2014 Civil Justice Update

By Emily Kelchen

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Introduction

This paper will recap important legal developments in the civil justice movement that occurred in 2014. Part I focuses on broad trends, Part II provides an overview of new legislation, and Part III highlights court cases from across the country that either strike down previously adopted reforms or adopt novel legal theories of interest to reformers.

I. Trends in the Legal Reform Movement

A. Asbestos Litigation Continues

You can hardly turn on the television without hearing an advertisement for asbestos injury lawyers.[1] Although we are past the epidemiological high point for exposure cases, the asbestos lawsuit industry is booming.[2]

Plaintiffs can seek compensation from two different sources: bankruptcy trust funds set up to compensate victims of asbestos-related cancer, and still-viable companies who produced asbestos or asbestos-containing products in the past. It is the interplay between these bankruptcy trust funds and the court system that sparked one of the most important cases of 2014, *In re Garlock Sealing Technologies, LLC*.[3]

1. *In re Garlock Sealing Technologies, LLC*

Garlock Sealing Technologies has been a defendant in asbestos cases since the 1980s.[4] For many years Garlock was a co-defendant along with 20-50 other companies, but as those companies began to go bankrupt, evidence that plaintiffs had been exposed to any asbestos other than that contained in Garlock's products disappeared, and Garlock faced increasing legal costs.[5] In 2010, Garlock filed for bankruptcy and the court set out to determine what amount Garlock would need to set aside to compensate existing and future asbestos victims.[6]

In January 2014, after a lengthy evidentiary hearing, U.S. Bankruptcy Judge George Hodges ruled that $125 million would satisfy Garlock's current and future claimants.[7] This was almost one billion dollars less than what the plaintiffs' representatives requested.[8] The difference between the two amounts is attributable to the method used for calculating future claims. The plaintiffs' representatives wanted to base future liability on the outcomes of previous cases, but Judge Hodges determined that Garlock's settlement history should not be used as a measure of its future trust liability because "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock…"[9]

"This occurrence," Judge Hodges determined, "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)."[10]

For instance, in fifteen settled cases in which Garlock was permitted to have full discovery, "Garlock demonstrated that exposure evidence was withheld in *each and every one* of them."[11] Judge Hodges said that "it appear[ed] certain that more extensive discovery would show more extensive abuse."[12]

In response to the abuses discovered, Garlock has filed complaints against five plaintiffs' law firms and several of their principals, alleging conspiracy, fraud, and RICO claims.[13]

1 *See* Mass Tort Advertising Data, Silverstein Group, http://www.silversteingroup.net/mass-tort-advertising-data.html (According to The Silverstein Group, a communication firm that tracks mass tort advertising, plaintiffs' lawyers spent over $100 million on television ads in 2013.).

2 *Mesothelioma Incidence*, The Mesothelioma Center, http://www.asbestos.com/mesothelioma/incidence.php.

3 504 B.R. 71 (W.D.N.C. Bankr. 2014).

4 *See*, In re Garlock Sealing Techs., 504 B.R. at 73.

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.* at 97.

9 *Id.* at 86.

10 *Id.* at 84.

11 *Id.* at 85 (emphasis in original).

12 *Id.* at 86.

13 Greg Ryan, *Garlock Sues 5 Law Firms for Asbestos Fraud*, Law360

2. Legislative Action

In March 2014, Wisconsin became the third state in the nation[14] to enact legislation requiring plaintiffs to disclose information about potential bankruptcy trust fund claims during litigation.[15] The *Garlock* case was cited by the bill's supporters as an example of the abuse the legislation is intended to prevent.[16]

Congress also considered such legislation in 2014. The Furthering Asbestos Claim Transparency (FACT) Act, would have required asbestos trusts to compile and release quarterly reports on claimants seeking payments for asbestos exposure.[17] The House passed the bill in November 2013, but the Senate failed to take action before the end of session.

3. Other Asbestos Cases

The *Garlock* case dominated the asbestos-related headlines this year, letting what would in other years be well-publicized developments slide by somewhat unnoticed.

a. New York City's Asbestos Litigation Docket

In April 2014, the current manager of the specialized New York City asbestos litigation (NYCAL) docket lifted the ban on punitive damage claims that had been in place in that court since 1996.[18] The court said that the legislature should be the body making decisions about the availability of punitive damages, particularly when plaintiffs in different parts of the same state end up being treated differently.[19] NYCAL is a very active docket, so the decision to once again allow punitive damages is not trivial.

NYCAL also began consolidating more cases in 2014.[20] The First Department has approved NYCAL's decision to consolidate two cases with different plaintiffs, worksites, occupations, exposure periods, diseases, and legal theories.[21] Defendants are now appealing that decision to the New York Court of Appeals.[22] Other jurisdictions discourage or even prohibit the consolidation of asbestos cases in order to prevent the facts of one cases from biasing the results of other cases,[23] so it will be interesting to see what New York's high court says about the practice.

b. Washington Rejects Expansion of Asbestos Litigation

In September 2014, the Washington Supreme Court issued a sharply divided opinion preserving the state's existing understanding of its Industrial Insurance Act. The court rejected a novel legal theory that would have allowed more employees to file asbestos exposure lawsuits against their employers.[24]

Boeing employee Gary G. Walston was exposed to asbestos when some pipes above his workspace were repaired.[25] Walston filed a lawsuit against Boeing after he was diagnosed with mesothelioma, alleging that Boeing knew injury was certain to occur because they knew that there was a possibility that workers exposed

(Jan. 13, 2014), http://www.law360.com/articles/500707/garlock-sues-5-law-firms-for-asbestos-fraud.

14 Ohio and Oklahoma had previously passed such legislation. *See* Andrew C. Cook, *Tort Reform Update: Recently Enacted Legislative Reforms and State Court Challenges*, The Federalist Society, 7 (Mar. 2014), http://www.fed-soc.org/publications/detail/2013-civil-justice-update-recently-enacted-state-reforms-and-judicial-challenges.

15 Wis. Stat. § 802.025.

16 *Media Reaction to Asbestos Lawsuit Abuse by Trial Attorneys*, Wisconsin Civil Justice Council (Mar. 4, 2014), http://www.wisciviljusticecouncil.org/wwcms/wp-content/uploads/2014/03/WCJC-Media-Reaction-to-Asbestos-Lawsuit-Abuse-3-4-14.pdf.

17 H.R. 982, 113 Cong. (2013).

18 In re New York City Asbestos Litig., 2014 WL 1767314 (N.Y. Sup. Ct. N.Y. Cnty. Apr. 8, 2014).

19 *Id.* at 9.

20 In re New York City Asbestos Litig., 121 A.D.3d 230, 990 N.Y.S.2d 174 (App. Div. 2014).

21 *Id.*

22 *Id.*

23 *See, e.g.*, Kan. Stat. Ann. § 60-4902(j); *Alexander v. AC & S, Inc.*, 947 So. 2d 891 (Miss. 2007); *In re Asbestos Litig.*, No. 77C-ASB-2 (Del. Super. Ct. New Castle Cnty. Dec. 21, 2007) (Standing Order No. 1) (prohibiting joinder of asbestos plaintiffs with different claims); Mich. Supreme Court Admin. Order No. 2006-6, Prohibition on "Bundling" [Asbestos-Related] Cases, (Aug. 9, 2006); Ga. Code Ann. § 51-14-11; Tex. Civ. Prac. & Rem. Code Ann. § 90.009.

24 Walston v. Boeing Co., 334 P.3d 519 (Wash. 2014).

25 *Id.* at 520.

to asbestos could become ill.[26]

Washington's Industrial Insurance Act (IIA) allows employees to bypass the state's no-fault compensation system and file a tort suit if they can prove their employer deliberately injured them.[27] Washington courts have interpreted this as meaning the company knew injury was certain to occur, so Walston's argument regarding asbestos exposure would have allowed him to sue Boeing directly if the court accepted it.[28]

In a 5-4 decision, the Washington Supreme Court rejected Walston's argument and reaffirmed earlier precedent, holding that risk of disease is insufficient to meet the deliberate intention standard.[29] The court also held that an asymptomatic cellular-level condition is not itself a compensable injury, but a risk of future injury.[30] For that reason, even if an employer knew that exposure to asbestos would result in subcellular-level changes, the deliberate intention standard is not met.[31]

B. Controlling Patent Litigation

Today, technological innovations are produced at a rapid pace, while prices for the goods and services inspired by these innovations drop, allowing greater access and use. Increased use and abuse of the patent system places patent litigation—specifically litigation by patent assertion entities that hold, but do not create, patents—in the spotlight.[32]

Many patents are vague enough that it is not clear, without litigating the matter, if a particular use is an infringement.[33] Advocates of patent reform contend bad actors, known as "patent trolls," have taken advantage of this to shakedown companies for cash.[34] They realized most companies would rather spend a significant, yet relatively small, amount of money to make a patent dispute disappear than pay a larger amount of money to fight even a completely frivolous claim in court.[35]

1. Legislative Attempts at Reform

Attempts by lawmakers to stop patent trolling have been mixed. Although patents are a purely federal issue,[36] reform efforts in Congress stalled[37] while state-level fixes gained traction.[38] By the end of 2014, over 20 states had passed legislation designed to deter the "bad faith" pursuit of patent lawsuits.[39]

Missouri's law is typical of this anti-patent troll legislation.[40] Persons who believe they are the target of a bad faith assertion of patent infringement can bring a private cause of action against the alleged patent troll.[41] The law lays out two different seven-factor tests that courts are to apply in patent infringement cases: one to determine if a case was brought in bad faith[42] and one to decide if a case is legitimate.[43] If the court finds that the demand letter was sent in bad faith, the target

26 *Id.* at 521.

27 *Id.* at 521-22.

28 *Id.*

29 *Id.* at 523.

30 *Id.* at 522-23.

31 *Id.*

32 James Bessen, *What the Courts Did to Curb Patent Trolling—for Now*, The Atlantic (Dec. 1, 2014), http://www.theatlantic.com/business/archive/2014/12/what-the-courts-did-to-curb-patent-trollingfor-now/383138/; Michael Blanding, *Bringing Patent Trolls Into The Light*, Forbes (Aug. 20, 2014), http://www.forbes.com/sites/hbsworkingknowledge/2014/08/20/bringing-patent-trolls-into-the-light/; Kristen Osenga, *Congress should regulate behavior, not business-models, when crafting patent legislation*, The Hill (Jan. 27, 2015), http://thehill.com/blogs/congress-blog/technology/230768-congress-should-regulate-behavior-not-business-models-when.

33 Lauren Cohen, Umit G. Gurun & Scott Duke Kominers, *Patent Trolls: Evidence from Targeted Firms* (Harvard Bus. School Working Paper, No. 15-002), http://www.hbs.edu/faculty/Pages/item.aspx?num=47648.

34 *Id.*

35 *Id.*

36 U.S. Const. art. I, § 8, cl. 8.

37 Ashby Jones, *Patent Overhaul Effort Stalls*, Wall St. J. (Aug. 17, 2014), http://www.wsj.com/articles/patent-overhaul-effort-stalls-1408317189.

38 Ruth Simon and Angus Loten, *States Revise Laws to Curb 'Patent Trolls'*, Wall St. J. (May 21, 2014), http://www.wsj.com/articles/SB10001424052702304422704579574293500331028.

39 *Patent Trolling Legislation*, National Conference of State Legislatures, http://www.ncsl.org/research/financial-services-and-commerce/patent-trolling-legislation.aspx.

40 Mo. Rev. Stat. §§ 416.650, 416.652, 416.654, 416.656, and 416.658 (2014).

41 Mo. Rev. Stat. § 416.654 (2014).

42 Mo. Rev. Stat. § 416.652.2(1) (2014).

43 Mo. Rev. Stat. § 416.652.3 (2014).

of the letter can recover attorney's fees and damages.[44] The law also allows the attorney general to investigate, restrain, and prosecute bad faith assertions of patent infringement claims.[45]

2. SCOTUS Steps In

Although most businesses hit with frivolous demand letters choose to pay up rather than fight back, two took their cases all the way to the United States Supreme Court. Together, the decisions in *Highmark Inc. v. Allcare Health Management System, Inc.*[46] and *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*[47] expand the availability of attorney's fees for prevailing parties in patent cases and increase federal district courts' discretion in awarding fees.

Federal courts always have discretion to award attorney's fees to punish unjustified litigation, or other bad conduct that would violate Rule 11 of the Federal Rules of Civil Procedure.[48] In addition, since 1951, federal district courts have also had the discretion under the Patent Act to award attorney's fees in "exceptional cases" to the prevailing party.[49] However, the Patent Act's fee-shifting mechanism had only been used when other indicia of bad faith or unfairness suggested that the awarding of fees was appropriate.[50]

The Supreme Court rejected these limitations in the *Octane Fitness* case, holding that the "exceptional" case "is simply one that stands out from others with respect to the substantive strength of a party's litigating position … or the unreasonable manner in which the case was litigated."[51] In *Highmark*, the Court clarified that a district court's decision to award fees will be upheld on appeal unless the court demonstrably abused its discretion.[52] These decisions are making it much easier for targets of patent trolling to get their attorney's fees paid,[53] which should reduce the number of patent lawsuits filed by bad actors.

C. Developments in Class Action Law

Since the Class Action Fairness Act was passed in 2005, almost all class actions have moved to the federal court system. As more cases are tried, the procedural law governing class actions has become hotly contested. The year 2014 saw big developments in the law governing what makes a class, and how class members should be compensated.

1. Moldy Washing Machines

A pair of lawsuits over moldy washing machines has shaped who can make up a class in the Sixth and Seventh Circuits respectively.[54]

Both *Glazer v. Whirlpool Corp.* and *Butler v. Sears, Roebuck & Co.* involved allegations that defendants manufactured or sold front-load washing machines that do not properly clean themselves, and, as a result, grow mold and/or smell musty.[55] The manufacturers in both cases argued that certification was improper because most owners of the washing machines in question did not experience problems with their washers, and thus suffered no injury.[56]

Despite the defendants' objections to issue-based classes, the Sixth and Seventh Circuits certified the class in each case.[57] Both certification decisions were appealed to the United States Supreme Court, which reversed and remanded for further consideration in light of the Court's decision in *Comcast Corp. v. Behrend*.[58]

In *Comcast,* the Court ruled that class certification was inappropriate because the damages model, which included damages for claims that the lower court had

44 Mo. Rev. Stat. § 416.654 (2014).

45 Mo. Rev. Stat. § 416.656 (2014).

46 134 S.Ct. 1744 (2014).

47 134 S.Ct. 1749 (2014).

48 Fed. R. Civ. P. 11.

49 *Octane Fitness*, 134 S.Ct. at 1753-54.

50 *Id.*

51 *Id.* at 1756.

52 *Highmark*, 134 S.Ct. at 1749.

53 *See, e.g.*, Lumen View Technology, LLC v. Findthebest.com, Inc., No. 13-cv-3599, at 14 (S.D.N.Y. May 30, 2014).

54 Glazer v. Whirlpool Corp., 722 F.3d 838 (6th Cir. 2013); Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013).

55 *Glazer*, 722 F.3d at 846-48; *Butler*, 727 F.3d at 797-98.

56 *Glazer*, 722 F.3d at 853-58; *Butler*, 727 F.3d at 798-99.

57 Butler v. Sears, Roebuck and Co., Nos. 11-8029, 12-8030 (7th Cir. 2012); In re Whirlpool Corp. Front-Loading Washer Prods., 678 F. 3d 409 (6th Cir. 2012).

58 Whirlpool Corp. v. Glazer, 133 S.Ct. 1722 (2013), Sears, Roebuck and Co. v. Butler, 133 S. Ct. 2768 (2013).

dismissed before certifying the class, was too broad.[59] The damages question would have to be resolved separately for each member of the class, thus destroying any efficiency gained by trying the case as a class action.[60]

Both the Sixth and Seventh Circuits took a narrow view of *Comcast*, focusing on the mismatch in that case between the damages theory and the injury theory rather than the Court's comments on inefficiencies, and reaffirmed their previous certification decisions.[61] The defendants in *Glazer* and *Butler* once again petitioned for Supreme Court review, but the Court denied cert in early 2014.[62]

What, if anything, the Court's decision in *Comcast* actually means in light of its denial of cert in *Glazer* and *Butler* is unclear. *Comcast* says that individual damages trials negate the efficiencies gained by treating related cases as a class action, while *Glazer* and *Butler* say bring it on. Suffice to say, the debate over what commonality really means got more interesting in 2014.

Most commentators assumed that defendants involved in cases where the court certified an issues-only class would settle rather than risk having to try countless mini trials on damages later, but Whirlpool shocked everyone by deciding to take the *Glazer* case to trial.[63] After a three-week trial, the jury returned a verdict in Whirlpool's favor, finding the plaintiffs had not shown a defect in the front-loading washing machines' design or a breach of warranty.[64]

2. Ascertainability

Another hot topic in the class action arena is ascertainability—the inherent requirement that a Rule 23(b)(3) class be definite enough so that it is administratively feasible for the court to determine whether an individual is or is not a member.

59 Comcast Corp. v. Behrend, 133 S. Ct. 1426, 1432-33 (2013).

60 *Id.* at 1453.

61 Glazer v. Whirlpool Corp., 722 F.3d 838 (6th Cir. 2013); Butler v. Sears, Roebuck & Co., 727 F.3d 796 (7th Cir. 2013).

62 Whirlpool Corp. v. Glazer, 134 S. Ct. 1277 (2014); Sears, Roebuck and Co. v. Butler, 134 S. Ct. 1277 (2014).

63 *Glazer et al v. Whirlpool Corp.* (N. Dist. Ohio No. 08-65000, Oct. 30, 2014).

64 *Id.*

Ever since the Third Circuit Court of Appeals denied the plaintiffs' petition for a rehearing *en banc* in *Carrera v. Bayer*,[65] court watchers have kept an eye on class action cases to see if one addressing ascertainability might make its way to the Supreme Court.[66]

In *Carrera,* the court held that defendants have a due process right to challenge individual class membership, even in cases where the defendant's overall liability is known.[67] Plaintiffs must be able to demonstrate that the method used for ascertaining class members is reliable, administratively feasible, and permits a defendant to challenge each individual's class membership if so desired.[68]

The *Carrera* holding has the potential to significantly curtail class-action litigation related to consumer products.[69] So, is it catching on? A quick search reveals over 30 decisions have cited *Carrera* since 2014. Several district courts, including those outside the Third Circuit, have adopted Carrera's stance on ascertainability.[70] The sharpest rebuke comes from a handful of district court cases in California.[71]

65 Carrera v. Bayer Corp., No. 12-2621, slip op. (3d Cir. May 2, 2014).

66 *See* Alison Frankel, *'Ascertainability' is no silver bullet in class action defense*, Reuters (Oct. 16, 2014), http://blogs.reuters.com/alison-frankel/2014/10/16/ascertainability-is-no-silver-bullet-in-class-action-defense/; Sindhu Sundar, *9th Circ. Critical In Growing Class Ascertainability Fight*, Law360 (Oct. 14, 2014), http://www.law360.com/articles/586878/9th-circ-critical-in-growing-class-ascertainability-fight.

67 Carrera v. Bayer Corp., 727 F.3d 300, 307 (3d Cir. 2014).

68 *Id.* at 307-8.

69 Alida Kass, *Third Circuit Case Could Limit Consumer Class Actions*, New Jersey Law Journal (June 25, 2014), http://www.njlawjournal.com/id=1202660768441/Third-Circuit-Case-Could-Limit-Consumer-Class-Actions.

70 *See, e.g.,* Sethavanish v. ZonePerfect Nutrition Co., No. 12-cv-2907-SC (N.D. Cal. Feb. 13, 2014); Karhu v. Vital Pharms., Inc., No. 13- 60768-CIV-COHN/SELTZER (S.D. Fla. Mar. 3, 2014); Donaca v. Disk Network, LLC, No. 11-cv-02910-RBJ-KLM (D. Colo. Feb. 18, 2014); Balschmiter v. TD Auto Finance LLC, No. 13-CV-1186 (E.D. Wis. Nov. 20, 2014); Langendorf v. Skinnygirl Cocktails LLC, No. 11-CV-7060 (N.D. Ill. Oct. 30, 2014).

71 *See, e.g.*, McCrary v. Elations Co., LLC, No. 13-cv-00242 (C.D. Cal. Jan. 13, 2014); Brazil v. Dole Packaged Foods, LLC, No. 12-CV-01831-LHK (N.D. Cal. May 30, 2014); Werdebaugh v. Blue Diamond Growers, No. 12-CV-2724-LHK (N.D. Cal.

In one often-cited case, *McCrary v. The Elations Company*, the court said,

> It appears that pursuant to [*Carrera*] in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record; of buyers, [*Carrera*] prohibits certification of the class. While this may now be the law in the Third Circuit, it is not currently the law in the Ninth Circuit.[72]

It went on to reason that even if affidavits are the primary means of identification, as long as a class is well-defined, it is certifiable.[73]

Taking a cue from *McCrary*, the court in *Lilly v. Jamba Juice Co.* took pains to distinguish the certification process from the claims process in a case where the damages were known in the aggregate.[74]

> If the responses to class notice present the specter of diluting legitimate claims, the Court can address the issue at that point, especially (but not exclusively) if absent class members appear to object. But that speculative possibility is not a compelling reason to refuse to certify any class at all. If the problem is that some absent class members may get less relief than they are entitled to, it would be a strange solution to deprive absent class members of any relief at all.[75]

The California cases set the stage for an eventual ruling on the issue of ascertainability from the Ninth Circuit. If the Ninth does not adopt the Third Circuit's *Carrera* reasoning, the Supreme Court could step in.

3. Objectors Upend Attorney-Favored Settlements

In 2014, the Seventh Circuit released a precedent-setting ruling aimed at ensuring class members are not snookered by their own attorneys. *Redman v. RadioShack* is a fairly typical Fair and Accurate Credit Transactions Act (FACTA) lawsuit over too much personal information being printed on a credit card receipt.[76] Radio Shack offered to settle the case for $1 million in attorney's fees and $10 coupons for each class member.[77] Class counsel accepted that offer, but several class members filed objections.[78]

In its opinion, the court goes into great detail on the relative interest of the parties, the incentives driving those interests, and the role of the court in analyzing class action settlements in light of the interests of the parties involved, noting:

> The optimal settlement from the joint standpoint of class counsel and defendant, assuming they are self-interested, is therefore a sum of money moderate in amount but weighted in favor of attorney's fees for class counsel. Ordinarily—in this case dramatically— individual members of the class have such a small stake in the outcome of the class action that they have no incentive to monitor the settlement negotiations or challenge the terms agreed upon by class counsel and the defendant.[79]

In light of the incentives at play, the court determined it must closely examine class action settlements. "The ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received."[80] The court found the ratio in this case to be unfair, so the settlement was voided and the case remanded.[81]

The attorney for the primary objectors in this case noted in a post-decision interview that he "is pursuing six cases in federal appeals courts raising similar issues."[82]

May 23, 2014); Lilly v. Jamba Juice Co., No. 13-cv-02998-JST (N.D. Cal. Sept. 18, 2014).

72 McCrary v. Elations Co., LLC, No. 13-cv-00242, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014).

73 *Id.*

74 Lilly v. Jamba Juice Co., No. 13-cv-02998-JST, 2014 WL 4652283, at *6 (N.D. Cal. Sept. 18, 2014).

75 *Id.*

76 Redman et al v. RadioShack Corp., 768 F.3d 622 (7th Cir. 2014).

77 *Id.* at 628-29.

78 *Id.* at 629.

79 *Id.*

80 *Id.* at 630.

81 *Id.* at 640.

82 Jonathan Stempel, *U.S. court voids RadioShack class-action settlement over card receipts*, Reuters (Sept. 19, 2014), http://www.reuters.com/article/2014/09/19/us-radioshack-classaction-idUSKBN0HE2HC20140919.

D. Private Attorney General Contracting

In 2014, Louisiana became the latest state to adopt legislation requiring more transparency when the state hires outside counsel to litigate on its behalf.[83] Act 796 codifies a previous Louisiana Supreme Court ruling prohibiting state entities from retaining any special attorney or counsel on a contingency fee basis in the absence of express statutory authority.[84] It also lays out the rules governing such contracts and the proceeds obtained from them.[85]

West Virginia attempted to pass its own so-called "Attorney General Ethics and Accountability Act" in 2014.[86] Unlike like the attorney general bills in other states, House Bill 4490 would have decreased the state's oversight of litigation it is involved in. The bill, which narrowly passed the House of Delegates before dying in the Senate Judiciary Committee, would have required the attorney general to hire outside counsel when a company or individual involved in a case had made a campaign contribution to the attorney general.[87]

E. Medical Liability Reform

Medical liability is a frequent target of tort reformers. While in the past, reform efforts have been more reactive, focusing on things like caps on damages, in 2014, reformers pursued a more proactive agenda. Over 30 states, including Alaska and Wisconsin, have now passed variations of so-called "I'm sorry" bills, while Oklahoma passed a law prohibiting litigants in a medical liability action from introducing evidence that a health care provider was not in compliance with the federal Patient Protection and Affordable Care Act.

Alaska's HB250 makes "expression[s] of apology, sympathy, commiseration, compassion, or benevolence by a health care provider" inadmissible in a subsequent medical malpractice case involving the provider.[88]

Wisconsin's version of the "I'm sorry" legislation limits the admissibility of statements or gestures expressing "apology, benevolence, compassion, condolence, fault, liability, remorse, responsibility, or sympathy" in "civil action[s], administrative hearing[s], disciplinary proceeding[s], mediation, or arbitration regarding the health care provider."[89] Supporters of the new law emphasized the importance of including both a list of statements and a list of circumstances where statements might be brought into evidence in the bill in order to fully protect honest and open provider-patient communication.[90]

It is still too soon to know what the long-term medical liability impacts of the federal Patient Protection and Affordable Care Act, more commonly known as Obamacare, will be, but Oklahoma is not taking any chances. Senate Bill 1905, which was signed into law in June 2014, provides:

> A health care provider's failure to comply with or a health care provider's breach of the federal Patient Protection and Affordable Care Act… and any regulation, program, guideline or other provision established by such, shall not be admissible, used to determine the standard of care, or the legal basis for a presumption of negligence in any medical liability action in this state.[91]

F. Trespasser Liability

Ever since the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* was published, a number of states have enacted legislation codifying their existing common law on trespassing.[92] The states

83 Since 2010, nine other states have enacted similar laws, including Alabama, Arizona, Florida, Indiana, Iowa, Mississippi, Missouri, North Carolina, and Wisconsin.

84 2014 La. Act 796 (codifying *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997); *See also, The Use of Contingency-Fee Contracts by the Attorney General, State Agencies, Boards, and Commissions*, Louisiana Legislative Auditor (Sept. 2014), http://app.lla.state.la.us/llala.nsf/7761902835ED7FC486257D5B00767C50/$FILE/(09-2014%20)%20White%20Paper%20-%20Contingency%20Fee%20Contracts.pdf.

85 2014 La. Act 796.

86 2014 W. Va. House Bill 4490.

87 *Id.*

88 Alaska Stat. § 09.55.544 (2014).

89 Wis. Stat. § 904.14.

90 *Support for Assembly Bill 120*, Wisconsin Medical Society (May 29, 2013), http://lc.legis.wisconsin.gov/comtmats2013/ab0120.pdf.

91 2014 Okla. Stat. tit. 63, § 1-1712.

92 *See* Andrew C. Cook, *Tort Reform Update: Recently Enacted Legislative Reforms and State Court Challenges*, The Federalist Society, 6-7 (Dec. 2012), http://www.fed-soc.org/doclib/20130110_CivilJusticeTortReformUpdateWP2012.pdf.

have been motivated by a fear that if existing law, which typically provides that a possessor of land "owes no affirmative duty to a trespasser who has invaded the land without either express or implied permission,"[93] is not codified, courts will adopt the new *Restatement*, which changes the traditional rule by providing a duty of reasonable care to all trespassers except for "flagrant trespassers."[94]

In 2014, Georgia,[95] Kansas,[96] and Michigan[97] all codified their existing common law on trespassing.

II. Legislative Activity

A. Florida

Investors are always keen to put more money into nursing homes in Florida.[98] In 2014, the legislature removed two hurdles that had been holding back the market. First, the legislature temporarily lifted a moratorium on new beds, allowing for expansion.[99] Second, a bill limiting the liability of nursing home investors was enacted.[100]

Senate Bill 670 explicitly limits the liability of "passive investors" in nursing home businesses.[101] It specifies that a cause of action:

> which alleges direct or vicarious liability for the personal injury or death of a nursing home resident arising from such negligence or violation of rights and which seeks damages for such injury or death may be brought only against the licensee, the licensee's management or consulting company, the licensee's managing employees, and any direct caregivers, whether employees or contractors [unless certain conditions are met.][102]

This bill passed with the support of Florida trial lawyers after language was added that makes it easier for residents of nursing homes, and their relatives and lawyers, to get documents without having to establish an estate.[103]

B. Kansas

The last time the Kansas Supreme Court took up a case challenging the state's cap on noneconomic damages, it suggested in dicta that the legislature should consider raising the cap.[104] Although the court upheld the cap in that case, the tone of the decision suggested that the court might overturn the $250,000 cap, which had not been increased since it was enacted in 1988, in a future decision.[105] At the urging of the Kansas Medical Society and the Kansas Chamber,[106] the legislature responded with Senate Bill 311. The bill immediately raises the cap on noneconomic damages by $50,000, and provides for $25,000 increases every four years until 2022:

- $250,000 for causes of action accruing from July 1, 1988, to July 1, 2014;
- $300,000 for causes of action accruing on or after July 1, 2014, to July 1, 2018;
- $325,000 for causes of action accruing on or after July 1, 2018, to July 1, 2022; and
- $350,000 for causes of action accruing on or after

93 Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. Marshall L. Rev. 379, http://www.shb.com/attorneys/SchwartzVictor/ReshapingtheTraditionalLimitsofAffirmativeDuties.pdf.

94 *Id.*

95 Ga. Code Ann. § 51.3.1 (2014).

96 Kan. Stat. Ann. § 58-821 (2014).

97 Comp. Laws § 554.581 (2014).

98 *See,* Carolina Bolado, *Fla. Nursing Home Expansion To Spur Litigation Wave*, Law360 (Nov. 24, 2014), http://www.law360.com/articles/598583/fla-nursing-home-expansion-to-spur-litigation-wave; Christine Jordan Sexton, *End of nursing home moratorium sparks big interest, money and possible legal challenges*, SaintPetersBlog (Oct. 23, 2014) http://www.saintpetersblog.com/archives/164020.

99 Fla. Stat. §§ 408.034, 408.036, 408.0436 (2014) (House Bill 287).

100 Fla. Stat. §§ 400.023, 400.0237, 400.024, 400.145 (2014) (Senate Bill 670).

101 Fla. Stat. § 400.023(1) (2014).

102 *Id.*

103 Fla. Stat. § 400.145 (2014).

104 Miller v. Johnson, 289 P.3d 1098, 1112-15 (2012).

105 *Id.*

106 *Supplemental Note on Senate Bill No. 311*, Legislative Research Department, 2, http://www.kslegislature.org/li_2014/b2013_14/measures/documents/supp_note_sb311_02_0000.pdf.

July 1, 2022.[107]

The bill also adopts the *Daubert* standard for expert testimony.[108] Prior to the adoption of this bill, Kansas was one of only nine states still using the less-rigorous *Frye* standard.[109]

C. Louisiana

In addition to the attorney general bill discussed above, Louisiana enacted four other legal reform bills in 2014.

1. H.B. 624—Expert Evidence

The law on the admissibility of expert opinion evidence in Louisiana has been considered consistent with the federal *Daubert* standard since 1993.[110] However, the state's rules of evidence were not amended to reflect the court system's adoption of the *Daubert* standards until now.

Although not a change from current practice, the Louisiana legislature formally codified the state's standards governing expert opinion testimony with House Bill 624.[111] The law now reads:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and
>
> (4) The expert has reliably applied the principles and methods to the facts of the case.[112]

2. H.B. 874—Litigation by the State

The Louisiana legislature really emphasized the importance of transparency this year with the passage of House Bill 874.[113]

Each year before the legislative session convenes, the head of each state agency must now publish a report listing all of the civil lawsuits initiated by the agency.[114] The attorney general must publish a similar list.[115] The reports must include all cases instituted, pending, or concluded in the prior calendar year and:

> (a) Contain the names of all parties appearing as plaintiffs at any time during the litigation and all parties named as defendants at any time during the litigation as they appear on the pleadings, the court which has jurisdiction over the matter, the docket number, the cause of action being averred, and the relief being sought.
>
> (b) Indicate the current status of the case, including whether the case has been heard on the merits, whether there is a final judgment therein and, if so, an indication if the final judgment was determined on a procedural or substantive issue, whether the case has settled prior to any final judgment, and whether an appeal has been taken and, if so, if that appeal was initiated by the agency.
>
> (c) List the name or names of all outside counsel representing the agency or the state and the agreement of the agency or the attorney general on behalf of the agency or the state, including the hourly rate of pay for the attorney or attorneys and paraprofessionals or the percentage of compensation or commission or any other arrangement relative to compensation, including payment of compensation by a defendant.[116]

After the initial report is filed, the agencies and the

107 Kan. Stat. Ann. § 60-19 (2014).

108 Kan. Stat. Ann. §§ 60-456-58 (2014).

109 Mike O'Neal, *Testimony before House Commerce Committee*, Kansas Chamber (Mar. 17, 2014), http://www.kslegislature.org/li_2014/b2013_14/committees/ctte_h_cmrce_lbr_1/documents/testimony/20140317_03.pdf.

110 State v. Foret, 628 So. 2d 1116, 1123 (La. 1993).

111 2014 La. Act 630.

112 LA Code of Evid., Art. 702.

113 La. Rev. Stat. Ann. § 36:8.1 (2014).

114 La. Rev. Stat. Ann. § 36:8.1.A.(1)(a) (2014).

115 La. Rev. Stat. Ann. § 36:8.1.A.(1)(b) (2014).

116 La. Rev. Stat. Ann. §§ 36:8.1.A.(2)(a-c) (2014).

attorney general must keep the legislature updated on their legal activities by filing quarterly reports listing new litigation initiated that quarter.[117]

This bill, coupled with the bill governing the attorney general's use of outside attorneys, will allow the legislature to step up its oversight of the state's legal activities.

3. S.B. 469—Lawsuits Brought by Local Agencies

In 2013, the Southeast Louisiana Flood Protection Authority-East filed a lawsuit seeking to require 97 oil, gas, and pipeline companies to pay a portion of the cost of restoring marshland in five parishes around New Orleans.[118] The plaintiffs allege that the defendants are liable for coastal erosion and environmental degradation.[119] The defendants counter that all their activities were permitted.[120]

Senate Bill 469 was passed in an effort to halt the Southeast Louisiana Flood Protection Authority-East's lawsuit from moving forward, and to prevent such lawsuits from being filed in the future.[121]

The new law provides that no state or local governmental entity, except the Department of Natural Resources, the Office of the Attorney General, and the Coastal Protection and Restoration Authority, may bring any action for violation or a claim for damages for violation of a coastal use permit.[122]

In addition, any such lawsuits that are currently pending shall be dismissed if the secretary of the Department of Natural Resources, the executive director of Coastal Protection and Restoration Authority, or the attorney general fails to intervene in the litigation.[123]

Finally, any money generated from lawsuits authorized under Act 544 or existing law shall be deposited in the Coastal Protection and Restoration Fund.[124]

The future of Act 544 is unclear. A state court has ruled that the law does not govern the Southeast Louisiana Flood Protection Authority-East's lawsuit, or future lawsuits, because the law is unconstitutional, and the Authority is an independent political subdivision and not a state agency.[125] Appeals are currently pending.

4. S.B. 667—Legacy Lawsuit

Closely related to Act 544 is Act 400, which also addresses lawsuits against permitted environmental degradation.[126] Hundreds of "legacy lawsuits" have been filed against oil and gas companies for contamination dating back decades.[127] Proving who is at fault is very complex. Accordingly, most defendants settle rather than risk a huge verdict, but there is evidence that settlement dollars are not going towards environmental clean-up.[128]

117 La. Rev. Stat. Ann. § 36:8.1.B.(1) (2014).

118 *The Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, et al., v. Tennessee Gas Pipeline Company, LLC, et al.*, No. 13-5410 (E.D. LA); *See also,* Nathaniel Rich, *The Most Ambitious Environmental Lawsuit Ever*, N.Y. Times Magazine (Oct. 2, 2014) http://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html; Jones, Swanson, Huddell, and Garrison, LLC, *Southeast Louisiana Flood Protection Authority – East Case*, http://jonesswanson.com/slfpaecase/.

119 *The Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, et al., v. Tennessee Gas Pipeline Company, LLC, et al.*, No. 13-5410 (E.D. LA); *See also,* Rich, *supra* note 121; *Southeast Louisiana Flood Protection Authority – East Case*, *supra* note 121.

120 *The Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, et al., v. Tennessee Gas Pipeline Company, LLC, et al.*, No. 13-5410 (E.D. LA); *See also,* Rich, *supra* note 121; Kyle Barnett, *Defense Attorneys Argue Coastal Lawsuit Should be Dismissed, Definitive Ruling by Judge Would be Improper*, Louisiana Record (Nov. 12, 2014), http://louisianarecord.com/news/264599-defense-attorneys-argue-coastal-lawsuit-should-be-dismissed-definitive-ruling-by-judge-would-be-improper.

121 La. Rev. Stat. Ann. § 49:214.36(O) (2014); Bret Allain II, *Bill Merely Reinforces Coastal Restoration Efforts, Sen. Allain Says: Letter*, Times-Picayune (May 18, 2014), http://www.nola.com/opinions/index.ssf/2014/05/bill_merely_reinforces_coastal.html.

122 La. Rev. Stat. Ann. § 49:214.36(O) (2014).

123 *Id.*

124 *Id.*

125 *The Board of Commissioners of the Southeast Louisiana Flood Protection Authority – East, et al., v. Tennessee Gas Pipeline Company, LLC, et al.*, No. 13-5410 (E.D. LA); *See also, Southeast Louisiana Flood Protection Authority – East Case*, *supra* note 121; Barnett, *supra* note 123.

126 2014 La. Act 400.

127 James Varney, *Louisiana Legacy Lawsuits Good for Certain Bank Accounts, not so Much the Environment*, The Times-Picayune (May 20, 2014), http://www.nola.com/opinions/index.ssf/2014/05/louisiana_legacy_lawsuits_good.html.

128 *Id.*

Act 400 was passed to ensure that "legacy lawsuits" are only filed where there is actual contamination.[129] The Act specifies the types of damages available and the standards for recovery, and puts in place a process for defendants who want to admit liability and work with the Department of Natural Resources to develop a plan to remediate the land and ensure that funds actually go towards environmental clean-up.[130]

In order to discourage frivolous claims, the law now allows a party whose motion for preliminary dismissal is granted to seek attorney's fees from the plaintiffs.[131]

D. Oklahoma

In addition to the medical liability bill discussed above, the Oklahoma Legislature passed three legal reform bills in 2014, building on the state's record in 2013.[132]

1. H.B. 3365—Product Liability

House Bill 3365 makes two substantial changes to Oklahoma's products liability law.

First, it provides a rebuttable presumption against liability when (1) the product complied with or exceeded mandatory safety standards or regulations promulgated by a government agency; or (2) the product underwent premarket licensing or approval by a government agency, and after full consideration of the product's risks and benefits, the product was approved or licensed for sale.[133] Claimants can only rebut the presumption if they are able to show the federal standards were inadequate or the manufacturer withheld information from, or made misrepresentations to the federal government.[134]

Second, it protects sellers from liability if they are simply offering a product manufactured by someone else.[135] The new law does not apply when the product in question is defective or was subject to a recall.[136]

2. H.B. 3375—Discovery

House Bill 3375 allows parties, upon showing of good cause, to obtain discovery regarding any matter that is relevant to any party's claim or defense.[137] Prior to this law's passage, there was some uncertainty about how broad discovery could be.

The new law also provides that in any action in which physical or mental injury is claimed, the party making the claim shall provide a release or authorization allowing the other parties to obtain relevant medical records and bills, and, when relevant, a release or authorization for employment and scholastic records.[138] This information was previously available only after a court ordered it.

3. S.B. 1799—Derivative Suits

The large number of shareholder lawsuits filed each year has been a hot topic as of late, particularly since Delaware started allowing corporations to put "loser pays" provisions in their bylaws.[139] Oklahoma has gone even further than Delaware, becoming the first state to mandate fee-shifting in derivative lawsuits. Senate Bill 1799 requires the nonprevailing party or parties in a derivative suit to pay the prevailing party or parties the reasonable expenses, including attorney's fees, taxable as costs, incurred as a result of such action.[140]

Academics believe the Oklahoma legislation will significantly reduce the number of shareholder lawsuits filed in Oklahoma even though the fee-shifting goes both ways.[141]

129 La. Rev. Stat. Ann. §§ 30:29(I)(1) (2014).

130 La. Rev. Stat. Ann. §§ 30:29(C)(2)(c), 30:29(H), 30:29(M) (2014).

131 La. Rev. Stat. Ann. § 30:29(B)(6) (2014).

132 *See* Cook, *supra* note 15, at 3-7.

133 Okla. Stat. tit. 76 §§ 57.2(A) and (C) (2014).

134 Okla. Stat. tit. 76 §§ 57.2(B) and (C)(1-2) (2014).

135 Okla. Stat. tit. 76 § 57.2(E) (2014).

136 Okla. Stat. tit. 76 § 57.2(D) (2014).

137 Okla. Stat. tit. 12 § 3226 (A)(1) (2014).

138 Okla. Stat. tit. 12 § 3226 (A)(2)a (2014).

139 *See, e.g.* Tom Hals, *Delaware Upholds Fee-Shifting Bylaw, Could Upend Class Actions*, Reuters (May 9, 2014), http://www.reuters.com/article/2014/05/09/delaware-courts-fees-idUSL2N0NV1PK20140509; Gretchen Morgenson, Shareholders, Disarmed by a Delaware Court, N.Y. Times (Oct. 25, 2014), http://www.nytimes.com/2014/10/26/business/shareholders-disarmed-by-a-delaware-court.html.

140 Okla. Stat. tit. 18 §§ 1126 (B-C).

141 Michael Greene, *Oklahoma Adopts Mandatory Fee-Shifting Law; Academics Say Will 'Chill' Derivative Lawsuits*, Bloomberg BNA (Oct. 23, 2014), http://www.bna.com/oklahoma-adopts-

E. Utah

Utah made a dramatic change in its law governing prejudgment interest in 2014. The state previously provided that prejudgment interest was available from the time of the injury at a rate of 7.5% simple interest per annum.[142] Senate Bill 69 makes several changes that will limit the availably of prejudgment interest and incentivize the early settlement of cases:

- The plaintiff must have tendered a written offer of settlement at least 60 days before trial.
- Prejudgment interest is only calculated from the date of the settlement offer.
- The settlement offer must have been less than 1-1/3 of the amount of the judgment eventually awarded at trial.
- The interest rate shall be the federal prime rate plus two percent, unless that would make the applicable rate lower than five percent or higher than ten percent.[143]

III. Court Cases of Interest

A. Alabama

In *PLIVA, Inc. v. Mensing*, the United States Supreme Court ruled that generic drug makers cannot be held liable under the theory of failure to warn since their product labels must mirror the labels of the FDA-approved brand name drug they replicate.[144] As Justice Sotomayor noted, this leaves plaintiffs who were injured by a generic drug without legal recourse.[145] The theory of "innovator liability" has been advanced as a means of filling that gap.[146]

Under innovator liability, brand name drugmakers can be held liable for injuries allegedly caused by the use of the generic versions of the brand name drugmakers' products. While this theory would allow injured plaintiffs to recover, critics protest that the theory abandons traditional limitations on the duty element of torts by forcing companies to stand behind the products and actions of their competitors.[147]

In 2013, the Alabama Supreme Court became the first state high court to adopt innovator liability as law.[148] The defendant drug companies in the case asked the court for a rehearing since the theory was adopted in an answer to a certified question from the U.S. District Court for the Middle District of Alabama without oral arguments, and the court agreed to do so.[149]

The underlying case was brought by Danny Weeks, who allegedly sustained injuries from the long-term use of the generic form of the drug Reglan.[150] Rather than suing the generic manufacturer who actually produced the drug Weeks ingested, Weeks sued the brand name drugmakers Wyeth LLC, Pfizer Inc., and Schwarz Pharma.[151] Weeks accused the brand name manufacturers of misrepresentation and fraud, claiming his physician was not adequately warned about the potential consequences of long-term use of the drug.[152]

In August 2014, the Alabama Supreme Court released its second *Wyeth v. Weeks* opinion.[153] Although

mandatory-n17179910813.

142 Utah Code Ann. § 78B-5-824 (2013).

143 Utah Code Ann. § 78B-5-824 (2014).

144 PLIVA, Inc. v. Mensing, 131 S. Ct. 2567 (2011).

145 *Id.* at 2592 (Sotomayor, J., dissenting).

146 The theory has been around since well before *Mensing* (*See* Foster v. American Home Products Corp., 29 F.3d 165 (4th Cir. 1994)), but it has been pursued much more frequently since the *Mensing* decision.

147 Brief of the chamber of Commerce of the United States of America and the Business Council of Alabama as Amici Curiae in Support of Appellants Wyeth LLC, Pfizer Inc., and Schwarz Pharma, Inc., *Wyeth, Inc. v. Weeks*, --- So.3d ----, 2014 WL 4055813 (Ala. Aug. 15, 2014). (No. 1101397), available at http://www.chamberlitigation.com/sites/default/files/cases/files/2011/Wyeth%2C%20Inc.%2C%20et%20al.%2C%20v.%20Weeks%20%28NCLC%20Amicus%20Brief%29.pdf (This brief was filed in the court on Dec. 12, 2011 the first time this case was before the Alabama Supreme Court).

148 *See* Wyeth, Inc. v. Weeks, ___ So.3d___, 2013 WL 135753, (Ala. Jan. 11, 2013) (This opinion was withdrawn by the court in Wyeth, Inc. v. Weeks, --- So.3d ----, 2014 WL 4055813 (Ala. Aug. 15, 2014)).

149 Order Granting Oral Arguments (June 13, 2013).

150 Wyeth, Inc. v. Weeks, --- So.3d ----, 2014 WL 4055813, at *1 (Ala. Aug. 15, 2014).

151 *Id.*

152 *Id.*

153 Wyeth, Inc. v. Weeks, --- So.3d ----, 2014 WL 4055813 (Ala. Aug. 15, 2014).

explicitly denying it was adopting innovator liability theory,[154] the court effectively did so by holding that a relationship between the plaintiff and the brand name manufacturers of the generic drug that allegedly injured the plaintiff is not necessary because the brand name manufacturers have a duty not to make a false representations, and it is "foreseeable" that statements made by the brand name manufacturers would influence physicians.[155]

The Supreme Court of Iowa also considered innovator liability in a generic drug case this past year. In *Huck v. Wyeth,* the court rejected innovator liability theory, holding,

> We are unwilling to make brand manufacturers the de facto insurers for competing generic manufacturers. It may well be foreseeable that competitors will mimic a product design or label. But, we decline [plaintiff's] invitation to step onto the slippery slope of imposing a form of innovator liability on manufacturers for harm caused by a competitor's product.[156]

B. California

California is known for being ahead of the curve when it comes to adopting new theories of product liability, and the state kept with its reputation in 2014. In *People v. Atlantic Richfield Co.*, the Santa Clara County Superior Court mixed product liability and public nuisance theories together in a ruling that holds paint companies liable for the "public nuisance" of lead paint.[157]

In 2000, Santa Clara County filed a lawsuit in California Superior Court against five of the largest manufacturers and sellers of lead paint, alleging that the companies had created a public nuisance by making and selling lead paint to be used inside California homes.[158] The case was originally dismissed, but in 2006, the Sixth Appellate District of the California Court of Appeals reversed the lower court's dismissal and allowed the case to move forward.[159] After years of discovery and pre-trial motion proceedings, the case went to trial in July 2013.[160] The court's landmark ruling holding the remaining defendants liable for the public nuisance of lead paint came down in January 2014.

The court found the defendants had actual, or at the very least constructive, knowledge of the dangers posed to children's health by the interior use of lead paint, yet they continued to promote the product.[161] The court held that the defendants' knowledge, combined with promotion of their products, made nuisance law more appropriate than products liability law in this case.[162]

The court then applied the substantial factor test from the Restatement Second of Torts to determine causation.[163] Under this test, a defendant is liable if

> [their] conduct plays more than an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss…Thus, multiple defendants are liable for public nuisance if they created or assisted in the creation of the nuisance. This is true even if the acts of each defendant are independent concurrent causes of the injury. It is also irrelevant whether the defendant owns, possesses, or controls the property which is the site of the nuisance.[164]

The court used records of advertisements and promotional efforts to determine whether each of the five defendants participated in the creation of the nuisance.[165] The court found that three of the defendants, Sherwin-Williams Co., ConAgra Foods Inc., and NL Industries Inc., caused lead paint to be used in the interiors of California homes, so it ordered those three companies to pay $1.1 billion into the state's

154 *Id.* at *23.

155 *Id.* at *22-23.

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

157 *People of the State of California v. Atlantic Richfield Company, et al.,* No. 1-00-CV-788657 (Cal. Super. Ct., Santa Clara County Jan 7, 2014) [hereinafter *Lead Paint Litigation*].

158 *Lead Paint Litigation,* slip-op at 6.

159 Cnty. of Santa Clara v. Atl. Richfield Co., 137 Cal. App. 4th 292 (2006).

160 *Lead Paint Litigation,* slip-op at 8.

161 *Lead Paint Litigation,* slip-op at 12-14.

162 *Lead Paint Litigation,* slip-op at 6-8.

163 *Lead Paint Litigation,* slip-op at 30.

164 *Id.* (internal citations and quotations omitted).

165 *Lead Paint Litigation,* slip-op at 33-76.

Childhood Lead Poisoning Prevention Branch.[166] Santa Clara County and the other jurisdictions participating as plaintiffs in the case can apply for grants to be used to abate lead paint in homes that were built before 1978.[167]

The defendants have appealed this decision.

C. Florida

One of the most notable cases of 2014 was *Estate of McCall v. United States*.[168] In perhaps no other case is the concept of judicial nullification so prominently illustrated.

The underlying case involves Michelle McCall, who died from pregnancy complications while under the care of medical professionals employed by the Air Force.[169] McCall's estate, her parents, and the father of her newborn son sued the United States under the Federal Tort Claims Act (FTCA) in the United States District Court for the Northern District of Florida.[170]

The district court found the United States liable for $980,462.40 of economic damages and $2 million of noneconomic damages, but reduced the noneconomic damages award to $1 million based on Florida's statutory cap on noneconomic damages in wrongful death medical malpractice claims.[171]

The plaintiffs appealed to the Eleventh Circuit, arguing that the cap on damages:

> violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and constitutes a taking in violation of the Fifth Amendment of the United States Constitution. They also asserted that the cap violates the following provisions of the Florida Constitution: (1) the separation of powers guarantee in article II, section 3 and article V, section 1; (2) the right to trial by jury under article I, section 22; (3) the right of access to the courts under article I, section 21; (4) the right to equal protection under article I, section 2; and (5) the prohibition against the taking of private property without full compensation under article X, section 6.[172]

The appellate court determined that the cap did not violate the federal Constitution, or constitute a taking under the Florida Constitution, but it was persuaded not to address the other challenges without guidance from the Florida Supreme Court.[173] The Florida Supreme Court accepted four certified questions from the Eleventh Circuit addressing each of the plaintiffs other arguments, but found it only needed to rule on the first one to decide the case.[174] The court issued a plurality opinion striking down the cap, ruling that it "violates the Equal Protection Clause of the Florida Constitution under the rational basis test."[175]

The two-justice majority opinion concluded that the legislature had no rational basis for passing the law enacting the caps.[176] The justices disregarded the legislative findings articulated when the bill was passed and instead relied on their own research on physician scarcity, supplemented by snippets of floor debate and newspaper articles, to make their decision.[177] They found that although it was claimed that the law was passed to address a medical malpractice insurance crisis, the justices' own research showed no such crisis existed.[178] Furthermore, the justices were skeptical that a cap on noneconomic damages in wrongful death medical malpractice cases would do anything to reduce insurance premiums if an insurance crisis did exist.[179]

Both the majority and the concurring opinion pointed out that the number of physicians in Florida has grown since the law was passed, while the number of large malpractice awards has decreased.[180] This led the court to rule that there was no rational basis for

166 *Lead Paint Litigation,* slip-op at 98-109.

167 *Id.*

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

169 *Id.* at 897-99.

170 *Id.* at 899.

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.* at 916.

175 *Id.* at 901.

176 *Id.* at 905.

177 *Id.* at 905-09.

178 *Id.* at 909.

179 *Id.* at 910-12.

180 *Id.* at 913-15, 920-21.

keeping the law in place, since laws enacted to address a crisis may not be rational after the crisis subsides.[181]

The lone dissenting justice opined that a "proper" rational basis review of the cap would defer to the legislature and uphold the law as the courts in so many other jurisdictions had done.[182] The dissent is very critical of the majority's decision to research the issue of medical malpractice *sua sponte*, and points out that while the majority used the information it gathered on the current absence of a crisis, "this information could just have easily (and perhaps more likely) supported the argument that the cap had its intended effect and that, if the cap was eliminated, the medical malpractice crisis would return with full force."[183]

D. Missouri

1. Court Strikes Down State's Cap on Punitive Damages

In *Lewellen v. Chad Franklin National Auto Sales North*, the Missouri Supreme Court held that the state's cap on punitive damages was unconstitutional when applied to an action based on a common law claim.[184]

Lillian Lewellen sued Chad Franklin and Chad Franklin National Auto Sales North, LLC (National), for fraudulent misrepresentation and unlawful merchandising practices under the Missouri Merchandising Practice Act (MMPA) after the monthly payments for the car she bought from Franklin's dealership dramatically increased—rising from the $49 per month she was told she would have to pay to $379 per month.[185]

A jury awarded Lewellen actual damages of $25,000 and punitive damages of $1 million against Franklin and National on both counts.[186] She took judgment against Franklin under her fraudulent misrepresentation claim, and judgment against National under her MMPA claim.[187] The circuit court reduced the punitive damages awards against Franklin and National to $500,000 and $539,050, respectively.[188] All of the parties appealed.

The court held that the statute limiting punitive damages to the greater of $500,000 or five times the amount of the total judgment infringed on the right to a jury trial under the Missouri Constitution when applied to the fraudulent misrepresentation claim against Franklin.[189] The court distinguished this case from the 2012 case *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, coincidentally against the same defendant, where it held that the punitive damages cap was constitutional.[190]

The difference, according to the court, is the basis of the underlying claim. In *Overbey*, the case was brought under the MMPA, while in *Lewellen*, the common law of fraudulent misrepresentation by Mr. Franklin was the foundation for the large punitive damages awarded. The court reasoned that the legislature has the right to determine what the damages should be when it creates a new cause of action, but it does not have the power to limit damages in common law-based claims because that was not allowed in 1820.[191]

2. Decision Opens the Door to More Retaliatory Discharge Claims

The Missouri Supreme Court overturned three decades of precedent in *Templemire v. W & M Welding* when it decided to allow employees to file retaliatory discharge claims in cases where they had previously been barred from doing so.[192]

John Templemire was injured at work when a large metal beam fell off a forklift and crushed his foot.[193] Templemire filed a workers' compensation claim for his injury while he was off work recovering.[194] His physician cleared him to return to work after a few weeks, but he was only able to do light-duty work.[195]

181 *Id.*

182 *Id.* at 927-33.

183 *Id.* at n.14.

184 441 S.W.3d 136 (Mo. 2014).

185 *Id.* at 141, 146.

186 *Id.* at 141.

187 *Id.* at 141-42.

188 *Id.* at 142.

189 *Id.* at 143-44.

190 *See* 361 S.W.3d 364 (Mo. 2012).

191 *Lewellen* at 143-44.

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

193 *Id.* at 373.

194 *Id.*

195 *Id.* at 373-74.

His employer tried to accommodate him, but there really was not much work Templemire was able to do.[196] Templemire was fired when he and his boss got into a verbal confrontation.[197] Templemire filed a retaliatory discharge claim alleging he was fired for filing for workers' compensation.[198] At trial, the jury found for the employer.[199] Templemire appealed.

The Missouri Supreme Court decided to explicitly overturn case law that had been in place since 1984, which limited retaliatory discharge claims to cases where the filing of a workers' compensation claim was the "exclusive cause" of a termination decision.[200] The court held that employees should instead be able to file a lawsuit alleging retaliatory discharge if they can demonstrate that filing a workers' compensation claim was a "contributing factor" to the employer's discrimination or the employee's discharge.[201]

This decision significantly expands the number of instances in which an employee can file a retaliatory discharge claim.

E. Pennsylvania

Though the design, manufacture, and sale of pharmaceuticals is strictly controlled by the federal Food and Drug Administration (FDA), over the past few years, state courts have begun to allow common law claims against drug companies, subjecting them to state-level regulation by litigation.[202] While most claims are related to labeling defects and the failure to warn,[203] the Pennsylvania Supreme Court has paved the way for a new type of lawsuit based on negligent design.[204]

The plaintiff in *Lance v. Wyeth* was the estate of a young lady who took the defendant's weight loss drug Redux, a "Phen-Fen" substitute, for several months in 1997 before it was removed from the market for due to the risk of primary pulmonary hypertension (PPH).[205] Seven years later, the plaintiff was diagnosed with, and quickly died from, PPH, which her estate alleged the defendant caused.[206]

The plaintiff argued that "Wyeth 'owed a duty to [the plaintiff] not to introduce onto the market a drug that was unreasonably dangerous for any person to use,' and Redux was 'so unreasonably dangerous and defective in design that it should never have been on the market.'"[207] The trial court granted Wyeth's motion for summary judgment, which argued the design of the drug was regulated by the FDA.[208] The plaintiff appealed, and the appellate court ruled that the defective design claim should have been allowed.[209] Both parties appealed, and the Pennsylvania Supreme Court agreed to hear the case.[210]

In a 4-2 decision, the court adopted a new "negligent design defect" theory of liability.[211] The court held that, "[u]nder Pennsylvania law, pharmaceutical companies violate their duty of care if they introduce a drug into the marketplace, or continue a previous tender, with actual or constructive knowledge that the drug is too harmful to be used by anyone."[212]

Both plaintiff and defense lawyers were shocked by the opinion.[213] The court opened up a new avenue for plaintiffs alleging pharmaceutical injuries to explore, and it did so without being fully briefed on the merits

196 *Id.* at 374.

197 *Id.*

198 *Id.*

199 *Id.* at 375.

200 *Id.* at 377-82.

201 *Id.* at 382-85.

202 *See* Lance v. Wyeth, 85 A.3d 434, 456-57 (Pa. 2014).

203 *Id.*

204 Lance v. Wyeth, 85 A.3d 434 (Pa. 2014).

205 *Id.* at 437.

206 *Id.*

207 *Id.* at 437 (citing the complaint); *see also Id.* at 446-49.

208 *Id.* at 439.

209 *Id.* at 440-41.

210 *Id.* at 441.

211 *Id.* at 461-62.

212 *Id.* at 461.

213 *See, eg.,* Max Mitchell, *Justices' Pharma Ruling Could Open New Avenue for Recovery*, Legal Intelligencer (Jan. 28, 2014); Philip N. Yannella et al., *Plaintiffs May Assert Negligent Design Claims for Prescription Drugs, Pa. Supreme Court Holds*, Ballard Spahr LLP (Jan. 23, 2014) http://www.jdsupra.com//plaintiffs-may-assert-negligentdesign-c-52077/; *Lance – If This Is Negligence, Who Needs Strict Liability?*, Drug and Device Law (Jan. 23, 2014), http://druganddevicelaw.blogspot.com/2014/01/lance-if-this-is-negligence-who-needs.html.

of such a theory.[214]

Furthermore, the ruling chips away part of the FDA's regulatory authority. The plaintiffs in this case did not have to show an alternative design as they would have had to do in a typical products liability case based on negligently defective design,[215] but doing so in a future case would necessarily call into question the FDA's decision-making since a drug's design is approved by the FDA and cannot be changed without fundamentally altering the product.

214 *Lance* at 441, 446, 449-450.

215 *Id.* at 442-44, 447-48, 458-59.

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