STATE COURT
DocketWatch®

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Alabama Supreme Court Adopts "Innovator Liability"

*By Jack Park**

In *Wyeth, Inc. v. Weeks*, the Supreme Court of Alabama, by an 8-1 margin, adopted the so-called "innovator liability" theory, holding brand-name drug manufacturer Wyeth liable for personal injuries suffered by an individual who bought and used only a generic drug product manufactured and sold by one of Wyeth's competitors.[1] Unless reversed on rehearing, this ruling—the first by a state's highest court—stands in contrast with the vast majority of decisions that have rejected the theory. Only a California court of appeals and a U.S. district court in Vermont have previously embraced the innovator liability theory.[2] Rulings from four federal courts of appeal and from Alabama's neighboring southeastern states are among those decisions to the contrary.[3]

The *Weeks* case came to the Alabama Supreme Court through a certified question from the U.S. District Court for the Middle District of Alabama.[4] In the underlying case, the plaintiff, Danny Weeks, sued five current and former drug manufacturers—both brand-name and generic—alleging that he was injured as a result of his long-term use of metoclopramide, the generic version of the anti-reflux prescription medication Reglan, which Wyeth formerly manufactured. The federal court asked the Alabama Supreme Court to answer the following question:

> Under Alabama law, may a drug company be held liable for fraud or misrepresentation (by misstatement or omission), based on statements made in connection with the manufacture or distributionof a brand-name drug, by a plaintiff claiming physical injury from a generic drug manufactured and distributed by a different company?

Weeks and cases like it arise from the fact that federal law and regulations treat brand-name and generic prescription drugs differently. After incurring the substantial research and development cost to produce a brand-name product (sometimes $1 billion or more for a drug), a brand-name manufacturer must show the Food and Drug Administration (FDA) that the new medicine is both safe and effective. The FDA approval process involves two major steps. First, a brand-name manufacturer

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Florida Supreme Court Upholds Legislature's Changes to State Pension System

*by Christine Pratt**

On January 17, 2013, in *Scott v. Williams*, 2013 FL 520 (Fla. 2013), the Florida Supreme Court upheld the Florida Legislature's amendments to the Florida Retirement System ("FRS") in a four-to-three decision.[1] Governor Rick Scott regarded the decision as a "victory for taxpayers," while union leaders complain that the governor is balancing the budget on the backs of state workers.[2]

By way of background, Senate Bill 2100 converted Florida's retirement program

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FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Oregon Supreme Court Shifts Burden of Proof for Eyewitness Testimony

*by Daniel C. Re**

On November 29, 2012, the Oregon Supreme Court filed its unanimous decision in the consolidated cases of *State v. Lawson* and *State v. James*.[1] The landmark ruling fundamentally altered the standard for eyewitness testimony at trial, and garnered national media attention.[2]

In both cases, the defendants were convicted in large part due to eyewitness identification testimony. The trial courts and the courts of appeal had allowed admission of the eyewitness testimony under the test established in *State v. Classen*.[3] The Oregon Supreme Court's review of *Lawson* and *James* was to determine whether the *Classen* test was consistent with current scientific research and understanding of eyewitness identification. After an extensive review of the current scientific data, the Supreme Court concluded that the *Classen* test was inadequate. The court established a new procedure that shifts the burden of proof to prosecutors to show that an eyewitness's identification is sufficiently reliable, a standard more consistent with the Oregon Evidence Code.

I. Facts in *Lawson*

In *Lawson,* the defendant was convicted of aggravated murder, aggravated attempted murder, and robbery. The victims, a husband and wife, were shot at night in their camp trailer. Earlier that day, the victims had talked to defendant at their campsite. The wife was transported to the hospital by ambulance and helicopter. She was delirious and said she did not know who shot her and had not seen the shooter's face.

The defendant's trial took place more than two years after the shooting. During that time, police interviewed the wife many times and her belief that defendant was the shooter changed from not knowing who shot her to being positive she was shot by the defendant. Initially, the wife could not identify the defendant from a photo lineup. In the next interview, the wife said the shooter put a pillow over her face and she could not see him. In a later interview, she said that despite the pillow, she did see the shooter but she again failed to pick the defendant from a photo lineup. Subsequently, she stated that she believed the defendant was the shooter, but she was not sure. During one interview, the wife said that the shooter wore a dark shirt and baseball cap. One month before trial, police showed her a single photo of the defendant wearing a dark shirt and a baseball cap. Just before trial, police had her observe the defendant at a pretrial conference. Only after those events occurred did the wife pick the defendant out of the same photo lineup that she had been unable to identify him from earlier. At trial, the wife testified that she was positive the defendant was the shooter.

II. Facts in *James*

In *James*, the defendant was convicted of robbing a grocery store and other associated crimes. The conviction was based primarily on eyewitness identification testimony

of two store employees who confronted the defendant as he was leaving the store. Prior to that confrontation, the store employees observed the defendant and an accomplice stuffing forty ounce bottles of beer into a backpack. The defendant physically assaulted the employees and then left the store and drove off with his accomplice. The theft was immediately reported to the police. The witnesses described the defendant as a Native American, approximately six feet tall, weighing about 220 pounds and wearing a white shirt and baggy blue jeans. During the confrontation with the defendant in the store, the eyewitnesses had a very good look at the defendant from close range.

Later that day, a police officer spotted the defendant based on the description given by the witnesses. The officer questioned the defendant but he denied being at the store. The officer, with consent, searched the accomplice's backpack and found an unopened forty ounce bottle of malt liquor. The defendant then consented to return to the store where he was immediately identified by the witnesses.

III. The *Classen* Test

Classen established a two-step test to determine admissibility of eyewitness identification testimony when a defendant files a motion to suppress that testimony. In *Classen*, the court recognized that suggestive circumstances affect the reliability and, therefore, the admissibility of eyewitness identification. The *Classen* test was designed to protect the reliability of the testimony. *Classen* first required the court to decide if the process leading to the identification by the eyewitness was suggestive or needlessly departed from procedures to avoid suggestiveness. If the court found that the procedure was suggestive, the state was then required to show that the identification testimony had a source independent of the suggestive procedure or that other aspects of the identification substantially excluded the risk that the identification result from the suggestive procedure.[4]

A. Scientific Data

In its opinion, the court noted that since 1979, when *Classen* was decided, there have been more than 2,000 scientific studies on the reliability of eyewitness identification.[5] Those studies have identified factors known to affect the reliability of such identifications.

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Virginia Supreme Court Expands Wrongful Discharge Cause of Action

*by Michael I. Krauss**

In *Van Buren v. Grubb*,[1] the Virginia Supreme Court ruled for the first time that a non-employer may be sued for wrongful discharge if he violated Virginia public policy.

I. Background on At-Will Employment

In all fifty states, in theory, employment is at-will as a general default rule. This means that employers can fire employees for any reason, or for no reason at all, unless employers have provided to the contrary in the employment contract. This is the case, for example, for tenured employees, who can be discharged only "for cause." In practice it is very hard to dismiss a tenured employee without proof of gross misconduct.

Most employees, though, are not tenured. Non-tenured employees can only prevail on a wrongful discharge suit if they fall into certain exceptions to at-will employment. Among those exceptions, in decreasing order of breadth, are:

1. The "covenant of good faith exception" (recognized in eleven, mostly Western states).[2] This sweeping exception almost swallows up the at-will employment rule. It reads a promise of good faith and fair dealing into every employment relationship, and has been interpreted to mean either that employer personnel decisions are subject to a "just cause" standard or that terminations made in bad faith or motivated by malice are prohibited.[3]

2. The "implied contract exception" (recognized in thirty-seven states and the District of Columbia to a greater or lesser extent). Although employment is often not governed by a contract, an employer may make oral or written representations to employees regarding job security or procedures that will be followed before adverse employment actions are taken. If such representations are made explicitly or even impliedly, these representations may create a contract for employment and limit the right to discharge the employee. In fourteen states such

explicit or implied representations may be oral or written (though in every case the discharged person bears the burden of proving their existence), while in twenty-three states only written representations may satisfy this exception.[4] Thus, "employee handbook" provisions describing termination for "just cause" or under other specified circumstances, or indicating that an employer will follow specific procedures before disciplining or terminating an employee, may waive an employer's at-will rights. So might (in fourteen states) a hiring official's oral representations to employees that employment will continue during good performance. Only Florida, Georgia, Indiana, Louisiana, Missouri, North Carolina, Pennsylvania, Rhode Island, Texas and Virginia have neither the good faith nor the implied contract exceptions in their employment laws.[5]

3. The "public policy exception" (recognized in the great majority of states) prohibits discharge in violation of the state's public policy doctrine or (typically) of a state or federal statute. For example, in most states an employer cannot terminate an employee for filing a valid workers' compensation disability claim, or for refusing to break the law at the employer's request or command.[6]

Virginia recognizes the public policy exception to at-will employment, but does not recognize implied contract or good-faith dealing exceptions. This means that Virginia employers can fire employees for any reason, or for no reason at all, unless the employment contract stipulates otherwise or there is the "public policy" exception, whereby an employee fired for reasons that shock Virginia public policy

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Oklahoma Supreme Court Strikes Down Informed Consent Law

*by Christine Pratt**

On December 4, 2012, in *Nova Health Systems v. Pruitt*, 2012 OK 103 (Okla. 2012), the Oklahoma Supreme Court summarily struck down—on federal constitutional grounds—an Oklahoma informed consent law that required abortion doctors to perform an ultrasound and make certain disclosures regarding fetal development before proceeding with an abortion.[1]

In its short, unanimous memorandum opinion, the Oklahoma Supreme Court affirmed the trial court's judgment *per curium*,[2] but it did not adopt the trial court's reasons for overturning the informed consent law (HB 2780, codified at Okla. Stat. tit. 63, §§ 1-738.1A *et seq.*). Rather than declare HB 2780 violative of the Oklahoma Constitution, as the trial court had done, the Oklahoma Supreme Court charted a different path and invalidated the law solely on federal constitutional grounds under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). In doing so, the Oklahoma Supreme Court created an apparent split with the U.S. Court of Appeals for the Fifth Circuit and broke from a growing trend in state and federal courts toward invalidating informed consent laws on First Amendment or state constitutional grounds rather than under *Casey*.[3] This article summarizes HB 2780's provisions and legislative history, analyzes the Oklahoma Supreme Court's opinion and places it within the broader context of other recent informed consent cases, and concludes with an assessment of *Pruitt*'s significance in the national landscape of abortion litigation.

I. Background

HB 2780 stated that it aimed to give women who seek abortions the benefit of an "informed decision."[4] Toward this goal of informed consent, HB 2780 required abortion doctors to perform an ultrasound at least one hour before proceeding with an abortion, display the ultrasound images to the pregnant woman,[5] and also provide a simultaneous medical description of the ultrasound images.[6] This medical description had to include the dimensions of the fetus, the presence of cardiac activity, and the presence of internal organs, if viewable.[7] The physician then was required to obtain from the woman her written certification that the physician complied with HB 2780.[8] If a woman faced a medical emergency in which her life or physical health were in danger because of the pregnancy, the physician could perform the abortion

without adhering to HB 2780.[9] The law further specified that nothing in HB 2780's provisions may be construed to prevent the woman from averting her eyes from the ultrasound images.[10]

The Oklahoma House of Representatives passed HB 2780 on March 2, 2010.[11] After garnering the necessary votes in the Senate about a month later,[12] the bill reached the desk of Governor Brad Henry, who vetoed the bill.[13] On April 27, 2010, the House and Senate overrode the Governor's veto, exceeding the three-fourths vote in each house required by the Oklahoma Constitution.[14]

That same day, Nova Health Systems, a non-profit corporation that operates an abortion clinic in

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Those factors are divided into two categories:

1. System variables, which refer to the procedure used to obtain identifications, such as lineups, showups, and suggestive questioning, which can cause post-event memory contamination; and, suggestive feedback and recording confidence;[6]
2. Estimator variables, which refer to characteristics of the witness that cannot be manipulated by the state, like stress, witness attention, duration of exposure, environmental conditions, perpetrator characteristics, speed of identification, and memory decay.[7]

B. The Revised Procedure

The *Classen* test assumed the eyewitness identification testimony was admissible, and, if the defendant objected, it was incumbent on him to prove why the testimony should not be admissible. In the current case, the court reasoned that while this standard meets due process, it was not consistent with admissibility of evidence under the Oregon Evidence Code.[8] Another issue with *Classen* was that it resulted in trial courts relying heavily on the eyewitness's testimony to determine whether the identification had been influenced by suggestive procedures, an inherently problematic practice.[9] New research, however, established that suggestive procedures could inflate eyewitness testimony and such inflation detracted from the testimony's reliability. As a result, the *Classen* test had to be revised.

Based on the scientific research, the court established the following procedure under the Oregon Evidence Code to determine admissibility of eyewitness identification evidence:

> 1. The state, as proponent of that evidence, must establish that the witness had adequate opportunity to observe or personally perceive the facts the witness will testify to and that the witness did, in fact, observe or perceive them, thereby gaining personal knowledge of those facts;[10]
>
> 2. Since the state is using lay opinion testimony, it must establish that the testimony is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony or determination of the fact in issue;[11]
>
> 3. If the state succeeds in establishing that the evidence is admissible under parts 1 and 2, the defendant can have the testimony suppressed by proving that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, undue delay or needless cumulative evidence;[12]
>
> 4. If the defendant succeeds under part 3, the court can either exclude the eyewitness testimony or fashion a remedy that cures the unfair prejudice or other danger attendant to using that evidence.[13]

The court further noted that research regarding eyewitness identification is ongoing and that based on new research no party was precluded from establishing other factors or from challenging factors set out in the opinion.[14]

III. Court's Application of the Revised Procedure to Lawson and James

In *Lawson*, the court expressed concern over the reliability of the wife's identification testimony in light of its revised procedure for eyewitness testimony. The court's concern stemmed from the following facts: the wife's tremendous stress when she first observed the shooter; the poor viewing conditions; the two year time period between the shooting and the wife's court identification; and significant suggestive procedures used by the police.[15] Because of these circumstances, under the new standard, the court reversed defendant's conviction and remanded the case for a new trial.

In *James*, the court held that application of the revised procedure could not have resulted in the exclusion of the

eyewitness identification. The court reasoned that since witnesses provided a detailed description of the defendant to the police within minutes of the robbery and the police identified the defendant as a suspect in the robbery based on their description of the witnesses within five hours, the eyewitness testimony would be allowed under the new standard. Additionally, the witnesses were face-to-face with the defendant and had the personal knowledge to identify him. Although some of the identification procedures were suggestive, the court found that the witnesses' identifications were based on their original observations and were not influenced by suggestive procedures. The court affirmed the defendant's conviction.

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Endnotes

1 State v. Lawson/James, 352 Or. 724, 291 P.3d 673 (2012).

2 Editorial, *A Check on Bad Eyewitness Identifications*, N.Y. Times, Dec. 5, 2012, http://www.nytimes.com/2012/12/06/opinion/a-check-on-bad-eyewitness-identifications.html?_r=0.

3 285 Or. 221, 590 P.2d 1198 (1979).

4 *Lawson/James*, 352 Or. at 737, 746, 749.

5 *Id.* at 739–740

6 *Id.* at 741–744, Appendix at 769–789.

7 *Id.* at 744–746, Appendix at 769–789.

8 *Id.* at 746–747.

9 *Id.* at 748.

10 *Id.* at 752–753.

11 *Id.* at 753–754.

12 *Id.* at 756–758.

13 *Id.* at 759.

14 *Id.* at 741.

15 During police interviews, the wife was asked leading questions that suggested defendant's guilt and, due to her condition, she was especially susceptible to memory contamination. The wife was twice unable to identify defendant from photo lineups and only identified him after seeing suggestive photographs of the defendant and after viewing him at a preliminary hearing.

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(e.g., race discrimination, resistance to the employer's sexual harassment, etc.) may sue for wrongful discharge notwithstanding the at-will rule. The public policy exception is quite restrictive, however. As the United States District Court for the Western District of Virginia recently held in *Shomo v. Junior Corp.*,[7] and based on the seminal case of *Bowman v. State Bank of Keysville*,[8] public policy exceptions are applied only in the following cases:

- Where an employer interferes with an employee's exercise of a statutorily created right;
- Where an employer violates a statutorily created public policy intended to protect a class of persons of which the employee is a member; or
- Where an employee is terminated because he refuses to engage in a criminal act.

In *Shomo v. Junior Corp.,* a federal court applying Virginia law held that a waitress who alleged she was fired for refusing to terminate her pregnancy by abortion cannot pursue a wrongful termination cause of action, since her complaint satisfied none of those three criteria. In *Shomo* the plaintiff had become romantically involved with "Junior," the son of the president of the restaurant corporation that had hired her. When the plaintiff disclosed that she was pregnant with Junior's child, Junior allegedly told her to undergo an abortion or face termination. Subsequent to her refusal and not long afterwards, Junior's father allegedly terminated plaintiff after telling her that customers preferred to be served by a slim waitress, not someone with a "belly." Granting a motion to dismiss, the federal court wrote, "Terminating an employee simply because she refuses to have an abortion offends the conscience of the Court," and noted that "there is substantial evidence that the public policy of the Commonwealth [of Virginia] seeks to limit abortion."[9] It nonetheless held for defendant in the absence of any of the Virginia exceptions stated above.[10] Such was the strength of the Virginia at-will rule.

II. *Van Buren v. Grubb*

In that light, it is highly interesting that in *Van Buren v. Grubb*, a decision rendered in November 2012 in response to a reference from the Fourth Circuit Court of Appeals, the Virginia Supreme Court expanded wrongful discharge liability. The Virginia Supreme Court held that a *non*-employer may be sued for wrongful discharge if that non-employer was in fact the individual violator of Virginia public policy.[11]

The original wrongful discharge suit was filed in United States District Court by a woman who claimed to have been both the victim of gender discrimination in violation of Title VII of the Civil Rights Act of 1964, and also to have been wrongfully discharged because she would not yield to her supervisor's repeated sexual advances. The suit was filed against Dr. Stephen Grubb, who was the owner of the Virginia limited liability corporation that employed her. The district court had dismissed the wrongful discharge suit against Dr. Grubb on the grounds that he was not plaintiff's employer and could therefore not be sued for wrongful discharge. On appeal, the Fourth Circuit referred to the Virginia Supreme Court the question of whether a suit for wrongful discharge could be filed against a non-employer.

By a 4-3 decision, the court answered in the affirmative, ruling that if a non-employer was in fact the violator of public policy he can be sued for wrongful discharge. The majority rejected Grubb's argument that by definition discharge can be performed only by an employer, and therefore that said employer can be liable for wrongful discharge. The majority emphasized the need to deter wrongful discharge, and that need would not be accomplished in cases such as this one without the liability of "fellow employee" Grubb. The upshot in the instant case, of course, is that the plaintiff can pursue the defendant's personal assets, not merely the assets of the corporation.

The Chief Justice's dissent (joined by Justices Goodwyn and McLanahan) emphasized the logical impossibility of a non-employer firing an employee. Though the supervisor's behavior was wrongful and likely tortious, and could possibly incur personal liability for battery, it was not and could not be in violation of his duty not to discharge an employee for reasons contrary to public policy. Citing Illinois, Oregon, and Texas decisions in support, the Chief Justice argued that the duty not to wrongfully fire can only be breached by an employer, and since a breach of duty (not mere wrongfulness) is necessary for tort liability, a supervisor, or even an owner, cannot be liable for the tort of wrongful discharge.

Therefore, in this very interesting Virginia Supreme Court decision, the majority seems to have waived the need for "breach of duty" for tort liability. In Virginia, wrongfulness is now enough to incur liability, at least for the tort of wrongful discharge.

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Endnotes

1 Virginia Supreme Court Record No. 120348, November 1, 2012.

2 Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah and Wyoming recognize this doctrine. See Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, 124 Monthly Lab. Rev. 1 (Jan. 2001), at 10.

3 California appears to have been the first mover here. *See* Cleary v. American Airlines, Inc., 111 Cal.App.3d 443 (1980).

4 Muhl, *supra* note 2, at 7.

5 *Id.* at 7–10.

6 Again California innovated. In *Petermann v. International Brotherhood of Teamsters,* plaintiff business agent refused to lie to a state committee to which he had been subpoenaed to testify, and was fired as a result. The California Supreme Court held that recognizing a wrongful discharge suit would effectuate California's policy against perjury. Holding otherwise would encourage criminal conduct by both employer and employee, the court reasoned. Petermann v. International Brotherhood of Teamsters, 174 Cal.App.2d 184, 188 (1959).

7 Shomo v. Junior Corp., No. 7:11-cv-508 (W.D. Va. June 1, 2012).

8 Bowman v. State Bank of Keysville, 331 S.E.2d 797, 331 S.E.2d 797. (Va. 1985).

9 Shomo v. Junior Corp., No. 7:11-cv-508, slip. op. at 13 (W.D. Va. June 1, 2012).

10 The plaintiff had argued that she should be protected by Virginia's "conscience clause," Va. Code § 18.2-75, which prohibits denial of employment to any person based on his or her refusal to participate in an abortion. However, this approach failed because, as the federal court noted, the law was intended to protect medical workers who object to taking part in abortion procedures. The law also requires that those seeking its shelter must have previously "state[d] in writing an objection to any abortion or all abortions on personal, ethical, moral or religious grounds", something the plaintiff had failed to do.

11 Van Buren v. Grubb, Virginia Supreme Court Record, No. 120348 (November 1, 2012).

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must submit an "Investigational New Drug Application," which includes, among other things, information about the chemistry, manufacturing, pharmacology, and toxicology of the proposed medicine as well as information about animal tests and the human testing protocols.[5] Second, once human clinical trials are complete, the brand-name manufacturer must submit a "New Drug Application," which reports the results of the clinical trials and includes information about the drug's components and its composition as well as samples of the proposed labeling.[6]

When the patent protection for an FDA-approved brand-name product expires (as Reglan's did in the mid-1980s) competitors are free to enter the market by selling generic versions of the medicine. Generic manufacturers do not have to follow the rigorous pre-market approval process that the FDA imposes on brand-name manufacturers. Instead, they can submit an Abbreviated New-Drug Application, which must show that the generic version is bioequivalent[7] to its brand-name counterpart but which, otherwise relies on the FDA's approval of that brand-name counterpart.

By piggy-backing on the FDA's approval of the brand-name product, the generic manufacturers "avoid the costly and time-consuming process associated with a [New-Drug Application], which allows the dissemination of low-cost generic drugs."[8] The generic manufacturer also piggy-backs on the promotional and marketing efforts of the brand-name manufacturers.

The result, not surprisingly, is that low-cost generic drugs are frequently substituted for the brand-name version. Indeed, in 2011, generic drugs constituted more than 80% of the prescriptions filled in the United States.[9] Depending on a state's particular requirements, the prescribing physician or a pharmacist can substitute a generic drug for the brand-name medicine, a result frequently promoted by insurance plans.

Prescription drugs, of course, come with side effects, and the FDA mandates that approved drugs be accompanied by warning labels that identify those risks. In fact, claims involving drug warning labels are the most common kind of lawsuits brought against pharmaceutical manufacturers. Frequently, when a plaintiff alleges that he has been injured by a drug product, he will sue the product's manufacturer alleging, among other things, that the product's warning label was inadequate.

As noted above, the question in *Weeks* was whether a plaintiff who consumed only the generic substitute for Reglan can hold Wyeth—which manufactured brand-name Reglan, not generic metoclopramide—liable for deficiencies in the warning label on the generic product's packaging. The courts have almost uniformly held that consumers of generic products cannot pursue claims against the brand-name manufacturers. The leading case is *Foster v. American Home Products Corp*., in which the Fourth Circuit held that "a name brand manufacturer cannot be held liable on a negligent misrepresentation theory for injuries resulting from the use of another manufacturer's product."[10] Since *Foster* was decided in 1994, more than 75 courts applying the law of 25 states have agreed with the Fourth Circuit.

Plaintiffs around the country, though, now assert that the U.S. Supreme Court's June 2011 decision in *PLIVA, Inc. v. Mensing* changed the legal landscape. In *PLIVA*, the Court held that federal law preempts state court lawsuits alleging that generic drug makers failed to provide adequate warnings about the risks associated with the use of their products. The *Mensing* plaintiffs contended that generic drug manufacturers have a duty to change the labels on their products to reflect developments in the knowledge related to risk of use that occurred after the Food and Drug Administration first approved the label.

The Supreme Court rejected that contention. Because federal regulations require the makers of generic drugs to use the same warning label as the one on the brand-name version, the Court held that generic manufacturers cannot "unilaterally" change their labels. Instead, agreeing with the FDA, it said that the generic manufacturers had to work through the brand-name manufacturers to change the labels. But, because federal law and regulations prohibit the generic manufacturers from independently strengthening their warning labels as state law might compel them to do, the state-law claims against the generic drug-makers are preempted.

The Court recognized that federal preemption dealt the consumers of generic drugs an "unfortunate hand." The Eighth Circuit had already followed *Foster* to hold that the plaintiff, Gladys Mensing, who consumed only generic drug products, had no claim against the brand-name manufacturer.[11] Accordingly, the Supreme Court's holding that Mensing's claims against the generic manufacturers are preempted left her with, as Justice Sotomayor lamented in dissent, "no right to sue."[12] The

Court explained, though, that given the dictates of federal statutory and regulatory law, the problems attributable to the warning labels on generic drugs were for Congress, the FDA, or both, to solve.

By foreclosing certain claims against generic drug manufacturers, *PLIVA* leaves a remedial "gap." Even though the U.S. Supreme Court put the burden on Congress and the FDA to plug the hole, that gap seemed to loom large in the Alabama Supreme Court's thinking.

In *Weeks*, the majority concluded that the brand-name manufacturer Wyeth could be held liable for deficiencies in the generic product's label because it should have "foreseen" that the generic manufacturer would use Wyeth's warning label. The majority explained, "[A]n omission or defect in the labeling for the brand-name drug would necessarily be repeated in the generic labeling, foreseeably causing harm to a patient who ingested the generic product."[13] It also surmised that a prescribing physician would rely on the brand-name manufacturer's label "even if the patient ultimately consumed the generic version of the drug."[14] Finally, the majority deemed the possibility of physical injury to be within the brand-name manufacturer's "reasonabl[e] contemplat[ion]."[15]

Accordingly, the majority held that a brand-name drug manufacturer can be held liable for defective warnings even "by a plaintiff claiming physical injury caused by a generic drug manufactured by a different company."[16] The majority asserted that state-law tort lawsuits fill a gap in the enforcement and regulatory structure because they "uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly and serve a distinct compensatory function that may motivate injured persons to come forward with information."[17] In short, the majority said that it was "not fundamentally unfair" to the brand-name manufacturer to make it answer for "the warnings on a product it did not produce" because the brand-name manufacturer drafted those warnings and the generic manufacturer "merely repeated" them.[18]

Justice Glenn Murdock dissented from the Alabama Supreme Court's decision to embrace the innovator liability theory. He recognized that "[t]here is no good outcome to this case," because *PLIVA* forecloses Mr. Weeks' claims against the manufacturers of the generic medicine he took. Justice Murdock then explained that the majority strayed from "certain bedrock principles of tort law and . . . [the] economic realities underlying those principles."[19] In his view, the majority's focus on foreseeability overlooked the core tort principle of duty, which requires that there be a preexisting "relationship" between the parties. A brand-name manufacturer that neither made nor sold that allegedly injurious generic metoclopramide to Mr. Weeks had no such relationship—and, thus, owed no duty to—him.

Justice Murdock also disagreed with the majority's treatment of the case law. As noted above, the *Weeks* decision departs from most other court rulings in the country rejecting innovator liability, and *PLIVA* did not upset that consensus.

Justice Murdock explained, *PLIVA* "did nothing to undermine the essential rationale in the plethora of pre- and post-*PLIVA* decisions holding that *brand-name* manufacturers are not liable for injuries caused by deficient labeling of generic drugs they neither manufactured nor sold."[20] He noted that, even when the pre-*PLIVA* courts seemed to assume that the plaintiffs could pursue their defective warning claims against the generic manufacturer, their conclusion that the brand-name manufacturers were not liable for the generic manufacturer's warning labels was independent of that assumption.[21] Indeed, it's not only the courts that ruled before *PLIVA* that reject attempts to hold brand-name drug manufacturers responsible for the labels on generic products, but each of the 18 post-*PLIVA* decisions as well. Justice Murdock pointed out, "Every one of the post-PLIVA decisions has held that the manufacturers of brand-name drugs have no duty or liability to the consumer of a generic drug manufactured and sold by another company."[22]

Unless reversed on rehearing, *Weeks* is likely to spawn more litigation in Alabama about the adequacy of drug warnings.[23] Notably, that litigation will take place just as the FDA considers amending its regulations to overrule *PLIVA* and eliminate federal preemption of claims against generic drug manufacturers.[24] A change in the FDA's regulations to allow suits against generic manufacturers would make the Alabama Supreme Court's embrace of the "innovator liability" theory unnecessary.

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Endnotes

1 ___So. 2d ___, 2013 WL 13573 (Ala. Jan. 11, 2013), *available at* http://alabamaappellatewatch.com/wp-content/uploads/2013/01/Wyeth-v.-Weeks.pdf. On February 4, 2013, the dissent of Associate Justice Glenn Murdock was released. *See id.* (Murdock, J., dissenting), *available at* http://wlflegalpulse.files.wordpress.com/2013/02/weeks-dissent.pdf.

2 *See* Conte v. Wyeth, Inc., 168 Cal. App. 4th 89, 85 Cal. Rptr. 3d

299 (2008); Kellogg v. Wyeth, 762 F. Supp. 2d 694 (D. Vt. 2010).

3 To date, more than 75 published decisions applying the law of 25 states have rejected the notion that the brand-name manufacturer is responsible to the consumer of generics. Those decisions include Demahy v. Schwarz Pharma, Inc., 702 F.3d 177 (5th Cir. 2012); Smith v. Wyeth, Inc., 657 F. 3d 420 (6th Cir. 2011); Mensing v. Wyeth, Inc., 658 F.3d 867 (8th Cir. 2011); Foster v. American Home Products Corp., 29 F.3d 165 (4th Cir. 1004).

4 The U.S. District Courts for the Northern and Southern Districts of Alabama are among the courts that have gone the other way. *See, e.g.*, Simpson v. Wyeth, Inc., No. 7:10-cv-01771-HGD (N. D. Ala. Dec. 9, 2010) (not reported); Overton v. Wyeth, Inc., No. CA-10-1491-KD-C (S.D. Ala. Mar. 15, 2011) (not published); Mosley v. Wyeth, 719 F. Supp. 2d 1340 (S.D. Ala. 2010); Barnhill v. Teva Pharm. USA, No 06-282-CB-M (S.D. Ala. 2007).

5 *See* 21 U.S.C. § 355(b); 21 C.F.R. § 312.21.

6 *See* 21 U.S.C. §§ 355(b)(1), 355(d)(5).

7 *See* 21 U.S.C. § 355(j)(2)(A)(iv)(2006); 21 C.F.R. pt. 320 (2009).

8 Wyeth, Inc. v. Weeks, 2013 WL 13573 at * ___ (Ala. Jan. 11, 2013); No. 1:10-cv-602, slip op. at 13, *available at* http://www.reedsmith.com/files/uploads/DrugDeviceLawBlog/Weeks.pdf.

9 *See* IMS Institute for Healthcare Informatics, The Use of Medicines in the United States: Review of 2011 26 (April 2012), *available at* http://www.imshealth.com/ims/Global/Content/Insights/IMS%20Institute%20for%20Healthcare%20Informatics/IHII_Medicines_in_U.S_Report_2011.pdf.

10 29 F.3d 165. 167 (4th Cir. 1994).

11 *See* Mensing v. Wyeth, Inc., 588 F. 3d 603, 612–14 (8th Cir. 2009).

12 PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2592 (2011) (Sotomayor, J., dissenting).

13 *Weeks*, No. 1:10-cv-602, slip op. at 41.

14 *Id.* at 42.

15 *Id.* at 45.

16 *Id.* at 51.

17 *Id.*

18 *Id.* at 52.

19 Wyeth, Inc. v. Weeks, No. 1:10-cv-602, slip op. at 1(Ala. Jan. 11, 2013) (Murdock, J., dissenting), *available at* http://wlflegalpulse.files.wordpress.com/2013/02/weeks-dissent.pdf.

20 *Id.* at 4 (emphasis in original)

21 *Id.* at 11–12

22 *Id.* at 28–29.

23 One scholar notes that the innovator liability theory is not, necessarily, limited to prescription drugs. He explains:

> [T]he same sorts of questions may arise with other types of consumer goods, ranging from nonprescription drugs and foods to household chemicals and appliances; in other words, crossover tort litigation could occur in any market served by brand-name companies that actively promote their wares but face competition from largely identical but lower-priced store brands.

Lars Noah, *Adding Insult to Injury: Paying for Harms Caused by a Competitor's Copcat Product*, 45 Tort Trial & Insurance Prac. L.J. (2010), *available at* http://www.americanbar.org/content/dam/aba/publications/tort_insurance_law_journal/tips_vol45_no3_4_Noah.authcheckdam.pdf.

24 *See* Brief for the United States of America as Amicus Curiae Supporting Petitioner at 15 n.2, Mutual Pharm. Co. v. Bartlett, ___ S. C.t ___ (2013) (No. 12-142), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-142_pet_amcu_usa.authcheckdam.pdf.

Florida Supreme Court Upholds Legislature's Changes to State Pension System

continued from front cover...

from a noncontributory system to a contributory system, required all current FRS members to contribute 3% of their salaries to the retirement system, and eliminated the retirement cost-of-living adjustment (COLA) for any service rendered after July 1, 2011.[3]

The court's decision reversed the trial court's ruling and explicitly rejected the trial court's conclusion that the pension amendments violated the Florida Constitution's contracts clause (article 1, section 10), takings clause (article 5, section 6), and collective bargaining clause (article 1, section 6).[4] *Williams* makes clear that, while the Legislature is barred from *retroactively* altering the benefits to which a member of its retirement system is entitled, the Legislature is free under the Florida Constitution to alter such benefits *prospectively*, that is, before the member has retired.[5]

I. Background

At a time when Florida lawmakers faced a budgetary shortfall of $3.6 billion and the possibility of a slipping credit rating,[6] the Legislature instituted one of the most drastic changes the FRS had seen in decades. Prior to the 2011 pension amendments, the main features of the FRS had remained largely unchanged since the Florida Legislature had made the plan noncontributory in 1974.[7] At that time, however, many public employees expressed misgivings about making the retirement system noncontributory, claiming that since the employee was no longer contributing to the system, the Legislature would feel free to change a member's retirement benefits anytime it wished.[8] Indeed, such fears were grounded in Florida law, as the Florida Supreme Court had previously

held that "even where an employee had already retired, the legislature had the authority to reduce the retirement benefits under a mandatory plan."[9]

To assuage public employees' apprehension about sudden changes to their retirement benefits, in 1974 the Legislature—at the same time it made the FRS noncontributory—enacted a preservation of rights provision.[10] The provision reads, in relevant part:

> As of July 1, 1974, the rights of members of the retirement system established by this chapter are declared to be of a contractual nature, entered into between the member and the state, and such rights shall be legally enforceable as valid contract rights and shall not be abridged in any way.[11]

The decisive issue the court faced in *Williams* was whether the preservation of rights provision, by expressly creating contract rights for all existing members of the retirement system, bound future legislatures to the noncontributory retirement system that the 1974 Legislature established. As already stated, the Florida Supreme Court held that it did not.[12]

II. The Trial Court

The trial court, deciding the case on cross motions for summary judgment, answered the above inquiry in the affirmative.[13] Seizing on the provision's language that the FRS members' contract rights "shall not be abridged in any way," the court held that the preservation of rights provision granted to FRS members "continuous, unconditional rights to a noncontributory plan with a cost of living adjustment."[14] Having found that the Legislature substantially impaired FRS members' contract rights, the court then evaluated the constitutionality of the impairment[15] by asking whether the state's impairment was reasonable and necessary to serve an important public interest.[16] The court held that the state's breach was not justified when the state intended to "make funds available for other purposes," and when other, reasonable alternatives existed to preserve the state's contract with FRS members.[17]

The trial court also acknowledged a previous Florida Supreme Court case, *Florida Sheriffs Ass'n v. Dep't of Administration*, 408 So. 2d 1033 (Fla. 1981), in which the court authorized the Legislature to lower the special risk credit benefit for a certain subset of FRS members who had not yet retired.[18] The trial court distinguished the case, however, reasoning that *Florida Sheriffs* did not, in the court's view, empower the Legislature to "completely gut" the FRS.[19]

Since the state, in the court's view, unconstitutionally breached its contract with FRS members, the court went on to declare that the funds that the state had withdrawn from the members' salaries following the amendments' effective date constituted an unconstitutional taking of private property.[20] The court also held that the amendments abridged the rights of public employees to bargain collectively over retirement benefits.[21]

III. The Florida Supreme Court

When the state appealed the case to Florida's First District Court of Appeal, the court certified to the Florida Supreme Court that the appeal presented issues of "great public importance" and required immediate resolution by the high court.[22] The court accepted the case and reversed the trial court's ruling, upholding the pension amendments as constitutional under the Florida Constitution.[23] Focusing most of its analysis on the preservation of rights provision and the Florida Constitution's contracts clause, the court reversed the trial court's ruling primarily under *Florida Sheriffs*.

The court had explicitly held in *Florida Sheriffs*, as it held again in *Williams*, that the preservation of rights provision had the effect of barring the legislature from altering retirement benefits *retroactively*, but did not affect the Legislature's ability to make *prospective* changes to a member's retirement benefits.[24] The court reiterated dicta from *Florida Sheriffs* in which the court stressed that "the rights provision was not intended to bind future legislatures from prospectively altering benefits. . . . This view would, in effect, impose on the state the permanent responsibility for maintaining a retirement plan which could never be amended or repealed irrespective of the fiscal condition of this state."[25] In *Williams*, the court found that since the 2011 pension amendments will not diminish any benefits earned before the effective date of July 1, 2011, the amendments operate purely prospectively and are therefore constitutional.[26]

The court briefly addressed the trial court's holdings regarding the Florida Constitution's takings and collective bargaining clauses.[27] The court found that there could not have been an unconstitutional taking, since no contract between the state and members of the FRS had been breached.[28] Regarding the collective bargaining clause, the court noted that the amendments' challengers had neglected to raise any proper claim identifying any specific collective bargaining agreements which the amendments violated, nor did the challengers address the effect of the amendments on any specific collective bargaining agreement.[29] Furthermore, the court reasoned that

nothing in the amendments prohibited public employees from collectively bargaining on the issue of retirement pensions or benefits.[30]

IV. Separately Concurring and Dissenting

Justice Pariente wrote a concurring opinion in which she emphasized that the court's decision does not express an opinion as to the amendments' wisdom or fairness, or even the necessity of the Legislature's actions.[31] Justice Pariente's concurrence then went on to respond to Justice Lewis' dissent.[32] In their dissents, Justices Lewis and Perry claimed that the majority's reading of the preservation of rights provision rendered the contract created by the provision "wholly illusory."[33] Both Justice Lewis and Justice Perry quoted large portions of the trial court's analysis, stating that they agreed with the trial court, and furthermore, that they would overturn *Florida Sheriffs* as having been incorrectly decided.[34] Justice Lewis in particular emphasized how the 2011 amendments changed the fundamental nature of the FRS and therefore violated the protection of rights provision.[35] Justice Perry focused on the rights provision's plain meaning and argued that the provision plainly gives state employees a contractual right to a noncontributory retirement system.[36]

V. Conclusion

Williams makes very plain the Florida Legislature's authority to make prospective changes to its retirement system's benefits, as Florida lawmakers gear up for more pension reform in the coming months. Indeed, only one week after *Williams* was decided, Governor Rick Scott and several legislators announced plans to implement further changes to the FRS that would include shifting new state employees to a 401(k)-style plan.[37] Politicians and voters may of course disagree on whether this is good public policy, but proponents of Governor Scott's pension amendments point to the $1 billion saved by the state and $600 million saved by local governments.[38] Time will tell whether the Florida Legislature's cost shifting measures will pay dividends in the long run towards the state's financial health.

**Christine Pratt graduated from the University of Florida Levin College of Law in 2011 and practices law in Florida. While in law school, she was secretary of her law school's chapter of the Federalist Society.*

Endnotes

1 Scott v. Williams, No. SC12-520 (Fla. 2013), *available at* http://www.floridasupremecourt.org/decisions/2013/sc12-520.pdf.

2 *Florida Supreme Court upholds law requiring state workers to contribute 3 percent of pay to state pension plan*, The Miami Herald, Jan. 17, 2013, http://www.miamiherald.com/2013/01/17/3187217/florida-supreme-court-upholds.html.

3 *Id.* at 2.

4 *Id.* at 3.

5 *Id.* at 18.

6 Jef Feeley & Christine Jordan Sexton, *Florida High Court to Weigh $1 Billion State Pension Case*, Bloomberg, Sept. 7, 2012, *available at* http://www.bloomberg.com/news/2012-09-07/florida-high-court-to-weigh-1-billion-state-pension-case.html (last visited Mar. 6, 2013).

7 Scott v. Williams, No. SC12-520, slip op. at 3 (Fla. 2013); *see also id.* at 28–29 (Lewis, J., dissenting).

8 *Id.* at 37 (Lewis, J., dissenting) (quoting Fla. Dep't of State, H.R. Comm. on Retirement, Personnel and Claims, Legislative Program Overview, June 24, 1974).

9 State ex rel. Holston v. City of Tampa, 159 So. 292, 293 (Fla. 1934).

10 Scott v. Williams, No. SC12-520, slip op. at 6 (Fla. 2013).

11 *See* Fla. Stat. §§ 121.011(3)(d) (1974), 121.011(3)(d) (2012).

12 Scott v. Williams, No. SC12-520, slip op. at 16 (Fla. 2013).

13 Order on Motions for Summary Judgment, Williams v. Scott, Case No. 2011 CA 1584 (Fl. Cir. Ct. Mar. 6, 2012), *available at* http://www.afscme1542.org/FRS_2nd_Circuit_Ct_Ruling_030612.pdf.

14 *Id.* at 6.

15 *Id.* at 7.

16 The trial court followed the United States Supreme Court's analysis in *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1 (1977).

17 Order on Motions for Summary Judgment, Williams v. Scott, Case No. 2011 CA 1584, slip op. at 7–8 (Fl. Cir. Ct. Mar. 6, 2012), *available at* http://www.afscme1542.org/FRS_2nd_Circuit_Ct_Ruling_030612.pdf.

18 *Id.* at 5–6.

19 *Id.* at 2.

20 *Id.* at 8–9.

21 *Id.* at 9–10.

22 Scott v. Williams, No. SC12-520, slip op. at 1 (Fla. 2013).

23 *Id.* at 1, 3.

24 *Id.* at 16.

25 *Id.*

26 *Id.* at 11–12.

27 *Id.* at 18–21.

28 *Id.* at 18–19.

29 *Id.* at 19.

30 *Id.* at 20.

31 *Id.* at 23 (Pariente, J., concurring).

32 *Id.* at 26–27.

33 *Id.* at 31 (Lewis, J., dissenting); *id.* at 44 (Perry, J., dissenting)

(quoting the circuit court opinion).

34 *Id.* at 36 (Lewis, J., dissenting); *id.* at 43 (Perry, J., dissenting).

35 *Id.* at 32 (Lewis, J., dissenting).

36 *Id.* at 39–42 (Perry, J., dissenting).

37 Kathleen Haughney, *Legislators Considering Pension System Overhaul*, Sun Sentinel, Jan. 24, 2013, *available at* http://articles.sun-sentinel.com/2013-01-24/news/fl-major-pension-changes-considered-20130124_1_pension-system-new-employees-florida-retirement-system (last visited March 6, 2013).

38 Feeley & Sexton, *supra* note 5.

Okalahoma Supreme Court Strikes Down Informed Consent Law

Continued from page 4...

Tulsa, Oklahoma, brought suit in an Oklahoma trial court challenging HB 2780 under the Oklahoma Constitution.[15] The trial court granted summary judgment to Nova Health Systems and issued a permanent injunction restraining the state from enforcing the law.[16] Reasoning that the law qualified as a special law under the Oklahoma Constitution, the trial court invalidated HB 2780 because "it is improperly addressed only to patients, physicians, and sonographers concerning abortions and does not address all patients, physicians, and sonographers concerning other medical care where a general law could clearly be made applicable."[17]

The Oklahoma Supreme Court decided to retain the appeal directly from the trial court rather than wait for an intermediate appellate court to decide the case.[18] Rule 1.24 of the Oklahoma Supreme Court Rules dictates that the Oklahoma Supreme Court will retain a case upon consideration of three factors: (1) whether a case involves an area of law undecided in Oklahoma; (2) whether a split exists between the lower state appellate courts on the matter; and (3) whether the issue raised on appeal "concern[s] matters which will affect public policy" that, when decided by the Oklahoma Supreme Court, are "likely to have widespread impact."[19] Because no lower appellate courts had yet decided a challenge to HB 2780 and there had been no other abortion ultrasound laws before HB 2780, the Oklahoma Supreme Court must have retained the appeal either because HB 2780 involved an area of law undecided in Oklahoma, or because the issue concerned a matter that would affect public policy and have widespread impact.

II. *Pruitt*'s Analysis

The Oklahoma Supreme Court affirmed the judgment of the trial court *per curiam*, but overturned HB 2780 under the United States Constitution, not the Oklahoma Constitution.[20] The court cited as the sole basis for its decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a United States Supreme Court decision that invalidated a state spousal notification requirement but upheld a 24-hour waiting period and informed consent and parental consent requirements under a newly announced "undue burden" standard that represented a partial retreat from *Roe v. Wade*, 410 U.S. 113 (1973).[21] The entire relevant portion of the Oklahoma Supreme Court's analysis in *Pruitt* was as follows:

> Upon review of the record and the briefs of the parties, this Court determines this matter is controlled by the United States Supreme Court decision in [*Casey*], which was applied in this Court's recent decision of *In re Initiative No. 395, State Question No. 761*.
>
> Because the United States Supreme Court has previously determined the dispositive issue presented in this matter, this Court is not free to impose its own view of the law. . . . The challenged measure is facially unconstitutional pursuant to *Casey*. The mandate of *Casey* remains binding on this Court until and unless the United States Supreme Court holds to the contrary. The judgment of the trial court holding the enactment unconstitutional is affirmed and the measure is stricken in its entirety.[22]

In *In re Initiative No. 395*, the Oklahoma Supreme Court invalidated a proposed constitutional amendment that would have granted personhood status and constitutional rights to fetuses at the earliest beginnings of their biological development in the womb—essentially a blanket abortion ban.[23] To explain why it was overturning the proposed amendment, the court simply said, "Initiative Petition No. 395 conflicts with *Casey* and is void on its face and is hereby ordered stricken,"[24] adding a brief citation to another case, *In re Initiative Petition No. 349, State Question No. 642*.[25] *In re Initiative No. 349* overturned, under *Casey*, a proposed constitutional amendment that would have banned all abortions except those that fell within one of four narrow exceptions.[26]

On the same day it released *Pruitt*, the Oklahoma Supreme Court released another memorandum opinion in which it overturned a law that would have prohibited the off-label use of chemotherapeutic and diagnostic drugs that are known to cause abortions.[27] The opinion

in *Oklahoma Coalition for Reproductive Justice v. Cline* is word-for-word, entirely identical to *Pruitt*, except when the court cites the name of the law, HB 1970.[28] Thus, the court likewise did not provide specifics as to why HB 1970 is facially unconstitutional under *Casey*, aside from the observation that near total abortion bans fail *Casey*'s "undue burden" test.

Pruitt marks the third abortion law case that the Oklahoma Supreme Court decided in 2012, and its treatment of the issue is similar to the court's treatment in *Cline* and *In re Initiative No. 395*.

III. Comparing *Pruitt* to Other High-Profile Ultrasound Law Challenges

In *Texas Medical Providers Performing Abortion Services v. Lakey*, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit unanimously upheld, under *Casey*, a Texas ultrasound law that was in some respects more intrusive than HB 2780.[29] The Texas law that *Lakey* reviewed is similar to HB 2780 in that it requires physicians to perform and display a sonogram of the fetus and exempts those women facing medical emergencies, but the Texas law goes further than HB 2780 by requiring physicians to make the heart auscultation of the fetus *audible* to women, and then wait at least *24 hours* before proceeding with an abortion.[30] Under the Texas law, women may decline to view the images or hear the heartbeat, but they may only decline to hear the explanation of the ultrasound images if their pregnancy meets one of three narrow exceptions.[31] As with HB 2780, under the Texas ultrasound law, pregnant women seeking an abortion have to certify their doctor's compliance with the requisite procedures.

In upholding the Texas ultrasound law, the Fifth Circuit rejected the district court's holding that the law violated physicians' and women's First Amendment right against compelled speech. In reaching its decision, the Fifth Circuit expressly relied on *Casey*'s holding that an informed-consent statute does not abrogate the First Amendment right against compelled speech when it requires the giving of "truthful, non-misleading information" that is "relevant" to the woman's decision regarding the abortion.[32] The Fifth Circuit found that the images and audio produced by an ultrasound are the "epitome of truthful, non-misleading information," and are not different in kind, though admittedly "more graphic and scientifically up-to-date," than the disclosure requirements upheld by the Supreme Court in *Casey*.[33]

It is also worth mentioning that the Fourth Circuit may weigh in on the matter shortly, as a federal district court in North Carolina issued a temporary injunction against North Carolina's ultrasound law on December 19, 2011, using reasoning similar to that employed by the Texas federal district court and rejected by the Fifth Circuit in *Lakey*.[34] In *Stuart v. Huff*, the North Carolina federal district court chose to avoid *Casey* entirely, issuing its injunction solely on First Amendment compelled speech grounds.[35] The district court's issuance of the temporary injunction has already been appealed to the Fourth Circuit.

IV. *Pruitt*'s Importance

Because the Oklahoma Supreme Court chose to strike down HB 2780 under the Federal rather than the Oklahoma Constitution, its ruling in *Pruitt* creates an apparent split with the Fifth Circuit and could plausibly be reviewed by the United States Supreme Court. Oklahoma Attorney General Scott Pruitt has filed a petition for *certiorari*.[36]

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Endnotes

1 Nova Health Systems v. Pruitt, 2012 OK 103, 292 P.3d 28 (Okla. 2012) (per curium).

2 *Id.*

3 Attorney General Pruitt announced on March 25, 2013 that his office had filed a petition for writ of certiorari in the case. Randy Krehbiel, *Pruitt asks U.S. Supreme Court to overturn state court's abortion ruling*, Tulsa World, Mar. 26, 2013, http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130326_16_A12_OKLAHO146921 (last visited April 23, 2013)

4 House Bill 2780 (2)(B), 2010 Okla Sess. Laws ch. 36. (codified at Okla. Stat. tit. 63, §§ 1-738.1A, 1-738.3e).

5 *Id.* (2)(B)(3).

6 *Id.* (2)(B)(2).

7 *Id.* (2)(B)(4).

8 *Id.* (2)(B)(5).

9 *Id.* (2)(D).

10 *Id.* (2)(C).

11 Message from the Okla. H. Reps., Enrolled House Bill No. 2780, April 27, 2010, *available at* https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HB/2780.pdf (last visited Feb. 6, 2013).

12 *Id.*

13 Veto Message from Governor Brad Henry for HB 2780, Okla. H. Journal, April 26, 2010, *available at* http://www.okhouse.gov/

Journals/HJ2010/2010%20Hleg%20Day49.pdf.

14 Message from the Okla. H.R., April 27, 2010, *available at* https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HB/2780.pdf (last visited Feb. 6, 2013).

15 Plaintiffs' Motion for a Temporary Injunction and Temporary Restraining Order, Nova Health Sys. v. Edmondson, Case No. CV-2010-533 (Okla. Dist. Ct. April 27, 2010), *available at* http://msnbcmedia.msn.com/i/MSNBC/Sections/TVNews/MSNBC%20TV/Maddow/Blog/2010/04/Motion.pdf (last visited Feb. 6, 2013).

16 Order Granting Summary Judgment Declaring Ultrasound Act as an Unconstitutional Special Law and Permanent Injunction Preventing the Enforcement of the Ultrasound Act, Nova Health Sys. v. Pruitt, Case No. CV-2010-533 (Okla. Dist. Ct. Mar. 28, 2012), *available at* http://ocrj.org/sites/default/files/

%5B150%5D%20Order%20Granting%20Summary%20Judgment%203-28-12.pdf (last visited Feb. 6, 2013).

17 *Id.* at 1.

18 Nova Health Systems v. Pruitt, 2012 OK 103, 292 P.3d 28 (Okla. 2012) (per curium).

19 Oklahoma Supreme Court Rules, Rule 1.24(c).

20 Nova Health Systems v. Pruitt, 2012 OK 103, 292 P.3d 28 (Okla. 2012) (per curium).

21 *Id.*

22 *Id.*

23 *In re* Initiative Petition, No. 395, State Question No. 761, 2012 Okla. 42, 286 P.3d 637 (Okla. 2012).

24 *Id.*

25 *Id.*

26 *Id.*

27 Okla. Coal. for Reproductive Justice v. Cline, 2012 OK 102, 292 P.3d 27 (Okla. 2012).

28 *Id.*

29 Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012).

30 *Id.* at 573.

31 *Id.* The Texas law provides that a woman may decline to hear a verbal explanation of the ultrasound if: (1) her pregnancy is the result of a rape, incest, or other sexual crime that she reported, or failed to report due to a reasonable belief that reporting the crime would put her at risk of serious bodily harm; (2) she is a minor and is obtaining her abortion through judicial bypass procedures; or (3) the fetus has a reliably diagnosed and documented irreversible medical condition or abnormality. Tex. Health Code Ann. § 171.0122(d) (West 2011). In contrast, HB 2780 allows women to decline to hear an explanation of the ultrasound images only when their health or lives are in danger.

32 *Id.* at 574–80.

33 *Id.* at 577–78.

34 Stuart v. Huff, 834 F. Supp. 2d 424 (M.D.N.C. 2011).

35 *Id.*

36 Randy Krehbiel, *Pruitt asks U.S. Supreme Court to overturn state court's abortion ruling*, Tulsa World, Mar. 26, 2013, http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20130326_16_A12_OKLAHO146921 (last visited April 23, 2013)

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