ 25-9-205; 27-1-210).

75 See N.D. H.B. 1197 (Reg. Sess. 2017) (codified at N.D. Cent. Code §§ 32-46.1.01 et seq.).

76 See Okla. H.B. 1570 (Reg. Sess. 2017) (codified at 12 Okla. Stat. §§ 3225 et seq.).

which is relevant to “any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Further, a court may enter a protective order to shift the cost of discovery to the requesting party, such as where the information sought is disproportional to the needs of the case.

K. South Dakota

South Dakota enacted asbestos bankruptcy trust claims transparency legislation.⁷⁷

L. Texas

Texas enacted “hailstorm” litigation reform to curtail the ability of policyholders to sue insurers over property claims following extreme weather events.⁷⁸ The new law requires “notice before a suit can be filed in order to permit the insurer to address any outstanding claim issue.”⁷⁹ The law also “cuts penalties for insurers sued for offering too little money on storm claims, including wind and hail damage, while making it harder for those suing to collect attorneys’ fees.”⁸⁰

In addition, Texas enacted legislation to require pre-suit notice before a lawsuit may be filed against a business owner alleging a failure to comply with standards meant to accommodate individuals with disabilities.⁸¹ The new law provides business owners with time to remedy architectural inadequacies following official notice.

M. West Virginia

West Virginia changed the state’s judgment interest rate to two percentage points above the Fifth Federal Reserve District secondary discount rate, provided that the rate shall not exceed nine percent or be less than four percent per annum.⁸² West Virginia also limited the liability of innocent sellers in products liability cases.⁸³ Under the new law, no product liability action may be maintained against a seller unless the seller had actual knowledge of the defect, exercised substantial control over the product, altered the product in a manner not authorized by the manufacturer, made an express warranty independent of any express warranty made by the manufacturer, resold the product

in a different condition than when it left the manufacturer, failed to exercise reasonable care in assembling or maintaining the product, removed or failed to convey labels or warnings from the manufacturer, is a controlled subsidiary of the manufacturer, or repackaged the product or placed its own brand on the product. A seller also may be subject to liability if the manufacturer cannot be identified after a good faith effort, is not subject to service of process, or is insolvent.

N. Wisconsin

Although Wisconsin did not pass any significant civil justice reform legislation, on December 21, 2017, the Wisconsin Supreme Court entered an order amending the state’s previous one-sentence class action statute⁸⁴ to align it with Rule 23 of the Federal Rules of Civil Procedure.⁸⁵ The new class action rule becomes effective on July 1, 2018, “although under the terms of the Wisconsin Supreme Court’s order, there will be a presumption that the new rule also applies to cases pending as of the effective date, absent a finding of unfeasibility or injustice.”⁸⁶

III. KEY COURT DECISIONS

Over the years, the “scales in state courts have increasingly tipped” toward upholding civil justice reforms in constitutional challenges brought by plaintiffs’ lawyers.⁸⁷ Most state courts respect the prerogative of legislatures to decide broad tort policy rules for their states.⁸⁸ There are a few state courts with a hostile attitude in general toward legislative lawsuit reform. Plaintiff tend to bring challenges in these jurisdictions.

A. Decisions Upholding State Reforms

The Indiana Supreme Court rejected a challenge to a statute immunizing firearms dealers from actions for recovery of damages caused by criminal or unlawful misuse of a firearm by a third party.⁸⁹ The court said that the “legislature has wide latitude in defining the existence and scope of a cause of action and in

77 See S.D. S.B. 138 (Reg. Sess. 2017) (codified at S.D. Codified Laws §§ 21-66-1 et seq.).

78 See Tex. H.B. 1774 (Reg. Sess. 2017) (codified at Tex. Ins. Code §§ 542A.001 et seq.).

79 Stephanie K. Jones, *Texas ‘Hailstorm’ Litigation Bill Headed to Governor’s Desk*, Ins. J., May 17, 2017, available at <https://www.insurancejournal.com/news/southcentral/2017/05/17/451407.htm>.

80 *Id.*

81 See Tex. H.B. 1463 (Reg. Sess. 2017) (codified at Tex. Hum. Res. Code. § 121.0041).

82 See W. Va. H.B. 2678 (Reg. Sess. 2017) (codified at W. Va. Code § 56-6-31).

83 See W. Va. H.B. 2850 (Reg. Sess. 2017) (codified at W. Va. Code § 55-7-31).

84 See Wis. Stat. § 803.08.

85 See *In re Proposed Amendments to Wisconsin Statutes* §§ 803.08 and 426.110, available at <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=206145>.

86 Elizabeth A.N. Haas et al., *Wisconsin Supreme Court Adopts Significant Changes to State Class Action Practice*, NAT’L L. REV., Dec. 22, 20017, available at <https://www.natlawreview.com/article/wisconsin-supreme-court-adopts-significant-changes-to-state-class-action-statute>.

87 Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. MED. & ETHICS 515, 527 (2005).

88 See, e.g., *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 421 (W. Va. 2011) (finding decision upholding \$500,000 limit on noneconomic damages in medical liability case to be “consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice or in any personal injury action”); Matthew W. Light, *Who’s the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 68 WASH. & LEE L. REV. 315, 320 (2001) (concluding “that the decisions that upholding damage caps against constitutional attack are better-reasoned than those rejecting the caps.”).

89 See *KS&E Sports v. Runnels*, 72 N.E.3d 892 (Ind. 2017).

prescribing the available remedy.”⁹⁰ Further, the court’s role is not to second-guess the legislature’s policy choices, but to “simply assess their legality.”⁹¹ “Once we determine they pass muster,” the court said, “our task concludes.”⁹² The court concluded that the statute fell within the “legislature’s broad discretion” and did not run afoul of the Indiana or U.S. Constitutions.⁹³

The Pennsylvania Supreme Court upheld the constitutionality of a statutory scheme embodying a cause of action for wrongful use of civil proceedings, commonly referred to as the Dragonetti Act.⁹⁴ The court rejected a generalized attorney immunity from the substantive tort principles “promulgated by the political branch in the Dragonetti Act.”⁹⁵ The court noted “the legislature’s superior resources and institutional prerogative in making social policy judgments upon developed analysis.”⁹⁶

The Utah Supreme Court upheld a temporary total disability benefits statute prohibiting compensation benefits from exceeding 312 weeks over a period of eight years.⁹⁷ The court also upheld a Workers’ Compensation Act provision that an employee claiming workplace injury has twelve years from the date of injury to prove that the person is due the compensation claimed.⁹⁸

Oregon’s Court of Appeals upheld the state’s statute of repose for product liability claims.⁹⁹

B. Decisions Nullifying State Reforms

The ATRF named Florida the #1 Judicial Hellhole in the country for 2017-18, in part because of the “Florida Supreme Court’s liability-expanding decisions” and apparent disregard “for the lawmaking authority of legislators and the governor.”¹⁰⁰ The court’s decisions on civil justice issues in 2017 reinforce ATRF’s perception.

For example, the Florida Supreme Court struck down as unconstitutional statutory caps on noneconomic damages in medical malpractice actions.¹⁰¹ The court looked to a 2014 decision in which a plurality of the court held that a cap on wrongful death noneconomic damages recoverable in medical malpractice

actions was unconstitutional.¹⁰² Justice Ricky Polston dissented, criticizing the majority’s disregard for “the proper rational basis test that [the court’s] long-standing precedent requires”¹⁰³ and “the Legislature’s policymaking role in constitutional system.”¹⁰⁴ Justice Polston found the caps to be “rationally related to the legitimate state interest of increasing the affordability, availability, and quality of medical care in Florida.”¹⁰⁵

The Florida Supreme Court also overturned a law that allowed prospective medical malpractice defendants to conduct pre-suit *ex parte* interviews with claimants’ treating healthcare providers.¹⁰⁶ In another case, the Florida Supreme Court held that a provision in a legislative claims bill limiting attorneys’ fees related to a negligence judgment against a state hospital unconstitutionally impaired the plaintiff family’s contingency fee contract with their law firm.¹⁰⁷

In addition, the Florida Supreme Court reached a controversial decision regarding two significant expert testimony reforms adopted by the legislature.¹⁰⁸ In 2013, the Florida legislature had rejected the longstanding *Frye*¹⁰⁹ standard and adopted the *Daubert* standard and Federal Rule of Evidence 702 with amendments to Florida’s Evidence Code. The court refused to adopt the *Daubert* expert evidence standard “to the extent it is procedural,” expressing “constitutional concerns.”¹¹⁰ Justice Polston, joined by Justice Charles Canady, said the court should adopt the *Daubert* standard and rejected the majority’s constitutional concerns as “unfounded.”¹¹¹ Justice Polston pointed out that the *Daubert* standard has been applied in the federal courts since 1993, the clear majority of states adhere to it, and there are no reported decisions declaring the standard unconstitutional, while there are cases holding that “the *Daubert* standard does not violate the constitution.”¹¹² The state law implementing *Daubert* still applies, because the court’s decision was not on the merits, but the ruling may be seen as giving plaintiffs “a green light to challenge the legislation and give the state Supreme Court an opportunity to decide on these constitutional issues.”¹¹³

In the same opinion, the Florida Supreme Court also declined to adopt an amendment to the Evidence Code that

90 *Id.* at 906.

91 *Id.* at 907.

92 *Id.*

93 *Id.*

94 *Villani v. Seibert*, 159 A.3d 478 (Pa. 2017).

95 *Id.* at 492-93.

96 *Id.* at 492.

97 *See Petersen v. Utah Labor Comm’n*, 2017 WL 5998823 (Utah Dec. 1, 2017).

98 *See Waite v. Utah Labor Comm’n*, 2017 WL 5999885 (Utah Dec. 1, 2017).

99 *Lunsford v. NCH Corp.*, 396 P.3d 288 (Or. App. 2017).

100 American Tort Reform Foundation, *2017-2018 Judicial Hellholes* (Dec. 2017), available at <http://www.judicialhellholes.org/wp-content/uploads/2017/12/judicial-hellholes-report-2017-2018.pdf>.

101 *N. Broward Hosp. Dist. v. Kalitan*, 219 So. 3d 49 (Fla. 2017).

102 *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014).

103 *Kalitan*, 219 So. 3d at 62 (Polston, J., dissenting).

104 *Id.* at 60 (Polston, J., dissenting).

105 *Id.* at 62 (Polston, J., dissenting).

106 *Weaver v. Myers*, -- So. 3d --, 2017 WL 5185189 (Fla. Nov. 9, 2017).

107 *Searcy, Denney, Scarola, Barnhart & Shipley v. State*, 209 So. 3d 1181 (Fla. 2017).

108 *In re Amendments to the Fla. Evidence Code*, 210 So. 3d 1231 (Fla. 2017).

109 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1023).

110 *Amendments to the Fla. Evidence Code*, 210 So. 3d at 1239.

111 *Id.* at 1242 (Polston, J., concurring in part and dissenting in part).

112 *Id.*

113 Carolina Bolado, *Fla. Supreme Court Declines to Adopt Daubert Standard*, LAW360, Feb. 16, 2017, available at <https://www.law360.com/articles/89>

requires a standard-of-care expert witness in a medical malpractice action to specialize in the *same* specialty (rather than the same *or similar* specialty) as the health care provider against whom or on whose behalf the testimony is offered.¹¹⁴ The court further declined to adopt a hearsay exception enacted by the legislature for reports of abuse by elderly persons or disabled adults.¹¹⁵

A Wisconsin appellate court struck down the state's statutory cap on noneconomic damages in medical malpractice claims.¹¹⁶ The court applied a 2005 Wisconsin Supreme Court decision which found a previously enacted lower cap to be unconstitutional.¹¹⁷

The Oklahoma Supreme Court nullified the legislature's most recent attempt to require an affidavit of merit as an indispensable step in the pleading process for certain professional negligence actions.¹¹⁸

The Pennsylvania Supreme Court declared that the longstanding methodology for impairment ratings under the Workers' Compensation Act was an unconstitutional delegation of legislative authority and struck the impairment rating evaluation (IRE) process from the Act.¹¹⁹ Previously, an employer that paid 104 weeks of total disability could request that the claimant submit to a medical evaluation to determine his or her level of impairment. If the IRE resulted in an impairment rating of less than fifty percent, the claimant's disability status could be modified from total to partial disability, resulting in the person's benefits being capped at 500 weeks, or nearly ten years.¹²⁰ Pennsylvania does not set time limits on total disability benefits. By striking the IRE process, the court removed a "powerful tool [that] was available to employers and workers' compensation carriers . . . to prevent a claimant from receiving total disability benefits indefinitely. . . ." ¹²¹ In response to the Pennsylvania

Supreme Court decision, "the Pennsylvania Compensation Rating Bureau recently filed a 6.06% lost cost increase."¹²²

IV. CONCLUSION

Significant civil justice reform legislation was enacted in 2017, particularly in Missouri and with respect to civil judgment interest rate reform, asbestos bankruptcy trust claims transparency, discovery reform, codification of traditional common law duties owed by land possessors to trespassers, expert evidence, and "phantom damages." Several reforms were upheld by courts, but activist courts nullified some others. The Florida Supreme Court has been particularly hostile toward civil justice legislation.

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114 *Amendments to the Fla. Evidence Code*, 210 So. 3d at 1239.

115 *See id.* at 1241.

116 *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 901 N.W.2d 782 (Wis. App.), *review granted*, 378 Wis. 2d 427 (Wis. 2017).

117 *Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund*, (Wis. 2005).

118 *John v. St. Francis Hosp., Inc.*, 405 P.3d 681 (Okla. 2017); *see also* *Wall v. Marouk*, 302 P.3d 775 (Okla. 2013); *Zeier v. Zimmer, Inc.*, 152 P.3d 861 (Okla. 2006).

119 *Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.)*, 161 A.3d 827 (Pa. 2017).

120 *See* Karyn Dobroskey Renzi, *Expectations After Pa. High Court Workers' Comp Ruling*, *Law360*, July 5, 2017, available at <https://www.law360.com/articles/938923/expectations-after-pa-high-court-workers-comp-ruling>.

121 Paul Clouser & Micah T. Saul, *Pennsylvania Supreme Court Decision in Protz Marks Major Change in Workers' Compensation Law*, PA. LABOR & EMPLOYMENT BLOG, July 7, 2017, available at <https://www.palaborandemploymentblog.com/2017/07/articles/workers-compensation/pennsylvania-supreme-court-decision-protz-marks-major-change-workers-compensation-law/>; *see also* Daniel Moore, *Ruling on Workers' Comp Opens Up Benefits to Injured Workers in Pennsylvania*, PITTSBURGH POST-GAZETTE, June 27, 2017, available at <http://www.post-gazette.com/business/career->

workplace/2017/06/27/workers-compensation-law-pennsylvania-supreme-court-ruling/stories/201706270032.

122 Joyce Famakinwa, *Court Ruling Expected to Drive Up Pennsylvania Com Claim Costs*, *Bus. Ins.*, Aug. 23, 2017, available at <http://www.businessinsurance.com/article/00010101/NEWS08/912315348/Court-ruling-expected-to-drive-up-Pennsylvania-comp-claim-costs>.



