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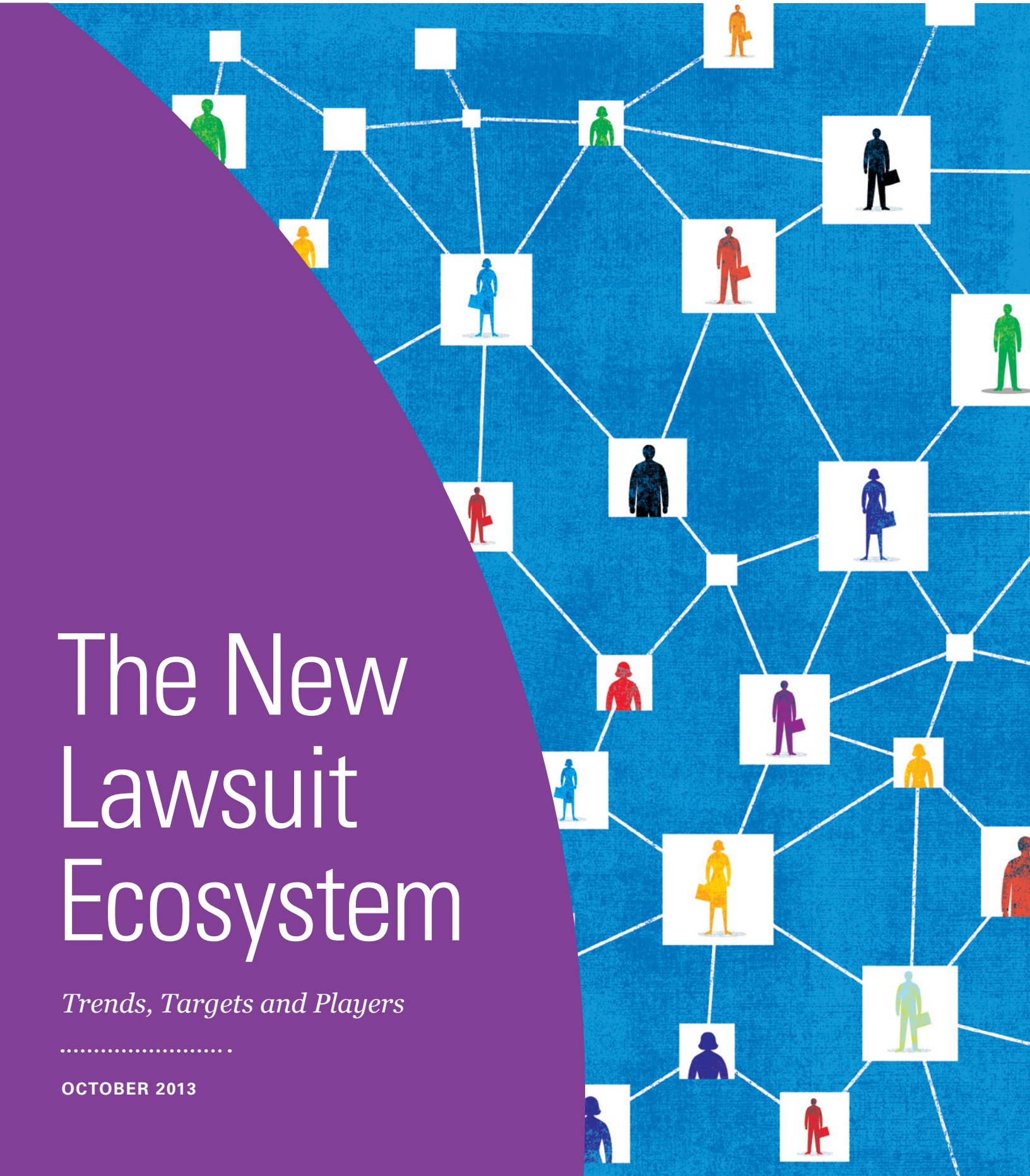

The New Lawsuit Ecosystem

Trends, Targets and Players

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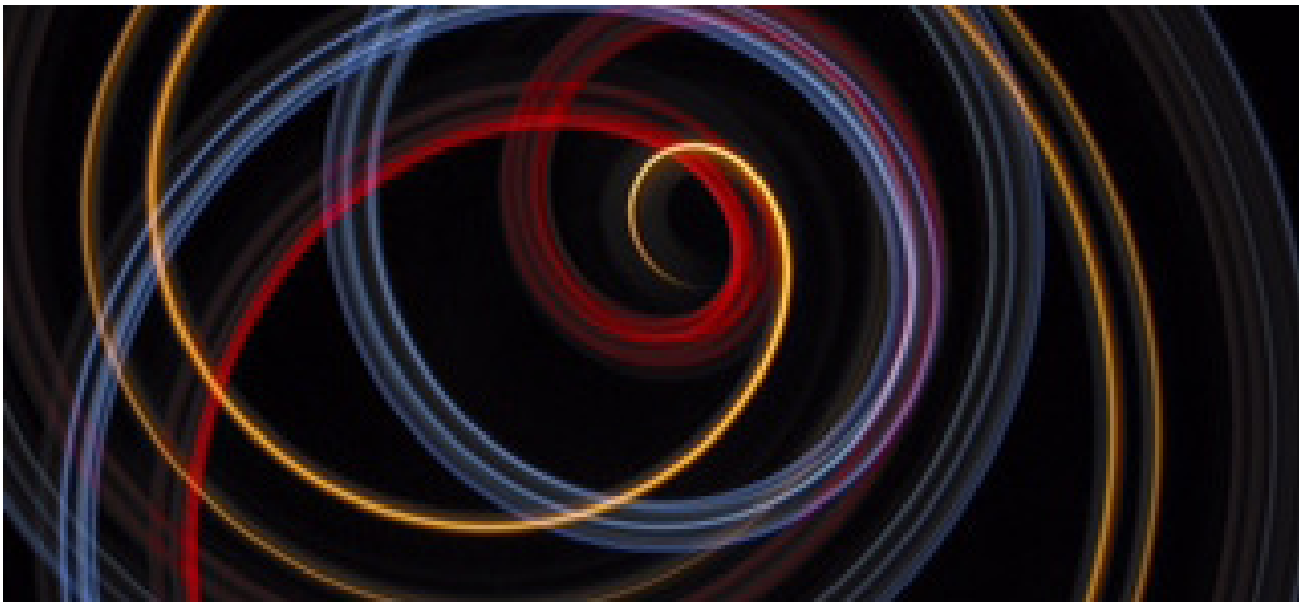
Executive Summary

This report brings together leading practitioners and scholars to describe the lawsuit "ecosystem" for the areas of litigation abuse of most concern to the business community. This report dissects the trends of the litigious culture that sustains big ticket litigation, the players that drive it, and how those players try to manipulate or change the law to their favor. Even when successful, these lawsuits rarely benefit anyone except the small handful of plaintiffs' lawyers who bring them. Defending these lawsuits drains millions of dollars from businesses that could be spent spurring business expansion and creating new jobs with few countervailing benefits.



This report starts by examining trends and offering insights into the six core areas of America's lawsuit industry: class actions, mass torts, asbestos, securities and mergers and acquisitions, false claims act, and wage and hour litigation.

The second part of the report delves into the areas of law where entrepreneurial plaintiffs' lawyers have been prospecting for new liability:

- Class actions against food makers alleging misleading advertising;
- Data privacy suits against businesses over allegations that they inadvertently violated released or misused customer information;
- Claims against brand-name drug manufacturers for injuries allegedly stemming solely from generic products they did not make or sell;
- "Patent troll" litigation in which companies are formed solely to sue innovators and their customers over often bogus claims of patent infringement; and
- Speculative theories of liability seeking to recover for risks of harm or "economic loss," not actual injuries.

The third part looks at the increasingly troubling trend of state attorneys general turning over the keys to their offices and litigation powers to private plaintiffs' lawyers. Plaintiffs' lawyers often develop the legal theories, decide whom to target, and then "recruit" state attorneys general to retain them on a contingency fee basis to bring the lawsuits. This process provides significant advantages to plaintiffs' lawyers: it eliminates the need to represent individuals who were actually injured by a defendants' product or conduct; avoids any contribution those individuals may have made to their own injuries; reduces traditional defenses; heightens the plaintiffs' lawyers' subpoena power; and gives them the ability to seek fines, not just damages. State attorneys general have these powers because they are to be used sparingly, and only to advance appropriate public policies. They are not to be used to maximize personal profit, which is the goal of private contingency fee lawyers who are often personal or political allies of the state attorneys general.

Finally, this report identifies the new major players in the plaintiffs' bar. Many of the people long-associated with the plaintiffs' bar—Fred Baron, Bill Lerach, Ron Motley, Mel Weiss, Dickie Scruggs, and Stan Chesley—have passed away, gone to prison, surrendered their law licenses, or retired. For this reason, several sections of this report highlight plaintiffs' lawyers and firms that are considered among the most active in bringing these "new waves" of lawsuits.

Below is a summary of the report's findings in each area.

Litigation Trends

THE CLASS ACTION LITIGATION ENVIRONMENT HAS IMPROVED, BUT THREATS REMAIN

The Supreme Court strengthened class action safeguards to ensure that cases are not lumped together when they involve widely varying factual circumstances or applicable law. The Court also protected the jurisdiction of federal courts to decide multi-state class actions, as Congress intended in

the Class Action Fairness Act (CAFA). Some federal appellate courts, however, do not appear to be heeding the Supreme Court's instructions. Several open questions are percolating in federal and state courts, including the role of expert testimony at the class certification stage, the propriety of issues-only classes, the application of CAFA to state attorneys general lawsuits seeking damages on behalf of state residents, and the validity of *cy pres* settlements.

THE PLAINTIFFS' BAR IS AGGRESSIVELY ATTEMPTING TO IDENTIFY NEW TARGETS FOR MASS TORT LITIGATION

Some recent targets include a company that designed technology allowing for minimally invasive surgery, energy drink makers, "sudden acceleration" claims against automakers, and concussion-related litigation against the NFL and helmet manufacturers. Some mass tort threats have lost steam, including lawsuits seeking to impose damages on manufacturers and energy providers for the effects of climate change and welding fume litigation. This has caused entrepreneurial plaintiffs' lawyers to turn to new areas for their litigation prospecting, and it remains to be seen whether the next round of suits gains momentum.

THE NEW ASBESTOS IS ALWAYS ASBESTOS. ASBESTOS LITIGATION IS A MASSIVE LAWSUIT MACHINE, WITH PLAINTIFFS' FIRMS AGGRESSIVELY SEEKING NEW TYPES OF CLIENTS AND NEW "SOLVENT BYSTANDER" BUSINESSES TO SUE

Asbestos litigation is constantly evolving. A new trend is the surge of claims asserting that asbestos caused a plaintiff to develop lung cancer. On the other hand, a positive development is that courts and legislatures are beginning to address the lack of transparency and coordination between trusts established to pay asbestos claimants and the court system in response to numerous attempts to file inconsistent, and sometimes fraudulent, claims.

SECURITIES FRAUD CLASS ACTION FILINGS REMAIN A SIGNIFICANT THREAT, WHILE MERGER AND ACQUISITION (M&A) CHALLENGES ARE BECOMING THE LAWSUITS OF CHOICE FOR PLAINTIFFS' LAWYERS

Abusive practices continue to plague securities class actions. While the number of securities class actions filed has slowed, the lawsuits are settling faster and for more money. The primary targets of the litigation have shifted from the financial industry to healthcare, biotechnology, and pharmaceutical industries. Meanwhile, there is an explosion in M&A lawsuits. Plaintiffs' firms typically file multiple M&A lawsuits in state courts within days of major corporate announcements. Most of these suits provide no benefit to shareholders, but require businesses to make small, often irrelevant, additional disclosures. Companies, eager to close a deal, settle the extortionate claims. Some courts have properly shown reluctance when asked to approve excessive plaintiffs' lawyer fees in these "disclosure only" lawsuits.

THE BARRIERS TO BRINGING FALSE CLAIMS ACT (FCA) LITIGATION ARE DECREASING AND THE NUMBER OF FILINGS HAVE REACHED AN ALL-TIME HIGH

In recent years, Congress and the courts have lowered the bar to sue under the False Claims Act, which was intended to be a penal statute for those who defraud the federal government. An increasingly aggressive and well-funded plaintiffs' bar has taken advantage of these developments, creating a surge in filings on behalf of individuals (known as *qui tam* plaintiffs or relators) often having little to do with any actual fraud. Prior to 2009, there were about 300 to 400 *qui tam* suits annually. Since 2012, that number has roughly doubled. Also, rather than combating fraud in military contracting, which the FCA was initially enacted to do, the targets are now anyone who has any dealings with the federal government, from the healthcare industry, to housing and mortgage-related claims, to financial services. Existing boutique *qui tam* firms are thriving; some larger plaintiffs' firms have created FCA practices; and new "split off" firms are being formed that focus solely on FCA litigation.

WAGE AND HOUR LITIGATION HAS INCREASED DRAMATICALLY IN RECENT YEARS AND OUTPACES ALL OTHER TYPES OF WORKPLACE LITIGATION

These lawsuits often claim that employers have misclassified workers as "exempt" employees or as independent contractors. Companies face the threat of both class action lawsuits and stepped-up federal and state government litigation seeking back wages, penalties, and attorneys' fees and costs. The risk of liability resulting from an employer's treatment of a worker as an independent contractor, rather than an employee, will rise when the Affordable Care Act's employer mandate takes effect in 2014 and requires employers to provide health insurance to their employees or face a penalty.

Emerging Liability Threats

"DEEP POCKET" LITIGATION TARGETS THE FOOD INDUSTRY

A small group of plaintiffs' lawyers is aggressively prospecting the food industry as a litigation target, filing numerous class action lawsuits directed at products ranging from soup to nuts. This litigation, which is centered in California, is largely driven by the financial interests of plaintiffs' lawyers and the agendas of certain advocacy groups, not consumers who have actually been deceived by any advertisements. They often center on whether ingredients are "natural," technical issues with labeling, or any suggestion that food provides a health benefit. Thus far, courts have been reluctant to dismiss these lawsuits, but aside from a few settlements, these suits have not succeeded.

DATA PRIVACY LITIGATION: THE DOUBLE WHAMMY

First come the hackers, and then come the class action lawsuits—regularly brought by plaintiffs' lawyers trolling news reports and public records for any excuse to sue. In these cases, plaintiffs' lawyers often have difficulty showing that anyone suffered any actual injury from the alleged breach. Under the complex web of federal and state privacy laws, plaintiffs' lawyers seek statutory damages that often are available

"per violation." When a hacker compromises potentially millions of records, these statutory damages can add up quickly, even though no one was actually harmed. Plaintiffs' lawyers have also developed several new "injury" theories that have gained traction.

COMPANIES ARE NOT THEIR COMPETITORS' KEEPERS

It is a long-standing principle in products liability and tort law that a manufacturer is responsible for defects in its own products, not products made and sold by competitors. But three courts have now turned against this basic tenet, holding that manufacturers of brand-name drugs can be subject to liability for harms where the plaintiff fully acknowledges that he or she took only a competitor's generic version of that drug. This is "deep pocket justice" at its worst. If other courts take this route, all innovators, not just in the pharmaceutical arena, could be subject to new, unfair, and unpredictable liability over other companies' products and labeling.

BEWARE OF THE "PATENT TROLL"

Patent lawsuits spiked by 30% in 2012, with a significant portion of these cases filed by "patent trolls." Patent trolls are companies that solely wage patent infringement lawsuits; they have no products or services. Their goal is to leverage the inefficiencies in the patent and litigation systems to generate massive numbers of settlements by threatening and filing speculative infringement actions. Because of the high cost of defending these actions, their targets often will settle. There is growing bipartisan support for addressing patent litigation abuse at the federal level. State attorneys general have also entered the fray, bringing actions to stop patent trolls from making coercive demands on local businesses.

PLAINTIFFS' LAWYERS TRY TO SUE WITHOUT SHOWING THAT ANY CLIENT WAS PHYSICALLY INJURED

Courts have traditionally kept tight safeguards over such claims, including "fear of disease" claims and pure "economic loss" claims. Today, when an issue with a product arises, whether real or as a result of a media scare, plaintiffs' lawyers increasingly file suit on behalf of everyone who owns or has used the product but was not injured. These economic loss claims are brought when their product works just as they expected it would, but they claim that they should be compensated nonetheless under the theory that their product has lost value because people know that the product could experience the defect in the future. "Loss of chance" suits seek compensation from doctors for not diagnosing plaintiffs earlier, without having to prove that earlier detection would have changed the course of an illness. Finally, there is renewed interest in suits seeking medical monitoring for exposure to potentially harmful substances, even though the person has not and may never develop an illness from that exposure. Such "injury-less" lawsuits, if allowed, will undoubtedly flood courts with speculative, frivolous, and fraudulent claims because they abandon the basic linchpin of liability – that people can only seek compensation in tort law for actual, not theoretical, injuries.

There Is a Growing State Attorneys General Alliance with Plaintiffs' Lawyers

THE PLAINTIFFS' LAWYERS-STATE ATTORNEYS GENERAL ALLIANCE GROWS TO PURSUE DOLLARS OVER JUSTICE

At least 80 plaintiffs' firms have represented states in the past three years, but only a handful of firms have driven the litigation. The novel, liability-expanding theories underlying these lawsuits are often developed by private lawyers, then "pitched" to state attorneys general as money-making enterprises. Some firms are establishing separate practice groups that specialize in bringing contingency fee litigation on behalf of states. State attorneys general in Mississippi, New Mexico, Louisiana, Nevada, and South Carolina most frequently use these questionable practices, which place the financial interests of personal injury lawyers before the public interest.

THE TARGETS OF THESE LAWSUITS CONTINUE TO EXPAND

After the state attorneys general-plaintiffs' lawyer alliance formed in the 1990s to sue the tobacco industry, the list of targets expanded to a wide variety of businesses. The current prime targets of these lawsuits include pharmaceutical makers, financial institutions, and energy firms. Now, plaintiffs' lawyers are looking for state attorneys general who are willing to hire them to sue food makers. New federal laws providing states with the ability to enforce federal regulations also offer an expanded business opportunity for plaintiffs' lawyers to align with state attorneys general.

COURTS HAVE SOUGHT TO CURTAIL THE AUTHORITY OF CONTINGENCY FEE COUNSEL HIRED BY STATE ATTORNEYS GENERAL, BUT TO LITTLE AVAIL

Businesses have challenged the use of contingency fee arrangements by state officials. The Rhode Island and California Supreme Courts in 2008 and 2010, respectively, found such arrangements permissible, but required states, not the contingency fee counsel, to control the litigation. In 2013, a Kentucky federal district court and the West Virginia Supreme Court of Appeals followed suit. While these rulings may be well-intended, the practical reality is that this distinction is difficult to enforce. Deciphering who controls the litigation is nearly impossible given the attorney-client and work product privileges.

LEGISLATURES ARE STEPPING IN TO ADDRESS SOME OF THE WORST CONTINGENCY FEE ABUSES

Nearly a dozen states have adopted the Transparency in Private Attorney Contracts Act (TiPAC) in recent years. TiPAC stems pay-to-play contracting, requires public disclosure of information related to contingency fee agreements, and attempts to assure that government attorneys, not plaintiffs' lawyers, control the litigation.

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Litigation Trends

Class Action Litigation

The Class Action Fairness Act of 2005 (CAFA) shifted numerous class actions from plaintiff-friendly "magnet" state courts to neutral federal courts that apply more exacting class certification standards. In addition, the U.S. Supreme Court has issued several class action rulings that have clarified the rules of the road for class actions pending in federal court. Nonetheless, some appellate courts continue to apply class action standards that are less rigorous than those demanded by Supreme Court precedent. And other class action-related questions are still percolating in federal and state courts, including the role of expert testimony at the class certification stage, the propriety of issues-only classes, application of CAFA to state attorneys general lawsuits seeking damages on behalf of state residents, and the validity of *cy pres* class settlements.

Recent Developments in Class Action Law

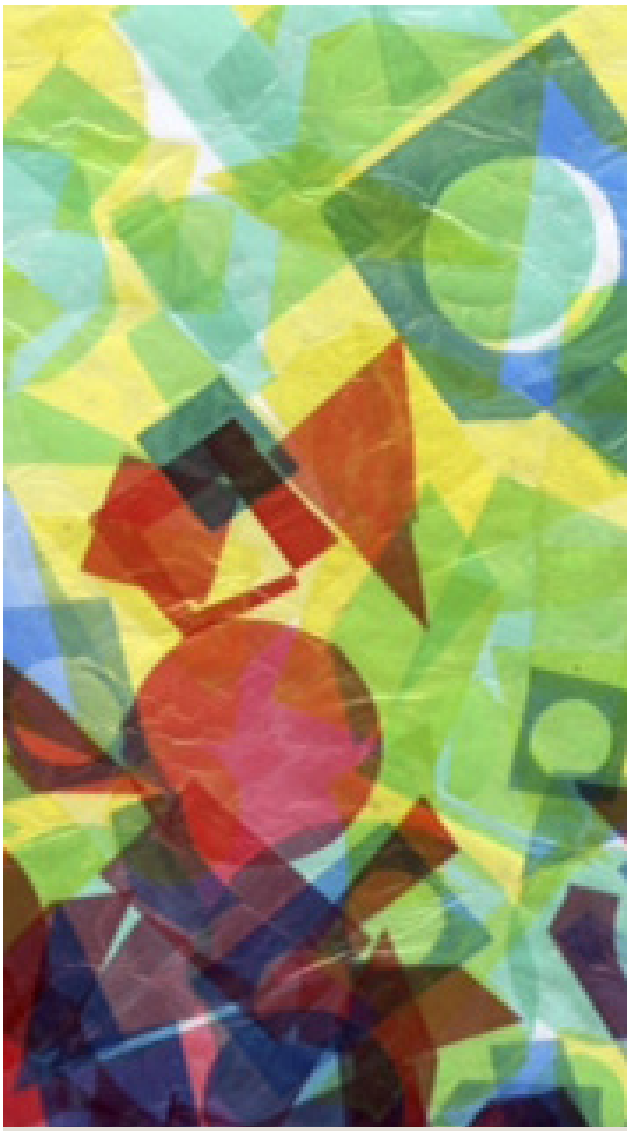
Recent decisions by the U.S. Supreme Court have improved the landscape for American businesses when it comes to defending class actions. The Court has strengthened class certification requirements and embraced a broad view of CAFA jurisdiction that protects the federal judiciary's jurisdiction over multi-state suits.

However, defendants faced a couple of setbacks this year with an unfavorable Supreme Court ruling in the area of securities fraud class actions and a mixed bag of decisions regarding class action waivers in arbitration contracts. Further, while recent decisions by the Supreme Court have largely leveled the playing field for American businesses faced with dubious class actions, the threat of frivolous and unwieldy class actions continues to loom large, especially within the Sixth and Seventh Circuits and federal district courts in California.

Over the past year, the Supreme Court decided the following five cases involving class action law, three of which adopted the position of the National Chamber Litigation Center (NCLC):

COMCAST CORP V. BEHREND[1]

In *Comcast*, the Supreme Court held that the proposed method of calculating damages in a class action must match the theory of liability in order for a class to be certified. The plaintiffs in *Comcast* alleged that Comcast entered into unlawful swap agreements with other cable carriers that eliminated competition and caused cable



"... the threat of frivolous and unwieldy class actions continues to loom large ..."

prices to rise. While the plaintiffs proposed four theories of antitrust impact, each of which supposedly increased cable rates, the district court accepted only one theory. The district court certified the class, finding that damages based on this theory could be calculated on a classwide basis, even though the damages model employed by plaintiffs' expert did not separately consider damages based on the only theory accepted by the court. The Third Circuit affirmed the class certification ruling, but the U.S. Supreme Court reversed.

The U.S. Supreme Court reaffirmed its instruction in *Wal-Mart Stores, Inc. v. Dukes* that a court's analysis of each of the Rule 23 prerequisites must be "rigorous" and that the court must "probe behind the pleadings" and consider the merits of the plaintiff's underlying claim. Applying these principles, the Court held in *Comcast* that the class should not have been certified because the plaintiffs did not present a classwide theory of damages that matched the theory of liability accepted by the district court.

By clarifying that a trial court must apply a "rigorous analysis" to each of the Rule 23 prerequisites, including predominance—even where such analysis entails an overlap with the merits underlying the plaintiff's claims—the Supreme Court has indicated that lax class certification standards have no place in federal class action practice. In addition, those lower courts that have resisted the Supreme Court's recent class certification decisions may be more inclined to deny class certification in cases involving individualized damages determinations.

STANDARD FIRE INSURANCE CO. V. KNOWLES[2]

In *Standard Fire*, the lower court had held that a named plaintiff could avoid removal under CAFA by stipulating in his complaint that he was not seeking to recover more than $5 million on behalf of absent class members. The Supreme Court reversed, holding that stipulating to the amount in controversy prior to class certification could have no such effect, because the named plaintiff has no authority to bind absent class members.

Plaintiffs' lawyers have sought to downplay the importance of this ruling, noting that the vast majority of class actions seek recovery over $5 million, that relatively few attorneys used such stipulations, and that most large class actions are already in federal court.[3] But this narrow reading of *Standard Fire* misses the broader point. After all, in barring the sort of amount-in-controversy stipulation at issue in *Standard Fire*, the Court reiterated Congress's

> *"... the Supreme Court has indicated that lax class certification standards have no place in federal class action practice."*

purpose in passing CAFA—*i.e.*, to expand federal jurisdiction over interstate class actions. Indeed, the Court clearly warned against any creative tactics that "squarely conflict with . . . [CAFA's] objective."

This pronouncement may lead lower courts to reject other efforts by plaintiffs' lawyers to evade federal jurisdiction under CAFA.

AMERICAN EXPRESS CO. V. ITALIAN COLORS RESTAURANT[4]

In *American Express Co.*, the Supreme Court ruled that the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration simply because the plaintiff's cost of individually arbitrating a federal statutory claim is too expensive. The Court therefore closed a loophole opened by the Second Circuit that would have allowed plaintiffs to avoid arbitration where the cost of pursuing an individual claim is substantially more than the potential amount of recovery.

While the cases summarized above represent positive developments in the area of class action law, two recent Supreme Court rulings were less favorable for class action defendants.

AMGEN INC. V. CONN. RETIREMENT PLANS AND TRUST FUNDS[5]

In *Amgen*, the Supreme Court considered whether securities fraud plaintiffs seeking class certification must prove that the misrepresentation at issue was material at the class certification stage in order to invoke the "fraud-on-the-market" presumption recognized in *Basic v. Levinson*, 485 U.S. 224 (1988). The Court held that plaintiffs need not make such a showing because materiality is an element of plaintiffs' claims under § 10(b), rather than a prerequisite for class certification.

Unlike many of the Court's other recent class certification rulings, *Amgen*'s result seems favorable to plaintiffs. Indeed, the plaintiffs' bar is already touting *Amgen*'s holding that materiality does not present insurmountable obstacles to class certification under the "fraud-on-the-market" theory. But while *Amgen* may encourage more securities fraud class actions, the decision left the door open to challenging the "fraud-on-the-market" presumption in the first place. Indeed, the *Amgen* majority expressly stated that it "'ha[d] not been asked to revisit'" the issue of whether the fraud-on-the-market theory makes economic sense or should be applied to facilitate class certification in securities cases.

OXFORD HEALTH PLANS LLC V. SUTTER[6]

In *Oxford*, the parties' contract agreed to resolve any disputes through binding arbitration. When the arbitrator allowed a class action to proceed in arbitration, however, the insurance company argued that the arbitrator had exceeded his authority.

The Supreme Court and the lower courts found that where the parties agree to arbitrate disputes, an arbitrator's interpretation of the agreement must stand. According to the Court, "[s]o long as the arbitrator was 'arguably construing' the contract—which this one was—a court may not correct his mistakes . . . ." The Court therefore refused to vacate the arbitrator's decision despite various suggestions that the Court disagreed with the arbitrator's interpretation of the contract.

Washing Machine Cases Suggest Lower Courts Aren't Hearing What The Supreme Court Is Saying

A recent trio of front-load washing machine cases reflects a lax approach to class certification, suggesting that some courts have not heard the Supreme Court's message about closer scrutiny of class proposals.

The claim in each of these cases (*Whirlpool Corp. v. Glazer, Butler v. Sears, Roebuck & Co.*, and *Tait v. BSH Home Appliances Corp.*) is that the defendants' front-load washing machines have a design defect that makes them prone to accumulate mold.[7] In finding that these cases satisfy the requirements of Rule 23, the Sixth and Seventh Circuits and the Central District of California brushed aside arguments that the proposed classes are overbroad because the overwhelming majority of class members experienced no problems with their machines.

The courts also found that class certification was proper even though the proposed classes were fraught with a number of individual issues, including variations in the machines at issue and "variations in consumer laundry habits." The Seventh Circuit reasoned that the predominance standard was satisfied in *Butler* because it would be more efficient to resolve the question whether the machines were defective in a single class trial than in individual proceedings.

Earlier this year, the Supreme Court vacated and remanded the Sixth Circuit's *Whirlpool* ruling for reconsideration in light of its decision in *Comcast*.[8] The Supreme Court did the same with respect to *Butler* a few months later.[9]

The Sixth and Seventh Circuits have since issued new rulings, finding that the front-load washing machine cases were properly certified notwithstanding *Comcast*.[10] The two courts of appeal essentially read *Comcast* as a very narrow decision that does not affect cases where the plaintiffs propose a classwide trial for liability, followed by individual trials for damages. Whirlpool has indicated that it will file another petition for certiorari (and Sears is likely to as well), but it remains to be seen whether the Supreme Court will accept the cases and issue more guidance to appellate courts about application of the predominance standard in putative class actions.

> *"... some courts have not heard the Supreme Court's message about closer scrutiny of class proposals."*

Threats and Opportunities

Several other issues related to class certification are percolating in lower courts and bear close attention over the coming year.

DAUBERT AT CLASS CERTIFICATION

In *Dukes*, the Supreme Court left open the question of whether expert testimony at the class certification stage must satisfy judicial safeguards intended to ensure that such testimony is based on reliable, sound methods. In the wake of *Dukes*, federal appeals courts have split on this question. Most have acknowledged that some scrutiny of expert evidence in support of class certification is necessary, but they have disagreed about whether courts must make a "conclusive" or merely "limited" or "tentative" assessment of whether the proposed evidence meets what is known as the *Daubert* standard.[11]

Although the Supreme Court did touch briefly on expert issues as they relate to class certification in *Comcast*, the ruling did not address *Daubert* directly, allowing lower courts to continue to take varying approaches as to whether—and to what degree—a *Daubert* analysis is required at the class certification stage.

ISSUES-ONLY CLASS ACTIONS

Another vexing question is whether courts may certify one or more common issues for class treatment, while allowing other, non-certifiable issues to be decided later in individual trials.

According to the Seventh Circuit, the answer is yes. In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Seventh Circuit endorsed such an approach in an employment discrimination class action.[12] Judge Posner wrote for the Court, holding that the plaintiffs' theory that Merrill Lynch's employment policies have a disparate impact on African-American financial advisers was amenable to classwide treatment. Judge Posner advanced a similar position in the *Butler* washing machine case, discussed above.

This approach to class certification may prompt a new wave of efforts by the plaintiffs' bar to seek certification of classes that traditionally have not been approved for class treatment on the theory that one or more issues could be tried on a classwide basis in a so-called "issues trial." Such issues trials, which have generally been rejected by federal courts, tend to be unfair because they allow plaintiffs to try abstract questions before a jury without having to deal with the facts of their cases or with critical elements of their claims, such as causation.[13]

STATE AG *PARENS PATRIAE* ACTIONS

This term, the U.S. Supreme Court is considering whether *parens patriae* actions brought by state attorneys general fall under CAFA. These are lawsuits that state attorneys general bring on behalf of a state's citizens, rather than the state itself.

Federal appellate courts have split as to whether *parens patriae* actions qualify as mass actions that may be decided in federal courts.[14] The Fourth, Seventh, and Ninth Circuits have found that such actions are not disguised mass or class actions subject to CAFA because they are not brought under a federal or state court rule governing class actions, but based on state laws.[15] The Fifth Circuit found otherwise,

> *Another recurring problem is the tendency of class actions to enrich class counsel instead of compensating those supposedly injured by the defendant's conduct.*

ruling in November 2012 that an antitrust case brought by Mississippi Attorney General Jim Hood on behalf of LCD consumers qualified as a mass action subject to CAFA because the real beneficiaries were the individual consumers, and the state attorney general could not claim monetary damages under state law.[16] The Supreme Court will decide an appeal of the Fifth Circuit case this term.

Nearly all of these cases were brought by contingency fee lawyers on behalf of a state, making the litigation functionally a class action without Rule 23 safeguards. West Virginia's case against pharmacies for allegedly overcharging consumers for prescription drugs was brought by Brian Glasser of Bailey & Glasser, and Joshua Barrett and Sean McGinley of Ditrapano, Barrett & Dipiero. Nevada's lawsuit alleging that mortgage lenders made misrepresentations to consumers was brought by Linda Singer of Cohen Milstein Sellers & Toll. Mississippi's antitrust action on behalf of LCD consumers was brought by A. Lee Abraham, Jr. and Preston Rideout, Jr. of Abraham & Rideout, and Carolyn Glass Anderson of Zimmerman Reed. The Illinois case, which is also an LCD antitrust action, is the only one of these four cases to proceed solely through government attorneys.

THE ROLE OF *CY PRES* IN CLASS SETTLEMENTS

Another recurring problem in current class action practice is the tendency of class actions to enrich class counsel instead of compensating those supposedly injured by the defendant's conduct.

In more and more class actions, class members are offered only small amounts of money for their alleged injuries, while counsel for the class receive thousands, if not millions, of dollars in attorneys' fees. Even if the money offered to class members is reasonable and fair compensation for their individual claims, those class members often do not submit claims for compensation. In some instances, the class members do not support or do not care about the claims; others simply do not want to bother with the claims process. As a result, most of the available funds go unclaimed, and these funds are increasingly distributed (through a process known as *cy pres*) to third-party charities that often have little or no connection to the subject matter of the litigation.

This problem was at play in two settlements that were recently nixed by the Third and Sixth Circuits. In *In re Baby Products Antitrust Litigation*, the attorneys received nearly five times the amount that

actually ended up in the pockets of their supposed clients.[17] There, the defendant agreed to pay $35.5 million into a settlement fund, with any unclaimed funds to be paid to specified charities. The trial court approved the settlement, which included payment of $14 million in attorneys' fees and expenses. Notably, only $3 million of the settlement fund was actually claimed by class members, leaving $18.5 million to be paid to charities. On appeal, the Third Circuit invalidated the settlement given the small amount that was directly distributed to qualifying class members.

A similar result was reached in *In re Dry Max Pampers Litigation*, which involved a class action settlement that would have paid the lawyers who negotiated it $2.73 million, absolved Procter & Gamble of any future liability for allegedly manufacturing Pampers products that cause diaper rash, awarded $1,000 each to the named plaintiffs who brought the lawsuit, and distributed money to charities.[18] The Sixth Circuit found that the settlement was unfair because it "provides the unnamed class members with nothing but nearly worthless injunctive relief."

Other courts have been more accepting of *cy pres* settlements. In *Lane v. Facebook, Inc.*, for example, the Ninth Circuit approved a $9.5 million settlement of a privacy lawsuit, of which approximately $3 million was used to pay attorneys' fees, administrative costs, and incentive payments to the class representatives.[19] The remaining $6.5 million was a *cy pres* award dedicated to establishing a new charity organization called the Digital Trust Foundation to create education programs about the protection of identity and personal information online.[20]

The Center for Class Action Fairness recently filed a petition for certiorari before the Supreme Court challenging the *Facebook* settlement and asking the high court to clarify the law governing *cy pres*.[21] Thus, there is a possibility that the Supreme Court will weigh in on the *cy pres* issue at some point in the next year.

As detailed later in the report, plaintiffs' lawyers have filed a surge of class actions targeting food makers in recent years (see p. 87). There is also renewed interest in bringing claims seeking compensation for medical monitoring costs. Medical monitoring lawsuits pose the potential for massive class actions on behalf of individuals who claim exposure to a potentially hazardous substance, but have not developed an injury (see p. 130).

Top National Plaintiffs' Class Action Firms

There are numerous boutique and state-focused plaintiffs' firms that are involved in substantial class action litigation. The list below highlights several firms with practices that are not limited by geographic boundaries. This does not mean that the firms bring nationwide class actions, which are difficult to certify, but that they instead file suits in several states. This list does not focus on firms leading food-related or securities class actions, which are discussed separately.

PLAINTIFFS' CLASS ACTION FIRM	PRINCIPAL LAWYER(S)	LOCATION	SPECIALTIES
Bailey & Glasser LLP	Eric Snyder	Charleston, WV	Automobile (Sudden Acceleration) Mortgage lending Consumer goods and services
Cohen Milstein Sellers & Toll PLLC	Joseph Sellers Christine Webber Jenny Yang Benjamin Brown Richard Koffman J. Douglas Richards Andrew Friedman	Washington, DC	Employment Antitrust Consumer goods and services
Colson Hicks Eidson	Lewis "Mike" Eidson Dean Colson Ervin Gonzalez	Coral Gables, FL	BP Oil Spill Chinese Drywall Automobile
Edelman Combs Latturner & Goodwin LLC	Cathleen Combs	Chicago, IL	Billing / debt collection practices Payday loans
Edelson LLC	Jay Edelson Rafey Balabanian Ari Scharg	Chicago, IL	Technology Privacy Telecommunications
Finkelstein Thompson LLP	Mila Bartos Rosemary Rivas Kendall Satterfield	Washington, DC	Consumer goods
Girard Gibbs	Eric Gibbs	San Francisco, CA	Employment Financial services Antitrust
Grant & Eisenhofer[22] P.A.	Adam Levitt	Chicago, IL	Automobile (Sudden Acceleration) Agriculture/Biotech
Hagens Berman Sobol Shapiro LLP	Steve Berman	Seattle, WA	Automobile (Sudden Acceleration) Technology/Antitrust Privacy
Hausfeld LLP	Michael Hausfeld James Pizzirusso Melinda Coolidge	Washington, DC	Acer Laptops / Sony Playstation Digital royalties Environmental Antitrust

PLAINTIFFS' CLASS ACTION FIRM	PRINCIPAL LAWYER(S)	LOCATION	SPECIALTIES
Leiff Cabraser Heimann & Bernstein, LLP	Elizabeth Cabraser Roger Heller Michael Sobol Steven Fineman Jonathan Selbin	San Francisco, CA San Francisco, CA San Francisco, CA New York, NY New York, NY	Consumer goods Financial services Billing practices Telecommunications Privacy
Milberg LLP	Paul Novak	New York, NY	Consumer goods Antitrust
Robins, Kaplan, Miller & Ciresi L.L.P.	Hollis Salzman	New York, NY	Antitrust
Susman Godfrey L.L.P.	Marc Seltzer Shawn Raymond James Southwick	Los Angeles, CA Houston, TX	Automobile (Sudden Acceleration) Antitrust
Wolf Haldenstein Adler Freeman & Herz LLP	Janine Pollack	New York, NY	Consumer goods
Zimmerman Reed, P.L.L.P.	Bucky Zimmerman J. Gordon Rudd, Jr. David Cialkowski Anne Regan	Minneapolis, MN	Consumer goods Antitrust Wage and Hour

Endnotes

[1] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[2] *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1346 (2013).

[3] *See* Bibeka Shrestha, *Plaintiffs' Attys Say Sky's Not Falling After CAFA Ruling*, Law360, Mar. 25, 2013.

[4] *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

[5] *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1188 (2013).

[6] *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2067 (2013).

[7] *Whirlpool Corp. v. Glazer*, 678 F.3d 409 (6th Cir. 2012), *cert. granted sub nom.*, *Whirlpool v. Glazer Corp.*, 133 S. Ct. 1722 (2013); *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *cert. granted*, 133 S. Ct. 2768 (2013); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012).

[8] *See Whirlpool Corp. v. Glazer*, No. 12-322 (U.S. Apr. 1, 2013); *Butler v. Sears, Roebuck & Co.*, Nos. 11-8029, 12-8030, 2013 WL 4478200 (7th Cir. Aug. 22, 2013).

[9] *Sears, Roebuck & Co. v. Butler*, No. 12-1067, 2013 WL 775366 (U.S. June 3, 2013).

[10] *See Glazer v. Whirlpool Corp.*, No. 10-4188, 2013 WL 3746205, at *17 (6th Cir. July 18, 2013).

[11] For example, in *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 812 (7th Cir. 2012), the Seventh Circuit declared that a full *Daubert* analysis is necessary when an expert's report is "critical to class certification." By contrast, the Eighth Circuit held that a full-scale *Daubert* analysis is not required because class certification is a "tentative, preliminary, and limited" stage of litigation. *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 644 F.3d 604, 613 (8th Cir. 2011) (internal quotation marks and citation omitted). The defendants in *Zurn Pex* filed a petition for certiorari; however, the parties settled the case, and the petition for certiorari was voluntarily dismissed.

[12] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 491 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012).

[13] Some of these issues were at play in the Engle tobacco litigation. In *Engle v. Liggett Group*, the Florida Supreme Court decertified a class action after finding that legal causation, comparative fault and damages could not be proven on a classwide basis. 945 So. 2d 1246 (Fla. 2006). Nonetheless, the court held that certain common liability findings, such as general causation of certain diseases and the addictive nature of cigarettes, would have "res judicata effect" in individual actions brought within a year of the opinion's mandate. *Id.* at 1269.

[14] For a helpful in-depth analysis of the issue, see Enrique Schaerer, *A Rose By Any Other Name: Why A Parens Patriae Action Can Be A "Mass Action" Under The Class Action Fairness Act*, 16 N.Y.U. J. Legis. & Pub. Pol'y 39 (2013).

[15] *See AU Optronics Corp. v. South Carolina*, 699 F.3d 385, 392–94 (4th Cir. 2012); *State ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir.), *cert. denied*, 132 S. Ct. 761 (2011); *LG Display Co. Ltd. v. Madigan*, 665 F.3d 768 (7th Cir. 2012); *Nevada v. Bank of America Corp.*, 672 F.3d 661 (9th Cir. 2012); *Washington v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011).

[16] *Mississippi ex. rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012); *see also Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 428-30 (5th Cir. 2008).

[17] *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169 (3d Cir. 2013).

[18] *In re Dry Max Pampers Litig.*, No. 11-4156, 2013 U.S. App. LEXIS 15930, at *2 (6th Cir. Aug. 2, 2013).

[19] *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

[20] However, just days before this ruling, the Ninth Circuit issued a decision in another case, this time rejecting a $10.6 million settlement of a consumer class action claiming that Kellogg Co. misrepresented Frosted Mini Wheats as increasing children's attentiveness. *See Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012). Under the agreement, Kellogg was to distribute $2.75 million to class members in the form of $5 coupons, the plaintiffs' attorneys were to receive $2 million in fees; and $5.5 million of Kellogg food items plus any unclaimed funds would be distributed to charities that feed the hungry. According to the Ninth Circuit, the *cy pres* distribution was improper because it lacked a "'driving nexus'" to the alleged harm. *Id.* at 865 (citation omitted).

[21] *See* Center for Class Action Fairness, *Our First Cert Petition, Challenging Facebook Beacon Cy Pres Settlement*, July 29, 2013.

[22] Though known for its securities litigation, Grant & Eisenhofer launched a national consumer class action litigation practice in 2013 when it hired Adam Levitt, a former partner with Wolf Haldenstein.

Mass Tort Litigation

Mass tort litigation continued to grow over the last year, posing challenges to a broad array of industries under numerous different theories. While pharmaceutical makers and manufacturers of certain types of medical devices are now the top targets of mass tort litigation (aside from asbestos claims), plaintiffs' lawyers are continually exploring and developing the next mass tort.

Prime Targets

With many federal courts scrutinizing requests for class certification more carefully, plaintiffs' lawyers have turned much of their attention to private mass-tort litigation.

Indeed, the plaintiffs' lawyer group known as the American Association for Justice (AAJ) recently created a number of litigation groups designed to target new areas of litigation. These groups, the trial bar explains, are "a critical tool for [its] members to level the playing field when forced to battle the overwhelming resources of corporate counsel."[1] Some of the new litigation groups and their AAJ co-chairs include:

SUPERSTORM SANDY

(established 2013)

This group assists lawyers who allege that insurers have not properly paid property damage claims resulting from the storm.

- Todd D. Muhlstock, Baker Sanders Barshay Grossman Fass Muhlstock & Neuwirth, LLC (Garden City, NY)
- Samuel W. Bearman, Law Office of Samuel W. Bearman, LC (Pensacola, FL)
- Jeff S. Korek, Gersowitz Libo & Korek, PC (New York, NY)

> *"The plaintiffs' lawyer group known as the American Association for Justice (AAJ) recently created a number of litigation groups designed to target new areas of litigation."*

- Michael W. Duffy, Childress Duffy Goldblatt, Ltd. (Chicago, IL)

DA VINCI ROBOTIC SURGERY
(established 2013)

This group provides support to lawyers who bring claims targeting technology that provides an effective option for minimally invasive surgery for a range of problems, from prostate cancer to fibroids. The litigation alleges that the robot has the propensity to lead to certain complications.

- Patricia M. Cruz Fragoso, Ventura Ribeiro & Smith (Danbury, CT)
- Jennifer Lawrence-Lewis, The Lawrence Firm, PSC (Covington, KY)
- Jennifer A. Moore, Grossman & Moore, PLLC (Louisville, KY)
- David A. Wenner, Snyder & Wenner (Phoenix, AZ)

LIPITOR
(established 2013)

This group supports plaintiffs' lawyers who allege that Lipitor, a popular drug designed to lower LDL cholesterol and triglycerides, may cause patients to develop Type II diabetes. The claims allege that there is no credible evidence that Lipitor will prevent heart disease in women, yet women are at a substantially increased risk over men of developing Type II diabetes from Lipitor.

- Elizabeth M. Burke, Richardson Patrick Westbrook & Brickman, LLC (Mount Pleasant, SC)
- Bill Robins, Heard Robins Cloud & Black LLP (Santa Fe, NM)
- Ramon Lopez, Lopez McHugh, LLP (Newport Beach, CA)

ENERGY DRINKS
(established November 2012)

This group is intended to assist lawyers who claim energy drinks contain ingredients whose potential side effects are not disclosed to the consumer public.

- Joseph Cammarata, Chaikin, Sherman, Cammarata & Siegel (Lorton, VA)
- Kevin Goldberg, Goldberg Finnegan & Mester, LLC (Silver Spring, MD)

MEDTRONIC INFUSE
(established September 2012)

The purpose of this group is to encourage lawsuits alleging that Medtronic marketed the device for off-label uses, which allegedly caused an over-promotion of bone growth with nerve damage and paralysis. Plaintiffs' lawyers in these cases are trying a new strategy to avoid the obstacles posed by *Riegel v. Medtronic*,[2] a 2008 Supreme Court preemption ruling, by asserting that the lawsuits assert parallel claims that can go forward. So far, district courts have reached different results, with some embracing plaintiffs' arguments and others rejecting them.[3]

- Turner W. Branch, Branch Law Firm (Albuquerque, NM)
- Stuart Goldenberg, Goldenberg Law (Minneapolis, MN)

BIOMET METAL-ON-METAL HIP IMPLANTS
(established September 2012)

This group assists lawyers with suits charging that metal-on-metal hip implants have unique risks in addition to the general risks of all hip implants. Plaintiffs' lawyers claim that friction between the metal ball and the metal cup can cause tiny metal

particles to wear off of the device and enter the bloodstream. There are currently several MDL proceedings involving metal-on-metal hip devices, including the Pinnacle Cup System, the ASR XL hip implant, the Biomet implant, the Wright implant, the Stryker Rejuvenate, and ABG II hip implants.

- Thomas R. Anapol, Anapol Schwartz (Philadelphia, PA)
- Michelle L. Kranz, Zoll, Kranz & Borgess, LLC (Toledo, OH)
- Daniel S. Robinson, Robinson Calcagnie Robinson Shapiro Davis, Inc. (Newport Beach, CA)

DIALYSIS EQUIPMENT, PRODUCTS AND CLINICS

(established July 2012)

This group is intended to promote claims against dialysis clinics and manufacturers of dialysis equipment and products for medical complications arising from dialysis treatment. The Judicial Panel on Multidistrict Litigation created an MDL proceeding for similar cases in the U.S. District Court in Massachusetts.

- Stephen J. Herman, Herman Herman & Katz LLC (New Orleans, LA)
- Michelle Parfitt, Ashcraft & Gerel, LLP (Falls Church, VA)
- Anthony Tarricone, Kreindler & Kreindler LLP (Boston, MA)

BUS LITIGATION

(established July 2012)

This group supports members who are active in litigation involving buses, school buses, motor coaches, and RVs.

- Robert L. Collins (Houston, TX)
- Lawrence M. Simon, Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins (Ridgewood, NJ)

GAS DRILLING/FRACKING

(establishment date unknown)

Plaintiffs' lawyers are alleging that retrieving natural gas can cause methane gas and other harmful substances to enter the local water supply and its surrounding environment. As a result of the extraction process, the plaintiffs' lawyers claim, people who live nearby are exposed to hazardous chemicals and have reduced property values. Some plaintiffs' lawyers are bringing fracking lawsuits under the guise of nuisance claims, alleging that the practice interferes with the use and enjoyment of one's property without having to show that a gas company contaminated a particular well.[4]

- John F. Romano, Romano Law Group (Lake Worth, FL)
- Todd O'Malley, O'Malley & Langan Law Offices (Scranton, PA)

CELL PHONE RADIATION

(established March 2011)

This group provides information to plaintiffs' lawyers seeking to sue cell phone manufacturers on the ground that frequent use of their products without a hands-free device increases the risk of brain tumors. Notably, a Third Circuit ruling finding such claims preempted by Federal Communications Commission regulations had previously dampened the prospects for this type of mass-tort litigation.[5] However, the FCC has since decided to review whether cell-phone usage causes cancer,

which may renew efforts by plaintiffs' lawyers to focus on this area.[6]

- Hunter Lundy, Lundy, Lundy, Soileau & South, L.L.P. (Lake Charles, LA)
- Jim Klick, Herman, Herman & Katz L.L.C. (New Orleans, LA)

OTHER MEDICAL DEVICES

AAJ also recently established litigation groups targeting Medtronic's SynchroMed II and SynchroMed EL Medical Devices in 2013, and Stryker Rejuvenate and ABG II Hip Implant and Wright Hip implants in 2012.

When plaintiffs' lawyers target an industry, Americans can lose their jobs. Until July 2012, Blitz, USA, a relatively small business, was the largest manufacturer of gas cans in America. The company was in the gas can business for 50 years and sold approximately 15 million of the 20 million red plastic gas cans sold annually. Blitz employed about 120 people and was the third largest employer in Miami, Oklahoma. Although the company's products warned of the obvious danger of using gas cans to fuel fires, and the Consumer Product Safety Commission (CPSC) found that related injuries were the result of misuse, plaintiffs' lawyers charged that the cans could have been designed in a manner that reduced injury. The suits led to Blitz's closing its doors.

As the CEO, Rocky Flick, testified before Congress:[7]

> About a decade ago, we started to see a couple of lawsuits here and there. Then, as our insurance provider started to increase settlement payments, we saw a flood of lawsuits. This became lucrative business for the trial bar. In fact, AAJ —the ironically named American Association for Justice—has held seminars and produced materials about how to sue gas can manufacturers. The industry was squarely in their sites. They even have a gas can "litigation group." Blitz was the trial bar's target because we were the biggest manufacturer. . . . All our efforts were insufficient and the rest is history for a once proud American manufacturer. As we said in our June 11, 2012 press release announcing that Blitz would not be able to emerge from Chapter 11 bankruptcy, "Unfortunately, Blitz, its lenders, and insurers could not find a viable solution with personal injury attorneys to address the untenable litigation costs." Imagine having to explain that to your loyal employees who lost jobs and local vendors that were never paid when Blitz closed its doors.

"When plaintiffs' lawyers target an industry, Americans can lose their jobs."

> *Lower federal courts have followed the spirit of the Supreme Court's AEP ruling in rejecting climate change cases.*

The Gas Can Litigation Group met during AAJ's Summer 2013 convention to discuss targeting other companies, including retailers such as Wal-Mart, Home Depot, and Lowes.

Waning Areas of Mass Tort Litigation

While the plaintiffs' bar has embraced a number of new categories of mass tort litigation, a few areas that were once prime targets for plaintiffs' lawyers are now on the decline.

CLIMATE CHANGE LITIGATION

Over the past several years, plaintiffs' lawyers seeking to hold businesses liable for the effects of global warming have suffered a series of defeats at the hands of the U.S. Supreme Court and other federal courts.[8] In rejecting climate change lawsuits, the Supreme Court and other federal courts have explained that the judiciary lacks the institutional tools for appropriately balancing the costs and benefits of setting greenhouse gas emission limits. Each level of the federal judiciary has appreciated that such determinations by judges would effectively set national energy standards, usurping the power of both Congress and the Environmental Protection Agency.

For example, in *AEP v. Connecticut*, the Supreme Court explained that "judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order."[9] Judges are instead "confined by a record" and "may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators" that would facilitate an objective, comprehensive evaluation of greenhouse gas emission limits. Lower federal courts have followed the spirit of the Supreme Court's *AEP* ruling in rejecting climate change cases.[10]

With this latest set of defeats, proponents of climate change litigation have few remaining legal theories to pursue and face a judiciary increasingly skeptical of such lawsuits. Nevertheless, only time will tell if this attempt to expand the law of nuisance and engage in "regulation through litigation" has finally reached its end, or whether plaintiffs' attorneys will seek to breathe new life into this category of litigation through state courts or new legal theories.

WELDING FUME LITIGATION

Once billed as the next asbestos litigation, lawsuits against the welding industry alleging that the manganese in welding fumes causes neurological injury are now essentially moribund. Plaintiffs in the welding fume litigation won only five of the 15,000 cases they filed over the course of a decade, and three of those verdicts were reversed on appeal.

In addition, defendants' fact development efforts uncovered numerous fraudulent cases. Early in the litigation, several cases were dismissed based on revelations of fraud, including one case plaintiffs had selected for an early bellwether trial, leading the MDL judge to demand that plaintiffs investigate and certify cases before designating them for trial. Once the MDL court's case management initiatives related to certification took hold, plaintiffs voluntarily dismissed thousands of claims in the MDL proceeding rather than certify them as trial-worthy. Plaintiffs ultimately dismissed more than two-thirds of the MDL cases they had actually certified.

In total, all but 100 of the 12,000 claims once pending in the federal MDL proceeding were voluntarily dismissed by plaintiffs. The parties ultimately reached a settlement resolving all remaining cases. On March 25, 2013, the presiding judge recommended that the MDL panel dissolve the proceeding.

Snapshot of Today's Mass Tort Litigation and Lead Counsel

Federal multidistrict litigation proceedings provide a snapshot of mass tort litigation across the country. The chart that follows, which reflects case filings as of August 15, 2013, includes four other mass torts that have made headlines: lawsuits resulting from the 2010 Gulf oil spill; sudden acceleration claims involving Toyota automobiles; claims by current and former professional football players against the National Football League and a helmet manufacturer regarding concussion-related injuries;[11] and Chinese-manufactured drywall claims.

Although the list below does not include cases pending in state courts, the federal MDL statistics provide a sense of the amount of litigation involving a particular product or occurrence, the attorneys and firms leading the litigation, and the current stage of litigation.

	PLAINTIFFS' LEAD/ LIAISON/COORDINATING COUNSEL[12]	FIRM	ACTIONS PENDING	TOTAL ACTIONS (HISTORICAL)
Pharmaceutical Litigation				
Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation	Michael Burg	Burg, Simpson, Eldredge, Hersh & Jardine, P.C.	9,868	11,215
	Michael London	Douglas & London, P.C.		
	MarkNiemeyer	Onder, Shelton, O'Leary & Peterson		
	Roger Denton	Schlichter Bogard & Denton, LLP		

	PLAINTIFFS' LEAD/ LIAISON/COORDINATING COUNSEL[12]	FIRM	ACTIONS PENDING	TOTAL ACTIONS (HISTORICAL)
Avandia Marketing, Sales Practices and Products Liability Litigation	Stephen Corr	Stark & Stark	3,411	4,662
	Vance Andrus	Andrus Hood & Wagstaff P.C.		
Prempro Products Liability Litigation	Zoe Littlepage	Littlepage Booth	2,917	9,760
	Ralph Cloar	Gary Eubanks & Associates		
Chantix (Varenicline) Products Liability Litigation	Ernest Cory	Cory Watson Crowder & Degaris, P.C.	1,531	3,015
	Russell Drake	Whatley Drake & Kallas, LLC		
Levaquin Products Liability Litigation	Ronald Goldser	Zimmerman Reed, P.L.L.P.	1,843	2,039
	Lewis Saul	Lewis Saul & Associates		
Actos (Pioglitazone) Products Liability Litigation	Richard Arsenault	Neblett Beard & Arsenault	2,514	2,580
	Paul Pennock	Weitz & Luxenberg, P.C.		
	Patrick Morrow	Morrow, Morrow Ryan & Bassett		
Pradaxa (Dabigatran Etexilate) Products Liability Litigation	Seth A. Katz	Burg Simpson	1,343	1,389
	Mikal C. Watts	Watts Guerra Craft, LLP		
	Tor A. Hoerman Steven D. Davis	TorHoerman Law LLC		
	Michael A. London	Douglas & London P.C.		
	Roger C. Denton	Schlichter, Bogard & Denton, LLP		
	Mark R. Niemeyer	Onder, Shelton, O'Leary & Peterson, LLC		
Fosamax (Alendronate Sodium) Products Liability Litigation (No. II) (femur fracture)	Donald Ecklund James Cecchi	Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C.	1,083	1,100
	Christopher Seeger	Seeger Weiss LLP		
Fosamax Products Liability Litigation (osteonecrosis of the jaw)	Timothy O'Brien	Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor, P.A.	978	1,120
	Christopher Seeger	Seeger Weiss LLP		
	Vance Andrus	Andrus Hood & Wagstaff		
	Russel Beatie	Beatis & Osborn LLP		
Medical Device				
American Medical Systems, Inc., Pelvic Repair System Products Liability Litigation	Bryan Aylstock	Aylstock Witkin Kreis & Overholtz, PLLC	8,967	9,058
	Henry Garrard, III	Blasingame, Burch, Garrard & Ashley, P.C.		
	Fred Thompson, III	Motley Rice LLC		
Ethicon, Inc., Pelvic Repair System Products Liability Litigation	Bryan Aylstock	Aylstock Witkin Kreis & Overholtz, PLLC	7,751	7,896
	Henry Garrard, III	Blasingame, Burch, Garrard & Ashley, P.C.		
	Fred Thompson, III	Motley Rice LLC		

	PLAINTIFFS' LEAD/ LIAISON/COORDINATING COUNSEL[12]	FIRM	ACTIONS PENDING	TOTAL ACTIONS (HISTORICAL)
DePuy Orthopaedics, Inc., Pinnacle Hip Implant Products Liability Litigation	Larry Boyd	Fisher, Boyd, Brown & Huguenard, L.L.P.	4,278	4,293
	Richard Arsenault	Neblett, Beard & Arsenault		
	Jayne Conroy	Hanly, Conroy, Bierstein, Sheridan, Fisher & Hayes LLP		
	Mark Lanier	The Lanier Law Firm		
	Kenneth Seeger	Seeger Salvas LLP		
Boston Scientific Corp., Pelvic Repair System Products Liability Litigation	Bryan Aylstock	Aylstock Witkin Kreis & Overholtz, PLLC	5,232	5,257
	Henry Garrard, III	Blasingame, Burch, Garrard & Ashley, P.C.		
	Fred Thompson, III	Motley Rice LLC		
C.R. Bard, Inc., Pelvic Repair System Products Liability Litigation	Henry Garrard, III	Blasingame, Burch, Garrard & Ashley, P.C.	3,407	3,463
Kugel Mesh Hernia Patch Products Liability Litigation	Donald Migliori	Motley Rice LLC	1,390	2,162
	Teresa Toriseva	Wexler Toriseva Wallace, LLP		
	Ernest Cory	Cory Watson Crowder & DeGaris, P.C.		
	Derek Potts	The Potts Law Firm, LLP		
	Harry Bell	The Bell Law Firm PLLC		
DePuy Orthopaedics, Inc., ASR Hip Implant Products Liability Litigation	Michelle Kranz	Zoll, Kranz & Borgess LLC	7,860	8,023
	James O'Callahan	Girardi & Keese		
	Christopher Placitella	Wilentz, Goldman & Spitzer P.A.		
	Ellen Relkin	Weitz & Luxenberg, P.C.		
	Steven Skikos	Skikos Crawford Skikos & Joseph		
NuvaRing Products Liability Litigation	Paul Rheingold Hunter Shkolnik	Rheingold, Valet, Rheingold, McCartney & Giuffra LLP	1,279	1,358
	Steven Blau	Blau & Brown, LLC		
	Roger Denton Kristine Kraft	Schlichter, Bogard & Denton, LLP		
Zimmer NexGen Knee Implant Products Liability Litigation	James Ronca	Anapol Schwartz P.C.	1,051	1,090
	Timothy Becker	Johnson Becker		
	Tobias Millrood	Pogust, Braslow and Millrood		
	Peter Flowers	Foote Meyers Miekle & Flowers P.C.		

	PLAINTIFFS' LEAD/ LIAISON/COORDINATING COUNSEL[12]	FIRM	ACTIONS PENDING	TOTAL ACTIONS (HISTORICAL)
Asbestos				
Asbestos Products Liability Litigation (No. VI)	Peter Angelos	Peter Angelos & Associates	3,531	192,020
	Janet Ward Black	Ward Black Law		
	Roger Lane			
	John Cooney	Cooney & Conway		
	Steven Kazan	Kazan, McClain, Satterley, Lyons, Greenwood & Oberman PLC		
	Peter Kraus	Waters & Kraus, LLP		
	Joseph Rice	Motley Rice LLC		
	Russell Budd	Baron & Budd, P.C.		
	Michael Thornton	Thornton & Naumes, LLP		
Other				
Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010	Stephen Herman	Herman, Herman & Katz LLC	2,854	2,979
	James Parkerson Roy	Domengeaux Wright Roy & Edwards LLC		
	Brian Barr	Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A.		
	Scott Summy	Baron & Budd, P.C.		
Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation	Elizabeth Cabraser	Leiff Cabraser Heimann & Bernstein, LLP	151	414
	Mark Robinson, Jr.	Robinson Calcagnie Robinson Shapiro Davis, Inc.		
	Steven Berman	Hagens Berman Sobol Shapiro LLP		
	Frank Pitre	Cotchett, Pitre & McCarthy, LLP		
	Marc Seltzer	Susman Godfrey LLP		
Chinese-Manufactured Drywall Products Liability Litigation	Russ Herman	Herman, Herman, & Katz, LLP	316	357
	Arnold Levin	Levin, Fishbein, Sedran & Berman		
National Football League Players' Concussion Injury Litigation	Sol Weiss	Anapol Schwartz	254	256
	Christopher Seeger	Seeger Weiss LLP		

Several significant MDLs have ended this year or in are the process of concluding:

CONCLUDING MDL LITIGATION (OVER 1,000 LAWSUITS IN FEDERAL COURTS)	ACTIONS PENDING	TOTAL ACTIONS (HISTORICAL)
Vioxx Marketing, Sales Practices and Products Liability Litigation	514	10,319
Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation	98	20,198
FEMA Trailer Formaldehyde Products Liability Litigation	1	4,828
Trasylol Products Liability Litigation	27	1,831
Ortho Evra Products Liability Litigation	15	1,572
Baycol Products Liability Litigation	1	9,107
Welding Fume Products Liability Litigation	0	12,681
Bextra and Celebrex Marketing, Sales Practices and Products Liability Litigation	0	2,192

Endnotes

[1] *See* American Ass'n for Justice, *Litigation Groups*, http://www.justice.org/cps/rde/justice/hs.xsl/1150.htm.

[2] *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

[3] *See* Jim Spencer, *Injured Infuse Users Struggle to Get Their Day in Court Against Medtronic*, Minneapolis Star Tribune, July 6, 2013.

[4] *See, e.g.*, Jim Efstathiou, et al., *Missouri Lawyer Brings Nuisance Claims to Fracking Arena*, Bloomberg Businessweek, June 11, 2013.

[5] *See Farina v. Nokia Inc.*, 625 F.3d 97, 133-34 (3d Cir. 2010), *cert. denied*, 2011 U.S. LEXIS 7125 (U.S. Oct. 3, 2011).

[6] *See* Tero Kuittinen, *FCC Will Review Cell Phone Radiation Danger – And Lawyers Are Already Sharpening Their Claws*, Yahoo News, Apr. 3, 2013.

[7] *See* Rocky Flick, Testimony Delivered before the House Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice, Hearing on Excessive Litigation's Impact on America's Global Competitiveness, March 5, 2013.

[8] *See* Keith Goldberg, *No Future For Climate Change Torts, Attys Say*, Law360, May 23, 2013; Christopher E. Appel, *Time for Climate Change Tort Litigation to Cool Off Permanently*, 12:223 Environmental Report (Bloomberg BNA) B-1, Nov. 20, 2012.

[9] *American Elec. Power Co. v. Connecticut.*, 131 S. Ct. 2527, 2539-40 (2011).

[10] *See* Victor E. Schwartz et al., *Does the Judiciary Have the Tools for Regulating Greenhouse Gas Emissions?*, 46 Val. U. L. Rev. 369, 399 (2012).

[11] In August 2013, lawyers representing the football players announced a $765 million settlement with the NFL. The plaintiffs' lawyers are now shifting their energy to target the helmet manufacturer, Riddell Inc.

[12] This list does not include additional attorneys who take leadership roles in the litigation through serving on the larger "steering committees" for each MDL. In some instances, the list includes members of the "executive committee" of the steering committee.

Asbestos Litigation

Asbestos litigation, the largest and longest running mass tort in U.S. history, continues to cost businesses billions of dollars each year and is predicted to last for several more decades. The litigation continues to morph in response to economic incentives and legal developments.

Internet and television advertising by plaintiffs' firms show fierce competition to recruit clients. While several plaintiffs' firms continue to dominate asbestos litigation, new firms are attempting to gain a foothold. As plaintiffs' lawyers approach a "max out" point on potential mesothelioma lawsuits each year and are forced to move away from filing claims on behalf of unimpaired claimants, some plaintiffs' firms are filing more lung cancer claims. New legal theories are being asserted to ensnare low-dose and remote defendants, and plaintiffs' lawyers are resurrecting old processes such as mass consolidations. Plaintiffs' lawyers have made consistent and sometimes fraudulent claims in seeking compensation through trusts established by bankrupt defendants and through civil litigation. There is a promising trend, however, toward greater transparency between the asbestos bankruptcy trust and civil tort systems.

Snapshot of the Litigation

A June 2013 study of asbestos personal injury claims by NERA Economic Consulting found:

- New asbestos claims have remained stable over the past five years. Asbestos claims peaked in 2004 and fell significantly until 2007, when they leveled off at the present rate. The number of new asbestos claims is just 20% of the 2001 level, a reflection of the move away from filings on behalf of unimpaired claimants.
- Average payments per resolved claim increased by 75% in 2011, following a 31% increase in 2010. The higher value of claims is likely a result of the shifting disease mix toward malignant diseases discussed below.
- The number of resolved claims declined by 30% in 2011, following a similar decline in 2010, reaching the lowest level since 2001. This decrease may reflect the lower level of asbestos filings in the second half of the 2000s.

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- Dismissal rates have slightly declined since 2008, following several years of increasing dismissal rates as tort reforms and heightened judicial scrutiny took effect.[1]

The asbestos litigation environment is also characterized by:

- Concentration of litigation in a few jurisdictions including New York City; Philadelphia, Pennsylvania; Madison and Cook Counties, Illinois; Baltimore, Maryland; and Los Angeles and San Francisco, California.
- The property casualty insurance industry incurs approximately $2 billion in annual asbestos losses and pays out $2.5 billion each year. A.M. Best recently predicted that the ultimate amount of asbestos losses for the P&C industry will be $85 billion, a $10 billion increase over its previous estimate.[2]

Asbestos Claims Marketing Practices

Plaintiffs' firms spend millions of dollars each year to advertise on television and the Internet in search of individuals on whose behalf they can file asbestos lawsuits, particularly mesothelioma claims.[3]

Personal injury firms spend as much as $52 million on Google keyword advertising each year, much of it related to asbestos litigation, according to a January 2012 study commissioned by the U.S. Chamber Institute for Legal Reform.[4] According to one online source, "mesothelioma settlement," "mesothelioma asbestos attorney," "asbestos attorney," and "asbestos law firm" are the top four most expensive Google AdWords, commanding between $107 and $143 per click. "Mesothelioma cancer" and "asbestos cancer" place 12th ($71) and 18th ($61), respectively.[5] These rates have increased over the past year, indicating increased competition among plaintiffs' firms.[6] The financial wherewithal of the trial bar to afford an unending stream of television advertising and readily spend as much as $143 every time someone clicks on a mesothelioma link is proof that the asbestos litigation business is booming.

Many plaintiffs' firms with a significant asbestos practice have established separate websites for asbestos claims and other areas of litigation. These are not simply websites that contain "mesothelioma" or "asbestos" in the domain and redirect to the law firm's general website, or include the term in the title of the website. Rather, the firms have

stand-alone websites that include information on asbestos-related diseases as well as attorney biographies tailored to asbestos lawsuits. For example, the Lanier Law Firm has established www.mesotheliomaadvocate.com and www.mesotheliomalawfirm.com in addition to its general purpose website, www.lanierlawfirm.com. In some instances, asbestos litigation websites do not disclose the identity of the firm that owns the site. For example, a "WHO IS" search reveals that www.mesothelioma-asbestos-help.com is owned by Oakland's Kazan Law.

Many plaintiffs' firms that engage in heavy advertising are "gatherer firms." These firms do not try or settle civil cases. Rather, they specialize in recruiting clients and referring them to other plaintiffs' firms. Typically, the gatherer firm receives a referral fee of one-third of the contingency fee received by the litigating firm. A new development with respect to this relationship is that gatherer firms are filing asbestos bankruptcy trust claims, then "selling" the civil claims to litigating firms.

For example, New Media Strategies estimated that Houston-based gatherer firm Danziger & De Llano spends as much as $16.7 million on Google keyword advertising, the highest of any plaintiffs' firm. In addition to its two general purpose websites, www.dandell.com and www.danzigerdellano.com, the firm has established at least two other websites to pull in asbestos claims. One website, www.nationalmesotheliomaclaims.com, purely targets the filing of claims with asbestos trusts "as seen on TV." Another of the firm's websites, www.mesotheliomaattorney.com/lawyers.htm, lists "Mesothelioma Lawyer Profiles," which includes attorneys who are not members of Danziger & De Llano.[7] The list includes Mark Lanier of the Lanier Law Firm, Fred Baron (who died in 2008), Lisa Blue of Baron & Blue, Ronald Motley of Motley Rice (who died in August 2013), and Richard Scruggs (who was imprisoned following his conviction for bribery of a judge in 2008).

Another example of a gatherer firm is New York-based Sokolove Law. In addition to its general website, sokolovelaw.com, the firm maintains www.asbestos.net and www.asbestoshelpnow.com. On asbestos.net, the Sokolove firm promotes itself as leading a "nationwide affiliate network of mesothelioma attorneys [who] help provide equal access to our nation's court system —regardless of income or race." Asbestos.net is filled with hyperlinked keywords, such as "asbestos law firm," "asbestos lawsuit," "asbestos lawyer," and "mesothelioma lawyer," geared to drive individuals searching for attorneys to their site.

Advertising for clients is particularly important for plaintiffs' lawyers who specialize in bringing asbestos claims. Unlike many other forms of litigation, it is possible to generate additional claimants and to make claims against additional defendants in response to economic incentives. This factor, sometimes termed "plaintiff and defendant elasticity,"[8] means that the availability of billions of dollars from trust funds established by bankrupt entities for asbestos claimants can have profound effects on the behavior of plaintiffs and their counsel. If substantial sums are

“... some plaintiffs’ firms are looking to lung cancer cases to expand their practices.”

available from the trust funds to those who meet minimal criteria, plaintiffs’ lawyers will undertake efforts to harvest those claims. To the extent that this solicitation for trust claims creates a pool of claimants and funds, it also enables the virtually riskless prosecution of lawsuits against solvent defendants in the tort system. The recent explosion in the number of lung cancer cases, in part, appears to be the product of such a process.

Shift in the Disease Mix—A Rise in Lung Cancer Claims

As a result of judicial and legislative reforms, plaintiffs’ lawyers have abandoned mass filing of claims on behalf of unimpaired plaintiffs. Since the mid-2000s, asbestos plaintiffs’ lawyers have focused on more lucrative mesothelioma claims. But, there is a finite number of people diagnosed with mesothelioma each year, and the CDC has predicted that mesothelioma deaths in the U.S. peaked around 2010 and should gradually decline.[9] Furthermore, the constant barrage of plaintiffs’ lawyer advertising has resulted in claims being filed by nearly 100% of those who develop mesothelioma and are inclined to sue. For these reasons, some plaintiffs’ firms are looking to lung cancer cases to expand their practices.

In contrast to mesothelioma, about 200,000 Americans are diagnosed with lung cancer each year. According to the CDC, about 85% of lung cancers are smoking-related. Nevertheless, if a plaintiffs’ lawyer can show that a person who developed lung cancer was exposed to asbestos-containing products, and finds an expert to testify that the exposure was a substantial contributing

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cause of the person's cancer, the lawyer can file an asbestos claim. While there are difficult causation issues in such litigation, asbestos-related lung cancer claims can involve significant damages and settlement value, particularly if the plaintiff was a non-smoker or the case is filed in a plaintiff-friendly jurisdiction.

In addition, these lung cancer cases offer plaintiffs' lawyers a substantial procedural advantage. As a result of existing statutory frameworks and reforms targeting claims by individuals with no asbestos-related impairment, in many jurisdictions, only cases involving malignant claims are scheduled for trial. Mesothelioma cases receive this treatment, but as noted, the incidence of the claims places a very low limit on the total number of claims available in a year. Lung cancer cases are ideal for plaintiffs' lawyers, as they will typically, as a life-threatening condition, support a trial preference, regardless of whether the etiology of the disease is related to asbestos. Unlike mesothelioma claims, there is, in a practical sense, an unlimited pool of these claims.

Consider, for example, the asbestos litigation experience of Madison County, Illinois. In 2012, Madison County shattered its record for new asbestos case filings, with 1,563 filings. The previous record, 953, was set in 2003 and tied in 2011. Over the past four years, the number of asbestos claims filed in Madison County has nearly doubled, and the mix of cases has tilted towards lung cancer filings. In 2012, for the first time, lung cancer claims exceeded mesothelioma claims in Madison County. Lung cancer filings could compete with mesothelioma claims for defendant resources and trial settings.

MADISON COUNTY ASBESTOS CLAIMS[11]

Year	Asbestos Claims	% Mesothelioma	% Lung Cancer
2009	814	60%	40%
2010	752	58%	42%
2011	953	52%	48%
2012	1,563	49%	51%
6/25/13[12]	793	58%	42%

Observers attribute the increase in asbestos filings to the Madison County Circuit Court's abandonment of a system that provided advanced trial settings for favored local law firms, allowing other firms to file lawsuits without affiliating with one

of the established local firms.[13] For example, a relatively new player in Madison County asbestos litigation, the New York-based Napoli Bern Ripka Shkolnik firm, was among the top three filers of asbestos claims in Madison County in 2012, with 343 new cases. Lung cancer cases represent most of the Napoli Bern firm's Madison County asbestos filings. While the percentage of lung cancer cases has subsided in Madison County as of June 2013, local defense attorneys expect the upward trend to continue for some time.[14]

Other jurisdictions are experiencing a rise in lung cancer filings too. For example, in New York City, the number of pending lung cancer cases has nearly tripled over the past four years, while remaining a relatively small portion of the asbestos litigation mix.[15] At a recent asbestos litigation conference, asbestos defense attorney Tim Krippner observed that "within the last 18 months, we have seen a dramatic increase [in lung cancer claims] across the nation."[16] Krippner suggested that the lung cancer filings are by plaintiffs' firms that are trying to gain a foothold in the litigation and are willing to "push the envelope." Others have similarly observed that despite the challenges of lung cancer cases, "more aggressive plaintiffs' firms (sometimes new to the field) have begun to usher in a new era of lung cancer claims."[17]

Emerging Theories of Liability

Plaintiffs' lawyers are raising a number of inventive claims to continue the litigation.

For example, plaintiffs' lawyers use the *any exposure* theory to bring claims against low dose defendants for *de mimimis* or remote exposures. Plaintiffs' experts who support this unscientific approach opine that any occupational or product-related exposure to asbestos fibers above the "background" exposure level (that which is naturally present) is a substantial contributing factor to development of an asbestos-related disease, regardless of the dosage.[18] In recent years, a growing number of courts have excluded "any exposure" testimony by plaintiffs' experts.[19]

Another theory promoted by some plaintiffs' counsel is that makers of products such as pumps or valves should be held liable for harms allegedly caused by asbestos-containing replacement gaskets or packing or asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, for example, by the U.S. Navy. This theory is attractive to plaintiffs' lawyers because most major manufacturers of asbestos-

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containing products have filed for bankruptcy, and the Navy enjoys sovereign immunity. As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms produced by products they never made or sold. Thus far, courts have drawn the line, holding that defendants are only responsible for harms caused by their own products.[20]

A third theory promoted by some plaintiffs' firms is that premises owners should be held liable in "take home" asbestos exposure cases. These cases typically allege that a spouse or child of a worker developed an asbestos-related condition as a result of exposure to asbestos brought home on the clothing of the occupationally exposed family member. Expanding the availability of asbestos actions against premises owners for persons who were not occupationally exposed and who had no relationship with the premises owner can create an almost infinite expansion of potential asbestos plaintiffs. Most courts that have considered the issue have concluded that premises owners are not liable for injuries arising from off-site exposures.[21] Most recently, Maryland's highest court adopted this approach.[22] In the few instances in which courts have recognized a duty of care in take home exposure cases, the decision focused primarily, if not exclusively, on the foreseeability of the risk to family members from workers' clothing.[23]

Threatened Reemergence of Mass Consolidations

In tort law, bad ideas never seem to go away. Instead, they tend to hibernate until memories fade about their flaws. Then they are dusted off and tried again. This phenomenon is being repeated in a recent proposal by the Law Offices of Peter G. Angelos, to consolidate thousands of asbestos cases for trial in Baltimore, Maryland.

In June 2012, the Angelos firm asked the Circuit Court for Baltimore City to consolidate a "backlog" of over 13,000 non-mesothelioma cases on the court's docket.[24] Dubbed "Consolidation III," the motion asked the Court to return to a practice used twice in Baltimore in the 1990s to resolve large numbers of cases. Each of those consolidations was followed by a large wave of filings, and defendants filed bankruptcy as a result of pressures from Baltimore and elsewhere.

It is particularly remarkable that a mass consolidation proposal was considered this year, because the practice has not been used in Baltimore for almost two decades

and has been abandoned by every other jurisdiction in the country. Courts moved away from mass consolidations a decade ago because the practice places "efficiency" above fairness, invites more filings, and threatens recoveries for future claimants with malignancies.[25] Judges came to realize that consolidations serve as a form of advertising for the filing of more claims.

The Philadelphia Court of Common Pleas' Complex Litigation Center (CLC) is the most recent court to reject trial consolidations. In February 2012, the CLC changed its protocol governing mass tort cases.[26] The CLC significantly limited the consolidation of asbestos and other mass tort cases absent an agreement of all parties.[27] After the CLC made this and other changes, the flow of asbestos and other mass tort cases into Philadelphia declined 70% from 2011, and the overall inventory of mass tort cases was reduced by 14%.[28]

Against this background, Baltimore City Circuit Court Judge John Glynn openly questioned the plaintiffs' proposed mass trial plan in a December 2012 hearing. Judge Glynn may be able to satisfy a desire to "do something about the backlog" by eliminating stale cases or non-viable cases that remain on the docket or transferring cases from other areas of Maryland to the plaintiffs' home court.

There are reports that some plaintiffs' firms may press for consolidation of asbestos claims in California, New York, and Illinois. It should be noted that the consolidations sought in these jurisdictions tend to be smaller consolidations of ten or fewer cases, not the mass consolidation sought in Baltimore. That they are smaller does not mean that they are benign. Trial of multiple mesothelioma cases against the same defendants can substantially impair those defendants' due process rights. A recent verdict in New York City underscores the risks of small consolidations. In that case, a five-plaintiff consolidation resulted in a $190 million verdict.[29]

Not all plaintiffs' lawyers share the desire to consolidate cases. Those who handle mesothelioma claims, for example, may view litigation that focuses on nonmalignant claimants as draining resources available to their clients. No court has approved a mass consolidation proposal in over a decade.

Asbestos Bankruptcy Trust Claim Transparency

To date, over 100 companies with asbestos-related liabilities have filed bankruptcy, allowing these companies to channel their asbestos liabilities into trusts and insulate themselves from tort claims in perpetuity.[30] According to a 2011 report by the U.S. Government Accountability Office, "the number of asbestos personal injury trusts increased from 16 trusts with a combined total of $4.2 billion in assets in 2000 to 60 with a combined total of over $36.8 billion in assets in 2011."[31]

A recent, major development in asbestos litigation relates to the impact of the many trusts established in bankruptcy to pay personal injury claims against former asbestos defendants and the impact of those trusts on civil tort litigation.[32]

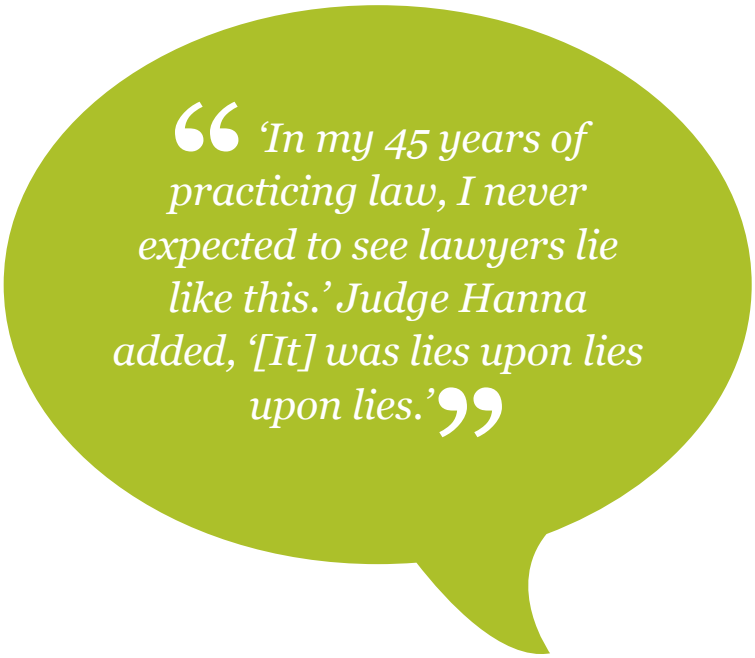
Examples of asbestos bankruptcy trust submission abuses have materialized. A widely reported example occurred in *Kananian v. Lorillard Tobacco Co.,*[33] where

Cleveland Judge Harry Hanna barred a prominent California asbestos plaintiffs' firm from his court after he found that the firm and one of its partners failed to abide by the rules of the court proscribing dishonesty, fraud, deceit, and misrepresentation.[34] An Ohio Court of Appeals and the Ohio Supreme Court let Judge Hanna's ruling stand.[35] Judge Hanna said later, "In my 45 years of practicing law, I never expected to see lawyers lie like this."[36] Judge Hanna added, "[It] was lies upon lies upon lies."[37]

Judge Hanna's ruling in *Kananian* received national attention for exposing "one of the darker corners of tort abuse" in asbestos litigation: inconsistencies between allegations made in open court and those submitted to bankruptcy trusts to pay asbestos-related claims.[38] As the *Cleveland Plain Dealer* reported, Judge Hanna's decision ordering the plaintiff to produce proof of claim forms "effectively opened a Pandora's box of deceit…. Documents from the six other compensation claims revealed that [plaintiff's lawyers] presented conflicting versions of how Kananian acquired his cancer."[39] Emails and other documents from the plaintiff's lawyers also showed that their client had accepted monies from entities to which he was not exposed, and one settlement trust form was "completely fabricated."[40] The *Wall Street Journal* editorialized that Judge Hanna's opinion should be "required reading for other judges" to assist in providing "more scrutiny of 'double dipping' and the rampant fraud inherent in asbestos trusts."[41]

In a Maryland case, *Warfield v. AC&S, Inc.,*[42] defendants aggressively pursued discovery of trust claims and were forced to file motions to compel, despite the fact that prior rulings made clear that trust claims materials must be produced. "At a hearing on the matter, plaintiff's counsel explained that he had been slow in producing the trust materials because he disagreed with the court's prior ruling, some two years previously, and went on to complain that the court had 'opened Pandora's Box' by requiring their disclosure."[43]

When production was finally made on the eve of trial, the "reasons for counsel's reluctance to produce the trust materials were made clear. There were substantial and inexplicable discrepancies between the positions taken in [c]ourt and the trust claims."[44] "Despite specific and explicit discovery requests, plaintiff had failed to disclose nine trust claims that had been made. As revealed in the claim forms, the period of exposure alleged in the litigation



versus that alleged in the trust submissions was materially different."[45] In the tort system, Mr. Warfield claimed under oath that he was exposed to asbestos exclusively between 1965 and the mid-1970s, focusing on the products of the solvent defendants and avoiding application of a Maryland statutory damage cap for later exposures. In the trust claim submissions, however, Mr. Warfield claimed exposure from 1947 to 1991, "both different in scope, but also clearly triggering the damage cap."[46] "Of note, eight of the trust forms had been submitted before Warfield testified" in court.[47]

In a Virginia case, *Dunford v. Honeywell Corp.,* the plaintiff's assertion that his asbestos-related illness was due to exposure only to friction products was contradicted by three defendant automakers who showed that the plaintiff had made multiple trust claims certifying exposure to products made by other asbestos defendants.[48] The plaintiff also reportedly filed a separate tort action against these asbestos defendants.[49]

Presiding Judge Thomas Home described the case as the "worst deception" used in discovery that he had seen in his twenty-two years on the bench.[50]

Delaware Superior Court Judge (ret.) Peggy Ableman provided another example of abuse in her recent testimony before a U.S. Congressional committee.[51] Judge Ableman discussed a case she presided over in which the plaintiffs filed a lawsuit against twenty-two asbestos defendants. Although the court had a standing order requiring plaintiffs to disclose all bankruptcy trust claims materials, and the defendants specifically requested this information in interrogatories, "nowhere did plaintiffs identify exposure through any of the 20 entities to whom bankruptcy claims were submitted."[52] Instead, plaintiffs claimed the decedent was exposed to asbestos solely through laundering her husband's work clothes throughout his career as an electrician, and "emphatically reported" to the court and the sole remaining defendant, Foster Wheeler, that no bankruptcy submissions had been made and no monies had been received.[53]

Two days before trial was set to begin, however, plaintiff's counsel reported the existence of two bankruptcy trust settlements—a disclosure that was "directly inconsistent with [counsel's] unequivocal representations to the Court and to opposing counsel at the pretrial conference."[54] By late afternoon of the following day, the day before trial, Foster

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Wheeler learned that a total of 20 bankruptcy trust claims had been submitted. Judge Ableman explained, "[a]lthough Foster Wheeler had been led to believe that [the decedent's] exposure was solely the result of take-home fibers on her husband's clothing, at this late point in the litigation, it became obvious that one or more of plaintiff's attorneys had been claiming exposure through [decedent's] own employment" and that "representations to the bankruptcy trusts painted a much broader picture of exposure to asbestos than either plaintiff or any of plaintiff's attorneys had acknowledged during the entire course of the litigation."[55]

In a New Jersey case, *Barnes and Crisafi v. Georgia Pacific,*[56] plaintiff's counsel disclosed the existence of bankruptcy trust claims submissions during the pre-trial conference. The disclosure came about only after defense counsel independently contacted a representative of the Johns-Manville Trust who confirmed that a claim had been made on behalf of one of the plaintiffs. Counsel for plaintiff subsequently disclosed the existence of other trust filings, and attempted to explain the lack of earlier disclosure on the grounds that the filings were "deferred claims" intended to preserve the trust statute of limitations and seek compensation at a later time, and were filed by another law firm.[57] In response, the court stated that no such distinction in the type of trust claims filed was expressed in the court's discovery order and that the plaintiffs clearly had an obligation to identify and produce this information. The court admonished plaintiff's counsel for violating its order, saying, "You cannot be blind, deaf and dumb," and reminded counsel, "You're an officer of The Court."[58] The court went on to repeatedly state that this failure to disclose the trust submissions constituted "a major problem," questioning: "How can I try this case now?"[59] After discussing with the parties how this lack of disclosure prejudiced the defendants, the court decided to postpone the trial that was scheduled to begin the following week.

As these cases illustrate, problems arising from the lack of transparency between the asbestos bankruptcy trusts and judicial system are widespread. The *Wall Street Journal* recently reviewed trust claims and court cases of roughly 850,000 persons who filed claims against the Manville Trust from the late 1980s until as recently as 2012.[60] "The analysis found numerous

apparent anomalies: More than 2,000 applicants to the Manville Trust said they were exposed to asbestos working in industrial jobs before they were 12 years old."[61] "Hundreds of others claimed to have the most-severe form of asbestos-related cancer in paperwork filed to Manville but said they had lesser cancers to other trusts or in court cases."[62] The study also identified a trust claim that was filed against the Manville Trust by an individual who did not exist.[63]

There is a movement afoot by courts and state legislatures to adopt trust transparency reforms that generally permit the discovery of asbestos bankruptcy trust claims information and in some jurisdictions compel plaintiffs to file trust claims before trial.[64] For example, in December 2012, Ohio became the first state to adopt legislation requiring plaintiffs to produce trust claims materials and to compel the filing of trust claims before trial.[65] In 2013, Oklahoma enacted a reform similar to Ohio's asbestos bankruptcy transparency law. The Oklahoma law provides for disclosure of any personal injury bankruptcy trust claims and is not limited to asbestos bankruptcy trusts claims.[66]

Beyond curbing fraud in asbestos litigation through inconsistent filings to trusts and the courts, discovery of trust claims information can benefit defendants by promoting a fully informed jury and greater fairness in the adjudication of an asbestos personal injury claim. "Sunshine" requirements that improve bankruptcy trust transparency provide tort defendants a tool to: (1) identify fraudulent or exaggerated exposure claims; (2) establish that a debtor company was partly or entirely responsible for the plaintiff's harm; and (3) allow judgment defendants to obtain set-off credits for trust claim payments received by the plaintiff.

At the federal level, the Furthering Asbestos Claim Transparency (FACT) Act of 2013 (H.R. 982) introduced by Rep. Blake Farenthold (R-Tex.) would amend federal bankruptcy law to require trusts to file quarterly reports with the bankruptcy courts, available on the public docket, that describe each demand the trust has received from a claimant and the basis for any payment made to that claimant.[67]

Leading Plaintiffs' Firms for Asbestos Litigation

Asbestos litigation is concentrated in a few jurisdictions with a few firms that tend to dominate filings in these forums. For example, Belluck & Fox and Weitz & Luxenberg lead New York litigation, while The Simmons Law Firm and Gori, Julian & Associates file most of the asbestos cases in Madison County, with the New York-based Napoli Bern firm joining the action as well. Napoli Bern recently hired Patrick Haines, the Lanier Law Firm's head of asbestos litigation, to open a new office in Edwardsville, Illinois and handle the firm's Madison County litigation.

Asbestos plaintiffs' lawyers make a good living. The Spring 2013 edition of *The Trial Lawyer* magazine includes a profile of Randi Gori of Gori, Julian & Associates. The magazine asked, "If you and your firm are nationwide leaders in handling asbestos exposure claims and hundreds of mesothelioma lawsuits obtaining over $1 billion in verdict awards and settlements for

clients, where do you spend your vacation?" The article details Mr. Gori's vacations to Modena, Italy, the birthplace of Ferrari, due to his lifelong fascination with the cars.

The firms and plaintiffs' lawyers below are known leaders in asbestos litigation. These firms often handle other mass tort cases as well.

TOP PLAINTIFFS' FIRMS FOR ASBESTOS LITIGATION	PRINCIPAL LAWYERS(S)	LOCATION(S)
Law Offices of Peter G. Angelos	Peter G. Angelos	Baltimore, MD
Baron & Budd, P.C.	Steve Baron Russell Budd J. Todd Kale J. Burton LeBlanc	Dallas, TX Dallas, TX Dallas, TX Baton Rouge, LA
Belluck & Fox, LLP	Joseph Belluck Jordan Fox	New York, NY
Brayton Purcell, L.L.P.	Alan Brayton Gilbert Purcell James Nevin	Novato, CA
Brent Coon & Associates	Brent Coon	Beaumont, TX
Cooney & Conway	John Cooney	Chicago, IL
Goldberg, Persky & White, P.C.	David Chervenick Bruce Mattock	Pittsburgh, PA
Gori, Julian & Associates PC	Randy L. Gori	Edwardsville, IL
James F. Humphreys & Associates	James F. Humphreys	Charleston, WV
Kazan Law (Kazan McClain Satterley Lyons Greenwood & Oberman PLC)	Steven Kazan Joseph Satterley Justin Bosl	Oakland, CA
The Lanier Law Firm	Mark Lanier	Houston, TX
Levy Phillips & Konensberg, LLP	Robert Komitor	New York, NY Lawrence, NJ
Motley Rice LLC	Joseph Rice	Mt. Pleasant, SC
Napoli Bern Ripka Shkolnik LLP	Patrick Haines Steven Aroesty	Edwardsville, IL Chicago, IL
Patten, Wornom, Hatten & Diamonstein	Robert Hatten	Norfolk, VA

TOP PLAINTIFFS' FIRMS FOR ASBESTOS LITIGATION	PRINCIPAL LAWYERS(S)	LOCATION(S)
Paul & Hanley	Dean Hanley	Berkeley, CA
Provost Umphrey LLP	Thomas Walter Umphrey Bryan Blevins, Jr.	Beaumont, TX
The Ruckdeschel Law Firm LLC	Jonathan Ruckdeschel	Baltimore, MD
Savinis, D'Amico & Kane, L.L.C.	Janice Savinis	Pittsburgh, PA
Segal Law Firm	Scott Segal	Charleston, WV
Shein Law Center, LTD	Benjamin Shein	Philadelphia, PA
Simon Greenstone Panatier Bartlett, PC	Jeffrey Simon	Dallas, TX
Simmons Law Firm	John Simmons	East Alston, IL
Waters, Kraus & Paul, LLP	Peter Kraus Charles Seigel Michael Armitage	Dallas, TX Dallas, TX Los Angeles, CA
Weitz & Luxenberg PC	Perry Weitz Charles Ferguson	New York, NY
Wilentz, Goldman & Spitzer P.A.	Lynne Kizis Philip Tortoreti	Woodbridge, NJ

Endnotes

[1] *See* Mary Elizabeth C. Stern & Lucy P. Allen, Asbestos Payments per Resolved Claim Increased 75% in the Past Year—Is This Increase as Dramatic as it Sounds? Snapshot of Recent Trends in Asbestos Litigation: 2012 Update (NERA Economic Consulting 2012).

[2] *See Asbestos Losses Persist; A.M. Best Raises Industry's Loss Estimate to $85 Billion*, Best's Special Report, Market Rev., Dec. 10, 2012.

[3] *See* Dionne Searcey, *With Billions at Stake in Asbestos Lawsuits, the Search For Mesothelioma Clients Intensifies on TV, Web*, Wall St. J., May 5, 2013.

[4] New Media Strategies, The Plaintiffs' Bar Goes Digital: An Analysis of the Digital Marketing Efforts of the Plaintiffs' Attorneys & Litigation Firms, at 3 (Jan. 2012).

[5] *See* Markus Allen's Search Engine Marketing Roundup, The Most Expensive Keywords in Google (last visited Sept. 17, 2013).

[6] *See* New Media Strategies, *supra*, at 7 (indicating rates of between $56 and $80 per click for mesothelioma-related keywords).

[7] The firm's multiple websites oddly include variations of the firm's name. Two website refers use "Danziger & De Llano, LLP," while another refers to the firm as "Danziger & De Llano, P.C."

[8] James L. Stengel, *The Asbestos End Game*, 62 N.Y.U. Ann. Surv. 223, 233-39 (2006).

[9] CDC, Malignant Mesothelioma Mortality – United States, 1999—2005, Morbidity, Mortality Wkly. Rep., 58(15);393-396 (Apr. 24, 2009). According to the National Cancer Institute, the incidence of mesothelioma in the U.S. fell 22% between 1992 and 2009, to 0.96 new cases per 100,000 from 1.23.

[10] *See, e.g.*, Bethany Krajelis, *Lung Cancer Suits are New Trends in Asbestos Litigation; Filings Discussed at Recent California Asbestos Conference*, Madison Record, Mar. 28, 2013.

[11] Kirk Hartley, Madison County Asbestos Filings for 2012 – Data on Claims by Disease and Plaintiff's Firm, Global Tort (citing statistics presented by Jonathan Lively, a partner with Segal McCambridge Singer & Mahoney).

[12] *See* Bethany Krajelis, *2013 Asbestos Filings on Pace With Last Year at 793 Year to Date*, Madison Record, June 25, 2013.

[13] *See* Bethany Krajelis, *Along With More Filings, 2012 Brought New Players to Asbestos Docket*, Madison Record, Jan. 31, 2013.

[14] *See* Krajelis, *2013 Asbestos Filings on Pace With Last Year at 793 Year to Date, supra* (citing Brian Huelsmann, a defense attorney with HeplerBroom in Edwardsville, and Raymond Fournie, a defense attorney at Armstrong Teasdale in St. Louis).

[15] *See* Sheila Doyle Kelley & Allison N. Fihma, *Recent Trends in Asbestos Litigation*, Oct. 2012 (noting that, in New York City, in 2008, there were 35 lung cancer cases, while there were 89 such cases in July 2012 in the extremis cluster.

[16] Krajelis, *Lung Cancer Suits are New Trends in Asbestos Litigation, supra* (*quoting* Timothy L. Krippner, an attorney with Segal McCambridge Singer & Mahoney in Chicago who represents asbestos defendants).

[17] Kelley & Fihma, *supra*.

[18] *See* Mark A. Behrens & William L. Anderson, *The "Any Exposure" Theory: An Unsound Basis for Asbestos Causation and Expert Testimony*, 37 Sw. U. L. Rev. 479 (2008); William L. Anderson et al., *The "Any Exposure" Theory Round II -- Court Review of Minimal Exposure Expert Testimony In Asbestos and Toxic Tort Litigation Since 2008*, 22 Kan. J.L. & Pub. Pol'y 1 (2011).

[19] *See* Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made Over the Past Decade and Hurdles You Can Vault in the Next*, 36 Am. J. of Trial Advoc. 1, 29-30 (2012) (citing e.g., *Moeller v. Garlock Sealing Techs.*, 660 F.3d 950, 955 (6th Cir. 2011); *Betz v. Pneumo Abex LLC*, 44 A.3d 27, 56 (Pa. 2012); *Borg-Warner Corp v. Flores*, 232 S.W.3d 765, 773 (Tex. 2007); *Butler v. Union Carbide Corp.*, 712 S.E.2d 537, 552-53 (Ga. Ct. App. 2011), as well as many trial court decisions).

[20] *See* Schwartz, *A Letter to the Nation's Trial Judges, supra*, at 24-26 (citing high court decisions in California and Washington as well as state and federal courts in, or applying the law of, Delaware, Florida, Illinois, Maine, Maryland, Massachusetts, Minnesota, Pennsylvania, New Jersey, and New York). The Supreme Court of Washington, in a case with different facts than the typical third-party exposure claim, held that a worker could sue a respirator manufacturer for failing to warn of the dangers of asbestos. *See Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069 (Wash. 2012).

[21] *See* Schwartz, *A Letter to the Nation's Trial Judges, supra*, at 21-22 (citing cases in California, Delaware, Georgia, Illinois, Maryland, Michigan, New York, and Pennsylvania and legislation recognizing this principle adopted in Kansas and Ohio).

[22] *Georgia Pacific LLC v. Farrar*, No. 102 Sept. Term 2012, 2013 WL 3456573 (Md. July 8, 2013) (holding that in cases involving pre-1972 take-home asbestos exposure, product manufacturers had no duty

to warn household members who had no relationship with the manufacturer, did not use the manufacturer's product and were never physically present at the job site where the product was used).

[23] *See* Schwartz, *supra*, at 23 n. 111 (citing cases).

[24] *See In re Baltimore City Personal Injury Asbestos Cases, Proposed Consolidation,* No. 24-X-87-048500 (Md. Cir. Ct. Baltimore City, filed June 19, 2012) (Plaintiffs' Motion for Asbestos Case Consolidation and Adoption of Trial Plan and Memorandum in Support of Motion for Asbestos Case Consolidation and Adoption of Trial Plan).

[25] *See* Schwartz, *A Letter to the Nation's Trial Judges, supra*, at 13-14; see also Mark A. Behrens & Cary Silverman, *The Baltimore City Circuit Court Should Reject 'Consolidation III,'* 28:4 Mealey's Litig. Rep.: Asbestos 1 (Mar. 20, 2013) (citing cases, court rules, and statutes rejecting mass consolidation).

[26] *See* General Court Regulation No. 2012-01, *In re* Mass Tort & Asbestos Programs (Pa. Ct. Com. Pl. Phila. County Feb. 15, 2012).

[27] *See id.*; General Court Regulation No. 2013-01, Notice to the Mass Tort Bar, Amended Protocols and Year-End Report (Pa. Ct. Com. Pl. Phila. County Feb. 7, 2013). In addition to restricting mass consolidation, the CLC eliminated reverse bifurcation of any mass tort case absent consent of all parties, continued the court's longstanding practice of deferring punitive damages claims in asbestos cases, and limited the number of cases that can be tried by out-of-state attorneys annually.

[28] *See* General Court Regulation No. 2013-01, Notice to the Mass Tort Bar, Amended Protocols and Year-End Report (Pa. Ct. Com. Pl. Phila. County Feb. 7, 2013).

[29] *See* Julia Marsh, *Cancer Victims Win $190 Million In Asbestos Case — The 'Largest Ever' Judgment of Its Kind In New York City*, N.Y. Post, July 24, 2013.

[30] *See* 11 U.S.C. § 524(g); Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts 25* (Rand Corp. 2010); Plevin, *supra* (Chart 1); New York City Asbestos Litigation, *Bankruptcies*, http://www.nycal.net/bankruptcies.htm(2013).

[31] U.S. Government Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 3* (Sept. 2011); *see also* Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* (Rand Corp. 2011); Marc C. Scarcella & Peter R. Kelso, *Asbestos Bankruptcy Trusts: A 2012 Overview of Trust Assets, Compensation & Governance*, 11:11 Mealey's Asbestos Bankr. Rep. 1 (June 2012).

[32] *See* William P. Shelley et al., *The Need for Transparency Between the Tort System and Section 524(g) Asbestos Trusts,* 17 Norton J. Bankr. L. & Prac. 257 (2008).

[33] No. CV-442750 (Ohio Ct. Com. Pl. Cuyahoga County Jan. 17, 2007).

[34] *See Ohio Judge Bars Calif. Firm from His Court*, Nat'l L.J., Jan. 22, 2007, at 3; Thomas J. Sheeran, *Ohio Judge Bans Calif. Lawyer in Asbestos Lawsuit*, Cincinnati Post, Feb. 20, 2007, at A3.

[35] *See Kananian v. Lorillard Tobacco Co.,* No. 89448 (Ohio Ct. App. Feb. 21, 2007) (dismissing appeal as moot, sua sponte), *review denied*, 878 N.E.2d 34 (Ohio 2007); *see also* Behrens, *supra*, 28 Rev. Litig. at 550-52.

[36] James F. McCarty, *Judge Becomes National Legal Star, Bars Firm from Court Over Deceit, Cleveland Plain Dealer*, Jan. 25, 2007, at B1.

[37] *Id.*

[38] Editorial, *Cuyahoga Comeuppance*, Wall St. J., Jan. 22, 2007, at A14; see also Kimberly A. Strassel, Opinion, *Trusts Busted*, Wall St. J., Dec. 5, 2006, at A18 ("[One] law firm filed a claim to one trust, saying Kananian had worked in a World War II shipyard and was exposed to insulation containing asbestos. It also filed a claim to another trust saying he had been a shipyard welder. A third claim, to another trust, said he'd unloaded asbestos off ships in Japan. And a fourth claim said that he'd worked with 'tools of asbestos' before the war. Meanwhile, a second law firm, Brayton Purcell, submitted two more claims to two further trusts, with still different stories…. [Brayton Purcell then] sued Lorillard Tobacco, this time claiming its client had become sick from smoking Kent cigarettes, whose filters contained asbestos for several years in the 1950s.").

[39] McCarty, *Judge Becomes National Legal Star*, *supra*.

[40] Daniel Fisher, *Double-Dippers*, Forbes, Sept. 4, 2006, at 136, 137.

[41] *Cuyahoga Comeuppance, supra*, at A14.

[42] No. 24X06000460, Consolidated Case No. 24X09000163, Jan. 11, 2011 Mesothelioma Trial Group (M 112).

[43] *See* Problems with Asbestos Compensation System, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, 111th Cong. (Sept. 9, 2011) (statement of James L. Stengel), *at* 2011 WLNR 24791123.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See* Asbestos Claims Legislation, Hearing Before The Subcommittee on Courts, Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, 112th Cong. (May 10, 2012) (statement of Leigh Ann Schell), *at* 2012 WLNR 9840045.

[49] *See id.*

[50] *Id.*

[51] *See* Asbestos Claims Transparency, Hearing Before The Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary, House of Representatives, 113th Cong. (Mar. 13, 2013) (statement of Hon. Peggy L. Ableman), *at* 2013 WLNR 7440143.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Nos. MID-L-5018-08 (AS) & MID-L-316-09 (AS) (N.J. Super. Ct. Middlesex County, June 12, 2012) (Pre-Trial Conf. Trans.).

[57] *See id.* at 128-29.

[58] *Id.* at 129-30.

[59] *Id.* at 133-134.

[60] *See* Dionne Searcey & Rob Barry, *As Asbestos Claims Rise, So Do Worries About Fraud*, Wall St. J., Mar. 11, 2013, at A1, A14.

[61] *Id.* at A14.

[62] *Id.*

[63] *See id.*

[64] *See* Schwartz, *A Letter to the Nation's Trial Judges, supra*, at 16-20 (discussing "recent, major development" of asbestos bankruptcy trusts and efforts to promote greater transparency between the trust and tort systems).

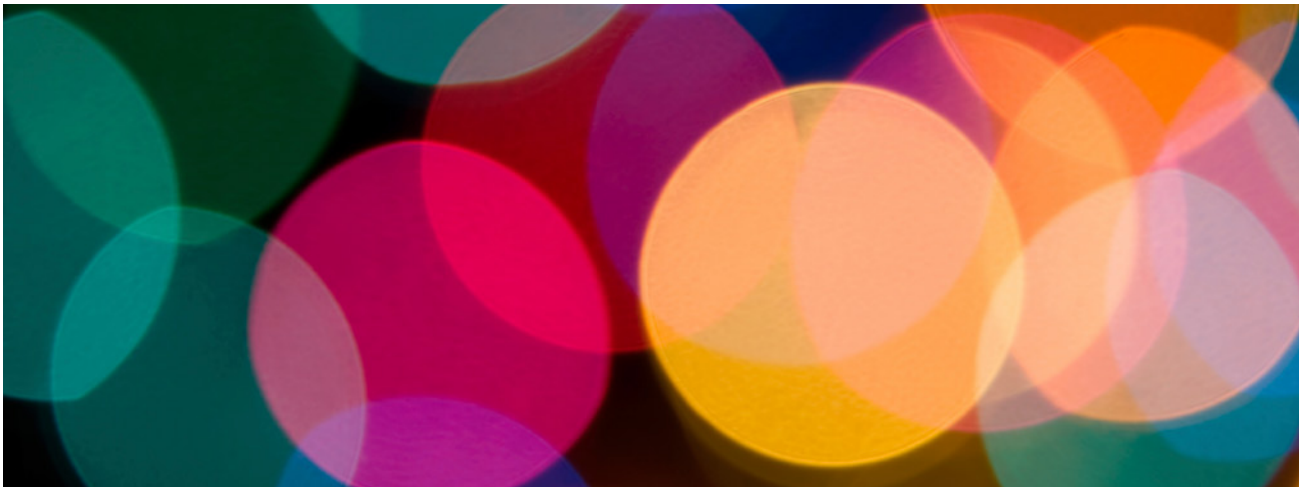
[65] *See* Ohio Rev. Code §§ 2307.951 to 2307.954 (Ohio Am Sub. H.B. 380 (2012)).

[66] *See* Okla. S.B. 404 (2013); *see generally* Editorial, *Busting the Trust Fraud*, Wall St. J., Dec. 12, 2012, at A18 ("The asbestos blob is still too big, but state reformers are melting it at the edges.").

[67] In 2012, such legislation, H.R. 4369, was introduced by Rep. Benjamin Quayle (R-AZ), and reported by the House Judiciary Committee.

Securities and M&A Litigation

Abusive practices continue to plague securities class actions. While the number of securities class actions filed has slowed, the lawsuits are settling faster and for more money. The prime targets have also shifted from the financial industry to healthcare, biotechnology, and pharmaceutical industries. Meanwhile, shareholder lawsuits challenging mergers and acquisitions (M&A) are emerging as the lawsuits of choice for plaintiffs' securities lawyers. Multiple M&A lawsuits are routinely filed within days of a major corporate announcement and can extract quick settlements from businesses that are anxious to avoid obstacles to a pending deal. Some courts have begun to respond to over-the-top tactics and requests for excessive fees in suits that provide only for disclosure of additional information that is of questionable value to class members.



Snapshot of Securities Class Action Litigation

According to a study of 2012 securities class action filings conducted by Cornerstone Research in cooperation with the Stanford Law School Securities Class Action Clearinghouse:[1]

- In 2012, about 1 in 29 companies (3.4%) in the S&P 500 was a defendant in a securities class action compared with 1 in 16 companies (6.1%) between 2000 and 2011.
- Rule 10b-5 claims (those alleging intentional misstatements or omissions of material fact in connection with the purchase or sale of securities) jumped from 71% of filings in 2011 to 85% in 2012. The percentage of filings alleging false forward-looking statements increased from 56% to 62%.
- The majority of securities class actions targeted the healthcare, biotechnology, and pharmaceutical industries (22% of all filings), even as filings against other sectors declined. Many smaller healthcare firms are targets.
- Federal filings against the financial sector declined from 43 in 2010 (24% of all filings) and 25 in 2011 (13%) to 15 filings (10% of all filings) in 2012.
- New class actions stemming from the credit crisis have stopped. There were no such filings in 2012, compared with three in 2011.
- Lawsuits are filed quickly (within a median of 23 days of the end of the class period) due to competition among plaintiffs' firms.
- Cases filed quickly tend to settle more quickly than cases with a significant lag time. About 20% of cases filed within 60 days of the class period settle before a ruling on a motion to dismiss. More than half of the more quickly filed cases settled prior to summary judgment, while 37% were dismissed. With respect to slower filings, only 11% settled prior to a ruling on a motion to dismiss. About half settled and half were dismissed prior to summary judgment.

Cornerstone Research separately studied 2012's securities class action settlements:[2]

- The total amount expended on settlements doubled compared to 2011, returning to the same level of annual aggregate expenditure as most of the past ten years (adjusted for inflation).
- 2012's median settlement amount of $10.2 million represented an increase of 70% over 2011, and was 25% higher than the median for all settlements in 1996-2011.
- The average settlement size—$54.7 million—was 150% greater than the average for 2011. Moreover, "the average settlement amount of $54.7 million in 2012 is well above the historical average of $36.8 million" for all settlements from 1996-2011 (excluding the extraordinarily large settlements in Enron, WorldCom, and Tyco).
- Significantly, "[m]ega-settlements (settlements in excess of $100 million) accounted for nearly 75% of all settlement dollars in 2012—the highest proportion in the last five years."

> *"... there is strong evidence that Congress' reforms, while blocking a significant number of meritless claims, have not eliminated abusive securities litigation."*

- Cases settled more quickly in 2012. There was a 70% increase in the proportion of cases settling within two years of the filing date.

A separate study of 2012 settlements, conducted by NERA Economic Consulting, found that no securities class action was resolved through a judgment on the merits; every case that was not dismissed was concluded by settlement.[3] Also, aggregate plaintiffs' attorneys' fees and expenses for all settlements were $653 million in 2012.

There was a sharp drop in the number of settlements. Only 93 securities class actions were settled in 2012—a record low since 1996 and a 25% reduction compared to 2011.

Abusive Practices Continue to Plague Federal Securities Class Actions

Congress enacted the Private Securities Litigation Reform Act (PSLRA) and the Securities Litigation Uniform Standards Act (SLUSA) in the 1990s in an attempt to eliminate the abusive practices that characterized these lawsuits. It found, for example, that the initiative for filing securities class actions came "almost entirely from the [plaintiffs'] lawyers, not from genuine investors" and sought to "transfer primary control private securities litigation from lawyers to investors" by "increasing the role of institutional investors."[4]

The plaintiffs' bar has figured out how to circumvent these reforms, using political contributions to elected officials who oversee state and local pension funds to make those pension funds the equivalent of the lawyer-controlled "professional plaintiffs" that Congress tried to eliminate. As the late Judge Edward Becker, one of the most respected members of the federal judiciary, recognized: "[P]ublic pension funds are in many cases controlled by politicians, and politicians get campaign contributions. The question arises then as to whether the lead plaintiff, a huge public pension fund, will select lead counsel on the basis of political contributions made by law firms to the public officers who control the pension funds and who, therefore, have a lot of say in selecting who counsel is."[5] This "pay-to-play" phenomenon is "the equivalent of hanging a 'for-rent' sign out over the pension fund."[6]

Another problem addressed by Congress was the filing of unjustified and abusive claims—"today certain lawyers file frivolous 'strike' suits alleging violations of the

Federal securities laws in the hope that defendants will quickly settle to avoid the expense of litigation," with the lawsuit "often based on nothing more than a company's announcement of bad news, not evidence of fraud."[7] Again, there is strong evidence that Congress' reforms, while blocking a significant number of meritless claims, have not eliminated abusive securities litigation. For example, the United States Court of Appeals for the Seventh Circuit—in upholding dismissal of a class action complaint—directed the district court to consider whether sanctions should be imposed on the plaintiffs' lawyers who filed the case for failing to question a witness whose comments were relied upon in the complaint.[8] Other courts have reached the same conclusion.[9]

Finally, Congress was concerned that—in the words of then-SEC Chairman Arthur Levitt—"[b]ecause the existing safeguards provided by the [litigation] system are imperfect, there is a danger that weak claims may be overcompensated while strong claims are undercompensated."[10] Huge litigation costs led defendants to settle meritless claims, while the availability of large attorneys' fees in the settlement context encouraged plaintiffs' lawyers to accept inadequate settlements rather than pursuing meritorious cases. Congress enacted a variety of reforms designed to encourage defendants to fight unjustified claims.

Although these reforms took a substantial step toward refocusing the system on meritorious claims, the problem of skewed incentives remains. One federal judge with deep experience overseeing securities class action lawsuits recently observed that the civil justice system continues to produce securities class action settlements likely generated by the costs of litigation rather than the underlying merits. "[W]e as a society are probably paying about a dollar [in attorneys' fees] for every dollar recovered in securities class action settlements," he said. Plaintiffs' lawyers have an "incentive to settle and thereby earn a sure fee rather than try a case and take that risk."[11]

Many of these problems result from fundamental defects in the underlying rationale for securities fraud lawsuits, which were created piecemeal by courts rather than enacted as part of a legislative plan. Scholars in recent years have focused considerable attention on these concerns. For example, as Professor John C. Coffee (among many others) has noted,

"... the civil justice system continues to produce securities class action settlements likely generated by the costs of litigation rather than the underlying merits."

> the familiar secondary market 'stock drop' case . . . essentially involves shareholders suing shareholders. Inevitably, the settlement cost imposed on the defendant corporation in a securities class action falls principally on its shareholders. This means that the plaintiff class recovers from the other shareholders, with the result that secondary market securities litigation largely generates pocket-shifting wealth transfers among largely diversified shareholders.[12]

Professor Coffee concluded that "the odds are high that shareholders are made systematically worse off by securities class actions."[13] As Professor Donald C. Langevoort of Georgetown Law has observed, "[w]ere this [system] sold as an insurance product, consumer-protection advocates might well seek to have it banned as abusive because the hidden costs are so large."[14]

Recent U.S. Supreme Court Rulings Are a Mixed Bag for Future Litigation

Three key U.S. Supreme Court decisions within the last three years have rejected defendants' arguments against large-scale, multi-district securities class actions. Two earlier decisions, however, rejected efforts by plaintiffs' lawyers to open the door to a huge expansion in unjustified securities class actions. This fall, the Supreme Court will hear argument in a case in which plaintiffs' lawyers are trying to circumvent the class action reforms adopted by Congress in SLUSA.

In *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), a securities fraud class action involving statements related to Vioxx, the Court held that the limitations period for private securities law claims does not begin to run until the plaintiff discovers, or a reasonably diligent investor would have discovered, the facts constituting the violation -- including evidence of the defendants' fraudulent intent. Bernstein Litowitz Berger & Grossmann (BLB&G) were co-lead counsel in the case, representing the lead plaintiffs, the Public Employees' Retirement System of Mississippi and Richard Reynolds. BLB&G successfully argued that plaintiffs did not discover—and could not and would not have discovered —the "facts constituting the [defendants'] violation" until several years after the alleged fraud began, because evidence sufficient to adequately plead the defendants' fraudulent intent did not become available to investors until well after the commencement of the fraud. *Reynolds* may enable plaintiffs to delay the filing of litigation in order to increase settlement value. The ruling also introduces a level of uncertainty for potential defendants, who can no longer rely on a strict two-year limitations period.

In *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179 (2011), the Court held that securities fraud plaintiffs need not prove loss causation to obtain class certification. In other words, shareholders who allege that they were defrauded do not have to show that the alleged fraud caused a drop in stock prices to obtain class certification, even if they will eventually have to prove those losses at trial to win their case. The decision presents an

> *"... altering the fraud-on-the-market presumption would be a game changer in securities class action litigation."*

obstacle to efforts to require securities plaintiffs to demonstrate that they have a viable claim before the court certifies a class and the significant settlement pressure that comes along with such a ruling.

Most recently, Labaton Sucharow helped secure another significant victory for the plaintiffs' bar in *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 133 S. Ct. 1184 (2013). In that case, the plaintiffs claimed that Amgen violated federal securities law by making materially misleading statements regarding the safety of two drugs, Aranesp and Epogen, by assuring investors that the drugs were safe when used in accordance with FDA labeling instructions. Amgen's stock then suffered a significant decline after an FDA panel raised questions about the drugs' safety. *Amgen* provided the Supreme Court with the opportunity to consider whether plaintiffs invoking the "fraud-on-the-market" presumption of reliance must establish materiality before obtaining class certification in securities class actions. In a 6-3 ruling, the Court affirmed a Ninth Circuit's ruling that plaintiffs must only plausibly allege—not prove—that allegedly misleading statements are material in order to obtain class certification. Proof of materiality, the Court found, is a merits issue for consideration on a motion for summary judgment or at trial.

Amgen, along with *Erica P. John Fund,* will make it easier for plaintiffs' lawyers to obtain class certification in securities litigation as well as any litigation in which plaintiffs assert a presumption of reliance at the class certification stage. These rulings may fuel an uptick in securities fraud class actions.

Amgen has set the stage for the next question that the Court might address in securities class action litigation: the appropriateness of the fraud-on-the-market theory. That doctrine, which is frequently used by plaintiffs in securities class actions, assumes that investors who buy stock in an efficient market rely on a company's alleged misstatements, which are reflected in the stock price. The theory allows claims that all shareholders of a company were misled when a stock price sank, maximizing the size of the class. Although the plaintiffs' use of the doctrine was not challenged in *Amgen*, four justices used the case as an opportunity to question the doctrine's premise.[15] Lawyers for both plaintiffs and defendants agree that altering the fraud-on-the-market presumption would be a game changer in securities class action litigation.[16]

The Supreme Court's recent decisions have not all favored plaintiffs. In *Stoneridge Investment Partners v. Scientific-Atlanta*, 552 U.S. 148 (2008), the Court rejected an attempt by plaintiffs' lawyers to end-run the Court's earlier holding in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), that the key federal securities law anti-fraud provision—Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)—does not provide a cause of action for secondary liability such as aiding and abetting. That theory had been used by the plaintiffs' bar to try to assert claims for hundreds of millions of dollars against professionals and service providers when the perpetrators of a fraud were bankrupt, even when the professionals and service providers themselves were unaware of the fraud and were themselves deceived by the fraudsters.

More recently, in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the Court held that Section 10(b) does not apply extraterritorially—it is limited to purchases or sales of securities that occur on a domestic U.S. exchange or otherwise occur within the United States. Plaintiffs' lawyers had sought to expand the size of class actions by seeking damages on behalf of purchasers or sellers of securities anywhere in the world. By rejecting that extraordinarily broad argument, the Court accorded appropriate respect to the laws of other nations and, in addition, prevented abuse of the U.S. legal system through assertion of gigantic claims designed to force settlements regardless of the underlying merits.

This year, the Supreme Court will consider an argument by plaintiffs' lawyers seeking to narrow SLUSA which Congress enacted to prevent plaintiffs from using state court actions to avoid the federal reforms enacted in the PSLRA. SLUSA precludes most state-law class action claims that allege "a misrepresentation or omission of a material fact in connection with the purchase or sale of" securities covered by the statute. The particular question in these cases—*Chadbourne & Parke LLP v. Troice*, No. 12-79, *Willis of Colorado v. Troice*, No. 12-86, and *Proskauer Rose LLP v. Troice*, No. 12-88—involves the standard for determining when a misrepresentation is "in connection with" a securities transaction covered by SLUSA. Significantly, both the U.S. Department of Justice and the Securities and Exchange Commission have sided with the defendants in arguing that the plaintiffs' claims are precluded by SLUSA.

An Explosion in M&A Litigation

Many of the firms involved in securities class actions are also heavily involved in a remarkable explosion of M&A litigation.

Just about every merger or acquisition that involves a public company becomes the subject of multiple class action lawsuits within weeks of its announcement, as closely documented in a recent report prepared for the U.S Chamber Institute for Legal Reform.[17] Because parties to the merger want to close their deal and begin to reap the economic benefits of the combination, the vast majority of these lawsuits settle quickly. As that report recognized, this is extortion through litigation, plain and simple. Trial lawyers

hold transactions hostage until they collect a "litigation tax," draining a share of the merger's economic benefit away from shareholders and into the lawyers' own pockets.

Plaintiffs' firms race to the courthouse. They typically announce investigations within hours of a merger announcement. Lawsuits challenging mergers and acquisitions are filed, on average, within two weeks.[18] According to an independent study, 93% of acquisitions valued at over $100 million announced in 2012 were challenged by an average of 4.8 shareholder lawsuits per deal.[19] Higher value deals attract even more lawsuits. M&As valued at over $500 million are challenged 96% of the time by an average of 5.4 lawsuits per deal.[20] By comparison, only 53% of such deals in 2007 were subject to a lawsuit.[21]

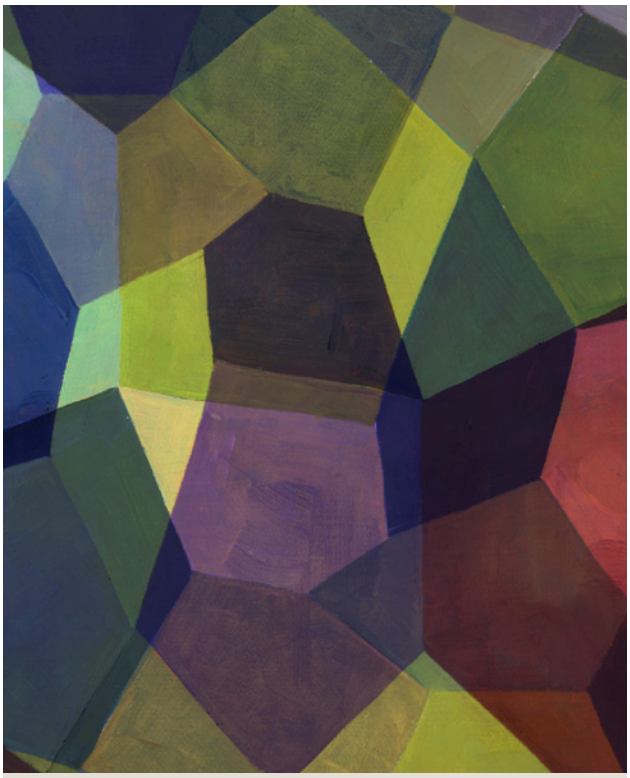
An example is Google's August 2011 agreement to buy Motorola Mobility Holdings, Inc. for $12.5 billion, which sparked at least 16 lawsuits in Delaware Chancery Court, Illinois federal court, and two Illinois state courts.[22]

M&A lawsuits typically allege that the defendant company's board of directors violated their fiduciary duties to shareholders by conducting a flawed sales process that failed to maximize shareholder value.[23] Common allegations include the deal terms not resulting from a sufficiently competitive auction, the existence of restrictive deal protections that discouraged additional bids, or the impact of various conflicts of interests, such as executive retention or change-of-control payments to executives. Complaints also typically allege that a defendant company's board failed to disclose sufficient information to shareholders to enable their informed vote. Insufficient disclosure allegations have focused on information related to the sale process, the reasons for the board's actions, financial projections, and the financial advisors' fairness opinions.

Certainly, no one can reasonably claim that there is credible evidence of fraud or other violations with respect to more than 90% of the large M&A transactions in the United States. If the allegations were real, there would be intense law enforcement focus on such a hotbed of fraud—by the Securities and Exchange Commission, the Department of Justice, and state attorneys general. That has not happened.

Lewis & Clark Law School Professor Jennifer Johnson recently found that "M&A objection cases have replaced the traditional stock-drop cases as the lawsuit

> *"... this is extortion through litigation, plain and simple. Trial lawyers hold transactions hostage until they collect a 'litigation tax,' draining a share of the merger's economic benefit away from shareholders and into the lawyers' own pockets."*



“Businesses quickly settle even meritless M&A lawsuits as a cost of doing business in order to eliminate potential obstacles to the deal.”

of choice for plaintiffs’ securities lawyers.”[24] Unlike securities class actions, which are largely confined to neutral federal courts by the PSLRA and SLUSA, M&A litigation can be brought in state court, making such cases especially attractive to plaintiffs’ lawyers. The Delaware Chancery Court considers 39% of M&A suits, with 53% of the cases spread across other state courts.[25] Just 8% of M&A suits are filed in federal court, a percentage that has declined from 12% in 2010.[26]

Businesses quickly settle even meritless M&A lawsuits as a cost of doing business in order to eliminate potential obstacles to the deal. Sixty-four percent of cases settled in 2012, with most of the remainder voluntarily dismissed.[27] These settlements occurred, on average, within six weeks of when the lawsuit was filed.[28]

Moreover, since two of the largest settlements in recent years occurred in 2012 (El Paso Corp./Kinder Morgan, Inc. for $110 million with $26 million sought in attorneys’ fees and Delphi Financial Group, Inc./Tokio Marine Holdings, Inc. for $49 million with $12 million awarded in attorneys’ fees), plaintiffs’ firms will be further motivated to rush to file such suits.

Four out of five M&A lawsuits that settled in 2012 required only additional disclosures, not payments to shareholders.[29] That is a very significant change from ten years earlier, when shareholder suits were filed much less frequently. At that time, more than half of the settlements resulted in cash awards for shareholders, and only 10% were limited to additional disclosures.[30] Indeed, defense lawyers say that, today, in settlement negotiations, plaintiffs’ lawyers are asking companies to

> *"... plaintiffs' lawyers ... file cookie-cutter challenges to major mergers or acquisitions regardless of whether there is any evidence that the deal negatively impacted shareholders."*

provide additional information in an increasingly minute, granular form in order to find some basis on which to settle.[31]

Many question whether such lawsuits provide any benefit to shareholders. "If you can get $500,000 for increased disclosures and not one nickel for shareholders, who's paying that?" Professor Johnson said. "It's coming out of shareholders' pockets" because the companies pay the lawyers' bills.[32] Even in these cases, in which the shareholders do not receive a cent, the average, agreed-upon attorneys' fee awarded in 2012 was $725,000. Three cases resulted in disclosed awards of $1 million or more.[33]

Such settlements encourage plaintiffs' lawyers to file cookie-cutter challenges to major mergers or acquisitions regardless of whether there is any evidence that the deal negatively impacted shareholders. By using a form complaint to challenge dozens of deals each year, plaintiffs' firms can generate a lucrative practice.

But there are warning clouds on the horizon for plaintiffs' lawyers filing unjustified M&A lawsuits. Judges are beginning to view "disclosure-only" lawsuits with skepticism, since there is always more information that a company can tell shareholders about a deal.

Over the past year, at least two Texas appellate courts, applying a 2003 Texas law discouraging "coupon settlements" of class actions, rejected fee awards to plaintiffs' lawyers in disclosure-only suits that resulted in release of additional information to shareholders that was of marginal value.[34]

Delaware's Court of Chancery recently rejected a disclosure-only settlement accompanied by a request for a $500,000 fee award. Chancellor Leo Strine stated in his opinion from the bench that

> a suit without any real investigation or depth was immediately traded away by the plaintiffs for simply more information which did not contradict the mix of information that was already available. And the only checkpoint on the approval of that by counsel are a couple of stockholders who own, frankly, amounts of shares which suggest it was irrational for them to cause a suit to be brought in the first instance, and who can't even recall how they voted or if they voted in the merger.[35]

He found that the named plaintiffs were not adequate class representatives and refused to certify the class, approve the settlement, or award the attorneys' fees.[36] The plaintiffs

dismissed the case without prejudice ten days later.

The U.S. Court of Appeals for the Ninth Circuit recently gave plaintiffs' firms that routinely challenge mergers another reason to pause when the court sanctioned a prominent M&A lawyer and his firm for filing vexatious litigation and required them to pay $67,495 of the defendants' attorney fees.[37] In that instance, the Alioto Law Firm, led by Joseph Alioto, sued on behalf of Southwest and AirTran customers one day after a merger of the airlines closed. The district court denied the plaintiffs' motion for a pre-closing temporary restraining order since the merger had already closed and dismissed the case. Nevertheless, the firm filed a notice of appeal along with an emergency motion for an injunction to stop the airlines from merging their assets, broader relief than requested in the complaint. Attorneys for the airlines moved for sanctions, observing that "[c]ounsel's modus operandi in these cases is to sue companies that are attempting to complete high profile mergers at the most time-sensitive stage of the transaction in hopes of extracting a cash settlement that does not benefit (and indeed ultimately increases the costs to) the public at large."[38]

Alioto, who plans to personally pay the fees, responded that the sanction would not deter him from continuing to challenge mergers, but noted that the case had alarmed other plaintiffs' lawyers who file antitrust suits because the Ninth Circuit did not set out a clear standard "to determine whether or not what you're doing in a fast-moving merger case is vexatious."[39] Although the Ninth Circuit's ruling is a positive development for businesses, it is important to recognize that the court did not impose sanctions for what is the usual practice of immediately challenging a merger or an ordinary appeal. Rather, the court imposed sanctions based on the Alioto Law Firm's unusual conduct in seeking an emergency order from the Ninth Circuit on grounds not stated in the original suit. In fact, the substantive appeal of the merger challenge remains pending before the Ninth Circuit.

Finally, the Delaware Court of Chancery recently rejected an attempt to invalidate two companies' corporate bylaws requiring shareholders to file in the Delaware courts litigation related to the company's internal affairs.[40] To the extent that ruling is upheld on appeal and other state courts then honor it[41]—and the Delaware courts similarly reject future "as applied" challenges to such bylaws—they should significantly reduce the forum-shopping and multiple filings that fuel abusive M&A litigation.

Leading Plaintiffs' Firms for Securities Class Action Litigation

The five plaintiffs' firms with the most appearances as lead or co-lead counsel in the top 100 securities class action settlements, as compiled by Securities Class Action Services (SCAS) of Institutional Shareholder Services Inc. (ISS), are Bernstein Litowitz Berger & Grossmann; Milberg; Labaton Sucharow; Grant & Eisenhofer; and Robbins Geller Rudman & Dowd.[42]

LAW FIRM	ATTORNEY NAME		CITY
Abbey Spanier, LLP	Arthur Abbey		New York, NY
Allen Matkins Leck Gamble Mallory & Natsis LLP	Joe Davidson		San Diego, CA
Barrack, Rodos & Bacine	Leonard Barrack		Philadelphia, PA
Berger & Montague P.C.	H. Laddie Montague, Jr. Merrill Davidoff	Sherrie Savett Douglas M. Risen	Philadelphia, PA
Bernstein Liebhard LLP	Stanley Bernstein		New York, NY
Bernstein Litowitz Berger & Grossmann LLP	Max Berger Gerald "Jerry" Silk Mark Lebovitch Salvatore J. Graziano	Blair Nicholas Hannah Ross Steven Singer	New York, NY
Cohen Milstein Sellers & Toll PLLC	Steven Toll Daniel Sommers		Washington, DC
Cotchett Pitre & McCarthy, LLP	Joseph Cotchett		Burlingame, CA
Entwistle & Cappucci LLP	Andrew Entwistle		New York, NY
Esler, Stephens & Buckley, LLP	Michael Esler		Portland, OR
Girard Gibbs LLP	Daniel Girard Amanda Steiner		San Francisco, CA
Glancy Binkow & Goldberg LLP	Peter Binkow		Los Angeles, CA
Grant & Eisenhofer P.A.	Stuart Grant Jay Eisenhofer Geoffrey Jarvis Megan McIntyre		Wilmington, DE
Hagens Berman Sobol Shapiro LLP	Steve Berman		Seattle, WA
Kaplan Fox & Kilsheimer LLP	Robert Kaplan Frederic Fox Gregory Arenson		New York, NY
Kessler Topaz Meltzer & Check, LLP	David Kessler		Philadelphia, PA
Labaton Sucharow LLP	Lawrence Sucharow Thomas Dubbs Christine Azar	Joel Bernstein James Johnson Michael Stocker	New York, NY
Lovell Stewart Halebian Jacobson LLP	John Halebian		New York, NY
Motley Rice LLC	William Narwold		Hartford, CT
Milberg LLP	Sanford Dumain Matthew Gluck Ariana Tadler		New York, NY

LAW FIRM	ATTORNEY NAME	CITY
Robbins Geller Rudman & Dowd LLP	Darren Robbins Samuel Rudman Michael Dowd Paul Geller	San Diego, CA New York, NY San Diego, CA Boca Raton, FL
Saxena White P.A.	Maya Saxena	Boca Raton, FL
Scott & Scott, LLP	David Scott	Colchester, CT
Wolf Haldenstein Adler Freeman & Herz LLP	Demet Basar	New York, NY
Zwerling Schachter & Zwerling, LLP	Jeffrey & Robin Zwerling	New York, NY

Endnotes

[1] Cornerstone Research, Securities Class Action Filings: 2012 Year in Review (2013).

[2] Ellen M. Ryan & Laura E. Simmons, Securities Class Action Settlements: 2012 Review and Analysis (Cornerstone Research 2013).

[3] Renzo Comolli et al., Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review (NERA Economic Consulting 2013).

[4] S. Rep. 104-98, 104th Cong., 1st Sess. 6, 11 (1995).

[5] Edward R. Becker et al., *The Private Securities Law Reform Act: Is It Working?,* 71 Fordham L. Rev. 2363, 2369 (2003).

[6] Joseph Tanfani & Craig R. McCoy, *Lawyers Find Gold Mine in Philadelphia Pension Cases, Philadelphia Inquirer,* Mar. 16, 2003, at A1 (quoting Professor John C. Coffee). Numerous media exposes have documented the proliferation of pay to play. *See, e.g.,* John C. Coffee, Jr., *'Pay-to-Play' Reform: What, How and Why?*, N.Y.L.J., May 21, 2009; Kevin McCoy, *Campaign Contributions or Conflicts of Interest?*, USA Today, Sept. 11, 2001; Nate Raymond, *New Suit by Former Labaton Sucharow Lawyer Offers Glimpse at Plaintiffs Bar Business Tactics*, AmLaw Litigation Daily, May 1, 2009.

[7] S. Rep. 104-98, *supra*, at 4.

[8] *City of Livonia Employee Retirement System v. Boeing Co.*, Nos. 12-1899, 12-2009 2013 WL 1197791 (7th Cir. Mar. 26, 2013).

[9] For example, two other judges recently leveled similar criticism at securities class action complaints filed by the same law firm. *Livingston v. Cablevision Systems Corp.*, No. 12-CV-377 (E.D.N.Y. Sept. 5, 2013); *City of Taylor General Employees Retirement System et al. v. Magna International Inc.,* No. 12 Civ. 3553 (S.D.N.Y. Aug. 23, 2013).

[10] S. Rep. 104-98, *supra*, at 7.

[11] Nate Raymond, *Investor Class Action System Needs Review* (Dec. 11, 2012); *see also* Dick Thornburgh, Commentary, *Class Action Gamesmanship*, Wash. Times, Jun. 15, 2007 ("Outcomes [of securities class actions] are often less a matter of justice than of negotiation, as many defendants decide it is better to settle than to incur the enormous costs, inconvenience and risks associated with what may become virtually endless litigation.").

[12] *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 304 (2007).

[13] *Id.*

[14] Donald C. Langevoort, On Leaving Corporate Executives *"Naked, Homeless and Without Wheels": Corporate Fraud, Equitable Remedies, and the Debate over Entity Versus Individual Liability*, 42 Wake Forest L. Rev. 627, 635 (2007); *see also* Merritt B. Fox, *Why Civil Liability for Disclosure Violations When Issuers Do Not Trade?*, 2009 Wis. L. Rev. 297, 307 (2009) (observing that "securities litigation is so costly, relative to the amount of loss spreading achieved, that it is unlikely to be worthwhile even if there were no alternative way of reducing the social disutility arising from the risks of issuer misstatements").

[15] In a concurring statement, Justice Alito warned that the fraud-on-the-market theory presumption "may rest on a faulty economic premise." *Amgen*, 133 S. Ct. at 1204 (Alito, J., concurring). In a dissenting opinion, Justices Thomas and Kennedy called the theory "questionable." *Id.* at 1208 n.4. Justice Scalia said in another dissent that the fraud-on-the-market theory was "invented by the court." *Id.* at 1204 (Scalia, J., dissenting).

[16] *See* Max Stendahl, *Amgen Dissents Put Fraud On The Market On Thin Ice*, Law 360.

[17] *See* Andrew J. Pincus, The Trial Lawyers' New Merger Tax (Inst. for Legal Reform, Oct. 2012).

[18] *See* Robert M. Daines & Olga Koumrian, Shareholder Litigation Involving Mergers and Acquisitions: Review of 2012 M&A Litigation at 1 (Feb. 2013 update) (hereinafter "Shareholder Litigation Involving Mergers and Acquisitions").

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *See* Alison Frankel, *What Motorola Settlement Says About Shareholder M&A Litigation*, Reuters News and Insight, Nov. 10, 2011.

[23] Shareholder Litigation Involving Mergers and Acquisitions, *supra*, at i.

[24] Jennifer Johnson, *Securities Class Actions in State Court*, 80 U. Cin. L. Rev. 349, 384 (2012).

[25] Shareholder Litigation Involving Mergers and Acquisitions, *supra*, at 2.

[26] *Id.*

[27] *Id.* at 5.

[28] *Id.*

[29] *Id.* at 6.

[30] *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions,* 57 Vanderbilt L. Rev. 133, 199 tbl. 17 (2004).

[31] David Marcus, *Video: Skadden's Matthew Kipp on Settlements in Shareholder Litigation*, The Deal, May 7, 2012.

[32] Ann Woolner, Phil Milford & Rodney Yap, *When Merger Suits Enrich Only Lawyers*, Bloomberg News, Feb. 16, 2012.

[33] *Id.* at 9.

[34] *See* Nate Raymond, *Another Texas Appeals Court Says No Fees in Disclosure-Only M&A Cases*, Thomas Reuters News & Insight, Mar. 28, 2013 (discussing *Kazman v. Frontier Oil Corp.*, No. 14-12-00320-CV (Tex. Ct. App.-Houston, Mar. 28, 2013) (holding that, because the settlement class received only the "noncash common benefit" of injunctive relief and no cash, Texas civil procedure rules preclude an award of $612,500 in attorney's fees to class counsel) and *Rocker v. Centex Corp.*, 377 S.W.3d 907 (Tex. Ct. App.-Dallas 2012) (rejecting a $1.1 million fee award in litigation over the $3 billion merger of Centex Corp and Pulte Homes on similar grounds), review granted, judgment set aside, and remanded by agreement (Tex. Nov. 30, 2012).

[35] *In re Transatlantic Holdings Inc. Shareholders Litig.,* C.A. No. 6574-CS, 2013 WL 1191738, at *3 (Del. Ch. Mar. 8, 2013).

[36] *Id.; see also In re PAETEC Holding Shareholders Litigation*, C.A. No. 6761-VCG, 2013 WL 1110811 (Del. Ch. Mar. 19, 2013) (upholding fee award in disclosure-only settlement only because the particular addition disclosure conferred a significant benefit on the class).

[37] *See Taleff v. Southwest Airlines Co.*, No. 11-16173 (9th Cir. Mar. 21, 2003).

[38] *See* Andrew Longstretch, *Antitrust Plaintiffs' Lawyer Sanctioned in Merger Case*, Thomas Reuters News & Insight, Mar. 25, 2013.

[39] *See* Andrew Longstretch, *Antitrust Lawyer Calls Court Reprimand a 'Badge of Honor,'* Thomas Reuters News & Insight, Mar. 25, 2013.

[40] *Boilermakers Local 154 Retirement Fund v. Chevron Corporation & IClub Investment Partnership v. FedEx Corporation*, 2013 WL 3191981 (Del. Ch. June 25, 2013), appeal pending, No. 433, 2013 C (Del. Sup. Ct.).

[41] Prior to the Delaware decision, a federal district court in California had held such bylaws invalid under Delaware law, and allowed an action to proceed in California. *Galaviz v. Berg*, 763 F.Supp.2d 1170 (N.D.Cal.2011). That case presumably now would come out differently now that the Delaware courts have spoken regarding the matter.

[42] *See* Institutional Shareholder Services Inc., Securities Class Action Services, The SCAS 100 for 1H 2013, at 13 (2013).

False Claims Act Litigation

Courts are experiencing an explosion of federal False Claim Act (FCA) litigation. FCA claims have become increasingly attractive for plaintiffs' lawyers as the requirements for bringing such suits, which can result in a substantial bounty, have become easier to meet due to amendments to the law and pro qui tam court decisions. States are also continuing to adopt state FCAs, expand their coverage, and reduce requirements for qui tam recovery. While several plaintiffs' firms maintained FCA practices for years, today more firms are creating or expanding FCA practices.

Background

The FCA[1] was originally enacted in 1863 to recruit civilian assistance in stopping dishonest suppliers to the Union military. Qui tam is shorthand for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning "who pursues this action on our Lord the King's behalf as well as his own." The FCA imposes treble damages and per-claim penalties ranging from between $5,500 and $11,000 on persons or entities who knowingly submit "false claims" for payment from federal funds or who improperly retain amounts that should be paid to the United States.

To bring a case, a private party, referred to as a qui tam plaintiff or relator (also commonly referred to as a whistleblower), must have knowledge of facts demonstrating that the defendant knowingly submitted false claims, improperly avoided paying money owed to the government, or induced the government to overpay. A plaintiffs' lawyer may bring an FCA action on behalf of the United States by filing a complaint under seal and serving the complaint and disclosure of material evidence and information on the United States.[2]

The FCA then provides the United States with 60 days, plus any extensions granted by the court for "good cause" shown, to investigate the relator's allegations while the case remains under seal and to decide whether to intervene in the case and take primary responsibility for the litigation. The case remains under seal until the deadline for the federal government's decision on intervention. At the end of this period, the United States must notify the court whether it wishes to intervene in the lawsuit. The U.S. Department of Justice (DOJ) intervenes in about 25% of filed qui tam cases. Nearly all the cases in which the federal government intervenes lead to a favorable judgment or settlement. In such cases, whistleblowers receive between 15-25% of the total recovery.

When the federal government declines to intervene in a case, the qui tam plaintiff may proceed on his or her own as a "private attorney general."[3] However, the qui tam plaintiffs' success rate when the United States declines to intervene is extremely low—about 6%. In the small number of cases in which the relator recovers without the aid of the government in the litigation, the relator is entitled to keep up to 30% of the government's recovery.

With or without the government's participation, lawyers who represent the whistleblower typically receive a contingency fee based upon the whistleblower's share of the government's recovery plus their attorneys' fees and costs. Given the threat of treble damages and substantial per claim penalties, targets of FCA investigations and lawsuits often feel that settlement is the most viable option.

Liability-Expanding FCA Amendments

Congress has expanded FCA liability three times since 2009, making FCA lawsuits more attractive to plaintiffs' lawyers.

"Given the threat of treble damages and substantial per claim penalties, targets of FCA investigations and lawsuits often feel that settlement is the most viable option."

> *"The ACA further increased the potency of the FCA by significantly weakening the FCA's public disclosure bar and reversing court decisions that had constrained parasitic FCA qui tam actions."*

The Fraud Enforcement and Recovery Act of 2009 (FERA) substantially expanded the range of conduct subject to liability under the FCA, provided greater protection for whistleblowers, and removed certain procedural requirements that the government and whistleblowers faced in pursuing FCA investigations and actions. FERA amended the FCA to:

- Impose FCA liability on parties that indirectly receive government funds, even if they never directly present a claim to the government.
- Provide that a party is liable under the FCA if it unintentionally receives and does not return an overpayment from the government.
- Overturn the U.S. Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), which held that proof of intent to defraud the government itself (as opposed to a contractor) is a required element of a false statement claim. Following FERA, liability attaches if a false record or statement is merely "material to a false or fraudulent claim." This expansion of the FCA has brought to reality the Supreme Court's fear that the FCA could become "an all-purpose antifraud statute."[4]
- Expand liability for conspiracy to violate the FCA.
- Broaden whistleblower protections against retaliation beyond employees of the company at issue to contractors and agents.[5]

Courts are grappling with the question of when these changes apply retroactively.[6]

The Patient Protection and Affordable Care Act of 2010 (ACA)[7] further increased the potency of the FCA by significantly weakening the FCA's public disclosure bar and reversing court decisions that had constrained parasitic FCA qui tam actions. The intent of the public disclosure bar is to preclude qui tam actions based on information that is already in the public realm because whistleblower actions are intended to reward those who come forward with inside (*i.e.*, new, unknown) information. The ACA substantially increased the pool of potential plaintiffs by:

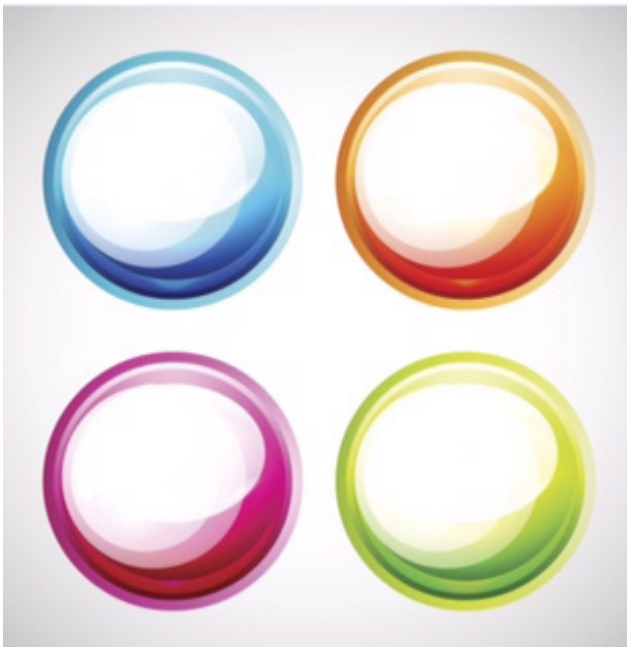
- Eliminating the need for a relator to have "direct and independent knowledge" of the allegations to serve as an "original source." It is sufficient to have "knowledge that is independent of and materially adds to the publicly disclosed allegations" to qualify to bring a qui tam action based on public disclosures.[8] Companies interacting

with the federal government now face the threat of lawsuits if a relator can add anything material to publicly available information.

- Allowing cases that would have been barred by the public disclosure provision to move forward with the government's support. Prior to the ACA, a court had no jurisdiction to hear an FCA case "based on" public disclosures and if the relator was not an "original source." The FCA now states that "the Court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions alleged in the action or claim were publicly disclosed."[9]
- Limiting "public disclosure" to claims aired in federal forums in which the government is a party. Courts previously construed the "public disclosures" to include information discussed in state and local administrative proceedings or hearings.[10]

In addition, the ACA has the potential to result in a new area of FCA litigation once the healthcare exchanges created by the ACA are active in 2014. The ACA subjects payments involving federal funds made through or in those healthcare insurance exchanges to FCA liability. The ACA will also increase FCA lawsuits by making a violation of the Anti-Kickback Statute a violation of the FCA.

Finally, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 expanded FCA liability by adding protection for individuals associated with the whistleblower and a broad range of activities related to bringing an FCA lawsuit or stopping potential FCA violations. The law also clarified the FCA's three-year statute of limitations for discriminatory or retaliatory conduct.[11]



> *"Companies interacting with the federal government now face the threat of lawsuits if a relator can add anything material to publicly available information."*

> *For the past two decades, annual qui tam filings averaged about 300 to 400 … qui tam actions climbed from 379 filings in FY 2008 to a record 647 in FY 2012.*

2012 Sets a Record for Qui Tam Filings and FCA Settlements

As a result of these legislative changes, and publicity from large settlements, FCA filings have surged in recent years. For the past two decades, annual qui tam filings averaged about 300 to 400. That number began to change after enactment of FERA in 2009. While government FCA filings have remained stable at about 125 to 160 each year, qui tam actions climbed from 379 filings in FY 2008 to a record 647 in FY 2012.[12] Over the past three years, qui tam filings outnumbered government-initiated cases about five to one. Private plaintiffs' lawyers had their best year in 2011, when they recovered $558.3 million in relator awards.

Since 2009, the United States has recovered $13.3 billion, which is the largest four-year total in the Justice Department's history and more than a third of total recoveries since the FCA was significantly amended in 1986.[13]

In FY 2012, DOJ secured a record-breaking $5 billion in settlements and judgments under the FCA.[14] Healthcare fraud actions, primarily against pharmaceutical and medical device manufacturers, constituted $3 billion of this amount and were the source of many of the largest recoveries of FY 2012. Two of the largest were:

- GlaxoSmithKline's $1.5 billion settlement to resolve allegations that the company (1) promoted Paxil, Wellbutrin, Advair, Lamictal and Zofran for off-label use, and paid physicians to prescribe those drugs as well as Imitrex, Lotronex, Flovent and Valtrex; (2) made false and misleading statements concerning the safety of Avandia; and (3) reported false best prices and underpaid rebates owed under the Medicaid Drug Rebate Program. The $1.5 billion in federal civil recoveries was part of a $3 billion global settlement including criminal fines and forfeitures as well as state Medicaid recoveries, the largest healthcare fraud settlement in U.S. history.
- Merck's $441 million settlement resolving allegations that the company promoted Vioxx for off-label use and that company representatives made inaccurate, unsupported, or misleading statements about Vioxx's cardiovascular safety to increase sales, resulting in payments by federal healthcare programs. Merck also paid nearly $322 million in criminal fines and returned

FISCAL YEAR[16]	QUI TAM FILINGS	NON QUI TAM FILINGS	% QUI TAM	RECOVERY IN QUI TAM ACTIONS (BILLION)	TOTAL US RECOVERY (BILLION)	RELATOR SHARE OF AWARD (MILLION)	RELATOR RECOVERY (MILLION)		
							HEALTHCARE	DEFENSE	OTHER
2008	379	162	70%	$1.1	$1.4	$202.3	$186.1	$13.3	$2.9
2009	433	132	77%	$2.0	$2.5	$258.8	$164.0	$64.1	$30.6
2010	575	140	80%	$2.4	$3.1	$391.5	$338.4	$15.2	$38.0
2011	638	124	84%	$2.8	$3.1	$558.3	$470.2	$9.0	$79.2
2012	647	135	83%	$3.4	$5.0	$439.2	$284.3	$19.6	$135.3

more than $200 million to state Medicaid programs.

The FY 2012 recoveries do not include Abbott Laboratories' $1.5 billion settlement with several states and the federal government to resolve criminal and civil liability arising from the company's alleged unlawful promotion of the prescription anti-seizure drug Depakote for off-label use. The civil portion of the FCA settlement is $800 million; $561 million will go to the federal government and $239 million will go to the states.[15] This settlement will be reflected in the 2013 figures.

Claims related to housing and mortgage fraud, which are also high priorities for DOJ, resulted in much of the remaining recovery in 2012, an "unprecedented $1.4 billion."[17] In addition to a $25 billion settlement between the federal government, most state governments, and the five largest mortgage lenders,[18] other significant FCA settlements to redress false claims in connection with federally insured mortgages include a $202.3 million settlement with Deutsche Bank AG and its subsidiary MortgageIT Inc., a $158.3 million settlement with Citibank subsidiary CitiMortgage Inc., and a $132.8 million settlement with Flagstar Bank. The plaintiffs' bar regards FCA claims against the financial services companies, "anything from loan origination to loan servicing," as "absolutely red hot."[19]

Qui tam plaintiffs have largely driven the increase in FCA claims. Of the $5 billion recovered by the federal government in 2012, about two-thirds ($3.4 billion) stemmed from cases initiated through qui

> *"Qui tam plaintiffs have largely driven the increase in FCA claims."*

tam actions by private plaintiffs' lawyers.[20] The Obama Administration has encouraged such growth. For example, in early 2012, Attorney General Eric Holder formed a Residential Mortgage-Backed Securities Working Group to investigate misconduct in the market for mortgage-backed securities that contributed to the real estate crisis starting in 2008.[21] The Working Group then launched a website for whistleblowers to report mortgage fraud, noting that "[s]ubstantial financial rewards may be available if you provide specific information that leads to a monetary recovery by the government."[22]

Some have suggested that other areas prime for future FCA litigation are cases flowing from grants through the $787 billion 2009 financial stimulus bill, such as renewable energy projects. Data-storage violations related to the government's use of "cloud computing" and counterfeit electronic component parts are other potential areas of increased FCA litigation.[23]

Litigation Impact of the Backlog of FCA Cases

As qui tam filings have increased, DOJ continues to intervene in the same proportion of FCA claims—roughly 20—25%.[24] The increase in filings, however, has reportedly made it a challenge for the government to investigate the filings and determine whether to intervene in a timely manner. As a result, an increasing number of cases remain under seal in the district courts. As courts lose patience with requests for extensions, DOJ is consenting to unsealing cases, allowing the qui tam plaintiff to proceed alone, with a notice that it will not intervene "at this time."

If this becomes a routine practice, it may have significant implications for litigating qui tam cases. As noted earlier, qui tam cases do not lead to any recovery through settlement or judgment, and many cases are voluntarily dismissed by the relator once the government declines to intervene. If the government is noncommittal and holds out the hope of intervening in the future, more qui tam plaintiffs may opt to continue the litigation. Reuben Ruttman, of Grant & Eisenhofer, observes that qui tam lawyers will "have to all assume that we're going to litigate the case."[25] Plaintiffs' lawyers who are more experienced, aggressive, and better funded are likely to go at it alone, posing a new challenge for defendants. Companies will also be in uncharted territory as they defend themselves in active qui tam litigation while, at the same time, potentially needing to respond to ongoing government investigation into the same matters.[26]

Recent Court Decisions Pour More Fuel on the Fire

Several recent federal appellate court decisions are likely to further fuel the rise of FCA litigation.[27]

In July 2012, the Fifth Circuit expanded the plaintiff pool when it ruled that a federal auditor may serve as a relator even though it is his or her job to investigate fraud.[28] The court rejected the government's position that federal employees such as auditors, attorneys, and other investigators cannot serve as whistleblowers and take a share of the recovery, even though uncovering the conduct at issue was within the scope of the person's employment. Prior to this decision, most courts had found that such a

federal employee could not serve as an "original source" of the information because the employee's duty to investigate precluded him or her from "voluntarily" providing information to the government, or the employee's information could not be considered "independent" because it was derived from the government's own efforts to uncover fraud.[29] The Fifth Circuit's decision allows a government employee to bring an FCA suit so long as the action is based on nonpublic information.

More recently, the Fourth Circuit issued a decision holding that a statute known as the Wartime Suspension of Limitations Act (WSLA) indefinitely suspends the running of the FCA statute of limitations.[30] The March 2013 decision held that the law applied to civil fraud statutes, including the FCA, and it applied to actions filed by qui tam plaintiffs in addition to actions filed by the United States. The Court ruled that the WSLA suspended the running of the FCA's six-year statute of limitations beginning on October 11, 2002 (*i.e.*, the beginning of the war in Iraq), and the suspension remains in effect because neither the President nor Congress has officially declared an end to the war. In effect, the decision holds that the FCA statute of limitations is indefinitely suspended. Moreover, the suspension apparently applies to all cases asserted under the FCA, not only those that relate to war-related fraud. If followed by other courts, this decision could dramatically increase companies' exposure to FCA liability.[31]

Not all cases have expanded FCA liability. A qui tam plaintiff has asked the U.S. Supreme Court to grant certiorari of the Fourth Circuit's dismissal of his case against Takeda Pharmaceuticals.[32] The relator, a territory manager for the company, claims that the company defrauded Medicare by overbilling for stomach acid drug prescriptions. The Fourth Circuit found that the complaint failed to include details about the particular prescriptions physicians wrote for Medicare patients, or show that claims related to such patients were submitted to the government. On May 10, attorneys for the relator told the U.S. Supreme Court that the circuits have split, with some, like the Fourth Circuit, placing an "insurmountable obstacle" for qui tam plaintiffs by effectively requiring access to confidential health records, while other courts find a complaint sufficient so long as it provides context for the claims.[33]

The D.C. Circuit also issued an opinion that constrained FCA liability by finding that it is insufficient for the government to show it would have withheld payment had it known the true facts (*i.e.*, there was insufficient documentation supporting the submitted expenditures). FCA liability, the court found, requires evidence that the performance the government received was worth less than what it believed it had purchased.[34] Finally, the Sixth Circuit issued an opinion that may be helpful to defendants in situations in which a relator's claim is based on a technical violation of a regulation that is immaterial to the government's payment decision, even if the contractor's compliance with regulations was a condition of program participation.[35]

States Enact and Expand FCAs

In addition to the federal FCA, 29 states and the District of Columbia have their own false claims acts. Traditionally, these state acts have focused on Medicaid fraud. A 2006 federal law encourages enactment of these laws by providing states with an additional 10% share of any FCA settlements tied to joint state-federal programs, such as Medicaid, if their false claims act closely mirrors the federal FCA.[36] State laws must provide qui tam provisions that are at least as effective as the federal FCA with respect to Medicaid spending, among other requirements. The U.S. Department of Health and Human Services Office of Inspector General (HHS OIG) determines whether a state FCA meets these qualifications.[37]

As a result of amendments to the FCA through FERA, ACA, and Dodd-Frank, HHS OIG is reevaluating whether each existing state law still qualifies for the additional federal funds.[38] HHS OIG provided a two-year grace period for states with FCAs to adopt amendments consistent with the federal law, resulting in a flurry of state legislative activity. Several states, such as California, Hawaii, Massachusetts, and Tennessee, altered their FCAs to relax standards for whistleblower recovery in the same manner provided by the amended federal law. Connecticut and Iowa have obtained re-approval after amending their FCAs. Some states, such as Georgia and North Carolina, used this opportunity to expand the scope of their existing laws beyond Medicaid or adopt a separate law applying to any false claims resulting in any government payment. Washington enacted its first FCA targeting Medicaid-related false claims. Other states that have not adopted their own FCAs, such as Pennsylvania, are considering doing so because "[i]n these continuing tough economic times, we cannot afford to ignore any additional source of new revenue."[39]

This process of adopting and expanding state FCAs will continue in 2014.[40]

The Whistleblower Bar

An increasingly aggressive and well-funded whistleblower plaintiffs' bar has grown as Congress and the courts have made the FCA a more potent and profitable weapon. The list below includes firms with established FCA practices, such as Phillips & Cohen and Greene, and new firms established by plaintiffs' lawyers who split off from larger firms to exclusively pursue FCA cases, such as Sadowski Fischer and McKnight & Kennedy. Another example is Stone & Magnanini, whose principals David S. Stone and Robert A. Magnanini, former partners at Boies, Schiller & Flexner (BSF), formed their own firm to "expand [their] successful and profitable qui tam practice" in 2009.[41] Several major firms recently created or expanded their FCA practices, such as Cohen Milstein, Hagens Berman, Sobol Shapiro, and McKool Smith.

Some firms that represent businesses also represent whistleblowers in FCA litigation. For example, Blank Rome is an "Am Law 100" firm known for its corporate, securities, banking and finance, transportation, real estate, and complex commercial litigation work. Yet, several of its attorneys, led by W. Scott Simmer, maintain an "affirmative" healthcare fraud practice, tax fraud, and defense contractor fraud litigation on behalf of whistleblowers,

employer and union health plans, and third-party payers. Mr. Simmer joined Blank Rome in 2008 from Robins, Kaplan, Miller & Ciresi, where he was head of the healthcare litigation practice. The growth of the FCA practice at Boies, Schiller & Flexner, particularly as it gravitated toward pharmaceutical companies, led to potential conflicts with the firm's institutional clients, and ultimately, the spinoff of its New Jersey office.

LEADING PLAINTIFFS' FIRMS FOR FCA LITIGATION	PRINCIPAL LAWYER(S)	LOCATION	NOTABLE LITIGATION
Berg & Androphy PC	Joel Androphy Sarah Frazier	Houston, TX	• Lead counsel for one of nine whistleblowers in the Eli Lilly qui tam civil lawsuit alleging off-label marketing and promotion of Zyprexa, which netted the government and all whistleblowers $750 million. • Lead counsel in $13.7 million settlement against American Grocers Ltd. related to fraudulent alteration of expiration dates on food products sent to U.S. troops in the Middle East.
Berger & Montague P.C.	Joy Clairmont Jonathan Berger	Philadelphia, PA	• GlaxoSmithKline ($150 million; $26 million whistleblower's share) • Aventis Pharmaceuticals ($190 million; $32 million whistleblower's share) • AstraZeneca ($124 million combined settlement with three other drug companies for Medicaid rebate fraud; $10 million whistleblower's share)
Blank Rome LLP	W. Scott Simmer Nicholas Harbist Thomas Poulin	Washington, DC	• Lead counsel in $1.5 billion settlement against Abbott Laboratories related to off-label promotion and payment of kickbacks for Depakote. • Lead counsel in $2.3 billion settlement against Pfizer who represented three whistleblowers with regard to claims of off-label promotion and retaliation. • Lead counsel in $1.3 billion settlement against Abbott Laboratories related to off-label promotion of Depakote.
Cohen, Jayson & Foster, P.A. (The Barry A. Cohen Law Group)	Barry Cohen Kevin Darken Christopher Jayson	Tampa, FL	• Lead counsel for one of five qui tam relators in a $327 million settlement against HealthSouth Corporation. • Lead counsel in $10 million settlement against Morton Plant Mease Health Care Inc. related to alleged improper billing for out-patient procedures.
Getnick & Getnick	Neil Getnick	New York, NY	• Neil Getnick is Chairman of the Board of Taxpayers Against Fraud, the leading qui tam lawyers' association. • Represented relator in $750 million settlement with GlaxoSmithKline.
Greene LLP	Thomas Greene	Boston, MA	• Greene testified before Congress on the False Claims Act in 2013. • First to use FCA to find that off-label promotion of prescription drugs was fraud that could result in liability to the government in case against Parke-Davis and Pfizer filed in 1996. • Owns falseclaimsactattorney.com.

LEADING PLAINTIFFS' FIRMS FOR FCA LITIGATION	PRINCIPAL LAWYER(S)	LOCATION	NOTABLE LITIGATION
Grant & Eisenhofer P.A.	Reuben Guttman Traci Buschner	Washington, DC	• Abbott Laboratories. $1.6 billion settlement, announced in May, 2012, involved alleged illegal marketing of the anti-seizure drug Depakote to children and geriatric patients. • $3 billion settlement, including $2 billion for civil misconduct, with GlaxoSmithKline PLC for civil misconduct related to off-label promotion of Avandia, Paxil, and Wellbutrin.
Hagens Berman Sobol Shapiro LLP	Shayne Stevenson Steve Berman	Seattle, WA	• Claims whistleblower recovery of $2.8 billion. • Has built its whistleblower team, which has three times as many lawyers working on whistleblower cases now as it did five years ago.[43] • Has a website dedicated exclusively for whistleblower suits, www.hb-whistleblower.com/.
Hare Wynn Newell & Newton	Scott Powell	Birmingham, AL	• Has recovered more than $500 million in FCA cases.
Helmer Martins Rice Popham Co., L.P.A.	Jim Helmer Paul Martins	Cincinnati, OH	• Represented relator in Allison Engine case. • Has recovered almost $1 billion in qui tam actions. • Jim Helmer testified in Congress in 2008 on proposed FCA amendments.
Kenney & McCafferty, P.C.	Brian Kenney Brian McCafferty	Philadelphia, PA Also Miami, Minneapolis, and Los Angeles	• Focuses exclusively on whistleblower cases in a wide range of areas. • Owns http://quitam-lawyer.com/. • $3.0 billion settlement with GlaxoSmithKline • $2.3 billion settlement with Pfizer • $1.4 billion settlement with Eli Lilly • $520 million settlement with AstraZeneca • $425 million settlement with Cephalon
Kline & Specter, P.C.	Tom Kline Shanin Specter David Caputo	Philadelphia, PA	• Owns www.attorneysforwhistleblowers.com • Lead counsel in $800,000 settlement with Williston Rescue Squad Inc. related to false claims for payment to Medicare for ambulance transports; $160,000 whistleblower's share. • Better known for personal injury and medical malpractice litigation.
Kohn, Kohn & Colapinto, LLP	Michael Kohn Stephen Kohn David Colapinto	Washington, DC	• Exclusively represents whistleblowers. • Secured $104 million IRS whistleblower reward for client Bradley Birkenfeld stemming from the UBS offshore tax shelter case.
Lieff Cabraser Heimann & Bernstein	Robert Nelson Nimish Desai	San Francisco, CA	• Served as lead trial counsel in FCA claim against University of Phoenix, which settled for $78.5 million, among the largest FCA settlements without government intervention.
Milberg LLP	Anna Dover Roland Riggs	New York, NY	• $85 million settlement with Medline, representing the second largest settlement of a False Claims Act case in which US declined to intervene. • $515 million settlement with Bristol-Myers Squibb.

LEADING PLAINTIFFS' FIRMS FOR FCA LITIGATION	PRINCIPAL LAWYER(S)	LOCATION	NOTABLE LITIGATION
Motley Rice LLC	Mark I. Labaton Rebecca M. Katz	Los Angeles, CA New York, NY	• Focuses on whistleblower lawsuits against individuals or companies who have allegedly violated tax or federal securities laws under Dodd-Frank Act. • Opened Los Angeles office in 2010, headed by Mr. Labaton, a former federal prosecutor. Qui tam claims are a focus of the office. • Motley Rice was ordered by a federal judge, along with two other firms, to pay $395,000 in sanctions for manufacturing a frivolous FCA case, a ruling that was reversed by the Seventh Circuit in July 2013.[44]
Packard Packard Johnson	Lon Packard Ron Packard	Salt Lake City, UT	• Has recovered more than $2 billion in FCA cases. • $46 million settlement with Oracle. • $55 million settlement with Hewlett Packard.
Pietragallo Gordon Alfano Bosick & Raspanti, LLP	Marc Raspanti, Michael Morse	Philadelphia, PA	• Owns www.falseclaimsact.com. • Markets itself as consisting of distinguished former prosecutors. • Primarily healthcare non-pharmaceutical and other targets. • Current target cases include CVS and Cooper Health System.
Phillips & Cohen LLP	John Phillips Erika Kelton Peter Chatfield Colette Matzzie Tim McCormack	Washington, DC	• $3.0 billion settlement with GlaxoSmithKline • $1.8 billion settlement with Pfizer • $425 million settlement with Cephalon • $96.5 million settlement with Verizon Communications.
Seeger Weiss LLP	Stephen Weiss David Buchanan	New York, NY	• $3 billion settlement with GlaxoSmithKline • Represented relator in lawsuit against Abbott Labs, alleging unlawful marketing of the anti-seizure drug Depakote, which settled for $1.6 billion.
Vogel, Slade & Goldstein, LLP	Robert Vogel Shelley Slade Janet Goldstein	Washington, DC	• Dedicated exclusively to the representation of qui tam plaintiffs. • Shelley Slade testified before Congress on the False Claims Act in 2013.
Warren | Benson Law Group	Phillip Benson Donald Warren	Los Angeles, CA	• $103 million whistleblower recovery and retaliation jury verdict against two leading defense contractors for fraud in falsifying tests and product substitution on military equipment. • $100 million aerospace labor fraud verdict against General Dynamics. • $56.3 million combined judgment and settlement against two defense contractors for cost padding in a Lockheed contract. • $51 million in Medicare fraud whistleblower recoveries against 33 research hospitals for upcoding and mischarging Medicare and Tricare for the cost of experimental devices.

Endnotes

[1] 31 U.S.C. §§ 3729-3733.

[2] 31 U.S.C. § 3730(b).

[3] 31 U.S.C. § 3730(b).

[4] *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 672 (2008).

[5] *See* Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4 (2009) (amending 31 U.S.C. §§ 3729 to 3733).

[6] Three circuits have found that FERA's relaxation of the FCA's liability provisions applied retroactively to cases, not claims for payment, pending as of June 7, 2008: *Sanders v. Allison Engine Co.*, 703 F.3d 930 (6th Cir. 2012); U*nited States ex. rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1885 (2011). Two other circuits have found that the 2009 FERA amendments apply retroactively only to claims for payment that were pending as of June 7, 2008: *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009).

[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. X, § 10104(j)(2) (2010) (amending 31 U.S.C. § 3730(e)).

[8] 31 U.S.C. § 3730(e)(4)(B).

[9] 31 U.S.C. 3730(e)(4)(A) (emphasis added).

[10] *See Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010).

[11] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A (2010) (amending 31 U.S.C. § 3730(h)).

[12] *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics – Overview (Oct. 24, 2012).

[13] *Id.*

[14] *See id.; see also* Press Release, Office of Pub. Affairs, *Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012).

[15] *See* Press Release, Office of Public Affairs, U.S. Dep't of Justice, *Abbott Labs to Pay $1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote*, May 7, 2012.

[16] *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics – Overview (Oct. 24, 2012).

[17] For more detail on DOJ's FCA activity regarding financial service institutions in 2012, *see* Thomas J. Kenny & Vicki H. Butler, *Expanding Use of the False Claims Act Against the Financial Services Industry*, Kutak Rock LLP, Feb. 18, 2013.

[18] DOJ attributes approximately $900 million of this $25 billion settlement to the FCA. *See Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012, supra.*

[19] Dietrich Knauth, *4 Industries Facing New Heat from the False Claims Act*, Law360, Apr. 9, 2013 (quoting Ruben Guttman of Grant & Eisenhofer PA).

[20] *See* U.S. Dep't of Justice, Civil Division, Fraud Statistics – Overview, at 2 (Oct. 24, 2012).

[21] *See* Press Release, Office of Public Affairs, U.S. Dep't of Justice, *Attorney General Holder Speaks at the Announcement of the Financial Fraud Enforcement Task Force's New Residential Mortgage-Backed Securities Working Group*, Jan. 27, 2012.

[22] *See* Press Release, Office of Public Affairs, U.S. Dep't of Justice, *Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct,* May 24, 2012 ("Under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the reward can amount to 10-30% of the government's monetary recovery. . . . Rewards also may be available in some circumstances under other statutes, such as the False Claims Act or the Financial Institutions Anti-Fraud Enforcement Act, which allow whistleblowers to report fraud to the United States Attorney General."

[23] Knauth, *4 Industries Facing New Heat from the False Claims Act, supra.*

[24] *See* Erica Techert, *FCA Recoveries Hit New $5 Billion High in 2012*, DOJ Says, Law360, Dec. 4, 2012.

[25] Dietrich Knauth, *FCA Whistleblowers Forced to Go it Alone as DOJ Drags Feet*, Law360, Apr. 12, 2013.

[26] *See* Grayson Yeargin & Conor Harris, *A New Procedural Trend in Qui Tam Cases*, Law360, May 16, 2013;

[27] *See generally* Joe West et al., *Government Contractors Beware; Recent Federal Appellate Decisions Are Sure to Fuel Increased FCA Litigation*, The Government Contractor (Thomas Reuters Aug. 22, 2012) (authored by Gibson Dunn attorneys).

[28] *United States ex rel. Little v. Shell Exploration*, 690 F.3d 282 (5th Cir. 2012).

[29] *See, e.g., United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740, 743-44 (9th Cir. 1995) (en banc).

[30] *United States ex rel. Carter v. Halliburton*, No. 12-1011, 2013 WL 1092732 (4th Cir. Mar. 18, 2013).

[31] The Ninth Circuit ruling also expanded liability under the FCA when it ruled that a contractor that *underbids* to increase its chance of winning a contract may violate the FCA even in absence of subsequent attempts to overcharge. *United States ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012).

[32] *United States, ex rel. Nathan v. Takeda Pharma. N. Am., Inc.,* No. 12-1349 (U.S. filed May 10, 2013). As of September 2013, the Court had not decided the petition.

[33] According to the Petition, the Fourth, Sixth, Eighth, and Eleventh Circuits have placed the higher standard to state an FCA claim, while the First, Fifth, Seventh, and Ninth Circuits have imposed a lower standard.

[34] *See United States ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012) (in which the relator alleged that the District's public schools violated the FCA by submitting a Medicaid claim for reimbursement without maintaining adequate supporting documentation, but there was no question regarding the value of the medical care that the District provided).

[35] *See United States ex rel. Williams v. Renal Care Group Inc.*, 696 F.3d 518 (6th Cir. 2012) (finding that the FCA is not a vehicle for policing technical compliance with complex federal regulations).

[36] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 6031 (2006) (creating § 1909 of the Social Security Act).

[37] *See* Dep't Health & Human Servs., Office of the Inspector General, State False Claims Act Reviews, *at* http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp.

[38] *See* Rachel Slajda, *Health Providers Brace for Tougher False Claims Statutes*, Law360, Mar. 21, 2013 (reporting that OIG released guidance in March 2013 instructing that state FCA laws will need to drop any requirement of specific intent to defraud and provide at least a three-year statute of limitations on retaliation actions in order to maintain eligibility for extra funds).

[39] *See* Dan Packel, *Democrats to Push Pa. False Claims Act*, Law 360, Apr. 25, 2013 (quoting Rep. Brandon Neuman, who has co-sponsored the Pennsylvania bill).

[40] *See* Dietrick Knauth, *States Look Beyond Medicaid With Latest FCA Expansions*, Law 360, Apr. 30, 2013. HHS OIG issued new guidelines for future compliance in March 2013. *See* U.S. Dep't of Health & Human Servs., Office of Inspector General, OIG Guidelines for Evaluating State False Claims Acts, Mar. 15, 2013.

[41] *See* http://www.stonemagnalaw.com/2009/03/05/new-false-claims-and-complex-commercial-litigation-firm-formed-by-david-s-stone-and-robert-a-magnanini-%E2%80%93-stone-magnanini-llp/. Mr. Stone previously led BSF's False Claims Act practice and the firm's New Jersey office.

[42] *See* David Lat, *Boies Schiller Spins Off NJ Office: Say Hello To Stone & Magnanini*, Above the Law, Mar. 6, 2009 (interview with David Stone, in which Mr. Stone notes, "Our False Claims Act practices has become so big, and so public, that it has started to give rise to potential conflicts with Boies Schiller, because of BSF's institutional clients"); Boies, Schiller & Flexner LLP, Representative Clients, *at* http://www.bsfllp.com/about/representative_clients.html (listing pharmaceutical companies, such as Merck & Co. and Pfizer, among firm clients).

[43] Erin Coe, *5 Tips For Building Bridges With Whistleblower Clients*, Law360, Mar. 20, 2013.

[44] *See United States v. ITT Educational Servs., Inc.*, No. 1:07-CV-00867, 2011 WL 3471071 (S.D. Ind. Aug. 8, 2011), *rev'd sub. nom, Leveski v. ITT Educational Servs., Inc.,* Nos. 12-1369, 12-1967, 12-1979, 12-2008 and 12-2891, 2013 WL 3379343 (7th Cir. July 8, 2013).

Wage and Hour Litigation

The economy is still weathering tough times, so workers who are let go increasingly look to lawsuits when confronting the unemployment line. Wage and hour litigation has increased dramatically in recent years and is unlikely to stop anytime soon.[1] Today it is common for employees to walk into a lawyer's office with what they think is a discrimination case and walk out with what their lawyers have repackaged as a wage and hour case. Why? Because wage and hour cases are usually much easier to prove than discrimination claims and are generally more lucrative for plaintiffs' lawyers.

However, it's not just plaintiffs' lawyers; the government is after employers too. The U.S. Department of Labor (DOL) is actively enforcing its regulations: since 2007, there have been 150,000 wage and hour investigations which resulted in findings of 110,000 violations. More than 75% of these cases included back wages, with around 11% including additional penalties.[2]

Wage and hour cases are often based upon employers that misclassify workers in one of two ways: (1) labeling nonexempt employees as exempt; or (2) classifying workers as independent contractors instead of employees. Misclassification is costly — the law currently allows for back wages, penalties, and attorneys' fees. When an employer fails to pay or withhold required payroll taxes for a misclassified independent contractor, federal and state agencies can come after the employer for back taxes, potentially crippling penalties, and interest. Multiply that by tens, hundreds, or even thousands of workers and it is no wonder that misclassification claims are high on a company's list of fear-factors. This section discusses the perils of both kinds of misclassification.

Misclassifying Employees as Exempt v. Non-Exempt

As companies have long known, employees are classified as either "exempt" or "non-exempt." Non-exempt employees are often paid hourly and must earn at least the federal minimum wage, with a premium for overtime. Exempt employees are just that: "exempt" from parts of the Fair Labor Standards Act (FLSA), including the overtime provisions. With few exceptions, pay to exempt employees must be on a salary basis, which means the employee gets a fixed amount regardless of how much or well they work.

To be exempt, most employees must pass both a salary test and a duties test. Simply giving an employee a fancy title and paying a salary is not enough.[3] The "salary basis" test generally prohibits employers from taking deductions from an employee's pay and must be at least $455 per week.[4]

The duties test focuses on the employee's actual duties. Unless they fall within certain exemptions, the employee is non-exempt and has the right to overtime. The FLSA's "white collar" exemptions apply to specific duties, the most common being executive, professional, administrative, and computer employees.[5] Other exemptions include exemptions for seasonal employees, outside sales, and highly compensated employees.[6]

It's expensive: wage and hour claims currently outpace all other types of workplace litigation. If an employer misclassifies one employee, they probably did the same to other employees doing a similar job. As a result, these cases are often brought as collective actions, increasing the financial risk and the amount of attorneys' fees an employer may have to pay. To make things even more complicated, they are much harder to resolve privately: a court or the DOL must approve any settlement because an employee cannot privately agree to release its wage and hour claims against its employer.

In 2012 alone, settlements of wage and hour cases equaled $467 million, bringing the total since 2007 to about $2.7 billion. In 2012, companies on average paid $4.8 million per case.[7]

Notable examples include:

- Rite Aid Corporation agreed to a $20.9 million settlement in a misclassification case involving 9,400 employees, including $7 million in attorneys' fees.[8]

> *"... wage and hour claims currently outpace all other types of workplace litigation."*

- First Republic Bank paid more than $1 million in a settlement with the DOL for improperly treating employees as exempt.[9]
- Prudential Insurance Company agreed to pay $1.02 million to settle FLSA claims for just 22 employees.[10]
- Novartis Pharmaceuticals Corporation settled a class action brought by current and former sales representatives for $99 million, with more than $27 million of that dedicated to attorneys' fees.[11]
- Jessica's Brick Oven, Inc. settled with the Massachusetts Attorney General for $586,000 in penalties and restitution for not paying overtime and for allegedly retaliating against those employees who pursued their overtime pay.[12]
- Caicos Corporation agreed to pay more than $89,000 for misclassifying 14 employees, plus approximately $20,000 in fees.[13]

As these cases highlight, it can be costly for employers even if only a few employees are misclassified. Continual advances in technology and an increase in decentralized business operations make it harder to monitor employees, which leaves employers vulnerable to claims of unpaid overtime or off-the-clock work.

Misclassifying Employees as Independent Contractors

A second fear-factor is the government's and plaintiffs' bar's renewed focus in pursuing companies that misclassify their employees as independent contractors.

Unlike employees, independent contractors are generally excluded from wage-and-hour and employee-leave laws, and are not subject to federal or state employment or payroll taxes (including FICA, unemployment insurance taxes, and workers' compensation premiums). The savings can be significant. According to government estimates, every worker earning $43,007 who is treated as a contractor saves the employer approximately $3,710 per year in taxes.[14] But just calling a worker an "independent contractor" does not make it so. With shrinking tax rolls, federal and state governments review such classifications because misclassifying an employee as an independent contractor results in less revenue.

Plaintiffs' lawyers have also been busy, bringing class actions on behalf of misclassified independent contractors because they were not properly paid under the FLSA and similar state laws. The penalties for "getting it wrong" can be severe, including back pay with liquidated damages, liability for unpaid taxes, plus interest and statutory penalties.

For example, over the past few years, employers have paid a hefty price for incorrectly classifying their workers as independent contractors:

- Over $29 million in back wages has been collected by the DOL since 2009 for over 29,000 employees who were misclassified as independent contractors.[15]

- A $12.9 million settlement was reached in October 2012 for wage and hour violations stemming from allegations that "exotic dancers" at an adult-entertainment club were incorrectly treated as independent contractors.[16]
- An $8 million settlement in April 2013, also involved the alleged misclassification of strippers as independent contractors.[17]
- A $1.24 million settlement in January 2013 involved a class of misclassified Apple and AT&T Mobility customer service representatives.[18]
- A $1.47 million verdict in August 2013 arose from a DOL lawsuit against an Ohio cable company who misclassified 250 cable installers.[19]
- A $3.75 million class action settlement in 2011 involved allegations that 265 truck drivers were misclassified as independent contractors.[20]

ENTER THE REGULATORS

Misclassification is widespread. In its last comprehensive study of the issue, the IRS found that 15% of employers misclassified workers and noted that the problem affects millions of workers nationwide.[21] A DOL commissioned study concluded that 10% to 30% of employers audited by states misclassified their workers.[22]

The resulting cost to state and federal governments from lost revenue is enormous:

- According to a DOL-commissioned study, if only 1% of employees were misclassified nationally, the loss in unemployment insurance revenue would be nearly $200 million per year.[23]
- The U.S. Government Accountability Office (GAO) estimated that in 2006 alone, the federal government lost approximately $2.7 billion in unpaid taxes due to misclassification.[24]
- States reported losing $5 to $20 million annually just on unemployment insurance payments.[25]

With so much tax revenue at stake, it makes sense that federal and state authorities have made it a priority to uncover and penalize. The DOL has led this effort for the federal government. In 2011, it announced its "Misclassification Initiative."[26] Under this initiative, the DOL entered into a memorandum of understanding (MOU) with the IRS to share information regarding employee misclassification, and entered into similar MOUs with 14 states while "actively pursuing" MOUs with additional states.[27]

> *"Plaintiffs' lawyers have also been busy, bringing class actions on behalf of misclassified independent contractors because they were not properly paid under the FLSA and similar state laws."*

Employers are already feeling the pinch from the DOL's efforts. Since implementing the Misclassification Initiative, the DOL has increased collections by 80%, recovered more than $9.5 million from employers in back wages, and doubled the number of back pay awards to misclassified workers.[28] The DOL clearly plans to keep the pressure on employers. Its FY2013 budget includes $14 million to help identify worker misclassification, with $10 million in grants to assist states in their efforts, and $4 million for DOL Wage and Hour Division investigators.[29] The DOL's FY2014 budget contains similar line-item requests.[30]

The IRS is also increasingly active in its efforts to recover tax dollars lost to misclassification. In 2007, the agency announced its "Questionable Employment Tax Practice" (QETP) initiative, under which it has (to date) entered into MOUs with 37 state agencies to share the results of employment tax audits.[31] Under the QETP program, states have found over 7,000 workers who were incorrectly classified as independent contractors, reclassified more than $1.3 billion in wages, and assessed almost $21 million in penalties through the use of information obtained from federal tax audits, just through mid-2011.[32] The IRS, meanwhile, has assessed almost $23 million in taxes on employers based on state referrals under QETP.[33] Further adding to employer headaches is the IRS's Employment Tax National Research Project, which began in 2010, and under which the IRS conducted 6,000 random employer audits from 2010 through 2012 to determine whether employers complied with tax laws.[34]

This renewed attention to worker misclassification is not limited to the federal government. States are increasingly focused on the issue, with over a dozen states creating task forces focused just on uncovering employee misclassification.[35] In at least a few states, the resulting employer liabilities are stunning. For example, in the 18-month period between July 2011 and December 2012, Massachusetts recovered more than $21 million in revenue—an amount greater than the sum of all prior years combined.[36] The state of Washington assessed a record-breaking $24.6 million in unpaid employer premiums plus penalties in 2012 alone.[37]

Federal and state governments have also recently turned to legislative solutions to deal with the misclassification issue. While the federal legislation has stalled,[38] in early 2013 the DOL announced and invited comments on its proposal to survey workers nationwide for information on whether workers "have knowledge of their employment classification and understand the implications of their classification status."[39] At the state level, since 2007, at least 24 states have passed legislation affecting independent contractor classification, restricting use of independent contractors, and/or imposing stiffer penalties for misclassification.[40] Currently, nearly half of the states have legislation pending that deals with the misclassification issue.[41]

Government misclassification audits and settlements do not go unnoticed by the plaintiffs' bar, and do not preclude private class actions either. An employer found to have misclassified its workers by a government regulator presents "low

> *"An employer found to have misclassified its workers by a government regulator presents "low hanging fruit" to plaintiffs' counsel, and the company may find itself fighting on two fronts—a federal or state investigation and a class action."*

hanging fruit" to plaintiffs' counsel, and the company may find itself fighting on two fronts—a federal or state investigation and a class action.

PENALTIES FOR MISCLASSIFICATION

Worker misclassification exposes the employer to a broad range of penalties, including but not limited to the following:

- **FLSA Liability:** Employers who improperly classify workers as independent contractors can be liable for unpaid wages (including overtime), with liquidated damages, attorneys' fees, and costs. The same is true under state wage and hour laws.
- **Federal Tax Liability.** An employer who fails to withhold or pay federal employment taxes (federal income tax, FICA, and FUTA) is subject to significant IRS liability including back taxes, penalties ranging from 10% to 100% of the amount owed depending on the type of violation and mental state of the employer, plus interest.[42]
- **State Tax Liability.** At the state level, employers who misclassify are subject to payment of back taxes, plus penalties and interest, for failure to pay state payroll taxes (e.g., payments for unemployment and workers' compensation, etc.). For example, in California the penalty is 10% of the unpaid tax, plus interest.[43]
- **Additional State Penalties.** Some states have recently enacted laws imposing potentially crippling penalties upon employers who misclassify. For example, effective January 2012, California penalizes employers $5,000 to $15,000 for each instance of "willful" misclassification; this can increase to $10,000 to $25,000 per violation if there is a "pattern and practice" of misclassification.[44] Further, anyone (excluding attorneys) who knowingly advises an employer to misclassify workers is jointly and severally liable for any penalties imposed.[45] Finally, a company that willfully misclassifies must display "prominently" on its website a statement to that effect – surely "blood in the water" to plaintiffs' lawyers looking for new class actions to file.[46]

THE ACA'S EMPLOYER MANDATE WILL RESULT IN EXPOSURE TO MORE PENALTIES

As if the risks and consequences of misclassification were not already large enough, when the employer mandate provisions of the Patient Protection and Affordable Health Care Act (ACA) take

effect in 2014, it will increase the risk and potential liability for employers. Under the ACA, large employers—defined as those with 50 or more full-time employees—must offer health insurance to their employees or face a penalty. This of course begs the question whether the employer's workers are employees or independent contractors. If an employer mistakenly believes it is exempt from the ACA's mandate because its 50 workers are independent contractors and not employees, but is later found to have misclassified the workers, then it is subject to a penalty if *any* of its workers purchased insurance on a state or federal insurance exchange.[47] The penalty can be up to $2,000 per uncovered worker beyond the employer's first 30 employees.[48] Even if the employer offers coverage to its "employees," it is not out of the woods. As employers generally do not offer health insurance to independent contractors, an employer can still face similar penalties in the event coverage is not offered to a misclassified independent contractor who later purchases insurance on an exchange.[49]

WHO IS AN INDEPENDENT CONTRACTOR?

As the state and federal authorities circle along with the plaintiffs' bar, it is more important than ever to correctly classify workers. But as the GAO itself notes, "the tests used to determine whether a worker is an independent contractor or an employee are complex and differ from law to law."[50] The IRS's test focuses on three main factors (composed of multiple other sub-factors): (1) behavioral control; (2) financial control; and (3) relationship of the parties.[51] This test differs from the 7-factor "economic realities" test used by the DOL in enforcing the FLSA.[52]

To further complicate matters, many states have adopted different tests. For example, state "tests" include a 3-factor test,[53] a 5-factor test, a 9-factor test,[54] a 10-factor test,[55] and many other varying iterations. And, as with federal agencies, different state agencies may apply different tests to different laws within the same state.[56] The upshot is it is conceivable that a worker could be deemed an "employee" for wage and hour purposes and an independent contractor under the tax laws, with similar inconsistent characterizations under other state and federal laws.[57]

The bottom line is that liabilities arising from worker misclassification are growing for companies across the country.

> *"... the employer mandate provisions of the Patient Protection and Affordable Health Care Act (ACA) ... will increase the risk and potential liability for employers."*

Leading Plaintiffs' Firms for Wage and Hour Class Action Litigation

These plaintiffs' firms are well-known to defense counsel for their wage and hour class action work and have been involved in some of the largest wage and hour verdicts and settlements in recent years:

TOP PLAINTIFFS' FIRMS FOR WAGE AND HOUR CLASS ACTIONS	PRINCIPAL LAWYER(S)	LOCATION
Altshuler Berzon LLP	Michael Rubin	San Francisco, CA
Berger & Montague, P.C.	Shanon Carson	Philadelphia, PA
Cohen Milstein Sellers & Toll PLLC	Joseph M. Sellers	Washington, DC
Goldstein, Borgen, Dardarian & Ho	David Borgen	Oakland, CA
Lieff Cabraser Heimann & Bernstein LLP	Kelly M. Dermody	San Francisco, CA
Marlin & Saltzman LLP	Louis M. Marlin	Irvine, CA
The Mills Law Firm	Robert Mills	San Rafael, CA
Nichols Kaster PLLP	Donald H. Nichols Michelle Fisher Paul J. Lukas	Minneapolis, MN
Outten & Golden LLP	Wayne Outten Adam T. Klein	New York, NY
Rudy, Exelrod, Zieff & Lowe, LLP	John T. Mullan	San Francisco, CA
The Employment Law Group, P.C.	Nicholas Woodfield	Washington, DC
Thierman Law Firm, P.C.	Mark Thierman	Reno, NV
Thomas & Solomon LLP	J. Nelson Thomas	Rochester, NY
Sanford Heisler LLP	David Sanford	New York, NY

Endnotes

[1] Once misclassification has been established, calculating damages is often a simple matter of comparing time cards and paychecks.

[2] Denise Martin, Stephanie Plancich & Janeen McIntosh, *Trends in Wage and Hour Settlements: 2012 Update* (hereinafter "*NERA 2012 Update*") NERA Econ. Consulting 14 (2013).

[3] 29 C.F.R. § 541.2.

[4] U.S. Department of Labor, Wage and Hour Division, Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA) (rev. July 2008).

[5] 29 U.S.C. § 213(a).

[6] For a detailed explanation of the requirements for each category, employers should look at FLSA regulations found at 29 C.F.R. Part 541. States have their own wage and hour laws. It is important to be familiar with those requirements, as well as federal laws and regulations, as employers must follow whichever law affords the employee greater protection.

[7] *NERA 2012 Update*, *supra*, at 1.

[8] John Beauge, *$20.9 Million Rite Aid Settlement Approved*, Penn Live, Jan. 7, 2013; Beth P. Zoller, *Rite Aid Settles Class Action Overtime Lawsuit for $20.9 million*, JDSupra Law News, Jan. 24, 2013.

[9] U.S. Dept. of Labor, News Release, *San Francisco-Based Bank Pays More Than $1 Million in Overtime Back Wages to Employees in 5 States Following US Labor Department Investigation*, Nov. 27, 2012.

[10] *NERA 2012 Update, supra*, at 13.

[11] *Id.*; Sanford Heisler LLP, Featured Cases, *Novartis Pharmaceutical Wage & Hour Class Action*; John Herzfeld, *Judge OKs $99 Million Overtime Settlement For More Than 7,000 Novartis Sales Reps*, Bloomberg BNA, June 11, 2012,

[12] Attorney Gen. of Mass., Press Release, North Andover Bakery to Pay More Than $586,000 to Settle Claims it Violated Overtime and Anti-Retaliation Laws, Jan. 18, 2013.

[13] Wash. State Office of the Attorney Gen., Press Release, *Attorney General's Office, Labor & Industries Secure More Than $89K in Wages and Interest for Misclassified Workers*, June 5, 2013; Jessica M. Karmasek, *Wash. AG Helps Secure More Than $89,000 in Wages, Interest for Misclassified Workers*, Legal Newsline, June 6, 2013.

[14] *See* Treasury Inspector General for Tax Admin., Ref. No. 2013-30-058, Employers Do Not Always Follow Internal Revenue Service Worker Determination Rulings (June 14, 2013).

[15] *See* Proposed Information Collection Request (ICR) for the Worker Classification Survey, 78 Fed. Reg. 2447, 2448 (Jan 11, 2013).

[16] *See* Matt Reynolds, *Strippers Win $13 Million Class Settlement*, Courthouse News, Oct. 10, 2012.

[17] *See* Dan Prochillo, *Penthouse Club Strippers Score $8M Wage Settlement*, Law360, Apr. 8, 2013.

[18] *See* David McAfee, *AT&T, Apple Reps' $1.24M Accord OK'd In Status Row*, Law360, Jan. 9, 2013.

[19] *See* U.S. Dept. of Labor, Press Release, *Judge Finds Ohio-Based Cascom Inc. Liable for Nearly $1.5 Million in Back Wages, Damages To Employees Misclassified as Independent Contractors*, Aug. 29, 2013.

[20] *See* Ben James, *Cardinal Drivers Seek OK For $4M Wage Action Deal*, Law360, July 25, 2011.

[21] *See id.*

[22] *See* Proposed Information Collection Request (ICR) for the Worker Classification Survey, 78 Fed. Reg. 2447, 2448 (Jan. 11, 2013).

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See* U.S. Dept. of Labor, Wage and Hour Division, *Employee Misclassification as Independent Contractors* (last visited Sept. 16, 2013).

[27] *See id.*

[28] *See* U.S. Dept. of Labor, Press Release, *Iowa Workforce Development Sign Agreement to Reduce Misclassification of Employees as Independent Contractors*, Jan. 17, 2013.

[29] *See* U.S. Dept. of Labor, Fiscal Year 2013 Budget in Brief.

[30] *See id.* at 3, 25.

[31] *See* Internal Revenue Serv., IRS and States to Share Employment Tax Examination Results, IR 2007-184, Nov. 6, 2007. *See also* IRS

to Reinvigorate its QETP Program in Effort to Crack Down Harder on Independent Contractor Misclassification, Independent Contractor Compliance, May 16, 2013 (noting that as of May 2013, 37 states have entered into MOUs with the IRS, and IRS's recent efforts to root out misclassification).

[32] *See* QETP Oversight Team, *The Questionable Employment Tax Practices Initiative Progress Report* 7-8 (Apr. 2011).

[33] *See id.* at 2.

[34] *See* Social Security Admin. & Internal Revenue Serv., IRS Begins Employment Tax Research Study, SSA/IRS Reporter (Spring 2010).

[35] *See* National Conference of State Legislatures, Employee Misclassification, www.ncsl.org/issues-research/labor/employee-misclassification-resources.aspx#state (last visited Sept. 16, 2013) (listing 14 states that have created tasks forces as of September 2013).

[36] *See* Mass. Dept. of Labor & Workforce Dev., Press Release, *Massachusetts Recovers Millions In Revenue By Reducing Employer Fraud and Worker Misclassification*, Sept. 5, 2013.

[37] Wash. State Dept. of Labor & Industries, 2012 Annual Fraud Report to the Legislature at 2.

[38] The Employee Misclassification Prevention Act was introduced in Congress in 2010 and 2011, but did not make it out of Committee. This legislation would have amended the FLSA to impose strict record-keeping requirements, and penalties of up to $5,000 for each misclassified worker. *See* Employee Misclassification Prevention Act, H.R. 3178.

[39] *See* Proposed Information Collection Request (ICR) for the Worker Classification Survey, 78 Fed. Reg. 2447, 2448 (Jan 11, 2013).

[40] *See* IC Laws Enacted (Since July 2007) and Selected Bills: Federal and State, http://independentcontractorcompliance.com/legal-resources/state-ic-laws-and-selected-bills (last visited Sept. 16, 2013).

[41] *See* National Conference of State Legislatures, Employee Misclassification, 2012 Misclassification Bills www.ncsl.org/issues-research/labor/2012-employee-misclassification-bills.aspx (last visited Sept. 16, 2013); National Conference of State Legislatures, Employee Misclassification, http://www.ncsl.org/issues-research/labor/employee-misclassification-resources.aspx (last visited Sept. 16, 2013).

[42] *See, e.g.,* 26 U.S.C. §§ 6651, 6656, and 6672.

[43] *See* Cal. Unemp. Ins. Code §§ 1112,1113.

[44] *See* Cal. Lab. Code § 226.8(a)(2)(c).

[45] *See id.* § 2753.

[46] *See* Cal. Lab. Code § 226.8(a)(3).

[47] *See* J. Mulvey, Cong. Research Serv., 7-5700, Potential Employer Penalties Under the Patient Protection and Affordable Care Act (ACA), at 3-5 (2013).

[48] *Id.* at 4-5.

[49] *See id.*

[50] *See* U.S. Gov't Accountability Office, Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention, GAO-09-717, at 3 (2009).

[51] *See, e.g.,* Internal Revenue Serv., Independent Contractor or Employee?, IRS Pub. 1779 (rev. Mar. 2013).

[52] *See* U.S. Dept. of Labor Wage & Hour Div., Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act (FLSA), *at* http://www.dol.gov/whd/regs/compliance/whdfs13.pdf (last visited Sept. 16, 2013).

[53] *See, e.g.,* Conn. Dept. of Labor, Worker/Employee Misclassification Issue in Connecticut, *at* http://www.ctdol.state.ct.us/wgwkstnd/JEC/WorkerMisClassFAQs.pdf(last visited Sept. 16, 2013) (noting that the state's Unemployment Compensation Division applies the ABC Test).

[54] *See, e.g.,* Minn. Dept. of Labor and Industry, Workers' Compensation -- Determining Independent Contractor or Employee Status, *available at* www.doli.state.mn.us/wc/indpcont.asp. (last visited Sept. 16, 2013) (noting that a 9-factor test is applied to construction workers, a 7-factor test is applied to workers in the trucking and messenger/courier industries, and a 5-factor test is applied for workers in other occupations).

[55] *See, e.g.,* "Independent Contractors and the Pennsylvania Workers' Compensation Act," *at* www.portal.state.pa.us/portal/server.pt/document/844451/independent_contractors_and_the_pa_wc_act_-_final_pdf (last visited Sept. 16, 2013).

[56] *See, e.g.,* Conn. Dept. of Labor, Worker/Employee Misclassification Issue in Connecticut, *at* http://www.ctdol.state.ct.us/wgwkstnd/JEC/WorkerMisClassFAQs.pdf (last visited Sept. 16, 2013) (noting that the state's Unemployment Compensation Division applies the "ABC Test" while its Department of Revenue applies the common law rules).

[57] At least some states have begun to address this issue. *See, e.g.,* Maine Dept. Labor, Employment Standard Defining Employee vs Independent Contractor, *at* http://www.maine.gov/labor/misclass/employment_standard.shtml (last visited Sept. 16, 2013) (noting that new law establishes uniform standard for determining worker status under workers' compensation, unemployment insurance and wage & hour coverage laws).

U.S. CHAMBER
Institute for Legal Reform

Emerging Liability Threats

Food Class Action Litigation

Courts are seeing an unprecedented surge in consumer class actions against food manufacturers. The epicenter of such lawsuits is California, where a few lawyers have taken advantage of the most plaintiff-friendly consumer laws in the nation to bring lawsuits alleging trivial violations of federal regulations and to seek millions of dollars where no reasonable consumer was deceived.

These lawyer-driven claims recycle complaints and even re-use plaintiffs to file lawsuits against manufacturers making everything from soup to nuts. Some groups use these lawsuits to pursue their own political agendas when they cannot achieve their goals by legitimate means through elected officials or regulatory agencies. Others are just looking for the next "deep pocket." While some plaintiffs' lawyers win lucrative fees, consumers are saddled with higher prices and fewer choices as a result of litigation by the self-anointed food police.

> *We identified nearly 150 food class actions filed since 2011, with more than half filed in California courts.*

A Surge of Class Action Filings

According to a recent study, the number of consumer fraud class actions brought in federal court against food and beverage companies skyrocketed from roughly 19 cases in 2008 to more than 102 in 2012.[1] Another report found that between March 2012 and March 2013 a network of plaintiffs' lawyers filed 28 food labeling class actions in the U.S. District Court for the Northern District of California.[2] The litigation today is even more widespread. We identified nearly 150 food class actions filed since 2011, with more than half filed in California courts.

Nature of the Allegations

Food-related actions generally allege that:

- a product was advertised as "all natural" when it contained synthetic or artificial ingredients, such as preservatives or high-fructose corn syrup;
- a product was advertised as "all natural" when it contained genetically modified ingredients, such as corn or soy;
- the product's advertising included unsubstantiated claims about the health benefits of the product or misled consumers into believing the product was healthier than warranted; or
- the product was marketed in some other manner that is claimed to be deceptive or misrepresents the product's content, such as a taco sold as "beef," beer that has lower alcohol content than consumers expect, Hebrew National products that are not "kosher," or "Greek" yogurt that allegedly does not qualify as "Greek" or "yogurt."

The plaintiffs' bar and some health advocates have mobilized to influence public opinion and bring lawsuits focused on the "hidden" or "disguised" sugar content of products.[3] For example, some plaintiffs' lawyers have targeted use of the term "evaporated cane juice" on labeling. Energy drink makers are also attracting the interest of the plaintiffs' bar.

Plaintiffs often allege claims for violations of unfair business acts and deceptive advertising provisions of the California business code (or other state consumer protection statutes), express and implied warranty, the Magnuson-Moss Warranty Act, and unjust enrichment. These lawsuits are trickling through the courts.

Why Is Food a Target?

Media coverage suggests that some lawyers who were active in the state attorneys general tobacco litigation, such as Don Barrett, Walter Umphrey, Dewitt Lovelace, and Stuart and Carol Nelkin, have shifted their focus to target food manufacturers,[4] though not all of the lawyers driving the litigation are former tobacco plaintiffs' lawyers. Regardless of who is involved, some legal observers note that "the latest happenings indicate food is replacing tobacco as the new regulatory and class action target."[5]

The perfect storm behind food labeling suits is a combination of:

- plaintiffs' lawyers viewing the food industry as a relatively untapped "deep pocket";
- plaintiff-friendly consumer protection laws that provide an opportunity to attempt to recover without showing an actual injury;
- a perception that certain courts are willing to entertain such claims;
- an expectation by plaintiffs' lawyers that the discovery process will uncover unflattering or inflammatory documents that can be taken out of context and exploited to demonize the industry;
- unaddressed or uncertain positions of the FDA with respect to aspects of food labeling; and
- an increasingly health-conscious public.

Some suggest that food litigation took off in California after Dannon paid $35 million in 2009 to settle a class action alleging it made false claims about the digestive benefits of Activia probiotic yogurt.[6] Others attribute the increase in litigation nationwide to a 2009 Third Circuit ruling finding that claims challenging representation of a product as "natural" are not preempted by FDA regulations.[7] Most major food manufacturers are facing one or more consumer class actions of this nature.

Plaintiffs' lawyers carefully monitor warning letters issued by the FDA and actions taken by the FTC for opportunities to sue.[8] Firms may recycle cookie-cutter allegations when bringing lawsuits related to labeling of products as "100% natural" or "organic."

Plaintiffs' Lawyer-Driven Lawsuits

Food class action litigation is largely driven by the financial interests of plaintiffs' lawyers and the regulatory agendas of certain advocacy groups, not consumers. Plaintiffs' lawyers dispute this contention, but the evidence strongly suggests otherwise.

> *"Food class action litigation is largely driven by the financial interests of plaintiffs' lawyers and the regulatory agendas of certain advocacy groups, not consumers."*

In one instance, deposition testimony revealed that the named plaintiff in a class action against Hershey was the husband of a legal secretary at a lead plaintiffs' firm for food litigation, Pratt & Associates. After his wife suggested he talk with an attorney, a lawyer recommended that he sue Hershey for representations the company had made about the health benefits of anti oxidants contained in its products. He had no desire to sue Hershey before the meeting and could not recall ever reading the labeling at issue.[9]

Some plaintiffs' firms repeatedly use the same person to file multiple class actions involving different companies and products. For example, Stember Feinstein Doyle & Payne, the Law Offices of Janet Lindner Spielberg, and the Braun Law Group named Kimberley Sethavanish as a plaintiff in separate "all natural" lawsuits against Balance Bar Co. for its energy bars, ZonePerfect Nutrition Co. for its ZonePerfect bars; and Kashi Co. for its GoLean protein, fiber bars, and shakes, TLC Granola bars, cookies, waffles, and frozen dinners. The law firms also named Skye Astiana as a plaintiff in "all natural" lawsuits against Kashi, Ben & Jerry's, Dreyer's Grand Ice Cream, and Hain Celestial Group Inc. The Law Offices of Howard Rubinstein have used Elizabeth Cox as a class representative in separate lawsuits against General Mills and Gruma alleging that vegetable and tortilla products, respectively, are not "100% natural" when they contain genetically modified ingredients. Law firms have also named Tamar Davis Larsen as a plaintiff in lawsuits against King Arthur Flour Co., Trader Joe's, and Hain Celestial Group.

Where Is the Food Litigation?

Food litigation is largely centered in California, which appears to host about 60% of these class action lawsuits. California is the epicenter of such litigation because of the state's plaintiff-friendly consumer protection laws and large population, which allow for large single-state class actions.[10] Some also place responsibility for the concentration of food class actions in California's federal courts with the Ninth Circuit, which has shown a general willingness to certify class actions[11] and a lax approach to requiring consumers to show reliance on allegedly deceptive conduct.[12]

Within California, the U.S. District Court for the Northern District of California is the focal point. Two-thirds of California's food class action litigation (and about one-third of food litigation nationwide) is filed there. "In the Northern District, the judges have shown they're going to allow cases," said

"Some plaintiffs' firms repeatedly use the same person to file multiple class actions involving different companies and products."

> *"... even judges are reportedly calling the Northern District of California "the food court."*

Morrison & Foerster partner William Stern, who represents Ben & Jerry's, Del Monte Foods, Unilever Inc., Campbell Soup Co., and other food companies in labeling suits. "It's like having a welcome mat on the front door."[13] The Bay Area is also considered to have a health-conscious jury pool, another draw for plaintiffs' lawyers. As a result, even judges are reportedly calling the Northern District of California "the food court."[14]

Observers note that most of the claims filed in the Northern District allege either technical violations of FDA labeling regulations concerning use of popular advertising phrases, such as "organic" or "low calorie," or challenge use of terms undefined by federal regulations, such as "all natural." For example, in a case brought against Con Agra with respect to its Pam cooking spray product, counsel for the defendant argued that "[i]t makes a mockery of congressional intent to have [a] rival enforcement scheme."[15] However, Judge Breyer of the Northern District of California was not persuaded, issuing an order concluding that labeling claims under state consumer protection laws are permissible so long as the lawsuit would not impose requirements beyond those provided by federal law. Because the theory underlying that California lawsuit mirrored—rather than exceeded—federal food labeling laws, the court reasoned, the suit could proceed.

Many class actions involving food products are pending in the U.S. District Courts for the Central and Southern Districts of California. Unlike the Northern District of California, observers have noted claims in other California federal district courts predominantly challenge the truthfulness of claimed health benefits.[16]

New Jersey is the second most popular jurisdiction in which to file claims, but filings do not come close to matching those of California. The statute of limitations for consumer claims in New Jersey is longer than most states, six years, which allows for larger classes.

Since plaintiffs' lawyers file duplicative class actions regarding the same product, federal courts have considered requests to consolidate similar class actions before a single judge. Although the number of multidistrict consolidations in the federal courts declined in 2012, food MDLs appear to be on the rise.[17] In June 2013, the MDL Panel established dockets for seven proposed class actions contesting the length of Subway's "footlong" sandwiches,[18] six proposed class actions accusing Anheuser-Busch of watering

down its beer,[19] and seven proposed class actions challenging representations that 5-Hour Energy products do not result in a "crash."[20] Each of these class actions is premised on allegations that the defendant deceptively marketed its food products.[21]

Status of the Food Litigation

Despite a few high-profile settlements, such as those involving Nutella and Frosted Mini-Wheats, food class actions have largely failed. Courts have dismissed claims on several grounds, such as preemption of misrepresentation claims when the label at issue complies with federal food labeling standards, and "primary jurisdiction" when a federal agency is considering the type of representation involved in the case.[22] Courts have also dismissed claims that attack an entire product line on grounds such as the plaintiffs' lack of standing to make claims involving products he or she never purchased or that the complaint fails to plausibly explain how the manufacturer's alleged conduct violates the law.

Courts have often taken a piecemeal approach. For example, they may dismiss claims involving products that the plaintiff did not purchase while allowing claims against other products to go forward. They may also dismiss misrepresentation claims where the manufacturer clearly complied with the applicable federal labeling standard, while preserving other theories. Courts have also dismissed claims where the plaintiff admits that he or she did not rely on the alleged misrepresentation when purchasing the product. For these reasons, many of the lawsuits highlighted in this section are still active, even if courts have significantly narrowed the claims.

A lawsuit against Ocean Spray was one of the cases in which the Northern District of California decided class certification. The claim alleges that several Ocean Spray juice products contain the statement "No Sugar Added" when these products contain concentrated fruit juice, which has added sugar. The suit also claims that the label on the Ruby Cherry drink states the product is free of artificial flavors, colors, or preservatives even though the product contains these ingredients. In June 2013, the court denied class certification due to the lack of typicality of claims given the range of products involved.[23] Undeterred, the plaintiffs' lawyers plan to refine their complaint and seek to certify a class.[24]

While plaintiffs were unsuccessful in the Ocean Spray suit, they have obtained certification in at least two other cases. In July 2013, the Southern District of California certified classes in litigation involving Kashi and Bear Naked products labeled "Nothing Artificial" or "100% Natural." In two separate rulings, U.S. District Judge Marilyn L. Huff allowed California consumers who purchased Bear Naked products that contained hexane-processed soy ingredients to move forward with their claim. She found that while "all natural" lacked a commonly understood or federally recognized definition, federal regulations recognize certain ingredients as synthetic.[25] Judge Huff certified a class of California consumers who had purchased products labeled as natural with these synthetic ingredients. She rejected the plaintiffs' request to certify a nationwide class to which the court would apply California law. While Judge Huff certified a relatively narrow class, her ruling will likely

encourage more "all natural" class actions in the Southern District of California and elsewhere.

The result may be different when labeling complies with a federal regulation. For example, in May 2013, the Third Circuit affirmed a district court's ruling that found that Johnson & Johnson could market its Benecol brand of butter and margarine substitutes as containing "no trans fat," even though it allegedly contained a small amount of trans fat. FDA regulations permit such labeling when the product contains less than one-half gram of trans fat per serving.[26] The Third Circuit also found that the company can claim Benecol is "proven to reduce cholesterol" because the representation is based on inclusion of plant stanol esters, a link allowed under FDA regulations.[27] However, as the "all natural" suits show, in many other cases there is no FDA regulation on point, or plaintiffs claim that the labeling does not comply with federal regulations.[28]

All food class actions are not created equal. Lawsuits that broadly challenge a food manufacturer's product line, not a specific product, as deceptively advertised are likely to face significant standing and pleading challenges. As noted, courts are likely to eventually dismiss claims alleging misrepresentations where a federal agency has issued labeling or advertising standards with which the manufacturer has clearly complied. On the other hand, claims alleging misrepresentations in labeling where the tort claim is consistent with FDA labeling standards (sometimes called "parallel claims") and lawsuits alleging that a company made specific health claims for which it lacks scientific support are most likely to gain traction.

The gray area includes claims challenging whether a product is "all natural" when it includes ingredients that some consider artificial or synthetics; when the food may include genetically modified ingredients; or when a food qualifies as "organic." In such areas, where the FDA (or, in some cases, the Federal Trade Commission or U.S. Department of Agriculture) has not provided clear guidance, there is likely to be prolonged litigation. Such litigation may proceed beyond standing, preemption, and primary jurisdiction defenses to class certification issues, such as whether class members relied on the alleged misrepresentations. As with other class action litigation, if a district court certifies a class, the case may be likely to settle given the high stakes.

Some believe that the surge of "all natural" claims may be short-lived because ingredients such as high fructose corn syrup and preservatives are clearly disclosed on the label, and consumers can make their own judgment as to whether to purchase the product.[29] In other cases, such as whether fruit Newton cookies are deceptively advertised as "made with real fruit" when they contain fruit puree rather than "actual strawberries and raspberries," a court has found that it is "ridiculous" to claim that reasonable consumers misled as to the nature of the products here.[30]

Unless federal agencies adopt regulations providing clear guidance as to use of "natural," "organic," and other such terms in labeling and advertising, or Congress takes action, such lawsuits are likely to continue. In July 2013, a federal judge in

California ordered a six-month stay in a class action challenging whether tortilla chips can be advertised as "all-natural" when they contain genetically modified corn to provide the FDA with an opportunity to decide the issue.[31] It is believed to be the first time that a court has referred the issue of Genetically Modified Organisms (GMO) to the FDA.

Targeted Companies Go on Offense

Some companies have aggressively fought the accusations made in class actions in the courts and the media. Taco Bell and Anheuser Busch engaged in a public relations campaign to protect their reputations after their products were targeted by plaintiffs' lawyers.

More recently, Monster Beverage Corporation sued San Francisco City Attorney Dennis Herrera after he threatened legal action over the company's alleged marketing to children, including claims regarding the number of Monster energy drinks adolescents can safely drink in one day. Monster's suit against San Francisco's top attorney, which a federal court has allowed to proceed, alleges Herrera's threats were unconstitutional and preempted by federal law.[32]

If the food and beverage industry gains a reputation for giving in to extortionate demands to settle claims where no one was deceived, this type of litigation is likely to continue and spread.

"If the food and beverage industry gains a reputation for giving in to extortionate demands to settle claims where no one was deceived, this type of litigation is likely to continue and spread."

Threat of State Attorneys General Action

Plaintiffs' lawyers are pitching a proposal to state attorneys general for a multistate attack on "Big Food" modeled off the state attorneys general tobacco litigation. This proposal, which is fully described in the State Attorneys General section of this report, would seek reimbursement of Medicaid expenses attributed to treatment of obesity-related conditions.

Leading Plaintiffs' Firms for Food Lawsuits

The list below highlights the plaintiffs' firms and lawyers most active in bringing food lawsuits over the past two years. It is common for several firms to jointly represent plaintiffs in such suits; thus, frequently partnering firms are listed together.

TOP PLAINTIFFS' FIRMS FOR FOOD LITIGATION	PRINCIPAL LAWYER(S)	REPRESENTATIVE LITIGATION	COURT
Ahdoot & Wolfson PC (Los Angeles, CA)	Tina Wolfson Robert Ahdoot Theodore Maya Bradley King	Quaker's Mother's Natural cereals General Mills Kix cereal Naked Juice all natural products	Cal. Super. D. N.J. C.D. Cal.
Barrett Law Group PA (Lexington, MS)	John (Don) Barrett Charles Barrett Brian Herrington David McMullan, Jr. Katherine Riley	Frito-Lay chips and other snacks ConAgra Foods products Bumble Bee products Del Monte fruit/vegetable products Dole fruit products (Barrett) Nestle chocolate, Hot/Lean Pocket, and Buitoni pasta products (Barrett)	N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal.
Nelkin & Nelkin, PC (Houston, TX)	Stuart Nelkin Carol Nelkin Jay Nelkin		
Lovelace Law Firm, PA (Miramar Beach, FL)	Dewitt Lovelace, Sr. Alex Peet		
Blood Hurst & O'Reardon LLP (San Diego, CA)	Timothy Blood Leslie Hurst Thomas O'Reardon II	General Mills Yoplait YoPlus Procter & Gamble Align probiotic Kellogg's Frosted Mini-Wheats Taco Bell Ground Beef	C.D. Cal. S.D. Ohio C.D. Cal. C.D. Cal.
Braun Law Group PC (Los Angeles, CA)	Michael Braun	Kashi all natural products Bear Naked all natural products Dreyer's Grand Ice Cream Jason Natural Products King Arthur Flour Co. products Trader Joe products Balance energy bars ZonePerfect energy bars Kashi GoLean products Ben & Jerry's ice cream Breyer's ice cream Diamond Food walnuts	S.D. Cal. S.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal.
Law Office of Janet Lindner Spielberg (Los Angeles, CA)	Janet Linder Spielberg		
Stember Feinstein Doyle & Payne LLC (Pittsburgh, PA)	Joseph Kravec, Jr. Maureen Davidson-Welling Wyatt Lison Ellen Doyle		
Bursor & Fisher PA	Scott Bursor Joseph Marchese	5 Hour Energy Dannon Activia Yogurt Cabot Greek yogurt ConAgra cooking oil	C.D. Cal./S.D. Fla. S.D.N.Y. N.D. Cal. C.D. Cal.

TOP PLAINTIFFS' FIRMS FOR FOOD LITIGATION	PRINCIPAL LAWYER(S)	REPRESENTATIVE LITIGATION	COURT
Carella Byrne Cecchi Olstein Brody & Agnello, P.C. (Roseland, NJ)	James Cecchi Lindsey Taylor	Nutella chocolate hazelnut spread Wesson cooking oils Gerber probiotic representations	D. N.J. D. N.J./C.D. Cal. D. N.J.
Center for Science in the Public Interest	Stephen Gardner Seema Rattan Amanda Howell	McDonald's Happy Meals Johnson & Johnson Splenda Nature Valley granola bars General Mill's Fruit Roll-Ups 7UP products with antioxidants Coca Cola (Glaceau) vitaminwater Kashi all natural products	Cal. Super. N.D. Cal. N.D. Cal. N.D. Cal. C.D. Cal. E.D.N.Y. S.D. Cal.
Faruqi & Faruqi LLP	Nadeem Faruqi Juan Monteverde Antonio Vozzolo	5 Hour Energy Nature Valley 100% natural products ConAgra cooking oil Kashi all natural products	C.D. Cal. D. Minn. C.D. Cal. S.D. Cal.
Flashpoint Law Inc. (San Mateo & Irvine, CA)	Shirish Gupta	Kashi all natural products Naked juice	S.D. Cal. C.D. Cal.
Golan Law Firm (Houston, TX)	Yvette Golan		
Finkelstein Thompson LLP (San Francisco, CA)	Rosemary Rivas Danielle Stoumbos	Jamba Juice Do-It-Yourself Smoothie SoBe's 0 Calories Lifewater Naked Juice all natural products One World Co. O.N.E. coconut water Kashi all natural products Bear Naked 100% natural products	N.D. Cal. C.D. Cal. C.D. Cal. C.D. Cal. S.D. Cal. S.D. Cal.
Lite DePalma Greenberg, LLC (Newark, NJ)	Allyn Lite Joseph DePalma Bruce Greenberg	Arizona ice tea General Mills Kix cereal	D. N.J. D. N.J.
Law Offices of Ronald A. Marron (San Diego, CA)	Ronald Marron Beatrice Skye Resendes Maggie Realin Margarita Salazar	Ferrero Nutella Kellogg's Froot Loops, Pop-Tarts etc. Smucker "all vegetable" products Kraft cookie and cracker products Gerber probiotic claims	S.D. Cal. C.D. Cal. C.D. Cal. C.D. Cal. C.D. Cal.
The Mills Law Firm (San Rafael, CA)	Robert Mills Joshua Boxer Corey Bennett	Anheuser-Busch Cos. beer Johnson & Johnson Splenda	N.D. Cal./D. Colo. N.D. Cal.

TOP PLAINTIFFS' FIRMS FOR FOOD LITIGATION	PRINCIPAL LAWYER(S)	REPRESENTATIVE LITIGATION	COURT
Pratt & Associates (San Jose, CA)	Ben Pierce Gore	Nature's Path organic products Ocean Spray drinks Clover Stornetta Farms yogurts Kraft/Cadbury – numerous products Frito-Lay chips ConAgra Foods products Dole fruit products Chobani Greek yogurts Nestle/Gerber baby food products Twinings tea Bigalow tea 7-Eleven potato chips Bumble Bee products Del Monte fruit/vegetable products Wholesoy yogurt products Turtle Mountain dairy-free products Nestle chocolate, Hot/Lean Pocket, and Buitoni pasta products Hain Celestial products Tetley teas	N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal. N.D. Cal.
Reese Richman LLP (New York, NY)	Michael Reese Kim Richman	Frito-Lay Tostitos and SunChips General Mill's Fruit Roll-Ups General Mills' Kix cereal 7UP products antioxidants Johnson & Johnson Benecol Dreyer's Grand Ice Cream Drumstick Coca Cola (Glaceau) vitaminwater	E.D.N.Y. N.D. Cal. Cal. Super. C.D. Cal. D. N.J. / 3d Cir. N.D. Cal. E.D.N.Y.
Law Offices of Howard W. Rubenstein (West Palm Beach, FL and San Francisco/San Diego, CA)	Benjamin Lopatin Howard Rubenstein	Super Mario Fruit Snacks Nature Valley snacks Pepperidge Farm Goldfish crackers Snapple acai mixed berry red tea Kashi cereal products One World O.N.E. coconut water Redline energy enhancers Green Giant Valley Fresh Steamers Campbell's soup varieties Gruma "all-natural" tortilla chips Nabisco Fruit Newton cookies	N.D. Cal. N.D. Cal. D. Colo. N.D. Cal. S.D. Fla. C.D. Cal. S.D. Cal. N.D. Cal. N.D. Cal./S.D. Fla. N.D. Cal. W.D. Cal.
The Weston Firm (often w/ Ronald Marron) (San Diego, CA)	Gregory Weston John Fitzgerald IV Courtland Creekmore Melanie Rae Persinger	Ferrero Nutella Gruma vegetable products Smucker "all vegetable" products Kraft cookie and cracker products Gerber probiotic claims	S.D. Cal. C.D. Cal. C.D. Cal. C.D. Cal. C.D. Cal.
Wilentz Goldman & Spitzer PA (Woodbridge, NJ)	Kevin Roddy Philip Tortoreti Daniel Lapinski	Arizona iced tea Snapple all natural beverages	N.D. Cal./D. N.J. S.D.N.Y.
Zimmerman Reed PLLP	Anne Regan Hart Robinovitch	ConAgra Hebrew National products Yoplait Greek yogurt	D. Minn. D. Minn.
Kuhlman Law PLLC	Christopher Kuhlman		
Ridout Lyon & Ottoson LLP	Christopher Ridout		

Endnotes

[1] *See* Jessica Dye, *Food Companies Confront Spike in Consumer Fraud Lawsuits*, Thomson Reuters News & Insight, June 13, 2013 (citing data compiled by food litigation attorneys at Perkins Coie).

[2] *See, e.g.*, Vanessa Blum, *Welcome to Food Court*, The Recorder, Mar. 1, 2013.

[3] *See, e.g.*, Karen Sloan, *Wielding the Law as a Weapon*, Nat'l L.J., May 20, 2013 (profiling Dr. Robert Lustig, a physician that obtained a masters degree in law for the purpose of achieving public health goals through litigation and public policy); *The Secret Sugar in Your Food and its Impact on Your Health*, WTOP, Jan. 15, 2003 (reporting that Dr. Lustig is helping file a class-action lawsuit against food manufacturers for misbranding and mislabeling related to sugar content).

[4] *See, e.g.*, Stephanie Strom, *Lawyers Take on Big Food Manufacturers Over Labeling*, N.Y. Times, Aug. 19, 2012; *see also* Sara Turner, *Litigation: What to Know About the New 'Big Food' Lawsuits*, Inside Counsel, Sept. 6, 2012 (making similar observation).

[5] John A. Vogt & Hannah R. Kim, *Food Labeling: The Next Wave of Consumer Class Actions*, Bloomberg BNA Product Safety & Liability Reporter, 41 PSLR 565, May 6, 2013 (authored by attorneys in Jones Day's Business and Tort Litigation Group).

[6] *See* Paul M. Barrett, *California's Food Court: Where Lawyers Never Go Hungry, Bloomberg* Businessweek, Aug. 22, 2013 (quoting defense attorney William Stern of Morrison & Foerster).

[7] *See* Michael D. Leffel & Nathan A. Beaver, *Trends in 'All Natural' Class Actions*, Law360, Nov. 10, 2011) (citing *Holk v. Snapple Beverage Corp.*, 575 F.3d 329 (3d Cir. 2009) (authored by defense attorneys at Foley & Lardner LLP).

[8] *See* FDA's Electronic Reading Room - Warning Letters, Subject: Food, *at* http://www.accessdata.fda.gov/scripts/warningletters/wlSearchResult.cfm?subject=Food.

[9] *See* Barrett, *supra*.

[10] A recent study identified 68 consumer class actions filed against food and beverage companies in the Northern District between April 2012 and April 2013, while California's other three federal district courts *combined* hosted about 12 to 15 claims against food makers and another 40 involving dietary supplements. *See id.*

[11] *See id.* (citing *Stearns v. Ticketmaster*, 655 F. 3d 1013 (9th Cir. 2011); *Yokoyama v. Midland Nat'l Life Ins.* Co., 594 F. 3d 1087 (9th Cir. 2010); *Wolin v. Jaguar Land Rover N. Am.*, 617 F. 3d 1168 (9th Cir. 2010)).

[12] *See id.* (citing *Chavez v. Nestle*, 2013 WL 62932 (9th Cir., Mar. 8, 2013); *Chavez v. Blue Sky Natural Beverage Co.*, 340 Fed. Appx. 359 (9th Cir. 2009)).

[13] *See, e.g.*, Blum, *supra* ("Though the merits of such cases have yet to be fully tested, judges here have rejected broad defenses to food labeling suits, spurring more litigation and setting the Northern District at the epicenter of a burgeoning legal fight over how food is labeled.").

[14] *See* Barrett, *supra*.

[15] Blum, *supra*.

[16] *See* Anthony J. Anscombe & Mary Beth Buckley, *Jury Still Out on the 'Food Court': An Examination of Food Law Class Actions and the Popularity of the Northern District of California*, 41 Prod. Safety & Liab. Rep. 798 (July 1, 2013).

[17] *See* Jessie Kokrda Kamens, *Fewer Federal MDLs Created These Days; But Consumer, Food Suit Petitions to JPML Up*, 41 Prod. Safety & Liab. Rep. 642 (May 27, 2013).

[18] *In re: Subway Footlong Sandwich Marketing & Sales Practices Litig.*, MDL No. 2439 (J.P.M.L. June 10, 2013) (transferring litigation to the Eastern District of Wisconsin).

[19] *In re: Anheuser-Busch Beer Labeling Marketing & Sales Practices Litig.*, MDL No. 2448 (J.P.M.L. June 10, 2013) (transferring litigation to the Northern District of Ohio).

[20] *In re: 5-Hour Energy Marketing & Sales Practices Litig.*, MDL No. 2438 (J.P.M.L. June 5, 2013) (transferring litigation to the Central District of California).

[21] Federal courts declined to establish MDLs for food class actions challenging Kashi's use of the term "evaporated cane juice," Kangadis Food Inc.'s labeling of olive oil, and marketing practices related to Nutella and Skinnygirl margarita mix. In these cases, the federal court did not view the number of duplicative class actions, or complexity of the issue, as warranting consolidation.

[22] *See* Cary Silverman, *I'll See You in The Agency! "Primary Jurisdiction" Gains Ground As A Defense For Regulated Industries*, Prod. Liab. L. & Strategy (May 2013).

[23] *Major v. Ocean Spray Cranberries Inc.*, No. 12-03067 (N.D. Cal., June 10, 2013). Two years earlier, the Northern District of California certified a class action alleging that walnuts were misbranded because the manufacturer exaggerated health benefits. *Zeisel v. Diamond Foods Inc.*, No. 10-01192 (N.D. Cal. June 7, 2011).

That order, however, was issued before the U.S. Supreme Court's decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), which strengthened class certification requirements. The *Zeisel* case settled in October 2012.

[24] *See* Julie A. Steinberg, *No Certification in Ocean Spray Labeling Case; Plaintiff's Claims Don't Typify Those of Class*, Prod. Safety & Liab. Rep., June 11, 2013.

[25] *See* Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, *Astiana v. Kashi Co.*, No. 3:11-CV-01967-H (S.D. Cal. July 30, 2013) (consolidation of seven class actions); Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification, *Thurston v. Bear Naked, Inc.*, Nos. 3:11-CV-02890-H, 11-CV-2985-H (S.D. Cal. July 30, 2013).

[26] *Young v. Johnson & Johnson*, Slip Op., No. 12-2475, at 6 (3d Cir. May 9, 2013) (not precedential; applying New Jersey law) (citing 21 C.F.R. § 101.9(c)(2)(ii), (f)(1)).

[27] *Id.* at 8 (citing 21 C.F.R. § 101.83(d)(3)). In so ruling, the Third Circuit joined the Seventh and Ninth Circuits in finding that food labeling claims that challenge representations expressly allowed under FDA regulations are preempted by the Nutritional Labeling and Education Act. *Carrea v. Dreyer's Grand Ice Cream, Inc.,* 475 Fed. Appx. 113 (9th Cir. 2012) (upholding dismissal of suit involving similar "no trans fat" representation on preemption grounds); *Turek v. General Mills, Inc.*, 662 F.3d 423 (7th Cir. 2011) (upholding dismissal of class action on basis that plaintiffs sought labeling regarding health benefits of fiber content of snack bars that was inconsistent with FDA regulations).

[28] *See* Greg Ryan, *3rd Circ. J&J Ruling Won't Halt Flood of Food Labeling Suits*, Law 360, May 10, 2013 (noting that there is not FDA regulation defining terms such as "wholesome" or "all natural").

[29] *See* Erin Fuchs, *'All Natural' Class Action Wave May be Short-Lived*, Law360, Oct. 19, 2011 (citing Randal M. Shaheen at Arnold & Porter LLP).

[30] *See Manchouck v. Mondelez Int'l, Inc.,* No. 13-02148 (N.D. Cal. Sept. 26, 2013). (dismissing claim on basis that "[i]t is ridiculous to say that consumers would expect snack food 'made with real fruit' to contain only 'actual strawberries or raspberries,' rather than these fruits in a form amenable to being squeezed inside a Newton.").

[31] *See* Order Granting Motion to Dismiss in Part and for Referral to the United States Food and Drug Administration, *Cox v. Gruma Corp.*, No. 4:12-cv-06502 (N.D. Cal. July 17, 2013).

[32] *See* Lance Duroni, *Monster Beverage Suit Against San Francisco Atty Survive*s, Law 360, Aug. 26, 2013 (discussing *Monster Beverage Corp. v. Herrera*, No. 13-00788 (C.D. Cal.). This case, while not a consumer class action, has the potential to affect current and future civil suits against Monster.

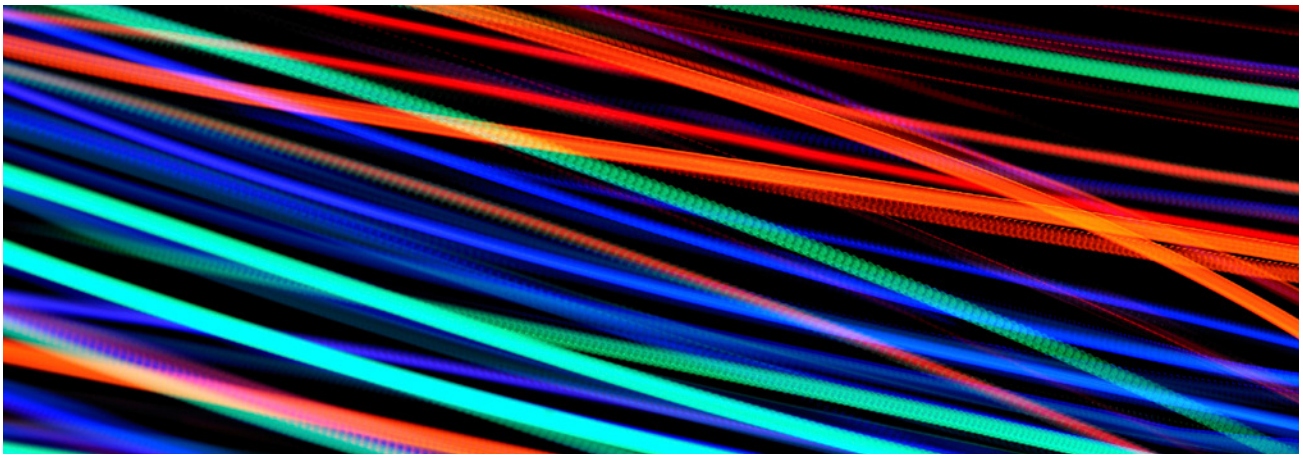
Data Privacy Litigation

When a privacy blogger revealed that Facebook tracked users even after they had logged out, the company thanked him for reporting it, and promised an immediate fix. Plaintiffs' lawyers then socked the company with a class action lawsuit seeking $15 billion in damages—just shy of what Facebook raised in its IPO.[1]

Hours after news broke that prominent technology and telecommunications companies cooperate with government monitoring of phone and Internet traffic on a vast scale, a plaintiff filed a pair of class actions against the companies and the Obama administration, seeking a combined $23 billion in damages.[2]

Within nine days of hackers stealing 6.5 million LinkedIn passwords, plaintiffs' lawyers hit the courthouse with a class action complaint seeking unspecified millions of dollars from the victimized company.[3] And, facing a damages demand that could have run into the billions of dollars, Netflix decided to settle a class action suit over its data storage practices for $9 million (including up to $2.25 million to plaintiffs' lawyers).[4]

Such is the hazardous legal landscape for companies for whom user data is a capital asset and a precious source of customer trust. Data privacy litigation is a growing industry for plaintiffs' lawyers thanks to a complex web of state and federal laws, data breaches that are growing in scale,



> *"... plaintiffs' lawyers troll news reports and public records, sometimes filing class actions within 24 hours of a data breach."*

and requirements that companies report themselves after data breaches.

These days, plaintiffs' lawyers troll news reports and public records, sometimes filing class actions within 24 hours of a data breach.[5] This practice deals a double blow to companies that typically have just been struck by hackers and may also contend with regulators enforcing data privacy laws. A recent survey of corporate counsel nationwide indicated that nearly half anticipate growth in consumer fraud and privacy class actions, versus 15% a year ago; the companies spend an average of $3.3 million defending class actions of all types.[6] To share lessons learned from the first wave of privacy-related suits, and to hone new strategies, class action lawyers recently held a conference in Philadelphia.[7]

The growing wave of privacy-related suits comes even as plaintiffs face an array of hurdles in getting their cases past the complaint stage. District courts have refused to approve class actions for failures to meet certification requirements, and the U.S. Supreme Court this year established even stricter standards.[8] Federal courts have shown skepticism about plaintiffs' claims of injury—a requirement for standing and for claims such as negligence—where, for instance, a data breach has compromised personal information but there is no evidence of actual identity theft or transaction fraud. Even so, the plaintiffs' bar is adapting to get around injury requirements. A new wave of data privacy litigation relies on laws with statutory damages, entitling plaintiffs to damages even without proof of actual injury.

A Complex Web of State and Federal Laws

No centralized or comprehensive set of laws governs data privacy[9] in the United States. Privacy rights flow from the U.S. and some state constitutions, the common law, and statutes. The United States takes a "sectoral" approach to data privacy, with each state and federal statute addressing a specific industry or type of record or problem. As a result of this patchwork system, an array of federal agencies has authority to enforce data privacy. State attorneys general also have jurisdiction under certain federal and state laws, including consumer protection statutes, to pursue companies that do not comply. Further complicating the matter, some of these state and federal laws give rise to private rights of action. For instance, 46 states presently have data security statutes requiring notification of breaches, and about a dozen of those provide a private right of action.[10] Of the roughly 20 federal statutes

that regulate privacy broadly, 13 contain private rights of action.[11]

Enter the plaintiffs' lawyers.

Favored Tactics and Data Privacy Laws of the Plaintiffs' Bar

One federal data privacy statute that has become a favorite of plaintiffs' lawyers and is rapidly evolving through case law and amendment is the Video Privacy Protection Act (VPPA).[12] The law bars (with certain exceptions) video tape service providers from knowingly disclosing personal information, such as titles rented, without the individual's written consent. This law's private right of action permits recovery of damages of $2,500 per violation regardless of whether the plaintiff sustained any actual damages, which has made it an appealing vehicle for plaintiffs' attorneys. Its seemingly archaic reference to "video tape" now reaches online streaming providers including Hulu, a court recently found.[13] Plaintiffs often assert that a website has violated this law by disclosing personal information about viewing to advertisers or other third parties. However, a new amendment to the law makes it easier for consumers to consent—including via the Internet—to a "video tape service provider" disclosing personally identifiable information.[14] That amendment was no comfort to Netflix which, as discussed above, had previously settled a class action lawsuit alleging violations of the VPPA and California privacy and unfair competition laws for $9 million.

As the Netflix litigation's kitchen-sink of federal and state claims illustrates, plaintiffs' lawyers typically include every cause of action they can argue into their complaints. It's a game of attrition, because only one claim need survive for the plaintiffs and their lawyers to cash in. An extreme example: a consolidated, multi-district litigation against Apple involving 19 putative class action lawsuits, asserting that applications available in the company's App Store disclosed personal information to the company without users' permission. After the first complaint was dismissed for lack of standing, the plaintiffs amended to allege 13 federal and state causes of action.[15] The case survived a second motion to dismiss when the court allowed two state claims to proceed.[16]

Data breaches have proven to be especially fertile ground for plaintiffs' lawyers. This reflects in part the mass-theft that hackers can perpetrate. In 2012, at least 44 million records were compromised in 621 confirmed data breaches globally.[17] In California alone, 2.5 million people experienced breaches of their Social Security numbers, credit card and bank

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> *"The federal Stored Communications Act (SCA) is a darling of the plaintiffs' bar, largely because it requires no proof of actual damages in order to obtain standing."*

accounts, and other sensitive information through 131 data breaches.[18] But the trend is also growing because plaintiffs' lawyers are increasingly savvy and aggressive in exploiting state and federal law.

The federal Stored Communications Act (SCA)[19] is a darling of the plaintiffs' bar, largely because it requires no proof of actual damages in order to obtain standing (as discussed further below). The Act requires that an Internet service provider "knowingly" disclosed personal information to a third party in order to be liable. Defendants can defeat these allegations by arguing that a hacking attack does not equate with "knowing" disclosure.[20] But plaintiffs routinely tack SCA causes of action onto their complaints in hopes they survive motions to dismiss.

As mentioned above, nearly every state has a data security breach notification statute. These statutes vary as to what events trigger notice, what exceptions to these triggers the states recognize, whom the corporate breach victim[21] must notify, and who may enforce (e.g., attorney general or individuals, or both).[22] For example, Massachusetts' notification law is triggered by either the unauthorized acquisition or misuse of personal information, or a substantial risk of identity theft or fraud; in Florida, unauthorized acquisition of personal data alone requires notification.[23] All states with breach notification statutes require that the breached company notify the individuals affected, but some also require that the state attorney general be notified.[24]

Regardless of the specifics, these statutes effectively require the breached company to set off a siren announcing its breach. It is a welcome wail to plaintiffs' lawyers, who file suit after nearly every reported data breach. Moreover, a minority of these notification statutes contain private rights of action, so plaintiffs in these states may sue not just for the breach but also for failure to notify in a timely fashion. That is what happened after a security breach in Sony's PlayStation Network exposed the personal data of some 77 million people—believed to be one of the largest data breaches in history.[25] Among several other causes of action, plaintiffs sued Sony for its alleged failure to timely disclose the breach as required by California's data security breach notification statute.[26]

Hurdles Faced by the Plaintiffs' Bar

Despite the rising tide of data privacy litigation, courts have not been very receptive to these lawsuits. Companies have defended themselves through a variety of methods, often winning dismissal of the cases in the early stages. One

fundamental problem plaintiffs face is proving they were injured by a company's data collection methods, or even by a breach. This requirement of injury trips up plaintiffs as they try to establish standing in federal court and as they seek to prove they have suffered a cognizable injury, i.e., harm for which the jurisdiction will grant relief. Class certification hurdles also doom many data privacy cases.

To show standing under Article III of the U.S. Constitution, a plaintiff must establish "an injury-in-fact" that is "concrete and particularized."[27] In recent years, skirmishes over what satisfies this requirement have been the front line in data privacy litigation. For years, the "injury-in-fact" requirement was defendants' reliable bulwark against the suits, resulting in the dismissal of the vast majority of these actions because plaintiffs could not prove concrete injury from privacy "invasions," such as the lost value of information gathered by cookies. The majority of courts continue to reject most of the injury-in-fact theories plaintiffs have advanced. For example, most courts have turned aside claims that data breaches injured plaintiffs by merely increasing the *risk* of identity theft, or elevating plaintiffs' *fear* of such theft.[28] Some commentators have read a 2013 U.S. Supreme Court decision in a government surveillance case, requiring that plaintiffs show a threatened injury is at least "certainly impending," as bolstering this view.[29]

Most courts have also rejected injuries purportedly stemming from data breaches, such as the cost of monitoring one's credit, emotional distress, increased risk of junk mail, time and effort to respond to the breach, and the lost data's intrinsic property value.[30]

But new "injury" theories have recently gained traction in some courts. One court found injury-in-fact where defendants' collection of location data took a heavy toll on the battery life of plaintiffs' smart phones.[31] To evade the "injury-in-fact" requirement entirely, plaintiffs have also recently gravitated to federal and state laws containing statutory damages provisions. These statutes set forth damage awards rather than allowing courts to calculate damages based on the degree of harm to the plaintiff. Indeed, these laws require no evidence of actual injury. Federal statutes such as the Electronic Communications Privacy Act (ECPA) (which includes the SCA and the Wiretap Act[32]) and the VPPA, along with many state laws, specify statutory damages for each violation.

In a key Ninth Circuit case, *Jewel v. NSA,* although the plaintiff asserted no specific injury from surveillance devices attached to AT&T's communications network, violations of federal surveillance statutes represented injuries-in-fact because "a concrete 'injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'"[33] In a separate case, *Edwards v. First Am. Corp.,* the same court quoted the same language in finding a plaintiff in a real estate dispute had standing.[34] The Supreme Court granted certiorari in the latter case, but then decided it had improvidently done so and dismissed the action. This withdrawal of certiorari led some commentators to theorize that the Supreme Court tacitly endorses such broad

conceptions of standing based on violations of statutes.[35]

In addition to satisfying the Article III standing requirement of injury-in-fact, plaintiffs must generally show they have suffered an injury for which the jurisdiction will grant relief, *i.e.,* a cognizable injury for which damages may be recovered. Here again courts have been skeptical about some of the same claims of "injury." As with the standing question, courts reject as a cognizable injury the increased risk of identity theft arising from a data breach.[36] But one appeals court accepted plaintiffs' claims of incurring credit monitoring expenses as an injury.[37] And several courts have found cognizable claims of injury in the loss of the intrinsic value of data.[38]

Plaintiffs seeking class action status also sometimes stumble on the requirements of certification.[39] For example, they fail to meet the predominance requirement of Federal Rule of Civil Procedure 23(b), which mandates that questions of law or fact common to class members predominate over questions affecting only individual members. A Supreme Court decision this year further tightened class-certification standards.[40] However, plaintiffs' lawyers notched a major victory by winning certification in *Harris v. comScore, Inc.*,[41] said to be the largest class ever certified in a privacy-related case, with a class that is likely to include millions of individuals. Plaintiffs allege that comScore, a data research company, violated the ECPA, the SCA, and the Computer Fraud and Abuse Act[42] by selling customer information without permission.

Increasingly, companies are avoiding the data privacy class action game altogether by revising their privacy policies to resolve disputes through binding arbitration, rather than lawsuits.[43] This approach may have received a boost with the U.S. Supreme Court's landmark decision in *AT&T Mobility v. Concepcion*,[44] which invalidated a California rule barring class-action waivers in the context of consumer contracts.

Emerging Areas of Interest in Data Privacy Litigation

MOBILE APPLICATIONS AND LOCATION PRIVACY

The ubiquity of mobile devices, and consumer and corporate appetite for location services and data, has resulted in a fast-evolving legal front. One issue is who is liable for third-party apps that collect personal data using these devices? Though Apple had disavowed any responsibility for harms arising from apps its devices ran, a

"The ubiquity of mobile devices, and consumer and corporate appetite for location services and data, has resulted in a fast-evolving legal front."

court concluded its promise to protect consumer privacy superseded that disclaimer.[45] Google faces similar privacy allegations in a class action relating to its Android operating system.[46]

Plaintiffs are also bringing actions for companies' collection of individuals' location information, allegedly without their consent. Accuweather.com and HTC America, Inc. recently settled a class action alleging they had gathered users' location data through the Accuweather.com mobile application.[47] Microsoft faces allegations that it tracked the location of Windows Phone users even when they had explicitly refused to give their permission.[48]

REGULATORS FUELING PRIVATE LITIGATION

Regulators' activities in enforcing data privacy laws can leave a rich trail for plaintiffs' lawyers. Information reported about breaches to state attorneys general can become a matter of public record, providing grist for plaintiffs. SEC guidance now recommends that publicly traded companies disclose cyber-security risks and breaches.[49] It also suggests that companies involved in legal proceedings stemming from "a cyber incident" report the litigation in their disclosures.[50] Both types of disclosures seem sure to fuel shareholder derivative suits against officers and directors for depressed share prices following alleged failures to be sufficiently vigilant against cyber-attacks.[51]

CY PRES AWARDS

Cy pres awards have been growing in popularity in settlements of data privacy class actions. In these court-approved arrangements, settling defendants make a payout—often in the millions of dollars—to non-profit activists and research groups that may have an interest in the issues underlying the litigation.[52] A court recently granted final approval to Facebook's payment of $20 million into a settlement fund to be divided largely between plaintiffs' lawyers and such groups as the Electronic Frontier Foundation, the Berkeley Center for Law and Technology at the University of California, Berkeley School of Law, and WiredSafety.org.[53] The fund settled privacy claims from the company's program that placed users' names and photos in ads without their consent.

But activists and some courts have shown growing discomfort with these settlements. Google recently proposed an $8.5 million settlement, including a *cy pres* award, to resolve privacy class actions, but Consumer Watchdog criticized the deal for not sending any money to consumers affected by Google's practices.[54]

The Ninth Circuit last year rejected arguments that a settlement resolving privacy claims over another Facebook feature was inadequate because it called for the company to make a $6.5 million *cy pres* payment.[55] The money would establish a group to educate the public about Internet privacy. But a Facebook user has asked the Supreme Court to overturn the approval of the settlement on the grounds that it sends no money to class members[56]—a frequent objection in such cases.

NEGLIGENCE AS A CAUSE OF ACTION

Some plaintiffs try to use state negligence claims to bend privacy statutes to suit their needs. For instance, the Gramm-Leach-Bliley Act (GLBA)[57], which requires financial

institutions to disclose information-sharing practices to customers and to safeguard sensitive data, does not contain a private right-of-action. Plaintiffs' lawyers have attempted to assert negligence when a financial institution has allegedly failed to meet the law's standards. In a recent case brought against Wells Fargo, plaintiffs allege that violations of GLBA amount to negligence. The Georgia Supreme Court denied these claims, finding that GLBA's "goal that financial institutions respect the privacy, security, and confidentiality of customers . . . does not provide for certain duties or the performance of or refraining from any specific acts on the part of financial institutions, nor does it articulate or imply a standard of conduct or care, ordinary or otherwise."[58]

Negligence may also be alleged by plaintiffs' lawyers in connection with privacy policy notices. Under the California Online Privacy Protection Act, all companies that do business in California must post privacy notices online.[59] The California state attorney general has made clear that this extends to mobile applications as well. Here again, while these statutes do not authorize private rights of action, plaintiffs' lawyers are likely to assert negligence when alleging that companies do not conform their practices to their own privacy notices. Companies that fail to update their privacy notices to conform to their current practices or that do not conform their practices to their privacy notices make themselves ripe targets for claims brought by the plaintiffs' bar. Privacy notices displayed on mobile devices are of particular concern due to the challenges with presenting the information on these devices in a way that is accurate, complete, and easily understood.

As in other cases, plaintiffs alleging negligence face the obstacle of proving harm, a black-letter element of any such claim. Many cases fail on this requirement.[60]

CALIFORNIA'S SONG-BEVERLY CREDIT CARD ACT

A rash of litigation emerged over the past year relating to the collection of personal information by online and offline retailers when they process credit card transactions, including ZIP code information in California. The state's Song-Beverly Credit Card Act prohibits merchants that accept credit cards from collecting "personal identification information" as a condition of accepting the card when conducting a transaction.[61] In other words, the merchant may not demand "any personal identification information upon the credit card form or

"A rash of litigation emerged over the past year relating to the collection of personal information by online and offline retailers when they process credit card transactions, including ZIP code information in California."

otherwise."[62] The Act defines "personal identification information" as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number."[63] This "address" information includes ZIP codes, the California Supreme Court held recently.[64]

Plaintiffs' lawyers use this statute liberally as a cause of action. But courts have recently exempted from Song-Beverly certain information related to merchants' fraud prevention efforts, a trend that favors companies.[65] As one example, plaintiffs brought a class action lawsuit against Chevron, alleging that the company violated the act by requiring customers to provide their ZIP codes when buying gasoline with credit cards. A state trial court held that the company requested ZIP codes solely to prevent fraud and thus, the practice fell within an exemption recognized by Song-Beverly, which an appellate court affirmed.[66]

SUITS TARGETING TELECOMMUNICATIONS COMPANIES FOR COOPERATION WITH GOVERNMENT BULK COLLECTION OF DATA

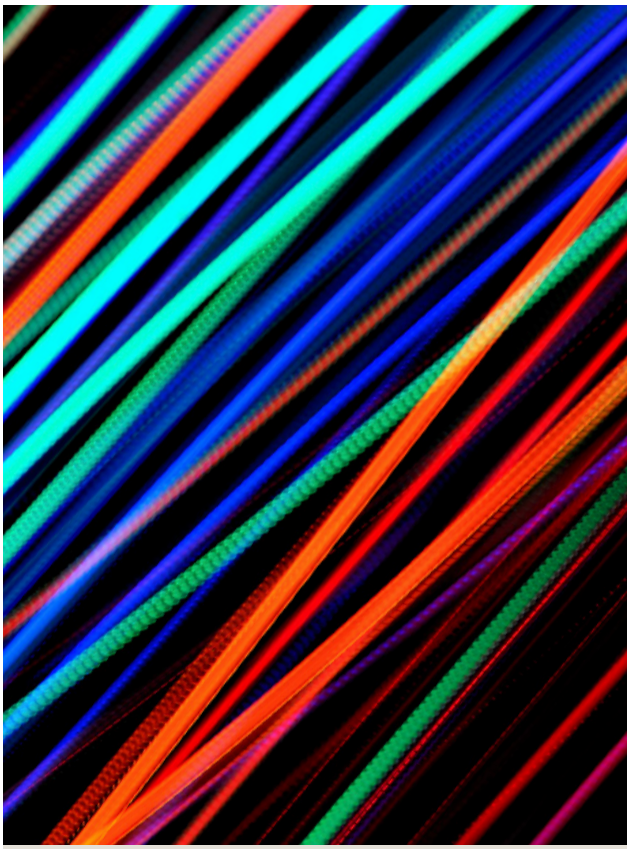
One day after news broke of the National Security Agency's vast phone surveillance program in cooperation with Verizon, a class action lawsuit named the company and the government.[67] As the disclosures unfolded in the days that followed, plaintiff Larry Klayman, an activist and former U.S. Department of Justice prosecutor, amended the complaint[69] to add new causes of action. The suit now seeks to hold liable the government and Verizon and its CEO, Lowell McAdam, for intentional infliction of emotional distress and intrusion upon seclusion, and Verizon liable for violations of the SCA (along with a raft of other alleged constitutional violations aimed solely at the government). The suit seeks $3 billion in damages and fees and claims a class of more than 100 million people. Klayman struck again with another suit for $20 billion when news broke of nine tech companies cooperating with the government.

Are these the first suits in a wave of class actions against telecommunications and Internet companies that cooperate with the government? Judging by the small number of actions in the months after the first disclosures enabled by NSA leaker Edward Snowden, the answer is no. According to one review of legal challenges to the U.S. government's intelligence-gathering programs, Klayman's suits are the only ones that named telecoms or Internet companies as defendants; the rest take aim at the government.[70]

Of course, Congress has granted a formidable defense: the Foreign Intelligence Surveillance Act (FISA) Amendments Act of 2008, which provides blanket retroactive civil immunity to telecommunications companies that assisted with the government's "terrorist surveillance program."[71] FISA already provided prospective immunity to private parties that assist in electronic surveillance, so long as they do it under the auspices of federal law.

Conclusion

Federal courts have approached data privacy lawsuits with some suspicion. But a determined and highly adaptive plaintiffs' bar is chipping away at some of defendant companies' most reliable defenses, most notably the requirement of injury to obtain standing. Any company that collects consumers' personal information must vigilantly monitor its compliance with ever-evolving state and federal privacy laws and keep close tabs on plaintiffs' lawyers' efforts to exploit them.



"... a determined and highly adaptive plaintiffs' bar is chipping away at some of defendant companies' most reliable defenses, most notably the requirement of injury to obtain standing."

Endnotes

[1] Corrected First Amended Complaint, *In re Facebook, Inc. Internet Tracking Litig.*, No. 5:12-MD-02314-EJD, Dkt. No. 35 (N.D. Cal. May 23, 2012).

[2] First Amended Complaint, *Klayman v. Obama*, No. 1:13-cv-00851-RJL, Dkt. No. 4 (D.D.C. June 9, 2013); Complaint, *Klayman v. Obama*, No. 1:13-cv-00881-RJL, Dkt. No. 1 (D.D.C. June 12, 2013).

[3] Complaint at 3, *In re LinkedIn User Privacy Litig.*, No. 5:12-CV-03088-EJD, Dkt. No. 1 (N.D. Cal. June 15, 2012).

[4] Settlement agreement at 12, *In re Netflix Privacy Litigation*, No. 5:11-CV-379-EJD, Dkt. No. 76-1 (N.D. Cal. May 25, 2012).

[5] *See* Antonio Regalado, *Why Privacy Is Big Business for Trial Lawyers*, MIT Technology Review, June 29, 2012, *at* http://www.technologyreview.com/news/428052/why-privacy-is-big-business-for-trial-lawyers/; Eric A. Packel, *If the Shoe Fits . . . File a Class Action? Zappos Data Breach Leads to Quick Lawsuit*, Data Breach Legal Watch, Jan. 21, 2012.

[6] *See* Ashley Post, *GCs Predict Increase in Consumer Fraud and Privacy Class Actions*, Inside Counsel, May 3, 2013 *at* http://www.insidecounsel.com/2013/05/03/gcs-predict-increase-in-consumer-fraud-and-privacy.

[7] *See* Jason Weinstein, *Lessons From Recent Trends In Privacy Class Actions,* Law360, Aug. 12, 2013.

[8] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[9] We use the phrase "data privacy" to refer to individuals' right to control personal information arising from their use of technology, and companies' collection, use and release of this data.

[10] Daniel J. Solove & Paul M. Schwartz, *Privacy Law Fundamentals 2013*, at 172-74 (Int'l Assoc. of Privacy Prof'Is. 2013). Solove, a professor at the George Washington University Law School, and Schwartz, a professor at the University of California, Berkeley School of Law, are currently co-reporters on the Restatement, Third, Information Privacy Principles for the American Law Institute. On August 19, 2013, they completed the first stage of this process, Preliminary Draft No. 1.

[11] Solove and Schwartz, *Privacy Law Fundamentals*, at 150.

[12] 18 U.S.C § 2710.

[13] *In re Hulu Privacy Litig.*, No. 3:11-CV-03764-LB, Dkt. No. 68, 2012 U.S. Dist. LEXIS 112916 (N.D. Cal. Aug. 10, 2012).

[14] 18 U.S.C. § 2710(b)(2)(B).

[15] First Amended Consolidated Complaint, *In re iPhone Application Litig.*, No. 5:11-MD-02250, Dkt. No. 25 (N.D. Cal. Nov. 22, 2011).

[16] *In re iPhone Application Litig.,*844 F. Supp. 2d 1040 (N.D. Cal. 2012). *See also* Tanya L. Forsheit & Kristen J. Mathews*, Proskauer on Privacy,* § 18:4.2 at 29-31 (Practicing Law Institute 2013).

[17] *2013 Verizon Data Breach Investigations Report*, at 11, http://www.verizonenterprise.com/DBIR/2013/.

[18] *See Attorney General Kamala D. Harris Releases Report on Data Breaches; 2.5 Million Californians Had Personal Information Compromised.*

[19] 18 U.S.C. §§ 2701–2712.

[20] *See* Gerry D. Silver, *Tips For Defending Against Data Breach Class Actions*, Law 360, March 8, 2013.

[21] We use the term "victim" because 92% of breaches are perpetrated by external actors, and just 2% are attributed to company error. *See 2013 Verizon Data Breach Investigations Report* at 20, 41.

[22] Solove & Schwartz, *Privacy Law Fundamentals 2013,* at 172-74.

[23] *Id.*

[24] *Id.*

[25] *See* Taylor Armerding, *The 15 Worst Data Security Breaches of the 21st Century*, CSOonline.com, Feb. 15, 2012.

[26] Cal. Civ. Code §§ 1798.29, 1798.82, 1798.84.

[27] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

[28] *See, e.g., Reilly v. Ceridian Corp.*, 664 F.3d 38, 43 (3d Cir. 2011) ("The present test is actuality, not hypothetical speculations concerning the possibility of future injury."); *Katz v. Pershing, LLC*, 672 F.3d 64, 78 (1st Cir. 2012) (plaintiff's purchase of credit-monitoring and insurance guard against "a purely theoretical possibility [that] simply does not rise to the level of a reasonably impending threat.")

[29] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) ("[R]espondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending.")

[30] Solove & Schwartz, *Privacy Law Fundamentals 2013* at 180-81.

[31] *Goodman v. HTC Am., Inc.*, No. 2:11-CV-01793-MJP, Dkt. No. 63, 2012 U.S. Dist. LEXIS 88496, at *19, (W.D. Wash. June 26, 2012).

[32] 18 U.S.C. § 2520.

[33] *Jewel v. NSA*, 673 F.3d 902, 908 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992).

[34] *Edwards v. First Am. Corp.*, 610 F.3d 514, 515-17 (9th Cir. 2010).

[35] *See* David F. McDowell, D. Reed Freeman Jr. & Jacob M. Harper, *Privacy Class Actions: Current Trends and New Frontiers in 2013*, Bloomberg Law (2013).

[36] Solove & Schwartz, *Privacy Law Fundamentals 2013* at 180-81.

[37] *Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 162-67 (1st Cir. 2011).

[38] *See, e.g., Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 864-66 (N.D. Cal. 2011).

[39] *See* David M. Governo & Corey M. Dennis, *Class Certification: A Critical Battleground in Privacy and Data Breach Class Actions*, The Privacy Advisor, Aug. 22, 2013.

[40] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[41] No. 1:11-CV-05807, Dkt. No. 186, 2013 U.S. Dist. LEXIS 47399 (N.D. Ill. Apr. 2, 2013).

[42] 18 U.S.C. § 1030.

[43] See Eddie Makuch, *Xbox One Terms of Service Prevent Class-Action Suits*, Gamespot, June 12, 2013.

[44] 131 S. Ct. 1740 (2011).

[45] *In re iPhone Application Litig.,* 844 F. Supp. 2d 1040 (N.D. Cal. 2012).

[46] Complaint at 2, *In re Google Android Consumer Privacy Litig.,* 3:11-MD-02264-JSW, Dkt. No. 21 (N.D. Cal. Nov. 28, 2011).

[47] Third Amended Supplemented Complaint at 2, *Goodman v. HTC Am., Inc.*, No. 2:11-CV-01793-MJP, Dkt. No. 64 (W.D. Wash. July 10, 2012).

[48] Third Amended Complaint at 1-2, *Cousineau v. Microsoft Corp.*, No. 11-CV-01438, Dkt. No. 64 (W.D. Wash. Apr. 9, 2013).

[49] *Securities and Exchange Commission Division of Corporation Finance CF Disclosure Guidance: Topic No. 2*, *Cybersecurity* (Oct. 13, 2011), http://www.sec.gov/divisions/corpfin/guidance/cfguidance-topic2.htm.

[50] *Id.*; Jason Weinstein, *supra.*

[51] *Id.*

[52] *See* Plaintiffs' Motion for Preliminary Approval of Class Action Settlement at 22-23, *In re Netflix Privacy Litig.*, No. 5:11-CV-379-EJD, Dkt. No. 76 (N.D. Cal. May 25, 2012) (defending *cy pres* arrangements and offering illustrative list of cases where they have been employed).

[53] Order Granting Motion for Final Approval of Settlement and Order Granting In Part Motion for Attorney Fees, Costs, and Incentive Awards, *Fraley v. Facebook, Inc.* No. 3:11-CV-01726-RS, Dkt. Nos. 359, 360 (N.D. Cal. Aug. 26, 2013).

[54] *See* Allison Grande, *Google's $8.5M Privacy Deal Cracks Puzzling Injury Issues*, Law360, Aug. 26, 2013.

[55] *Id.*

[56] *See* Allison Grande, *Facebook User Pushes High Court To Nix 'Beacon' Pact*, Law360, July 30, 2013..

[57] 15 U.S.C. §§ 6801-6809.

[58] *Wells Fargo Bank, N.A. v. Jenkins*, 293 Ga. 162, 164 (2013).

[59] Cal. Bus. & Prof. Code §§22575-22579.

[60] *See, e.g., Bell v. Blizzard Entm't, Inc.*, No. 12-CV-09475, Dkt. No. 54 (C.D. Cal. Jul. 11, 2013) (dismissing contract and negligence claims upon finding increased risk of identity theft resulting from a breach was not a cognizable harm).

[61] Cal. Civ. Code §§ 1747-1748.95.

[62] *Id.*

[63] *Id.*

[64] *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (2011).

[65] *See* David Cohen, *Chevron Ruling Reflects Trend On Song-Beverly's Reach*, Law360, June 27, 2013.

[66] *Flores v. Chevron U.S.A. Inc.*, 217 Cal. App. 4th 337 (2013).

[67] Complaint, *Klayman v. Obama*, No. 13-cv-00851 (D.D.C., filed June 6, 2013).

[68] Amended Complaint, *Klayman v. Obama*, at Docket No. 4 (filed June 9, 2013).

[69] Kara Brandeisky, *NSA Surveillance Lawsuit Tracker*, ProPublica, updated Aug. 26, 2013, *at* http://projects.propublica.org/graphics/surveillance-suits.

[70] Pub. L. No. 110-261 (codified in scattered sections of 50 U.S.C.).

Innovator Liability

Deep pocket justice has taken a new and dangerous turn in the past five years, as three courts broke with scores of rulings subjecting American innovators to liability for copy-cat products made and sold entirely by their competitors. These courts found that a manufacturer of a brand-name drug can be subject to liability even when a plaintiff fully acknowledges that he or she only took a generic form of that drug made by someone else. Such rulings denigrate a core principle of product liability law: a business is subject to liability for injuries caused by defects only in their own products, not in products they did not make or sell. The Alabama Supreme Court's decision to grant rehearing of the most recent of these decisions could place product liability law back on the right track.

Lawsuits targeting brand-name drug manufacturers for the injuries of those who took only generic drugs first surfaced in the early 1990s. More than 70 courts, including four federal courts of appeal, have rejected this unwise expansion of liability.[1] As the overwhelming majority of courts considering this issue have made clear, a manufacturer cannot be subject to liability for a product it did not make or sell because it does not owe a legal duty to the people who buy another company's products.

As courts have explained, the same rationale applies to someone who buys a foreign knock-off of an American consumer product. If he or she is hurt by the knock-off and wants to sue, claiming that the product was faultily designed or did not come with adequate warnings, she cannot sue the American innovator, even if the knock-off comes with the exact same design and warnings as the American product.

In 2008, a California mid-level appellate court hearing a prescription drugs case became the first court in the country to break with traditional tort law and approve innovator liability theories.[2] A federal trial court in Vermont followed in 2010,[3] and earlier this year, the Alabama Supreme Court became the first state high court to go in this direction, though that court has said it will reconsider its ruling.[4]

The rationale of the Alabama court is of significant concern: it admittedly favored deep pocket litigation over fundamental principles of tort law.

As motivation for its decision to allow innovator liability, the Alabama Supreme Court pointed to a 2011 ruling by the U.S. Supreme Court in *PLIVA, Inc. v. Mensing*.[5] In that case, the Supreme Court held that federal law does not permit people who take generic drugs to sue the manufacturers of those drugs for failing to warn them of risks associated with the drug. The Court said that Federal Drug Administration (FDA) regulations require generic drug manufacturers to copy the labeling of the brand-name version of that drug and does not allow them to change that labeling, even if a jury were to find those warnings inadequate. The Supreme Court held that because the generic drug manufacturers are powerless to address any inadequacy in the warnings, they cannot be subject to liability for failure to warn.

Mensing dealt only with U.S. constitutional issues regarding preemption of state tort suits; it did not have anything to do with state tort law. Yet, the Alabama court saw it as a game changer as to what its state tort law ought to be. It joined courts in California and Vermont in allowing innovator liability by altering state tort law to give users of generic drugs somebody to sue: the company that developed the drug and educated doctors about the drug years earlier.

The specific legal theories that all three courts used for allowing innovator liability stretched tort law far beyond its intended bounds. As a threshold matter, they generally recognized that the claim could not be brought under traditional products liability law, which requires a plaintiff to sue the manufacturer of the product that injured them and prove that the product was defective in design, manufacture, or warning. In many states, this is the only body of law that applies to product-based injuries, and the lawsuit would end here. There would be no liability for someone else’s product.

In other states, including California, Vermont, and Alabama, a product manufacturer can also be subject to liability under other tort theories. Most courts in these states have held that, even under these other torts, a manufacturer of a product, including prescription drugs, does not have a tort law duty to users of another's product. The relationship between the parties is too remote, and there are a number of public policy concerns with requiring brand-name drug manufacturers to assume the liability costs for the entire industry.

These courts have explained that although prescriptions may be filled by available generic versions of a drug, this is not a result of the brand-name manufacturers' conduct but of laws over which they have no control. In 1984, Congress created a law to encourage the availability of generic drugs by allowing companies to produce bioequivalent versions of a branded drug after the branded drug's patent expires. Also, nearly every state now has laws encouraging or requiring pharmacists to fill certain prescriptions with available generics. The result is that 90% of all prescriptions written after a brand-name drug's patent has expired are filled with a generic version of that drug.

Courts have said that saddling a company owning less than 10% of the market share with 100% of the liability exposure is unsustainable. It will lead to higher prices for brand-name drugs during periods of exclusivity and force many brand-name drugs from the market after a drug loses patent protection in an effort to reduce liability exposure, regardless of how beneficial the brand-name drug is to certain patients.

This indefinite and unpredictable liability may also lead innovating companies, which spend an average of $1.2 billion and 10 to 15 years designing and obtaining approval for a new life-saving or life-improving drug, to reassess whether the rising liability costs outweigh the benefit for certain types of drugs. For example, some drugs may need to be powerful to deal with the ailments for which they are prescribed, but may also have the potential for severe side effects. If these high-risk drugs are not expected to generate sufficient proceeds to cover future liability for their generic counterparts, the companies may choose not to bring them to market at all.

In an effort to set aside the multitude of rulings against innovator liability, the three courts in question focused their inquiry solely on the issue of whether the plaintiffs' harms were foreseeable to the brand-name manufacturers. If a plaintiff's injury was a foreseeable result of the company's conduct, then the manufacturer's duty of care would extend to the user of the generic versions of their drugs.

The courts said that it is foreseeable to brand-name manufacturers that their warnings, as well as statements they make about their drugs, could result in patients taking and being harmed by generic versions of their drugs. It does not matter if these warnings and statements were made during the brand-name drug's period of exclusivity, which might be years before the plaintiff ended up taking generic versions of the drug. In some cases, they said, a plaintiff's prescribing physician learned about the drug when it was

> *... the role of tort law is not to find deep pockets for paying claims, but to require someone to properly compensate a person they have wrongfully injured.*

marketed and sold by the brand-name manufacturer and will write the name of the brand-name drug on the prescription. The switch to an available generic is made only at the pharmacy.

The problem with this theory is that foreseeability alone does not create a duty of care in tort law. As other courts have appreciated, the creation of tort law duties includes several other factors, including remoteness of the conduct to the harm, the relationship of the parties, and important public policy concerns. Foreseeability does not go on forever, and there is no tort law duty to the world.

In short, the role of tort law is not to find deep pockets for paying claims, but to require someone to properly compensate a person they have *wrongfully* injured. The innovators could not have wrongfully injured any of the plaintiffs in these cases because the plaintiffs did not use their products.

This is true in pharmaceutical cases just as it is in other areas of the law. While the Alabama Supreme Court suggested that innovator liability theories could be limited to the pharmaceutical industry, courts that hear cases against companies in other industries may find that there is nothing unique to the pharmaceutical industry in considering foreseeability. Indeed, if history is any guide, allowing one company to be blamed for similar products made by another is likely to expand to other products and situations.

When the Alabama Supreme Court reconsiders this issue, it should reverse its earlier ruling as being far outside the mainstream.[6] Several federal courts of appeal along with dozens of federal district and state trial courts have rejected

> *Several federal courts of appeal along with dozens of federal district and state trial courts have rejected innovator liability.*

innovator liability. As they have explained, brand-name drug manufacturers, in their materials and labeling, are referencing the safety and efficacy of only their own drugs, not the generic forms of their drugs.

The Supreme Court appreciated in *Mensing* that its holding that federal drug law preempts state failure to warn claims for users of generic drugs would take away the right of those plaintiffs to sue. It knew the impact of its ruling on these plaintiffs. The Court stated clearly that if this result was unacceptable, it would be up to Congress and the FDA, acting pursuant to congressional authority, to make changes that would fix this situation in the context of fashioning the best healthcare policy for the country.

Discussions along these lines are already taking place in Congress and the FDA, ranging from the creation of a decentralized system where each drug manufacturer has responsibility over its own labeling, to an FDA-centric system where the FDA makes all labeling decisions for a drug once its patent expires and it becomes available from multiple sources. Regardless of which path Congress chooses, even if it chooses to do nothing at all, state courts should not alter well-established tort law in search for deep pockets to sue.

Endnotes

[1] *See Demahy v. Schwarz Pharma, Inc.,* 702 F.3d 177 (5th Cir. 2012) (applying Louisiana law); *Smith v. Wyeth, Inc.*, 657 F.3d. 420, 422 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 2103 (2012) (applying Kentucky law); *Mensing v. Wyeth, Inc.*, 588 F.3d 603, 613 (8th Cir. 2009) (applying Minnesota law), *aff'd in pertinent part and vacated in part on other grounds*, 658 F.3d 867 (8th Cir. 2011); *Foster v. Am. Home Prods. Corp.*, 29 F.3d 165, 167-68 (4th Cir. 1994) (applying Maryland law).

[2] *Conte v. Wyeth, Inc.*, 85 Cal. Rptr. 3d 299 (Cal. Ct. App. 2008).

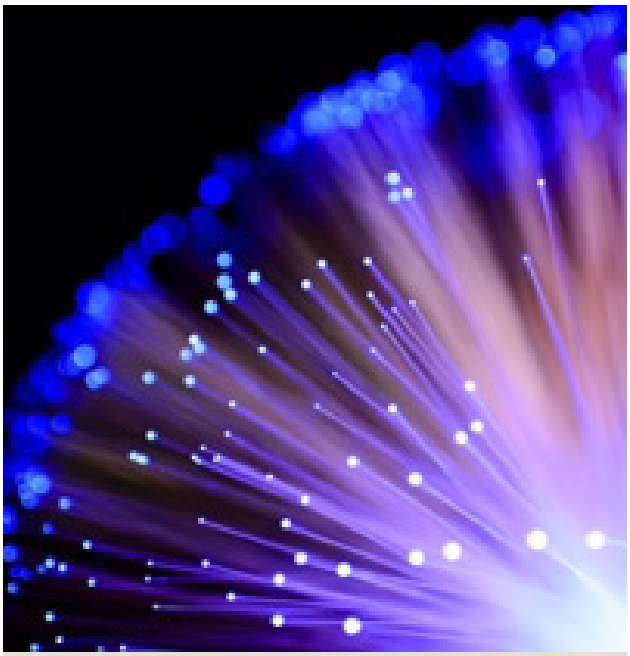
[3] *Kellogg v. Wyeth*, 762 F. Supp. 2d 694 (D. Vt. 2010).

[4] *Wyeth, Inc. v Weeks*, No. 1101397, 2013 WL 135753 (Ala. Jan. 11, 2013).

[5] 131 S. Ct. 2567 (2011).

[6] *See generally* Victor E. Schwartz, Phil Goldberg & Cary Silverman, *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).

Patent Litigation



> *"According to a recent study, the number of patent lawsuits filed in the United States spiked by almost 30% in 2012, to more than 5,000 cases."*

Over the past few years, there has been a surge in patent enforcement actions against American and multinational businesses. According to a recent study, the number of patent lawsuits filed in the United States spiked by almost 30% in 2012, to more than 5,000 cases.[1] The number of defendants in patent infringement lawsuits has also risen substantially.[2] Notably, a significant percentage of these cases are filed by so-called "trolls"—sometimes referred to more broadly as patent assertion entities (PAEs) or non-practicing entities (NPEs)—entities that own and assert patents, but generally have no real products or services that they sell or otherwise provide.

> *The typical patent troll's entire business model is to assert highly speculative patent infringement claims solely for purposes of forcing settlement, often at a cost less than the target company would incur in defending the lawsuit.*

Unlike a university, research lab, or marketplace competitor, patent trolls typically draw from an arsenal of questionable patents, abusive assertion tactics, and settlement strategies that extract nuisance value settlements from companies across multiple industries.[3] Concern among the business community is intensifying as the frequency of abusive patent assertion and lawsuits has continued to rise, imposing significant litigation and settlement costs on companies that actually research, develop, and provide products and services to Americans.

What Is Abusive Patent Litigation?

The typical patent troll's entire business model is to assert highly speculative patent infringement claims solely for purposes of forcing settlement, often at a cost less than the target company would incur in defending the lawsuit. They send demand letters requiring immediate settlement payments, assert patents long after the market for the patented inventions has matured and the inventions have become widely used in the industry, and seek broad and lengthy discovery to drive up litigation costs for the defendant.

For example, some trolls will deliver hundreds or even thousands of demand letters to American businesses with little regard for the merits of their claims.[4] The demand letters often target the least patent-savvy defendants who are unequipped to defend themselves against such claims. Also, they typically provide vague details concerning the asserted patent(s), the infringement allegations, and the entity seeking compensation for the alleged infringement. Under this "patent shakedown," the troll demands an immediate, lump sum license—which is often significantly less than the cost of hiring an attorney—to drop its claims. Court action is often threatened if payment is not received.

Other trolls will initiate patent infringement lawsuits against large numbers of customers or end-users of patented products, rather than the original manufacturer or provider of the allegedly infringing product. Again, their aim is to leverage the cost of defense and apply pressure to settle. They try to collect small settlements that when multiplied by the number of end users can far exceed the amount that could have been recovered from the original manufacturer.

What many trolls have in common is that they often assert either vague or overbroad patents, particularly those that implicate software or Internet-related technologies (Wi-Fi networks, networked photocopiers, or software applications)—e.g., “basic ideas, such as sending a photocopy to email, podcasting aggregated news articles, offering free Wi-Fi in your shop, or using a shopping cart on your Web site.”[5] Software patents now account for 89% of patent litigation.[6] Rather than researching and developing the patented technology, patent trolls often purchase or license patents from an inventor or patent-holding company before initiating a lawsuit.

This type of abusive conduct may have long existed in personal injury suits and class actions but is new to patent litigation, which is particularly susceptible to those who would abuse the system. Courts generally view patents as especially complex to construe, thus permitting extensive document discovery, depositions, and expert testimony. Due to the inherent nature of patent infringement claims, it may be more difficult to establish early in the case that a claim is meritless, or worse yet, vexatious.

Often the mere threat of this type of patent litigation induces many companies to settle out of court to avoid the risk and cost of litigation, which has been estimated to range between $650,000 and $5 million per case.[7]

Where Are Abusive Patent Cases Being Filed?

Patent trolls often target companies that sell products or services nationwide, which gives them wide latitude to select the forum for these suits. They naturally choose courts perceived to be favorable to obtaining a good result, such as those with historically short times to trial. Expeditious proceedings are valuable to patent trolls and their contingency fee lawyers because they reduce legal fees and shorten the time to settlement or judgment—in other words, pay day.

From 2000 to 2011, about one-third of patent infringement lawsuits were filed in three federal district courts: the Eastern District of Texas, the District of Delaware, and the Central District of California.[8] The Eastern District of Texas may be the most popular venue choice for patent trolls because the court moves cases to trial quickly and its juries are perceived to be plaintiff-friendly.[9] Despite several recent verdicts in favor of defendants in that forum,[10] the relatively infrequent summary judgment dispositions in the Eastern District of Texas also make this venue a popular one for patent trolls.

Who Brings the Litigation?

The New York Times recently profiled two companies that some regard as among the most aggressive patent trolls, IPNav and Intellectual Ventures.

IPNav, led by Erich Spangenberg, has sued 1,638 businesses for patent infringement in the past five years, more than any other entity in the patent field.[11] IPNav's website proclaims that it has monetized over $610 million in intellectual property (IP) assets, "[t]urn[ing] idle patents into cash cows."[12] The company has expanded from five to eighty employees and opened offices in Dallas, Shanghai, Tel Aviv, and Dublin. It currently manages 10,000 patents. A company that hires IPNav to monetize its patents may keep about 40% of any settlement revenue and verdicts, plus a fee to have exclusive rights to monetize the patent for a fixed time, while IPNav and the lawyers it hires share 60% of any recovery.[13]

Intellectual Ventures was co-founded by Nathan Myhrvold, a former chief technology officer of Microsoft, and Peter N. Detkin, who was once in charge of patents for Intel. The company has bought 70,000 patents and related assets in the last 13 years. Intellectual Ventures has filed at least 14 lawsuits this year, eight of which target banks for allegedly infringing patents related to data encryption techniques, firewall protection systems, or digital imaging. Intellectual Ventures claims to have generated $3 billion in revenue since its founding.[14]

A recent report on patent litigation by the Manhattan Institute crowns one of the lawyers who represents PAEs, Raymond Niro of Niro, Haller & Niro, the "Original King of the Patent Trolls."[15] Mr. Niro has focused on patent litigation since the late 1990s. Among his latest activities: he sent about 8,000 letters to hotels, coffee shops, and restaurants who provided Wi-Fi to customers, threatening them with litigation if they did not pay licensing fees of $2,500 to $3,000 for associated technology.[16] Mr. Niro claims $800 million in patent suit recoveries.[17]

Are There Any Solutions?

Abusive patent litigation has gained the attention of all three branches of the U.S. government, and each is working to develop solutions to curb the problem. Perhaps most significantly, Congress passed the America Invents Act of 2011 (AIA), which included provisions designed to lessen the opportunity for abusive patent litigation conduct. Specifically, it created several new procedures to allow members of the public, including those facing a patent infringement lawsuit, to quickly and

> *"... about 8,000 letters [were sent] to hotels, coffee shops, and restaurants who provided Wi-Fi to customers, threatening them with litigation if they did not pay licensing fees of $2,500 to $3,000 for associated technology."*

> *While the Congressional debates continue, states are beginning to use their own consumer protection laws as new weapons against abusive patent litigation.*

inexpensively challenge a patent's validity before the U.S. Patent and Trademark Office (PTO). The AIA also eliminated private party false marking suits, mandated that plaintiffs could no longer join unrelated parties in a lawsuit, and ordered a government-sponsored study of the effects of patent litigation by non-practicing entities.[18] But some argue that the reforms did not go far enough to curb the aggressive litigation tactics discussed above and that patent trolls continue to drive settlements despite the specious nature of their claims.[19]

Several members of Congress have proposed a handful of new bills designed to deter abusive patent litigation through heightened pleading standards, cost-shifting, and bonding requirements.[20] The general aim of anti-IP litigation abuse legislation is to improve the quality of issued patents, reduce patent litigation costs, and strengthen litigation procedures for earlier detection and deterrence of frivolous cases. Both House Judiciary Committee Chairman Bob Goodlatte and Senate Judiciary Committee Chairman Patrick Leahy have shown interest in addressing patent litigation abuse.[21] President Obama has also spoken out against frivolous patent litigation and released a package of Executive actions and legislative recommendations.[22] The judicial branch handed down important decisions to deter abusive litigation practices by awarding sanctions against plaintiffs that assert objectively unreasonable positions during litigation. Perhaps most notably, some states have taken action against patent trolls by enforcing their consumer protection laws.

It is also important to note that others argue that the various proposed reforms go too far in protecting patent defendants at the expense of legitimate patent plaintiffs. The challenge is to find solutions that stop litigation prospecting, but not hurt traditional patent holders.

State Attorneys General Action

While the Congressional debates continue, states are beginning to use their own consumer protection laws as new weapons against abusive patent litigation.

State attorneys general in Vermont, Minnesota, and Nebraska have taken action against MPHJ Technology Investments, LLC (MPHJ), which is alleged to have sent threatening letters to many small businesses demanding that they pay licensing fees of $1,000 to $1,200 per employee or face a lawsuit. MPHJ accused

the businesses of infringing patents by using basic office photocopiers to attach scanned documents to e-mails.

Vermont Attorney General William Sorrell was first to bring an action against MPHJ in May, claiming the entity's conduct violated the state's unfair and deceptive business practices law.[23] He noted that at least two of the businesses targeted by MPHJ are non-profits that assist developmentally disabled Vermonters. Soon after AG Sorrell took action against MPHJ, Vermont Governor Peter Shumlin signed the Bad Faith Assertions of Patent Infringement Act, the first state law to specifically address patent trolling.[24]

Two months later, Nebraska Attorney General Jon Bruning ordered MPHJ to stop sending demand letters to local businesses while the state investigates the entity's conduct. "'Patent trolls' make egregious threats with little or no valid legal purpose to gain fast money," Bruning said in a statement.[25]

Minnesota Attorney General Lori Swanson launched a similar investigation,[26] which, in August, led to the first settlement in which a patent troll agreed to stop targeting businesses in a state.[27] Under its terms, MPHJ may not send demand letters to anyone in Minnesota without giving the Attorney General's office two months' notice and obtaining its consent.[28] As AG Swanson observed, "While this settlement and court order may affect one patent troller, the practice of 'patent trolling' will continue until Congress enacts laws to prohibit such activity."

Conclusion

Most stakeholders agree that patent troll "extortionist demands" should not become an ordinary cost of doing business in this country. Americans value both a strong patent system that promotes innovation and a civil litigation system that is protected from abusive conduct. The challenge is curtailing the abusive litigation practices in a way that does not harm legitimate patent enforcement.

"Americans value both a strong patent system that promotes innovation and a civil litigation system that is protected from abusive conduct."

Endnotes

[1] PricewaterhouseCoopers LLP, 2013 Patent Litigation Study: Big Cases Make Headlines, While Patent Cases Proliferate 3 (June 2013) ("2013 PWC Report"); Government Accountability Office, Intellectual Property: Assessing Factors That Affect Patent Infringement Litigation Could Help Improve Patent Quality 14 (Aug. 2013) ("GAO Report").

[2] National Economic Council and the Council of Economic Advisers, *Patent Assertion and U.S. Innovation* 1 (June 2013) ("White House Report").

[3] Although the calculations of the number of infringement cases filed by patent trolls have varied (GAO Report at 17; *id.* at 17 n.36 (ranging from approximately 19 to 69 percent of cases filed)), abusive patent assertion activities, from demand through settlement or trial, have had an undeniable, negative impact on American companies.

[4] *See, e.g., Cisco Sys., Inc. v. Innovatio IP Ventures, LLC,* No. 1:11-cv-0939 (N.D. Ill. filed Dec. 28, 2011).

[5] U.S. House of Representatives, Committee on the Judiciary, *Statement of Judiciary Committee Chairman Bob Goodlatte, Subcommittee on Courts, Intellectual Property and the Internet Hearing on Abusive Patent Litigation: The Impact on American Innovation & Jobs, and Potential Solutions*, Mar. 14, 2013.

[6] GAO Report at 21.

[7] GAO Report at 26 (citing American Intellectual Property Law Association (AIPLA), *Report of the Economic Survey 2011* (2012), *available at* http://www.aipla.org)).

[8] GAO Report at 23.

[9] GAO Report at 25.

[10] *See, e.g., Calypso Wireless v. T-Mobile USA*, No. 2:08-cv-441, 2013 WL 684733 (E.D. Tex. Jan. 15, 2013) (granting defendant's motion for summary judgment of non-infringement); *CEATS, Inc. v. Continental Airlines*, No. 6:10-CV-120 (E.D. Tex. May 25, 2012) (same); *MHL Tek, LLC v. Nissan Motor Co.*, No. 2:07-cv-289 (E.D. Tex. Dec. 15, 2009) (same).

[11] *See* David Segal, *Has Patent, Will Sue: An Alert to Corporate America*, N.Y. Times, July 13, 2013 (citing a report by RPX, a patent risk management provider).

[12] *See* IPNav, *at* http://www.ipnav.com/what-we-do/ (last visited July 29, 2013).

[13] *See* Segal, *supra*.

[14] *See* Wyatt, *supra*.

[15] Manhattan Inst. Trial Lawyers Inc.: Patent Trolls 5 (July 2013).

[16] *Id.* (citing Joe Mullin, *Patent Trolls and Their Foes Square Off at the FTC*, Arstechnica Blog (Dec. 11, 2012)).

[17] *Id.* (citing Niro, Haller & Niro, Ltd., Raymond P. Niro, http://www.niroscavone.com/document.php?ID=67 (last visited July 16, 2013)).

[18] *See generally* GAO Report.

[19] White House Report at p. 3.

[20] *See, e.g.*, Saving High-Tech Innovators from Egregious Legal Disputes Act, H.R. 845, 110th Cong. (2013) (introduced Feb. 27, 2013) (providing for the recovery of patent litigation costs and attorneys' fees for the prevailing parties and carving out an exception for inventors, original patent holders, companies that invest in product development, educational institutions, and transfer organizations that commercialize their technology); Patent Litigation and Innovation Act, H.R. 2639, 110th Cong. (2013) (introduced July 10, 2013) (creating heightened pleading standards designed to address concerns that suits by non-practicing entities include vague infringement allegations); Patent Abuse Reduction Act, S. 1013, 110th Cong. (2013) (introduced May 22, 2013) (providing similar procedural requirements for patent infringement suits); End Anonymous Patents Act, H.R. 2024, 110th Cong. (2013) (introduced May 16, 2013) (requiring disclosure of patent ownership and transfers of patent ownership); Patent Quality Improvement Act, S. 866, 110th Cong. (2013) (introduced May 6, 2013) (expanding the transitional program for covered business method patents—a newly created post-grant challenge procedure available in the PTO—by extending the time period for review and the type of patents eligible for review); Stopping Offensive Use of Patents Act, H.R. 2766, 110th Cong. (2013) (introduced July 22, 2013) (changing the transitional program for covered business method patents).

[21] In May, U.S House of Representatives, Committee on the Judiciary, Press Release, *Goodlatte Releases Patent Discussion Draft*, May 23, 2013. For example, the discussion draft would require more detailed pleading than currently required, the real parties in interest would need to be identified at the beginning of litigation, and discovery would be divided into "core documentary evidence" and "additional discovery." Also, each party may ask for additional discovery under the civil rules, but that party must bear the costs, including reasonable attorneys' fees, and post a bond or provide other security for payment of the additional discovery costs. In addition, Senator Leahy is considering legislation to create new protections for end-users, strengthen post-grant review procedures, and increase the transparency in patent assertions.

[22] *See, e.g.*, White House Press Release, *Fact Sheet: White House Task Force on High-Tech Patent Issues*, June 4, 2013 (Legislative Recommendations) (recommendations to require patentees and applicants to disclose the "real party-in-interest," permit more discretion in awarding fees to prevailing parties in patent cases, expand the PTO's transitional program, protect off-the-shelf use by consumers and businesses, changing the ITC standard for obtaining an injunction, use demand letter transparency to help curb abusive suits, and ensure the ITC has adequate flexibility in hiring); *see also id.* at Executive Actions (announcing steps to bring greater transparency to the patent system, including making "real party-in-interest" the new default, tightening functional claiming, empowering downstream users, expanding dedicated outreach and study, and strengthening enforcement process of exclusion orders).

[23] Vermont Office of the Attorney General, Press Release, *Vermont Attorney General Sues "Patent Troll" in Groundbreaking Lawsuit*, May 22, 2013.

[24] H. 299 (Vt. 2013) (to be codified at 9 V.S.A. §§ 4195-99). The Act provides an open-ended test for distinguishing legitimate patent assertions from trolling activity. Factors indicating trolling include failing to identify the asserted patents, the patent owner, or the infringing conduct; demanding an unreasonable response time or sum or money; and asserting frivolous or deceptive infringement claims. Legitimate patent assertions are defined as those from entities that have commercialized the patented technology; where the patent is owned by the original inventor or an educational institution; or the patent has already been successfully enforced in federal court. In addition to providing liability for a plaintiff's damages and possibly reasonable costs and attorney's fees, a defendant found liable under the Act may be subject to punitive damages of the greater of $50,000 or three times the total damages, costs, and attorney's fees.

[25] Ryan Davis, *Neb. AG Launches Probe of 'Patent Troll' Law Firm*, *Law360*, July 19, 2013.

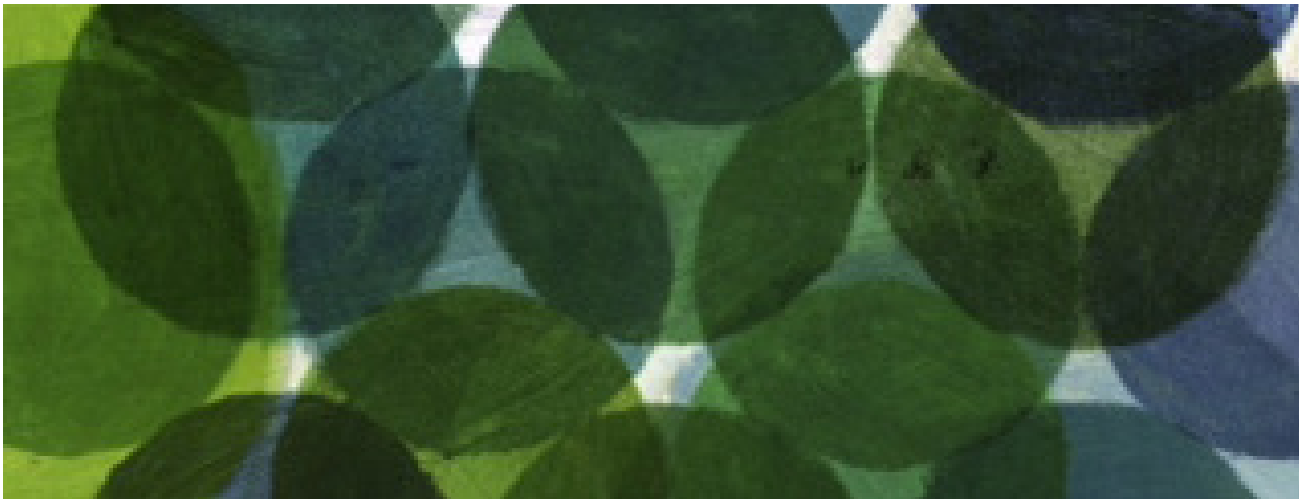
[26] Annie Baxter, *Company's 'Patent Trolling' Will End in Minnesota After Attorney General Investigation, Minnesota Public Radio, Aug. 20, 2013*.

[27] Office of the Minnesota *Attorney General, Press Release, Attorney General Lori Swanson Announces First-In-The-Nation Order to Stop Delaware Company From "Patent Trolling" in Minnesota, Aug. 20, 2013*.

[28] Susan Decker, *Minnesota Forces Patent Company to Limit Demand Letters, Bloomberg News, Aug. 20, 2013*.

"No Injury" Theories of Liability

For the civil justice system to work properly and not flood the courts with speculative, frivolous, or fraudulent claims, the law typically permits a person to file a lawsuit only after sustaining an actual physical injury. For many years, however, plaintiffs' lawyers have attempted to bring massive lawsuits on behalf of people who have not experienced an injury. For example, some lawsuits seek recovery for a person's fear of developing a disease in the future. Others seek damages for the increased risk of developing a disease or the lost chance of recovery resulting from an allegedly late diagnosis and treatment of an existing illness. There is also renewed interest in lawsuits seeking money for medical monitoring on behalf of people who may have been exposed to a harmful substance but who have not developed an illness.



Increased Risk of Harm

For many years, plaintiffs' lawyers have brought lawsuits on behalf of people who were, or believe they may have been, exposed to a toxic substance and fear they might develop a disease in the future. Courts have kept tight constraints on such claims, which, absent exceptional circumstances, are ordinarily dismissed.

Nevertheless, plaintiffs' lawyers continue to try to expand liability in this area. For example, this year, in reversing a $1.5 billion verdict, Maryland's highest court found that individuals who believed they were exposed to MTBE due to an underground leak of gasoline at a storage station could not recover for alleged emotional distress for fear of developing cancer.[1] In that instance, many of the plaintiffs could not show they were actually exposed to MTBE in their water, and those that could were exposed to levels that state and federal environmental regulators did not consider actionable (rendering their fear unreasonable). Nor could the plaintiffs, who had experienced no physical or psychological symptoms, show an objective and demonstrable physical injury stemming from the exposure, which is a critical safeguard that prevents a flood of claims seeking damages for purely emotional harm.[2]

"Economic Loss" Claims

While emotional distress claims based on the chance of a future injury continue to face a high bar, courts have shown a willingness to entertain lawsuits seeking compensation for the diminished value of a product, purchase price, or repair or replacement costs based on a fear that a product might fail or cause injury in the future.[3] To do so, plaintiffs' lawyers often take advantage of broad state consumer protection laws as a substitute for bringing traditional product liability or other personal injury claims.

For example, after a media scare in 2010, Toyota was hit with a surge of lawsuits alleging that the electronics system in certain vehicles can result in "sudden unintended acceleration." Relatively few of these cases involved people who actually were injured in an accident allegedly resulting from such an occurrence. Rather, most of these suits claimed that while no one was harmed, the risk of product failure led to a decrease in the resale value of a vehicle, thereby causing the owner a financial loss. The lawsuits sought damages representing the lost resale value of their cars due to this risk.

Toyota opted to settle these economic loss claims for about $1.2 billion to protect its reputation, even though government

"... plaintiffs' lawyers often take advantage of broad state consumer protection laws as a substitute for bringing traditional product liability or other personal injury claims."

> *The problem with "loss of chance" claims is that they are highly speculative and may impose liability on doctors for the inevitable results of a patient's pre-existing condition.*

officials concluded there was no evidence that faulty electronics systems contributed to the acceleration issues.[4] The settlement is the largest of its type in automobile history.[5] Following the settlement with Toyota, plaintiffs' lawyers filed similar lawsuits against Ford.[6] The Toyota litigation shows that economic loss theories based on the potential for future injury have a chance of leading to a lucrative settlement.

These types of economic loss claims are not limited to automobile manufacturers. Prescription drug makers are also frequent targets. While some plaintiffs' firms advertise to find clients who "may have been injured" by a drug, others bring massive class actions on behalf of everyone who took the drug *but was not injured* (and may actually have been successfully treated).

Rather than showing that a prescription drug has an inadequate warning label, plaintiffs' lawyers have alleged that a drug is simply not as safe or effective as patients were led to believe, or that the patient would not have purchased the drug had she fully appreciated the risks, even when the medicine worked.

Some judges have dismissed such no-injury lawsuits, finding that "[t]here is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm."[7] Other such cases, however, have recently led to multi-million dollar settlements.[8]

Reduced Chance of Recovery

Courts appear to be showing increased receptivity to "loss of chance" claims against physicians. These claims allege that had a doctor recognized a condition or developing illness earlier, the patient would have had a better chance of recovery or survival. The problem with "loss of chance" claims is that they are highly speculative and may impose liability on doctors for the inevitable results of a patient's pre-existing condition.

Some courts require a showing that the patient would have, more likely than not, recovered or survived if diagnosed earlier. Other courts, however, have rejected this requirement and more broadly permitted loss of chance claims, including the Minnesota Supreme Court earlier this year.[9]

A loose standard for "loss of chance" claims is likely to spur speculative medical malpractice lawsuits by plaintiffs who did not recover from an underlying illness or who believe they have a reduced life expectancy. As attorneys who represent

plaintiffs in medical malpractice claims have themselves recognized (and advertised) with respect to the Minnesota ruling:

> Prior to the more recent decision in *Dickhoff*, many attorneys had been reluctant to work with patients in cases involving negligent diagnosis where the patient's damages were limited to decreased odds of recovery. However, because the landscape has dramatically changed, those claims may now have merit. Accordingly, if you or a loved one has suffered a "loss of chance" due to a medical provider's conduct, you should seek counsel immediately, even if another lawyer previously declined to represent you.[10]

In responding to such suits, doctors will face the challenge of showing they diagnosed a condition at the earliest possible time. They face a risk of liability for the result of a patient's illness even when earlier treatment would not likely have changed the course of a patient's disease. As a result, doctors who specialize in treating patients with serious or potentially fatal conditions may have to pay higher medical malpractice insurance premiums.

Renewed Interest in Medical Monitoring Claims

A handful of state appellate courts permitted lawsuits seeking medical monitoring without a present physical injury in the 1980s and 1990s. That early trend reversed course after the U.S. Supreme Court rejected medical monitoring claims under a federal law governing compensation for railroad employee injuries in 1997, expressing concern that "tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure related monitoring."[11] After that decision, a flurry of state supreme courts followed its reasoning in rapid succession, including the high courts of Nevada (2000),[12] Alabama (2001),[13] Kentucky (2002),[14] Michigan (2005),[15] Mississippi (2007),[16] and Oregon (2008).[17] These courts recognized that if the law permits recovery for medical monitoring, individuals who are sick or may become sick in the future could be adversely affected because resources are diverted to those who are not sick and may never develop a disease as a result of their alleged exposure.[18] Defendants would be subjected to enormous costs with little or no public benefit.[19]

Over the past five years, the pendulum has started to swing back toward permitting medical monitoring claims, in some circumstances. The Missouri Supreme Court began this shift in 2007, when it broadly permitted a class action seeking cash for medical monitoring on behalf of individuals without present physical injury regardless of the intensity of duration of their exposure.[20] Massachusetts' highest court followed in 2009, when it more narrowly found that smokers who had not developed any smoking-related illness, but could show damage to their lungs that may indicate a significantly heightened risk of developing cancer, could recover through a medical monitoring claim.[21]

Maryland's high court is the most recent to permit a claim for medical monitoring. Its decision, however, includes significant safeguards intended to prevent wholly

speculative lawsuits. In the case involving an underground gasoline leak discussed above, the court recognized a medical monitoring claim only for those residents whose wells tested above government action levels for MTBE. It rejected the plaintiffs' lawyers' contention that "any exposure" to the chemical was sufficient to bring a lawsuit. Each individual would need to show a "particularized, significantly-increased risk of developing a disease in comparison to the general public" to recover proven medical costs. The court also found that instead of giving plaintiffs cash awards that could be spent on items other than healthcare expenses, the appropriate relief was to establish a fund, administered by a trustee, to reimburse valid medical monitoring expenses. Finally, the court upheld the general rule that individuals cannot recover damages merely for fear of developing a disease in the future unless that fear is reasonable and he or she, as a result, developed a physical injury capable of objective determination.[22]

As these cases show, it is critical for courts to exercise prudence when considering lawsuits seeking compensation for medical monitoring. Courts may follow the steps of the U.S. Supreme Court and other state supreme courts in upholding traditional principles of law by rejecting medical monitoring claims by individuals with no present injury. They may take the unsound path of Missouri, permitting large class actions seeking cash damages now based on a speculative future harm. Or they can take the Maryland approach, which permits medical monitoring in a narrow range of cases, requires individual proof of harm, and reimburses actual medical expenses from a fund.

The next test of the medical monitoring trend will occur in New York. In May 2013, New York's highest court accepted review of a question posed to it by the U.S. Court of Appeals for the Second Circuit: whether smokers who have not developed an illness can bring a stand-alone medical monitoring cause of action and, if so, what the elements of such a cause of action are, what statute of limitations applies, and when such a cause of action accrues.[23] The court's decision in this case is likely to impact future litigation in a variety of contexts. If the New York Court of Appeals permits medical monitoring, as lower courts in New York have predicted, then the question is whether the court takes a narrow approach with proper safeguards or more broadly permits such lawsuits. Its decision is likely to influence state courts that have still not ruled on the issue and potentially affect class action law as well.

"... it is critical for courts to exercise prudence when considering lawsuits seeking compensation for medical monitoring."

Endnotes

[1] To recover emotional distress damages for fear of developing disease, the Maryland Court of Appeals requires a plaintiff to show that "(1) he or she was exposed actually to a toxic substance due to the defendant's tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a disease; and (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination." *Exxon Mobil Corp. v. Albright*, No. 15, 2013 WL 673738 (Md. Feb. 26, 2013).

[2] The Maryland Court of Appeals also clarified that subcellular changes produced by exposure to a toxic substance—without manifested symptoms of a disease or actual impairment—is equivalent to a physical injury permitting recovery for fear of contracting a disease in the future. *Id.*

[3] These types of theories are more fully explored in Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, Harv. 35 J. L. & Pub. Pol'y 681 (2012).

[4] *See* U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., Technical Assessment of Toyota Electric Throttle Control (ETC) Systems (2011).

[5] *See* Bill Vlasic, *Toyota Agrees to Settle Lawsuit Tied to Accelerations*, N.Y. Times, Dec. 26, 2012; W.J. Hennigan, *Toyota Settlement in Sudden-Acceleration Case Will Top $1 Billion*, Dec. 26, 2012.

[6] *See* Margaret Cronin Fisk, *Ford Sued in Class Action Claiming Sudden Acceleration*, Bloomberg, Mar. 29, 2013.

[7] Order & Reasons, *Walker v. Merck Sharp & Dohme Corp.*, No. 2:08-cv-4148, at 11 (E.D. La. June 13, 2012).

[8] For example, a state appellate court affirmed certification of a class of Missouri residents who were prescribed Vioxx, but experienced no injury, under the Missouri Merchandizing Practices Act (MMPA). The court found that the plaintiffs could state a valid claim in alleging that Vioxx was worth less than the product as represented because the company had not fully disclosed risks associated with the drug (which the plaintiffs did not suffer. *See Plubell v. Merck & Co.*, 289 S.W.3d 707 (Mo. Ct. App. 2009). Merck settled the Missouri case for $39 million. *See* Carolina Bolado, *Merck Puts Up $39M To Settle Vioxx Class Action*, Law360, Nov. 1, 2012. Merck then settled an "economic loss" consumer class action on behalf of everyone else, those who used Vioxx without incident outside of Missouri, for another $23 million in July 2013. *See, e.g.*, Ciaran McEvoy, *Merck To Pay $23M To Settle Vioxx Economic-Loss Claims*, Law360, July 18, 2013 (discussing *Herke v. Merck & Co.*, No. 2:09-cv-07218 (E.D. La.)).

[9] *See Dickhoff v. Green*, No. A-11-0402, 2013 WL 2363550 (Minn. May 31, 2013) (overruling *Fabio v. Bellomo*, 504 N.W.2d 758 (Minn. 1993)).

[10] Hansen, Dordell, Bradt, Odlaug & Bradt, *Minnesota Supreme Court Recognizes "Loss of Chance" Medical Malpractice Claims*, June 13, 2013.

[11] *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440 (1997).

[12] *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2000).

[13] *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

[14] *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002).

[15] *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005).

[16] *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007).

[17] *Lowe v. Philip Morris USA, Inc.*, 183 P.2d 181 (Or. 2008).

[18] *See Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 694 (Mich. 2005) ("Litigation of these preinjury claims could drain resources needed to compensate those with manifested physical injuries and a more immediate need for medical care."); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 857 (Ky. 2002) ("[D]efendants do not have an endless supply of financial resources. Spending large amounts of money to satisfy medical monitoring judgments will impair their ability to fully compensate victims who emerge years later with actual injuries that require immediate attention.").

[19] *See Hinton v. Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001) (stating that "a 'cost-benefit' analysis counsels against recognizing a cause of action for medical monitoring.").

[20] *See Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007); *see also* Mark A. Behrens and Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor: Sound Policy Should be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135 (2007) (exposing the flaws in the Missouri Supreme Court's reasoning).

[21] *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 902 (Mass. 2009) (permitting medical monitoring claims if "(1) The defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic

medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint.").

[22] *See Exxon Mobil Corp. v. Albright*, 2013 WL 673738, *31-32 (Md. Feb. 26, 2013); *see also Exxon Mobil Corp. v. Ford*, 2013 WL 4052616, *16-17 (Md. Feb. 26, 2013).

[23] *Caronia v. Philip Morris USA, Inc.*, No. 171, NYLJ 1202602235078, at *1 (Ct. of App., May 30, 2013).

Other Leading Plaintiffs' Lawyers

There are many highly respected plaintiffs' lawyers who are not reflected in the types of litigation discussed in this report. These lawyers may practice in areas such as general personal injury law or medical malpractice, for which a list of the "top lawyers" is difficult to compile given the local nature of the practice and numerous lawyers involved. Others are general practitioners with diverse practices that do not neatly fit in any of the areas discussed in this report. There are also some who have taken the lead on opposing reasonable civil justice reform initiatives in the legislatures and courts. The list below highlights roughly fifty of these attorneys.

PRINCIPAL LAWYER(S)	FIRM	LOCATION	SPECIALTIES	
Richard Alan Arnold	Kenny Nachwalter	Miami, FL	Antitrust	Employment
Lisa Blue Baron	Baron & Blue	Dallas, TX	President Elect of AAJ	Toxic torts Environmental law
James Beasley, Jr.	The Beasley Firm LLC	Philadelphia, PA	Medical malpractice	Personal injury
Robert Berthold, Jr.	Berthold, Tiano & O'Dell	Charleston, WV	Medical malpractice Bad Faith Product liability	Auto and trucking liability
William Blechman	Kenny Nachwalter	Miami, FL	Antitrust	False Claims Act
Frank Branson	Law Offices of Frank L. Branson	Dallas, TX	Personal injury Medical malpractice	Product liability
Michael Ciresi	Robins, Kaplan, Miller & Ciresi L.L.P.	Minneapolis, MN	Product liability Intellectual property	Business and commercial litigation
Robert Cunningham	Cunningham Bounds, LLC	Mobile, AL	BP Oil Spill Class actions, Products liability	Environmental Personal injury Bad faith

PRINCIPAL LAWYER(S)	FIRM	LOCATION	SPECIALTIES	
Thomas Demetrio	Corboy & Demetrio	Chicago, IL	Medical malpractice	Aviation crashes
John DiDonato	Brookman Rosenberg Brown & Sandler	Philadelphia, PA	Asbestos Products liability, Medical malpractice	Car accidents Premise liability
Joanne Doroshow	Center for Justice & Democracy	New York, NY	Founder and executive director of the Center for Justice & Democracy	Co-founder of Americans for Insurance Reform
Lewis "Mike" Eidson	Colson Hicks Eidson	Coral Gables, FL	AAJ Executive Committee	Medical malpractice Product liability Aviation Class action
Robert Fitzsimmons	Fitzsimmons Law Firm, LLC	Wheeling, WV	Bad faith Medical malpractice	Personal injury
Anthony Gair	Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz	New York, NY	Catastrophic injury Construction	Birth injuries Product liability
Willie Gary	Law Firm of Gary, Williams, Finney, Lewis, Watson and Sperando, P.I.	Stuart, FL	Personal injury Wrongful death Medical malpractice	Product liability Class action
Tom Girardi	Girardi & Keese	Los Angeles, CA	Wrongful death Products liability Medical malpractice	Bad faith insurance Toxic torts
Stuart Grossman	Grossman Roth, PA	Palm Beach, FL	Medical malpractice Product liability Police misconduct	Aviation crashes Personal injury
R. Edison Hill	Hill Peterson Carper Bee & Deitzler, PLLC	Charleston, WV	Medical malpractice Bad Faith	Clergy sex abuse Personal injury
Joseph Jamail, Jr.	Jamail & Kolius	Houston, TX	Personal injury Medical malpractice	Product liability
Steven Kanner	Freed, Kanner, London & Millen, LLC	Chicago, IL	Antitrust	Class action
Gary Kendall	MichieHamlett	Charlottesville, VA	Product liability	Asbestos
Thomas Kline	Kline & Specter, P.C.	Philadelphia, PA	Personal injury Medical malpractice	Nursing home negligence
Joseph Kohn	Kohn, Swift & Graf, P.C.	Philadelphia, PA	Antitrust Class action	Mass torts
Jon Krupnick	Krupnick Campbell Malone Buser Slama Hancock Liberman & McKee	Fort Lauderdale, FL	Product liability	
Bradley Lakin	Lakin Chapman LLP	Wood River, IL	Product liability Nursing home negligence	Personal injury FELA
Mark Lanier	The Lanier Law Firm	Houston, TX	Product liability Asbestos	Antitrust Class action
J. Burton LeBlanc IV	Baron & Budd, PC	Baton Rouge, LA	President of AAJ	

PRINCIPAL LAWYER(S)	FIRM	LOCATION	SPECIALTIES	
Fredric Levin	Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A.	Pensacola, FL	Personal injury Wrongful death	Tobacco
Linda Lipsen	American Association for Justice	Washington, DC	CEO of AAJ since 2010	AAJ lobbyist since 1993
Patrick Malone	Patrick Malone & Associates	Washington, DC	Medical malpractice	
Marvin Masters	The Masters Law Firm, P.C.	Charleston, WV	Pharmaceutical class actions Medical malpractice Product liability	Personal injury Consumer fraud
Mary Alice McLarty	McLarty Pope, L.L.P.	Dallas, TX	Immediate Past President of AAJ	Catastrophic injury
Richard Warren Mithoff	Mithoff Law Firm	Houston, TX	Personal injury	
Robert Mongeluzzi	Saltz Mongeluzzi Barret & Bendesky	Philadelphia, PA	Construction accidents Electrical accidents	Product liability
Steve Mostyn	The Mostyn Law Firm	Houston, TX	Insurance litigation Personal injury Commercial litigation	President of the Texas Trial Lawyers Association
Francis Patrick Murphy	Corboy & Demetrio	Chicago, IL	Aviation Construction Product liability	Porch and deck collapse
Anthony Palumbo	Palumbo Wolfe & Palumbo	Phoenix, AZ	Medical malpractice	
Brian Panish	Panish Shea & Boyle LLP	Los Angeles, CA	Personal injury	Product liability
Robert S. Peck	Center for Constitutional Litigation	Washington, DC	Challenges to constitutionality of tort reform laws.	
Patrick Perotti	Dworken & Bernstein Co. L.P.A.	Cleveland, OH	Civil rights and employment discrimination	Consumer Class action
James Peterson	Hill Peterson Carper Bee & Deitzler, PLLC	Charleston, WV	Medical malpractice Product liability	Mass tort Motor vehicle accidents
Kathleen Flynn Peterson	Robins, Kaplan, Miller & Ciresi L.L.P.	Minneapolis, MN	Medical malpractice Personal injury	AAJ Past President
Aaron Podhurst	Podhurst Orseck, P.A.	Miami, FL	Personal injury Wrongful death Medical malpractice	Product liability Aviation crashes
James Prat III	Hare, Wynn, Newell & Newton	Birmingham, AL	Medical malpractice	Wrongful death
Howell Rosenberg	Brookman Rosenberg Brown & Sandler	Philadelphia, PA	Asbestos Medical malpractice	Toxic torts Pharmaceutical
James Parkerson “Jim” Roy	Domengeaux Wright Roy & Edwards, L.L.C.	Lafayette, LA	BP Oil Spill Personal Injury	Maritime Law
Shanin Specter	Kline & Specter, P.C.	Philadelphia, PA	Product liability	Personal injury

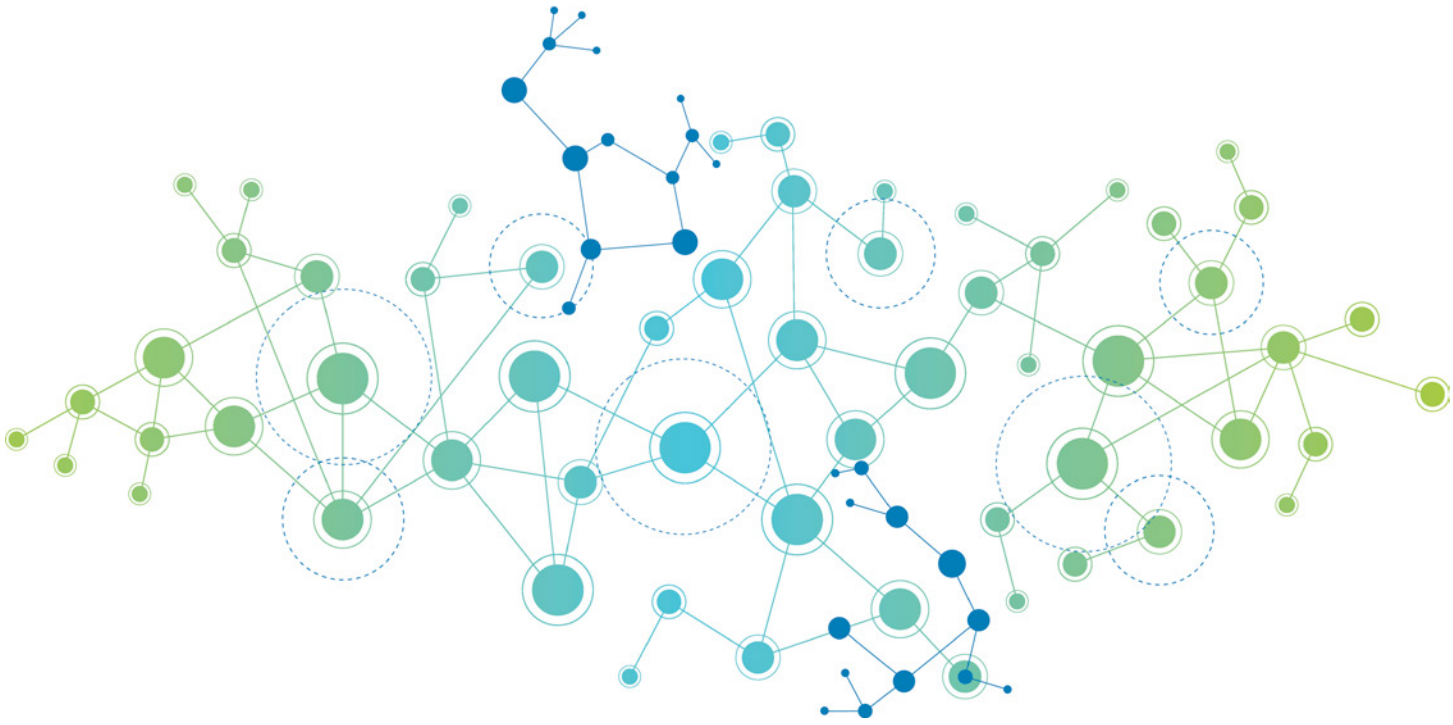
PRINCIPAL LAWYER(S)	FIRM	LOCATION	SPECIALTIES	
Stephen Tillery	Korein Tillery	St. Louis, MO	Insurance Securities Antitrust Pharmaceuticals Consumer Fraud	Environmental Tobacco Technology "Hot Fuel"
Christian Searcy	Searcy Denney Scarola Barnhart & Shipley, P.A.	West Palm Beach, FL	Personal injury Catastrophic injury and death	Past President Florida Justice Association
Justin Shrader	Shrader & Associates LLP	Houston, Texas	Toxic torts	Asbestos
Jeffrey Simon	Simon Greenstone Panatier Bartlett, PC	Dallas, TX	Toxic tort Pharmaceutical	Asbestos
Larry Stewart	Stewart Tilghman Fox & Bianchi, P.A.	Miami, FL	Medical malpractice	Product liability
Mikal Watts	Watts Guerra Craft LLP	San Antonio, TX	Product liability	
John Eddie Williams	Williams Kherkher Hart Boundas Law Firm, LLP	Houston, TX	Mass torts	Catastrophic injury
Elliot Wolfe	Palumbo Wolfe & Palumbo	Phoenix, AZ	Medical Malpractice Defective Products	Truck collisions Railroad collisions Aviation crashes

U.S. CHAMBER
Institute for Legal Reform

The Growing State Attorneys General Alliance With Plaintiffs' Lawyers

The Growing State Attorneys General Alliance With Plaintiffs' Lawyers

Private lawyers have received billions of dollars in fees representing states against corporate defendants since the tobacco litigation of the 1990s. Unsurprisingly, plaintiffs' lawyers have made a concerted effort to ally themselves with state attorneys general (AGs) to continue to pursue speculative but lucrative litigation against a wide range of industries.



Private attorneys hired to represent a state are able to cloak themselves with the moral authority of the state and claim legitimacy for novel theories by asserting that they are representing the public interest. Further, private counsel representing states can seek recoveries or fines that, in many cases, are not available to private litigants and circumvent procedural hurdles required of conventional plaintiffs. Some lawyers travel the country pitching case theories to AGs and offering to represent the state on a contingency fee basis or for a share of court-awarded attorneys' fees, promising that the suits will cost the state nothing and allow the AG to bring cases he or she might not otherwise have the resources to pursue alone. Private lawyers have also deepened their ties with AGs of both parties by making political contributions to their campaigns.

Private lawyers' relationships with AGs give rise to a myriad of legal and policy issues. Fundamentally, such relationships can damage the rule of law by compromising public perception that the state is using its power in the public interest, rather than for the benefit of a well-connected few. This is especially true when AGs hire counsel from whom they have received contributions, or when private lawyers pocket exorbitant fees from litigation brought in the state's name. In addition, AGs violate the due process rights of defendants by empowering private attorneys with a personal stake in litigation to act as government lawyers.

Raising these arguments, a number of defendants have attempted judicial challenges to the use of outside counsel by AGs, especially on a contingency fee basis. In addition, some state legislatures and officials have attempted to address these issues through laws and regulations. However, the relationship between private lawyers and AGs persists and continues to evolve, encompassing new theories and impacting an expanding number of industries.

Targets of Litigation by Private Lawyers Retained by AGs

Cooperation between private lawyers and AGs has progressed from the first large-scale partnerships in the landmark state tobacco litigation of the 1990s to a wide variety of industries, including pharmaceutical companies, financial institutions, and energy firms. The tobacco litigation established several major trends that have driven the practice, including private lawyers making political contributions to AGs from whom they seek contingency fee work[1] and massive windfalls from settlements that, in some cases, exceeded tens of thousands of dollars per hour.[2]

Although observers initially viewed such arrangements as unique to tobacco, plaintiffs' lawyers and some AGs have since expanded this model. Private lawyers have enticed states to bring novel or speculative lawsuits that seek to expand liability rather than enforce existing law.[3] For example, plaintiffs' lawyers attempted to bring cases around the country against former makers of lead paint after then-Rhode Island AG (now Senator) Sheldon Whitehouse retained the plaintiffs' firm Motley Rice to use the common law theory of public nuisance to hold manufacturers

responsible for a product they sold legally decades earlier.[4]

Since then, ever-inventive plaintiffs' lawyers have partnered with AGs against a host of other industries, a sample of which is set forth below.

AWP LITIGATION

Many states, most represented by contingency fee lawyers, have sued virtually the entire pharmaceutical industry alleging fraud in the reporting of prices for drugs covered under state Medicaid programs. State Medicaid agencies historically reimbursed pharmacies and healthcare providers for the costs of prescription drugs on the basis of the drugs' average wholesale price (AWP), which manufacturers supply to an independent price reporting service. In the AWP litigation, states alleged that they were unaware that the AWP was higher than the prices actually paid by many providers because it did not incorporate discounts, rebates, or other price concessions, and therefore, state Medicaid programs over-reimbursed providers. In June 2012, Beasley Allen, which represents eight states in AWP litigation, touted settlements of $600 million against a number of drug manufacturers, with an additional $118 million in verdicts on appeal.[5] Such settlements result in millions of dollars in fees for plaintiffs' lawyers.

PHARMACEUTICAL MARKETING

A number of states have hired contingency fee counsel to bring claims that drug makers have unlawfully engaged in off-label promotion of their products, defrauding consumers and state Medicaid programs. The firm Bailey Perrin Bailey routinely partners with state officials to bring litigation regarding second-generation, anti-psychotic drugs, such as Zyprexa, Seroquel, and Risperdal. For example, Arkansas hired the firm and obtained a $1.2 billion judgment against Johnson & Johnson alleging the company downplayed the risks of Risperdal. In February 2013, an Arkansas state judge awarded Bailey Perrin Bailey $181 million based on the agreed upon 15% contingency fee. Johnson & Johnson, which is appealing the verdict, is also appealing the fee award as excessive, as its reconstruction of the time spent by the firm on the case yielded the equivalent of almost $20,000 per hour for each of the outside lawyers and staff.[6] A few years earlier, Arkansas, again using Bailey Perrin Bailey, settled a suit with Eli Lilly for $18.5 million over allegations that the company engaged off-label marketing of its schizophrenia drug Zyprexa.

Other states and firms have also brought similar cases. For example, in August 2012, AstraZeneca settled a suit with South Carolina involving the marketing of its drug Seroquel for $26 million, an amount believed to be the largest in the state's history under its Unfair Trade Practices Act. South Carolina hired Bailey Perrin Bailey and local firms Harrison, White, Smith and Coggins and The Simmons Law Firm to bring the case.[7] GlaxoSmithKline also recently settled claims that it misrepresented the cardiovascular risks of its diabetes drug Avandia. Several of the 38 states that were parties to the $90 million settlement reached in November 2012 were represented by contingency fee counsel. Another eight states (Kentucky, Louisiana, Maryland, Mississippi, New

Mexico, South Carolina, West Virginia, and Utah) did not join the Avandia settlement and continued to litigate their claims separately, represented by Bill Robins of Heard Robins Cloud & Lubel. GlaxoSmithKline recently agreed to pay an additional $299 million to resolve those lawsuits.[8]

FINANCIAL SERVICES

In the wake of the financial crisis, plaintiffs' firms have been quick to partner with AGs to bring claims under state consumer protection and other laws against a number of companies in the financial sector.

For example, Baron & Budd, joined by three local firms, was retained by then-West Virginia AG Darrell McGraw to sue several financial services companies under the West Virginia Consumer Credit and Protection Act stemming from their allegedly deceptive sales of "payment protection plans" for credit cards.[9] Linda Singer, a former Washington D.C. AG and now head of Cohen Milstein's Public Client Practice, represented Arizona and Nevada in lawsuits against homebuilders Pulte Homes and Lennar Corp. alleging they engaged in predatory mortgage lending in the run-up to the foreclosure crisis.[10]

Nevada also has a standing retainer agreement with Cohen Milstein that authorizes the firm to investigate and file litigation against virtually any company involved with mortgages in exchange for a share of any recovery received. The firm has taken a number of other actions pursuant to this arrangement alleging that businesses engaged in deceptive or fraudulent practices, including an ongoing lawsuit against Lender Processing Services that claims the company was involved in fraudulent practices related to services it provided mortgage servicers, as well as settlements with Bank of America over its mortgage servicing practices and other companies over the issuance of mortgage-backed securities.[11]

SECURITIES LITIGATION

Federal attempts to reform securities class actions have resulted in state pension funds having preferred status to serve as lead plaintiffs. Recognizing this, several securities class action firms, such as Bernstein Litowitz Berger & Grossman, Kaplan Fox, Kessler Topaz Meltzer & Check, and Labaton Sucharow, have filed lawsuits on behalf of public pension funds, whose counsel generally must be approved by AGs. The Mississippi Public Employees Retirement System, for example, has become a frequent lead plaintiff for securities class actions. Mississippi AG Jim Hood authorized the firms of Bernstein Litowitz, Labaton Sucharow, Wolf Popper, and Kaplan Fox to represent the fund in 16 securities lawsuits between 2005 and 2011.[12] Those firms gave a combined $330,750 to AG Hood's campaigns during that period.[13]

BP OIL SPILL

Litigation brought by Gulf states seeking economic damages from BP as a result of the Deepwater Horizon oil spill offers a microcosm of AGs' varied approaches to using outside counsel. Mississippi AG Jim Hood hired former AG Mike Moore, who while in office pioneered AGs' use of contingency fee lawyers against the tobacco industry, and former Mississippi Supreme Court Justice Reuben Anderson.[14]

> *By handling the case in-house, AG Strange reasoned he would recover 14% more, the amount that would otherwise go to contingency fee counsel under the agreement.*

Florida AG Pam Bondi hired four firms to represent the state on a contingency fee basis: Fowler White, Boggs; Harrison, Rivard, Duncan & Buzzett; Harrison Sale McCloy; and Nix Patterson & Roach.[15] Notably, this appears to be Florida's first instance of hiring contingency fee counsel since its legislature enacted the Transparency in Private Attorney Contracting Act (TiPAC) in 2010, which put in place a number of requirements to prevent outside counsel from abusing their position as counsel for the state, including mandating competitive bidding in the state's selection of counsel, imposing caps on the maximum fees counsel can receive, and subjecting their conduct of the litigation to oversight and control by government attorneys in the AG's office.[16]

Louisiana AG Caldwell also attempted to hire outside lawyers to sue BP on a contingency fee basis, but when he was unable to obtain legislative authorization required by the Louisiana Constitution, he hired them on an hourly basis instead.[17] As of January 2013, AG Caldwell had paid the private lawyers $15.4 million in fees.[18] He paid these fees by drawing on a $10 million grant provided by BP after the spill and with money earmarked from a state fund set-aside with money paid by the oil industry to address spills. The firms AG Caldwell retained made substantial donations to him or to Governor Bobby Jindal, including Henry Dart Attorneys at Law; Kanner & Whiteley; Shows, Cali, Berthelot & Walsh; Spears & Spears; and Usry, Weeks & Matthews.[19] In addition, Governor Jindal separately hired Baron and Budd to consult on the litigation.[20]

In contrast, Texas, which was among the first states to enact transparency and legislative oversight over AG contracts with private counsel, is also pursuing litigation against BP, but is doing so through government lawyers.[21] In addition, Alabama AG Luther Strange, upon taking office, discontinued a contingency fee agreement entered by his predecessor, Troy King, with Beasley Allen and Prince Glover & Hayes, and instead is using his own attorneys to litigate the case. By handling the case in-house, AG Strange reasoned he would recover 14% more, the amount that would otherwise go to contingency fee counsel under the agreement.[22] However, coastal counties and municipalities impacted by the spill (Mobile and Baldwin Counties and the City of Dauphin Island), have hired four law firms on a contingency fee basis to bring their own suits, including Blackburn & Conner; Johnston Druhan; the Law Offices of Frederick T. Kuykendall III; and Riley & Jackson.[23]

Future Targets

AGs' use of contingency fee lawyers is unlikely to abate any time soon. In fact, the practice likely will expand to new targets and new theories, driven by large recoveries and the perception that such suits are "no-risk" propositions for the states. Tight state budgets will also drive officials towards contingency fee arrangements as they lack staff to pursue such claims and are expected by state legislatures to become self-funded and contribute to state revenues through recoveries. Just as private counsel reacted to the financial crisis by crafting new litigation theories and pitching them to AGs, they can be expected to use the latest public policy and legal issues to create the next generation of contingency fee suits.

For example, the Valorem Law Group, a small Chicago-based plaintiffs' firm composed of attorneys who previously worked at large defense firms, has created a proposal to drafted AGs to use their *parens patriae* power to sue "Big Food" for reimbursement of Medicaid costs for obesity-related conditions.[24] The proposal, which was authored by a former tobacco defense lawyer,[25] suggests using the tobacco lawsuits as a model for pressuring the food companies into a settlement.[26] The proposal suggests that the state file a lawsuit, through the firm working under a contingency fee agreement, against manufacturers of foods and beverages that are "high in fat, saturated fat, caloric density, sugars and/or glycemic index" on the basis that such foods "produce harmful externalities that are 'eating up' state budgets."[27]

The draft proposal is an example of how private lawyers make pitches to AGs. The proposal:

- Emphasizes the states' budgetary shortfalls and shrinking availability of federal funds for healthcare and Medicaid and suggests that states can potentially recover billions of dollars through litigation "transform[ing] AGs into unlikely heroes in budget dramas";[28]
- Notes that *parens patriae* actions eliminate defenses that are available to defendants in private litigation, such as product liability and consumer protection claims, and precludes "personal responsibility" defenses, since the state is purely seeking money for its healthcare expenses, not personal injuries;[29]
- Asserts that the hiring of contingency fee attorneys involves "no budgetary cost or risk;"[30]
- Recommends use of the state's unique ability to investigate the food companies before filing suit through use of government investigatory subpoenas under consumer protection statutes.[31] The confidential information obtained from the companies can then be used to develop claims to avoid dismissal for failure to meet the minimum standard for pleading a claim; and
- Suggests that, in addition to obtaining a substantial recovery and improving the state's budgetary outlook, the lawsuit "offers perhaps the best opportunity to better regulate Big Food conduct to improve the public health because

policy objectives could be agreed to as part of any settlement."[32]

Potential food litigation is just one example of how private lawyers are taking their partnership with AGs in new directions. In addition, Congress may be opening an entire new field for cooperation between plaintiffs' lawyers and states by delegating enforcement of federal laws to AGs. A number of recent federal laws, including the Consumer Product Safety Improvement Act, HITECH Act, and Dodd-Frank permit state regulators to bring their own independent actions enforcing federal laws and regulations.[33] While the federal government does not hire contingency fee counsel,[34] nothing in these laws expressly prohibits state AGs from retaining private counsel, including on a contingency fee basis, for such cases. While no AG has done so yet, the possibility warrants close attention.

AGs Who Most Frequently Retain Private Lawyers

Government officials, both Democrat and Republican, in approximately half of the states have hired plaintiffs' lawyers to enforce state laws in recent years, often pursuant to contingency fee arrangements or by promising outside counsel the attorneys' fees to which the state is entitled to recover from defendants.

Following West Virginia AG Darrell McGraw, Jr.'s (D) loss in his 2012 bid for re-election, Mississippi AG Jim Hood (D) is the most frequent user of contingency fee agreements with private firms.[35] Other AGs who have hired outside counsel to represent their states in litigation include Jack Conway (D-KY), Buddy Caldwell (R-LA), Catherine Cortez Masto (D-NV), Gary King (D-NM), and Alan Wilson (R-SC).

A number of other AGs are also involved in contingency fee litigation, although for some AGs this stems from participation in multi-state suits brought by a group of AGs jointly pursuing a case; as a result of ongoing litigation using outside counsel hired by their predecessors; or from what appears to be complex or special circumstances.

For example, West Virginia's new AG, Patrick Morrisey (R-WV), recently successfully defended before the West Virginia Supreme Court the authority of his office under former AG McGraw to hire lawyers to sue pharmaceutical and financial services companies in exchange for court-approved attorneys' fees, while simultaneously proposing a new policy for use of outside counsel in the future.[36] South Carolina AG Alan Wilson, who took office in 2011, appears to be continuing the practice of his predecessor, Henry McMaster (R-SC), of using contingency fee lawyers subject to disclosure of such arrangements on a public website.[37] And, as discussed above, Pam Bondi (R-FL), elected in 2010, appears to have engaged in limited use of contingency fee litigation to seek recovery for economic harm stemming from the BP oil spill.

Law Firms Specializing in Representing State Governments

Although state laws typically require the use of an open and competitive process when the state contracts for goods and services, such laws may not apply to

contracts for legal services. Plaintiffs' firms have become adept at exploiting this exception by developing theories for litigation and then shopping them to AGs, rather than AGs identifying unlawful or harmful activity through their own independent investigations.

A number of state officials have hired firms that contribute, or are expected to contribute, to their campaigns, or that have political or personal connections to the hiring official. For example, Louisiana AG Buddy Caldwell recently was criticized when a media investigation of his hiring of outside counsel concluded that 13 law firms that received much of the $27 million hourly fees paid by the AG's office had given a combined $277,000 to AG Caldwell's campaigns.[38] The firms that the investigation identified included that of his campaign chief, Allen Usry of Usry, Weeks & Matthews, which had 11 contracts to represent the state and had contributed more than $100,000 to AG Caldwell's campaign. AG Caldwell's campaign treasurer, Wade Shows, was named as another contract recipient.

Often, the plaintiffs' lawyers who pursue AG litigation have represented individual litigants or brought class actions making similar allegations or targeting the same industry. For example, Bill Robins of Heard Robins Cloud & Lubel handled Avandia personal injury litigation on behalf of private plaintiffs before leading AG suits related to the drug. Other well-known plaintiffs' firms, such as Beasley Allen (AWP litigation) and Bailey Perrin Bailey (pharmaceutical marketing practices) also represent states in particular types of litigation. Still other firms have developed close relationships with a specific state or official, such as The Simmons Law Firm and Harrison, White, Smith and Coggins with the AG's office in South Carolina, and Bernstein Litowitz Berger & Grossman with the AG of Mississippi.

Beyond personal or historical relationships, some plaintiffs' firms are now establishing separate practice groups specializing in the representation of AGs or other government entities. As mentioned above, Cohen Milstein Sellers & Toll hired the District of Columbia's former AG, Linda Singer, and her former Chief of Staff, Betsy Miller, in 2009 to launch the firm's Public Client Practice Group. Cohen Milstein currently represents at least four states in litigation related to mortgage lending, financial services, pharmaceutical marketing, antitrust, and other issues.

"... some plaintiffs' firms are now establishing separate practice groups specializing in the representation of AGs or other government entities."

“There is an inherent conflict of interest between the profit-maximizing goal of a private attorney whose compensation is based on the amount of damages or fines imposed on a defendant, and the state’s fundamental role of ensuring that the law is enforced in a fair and reasonable manner.”

Judicial Challenges

Enforcement of state law through private contingency fee counsel raises serious ethical and constitutional concerns.[39] There is an inherent conflict of interest between the profit-maximizing goal of a private attorney whose compensation is based on the amount of damages or fines imposed on a defendant, and the state’s fundamental role of ensuring that the law is enforced in a fair and reasonable manner. In some cases, the public interest may be served best through a remedy that is not financial in nature, such as an injunction or consent order establishing a remediation program, or the evidence or public policy may suggest that the government should discontinue litigation.

Moreover, unlike cases brought for private plaintiffs, public enforcement actions “involve a balancing of interests” and a “delicate weighing of values” that “demands the representative of the government to be absolutely neutral.”[40] This is not the case when a private lawyer’s compensation depends upon the dollar amount of a judgment or settlement. At the very least, that creates a potential conflict of interest and may violate defendants’ due process rights to a neutral government prosecutor. In addition, AGs may lack the legal authority to outsource the law enforcement power of the state to private lawyers, or may be prohibited by separation-of-powers principles or statutes from promising fees to outside counsel.[41]

Over the years, the National Chamber Litigation Center and other organizations have filed *amicus* briefs supporting challenges to the AG’s hiring of outside

counsel in at least six states. Pharmaceutical companies, former makers of lead paint, financial services companies, homebuilders, and others have also gone on the offensive, filing their own separate lawsuits seeking to invalidate such arrangements by the AGs of Rhode Island, Kentucky, Louisiana, Nevada, and South Carolina.[42] However, litigation challenging the authority of state officials to enter contingency fee agreements on constitutional, ethical, and policy grounds has had only partial success thus far.

The two most substantive decisions on government use of outside counsel, by the California and Rhode Island Supreme Courts, resulted in holdings that contingency fee agreements between government officials and private lawyers may be permissible in some circumstances. In both cases, defendants argued that such arrangements should be *per se* prohibited because they impermissibly compromise the government's neutrality in pursuing its claims. The courts rejected that argument, holding contingency fee arrangements could be permissible when the retainer agreements guaranteed that government attorneys would retain full and complete control over the litigation, and if the government attorneys actually exercised that authority.[43] However, the practical impact of these decisions may be limited, as it is very difficult, if not impossible, for a defendant or even a court to monitor and enforce such control provisions in practice, given the shield of the attorney-client privilege and other impediments.

For example, a Kentucky federal district court recently rejected Merck's lawsuit to enjoin Kentucky AG Jack Conway from pursuing Vioxx-related consumer protection claims through use of contingency fee lawyers.[44] Merck argued that Kentucky's outside counsel, Garmer & Prather, appeared to be calling all the shots. The court, looking to the California and Rhode Island decisions, found that the AG's office had sufficient control over the litigation. It reached this conclusion even though evidence showed that the private firm had asserted the exact same allegations it had developed for litigation in Alaska and the assistant AG who was tasked with overseeing the litigation had little knowledge about aspects of the case. Although the court found that the AG's "unfamiliarity" with certain aspects of the underlying state court litigation was "disconcerting," it nevertheless upheld the arrangement on the basis that "the AG's office does not need to be intimately involved in all of the everyday work or decision-making that occurs in the [Vioxx] litigation to exercise meaningful control over the proceedings."[45] Although Merck appealed this decision to the Sixth Circuit, the underlying litigation settled before oral argument, mooting the case.

Most recently, on June 4, the West Virginia Supreme Court of Appeals rejected petitions for writs of prohibition sought by credit card companies and GlaxoSmithKline to preclude the West Virginia AG from continuing litigation through outside counsel.[46] The court held that the West Virginia AG has inherent common law power to hire outside counsel, summarily rejected the argument that the state's use of private counsel violated the defendants' due process rights, and further held that the AG has inherent common law authority

to hire outside counsel. It further concluded that private counsel are not state employees and thus are not subject to the state's ethics in government act, which prohibits state employees from acting where they may have a conflict-of-interest. It also found no financial conflict-of-interest under the rule of professional conduct because there was no direct tie between the penalties that could be imposed and the lawyers' compensation, which would be approved by the trial court.

Challenges based on state statutes have been a little more successful. The Mississippi Supreme Court recently held, in a challenge brought by the State Auditor to the Mississippi AG's use of outside counsel, that state law does not permit the AG to require a defendant to directly pay the attorneys' fees of private lawyers representing the state. Instead, the court held that any amount due as a result of settlement with the state must be paid into the state treasury, from which the legislature may appropriate the funds to pay outside counsel.[47] However, while the Mississippi ruling will result in a change in how settlements are collected and fees are paid, it expressly does not restrict the AG's use of contingency fee agreements.

Similarly, years earlier, the Supreme Court of Louisiana invalidated a contingency fee agreement between the AG and private counsel on the basis that the Louisiana constitution gives appropriation power exclusive to the legislature, and the separation-of-powers principle therefore prohibits the AG from promising a share of the state's litigation recovery to a private party without legislative approval.[48] AG Caldwell has attempted to skirt this requirement by hiring counsel on an hourly basis, as he did in the BP case, or by crafting retainer agreements that assign the state's right to recover attorneys' fees directly from defendants if the state prevails on its claims.[49]

Another case, pending before the Nevada Supreme Court, is a challenge brought by Lender Processing Services against the Nevada AG's contingency fee agreement with Cohen Milstein, pursuant to which the company was sued for its work on behalf of mortgage servicers. The company argues that a specific Nevada statute voids retainer agreements between state officials and outside counsel entered into without legislative approval (which the AG had not obtained for the Cohen Milstein retainer), and cross-briefing by both the AG and company has also raised issues of the state's inherent power to retain outside counsel and the company's right to a neutral prosecutor.[50] AG Masto has offered no good explanation as to why her office's substantial taxpayer-funded staff cannot handle the litigation or why she believes a D.C. law firm, which gave generously to her campaign and the Democratic Attorneys General Association,[51] is better equipped to represent Nevadans than government lawyers. While 49 other states have settled similar litigation with Lender Processing Services, the contingency fee lawyers representing Nevada, who have virtual veto power over a settlement, are the lone holdout.[52] The Nevada Supreme Court, sitting *en banc*, heard oral arguments in June 2013.

Despite the uneven success of these challenges, defendants are likely to continue raising such arguments,

> *... the constitutional guarantee of due process of law, in addition to public policy, weighs heavily against the propriety of arrangements that empower private attorneys with a financial stake in litigation and the authority of the state.*

particularly given that a limited number of states have considered the issue. The policy implications of states' use of contingency fee counsel are particularly strong where such litigation seeks to impose fines not available to private litigants; the litigation is quasi-criminal in nature; or the contract at issue provides outside counsel with significant discretion in pursuing and settling the case. In such cases, the constitutional guarantee of due process of law, in addition to public policy, weighs heavily against the propriety of arrangements that empower private attorneys with a financial stake in litigation and the authority of the state.

Legislative Reform

Even as the practice of states hiring private lawyers has expanded, some state legislators have responded by adopting safeguards on the hiring, oversight, and payment of private attorneys by state officials.

In the late 1990s and early 2000s, Colorado, Connecticut (via executive order), Kansas, Minnesota, North Dakota, Texas, and Virginia adopted legislation providing legislative oversight and contracting safeguards for state hiring of contingency fee lawyers. More recently, another wave of states have adopted legislation modeled after the Transparency in Private Attorney Contract (TiPAC) Act first passed in Florida in 2010.[53] TiPAC laws generally subject state contracts with private counsel to public bidding, require posting of contracts on public websites, place maximum caps on fees that outside counsel can receive, and mandate control and oversight of the litigation by government attorneys.

States that have adopted TiPAC-based laws include Arizona, Indiana, and Missouri in 2011;[54] Iowa and Mississippi in 2012;[55] and Alabama, with the support of AG Strange, in 2013.[56] Two state attorneys general, Georgia AG Sam Olen and West Virginia AG Patrick Morrisey, have issued administrative orders implementing similar transparency reforms.[57]

Momentum for legislative reform continues to grow, and such laws and regulations provide needed transparency. These laws should discourage "pay-to-play" arrangements between firms that pitch the litigation to the state and AGs who receive campaign contributions from private lawyers. The laws may also make it easier for a defendant to negotiate directly with the state to settle the litigation, rather than work through private lawyers. Such laws are not intended to stop states from entering such arrangements but to mitigate abuse by private lawyers of the power and

authority with which they are entrusted. Accordingly, the use of contingency fee lawyers by states subject to TiPAC should be closely monitored to evaluate whether the reform is having its intended effect or if modifications are needed.

Snapshot of State Litigation Using Outside Counsel

To address the scope of the relationship between private counsel and AGs, the list below provides a snapshot of sample AG litigation using outside counsel in the past three years.

FIRMS REPRESENTING STATE ON A CONTINGENCY FEE BASIS	PRINCIPAL ATTORNEY(S)	AREA(S) OF LITIGATION	STATE(S) REPRESENTED
Abraham & Rideout (MS)	A. Lee Abraham, Jr. Preston Rideout , Jr.	LCD Anti-trust Litigation	MS
Bailey Perrin Bailey LLP (TX)	F. Kenneth Bailey, Jr. Fletcher Trammell Michael Perrin Robert Cowan Justin Jenson Andrew Kirkendall Leslie LaMacchia Elizabeth Williams	Prescription Drug Marketing (Risperdal)	AR, LA, NM, KY, MS, PA, SC
		Prescription Drug Marketing (Seroquel)	SC
		Prescription Drug Marketing (Plavix)	MS
		Prescription Drug Marketing (Zyprexa)	AR, LA, MS
Baron & Budd, P.C. (TX)	Laura Baughman J. Burton LeBlanc IV Russell Budd S. Ann Saucer	BP – 2010 Gulf Spill	LA
		Credit card industry practices	MS, WV
		Prescription Drug Marketing (Avandia)	KY, MS, NM, WV
Barnhill & Galland, PC (IL)	Judson Minor	Average Wholesale Pricing (McKesson)	IN
Beasley Allen (AL) Crow, Methvin, Portis & Miles, P.C.	W. Daniel (Dee) Miles Roman Shaul H. Clay Barnett	Average Wholesale Pricing	AL, AK, HI, MS, LA, KA, SC, UT
Bernstein Litowitz Berger & Grossman LLP (NY/CA)	Gerald Silk Jay Eisenhofer Max Berger Salvatore Graziano	Securities (BoA Acquisition of Merrill Lynch)	OH Pension Fund
		Securities (Delphi Corp.) Securities (Amedisys) Securities (Satyam, PriceWaterhouseCoopers, Lovelock & Lewes) Securities (Schering-Plough Corp.) Securities (State Street Corp.)	MS
Blackburn, Conner & Taupeka, PC (AL)	Daniel Blackburn	BP – 2010 Gulf Spill	Mobile & Baldwin counties, Dauphin Island City Council, AL
Block Law Firm PLC (LA)	Jerald Block Matthew Block	Average Wholesale Pricing	LA
Boies Schiller & Flexner LLP (NY)	David Barrett	Microsoft anti-trust litigation	IN, MS

FIRMS REPRESENTING STATE ON A CONTINGENCY FEE BASIS	PRINCIPAL ATTORNEY(S)	AREA(S) OF LITIGATION	STATE(S) REPRESENTED
The Branch Law Firm (NM)	Brian Branch	Royalties on oil and gas extracted from state lands	NM
Charlie Condon Law Firm, LLC (SC)	Charlie Condon	Prescription Drug Marketing (Avandia)	SC
Chitwood Harley Harnes LLP (GA/NY)	Martin Chitwood	Securities (Diamond Foods, Inc.)	MS
Clarkson, Walsh, Terrell, & Coulter P.A. (SC)	N. Heyward Clarkson, III	LCD Anti-trust	SC
Clayton & Fruge (LA)	Tony Clayton	Prescription Drug Marketing (Wellbutrin and Paxil)	LA
Cohen Milstein Sellers & Toll PLLC (DC)	Linda Singer Betsy Miller Matthew Liles	Fraudulent mortgage lending & servicing Employment laws.	AZ, NV
		Misclassification of independent contractors in violation of state tax and	MT
		Average Wholesale Pricing (McKesson)	IN
		False Claims Act (Depakote)	IN
		Prescription Drug Marketing (Depakote)	MS
Cohen, Placitella & Roth, P.C. (NJ/PA)	Christopher Placitella Mark Schultz	Prescription Drug Marketing (Vioxx)	SC
Cook, Hall & Lampros, LLP (GA)	Edward Cook (former West Virginia AG McGraw's brother in law)	Securities litigation, consumer protection and fraud (Merck-Medco, Bank of America)	WV
Copeland Cook Taylor & Bush, P.A. (MS)	C. Greg Copland	Average Wholesale Pricing	IN, MS
Covington, Patrick, Hagins, Stern & Lewis, PA (SC)	Eugene Covington, Jr.	Prescription Drug Marketing (Vioxx)	SC
Office of Kenneth W. DeJean (LA)	Kenneth DeJean	Pharmaceutical Marketing (Zyprexa)	LA
DiTrapano Barrett DiPiero McGinley & Simmons, PLLC (WV)	Joshua Barrett	Pharmaceutical Marketing	WV
Fibich Hampton & Leebron LLP (TX)	W. Michael Leebron	Pharmaceutical Marketing (Zyprexa)	LA
Fowler White Boggs PA (FL)	Carl R. Nelson	BP – 2010 Gulf Spill	FL
Garmer & Prather, PLLC (KY)	William Garmer Jerome Prather	Prescription Drug Marketing (Vioxx)	KY
The Gooch Firm PC (UT)	Jeffrey Gooch	Prescription Drug Marketing (Avandia)	UT
Greer, Russell, Dent & Leathers, PLLC (MS)	Michael Greer	Prescription Drug Marketing (Avandia)	MS
The Guerrini Law Firm (CA)	John Guerrini	Collection of telephone privacy and auto-dialer judgments in California	IN

FIRMS REPRESENTING STATE ON A CONTINGENCY FEE BASIS	PRINCIPAL ATTORNEY(S)	AREA(S) OF LITIGATION	STATE(S) REPRESENTED
Hagens Berman Sobol Shapiro, LLP (WA)	Lauren Barnes Steve Berman Thomas Sobol Sean Matt David Nalven	Pharmaceutical Marketing (Zyprexa)	CT
	Steve Berman	Average Wholesale Pricing	NV
Hare, Wynn, Newell & Newton (AL)	Don McKenna Matthew Minner Scott Powell	Prescription Drug Marketing (Vioxx)	KY
Harrison, Rivard, Duncan & Buzzett (FL)	Franklin R. Harrison Adrien A. ("Bo") Rivard, III	BP – 2010 Gulf Spill	FL
Harrison, White, Smith and Coggins, P.C. (SC)	John Belton White Jr. Donald Coggins, Jr.	Prescription Drug Marketing (Seroquel)	SC
		Prescription Drug Marketing (Avandia)	SC
		Prescription Drug Marketing (Risperdal)	SC
Hausfeld LLP (DC)	William Butterfield James Pizzirusso Nathaniel Giddings	Class action against Fannie Mae and Freddie Mac over allegedly dodging property-related transfer taxes.	OH counties WV counties
Heard Robins Cloud & Black LLP (TX)	Bill Robins Justin Kaufman	Prescription Drug Marketing (Zyprexa)	NM
		Prescription Drug Marketing (Avandia)	KY, LA, MD, MS, NM, SC, UT, WV
Hersh & Hersh (CA)	Rachel Abrams	Prescription Drug Marketing (Zyprexa)	NM
Ingram|Wilkinson (MS)	Carroll Ingram Jennifer Ingram Wilkinson	Prescription Drug Marketing (Avandia)	MS
Janet, Jenner & Suggs, LLC (SC)	Kenneth Suggs Eugene Jenner	Cephalon (Provigil, Gabitril, Actiq)	SC
		Prescription Drug Marketing (Vioxx)	SC
Johnston Druhan, LLP (AL)	Joseph Michael Druhan, Jr.	BP – 2010 Gulf Spill	Mobile & Baldwin counties, Dauphin Island City Council, AL
Jones Ward PLC (KY)	Lawrence Jones Jasper Ward, IV A. Layne Stackhouse	Prescription Drug Marketing (Avandia)	KY
Kanner & Whiteley, L.L.C. (LA)	Allan Kanner Conlee Whiteley Deborah Trotter	Prescription Drug Marketing (Avandia)	LA
		Prescription Drug False Claims (Wellbutrin and Paxil)	LA
Kaplan Fox & Kilsheimer LLP (NY)	Frederick Fox Donald Hall Hae Sung Nam	Securities (BoA Acquisition of Merrill Lynch)	OH Pension Fund
		Securities (Amedisys Inc.)	MS

FIRMS REPRESENTING STATE ON A CONTINGENCY FEE BASIS	PRINCIPAL ATTORNEY(S)	AREA(S) OF LITIGATION	STATE(S) REPRESENTED
Kessler Topaz Meltzer & Check, LLP (PA)	Sean Handler	Securities (BoA Acquisition of Merrill Lynch)	OH Pension Fund
		Prescription Drug Marketing (Lilly)	UT
Law Offices of Frederick T. Kuykendall III, LLC (AL)	Fred Kuykendall III	BP – 2010 Gulf Spill	Mobile & Baldwin counties, Dauphin Island City Council, AL
Labaton Sucharow LLP (NY)	Thomas Dubbs Louis Gottlieb	Securities (Royal Bank of Scotland)	MS
		Securities (at least 10 defendants, including CVS Caremark)	Norfolk County, MA
Langston Law Firm (MS)	Joseph Langston Timothy Balducci	MCI-WorldCom Taxes	MS
Lee & Associates (MS)	Herbert Lee, Jr.	Prescription Drug Marketing (Avandia)	MS
McCallum Methvin & Terrell, P.C. (AL)	Phillip McCallum	Underground storage tanks	SC
McCulley McCluer PLLC (AL, MS, FL)	Stuart McCluer	Average Wholesale Pricing (McKesson)	MS, OK, UT
McCutchen, Blanton, Johnson & Barnette, LLP (SC)	T. English McCutchen, III	Average Wholesale Pricing	SC
McGowan, Hood & Felder LLC (SC)	Chad McGowan Travis Medlock	LCD Anti-trust	SC
Law Office of L. Michael Messina PA (NM)	L. Michael Messina	Prescription Drug Marketing (Avandia)	SC, UT
The Miller Firm, LLC (VA)	Michael Miller David Dickens	Prescription Drug Marketing (Zyprexa)	MT
Mike Kelly Law Group, LLC (SC)	D. Michael Kelly	Average Wholesale Pricing	SC
Miner Barnhill & Galland, P.C. (IL, WI)	Charles Barnhill, Jr. Sarah Siskind George Galland, Jr. Robert Libman Benjamin Blustein	Average Wholesale Pricing (First Databank)	IN
		Average Wholesale Pricing (McKesson)	SC
Morrow, Morrow, Ryan & Bassett (LA)	Patrick Morrow James Ryan Jeffrey Bassett	Prescription Drug Marketing (Lilly)	LA
George Neville (MS)	George Neville	Prescription Drug Marketing (Avandia)	MS
Nix Patterson & Roach, LLP (TX/FL)	S. Drake Martin Louis B. ("Brady") Paddock	BP – 2010 Gulf Spill	FL
Price, Okamoto, Himeno & Lum (HI)	Richard Eichor Kenneth Okamoto	Average Wholesale Pricing	HI
The Quin Firm, PLLC (MS)	William Quin, II	Prescription Drug Marketing (Risperdal, Seroquel, Zyprexa)	MS

FIRMS REPRESENTING STATE ON A CONTINGENCY FEE BASIS	PRINCIPAL ATTORNEY(S)	AREA(S) OF LITIGATION	STATE(S) REPRESENTED
Riley & Jackson, P.C. (AL)	Robert Riley, Jr.	BP – 2010 Gulf Spill	Mobile & Baldwin counties, Dauphin Island City Council, AL
Robert Bolchoz LLC (SC)	Robert Bolchoz	Underground storage tanks	SC
Roe Cassidy Coates & Price, P.A. (SC)	William Coates	Prescription Drug Marketing (Vioxx)	SC
The Rosemond Law Group, P.C. (TX)	G. Erick Rosemond	Prescription Drug Marketing (Avandia)	NM
Rossbach Hart, P.C. (MT)	William A. Rossbach	Prescription Drug Marketing (Zyprexa)	MT
Salim & Beasley, LLC (LA)	Robert L. Salim	Prescription Drug Marketing (Zyprexa)	LA
Rutherford Law Firm (SC)	J. Todd Rutherford	Cephalon (Provigil, Gabitril, Actiq)	SC
Shows, Cali, Berthelot & Walsh, L.L.P. (LA)	E. Wade Shows	Prescription Drug False Claims (Wellbutrin and Paxil)	LA
Schmutz & Schmutz, PA (SC)	J. Stephen Schmutz	Average Wholesale Pricing (McKesson)	SC
Simmons Law Firm (IL)	John Simmons	Prescription Drug Marketing (Seroquel)	SC
		Affinion, Inc. and Trilegiant Corporation marketing practices	SC
		Prescription Drug Marketing (Avandia)	SC
		Prescription Drug Marketing (Risperdal)	SC
Steele & Biggs LLC (UT)	Joe Steele	Prescription Drug Marketing (Zyprexa)	UT
Strom Law Firm, LLC (SC)	J. Preston Strom, Jr.	Average Wholesale Pricing (McKesson)	SC
Susman Godfrey LLP (TX)		Microsoft litigation	IN
The Thomas Firm (KY)	Tad Thomas	Prescription Drug Marketing (Risperdal)	KY
Thomson Law Office, LLC (NM)	David Thomson	Tobacco Master Settlement Agreement arbitration	NM
Usry, Weeks & Matthews (LA)	T. Allen Usry	Prescription Drug False Claims (Wellbutrin and Paxil)	LA
W. Howard Gunn & Associates (MS)	W. Howard Gunn	Prescription Drug Marketing (Zyprexa)	MS
Willcox, Buyck & Williams, P.A. (SC)	Mark Buyck, Jr.	Underground storage tanks	SC
Wolf Popper LLP (NY)	Lester Levy James Harrod	Securities (Royal Bank of Scotland)	MS
Zimmerman Reed PLLP (MN)	Carolyn Glass Anderson	LCD Antitrust Litigation	IN, MS

Endnotes

[1] *See, e.g.*, Stuart Taylor, *How a Few Rich Lawyers Tax the Rest of Us*, Nat'l J., June 26, 1999; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingency fee Bonanza*, Legal Times, Feb. 1, 1999, at 27.

[2] The Manhattan Institute has estimated that approximately 300 lawyers from 86 firms will earn up to $30 billion from the settlement of this litigation *See* Manhattan Inst., Center for Legal Pol'y, Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003, at *6* (2003); *see also* Leah Godesky, *AGs and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587, 588-89 (2009) (estimating that approximately $14 billion of the settlement has gone to private attorneys).

[3] *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10; Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, at A15.

[4] After years of litigation, the Rhode Island Supreme Court unanimously threw out a verdict against the manufacturers, finding the case should have been dismissed because "public nuisance law simply does not provide a remedy for this harm." *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008). Courts reached similar results in other states. *See* Anna Stolley Persky, *Primed for Lead Paint Litigation*, ABA J., Apr. 1, 2008.

[5] *An Update on the AWP Litigation*, Jere Beasley Report, July 3, 2012.

[6] Casey Sullivan, *Houston Law Firm Wins Big Fees From Johnson & Johnson*, Reuters, Feb. 1, 2013.

[7] Nate Raymond, *AstraZeneca Pays $26 Million to Settle South Carolina Lawsuit*, Thomson Reuters News & Insight, Aug. 24, 2012.

[8] Bill Berkrot, *Glaxo to Pay $229 Million to Settle Avandia Suits with Eight States*, Reuters, July 24, 2013.

[9] Andrea Lannom, *WV Supreme Court Takes Up Cases Challenging AG Outside Counsel*, The State J., May 14, 2013.

[10] Steve Green, *Homebuilders Pulte and Lennar Sue AG Over Hiring of Law Firm to Probe Lending*, Las Vegas Sun, Mar. 11, 2010.

[11] Editorial, *What Doesn't Stay in Vegas*, Wall St. J., June 12, 2013, at A16.

[12] U.S. Chamber Institute for Legal Reform, Frequent Filers: Repeat Plaintiffs in Shareholder Litigation, at 5-7 (Sept. 2013).

[13] *See id.* at 7.

[14] *Hood Hires Ex-AG Mike Moore to Sue BP*, WAPT News, Mar. 21, 2012.

[15] Katie Sanders, *Bondi Hires Legal Team to Help with State's Claim Against BP for Oil Spill Damages*, Tampa Bay Times, Mar. 9, 2012.

[16] Fla. Stat. Ann. § 16.0155.

[17] *See* Melinda Deslatte & Michael Kunzelman, *La. AG's Oil Spill Tab Nears $24M*, Assoc. Press, Jan. 14, 2013.

[18] *See id.*

[19] *Id.*

[20] *See* Steve Korris, *La. AG Lashes Back After Authority Stripped in BP Litigation*, Legal Newsline, Jan. 10, 2012.

[21] Neil King, Jr., Dionne Searcey & Vanessa O'Connell, *States Weigh Big Claims Against BP*, Wall St. J., June 28, 2010.

[22] John O'Brien, *Ala. AG Strange Proud He Didn't Use Private Lawyers in BP Oil Spill Case*, Legal Newsline, Oct. 25, 2012.

[23] *See* Proposed Contingency Fee Agreement to Represent Baldwin County for BP Oil Spill Related Claims (Jan. 2011); *see also* Gulf Oil Spill Litigation, *at* http://www.rileyjacksonlaw.com/Pages/Gulf-Oil-Spill-Litigation/.

[24] Letter to the Hon. Kathleen Kane, Pennsylvania Attorney General from Paul L. McDonald, Partner, Valorem Law Group, *Redacted Litigation Proposal: Using Parens Patriae Authority to Prosecute [Redacted] Claims Against "Big Food" for its Contribution to the States' $30 Billion Annual Medicaid Bill for Obesity*, Feb. 9, 2013 (on file with ILR) (hereinafter "AG Proposal").

[25] *See* Paul L. McDonald, Valorem Law Group (noting that his experience includes representing Brown & Williamson Tobacco Corp. in *United States v. Philip Morris USA Inc. et al.*, the U.S. Department of Justice's civil racketeering suit against "Big Tobacco").

[26] AG Proposal, *supra*, at 3-4.

[27] *Id.* at 2.

[28] *Id.* at 1.

[29] *See id.* at 3.

[30] *Id.*

[31] *See id.* at 4-5.

[32] *Id.* at 5.

[33] *See* James R. Copland, Statement Before the House Committee on the Judiciary Subcommittee on the Constitution Hearing on Contingency fees and Conflicts of Interest in State Attorney General Enforcement of Federal Law, Feb. 2, 2012.

[34] *See* Exec. Order No. 13433, *Protecting American Taxpayers from Payment of Contingency Fees*, 72 Fed. Reg. 28,441 (May 18, 2007).

[35] *See* Mississippi Attorney General Jim Hood, Outside Legal Counsel, *at* http://agjimhood.com/index.php/sections/divisions/outside_counsel (disclosing forty active contingency fee agreements).

[36] John O'Brien, *Supreme Court Rules Against Businesses Arguing AG Can't Hire Private Lawyers*, W.V. Record, June 4, 2013; Office of West Virginia Attorney General Patrick Morrisey, Outside Counsel, *at* http://www.wvago.gov/outsidecounsel.cfm.

[37] *See* S.C. Attorney General Alan Wilson, Contingency Fee Litigation Retention Agreements, *at* http://www.scag.gov/litigation-retention-agreements.

[38] David Hammer, *Attorney General Called Out for Giving Contracts to Top Campaign Donors*, WWLTV Eyewitness News, May 20, 2013.

[39] *See* Martin H. Redish, *Private Contingency fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77 (2010).

[40] *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 352 (Cal. 1985).

[41] *See* U.S. Chamber Institute for Legal Reform, *Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector* (Sept. 2013).

[42] *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008). A number of these challenges were rendered moot when the underlying litigation settled. *See, e.g.*, *Merck Sharp & Dohme Corp. v. Conway*, No. 3:11-cv-00051-DCR 2013 U.S. Dist. LEXIS 73672 (E.D. Ky. May 24, 2013) (Order denying motion for summary judgment); *GlaxoSmithKline LLC v. Caldwell ex rel. State of Louisiana*, No. 612562 (La., 19th Judicial Dist. Ct.); *AstraZeneca Pharms. v. Wilson*, No. 2011-CP-42-1213 (S.C. Cir. Dec. 20, 2011) (Order denying South Carolina Attorney General's Motion to Dismiss); Steve Green, *Homebuilders Pulte and Lennar Sue AG Over Hiring of Law Firm to Probe Lending*, Las Vegas Sun, Mar. 11, 2010.

[43] *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428 (R.I. 2008); *County of Santa Clara v. Atlantic Richfield Co.*, 235 P.3d 21 (Cal. 2010); *see also People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 350 (Cal. 1985) (holding that state use of contingency fee arrangements is prohibited in quasi-criminal enforcement actions because a private attorney who has the "vast power of the government available to him" must "act with the impartiality required of those who govern").

[44] *See Merck Sharp & Dohme Corp.*, No. 3:11-cv-00051-DCR 2013 U.S. Dist. LEXIS 73672 (E.D. Ky. May 24, 2013).

[45] *Id.* at *38-39, *41.

[46] *State of West Virginia ex rel. Discover Fin. Servs., Inc.*, No. 13-0086, and *State of West Virginia ex rel. GlaxoSmithKline*, LLC, No. 13-0102 (W. Va. June 3, 2013).

[47] *See Pickering v. Hood*, 95 So. 3d 611 (Miss. 2012); *Pickering v. Langston Law Firm*, 88 So. 3d 1269 (Miss. 2012).

[48] *See Meredith v. Ieyoub*, 700 So. 2d 478, 481-83 (La. 1997).

[49] *See* David Hammer, *Attorney General Called Out for Giving Contracts to Top Campaign Donors*, WWLTV Eyewitness News, May 20, 2013.

[50] *Lender Processing Servs., Inc. v. Masto*, No. 61387 (Nev.).

[51] Editorial, *What Doesn't Stay in Vegas, Wall St. J., June 11, 2013.*

[52] *See Daniel Fisher, Nevada Supreme Court to Hear Challenge Over AG's Private Lawyers, Forbes, June 4, 2013; Amanda Bronstad, Cohen Milstein Role Under Fire in Robo-Signing Case, Am Law Litigation Daily, June 3, 2013.*

[53] Fla. Stat. Ann. § 16.0155.

[54] Ariz. Rev. Stat. § 41-4801; Ind. Code Ann. § 4-6-3-2; Mo. Rev. Stat. §§ 34.376, 34.378, and 34.380.

[55] Iowa Code § 13.7, 23B.1 et seq.; Miss. Code Ann. §§ 7-5-1 to -8, 7-5-21, 7-5-39;

[56] H.B. 227 (Ala. 2013); AG Strange commented on the Alabama bill's enactment, "When I became Attorney General, I took action to preserve the taxpayer's money by utilizing the experience, knowledge and skill of our professional staff of state attorneys to handle cases of complex litigation that might have otherwise been hired out to private attorneys." Business Council of Alabama, 2013 Legislative Session Ends on Positive Note, May 22, 2013.

[57] Ga. Attorney General Samuel L. Olens, Administrative Order on Hiring Outside Counsel on a Contingency Fee Basis, May 29, 2012; Office of W. Va. Attorney General Patrick Morrisey, Outside Counsel Policy, Policy No. WVAGO-004, July 15, 2013.

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