2018 Civil Justice Update

by Mark A. Behrens & Christopher E. Appel

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This paper reviews key civil justice issues and reforms in 2018. Part I focuses on broad trends, Part II provides an overview of important state level reforms adopted in 2018, and Part III highlights key court cases that addressed the constitutionality of state civil justice reforms.

I. Legal Reform Trends in 2018

A number of states enacted reforms on issues that have been trending in recent years: asbestos litigation reform to prevent strategic bankruptcy trust claim filings by asbestos plaintiffs' lawyers; alignment of state court discovery rules with the 2015 amendments to the Federal Rules of Civil Procedure; Transparency in Private Attorney Contracts (TiPAC); venue reform; limits on appeal bonds; and codification of common law duties owed by land possessors to trespassers. Looking ahead, legislators in some states will likely seek to preempt state courts from adopting a novel theory known as "innovator liability." Plaintiff attorneys utilize this theory to try to hold manufacturers of branded drugs liable for warnings-based claims brought by users of competitors' copycat generic drugs. The plaintiffs' bar is also working to chip away at pre-dispute arbitration agreements and sealed settlements, especially with regard to sexual harassment and sexual assault claims.

A. Defense-Oriented Issues

1. Asbestos Trust Transparency

Originally, and for many years, the primary defendants in asbestos cases were companies that mined asbestos or manufactured friable, amphibole-containing thermal insulation. Mass claims pressured "most of the lead defendants and scores of other companies" into bankruptcy, including virtually all manufacturers of asbestos-containing thermal insulation, such as Johns-Manville Corp.[1] In bankruptcy, these companies created trusts that collectively hold billions of dollars to pay asbestos claimants injured by exposure to their products.[2]

Plaintiffs typically obtain compensation both "from the trusts and through a tort case."[3] 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."[4] Many of the today's asbestos defendants are formerly peripheral or new defendants associated with chrysotile-containing products "such as gaskets, pumps, automotive friction products, and residential construction products."[5]

By delaying the filing of trust claims until after an asbestos-related personal injury case settles or is tried to a verdict, plaintiffs' counsel can suppress evidence of a plaintiff's trust-related exposures and thwart efforts by solvent defendants to apportion fault to bankrupt entities or obtain set-offs, resulting in "double dipping" by plaintiffs.[6] Further, some plaintiffs have alleged exposures in tort cases that are inconsistent with claims later submitted to asbestos trusts.[7]

These concerns came to the fore in Garlock's bankruptcy.[8] After most asbestos-containing thermal insulation manufacturers filed for bankruptcy, Garlock faced challenges defending itself because "evidence of plaintiffs' exposure to other asbestos products often disappeared."[9] This was the 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)."[10] The bankruptcy judge gave several specific examples of plaintiffs and their attorneys withholding exposure evidence from Garlock.[11]

Since the *Garlock* decision was issued, numerous reports have confirmed that "[w]e are now past the time when [the abuses described in *Garlock*] can be referred to as mere anomalies."[12] For instance, a 2015 study of almost 1,850 mesothelioma lawsuits resolved by industrial product manufacturer Crane Co. from 2007

1 Steven J. Carroll et al., *Asbestos Litigation* 67 (RAND Corp. 2005).

2 *See* S. Todd Brown, *How Long Is Forever This Time? The Broken Promise of Bankruptcy Trusts*, 61 Buff. L. Rev. 537, 537 (2013) ("Section 524(g) of the Bankruptcy Code authorizes the entry of an injunction that channels all of a debtor's asbestos-related liabilities to a bankruptcy trust, which is established by the debtor to pay all valid current and future asbestos claims."); U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011) (60 asbestos trusts collectively had over $36.8 billion in assets in 2011).

3 Lloyd Dixon & Geoffrey McGovern, *Bankruptcy's Effect on Product Identification in Asbestos Personal Injury Cases* iii (RAND Corp. 2015).

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

5 Marc C. Scarcella et al., *The Philadelphia Story: Asbestos Litigation, Bankruptcy Trusts and Changes in Exposure Allegations From 1991–2010*, 27 Mealey's Litig. Rep.: Asb., Oct. 10, 2012, at 1, 1. Chrysotile is "far less toxic than other forms of asbestos." *In re Garlock*, 504 B.R. at 75.

6 *See* Editorial, *The Double-Dipping Legal Scam*, Wall St. J., Dec. 25, 2014, at A12.

7 *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); Daniel J. Ryan & John J. Hare, *Uncloaking Bankruptcy Trust Filings in Asbestos Litigation: A Survey of Solutions to the Types of Conduct Exposed in Garlock's Bankruptcy*, 15 Mealey's Asb. Bankr. Rep. 1, 2 (Aug. 2015).

8 *See* Mt. McKinley Ins. Co. v. Pittsburgh Corning Corp., 2015 WL 4773425, at *5 (W.D. Pa. Aug. 12, 2015) ("The evidence uncovered in the *Garlock* case arguably demonstrates that asbestos plaintiffs' law firms acted fraudulently or at least unethically in pursuing asbestos claims in the tort system and the asbestos trust system.").

9 *In re Garlock,* 504 B.R. at 73.

10 *Id.* at 84.

11 *Id.* at 84-85.

12 Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial. Advoc. 479, 488 (2014).

through 2011 found a "similar pattern of systematic suppression of trust disclosures [as] was documented in the Garlock bankruptcy."[13] In cases where Crane Co. was a codefendant with Garlock, 80% of trust claim forms or related exposures "were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings."[14] Most recently, the United States Department of Justice has said that secrecy regarding trust filings has made it "nearly impossible to detect when plaintiffs are seeking recovery based on factual representations that may be incompatible with other representations previously made in other litigation or before other trusts."[15]

State legislatures are rejecting such secrecy and providing asbestos defendants with greater access to asbestos bankruptcy trust claim submissions by plaintiffs.[16] These materials contain important exposure history information, giving tort defendants a tool to identify fraudulent or exaggerated exposure claims and establish that trust-related exposures were partly or entirely responsible for the plaintiff's harm. In 2018, Kansas, Michigan, and North Carolina enacted laws to require pre-trial filing and disclosure of asbestos bankruptcy trust claims.[17] Fifteen states now have such asbestos bankruptcy trust transparency laws.[18]

In addition, the Department of Justice is taking unprecedented steps to combat the "problematic lack of transparency in the operation and oversight of asbestos trusts."[19] The Department's actions follow a November 2017 letter to the United States Attorney General by twenty state attorneys general describing problems with the asbestos trust system and need for federal intervention to "ensure that no fraud is being committed."[20] In the fall of 2018, the Department opposed the creation of two trusts that lack provisions to prevent "fraud, mismanagement, or abuse"[21] and appear to "contain many of the same attorney-friendly provisions and weak safeguards that have enabled fraud and abuse in past asbestos bankruptcy cases."[22] In addition, the Department is challenging the appointment of a longtime future claimants' representative from serving in that capacity in one of the bankruptcies.[23] The Department argues that the lawyer is too conflicted to serve as an independent fiduciary.[24] Further, the Department sent civil investigative demands to asbestos trusts to investigate "whether the Medicare Program

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.: Asb. 1, 1 (Nov. 4, 2015).

14 *Id.* Other recent studies have documented delays in trust claim filings by plaintiffs and additional instances of "inconsistent claiming behavior and allegations between the tort and trust systems" by plaintiffs. Peter Kelso & Marc Scarcella, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims,* U.S. Chamber Inst. for Legal Reform, at 9 (2015); *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 (2016); 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, at 3 (2017).

15 Statement of Interest on Behalf of the United States of America Regarding Plans of Reorganization for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., at 8, *In re Kaiser Gypsum Co., Inc.*, No 16-31602 (JCW), (Bankr. W.D.N.C. Sept 13, 2018).

16 *See* Mark A. Behrens, *Asbestos Trust Transparency*, 87 Fordham L. Rev. 107 (2018).

17 *See* Kan. Stat. Ann. §§ 60-4912–.4918; Mich. Code Ann. § 600.3010–.3016; N.C. Gen. Stat. §§ 1A-1, Rule 26; 8C-1, Rule 415; and 1-75.12

18 *See* Ariz. Rev. Stat. § 12-782; Iowa Code §§ 686A.1–.9; Kan. Stat. Ann. §§ 60-4912–.4918; Mich. Code Ann. § 600.3010–.3016; Miss. Code §§ 11-67-1 to -15; N.C. Gen. Stat. §§ 1A-1, Rule 26; 8C-1, Rule 415; and 1-75.12; N.D. Cent. Code §§ 32-46.1-01 to -05; Ohio Rev. Code Ann. §§ 2307.951–.954; Okla. Stat. tit. 76, §§ 81–89; S.D. Codified Laws §§ 21-66-1 to -11; Tenn. Code §§ 29-34-601 to -609; Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051–.058; Utah Code §§ 78B-6-2001 to -2010; W. Va. Code §§ 55-7F-1 to -11; Wis. Stat. § 802.025.

19 Letters from Hon. Jesse Panuccio, Acting Associate Attorney General of the United States, to Attorneys General of Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin (Sept. 13, 2018); *see also* Mark A. Behrens & William F. Northrip, *U.S. Department of Justice Takes on Asbestos Trust Fraud, Abuse*, 27:15 Legal Opinion Letter (Wash. Legal Found. Oct. 19, 2018).

20 Letter from Attorneys General of Alabama, Arizona, Arkansas, Georgia, Idaho, Kansas, Louisiana, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wisconsin to Hon. Jefferson B. Sessions, III, United States Attorney General (Nov. 6, 2017), at 1. The Washington Legal Foundation, among others, also called on the Department to act. *See* Glenn G. Lammi, *Cleaning Up the Asbestos Litigation Mess: A Role for the Department of Justice?*, Forbes.com, Apr. 2, 2018.

21 Statement of Interest on Behalf of the United States of America Regarding Plans of Reorganization for Kaiser Gypsum Company, Inc. and Hanson Permanente Cement, Inc., at 8, *In re* Kaiser Gypsum Co., Inc., No 16-31602 (JCW), (Bankr. W.D.N.C. Sept 13, 2018). This filing is believed to be the Department's first-ever Statement of Interest in an asbestos-related bankruptcy proceeding.

22 Objection of the United States Trustee to the Disclosure Statement for the Prenegotiated Plan of Reorganization for Duro Dyne National Corp., at 3, *In re* Duro Dyne Nat'l Corp., No 18-27963 (MBK), (Bankr. D.N.J. Oct. 15, 2018). The bankruptcy court judge subsequently approved an amended disclosure statement and set a February 8, 2019, deadline for any objections to confirmation of the plan of reorganization or proposed modifications to the plan. *See* Amended Order (I) Approving Second Amended Disclosure Statement as Providing Adequate Information Within the Meaning of Section 1125(A) of the Bankruptcy Code; (II) Establishing Procedures for Solicitation and Tabulation of Votes on Amended Plan of Reorganization; (III) Approving the Form of Ballots; (IV) Scheduling a Hearing on Confirmation of the Plan; (V) Approving the Form, Manner and Scope of Mailed and Published Notices of the Time Fixed to (A) Vote on the Amended Plan, and (B) File Objections to Confirmation of the Amended Plan; and (VI) Granting Related Relief, *In re* Duro Dyne Nat'l Corp., No 18-27963 (MBK), (Bankr. D.N.J. Nov. 20, 2018).

23 *See* Objection of the United States Trustee to the Debtors' Motion for an Order Appointing Lawrence Fitzpatrick as Representative for Future Asbestos Claimants, *In re* Duro Dyne Nat'l Corp., No 18-27963 (MBK), (Bankr. D.N.J. Oct. 1, 2018); *Judge Rejects U.S. Trustee's Objections, Names Future Claimants' Representative*, 18 Mealey's Asb. Bankr. Rep. 10 (Oct. 2018); *U.S. Trustee Appeals Appointment of FCR for Duro Dyne Chapter 11*, 2018-4762 Mealey's Daily News Update 8 (Nov. 5, 2018); Notice of Appeal and Statement of Election, *In re* Duro Dyne Nat'l Corp., No 18-27963 (MBK), (Bankr. D.N.J. Oct. 31, 2018).

24 *See* Objection of the United States Trustee, *supra* note 23.

has been reimbursed in accordance with the Medicare Secondary Payer Act" with regard to payments made by asbestos trusts.[25]

2. 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 restrict the scope of discovery in civil litigation. Important changes were made regarding obligations to preserve 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 the 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)).[26]

In 2017, Oklahoma became the first state to adopt legislation to bring state court civil discovery into closer conformity with the federal rules.[27] In 2018, Wisconsin enacted similar reforms.[28]

3. 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.[29] A new era of "regulation through litigation" was born.[30] The tobacco litigation model has inspired state and local governments to achieve policy through litigation against many other industries. Clinton Administration Labor Secretary Robert Reich said, "This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy."[31] Former Alabama Attorney General William Pryor, Jr., now a judge on the U.S. Court of Appeals for the Eleventh Circuit, once described government-sponsored lawsuits as "the greatest threat to the rule of law today."[32]

Besides the inherent problems with this type of litigation, fee agreements between public officials and private contingency fee lawyers for representation in these lawsuits 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 Contracts (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 recovered, and require that government attorneys control the litigation. In 2018, Kentucky and Missouri enacted TiPAC laws.[33]

4. Appeal Bond Limits

A supersedeas bond, popularly 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] 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

25 *See* Alex Wolf, *Asbestos Trusts Come Under DOJ Civil Investigation*, Law360, Oct. 5, 2018.

26 Other changes that took effect at the same time (1) require parties, as well as courts, to cooperate and employ the Rules 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 of documents prior to a Rule 26(f) conference (Rule 26(d)(2)) and require specificity in objections to requests for production (Rule 34(b)(2)).

27 *See* Okla. H.B. 1570 (Reg. Sess. 2017) (codified at 12 Okla. Stat. §§ 3225-3226, § 3234, § 3237).

28 *See* Wis. A.B. 773 (Reg. Sess. 2017-2018) (Act 235).

29 *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).

30 Robert B. Reich, Editorial, *Regulation Is Out, Litigation Is In*, USA Today, Feb. 11, 1999, at A15 ("The era of big government may be over, but the era of regulation through litigation has just begun.").

31 Robert B. Reich, Editorial, *Don't Democrats Believe in Democracy?,* Wall St. J., Jan. 12, 2000, at A22.

32 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)).

33 *See* Ky. H.B. 198 (Reg. Sess. 2018) (codified at Ky. Rev. Stat. Ann. § 45A.717); Mo. H.B. 1531 (Reg. Sess. 2018) (codified at Mo. Rev. Stat. §§ 34.378, 507.060).

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.

may be forced to 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 2018, Kansas became the latest state to reform its appeal bond law.[37]

5. Codification of Duties Owed by Land Possessors to Trespassers

Traditionally, land possessors owe no duty of care to trespassers except in narrow and well-defined circumstances.[38] In contrast, the Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm requires possessors to exercise reasonable care with respect to *all* entrants on their land,[39] except for "flagrant trespassers."[40] The Restatement's approach dramatically expands the ability of trespassers to sue landowners. In recent years, nearly half of states have enacted laws to preempt courts from adopting the Restatement Third's approach. Idaho joined the list in 2018.[41]

6. Third-Party Litigation Funding Disclosure

Investors are pumping unprecedented sums of money into litigation finance, lured by the prospect of payoffs untied to economic or market conditions.[42] The litigation finance industry has transformed from "a fringe investment community into a $5 billion market in the U.S. in less than two decades."[43] The defense bar, business organizations, and civil justice reform groups are seeking an amendment to the Federal Rules of Civil Procedure to "require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court."[44] The groups are concerned that outside legal investment encourages speculative litigation, frustrates settlement, raises costs for defendants, and creates potential conflicts.[45]

There is growing support for disclosure of third-party litigation funding arrangements. The issue was discussed in an October 2018 meeting of the federal judiciary's Advisory Committee on Civil Rules that focused on possible rules for federal multidistrict litigation.[46] In May 2018, U.S. District Judge Dan Aaron Polster entered a widely discussed order in the National Prescription Opiate Litigation requiring in camera disclosures of third-party funders.[47] In 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."[48] 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."[49] At the state level, in 2018, Wisconsin became the first state to require disclosure of third-party litigation funding arrangements.[50]

7. Innovator Liability Reform

Plaintiffs who have taken generic drugs are asserting that because federal law requires the generic version to have the same warning label as its brand-name counterpart, the branded drug company should be held liable for harms stemming from use of a competitor's generic copycat. Plaintiffs are targeting branded drug companies—rather than the companies that actually made the generic drugs ingested—because federal law generally preempts state law warnings-based claims against generic drug manufacturers.[51] Failure-to-warn claims against innovator branded drug companies generally are not preempted.[52] This incongruity reflects the different regulatory regimes that govern brand-name and generic drugs.

Plaintiffs' lawyers are alleging a novel "innovator liability" theory to try to shift liability to branded drug manufacturers for harms caused by generic drugs ingested by plaintiffs. Their

One law professor observed, "if multi-billion dollar judgments had been 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 tobacco Master Settlement Agreement signatories. Also, some appeal bond reforms apply to total awards, while others apply only to punitive damages. *See* American Tort Reform Association, *Appeal Bond Reform*, http://www.atra.org/issues/appeal-bond-reform.

37 *See* Kan. S.B. 199 (Reg. Sess. 2018) (codified at Kan. Stat. Ann. § 60-2103).

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

39 *See* Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm § 51 (2012).

40 *See id.* at § 52 (2012).

41 *See* Idaho H.B. 658 (Reg. Sess. 2018) (codified at Idaho Code §§ 6-3101 through 6-3103).

42 *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).

43 Natalie Rodriguez, *Going Mainstream: Has Litigation Finance Shed its Stigma?*, Law360, Dec. 12, 2017.

44 *See* Letter from U.S. Chamber Institute for Legal Reform et al. to Rebecca Womeldorf, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, June 1, 2017; *see also* Mary Novacheck, Editorial, *Time for Sunshine on 3rd-Party Litigation Funding*, Law360, July 23, 2018.

45 *See* David H. Levitt & Francis H. Brown, III, *Third Party Litigation Funding: Civil Justice and the Need for Transparency*, DRI-The Voice of the Defense Bar (2018).

46 *See* Andrew Strickler, *Federal Litigation Funding Rule Generates Support, Confusion*, Law360, Nov. 1, 2018.

47 *See In re* Nat'l Prescription Opiate Litig., 2018 WL 2127807 (N.D. Ohio May 7, 2018).

48 Tripp Haston, Editorial, *The Missing Key to 3rd-Party Litigation Funding*, Law360, Feb. 7, 2017.

49 Standing Order for all Judges of the Northern District of California, *Contents of Joint Case Management Statement*, § 19.

50 *See* Wis. A.B. 773 (Reg. Sess. 2018) (codified at Wis. Stat. § 804.01(2)(bg)).

51 *See* PLIVA v. Mensing, 564 U.S. 604 (2011); Mutual Pharm. Co. v. Bartlett, 570 U.S. 472 (2013).

52 *See* Wyeth v. Levine, 555 U.S. 555 (2009).

goal is to find a deep pocket to compensate someone alleging an injury, without regard to whether the defendant participated in the stream of commerce of the product used by the plaintiff. In this way, the theory forces branded drug manufacturers to act as insurers of their generic competitors' products.

Most courts presented with the issue have rejected innovator liability. The Iowa Supreme Court called innovator liability "[d]eep pocket jurisprudence" that is "law without principle" when it rejected the theory.[53] West Virginia's highest court said that "[r]equiring the defendant in a products liability case to be either the manufacturer or the seller of the product is the majority rule in this country."[54]

A few state supreme courts have adopted innovator liability. The Alabama Supreme Court adopted the theory in 2014, but the ruling was overturned by the legislature the following year.[55] Alabama law now makes clear that a manufacturer can be subject to liability only for its own product, including when its "design is copied or otherwise used by [another] manufacturer without . . . express authorization . . . even if use of the design is foreseeable."[56] The California Supreme Court adopted innovator liability in 2017.[57] In 2018, the Massachusetts high court adopted innovator liability but limited it to instances where a branded drug manufacturer acts "in reckless disregard of an unreasonable risk of death or grave bodily injury."[58]

State legislatures, concerned that shifting liability to branded drug companies will stifle drug innovation and lead to increased prices, are poised to respond by passing laws to preempt courts from adopting innovator liability. In 2018, the American Legislative Exchange Council (ALEC) adopted a model policy on the issue using language from the Alabama law.[59]

B. Plaintiff-Oriented Issues

The plaintiffs' bar supports many types of liability-expanding legislation. Below, we describe a couple of issues that are a high priority for the American Association for Justice (AAJ).

1. Pre-Dispute Arbitration Agreements

Barring or restricting the use of pre-dispute arbitration agreements is a top priority for the AAJ.[60] A progressive think-tank estimates that more than half of the country's private sector nonunion employees (some 60 million workers) are subject to binding arbitration procedures, and that nearly 25 million American workers (23% of the private-sector nonunion workforce) are subject to class action waivers.[61]

Abolition of mandatory arbitration for sexual harassment claims is the present focus of the plaintiffs' bar.[62] Proponents hope that their efforts will gain traction against the backdrop of the recent #MeToo movement, aided by the advocacy of former Fox News host Gretchen Carlson,[63] record numbers of female policymakers, and decisions by high-profile tech companies (including Google, Facebook, Apple, Microsoft, Uber, and Lyft) to give employees the option of taking sexual harassment claims to court.[64] Plaintiff interests see the end of arbitration for sexual harassment in the workplace as chipping away at binding arbitration in all kinds of employee disputes.[65] One plaintiffs' attorney has said, "I think it's the pebble that starts the avalanche."[66]

In 2018, the plaintiffs' bar was dealt a blow when California Governor Jerry Brown vetoed a bill that would have banned pre-dispute arbitration agreements in employment contracts.[67] In 2019, there will be more bills at the state level seeking to prohibit mandatory arbitration of workplace sexual harassment claims. At the federal level, a priority of the House Judiciary Committee's new Democrat majority will be to narrow the Federal Arbitration Act to "reestablish the rights of individual citizens to band together and file class actions."[68]

2. Protective Orders and Sealed Settlements

Since the early 1990s, the AAJ has supported federal legislation to limit the use of protective orders and sealed settlements in civil cases.[69] As with mandatory arbitration, plaintiff interests are working to chip away at confidentiality agreements by prohibiting them in cases of workplace sexual assault or sexual harassment.

In 2018, Washington State enacted a law prohibiting employers from requiring employees to sign non-disclosure agreements relating to workplace sexual assault or sexual

53 Huck v. Wyeth, Inc., 850 N.W.2d 353, 380 (Iowa 2014).

54 McNair v. Johnson & Johnson, 818 S.E.2d 852, 860 (W. Va. 2018).

55 *See* Wyeth v. Weeks, 159 So. 3d 649 (Ala. 2014), *superseded by statute*, Ala. Code § 6-5-530.

56 Ala. Code § 6-5-530.

57 *See* T.H. v. Novartis Pharm. Corp., 407 P.3d 18 (Cal. 2017).

58 Rafferty v. Merck & Co., 92 N.E.3d 1205, 1219 (Mass. 2018).

59 *See* Copycat Product Act, Am. Legis. Exch. Council, https://www.alec.org/model-policy/copycat-product-act/.

60 *See* Elise R. Sanguinetti, *President's Page,* TRIAL, Nov. 2018, at 6; *see also* Menaka N. Fernando & Jennifer S. Schwartz, *Chipping Away at Workers' Rights: Tackling Forced Arbitration,* TRIAL, Sept. 2018, at 26.

61 *See* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol'y Inst. 1-2 (Sept. 27, 2017).

62 *See* Kate Halloran, *Stand Up to Forced Arbitration: Q&A With Gretchen Carlson and Nancy Erika Smith*, TRIAL, Nov. 2018, at 20.

63 *See* Elise R. Sanguinetti, *President's Page,* TRIAL, Nov. 2018, at 6; *see also* Fernando & Schwartz, *supra* note 60, at 26; Halloran, *supra* note 62, at 20.

64 *See, e.g.*, Daisuke Wakabayashi & Jessica Silver-Greenberg, *Facebook to Drop Forced Arbitration in Harassment Cases*, N.Y. Times, Nov. 9, 2018.

65 *Id.*

66 *Id.*

67 *See* Cal. A.B. 3080 (Reg. Sess. 2017-2018).

68 *See* Mandy Brown, *Q&A: Speaking Up, Standing Out*, TRIAL, Oct. 2018, at 30 (interview with Rep. Jerrold Nadler, the 2018 ranking member on the committee).

69 *See* Lori E. Andrus, *Rein In Secret Settlements,* TRIAL, Oct. 2018, at 40; April Strahan et al., *Break Through Protective Orders*, TRIAL, Oct. 2018, at 20.

harassment as a condition of employment.[70] California passed a law prohibiting provisions in settlement agreements that prohibit disclosure of facts relating to claims of sexual assault, sexual harassment, or harassment or discrimination based on sex.[71]

At the federal level, incoming House Judiciary Committee Chairman Jerrold Nadler has introduced "Sunshine in Litigation Act" legislation to sharply limit settlements in federal civil cases that include nondisclosure agreements.[72]

II. 2018 Civil Justice Reforms

A. Idaho

Idaho codified the traditional common law rule that land possessors owe only limited duties to trespassers.[73] Idaho's 2018 law states that land possessors owe no duty of care to trespassers except to refrain from injuring them by intentional or willful and wanton acts. Idaho preserved the common law doctrine of attractive nuisance for injuries to child trespassers. Idaho is the twenty-fourth state since 2011 to enact a law to preempt courts from adopting the radical duty standard for land possessors found in the Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm.

B. Kansas

Kansas enacted asbestos bankruptcy trust claim transparency legislation.[74] No later than thirty days after the date the court establishes for the completion of all fact discovery, plaintiffs in asbestos cases shall conduct an investigation and file all asbestos trust claims available to them, and they shall produce copies of the trust claims materials to the parties.[75] If the defendant believes the plaintiff can file additional trust claims, the defendant may move the court to stay the action until the plaintiff files those trust claims.[76] The law further provides for the admissibility of asbestos trust claims materials.[77] If a plaintiff files an asbestos trust claim post-judgment and that trust was in existence at the time the plaintiff obtained the judgment, the trial court may reopen the judgment within one year and adjust the judgment by the amount of any subsequent asbestos trust payments received by the plaintiff.[78]

In addition, Kansas established a $25 million appeal bond cap.[79] The appeal bond legislation also provides that a small business hit with a judgment that exceeds $2.5 million shall receive a lower appeal bond cap—$1 million plus 25% of any amount in excess of $1 million, up to $25 million—unless the appellee proves that the appellant is dissipating or diverting assets.

C. Kentucky

Kentucky enacted TiPAC legislation that requires the head of a state agency seeking to enter a contingency fee agreement with private attorneys to provide a written assessment of the need and propriety of such an agreement before entering it, and to make the contract for legal services available on a public website.[80] The legislation also expressly limits the amount of a private attorney's contingency fee based on the state's recovery in a legal action and requires a written accounting of expenses.[81] Further, the state agency that entered the contract must attend all settlement conferences, be personally involved in the litigation, and retain decision-making power regarding settlement of the matter.[82]

D. Michigan

Michigan enacted asbestos bankruptcy trust claim transparency legislation.[83] "Not later than 180 days before the initial date set for the trial of an asbestos action," a plaintiff must provide the court and parties with a sworn statement indicating that all asbestos trusts claims that can be made have been completed and filed.[84] The plaintiff must also provide the parties with copies of all trust claims materials.[85] If the defendant believes the plaintiff can file additional trust claims, the defendant may move the court for an order requiring the plaintiff to file the additional trust claims.[86] The law further provides for the admissibility of asbestos trust claims materials.[87] If a plaintiff files an asbestos trust claim post-judgment and that trust was in existence at the time the plaintiff obtained the judgment, the trial court may reopen the judgment within one year and adjust the judgment by the amount of any subsequent asbestos trust payments received by the plaintiff.[88]

E. Missouri

Missouri amended its TiPAC law, originally adopted in 2011, to establish clear limits on the amount private attorneys

70 *See* Wash. S.B. 5996 (Reg. Sess. 2018) (codified at Wash. Rev. Stat. § 49.44.210).

71 *See* Cal. S.B. 820 (Reg. Sess. 2017-2018).

72 *See* H.R. 1053, 115th Cong., 1st Sess. (introduced Feb. 14, 2017); *see* Brown, *supra* note 68, at 30 (interview with Rep. Jerrold Nadler).

73 *See* Idaho H.B. 658 (Reg. Sess. 2018) (codified at Idaho Code §§ 6-3101 through 6-3103).

74 *See* Kan. H.B. 2457 (Reg. Sess. 2018) (codified at Kan. Stat. Ann. §§ 60-4912–4918).

75 *See id.* (codified at Kan. Stat. Ann. § 60-4914).

76 *See id.* (codified at Kan. Stat. Ann. § 60-4915).

77 *See id.* (codified at Kan. Stat. Ann. § 60-4916).

78 *See id.* (codified at Kan. Stat. Ann. § 60-4917).

79 *See* Kan. S.B. 199 (Reg. Sess. 2018) (codified at Kan. Stat. Ann. § 60-2103).

80 *See* Ky. H.B. 198 (Reg. Sess. 2018) (codified at Ky. Rev. Stat. Ann. § 45A.717).

81 *See id.*

82 *See id.*

83 *See* Mich. H.B. 5456 (Reg. Sess. 2018) (codified at Mich. Code Ann. §§ 600.3010–.3016).

84 *See id.* (codified at Mich. Code Ann. § 600.3012).

85 *See id.*

86 *See id.* (codified at Mich. Code Ann. § 600.3013).

87 *See id.* (codified at Mich. Code Ann. § 600.3014).

88 *See id.* (codified at Mich. Code Ann. § 600.3015).

may recover under a contingency fee agreement with the state.[89] The legislation limits the contingency fee based on the amount of the state's recovery, excluding any amount attributable to a fine or civil penalty.

Missouri also enacted Business Premises Safety Act legislation.[90] The Act provides that a person owning or controlling an interest in real property is not subject to liability for the injury or death of a trespasser who is substantially impaired by alcohol or the illegal influence of a controlled substance unless the land possessor's "willful and wanton misconduct" is the proximate cause of the harm.[91] The Act also states that a business is only responsible for criminal or harmful acts on its property when it knows or has reason to know that such acts are likely to be committed in a particular area of the premises and sufficient time exists to prevent the crime or injury.[92] The law provides businesses with an affirmative defense for injuries sustained by a person in connection with criminal acts or harmful acts committed by another person on the premises where the business can show it implemented reasonable security measures, the incident occurred when the business was closed to the public, or the claimant was a trespasser or attempting to commit or engaged in a felony.[93]

F. North Carolina

North Carolina enacted asbestos bankruptcy trust claim transparency legislation. Within thirty days of filing a civil action for asbestos-related personal injuries, a plaintiff must provide the parties with "a sworn statement indicating that an investigation of all bankruptcy trust claims has been conducted and that all bankruptcy trust claims that can be made by the plaintiff have been filed."[94] The plaintiff must also produce copies of all trust claims materials.[95] If a defendant has a reasonable belief that the plaintiff can file additional asbestos trust claims, the defendant may move the court for an order to stay the action until the plaintiff files the additional trust claims.[96] The law also provides for the admissibility of asbestos trust claims materials.[97]

G. Ohio

American Law Institute members voted at the ALI's 2018 Annual Meeting to approve a proposed final draft of a new Restatement focusing on liability insurance.[98] The project has been controversial.[99] The ALI addressed some significant concerns with the project, but insurers do not believe the final work product is a faithful restatement of existing law. In 2018, Ohio enacted a law stating that the Restatement does not constitute the public policy of the state.[100]

H. Vermont

Vermont Governor Phil Scott vetoed bills that would have significantly expanded civil liability.[101] One of the bills he vetoed would have created a broad new cause of action for asymptomatic plaintiffs to sue large users of toxic substances for medical monitoring.[102] As explained in Governor Scott's veto statement, "any individual exposed to a chemical—who may have an indistinguishable change in risk compared to the general public—would be able to receive unlimited medical monitoring, without any proof that a medical condition is even likely to develop due to the exposure."[103] The other bill he vetoed would have voided liability waivers and other "standard-form contract" terms.[104] The legislation would have established a presumption of unconscionability with respect to contracts that limit an individual's remedies or ability to pursue a claim and authorized statutory penalties against drafting parties for contract terms that are found to be unconscionable.[105]

I. West Virginia

West Virginia enacted venue reform legislation to curb forum-shopping abuse.[106] Under the new law, a nonresident plaintiff may not bring a legal action in the state unless all or a substantial part of the acts or omissions giving rise to the claim occurred in West Virginia. The venue law provides an exception in situations where a nonresident's claim cannot proceed where the action arose because the local court cannot obtain jurisdiction over the defendant, unless the action is time-barred there. In addition, the law provides that in multiple plaintiff cases, each plaintiff must independently establish proper venue.

89 *See* Mo. H.B. 1531 (Reg. Sess. 2018) (codified at Mo. Rev. Stat. § 34.378).

90 *See* Mo. S.B. 608 (Reg. Sess. 2018) (codified at Mo. Rev. Stat. §§ 537.349, 537.785, 537.787).

91 *See id.* (codified at Mo. Rev. Stat. § 537.349).

92 *See id.* (codified at Mo. Rev. Stat. § 537.787(1)).

93 *See id.* (codified at Mo. Rev. Stat. § 537.787(2)).

94 N.C. S.B. 470 (Reg. Sess. 2018) (codified at N.C. Gen. Stat. § 1A-1, Rule 26(b)(2a)).

95 *See id.*

96 *See id.* (codified at N.C. Gen. Stat. §§ 1A-1, Rule 26; 1-75.12).

97 *See id.* (codified at N.C. Gen. Stat. § 8C-1, Rule 415).

98 *See* Restatement of the Law, Liability Insurance (forthcoming).

99 *See* W.J. Kennedy, *'Wacko': Insurance Law Project Puts Spotlight on American Law Institute's Direction*, Forbes.com, Aug. 1, 2017; *see also* Tiger Joyce, Editorial, *Tort Lawyers Take Over the American Law Institute*, Wall St. J., June 29, 2017.

100 *See* Ohio S.B. 239 (Reg. Sess. 2018) (codified at Ohio Rev. Code § 3901.82).

101 *See* April McCullum, *Gov. Scott Vetoes Four Bills, Including $15 Minimum Wage*, Burlington Free Press, May 22, 2018.

102 Vt. S. 197 (Reg. Sess. 2018).

103 *Governor Scott's Veto Message for S. 197*, Office of Governor Phil Scott, May 23, 2018, https://governor.vermont.gov/governor-scotts-blog/governor-scotts-veto-message-s197.

104 *See* Vt. S. 105 (Reg. Sess. 2018).

105 In October 2018, Governor Scott received the U.S. Chamber Institute for Legal Reform's State Leadership Award "in appreciation of his key role in improving the business climate of Vermont by vetoing liability-expanding bills during the 2018 legislative session." *U.S. Chamber Honors Advocates for Legal Reform*, BusinessWire, Oct. 24, 2018.

106 *See* W. Va. H.B. 4013 (Reg. Sess. 2018) (codified at W. Va. Code §§ 6-9A-6, 14-2-2a, 56-1-1).

J. Wisconsin

Wisconsin enacted a number of civil litigation reforms as part of a comprehensive bill addressing topics such as discovery procedures, third-party litigation funding, and class actions.[107] The law more closely aligns Wisconsin's discovery code with the current Federal Rules of Civil Procedure.[108] Now, a party may obtain discovery of any non-privileged information that 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."[109] 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.[110]

The Wisconsin law also provides that a party is not required to provide discovery of certain categories of electronically stored information (ESI) absent a showing of "substantial need and good cause."[111] These categories include data that cannot be retrieved without substantial additional programming or transformation into another form, backup data, legacy data on obsolete systems, and other data not available in the ordinary course of business or not reasonably accessible because of undue burden or cost.

In addition, the law limits parties to ten depositions, none of which may exceed seven hours in duration, and twenty-five interrogatories, including all subparts, unless otherwise stipulated or ordered by the court.[112] These provisions go beyond the 2015 amendments to the Federal Rules of Civil Procedure.

Wisconsin's new law is the first in the nation to require disclosure of any agreement in which a third-party funder receives a fee that is contingent on a recovery or settlement of the civil action.[113]

The new law also provides a right to interlocutory appeal of class certification decisions.[114] This right is significant because, as a practical matter, once a class action is certified, the combination of potentially enormous litigation costs and uncertainty of legal result typically forces a defendant to settle. By establishing a right to immediate appeal of class certification decisions, the new law is stronger than its federal rule companion and helps ensure that class certification decisions are correct.[115]

The law includes several other civil litigation reforms, including limitations on the use of discovery methods, reductions in the limitations period for bringing certain claims, and adjustment to the interest rate charged to insurers for overdue claims.

Wisconsin also enacted a separate law that prohibits an injured employee of a temporary help agency from filing a tort action against a temporary employer if the worker has a right to file a worker's compensation claim.[116] The law overturns a 2018 Wisconsin Court of Appeals decision which held that the estate of a deceased worker could assert a tort action against the worker's temporary employer instead of pursuing worker's compensation.[117]

III. Key Court Decisions

A. Decisions Upholding State Reforms

The Wisconsin Supreme Court overturned prior case law and upheld the constitutionality of the state's $750,000 cap on noneconomic damages in medical malpractice actions.[118] The court stated that the "legislature made a rational policy choice by limiting noneconomic damages."[119]

The Missouri Supreme Court reaffirmed the constitutionality of the state's affidavit of merit requirement for medical malpractice claims.[120] The court found that the affidavit of merit requirement does not violate the open courts, right to jury trial, or separation of powers provisions of the Missouri Constitution.

The North Dakota Supreme Court upheld the constitutionality of a statute limiting the tort liability of political subdivisions to $250,000 per person and $500,000 for injury to three or more persons during any single occurrence.[121] The court determined that the cap does not violate the open courts, right to jury trial, equal protection, or prohibition against special laws provisions of the North Dakota Constitution.

The Wisconsin Court of Appeals upheld the constitutionality of a statute of repose for improvements to real property as applied to asbestos-related personal injury claims.[122] The Kansas Court of Appeals ruled that a statute eliminating a cause of action for wrongful birth of a child does not violate the right to jury trial

107 *See* Wis. A.B. 773 (Reg. Sess. 2018).

108 *See* Wis. A.B. 773 (Reg. Sess. 2018) (codified at Wis. Stat. §§ 804.01, 804.045, 804.08, 804.09, 804.12).

109 *Id.* (codified at Wis. Stat. § 804.01(2)(a)).

110 *See id.* (codified at Wis. Stat. § 804.01(2)(am)(2)).

111 *Id.* (codified at Wis. Stat. § 804.01(2)(e)(1g)).

112 *See id.* (codified at Wis. Stat. §§ 804.045, 804.08(1)(am)).

113 *See* Wis. A.B. 773 (Reg. Sess. 2018) (codified at Wis. Stat. § 804.01(bg)).

114 *See* Wis. A.B. 773 (Reg. Sess. 2018) (codified at Wis. Stat. § 803.08(11)).

115 *Compare id.* ("An appellate court shall hear an appeal of an order granting or denying class action certification, or denying a motion to decertify a class action . . . ."); Fed. Rule Civ. Proc. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification . . . .").

116 *See* Wis. S.B. 781 (Reg. Sess. 2018) (codified at Wis. Stat. § 102.29) (Act 139).

117 *In re* Estate of Rivera, 908 N.W.2d 486 (Wis. Ct. App. 2018).

118 *See* Mayo v. Wisconsin Injured Patients & Families Comp. Fund, 914 N.W.2d 678 (Wis. 2018) (overruling Ferdon *ex rel.* Petrucelli v. Wisconsin Patients Comp. Fund, 701 N.W.2d 440 (Wis. 2005)).

119 *Id.* at 695.

120 *See* Hink v. Helfrich, 545 S.W.3d 335 (Mo. banc 2018) (reaffirming Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503 (Mo. banc 1991)).

121 *See* Larimore Pub. Sch. Dis. No. 44 v. Aamodt, 908 N.W.2d 442 (N.D. 2018).

122 *See* Mohn v. CBS Corp., 2018 WL 3747966 (Wis. Ct. App. Aug. 7, 2018) (applying Kohn v. Darlington Comm'ty Sch., 698 N.W.2d 794 (Wis. 2005)).

or right to remedy by due course of law provisions of the Kansas Constitution.[123]

B. Decisions Nullifying State Reforms or Reform-focused Rules

The Florida Supreme Court held that 2013 legislative amendments to the Florida Evidence Code incorporating the federal *Daubert*[124] standard for the admission of expert evidence represented an unconstitutional invasion of the court's rulemaking authority.[125] The court reaffirmed that "*Frye,*[126] not *Daubert*, is the appropriate test in Florida courts."[127] The court added that "*Frye* is inapplicable to the vast majority of cases because it applies only when experts render an opinion that is based upon new or novel scientific techniques."[128] In Florida, "medical causation testimony is not new or novel and is not subject to *Frye* analysis."[129]

Similarly, the Minnesota Supreme Court declined to adopt proposed amendments to the Minnesota Rules of Evidence that would have replaced the state's version of the *Frye* standard with a *Daubert*-like standard.[130] The court noted that it had declined to adopt *Daubert* in the past and saw no compelling reason to depart from that precedent.

The Kentucky Supreme Court held that the state's Medical Review Panel Act violated the open courts provision of the Kentucky Constitution.[131] The court's decision stands in contrast to what the majority of courts have decided: "We must acknowledge that the majority of our sister courts have upheld the constitutionality of statutes establishing medical review panels. But a minority of our sister courts have struck down the entirety or some provisions of medical review panel acts based on the same open-courts doctrine we apply to strike down [the law at issue] here."[132]

As of this writing, the constitutionality of a noneconomic damages cap is before the Oregon Supreme Court.[133] The North Dakota Supreme Court is reviewing the constitutionality of a limit on noneconomic damages in health care liability actions.[134] The New Mexico Supreme Court will decide whether the state's Medical Malpractice Act's damages cap, which allows a substantial but not unlimited recovery for nonmedical damages, in addition to uncapped medical expenses and related benefits, is constitutional.[135] The Kansas Supreme Court is reviewing the constitutionality of a limit on noneconomic loss in personal injury cases.[136]

IV. Conclusion

A number of states passed meaningful reforms in 2018. Wisconsin became the first state to adopt a mandatory disclosure requirement for third-party litigation financing agreements and the second state in as many years to adopt civil discovery reforms. Several states passed asbestos trust transparency legislation. The Florida Supreme Court further cemented its reputation as an activist court.

In 2019, the defense bar, civil justice reformers, and business groups will continue to press for reforms consistent with trending issues. The plaintiffs' bar and related organizations will press for liability-expanding reforms. The strongest push from the plaintiffs' bar will focus on eroding pre-dispute arbitration agreements and sealed settlements, especially with respect to sexual harassment in the workplace.

123 *See* Tillman v. Goodpasture, 424 P.3d 540 (Kan. Ct. App. 2018).

124 *See* Daubert v. Merrill Dow Pharms., 509 U.S. 579 (1993).

125 *See* DeLisle v. Crane Co., 2018 WL 5075302 (Fla. Oct. 15, 2018).

126 Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

127 *DeLisle*, 2018 WL 5075302, at *8. In 2017, the Florida Supreme Court refused to adopt the *Daubert* standard "to the extent it is procedural." *In re* Amendments to the Fla. Evid. Code, 210 So. 3d 1231, 1239 (Fla. 2017).

128 *DeLisle*, 2018 WL 5075302, at *8.

129 *Id.*

130 *See* Order Promulgating Amendments to the Rules of Evidence, ADM-8047 (Minn. Nov. 16, 2018) (considering various amendments to Minnesota Rules of Evidence but rejecting proposed amendment to Rule 702).

131 *See* Commonwealth of Ky. v. Claycomb, 2018 WL 5994975 (Ky. Nov. 15, 2018).

132 *Id.* at *11.

133 *See* Vasquez v. Double Press Mfg., Inc., 406 P.3d 225 (Or. Ct. App. 2017), *review allowed*, 415 P.3d 580 (Or. 2018).

134 *See* Condon v. St. Alexius Med. Ctr., No. 08-2014-CV-1904 (N.D. Dist. Ct., Burleigh Cty. Jan. 9, 2018), *review allowed* (N.D. July 30, 2018).

135 *See* Siebert v. Okun, No. A-1-CA-37286 (N.M. Ct. App.), *review allowed*, (N.M. Sept. 24, 2018).

136 *See* Hilburn v. Enerpipe, Ltd., 370 P.3d 428 (Kan. Ct. App. 2017), *review granted* (Kan. Aug. 24, 2017).