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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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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

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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.

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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

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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