2015 Civil Justice Update

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This paper recaps key civil justice reforms that occurred in 2015. Part I focuses on broad trends, Part II provides an overview of federal and state reforms adopted in 2015, and Part III highlights key court cases in 2015 that addressed civil justice and liability law issues.

I. Legal Reform Trends in 2015

Consistent with other recent years, there was substantial activity in 2015 with respect to providing for greater access to claimants' asbestos bankruptcy trust claims in civil asbestos personal injury trials, transparency in contracts between state attorneys general and private attorneys, codifying traditional common law duties owed by land possessors to trespassers, and limiting appeal bonds, among other areas.[1]

A. Asbestos Bankruptcy Trust Claim Transparency

Originally and for many years, the asbestos litigation was focused on actions by "dusty trades" workers against the major asbestos producers.[2] Mass asbestos personal injury filings led to a wave of bankruptcies in the early 2000s.[3]

Pursuant to the federal bankruptcy code, the major asbestos producers were able to reorganize in bankruptcy, channel their pending and future asbestos-related liabilities into trusts, and emerge from bankruptcy with immunity from asbestos-related tort claims.[4] The trusts created in bankruptcy are responsible for paying for injuries caused by exposures to those companies' products. According to a 2011 U.S. Government Accountability Office report, there are now at least sixty asbestos bankruptcy trusts which collectively hold about *$36.8 billion* to pay for harms caused by the reorganized historical asbestos defendants.[5]

After the primary historical defendants went into bankruptcy, plaintiffs' lawyers responded by targeting new or formerly peripheral defendants, such as manufacturers of products in which asbestos was encapsulated, distributors of products containing asbestos, and owners of premises that contained asbestos.[6] The asbestos litigation became an "endless search for a solvent bystander,"[7] and that continues today.[8]

As a result of these developments, the asbestos litigation morphed into two separate compensation systems: asbestos bankruptcy trust claims and tort claims against still-solvent defendants. It is common for claimants to receive compensation from both the asbestos bankruptcy trust and civil tort systems.[9] It

1 *See 2015 State Tort Reform Enactments*, American Tort Reform Association, http://atra.org/sites/default/files/documents/2015%20State%20Tort%20Reform%20Enactments.pdf.

2 *See* Eduardo C. Robreno, *The Federal Asbestos Product Liability Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 Widener L.J. 97, 103 (2013) ("Miners, ship workers, construction workers, and those involved in manufacturing other asbestos-based products were at the highest risk of contracting such [asbestos-related] diseases.").

3 *See* Mark D. Plevin et al., *Where Are They Now, Part Six: An Update on Developments in Asbestos-Related Bankruptcy Cases*, 11:7 Mealey's Asbestos Bankr. Rep. 1, Chart 1 (Feb. 2012) (documenting four asbestos-related bankruptcies in 2000, 12 in 2001, and 13 in 2002 – nearly as many as in the previous two decades combined).

4 *See* 11 U.S.C. § 524(g).

5 *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 3 (Sept. 2011).

6 *See* Stephen J. Carroll et al., *Asbestos Litigation* xxiii (RAND Corp. 2005) ("When increasing asbestos claims rates encouraged scores of defendants to file Chapter 11 petitions…the resulting stays in litigation…drove plaintiff attorneys to press peripheral non-bankrupt defendants to shoulder a larger share of the value of asbestos claims and to widen their search for other corporations that might be held liable for the costs of asbestos exposure and disease.").

7 *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 19 (Mar. 1, 2002) (quoting Mr. Scruggs, a former plaintiffs' lawyer).

8 *See* Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: The "Endless Search for a Solvent Bystander,"* 23 Widener L.J. 59 (2013).

9 *See* U.S. GAO, *supra*, at 15 ("Although 60 companies subject to asbestos-related liabilities have filed for

is also common for such persons to obtain payments from multiple asbestos trusts, since each trust operates independently and workers were often exposed to different asbestos products.[10] For example, in gasket and packing manufacturer Garlock Sealing Technologies, LLC's bankruptcy case, a typical mesothelioma plaintiff's total recovery was estimated to be $1-1.5 million, "including an average of $560,000 in tort recoveries and about $600,000 from 22 trusts."[11]

The federal bankruptcy judge in Garlock's bankruptcy highlighted some of the abuses stemming from the disconnect and lack of transparency between the asbestos bankruptcy trust and tort systems. The judge described how Garlock became a target defendant after asbestos plaintiffs' lawyers bankrupted the major asbestos producers. In addition, Garlock's participation in the tort system became "infected by the manipulation of exposure evidence by plaintiffs and their lawyers."[12] Evidence that Garlock needed to attribute plaintiffs' injuries to the major asbestos producers' products "disappeared."[13] The judge said this "occurrence was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[14] The judge concluded that "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock…."[15]

A recent analysis of the discovery data from Garlock's bankruptcy case in relation to asbestos defendant Crane Co. shows "a similar pattern of systemic suppression of trust disclosures that was documented on the Garlock bankruptcy."[16] The analysis examined 1,844 mesothelioma lawsuits resolved by Crane Co. from 2007 to 2011 that could reliably be matched to the public Garlock discovery data. The data revealed the following:

- "In cases where Crane was a codefendant with Garlock, plaintiffs eventually filed an average of 18 trust claim forms."[17]
- *"On average, 80% of these claim forms or related exposures were not disclosed by plaintiffs or their law firms to Crane in the underlying tort proceedings."*[18]
- "Overall, nearly half of all trust claims were filed after Crane had already resolved the tort case."[19]

Even more recently, in December 2015, the U.S. Chamber Institute for Legal Reform issued a report detailing additional case examples from the Garlock discovery data that "further expose the inconsistent claiming behavior and allegations between the tort and trust systems."[20]

State legislatures are responding to these problems by providing defendants with greater access to asbestos

bankruptcy under Chapter 11 and established asbestos bankruptcy trusts in accordance with § 524(g), asbestos claimants can also seek compensation from potentially liable solvent companies (that is, a company that has not declared bankruptcy) through the tort system.").

10 *See* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071, 1078-79 (2014).

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

12 *Id.* at 82.

13 *Id.* at 73.

14 *Id.* at 84.

15 *Id.* at 86; *see also id.* at 94 (withholding of exposure evidence by asbestos plaintiffs' counsel was "widespread and significant.").

16 *See* Peggy Ableman et al., *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.,* 30:19 Mealey's Litig. Rep.: Asbestos 1, 1 (Nov. 4, 2015).

17 *Id.*

18 *Id.* (emphasis added).

19 *Id.*

20 U.S. Chamber Institute for Legal Reform, *The Waiting Game: Delay and Non-Disclosure of Asbestos Trust Claims* 8 (Dec. 2015), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/TheWaitingGame_Pages.pdf; *see also* U.S. Chamber Institute for Legal Reform, Insights and Inconsistencies: Lessons from the Garlock Trust Claims (Feb. 2016), *available at* http://www.instituteforlegalreform.com/uploads/sites/1/InsightsAndInconsistencies_Web.pdf.

bankruptcy trust claim submissions by plaintiffs.[21] These materials contain important exposure history information, giving tort defendants a tool to identify fraudulent or exaggerated exposure claims, and to establish that trust-related exposures were partly or entirely responsible for the plaintiff's harm.

In 2015, Texas, West Virginia, and Arizona enacted laws that provide a mechanism to require plaintiffs to file and disclose their asbestos bankruptcy trust claims before trial, joining earlier laws enacted in Ohio, Oklahoma, and Wisconsin.[22]

B. Transparency in Private Attorney Contracts (TiPAC)

In the late 1990s, coordinated Medicaid recoupment litigation against the tobacco industry by state attorneys general working with private contingency fee law firms resulted in a landmark Master Settlement Agreement. The agreement included payments to the states on the order of a quarter of a trillion dollars, marketing restrictions on tobacco products, and enormous fees for the private law firms.[23] A new era of "regulation through litigation" was born.[24]

The tobacco litigation model has inspired state and local governments to advance policy preferences against firearms manufacturers, former manufacturers of lead pigment and paint, alleged contributors to global warming, gasoline refiners, health maintenance organizations, pharmaceutical manufacturers, and credit card and mortgage lenders, among others.

Policy-focused lawsuits give state executives the ability to bypass legislatures to achieve regulatory objectives that the majority of the electorate may not support. Clinton Administration Labor Secretary Robert Reich said, "This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy."[25] Former Alabama Attorney General William Pryor, Jr., now a judge on the United States Court of Appeals for the Eleventh Circuit, once described government-sponsored lawsuits as "the greatest threat to the rule of law today."[26]

Often in these types of cases, the fee agreements between public officials and private contingency fee lawyers are negotiated behind closed doors without a competitive bidding process. Because there is no public oversight, the attorney selection process can create the appearance of contracts being awarded for personal gain

21 At the federal level, the Furthering Asbestos Claims Transparency Act (formerly H.R. 526), which was included in the Fairness in Class Action Litigation Act (H.R. 1927) and passed out of the House of Representatives in January 2016, would require asbestos trusts to file quarterly reports that would be available on the bankruptcy court's public docket. The reports would describe "each demand the trust received from, including the name and exposure history of, a claimant and the basis for any payment from the trust made to such claimant." To protect claimant privacy, "any confidential medical record or the claimant's full social security number" is to be excluded from the report. Finally, upon written request, a trust shall provide in a timely manner any information related to payment from, and demands for payment from, the trust, subject to appropriate protective orders, to any party in a legal action relating to liability for asbestos exposure. Before producing the information, the trust may demand payment for any reasonable cost incurred by the trust to comply with the request.

22 *See* Tex. H.B. 1492 (Reg. Sess. 2015) (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-.058); W. Va. S.B. 411 (Reg. Sess. 2015) (codified at W. Va. Code §§ 55-7F-1 to 55-7F-11); Ariz. H.B. 2603 (Reg. Sess. 2015) (codified at Ariz. Rev. Stat. § 12-782). In 2016, Tennessee and Utah also enacted asbestos bankruptcy trust claim transparency legislation.

23 *See* Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments'* Tobacco *Litigation*, 33 Conn. L. Rev. 1143 (2001).

24 Robert B. Reich, *Regulation Is Out, Litigation Is In*, USA Today, Feb. 11, 1999, at A15 (stating "The era of big government may be over, but the era of regulation through litigation has just begun."); *see also* Michael I. Krauss, *Regulation Masquerading As Judgment: Chaos Masquerading as Tort Law*, 71 Miss. L.J. 631 (2001).

25 Robert B. Reich, *Don't Democrats Believe in Democracy?,* Wall St. J., Jan. 12, 2000, at A22; *see also* Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law*, 22 S. Ill. U. L.J. 601 (1998).

26 Victor E. Schwartz & Christopher E. Appel, *The Plaintiffs' Bar's Covert Effort to Expand State Attorney General Federal Enforcement Power*, 24:24 Legal Backgrounder (Wash. Legal Found. July 10, 2009) (quoting William H. Pryor, Jr., *Fulfilling the Reagan Revolution by Limiting Government Litigation*, Address at the Reagan Forum 2 (Nov. 14, 2000)).

and political patronage.[27]

Many states have enacted laws to improve the handling of policy-focused litigation involving private contingency fee lawyers. The first enactments occurred in the immediate wake of the tobacco Master Settlement Agreement, when it was revealed that the plaintiffs' firms involved in that litigation would collectively receive billions of dollars in fees for their role. In 1999, Texas became the first state to enact legislation to improve the state's private attorney selection process. A second wave of enactments began after Florida passed a law in 2010 known as the Transparency in Private Attorney Contract (TiPAC) Act. TiPAC laws generally subject state contracts with private lawyers to public bidding, require posting of contracts on public websites, provide recordkeeping requirements, limit attorneys' fees to a sliding scale based on the amount of recovery, and mandate complete control and oversight of the litigation by government attorneys. Now, over one-third of the states have rules in place to promote transparency and accountability in the contracting process.[28] These laws do not ban government-sponsored lawsuits by private law firms, but they do move contingency fee contracts in these cases into the public light.

In 2015, Arkansas, Nevada, Ohio, and Utah enacted TiPAC laws to regulate and provide transparency when state officials engage private attorneys to work on a contingency fee basis.[29]

C. Duties Owed by Land Possessors to Trespassers

Traditionally, land possessors owe no duty of care to trespassers except in narrow and well-defined circumstances.[30] In contrast, the "black letter" of the Restatement Third of Torts: Liability for Physical and Emotional Harm requires possessors to exercise reasonable care with respect to *all* entrants on their land,[31] except for undefined "flagrant trespassers."[32] The Restatement's approach would dramatically expand trespassers' rights to sue landowners.

In 2015, Indiana, Nevada, South Carolina, West Virginia, and Wyoming enacted laws "freezing" the limited duties traditionally owed by possessors to trespassers.[33] These states join a list of many others that have enacted legislation preempting courts from adopting the Restatement Third's extreme approach: Texas, Oklahoma, North Dakota, North Carolina, South Dakota, Wisconsin, Arizona, Tennessee, Alabama, Missouri, Ohio, Utah, Virginia, Kansas, Georgia, and Michigan.[34] Earlier, Colorado, Florida, Kentucky, and Arkansas codified the traditional duties owed by land possessors to trespassers.

D. Appeal Bond Limits

A supersedeas bond, also known as a defendant's appeal bond, provides security that a civil defendant who suffers an adverse judgment at trial will have assets

27 *See* Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, But Critics Still Focus on Arguments of the Past*, 31 U. Dayton L. Rev. 173 (2006) (discussing fee arrangements in the state attorneys general tobacco litigation); *see also* Mark A. Behrens & Donald Kochan, *Let the Sunshine In: The Need for Open, Competitive Bidding in Government Retention of Private Legal Services*, 28:38 Prod. Safety & Liab. Rptr. (BNA) 915 (Oct. 2, 2000).

28 *See* http://www.statelawsuitreform.com/factor_category/government-agency-hirings-of-private-lawyers/.

29 *See* Ark. S.B. 204 (Reg. Sess. 2015) (codified at Ark. Code Ann. §§ 25-16-714, 25-16-715); Nev. S.B. 244 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. §§ 228.110-.1118, 228.140, 228.170, 218E.405); Ohio S.B. 38 (Reg. Sess. 2015) (codified at Ohio Rev. Stat. §§ 9.49-.498); Utah S.B. 233 (Reg. Sess. 2015) (codified at Utah Code Ann. §§ 63G-6a-106, 67-5-33).

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

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

32 *See* Restatement Third of Torts: Liability for Physical and Emotional Harm § 52 (2012).

33 *See* Ind. S.B. 306 (Reg. Sess. 2015) (codified at Ind. Code §§ 34-31-11-1 through § 34-31-11-5); Nev. S.B. 160 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. § 41.515); S.C. H.B. 3266 (Reg. Sess. 2015) (codified at S.C. Code Ann. § 15-82-10); W. Va. S.B. 3 (Reg. Sess. 2015) (codified at W. Va. Code § 55-7-27); Wyo. S.B. 108 (Reg. Sess. 2015) (codified at Wyo. Stat. §§ 34-19-201 through 34-19-204).

34 In 2016, Mississippi also enacted legislation codifying existing land possessor duties to trespassers. *See* Miss. H.B. 767 (Reg. Sess. 2016) (codified at Miss. Code Ann. § 95-5-31).

sufficient to satisfy the judgment if efforts to challenge the verdict on appeal fail.[35] Appeal bond statutes were first enacted at a time when judgments were generally smaller - before the creation of novel and expansive theories of liability, and before the emergence of government-sponsored lawsuits and class actions. In the modern era, uncapped appeal bond requirements have the potential to force a defendant into bankruptcy before it can have its day in an appellate court.[36] To avoid this fate, a defendant may be forced to settle on unfavorable terms and pay a "premium" because it has been placed over a barrel.

A majority of jurisdictions have enacted legislation or changed court rules to limit appeal bonds in cases involving large judgments.[37] In 2015, appeal bond limits were enacted in Maryland and Nevada.[38]

II. 2015 Reforms

A. Federal: Amendments to Federal Rules of Civil Procedure

On December 1, 2015, a number of amendments to the Federal Rules of Civil Procedure (FRCP) took effect. The overarching goal of these amendments – the product of years of discussion and debate - is to improve early case management and the scope of discovery in civil litigation. Important changes were made with respect to obligations for preserving evidence, proportionality of discovery, and standards for imposing sanctions. Among other things, the amendments:

- Redefine the scope of discovery from a broad standard of any information "reasonably calculated to lead to the discovery of admissible evidence" to discovery that is "proportional to the needs of the case" (Rule 26(b)(1));
- Permit court-issued protective orders to shift costs of discovery to limit overly burdensome discovery requests (Rule 26(c)(1)(B)); and
- Establish a uniform standard for sanctions and curative measures where electronically stored information has not been properly preserved (Rule 37(e)).[39]

Resource materials and further details regarding the FRCP amendments are available on the Lawyers for Civil Justice website.[40]

B. State Rules and Legislation

1. Alabama

Alabama enacted legislation overturning an Alabama Supreme Court decision that had adopted a novel "innovator liability" theory in pharmaceutical cases. In 2014, the court held that, under Alabama

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

36 The problem of oppressive bonding requirements first became evident during the state attorneys general litigation against the tobacco industry. One law professor observed, "if multi-billion dollar judgments had been entered against the tobacco manufacturers in the states' lawsuits, the manufacturers likely would have lacked the resources to immediately pay the judgments (or even to post an appeal bond), and may have been forced into bankruptcy." Richard L. Cupp, *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect For Lead Paint Manufacturers And Others Fair Game?*, 27 Pepp. L. Rev. 685, 689-90 (2000).

37 Some appeal bond reforms apply to all civil defendants, while others are limited to signatories to the state attorneys general tobacco Master Settlement Agreement, generally including their successors and affiliates. Some appeal bond reforms apply to total damages, while others apply only to punitive damages. *See* http://www.atra.org/issues/appeal-bond-reform.

38 *See* Md. H.B. 164 (Reg. Sess. 2015) (codified at Md. Code Ann., Cts. & Jud. Proc. § 12-301.1); Nev. S.B. 134 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. §§ 17.370, 20.037).

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

40 *See* http://www.lfcj.com/the-2015-discovery-amendments.html.

law, a "brand-name-drug company may be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture of a brand-name prescription drug, by a plaintiff claiming physical injury caused by a generic drug manufactured by a different company."[41] The 2015 legislation provides:

> In any civil action for personal injury, death, or property damage caused by a product, regardless of the type of claims alleged or the theory of liability asserted, the plaintiff must prove, among other elements, that the defendant designed, manufactured, sold, or leased the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product. Designers, manufacturers, sellers, or lessors of products not identified as having been used, ingested, or encountered by an allegedly injured party may not be held liable for any alleged injury. A person, firm, corporation, association, partnership, or other legal or business entity whose design is copied or otherwise used by a manufacturer without the designer's express authorization is not subject to liability for personal injury, death, or property damage caused by the manufacturer's product, even if use of the design is foreseeable.[42]

2. Arizona

As stated, Arizona enacted asbestos bankruptcy trust claim transparency legislation to provide a mechanism to require plaintiffs to file and disclose their asbestos bankruptcy trust claims before trial.[43] Arizona also enacted a law to prevent abuse of the state's wrongful death statute where a person is killed by another's intentional act.[44] The legislation provides that if a person is found to have intentionally caused another's death, that person is deemed to have predeceased the decedent and is disqualified from recovering wrongful death benefits. In addition, Arizona enacted legislation to discourage vexatious litigation by requiring a party who has obtained a deferral or waiver of court fees and costs to pay those expenses if the court determines the party to be a vexatious litigant.[45]

3. Arkansas

Arkansas, enacted legislation to regulate and provide transparency in state contingency fee contacts with private attorneys.[46] Arkansas also enacted lawsuit lending reform legislation that subjects the lawsuit lending industry to the state's usury laws.[47] In addition, Arkansas enacted legislation to promote the continued viability of uniquely situated companies that have never manufactured, sold, or distributed asbestos or asbestos products and are liable only as successor corporations.[48] The legislation provides liability relief to companies with successor asbestos-related liabilities arising from a merger or consolidation before the 1972 adoption of asbestos regulations by the Occupational Safety and Health Administration, if the successor corporation did not continue in the asbestos business of the transferor after the merger or consolidation.

In addition, the Arkansas Supreme Court adopted amendments to Arkansas Rules of Civil Procedure 11 and 42, effective April 1, 2015.[49] Amended Rule 11

41 *See Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 676 (Ala. 2014); *see generally* Victor E. Schwartz et al., *Warning: Shifting Liability to Manufacturers of Brand-Name Medicines When the Harm was Allegedly Caused by Generic Drugs Has Severe Side Effects*, 80 Fordham L. Rev. 1835 (2013); Eric G. Lasker et al., *Taking the "Product" Out of Product Liability: Litigation Risks and Business Implications of Innovator and Co-Promotor Liability*, 82 Def. Counsel J. 295 (July 2015).

42 *See* Ala. S.B. 2603 (Reg. Sess. 2015) (codified at Ala. Code § 6-5-530(a)).

43 *See* Ariz. H.B. 2603 (Reg. Sess. 2015) (codified at Ariz. Rev. Stat. § 12-782).

44 *See* Ariz. H.B. 2374 (Reg. Sess. 2015) (codified at Ariz. Rev. Stat. § 12-612).

45 *See* Ariz. S.B. 1048 (Reg. Sess. 2015) (codified at Ariz. Rev. Stat. §§ 12-302, 12-3201).

46 *See* Ark. S.B. 204 (Reg. Sess. 2015) (codified at Ark. Code Ann. §§ 25-16-714, 25-16-715).

47 *See* Ark. S.B. 882 (Reg. Sess. 2015) (codified at Ark. Code Ann. § 4-57-109).

48 *See* Ark. H.B. 1529 (Reg. Sess. 2015) (codified at Ark. Code §§ 16-120-601 to 16-120-606) (effective Jan. 1, 2020).

49 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 11 and 42*, 2015

"replaces the affidavit requirement for medical injury cases invalidated in *Summerville v. Thrower*, . . . but is not limited to cases of that type."[50] Amended Rule 42 supersedes the Civil Justice Reform Act of 2003's bifurcated punitive damages trial provision.[51] The court also adopted amended Arkansas Rule of Civil Procedure 3 to provide a sixty-day pre-suit notice requirement for medical malpractice actions (effective upon enactment of a companion limitations-tolling provision by the General Assembly).[52]

4. Indiana

As stated, Indiana enacted legislation to codify the common law duties owed by land possessors to trespassers, preempting the potential adoption of the approach set forth in section 51 of the Restatement Third of Torts: Liability for Physical and Emotional Harm.[53] Indiana also enacted legislation to specify that an insurer is generally not required to pay noneconomic damages on a motor vehicle insurance claim for a loss incurred by an uninsured motorist who is at least eighteen years old.[54] The legislation further provided that a person who sustained bodily injury or property damage as a result of a motor vehicle accident, but was uninsured at the time of the accident, may not recover noneconomic damages from the person who was operating the other vehicle unless that person was convicted of a crime.

5. Maryland

Maryland set a $100 million limit on the amount a defendant can be required to pay to secure the right to appeal.[55]

6. Missouri

Missouri enacted legislation to replace English common law causes of action for medical malpractice with a statutory cause of action and to limit noneconomic damages in medical malpractice cases to $400,000 ($700,000 in cases of catastrophic injury).[56] The legislation was enacted in response to a Missouri Supreme Court decision overruling precedent and striking down a lower cap as violating the Missouri Constitution.[57]

7. Nevada

Nevada set a $50 million limit ($1 million for small businesses) on appeal bonds.[58] Nevada also enacted legislation to codify the traditional common law duties owed by land possessors to trespassers.[59] In addition, Nevada enacted legislation to regulate and provide transparency in state contingency fee contacts with private attorneys.[60]

Ark. 88 (Feb. 26, 2015) (per curiam); *see also* Mark A. Behrens & Christopher Casolaro, *Civil Justice Reform: Twists and Turns in Arkansas* (Federalist Soc'y Nov. 2015).

50 *Id.* In *Summerville v. Thrower,* 253 S.W.3d 415 (Ark. 2007), the Arkansas Supreme Court struck down a 30-day affidavit of merit requirement in medical malpractice actions as conflicting with court-promulgated procedures.

51 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 11 and 42*, 2015 Ark. 88 (Feb. 26, 2015) (per curiam).

52 *See In re Special Task Force on Practice and Procedure in Civil Cases- Ark. R. Civ. P. 3*, 2015 Ark. 89 (Feb. 26, 2015) (per curiam).

53 *See* Ind. S.B. 306 (Reg. Sess. 2015) (codified at Ind. Code §§ 34-31-11-1 through § 34-31-11-5).

54 *See* Ind. H.B. 1192 (Reg. Sess. 2015) (codified at Ind. Code §§ 27-7-5.1-1 through 27-7-5.1-6, 34-6-2-84, 34-6-2-87.7, 34-6-2-144.8, 34-30-29.2-1 through 34-30-29.2-4).

55 *See* Md. H.B. 164 (Reg. Sess. 2015) (codified at Md. Code Ann., Cts. & Jud. Proc. § 12-301.1).

56 *See* Mo. S.B. 239 (Reg. Sess. 2015) (codified at Mo. Rev. Stat. §§ 1.010, 538.205, 538.210).

57 *See Watts v. Lester E. Cox Med. Ctrs.,* 376 S.W.3d 633 (Mo. 2012) ($350,000 medical malpractice noneconomic damages cap violated jury trial provision of Missouri Constitution; overruling *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992), to the extent *Adams* held the cap did not violate the right to jury trial provision of the Missouri Constitution).

58 *See* Nev. S.B. 134 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. §§ 17.370, 20.037).

59 *See* Nev. S.B. 160 (Reg. Sess. 2015) (codified at Nev. Rev. Stat. § 41.515). The statute overturns Nevada Supreme Court decisions in *Moody v. Manny's Auto Repair*, 871 P.2d 935 (Nev. 1994), and *Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 153 (Nev. 2012), which had utilized the Restatement Third's unitary duty approach.

60 *See* Nev. S.B. 244 (Reg. Sess. 2015) (codified

8. Ohio

As stated, Ohio enacted legislation to regulate and provide transparency in state contingency fee contacts with private attorneys.[61]

9. Oklahoma

Oklahoma restricted "phantom damages" by providing that the amounts actually paid for medical care (rather than amounts billed) shall be admissible at trial to calculate the cost of medical care received by the plaintiff.[62] If no payment has been made, the Medicare reimbursement rates in effect when the injury occurred shall be admissible if a party submits a signed statement or sworn testimony from the medical provider indicating that the provider will accept payment at the Medicare reimbursement rate less cost of recovery as full payment of the obligation.

10. South Carolina

South Carolina enacted legislation to codify the common law duties owed by land possessors to trespassers.[63]

11. Texas

As explained, Texas enacted asbestos bankruptcy trust claim transparency legislation to provide a mechanism to require plaintiffs to file and disclose their asbestos bankruptcy trust claims before trial.[64] Texas also reformed the state's *forum non conveniens* law to allow a trial court to dismiss an in-state plaintiff's claim provided that substantial deference has been given to the legal resident plaintiff.[65]

12. Utah

Utah enacted legislation to regulate and provide transparency in state contingency fee contacts with private attorneys.[66] Utah also enacted legislation limiting the amount of recoverable damages in personal injury actions when the injured person dies before a judgment or settlement from causes unrelated to the action.[67]

13. West Virginia

Transformational change occurred in West Virginia in 2015. A new majority led by Senate President Bill Cole and House Speaker Tim Armstead enacted many civil justice reforms. Below are some of the more significant enactments.[68]

West Virginia capped punitive damages at the greater of four times the plaintiff's compensatory damages or $500,000.[69] The evidentiary burden for recovery of punitive damages was raised, requiring plaintiffs to establish by "clear and convincing evidence" that the defendant acted with "actual malice or a conscious, reckless, and outrageous indifference to the health, safety, and welfare of others." Also, punitive damages trials may be bifurcated at any defendant's request to prevent the jury from hearing evidence relevant only to punitive damages in the compensatory damage phase of a trial.

In addition, West Virginia replaced its modified joint liability approach with pure several liability.[70] Fault can be apportioned to nonparties and settled parties. If a defendant is unable to pay its share of a judgment, the

at Nev. Rev. Stat. §§ 228.110-.1118, 228.140, 228.170, 218E.405).

61 *See* Ohio S.B. 38 (Reg. Sess. 2015) (codified at Ohio Rev. Stat. §§ 9.49-.498).

62 *See* Okla S.B. 789 (Reg. Sess. 2015) (codified at 12 Okla. Stat. § 30009.1).

63 *See* S.C. H.B. 3266 (Reg. Sess. 2015) (codified at S.C. Code Ann. § 15-82-10).

64 *See* Tex. H.B. 1492 (Reg. Sess. 2015) (codified at Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051-.058).

65 *See* Tex. H.B. 1692 (Reg. Sess. 2015) (codified at Tex. Civ. Prac. & Rem. Code Ann. § 71.051).

66 *See* Utah S.B. 233 (Reg. Sess. 2015) (codified at Utah Code Ann. §§ 63G-6a-106, 67-5-33).

67 *See* Utah H.B. 34 (Reg. Sess. 2015) (codified at Utah Code Ann. § 78B-3-107).

68 For a comprehensive discussion of all of West Virginia's 2015 civil justice reforms, *see* J. Mark Adkins & Patrick C. Timony, *Returning the Mountain State to the Mainstream, West Virginia Adopts Sweeping Legal Reforms*, 30:13 Legal Backgrounder (Wash. Legal Found. June 5, 2015).

69 *See* W. Va. S.B. 421 (Reg. Sess. 2015) (codified at W. Va. Code § 55-7-29).

70 *See* W. Va. H.B. 2002 (Reg. Sess. 2015) (codified at W. Va. Code §§ 55-7-13a through 55-7-13d).

plaintiff can petition the court to reallocate that part of the judgment to the solvent defendants, but such reallocation is limited to each defendant's percentage of fault. A plaintiff's negligence serves to reduce that person's recovery until the plaintiff is found to be more than fifty-one percent at fault for his or her own injury, at which point recovery is barred.

West Virginia enacted asbestos bankruptcy trust claim transparency legislation to provide a mechanism to require plaintiffs to file and disclose their asbestos bankruptcy trust claims before trial.[71] West Virginia also enacted legislation to require plaintiffs to have a present physical impairment to bring or maintain an asbestos or silica personal injury action so that the truly sick do not have to compete with the non-sick for judicial and defendant resources.[72]

As stated, West Virginia enacted legislation to codify the common law duties owed by land possessors to trespassers.[73] Also in the premises liability area, the legislature overturned a 2013 decision from the West Virginia Supreme Court of Appeals that eliminated the "open and obvious" doctrine,[74] codifying the doctrine into the statutory law.[75]

In the area of medical liability, liability protections in the state's Medical Professional Liability Act were expanded to more health-care professionals, such as pharmacists, EMTs, and nursing care workers.[76] The legislature also provided for de novo review of expert evidence admitted in medical liability cases and modified the definition of a "collateral source" to allow juries to consider amounts written off on a medical bill and curb awards of "phantom damages."

71 *See* W. Va. S.B. 411 (Reg. Sess. 2015) (codified at W. Va. Code §§ 55-7F-1 to 55-7F-11).

72 *See* W. Va. S.B. 411 (Reg. Sess. 2015) (codified at W. Va. Code §§ 55-7G-1 to 55-7G-10).

73 *See* W. Va. S.B. 3 (Reg. Sess. 2015) (codified at W. Va. Code § 55-7-27).

74 *See Hersh v. E-T Enterp., Ltd. P'ship*, 752 S.E.2d 336 (W. Va. 2013).

75 *See* W. Va. S.B. 13 (Reg. Sess. 2015) (codified at W. Va. Code § 55-7-28).

76 *See* W. Va. S.B. 6 (Reg. Sess. 2015) (codified at W. Va. Code §§ 55-7B-1, 55-7B-2, 55-7B-7 through 55-7B-11).

In the area of employment law, terminated employees have a duty to mitigate their past and future wages, even when they are fired with malicious intent.[77] Formerly, West Virginia was the only state in the country that permitted a "double recovery" to aggrieved employees showing malicious termination. West Virginia also amended the standard for an injured worker to bring a cause of action against his or her employer for a "deliberate intent" injury.[78] Plaintiffs are no longer able to establish such intent through constructive knowledge of intermediary and lower-level employees concerning an unsafe working condition.

In the area of consumer protection law, the state's Consumer Protection Act was amended to provide that no award of damages may be made without proof that the allegedly injured individual suffered an out of pocket loss.[79] Furthermore, either party in an action under the Act has the right to demand a jury trial. Also, courts interpreting the Act must follow the guidance and interpretations of the Federal Trade Commission in addressing consumer protection claims.

14. Wisconsin

Wisconsin enacted legislation to repeal the state's False Claims for Medical Assistance Act, which was Wisconsin's version of the federal False Claims Act.[80] Prior to its repeal, the Wisconsin act allowed claimants alleging Medicaid fraud to claim up to thirty percent of awards, and provided whistleblower protections and triple damages similar to the federal law.[81]

15. Wyoming

Wyoming enacted legislation to codify the common law duties owed by land possessors to trespassers and preempt courts from adopting the approach set forth in section 51 of the Restatement Third of Torts: Liability

77 *See* W. Va. S.B. 344 (Reg. Sess. 2015) (codified at W. Va. Code §§ 55-7E-1 through 55-7E-3).

78 *See* W. Va. H.B. 2011 (Reg. Sess. 2015) (codified at W. Va. Code § 23-4-2).

79 *See* W. Va. S.B. 315 (Reg. Sess. 2015) (codified at W. Va. Code § 46A-6-101, 46A-6-102, 46A-6-105, 46A-6-106).

80 *See* Wis. S.B. 21 (Reg. Sess. 2015).

81 *See* Wis. Stat. § 20.931, *repealed by* Wis. S.B. 21 (Reg. Sess. 2015).

for Physical and Emotional Harm.[82]

III. Key Court Decisions

A. Decisions Upholding State Reforms

Over the years, the "scales in state courts have increasingly tipped" toward upholding civil justice reforms in constitutional challenges brought by plaintiffs' lawyers.[83] Most state courts respect the prerogative of legislatures to decide broad tort policy rules for their states.[84] This trend continued in 2015.

California appellate courts rejected attempts by plaintiffs to challenge longstanding California precedent[85] upholding that state's $250,000 limit on noneconomic damages in medical malpractice actions.[86] The First District Court of Appeal explained that "courts are extremely chary of invalidating legislative acts that have previously been held constitutional."[87] The court said that the debate "over the wisdom of [the Medical Injury Compensation Reform Act of 1975's] noneconomic damages cap remains a matter for the Legislature and state electorate."[88] The Second District Court of Appeal found "settled, well-reasoned authority rejecting each of the constitutional claims" against the statutory noneconomic damages cap.[89]

A Florida appellate court upheld amendments to the medical malpractice pre-suit notice sections of the Florida Statutes.[90] These amendments allow for ex parte interviews between the claimant's health care providers and the potential defendant and to require a potential claimant to sign a written waiver of federal privacy protection concerning relevant medical information prior to commencing a medical malpractice lawsuit. The court held that the amendments did not violate the separation of powers by intruding upon the Florida Supreme Court's procedural rulemaking power, did not constitute an impermissible special law, did not burden a claimant's right to access the courts, and did not violate the Florida Constitution's right of privacy guarantee.[91] The court also held that the amendments were not preempted by the federal Health Insurance Portability Accountability Act of 1996.[92] Review has been granted by the Florida Supreme Court.[93]

An Indiana appellate court upheld Indiana's motor vehicle "guest statute," which generally provides immunity to motor vehicle operators transporting passengers without payment.[94] The court found that the law did not violate the equal protection, open courts, or equal privileges and immunities provisions of the Indiana Constitution.

82 *See* Wyo. S.B. 108 (Reg. Sess. 2015) (codified at Wyo. Stat. §§ 34-19-201 through 34-19-204).

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

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

85 *See Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985).

86 *See Chan v. Curran*, 237 Cal. App. 4th 601 (1st Dist. Div. 1 2015) (cap did not violate equal protection, due process, or right to jury trial); *Lora v. Lancaster Hosp. Corp.,* 2015 WL 4477952 (Cal. App. 2d Dist. Div. 4 July 22, 2015) (cap did not violate equal protection or right to jury trial); *Rashidi v. Moser*, 2015 WL 1811971 (Cal. App. 2d Dist. Div. 4 Apr. 20, 2015) (cap did not violate right to jury trial, equal protection, or separation of powers).

87 *Chan*, 237 Cal. App. 4th at 606

88 *Id.* at 607. In 2014, California voters rejected a ballot proposal that would have raised the cap to $1.1 million as of January 1, 2015, and provided for annual adjustments thereafter. *See id*. at 607 n.2.

89 *Rashidi*, 2015 WL 1811971, at *4.

90 *See Weaver v. Myers,* 170 So. 3d 873 (Fla. Dist. Ct. App. 1st Dist. 2015), *review granted*, 2016 WL 1534092 (Fla. Apr. 13, 2016).

91 *See id*.

92 *See id*.

93 *See Weaver v. Myers,* 2016 WL 1534092 (Fla. Apr. 13, 2016).

94 *See Sasso v. State Farm Auto. Mut. Ins. Co.,* 43 N.E.3d 668 (Ind. App. 2015).

The Missouri Supreme Court held that a ten-year statute of repose for foreign-object medical malpractice claims did not violate the Missouri Constitution's equal protection or open courts provisions and did not constitute prohibited special legislation.[95] The court explained that the "open courts guarantee applies only to recognized causes of action; it does not guarantee access to the courts once the statute of repose extinguishes the cause of action."[96] The court also said that the statute of repose is rationally related to a legitimate state interest and "reflects a reasonable balance struck by the legislature between the right of those injured by medical malpractice to discover their injuries and the concern that medical defendants should be free from worry about liability for past acts after a reasonable period of time." [97] In another decision, the Missouri Supreme Court upheld a statute limiting damages for agricultural nuisances in a case involving alleged offensive odors emanating from a concentrated animal feeding operation.[98].

The Nevada Supreme Court held that Nevada's $350,000 medical malpractice noneconomic damages cap did not violate the right to jury trial or equal protection provisions of the Nevada Constitution.[99] The court concluded that the cap "does not interfere with the jury's factual findings because it takes effect only after the jury has made its assessment of damages, and thus, it does not implicate a plaintiff's right to a jury trial."[100] The court also concluded that equal protection was satisfied because the cap "is rationally related to the legitimate governmental interests of ensuring that adequate and affordable health care is available to Nevada's citizens."[101]

The New Hampshire Supreme Court held that the state's eight-year statute of repose for improvements to real property did not violate the equal protection or right to remedy provisions of the New Hampshire Constitutions.[102]

An Oregon appellate court held that Oregon's ten-year product liability statute of repose did not violate the remedy or right to jury trial provisions of the Oregon Constitution as applied to a wrongful death claim not recognized by the common law at the time of the original 1857 Constitution of Oregon.[103]

A Texas appellate court in Houston held that a fee-shifting mechanism in a rule authorizing the dismissal of lawsuits with no basis in law or fact did not violate due process and did not unreasonably limit access to the courts.[104]

B. Decisions Nullifying State Reforms

In contrast, the Utah Supreme Court held that the application of the Utah Health Care Malpractice Act's $450,000 noneconomic damages cap to wrongful death cases violated a Utah constitutional provision protecting the recovery of damages for wrongful death.[105] Utah is one of a handful of states with constitutional protections for damages in wrongful death cases.[106]

In addition, the Washington Supreme Court struck down the state's Act Limiting Strategic Lawsuits Against Public Participation (anti-SLAPP statute) for violating the state constitutional right to a jury trial.[107] The court found that the Act, which was adopted to address abusive lawsuits brought primarily to chill the exercise of constitutional rights of free expression, imposed an

95 *See Ambers-Phillips v. SSM DePaul Health Ctr.,* 459 S.W.3d 901 (Mo. 2015) (en banc).

96 *Id.* at 910.

97 *Id.* at 913.

98 *See Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319 (Mo. 2015) (en banc).

99 *See Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234 (Nev. 2015).

100 *Id.* at 238.

101 *Id.* at 239.

102 *See Lennartz v. Oak Point Assocs., P.A.,* 112 A.3d 1159 (N.H. 2015); *see also Winnisquam Reg'l Sch. Dist. v. Levine*, 880 A.2d 369 (N.H. 2005) (statute did not violate equal protection provision of New Hampshire Constitution).

103 *See Lunsford v. NCH Corp.*, 351 P.3d 804 (Or. App. 2015).

104 *See Guillory v. Seaton, LLC,* 470 S.W.3d 237 (Tex. App.-Houston (1st Dist.) 2015), *reh'g overruled* (Oct. 8, 2015), *review denied* (May 27, 2016).

105 *See Smith v. United States*, 356 P.3d 1249 (Utah 2015).

106 *See id.* at 1250 n.5.

107 *See Davis v. Cox*, 351 P.3d 862 (Wash. 2015).

unjust evidentiary burden on plaintiffs because the law required factual questions to be decided by judges rather than juries.[108]

C. Other Key Decisions of 2015

In a pair of liability-enhancing decisions, the Connecticut Supreme Court recognized a cause of action for loss of parental consortium[109] and chose to allow bystander negligent infliction of emotional distress claims arising from alleged medical malpractice.[110]

The Montana Supreme Court Supreme issued a decision authorizing awards of "phantom damages."[111] The court determined that a jury in a wrongful death action could only consider the nearly $200,000 in amounts billed for a decedent's medical expenses as opposed to the roughly $71,000 actually paid for the medical care by health insurers due to previously negotiated rate discounts.[112]

The New Hampshire Supreme Court permitted the state's use of a "market share" liability theory to support an award of approximately $236 million in damages against an oil and gas company in a methyl tertiary butyl ether (MTBE) groundwater contamination case.[113] The jury based its verdict on a finding that the company's market share of gasoline in the state was around twenty-nine percent during the period in which the alleged groundwater contamination occurred. The court determined that market share liability was a viable alternative liability theory where plaintiffs suffered an alleged injury, yet given the nature of the product, could not identify which manufacturer made the particular product that caused the injury.[114]

IV. Conclusion

Significant civil justice reform legislation was enacted in 2015, particularly in West Virginia and with respect to a few areas that have become (or remained) trends: asbestos bankruptcy trust claims transparency, transparency in private attorney contracts (TiPAC) entered into by state officials on a contingency fee basis, codification of traditional common law duties owed by land possessors to trespassers, and appeal bond limits. Courts upheld a number of past reforms, rejecting the vast majority of constitutional challenges that were decided in 2015. Judicial decisions expanding liability in broad new ways were limited.

108 *See id.* at 864.

109 *See Campos v. Coleman*, 123 A.3d 854 (Conn. 2015). The court determined that the "unique emotional attachment between parents and children" justified overruling prior case law to recognize a new cause of action. *Id*. at 859.

110 *See Squeo v. Norwalk Hosp. Ass'n*, 113 A.3d 932 (Conn. 2015).

111 *See Meek v. Montana Eighth Jud. Dist. Ct.*, 349 P.3d 493 (Mont. 2015).

112 *See id.* at 496.

113 *See New Hampshire v. Exxon Mobil Corp.*, 126 A.3d 266 (N.H. 2015).

114 *See id.* at 296.

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