U.S. CHAMBER
Institute for Legal Reform

Lawsuit Ecosystem II

New Trends, Targets and Players

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Executive Summary

What are the latest trends in American litigation? Where are opportunistic plaintiffs' lawyers prospecting for lawsuit gold? How are some state attorneys general delegating unprecedented powers to private lawyers who are driven by profit, not the public interest? Are targeted businesses pushing back? These key questions, and more, are examined in *The Lawsuit Ecosystem II: New Trends, Targets, and Players.*

Big-ticket litigation is a highly lucrative business. As the *National Law Journal* observed, in 2013, the 100 largest verdicts yielded more than $10 billion in recoveries, a sum the NLJ expects plaintiffs' lawyers to equal or surpass this year.[1] Creative plaintiffs' lawyers are continually developing new theories and identifying new targets to increase their profits.

This report, authored by a distinguished group of practitioners, explores the evolving lawsuit "ecosystem." It considers how plaintiffs' lawyers generate litigation and significant developments that will spur more lawsuits or rein in excessive liability.

Key findings are highlighted below.

Litigation Trends

ADVERTISING FOR MASS TORT CLAIMANTS

The business model for building mass tort litigation is extensive and complex:

- Plaintiffs' lawyers work with "lead generation" firms to advertise for prospective claimants, spending millions each month;
- At the first sign of a problem with a product, plaintiffs' lawyers begin recruitment efforts;
- Potential claims are sold, traded, and bundled before a plaintiffs' lawyer actually files them; and
- Plaintiffs' firms rush to file as many lawsuits as possible to gain a strategic advantage in future litigation.

EXPANSIONS OF PRODUCT LIABILITY

In three states, courts opened the door to new types of product liability lawsuits:

- In Pennsylvania, the high court ruled that manufacturers may be liable for "negligent design" of a drug, even if it adequately warned of potential side effects;
- In Alabama, the Supreme Court became the first high court to rule that a brand-name drug maker can be held liable for injuries caused by generic versions of the drug made by competitors; and
- In California, a $1.15 billion verdict requires companies to pay to remediate lead paint they may not have sold on property they do not control.

SANCTIONS FOR LOSS OF ELECTRONIC DATA

Plaintiffs' attorneys initiate discovery disputes to discredit a defendant in the judge's eyes and, when possible, generate sanctions.

- Given virtually unlimited amounts of electronic data, the risk of lost files, and opportunity for plaintiffs' lawyers to cry foul, is high.
- The largest verdict in a product liability case this year, $9 billion, stemmed from sanctions for failure to retain documents.
- Proposed changes to the federal rules may help clarify document retention obligations.

MIXED SIGNALS ON CLASS CERTIFICATION

The battle over what does and does not constitute a certifiable class action continues. On one hand:

- A class may include consumers who have experienced no problem with their purchases; and
- Federal appellate courts are rarely granting immediate review of class certification rulings, thereby increasing the pressure on defendants to settle even meritless claims.

But on the other hand:

- "Ascertainability"—the need for plaintiffs' lawyers to show they can accurately identify class members—has become increasingly prominent in class certification decisions; and
- Some judges are scrutinizing class action settlements that generously compensate plaintiffs' lawyers but provide little or no benefit to those they purportedly represent.

ASBESTOS LITIGATION CONTINUES TO EVOLVE

The outlook is mixed with respect to the seemingly endless parade of asbestos claims. On the plus side:

- A federal bankruptcy judge has shed light on some of the more suspect tactics of plaintiffs' lawyers, which might lead to additional evidence of abuse, and spur judicial action and legislative reform.

On the minus side:

- Court procedures in New York City were altered to favor asbestos plaintiffs;
- In two major states, plaintiffs' lawyers succeeded in subjecting employers to tort suits, circumventing workers' compensation laws; and
- Individuals with lung cancer—an illness often not related to asbestos—are being sought and recruited as a vast new pool of potential claimants.

SECURITIES LITIGATION CONTINUES UNABATED

Federal securities litigation harms investors while benefiting plaintiffs' lawyers:

- Shareholders lose $39 billion per year in wealth in order to collect $5 billion per year in settlement distributions;
- Federal securities class action settlements resulted in $1.1 billion in attorneys' fees, almost twice as much as the prior year;
- "Frequent filers"—professional plaintiff investors—play a significant role in securities litigation; and
- The U.S. Supreme Court maintained a court-created presumption that an alleged misstatement affects market price, which may result in even more complex and expensive securities litigation.

A LAWSUIT FOR EVERY MAJOR DEAL

Nearly every merger or acquisition results in multiple class action lawsuits within weeks of the announcement.

- Businesses quickly pay this "litigation tax" as a cost of doing business in order to complete the deal; and
- In three out of four settlements, shareholders do not receive a cent, but lawyers take home significant sums.

QUI TAM LAWSUITS REACH NEW HEIGHTS

Federal False Claims Act (FCA) lawsuits— known as *qui tam* actions—reached a new high in FY 2013, and continued at near record levels in FY 2014.

- The healthcare and financial services industries bear the brunt of the litigation;
- As the federal government assumes a greater role in healthcare, plaintiffs' lawyers may develop new theories to bring FCA lawsuits;
- Courts are considering cases that could further expand or constrain FCA liability, such as allowing "whistleblowers" to sue even when their allegations are publicly available or the conduct at issue was disclosed to the government; and
- Adoption or expansion of FCAs by states and major cities will provide plaintiffs' lawyers with additional avenues to sue.

TURNING THE TIDE AGAINST PATENT TROLLS

Patent troll litigation reached an all-time high in 2013, but movement is underway to curb it:

- Reform initiatives in Congress, while ultimately blocked by the plaintiffs' bar, gained momentum with bipartisan support and could move forward in the future;
- Eighteen states passed legislation that deters bad faith pursuit of patent lawsuits;
- Several state attorneys general have pursued patent troll entities, alleging unfair trade practice violations; and
- Recent U.S. Supreme Court decisions give patent defendants more and better tools to fight back.

SOCIAL MEDIA BECOMING FERTILE GROUND FOR LABOR AND EMPLOYMENT LAWSUITS

Plaintiffs' lawyers are turning employer use of social media into opportunities to bring lawsuits:

- The use of search engines to screen job applicants leaves employers vulnerable to employment discrimination charges; and
- Information viewed in social media posts can be construed as evidence in support of wage and hour claims.

ENERGY PRODUCERS AS LITIGATION TARGETS

The energy industry is a rising target for plaintiffs' lawyers:

- Even as climate change litigation has slowed, the industry faces lawsuits related to "fracking" as well as public nuisance claims against power plants; and
- BP's settlement stemming from the 2010 Deepwater Horizon spill remains problematic, as plaintiffs' lawyers file claims on behalf of businesses that were not even affected economically by the spill and continue to collect on questionable claims.

EXPLOITATION OF A LAW INTENDED TO STOP TELEMARKETING

A cadre of plaintiffs' lawyers uses the Telephone Consumer Protection Act (TCPA) as a litigation machine:

- Businesses that inadvertently contact people at a number reassigned from a former customer or employee are subject to draconian statutory penalties;
- Due to vagueness in the law, conflicting judicial interpretations, and a lack of defenses, some companies have entered multi-million dollar settlements with plaintiffs' lawyers; and
- The Federal Communication Commission has been slow to clarify the law, allowing litigation to thrive.

The Growing Alliance between Plaintiffs' Lawyers and Some State Attorneys General

EXPANDING THE POWERS OF PRIVATE LAWYERS

Some state AGs are delegating more power to private lawyers:

- Private lawyers have received not only the authority to sue on behalf of the government, but also the government's broad power to subpoena records in search of potential lawsuits;
- Plaintiffs' lawyers filed the first lawsuits under federal laws that authorize state AG enforcement, even where federal agencies are precluded from using contingency fee litigation to enforce the law; and
- Plaintiffs' lawyers are increasingly representing cities, counties, and local boards in addition to state AGs.

COURT CHALLENGES WITH MIXED RESULTS

Despite significant due process concerns, most courts are allowing private lawyers who are paid a percentage of the damages or fines imposed to represent the government so long as there are contractual safeguards mandating that government attorneys control the litigation. The litigation continues:

- Constitutional challenges before the Sixth Circuit and Nevada Supreme Court were withdrawn this year when the underlying litigation settled.
- Plaintiffs' lawyers who overreached when representing states suffered significant setbacks when the high courts of Arkansas, Louisiana, and Pennsylvania threw out multi-million and billion dollar verdicts; and
- A U.S. Supreme Court ruling that state AG actions—even when brought by contingency fee lawyers with claims mimicking class actions—are not subject to federal court jurisdiction is expected to further encourage the troubling practice of plaintiffs' lawyers teaming up with AGs in liability-friendly jurisdictions.

NEW LAWS ARE PROVIDING TRANSPARENCY

Bipartisan legislation has been adopted in ten states over the past four years:

- This legislation responds to the potential for pay-to-play hiring of private lawyers by government officials.
- Even Louisiana—considered a hotbed of such practices—passed such legislation.
- The laws vary state-to-state, but they are intended to ensure that such arrangements are negotiated openly, that contracts and payments are disclosed online, and that lawyers representing the state do not siphon an excessive amount of the taxpayers' recovery.

Special Features

RESTATEMENTS QUIETLY RESHAPE LITIGATION

The American Law Institute (ALI) is working on several new projects that could significantly impact hot areas of litigation. The influential group is involved in projects affecting:

- information privacy;
- consumer contracts;
- liability for economic harms;
- intentional torts;
- employment law; and
- insurance litigation.

Plaintiffs' lawyers may try to use the ALI's ordinarily balanced work to urge courts to adopt broader liability rules.

DEFENDANTS ARE FIGHTING BACK

Rather than simply treating baseless lawsuits as a cost of doing business, companies are fighting back.

- Two companies succeeded in civil RICO actions against plaintiffs' lawyers who filed fraudulent claims. A third RICO lawsuit, recently filed, alleges plaintiffs' lawyers routinely withhold key evidence in asbestos litigation;
- Businesses targeted by contingency fee lawyers deputized by state AGs are filing their own lawsuits challenging the constitutionality of the practice in federal courts;
- State AGs who fail to produce evidence supporting incendiary allegations may face court sanctions; and
- Businesses that face meritless lawsuits are taking their cases directly to the public to protect their reputations.

Mass Tort & Product Liability Litigation

As anyone who watches television has likely observed, aggressive advertising for lawsuits is on the rise. Plaintiffs' lawyers and "lead generators" spend millions each month to recruit plaintiffs, particularly for pharmaceutical and medical device litigation. TV viewers know little about the underbelly of mass tort litigation—how potential claims are bought, sold, and traded before eventually being filed. The plaintiffs' bar also continually tests means of expanding product liability in the courts. A few recent successes may prove short-lived. When the organized plaintiffs' bar fails, however, it turns to potential allies in government agencies to alter the rules, asks courts to allow junk science, or seeks to impose liability by sanction.

Development of a Mass Tort

While general personal injury firms advertise their services on television and on the radio, those that focus on mass tort litigation are willing to spend more on advertising given the greater return such suits can yield.[2] In addition to a never-ending search for asbestos claimants, solicitation of clients for prescription drugs and medical device litigation gets significant airtime. The more plaintiffs, the greater leverage a lawyer has in settlement negotiations (and in obtaining attorneys' fees), even as the lawyers' time and cost do not change significantly.

RISE OF LEAD GENERATION FIRMS

Scores of non-lawyer marketing firms have emerged to provide "lead generation" services for mass tort litigation. Plaintiffs' lawyers acknowledge a surge in these lead companies, even as they distance themselves from such practices.[3] These companies focus on recruiting thousands of people to join mass tort litigation through television, radio, print, and Internet advertising.

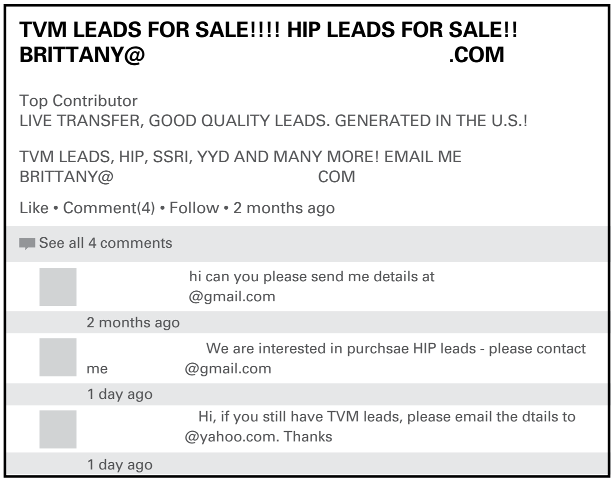
Marketing firms operate call centers that screen potential plaintiffs, receiving a substantial referral fee per qualified caller. That fee can vary based on the level of screening, the size of the pool of potential

> *Leads generated by these firms are often sold, traded, and consolidated before ultimately ending up in the hands of the plaintiffs' lawyer who files the claims.*

claimants, and whether the company uses a domestic or foreign call center. For example, a mass tort marketing company offers a qualified domestic lead for Actos litigation for $999, while a lead verified by an "import" (foreign) call center costs a little less, $925.[4] An Internet-submitted form might garner $150. One marketing firm touts generating an average of 60,000 mass tort leads annually.[5] Another such group declares that with their services, "[b]uilding a new mass tort practice isn't as difficult or expensive an undertaking as you might think."[6] Some companies coordinate "mass tort groups" that allow plaintiffs' firms interested in the same litigation to share the costs and leads generated through national television advertising campaigns.[7]

Bloomberg Businessweek profiled one particularly aggressive lead generator, Jesse Levine, in December 2013.[8] Levine, who is not a lawyer and has done two stints in prison, operated a company called Internet Technology Partnerships. Based in Norristown, Pennsylvania, the company maintained a network of lead generation websites. He also sponsored and attended plaintiffs' lawyer seminars to build relationships. According to the article, his business employs thirteen people full-time in the Philadelphia suburbs while contracting with $4 per hour contractors in the Philippines. Leads go for $500 to $2,000 apiece. The firm got into hot water after it cold-called scores of Missouri residents, asking personal questions, to prompt them to take part in Avandia litigation. After receiving complaints, Missouri Attorney General Chris Koster discovered the firm behind the calls and alleged the lead generator violated the "Do Not Call" list. Levine denied wrongdoing, but settled the claim for $35,000.[9]

Levine now runs bpclaims.info to entice businesses throughout Alabama, Louisiana, Florida, Texas, and Mississippi to seek settlement money related to the Gulf Coast spill, viewing emptying the fund as a "moral imperative" and a "patriotic duty."[10] Another of Levine's current advertising campaigns generates Actos litigation, which his firm advertises as an "URGENT MESSAGE" from "Med RECALL News,"[11] even though the FDA has *not* recalled the drug.[12]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1 day ago

Example of a LinkedIn lead generation group (identifying information is redacted)

Leads generated by these firms are often sold, traded, and consolidated before ultimately ending up in the hands of the plaintiffs' lawyer who files the claims. There is even an active market on LinkedIn for offering and buying leads that includes Craigslist-like posts.[13] The attorney who files the lawsuit may not know the original source of the plaintiff, which may be a cold-call placed to a Missouri resident or a response to a television ad through a call center in Asia.[14] Although one plaintiffs' lawyer regards lead generators as "leeches on our industry," he expects them to continue to proliferate "because there is money to be made."[15]

MILLIONS SPENT EACH MONTH ON TV ADVERTISING

According to The Silverstein Group, a communication firm that tracks mass tort advertising, plaintiffs' lawyers regularly spend over $10 million on national television network and national cable advertising, and more in local markets, *each month*.[16]

For example, in October 2014, plaintiffs' lawyers spent nearly $14 million on ads to find plaintiffs for Xarelto (a blood thinner) ($7.2 million), pelvic mesh ($3 million), power morcellators ($1.5 million), Risperdal - Risperidone (1.2 million), and testosterone therapy products ($953,000) litigation.[17]

Plaintiffs' lawyers keenly watch FDA investigations and warning letters for potential business. For example, within a month of the FDA's announcement of an investigation into the risk of stroke, heart attack, and death in men taking FDA-approved testosterone therapy products on January 31, 2014,[18] plaintiffs' lawyers ran over 5,000 ads on television.[19] Spending on testosterone lawsuit ads rose from $130,000 in January to $1.7 million in February to $5 million in March 2014,[20] before tapering off. "Low T" cases became a "hot campaign."[21] The litigation is just beginning.[22]

Money on the table also prompts plaintiffs' lawyers and lead generators to increase advertising. Following announcement of an $830 million settlement of pelvic mesh cases, plaintiffs' lawyers reportedly flooded the airwaves with 8,000 pelvic mesh lawsuit television ads in May 2014 at an estimated cost of $5.4 million.[23] That spending surged to $7.9 million the following month and gradually declined to $3 million in October 2014.[24]

DO LAWYER ADS ATTACKING DRUGS HAVE SIDE EFFECTS?

The onslaught of mass tort advertisements targeting prescription drugs may pose a risk to public health, cautions Law Professor Daniel M. Schaffzin in a recent article.[25] Such advertisements, often in a familiar dire, authoritative tone, warn patients of the potential for heart attacks, death, strokes, organ failure, suicidal tendencies, or other potentially fatal side effects. Repeatedly hearing exaggerated or sensationalized warnings may lead patients to not take a drug that their physician believes would provide them with significant benefits and pose little risk. For example, psychiatrists have reported that patients with schizophrenia and bipolar disorder have requested a medication change, or stop taking a particular medication, because the drug at issue was targeted in lawyer ads.[26] At worst, it could spur a patient to immediately stop using a drug without consulting a doctor, which itself could cause harm.[27]

The risk of harm from mass tort generating ads is particularly keen when plaintiffs' lawyers rush to be the first to air television advertisements—to gain an advantage in what could be the latest mass tort litigation—by spreading concern before the science supports their theories.

While drug-company advertising is also prevalent, pharmaceutical companies note the risks of their products along with the benefits. Their advertising is subject to FDA oversight. By way of contrast, television commercials—intended to generate litigation— dramatize risks while acknowledging none of the benefits. They may mislead patients by making incomplete or unsupported claims.[28]

Emerging Targets, Familiar Players

Federal Multidistrict Litigation (MDL) provides a snapshot of mass tort litigation. Although the list that follows does not include cases pending in state courts, these statistics show the amount of litigation involving a particular product or incident and whether the litigation is emerging, mature, or winding up.

As plaintiffs' lawyer spending on advertising suggests, and the MDL statistics show, pharmaceutical and medical device manufacturers are the most frequent

"The risk of harm from mass tort generating ads is particularly keen when plaintiffs' lawyers rush to be the first to air television advertisements—to gain an advantage in what could be the latest mass tort litigation—by spreading concern before the science supports their theories."

product liability targets of plaintiffs' lawyers. Most cases in MDL panels and about 40% of the American Association for Justice's 138 litigation groups fall in this area.[29]

Nearly half of the pending lawsuits in federal MDL panels are centralized in West Virginia federal court, where Judge Joseph R. Goodwin oversees over 65,000 pelvic mesh cases.[30] These lawsuits have doubled over the past year. In addition, courts in states such as Massachusetts, New Jersey, and Pennsylvania have established coordinated proceedings for pelvic mesh litigation. There are at least 8,600 cases pending in New Jersey alone.[31] Pelvic mesh devices retain FDA approval and continue to be recommended by doctors to treat stress urinary incontinence (leakage during coughing, sneezing, laughing, or exercise) and pelvic organ prolapse (lack of support of the pelvic organs resulting from labor, childbirth, or age) in women. Nevertheless, plaintiffs' lawyers continue to heavily advertise for pelvic mesh plaintiffs and their efforts are beginning to pay dividends. For example, in July, a Houston lawyer obtained a $73 million verdict against one manufacturer.[32] Given the prospect of a jackpot verdict and the continued use of the devices, plaintiffs' lawyers are likely to file more of these lawsuits for many years.

Mass tort suits also affect industries other than those that make medical devices and prescription drugs. Automakers see their share of litigation, as Toyota wraps up the last of the relatively few claims alleging physical injuries from unintended acceleration in its vehicles,[33] as opposed to economic losses (which settled for about $1.1 billion in 2013, plus payment of $200 million in attorneys' fees and $27 million in expenses to be divided among the 31 plaintiffs' firms that worked on the litigation).[34] Plaintiffs' firms involved in the Toyota litigation are jockeying to serve in leadership positions in the new MDL for personal injury and economic loss claims allegedly resulting from faulty ignition switches in GM vehicles.[35]

While lawsuits brought by former football players against the National Football League (NFL) for concussion injuries gained preliminary approval in July 2014,[36] student athletes who played in the National Collegiate Athletic Association (NCAA) began filing similar lawsuits in late 2013.[37] But why stop with football? After plaintiffs' lawyers filed the first three lawsuits alleging concussion-related injuries against the National Hockey League, the federal courts created an MDL for those and future claims in August 2014.[38]

Pending Federal Multidistrict Litigation (Select Cases)	Pending on 10/15/14	Pending on 10/15/2013	Percent Change	Historical Total – as of 10/15/14
Pharmaceutical Product Liability, Sales, Practices, and Marketing Claims				
Yaz	6,951	9,873	-29.5%	11,753
Actos	3,718	2,587	43.7%	3,847
Avandia	2,570	3,416	-24.7%	5,216
Pradaxa	2,479	1,591	55.8%	2,580
Fresenius GranuFlo/NaturaLyte Dialysate	2,127	312	581.7%	2,128
Fosamax	902	899	0.3%	1,138
Fosamax No. II	517	1,099	-52.9%	1,169
Vioxx	403	512	-21.2%	10,319
Levaquin	259	1,231	-78.9%	2,048
Testosterone Replacement Therapy Products	223	-	N/A	223
Prempro	61	1,202	-94.9%	9,761
Pelvic Mesh				
Ethicon, Inc.	21,643	10,270	110.7%	22,077
American Medical Systems, Inc.	18,866	10,577	78.3%	19,170
Boston Scientific Corp.	14,094	6,479	117.5%	14,250
C.R. Bard	9,863	4,826	104.3%	10,117
Coloplast Corp.	1,730	1,075	60.9%	1,813
Hip Replacement				
DePuy ASR Hip	8,509	8,313	2.3%	9,129
DePuy Pinnacle Hip	6,632	4,850	36.7%	6,711
Biomet M2a Magnum Hip Implant	1,947	725	168.5%	2,412
Stryker Rejuvenate and ABG II Hip Implant	1,908	346	451.4%	1,953
Asbestos				
Asbestos Products Liability Litigation (No. VI)	2,752	3,206	-14.1%	192,047
Other Product Liability				
NuvaRing	1,763	1,421	24.0%	1,860
Zimmer NexGen Knee Implant	1,319	1,077	22.4%	1,487
Mirena IUD Products	1,042	211	393.8%	1,042
Kugel Mesh Hernia Patch	665	1,196	-44.3%	2,232
Toyota Unintended Acceleration	145	156	-7.0%	435
GM Ignition Switch	119	-	N/A	119
Miscellaneous				
BP "Deepwater Horizon" Oil Spill	2,943	2,871	2.5%	3,079
Sketchers Toning Shoe Products	791	511	54.7%	858
NFL Concussions	329	281	17.0%	332
Chinese Drywall	291	289	0.6%	361
Target Corp. Customer Data Security Breach	107	-	N/A	110
NCAA Student Athlete Concussions	13	-	N/A	13
NHL Players' Concussions	8	-	N/A	8

Pushing to Expand Liability

Plaintiffs' lawyers routinely ask courts to push the limits on liability. Some courts are receptive. When they are not, the plaintiffs' bar looks to state legislatures and regulatory agencies to change the rules to their benefit.

COURT ALLOWS PLAINTIFFS' "NEGLIGENT DESIGN" CLAIM IN DRUG LAWSUIT

Typically, when personal injury lawyers bring product liability claims against pharmaceutical makers, they allege that the company failed to adequately warn of a risk.[41] They do not usually allege that a drug is defective in its design. The reason is simple: if the design of a drug is altered, it is no longer the same drug that went through years of tests and ultimately received FDA approval.[42] Drug risks are addressed through warnings, not design changes. For that reason, courts universally rejected design defect claims in drug litigation[43]—until this year.

In January 2014, the Pennsylvania Supreme Court narrowly opened the door to negligent design claims against drug makers. While both plaintiff and defense lawyers called the decision "monumental" [44] and "stunning,"[45] it remains to be seen whether this case becomes a significant new tool in the arsenal of plaintiffs' lawyers.

Lance v. Wyeth involved a weight loss drug, Redux, which the plaintiff briefly used just months before Wyeth withdrew the drug from the market due to the risk of Primary Pulmonary Hypertension.[46] Seven years later, the plaintiff was diagnosed with the condition and her estate claimed the drug was responsible for her death. The plaintiff relied on the theory that the drug was defectively designed, i.e., the manufacturer never should have sold it.

The trial court applied traditional rules of product liability and dismissed the case, but the Pennsylvania Supreme Court reversed. The court held that drug makers "violate their duty of care if they introduce a new drug into the marketplace, or continue a previous tender, with actual or constructive knowledge that the drug is *too harmful to be used by anyone*."[47] The court recognized that the plaintiff's "theory of liability would present more difficult questions in a circumstance in which a prescription drug maintained its FDA approval, remained on the market, and U.S. doctors continued to prescribe it."[48]

Plaintiffs may attempt to assert more negligent design claims in drug cases, but there are significant hurdles to overcome. Asserting a design defect claim against a drug manufacturer subtly attacks the regulatory authority of the FDA to approve drugs. The U.S. Supreme Court has indicated that it would consider a state tort law-based claim for design defect that requires a company to "stop selling" an FDA-approved drug to likely be preempted by federal law.[49] In addition, demonstrating that a safer, feasible alternative design exists for a drug design defect claim would be difficult, particularly if plaintiffs are required to show how the FDA would approve an alternative drug design.[50] The likelihood that plaintiffs will succeed with these types of claims is uncertain, but their attorneys are sure to continue to try.

> *"The Pennsylvania Supreme Court narrowly opened the door to negligent design claims against drug makers."*

INNOVATOR LIABILITY: FROM COURTS TO THE FDA

Creative plaintiffs' lawyers pursue new theories of product liability to expand the number of defendants—and increase the likelihood of reaching deep pockets for settlements. One such theory is "innovator liability," which attempts to hold companies that make brand-name prescription drugs liable for injuries allegedly stemming from generic versions. Finding a lack of success in the courts, plaintiffs' lawyers are pressuring the FDA to change regulations designed to facilitate availability of safe, low-cost generic drugs for their own benefit.

Plaintiffs' lawyers have increasingly asserted such claims in the wake of *PLIVA v. Mensing*, a 2011 case in which the U.S. Supreme Court held that lawsuits alleging a generic drug's labeling failed to adequately warn of risks are preempted by federal law.[51] The Court reached this decision because generic drugs must carry the same labeling approved by the FDA for the brand-name version, and generic drug makers cannot change their product labeling without first obtaining permission from the FDA.[52] When the Court blocked the possibility of recovery from generic drug manufacturers for failure to warn, more plaintiffs' lawyers targeted the deep pockets of brand-name drug makers.[53]

The innovator liability theory ignores a basic tenet of product liability law—a manufacturer is only subject to liability for products it makes, distributes, or sells.

"The innovator liability theory ignores a basic tenet of product liability law—a manufacturer is only subject to liability for products it makes, distributes, or sells."

Business are not obligated to "stand behind" the products of other companies—particularly those of its competitors.[54]

The overwhelming majority of courts have rejected attempts to impose innovator liability,[55] including five federal courts of appeal.[56] A Sixth Circuit decision this year found that 22 states would not recognize such a theory.[57] The Iowa Supreme Court in July 2014 is the latest state high court to follow this path.[58] The Alabama Supreme Court, however, became the first state high court to allow innovator liability in January 2013,[59] and, after reconsideration, adhered to this outlier result in August 2014.[60]

With few successes in the courts, the plaintiffs' bar turned its attention to the agency with the power to change the rules governing drug-warning labels. The FDA announced in November 2013 that it is considering altering its regulations to allow generic drug makers to unilaterally update their product labeling separately from the corresponding brand drug.[61] In an oversight hearing, an agency official said that the FDA is considering the rule change to "create parity" between brand name and generic drugs, encourage generic drug companies to actively cooperate with the FDA to ensure accuracy of their drug labels, and—most importantly to the plaintiffs' bar—"eliminate the preemption of certain failure-to-warn claims, with respect to generic drugs."[62]

The comment on the proposed rule change submitted by AAJ parrots this reasoning and defends the FDA's authority to engage in the proposed rulemaking.[63] The organization has also launched a grassroots website to encourage comments to Congress and signatures on a petition to the FDA.[64]

It is also worth noting that FDA staff did not meet with drug makers, physicians, pharmacists, or health insurers when developing its proposed rule on generic drug labeling. But, a few months before publishing it, the FDA did meet with one group: AAJ.[65] According to FDA records, three AAJ lobbyists met with the FDA's senior lawyers and policymakers in charge of developing the rule in February 2013. The meeting was titled "*Mensing* follow-up."[66] The meeting raises the question about whether the FDA is placing liability issues before patient safety.

Members of Congress have questioned the FDA's authority to change the regulation,[67] which stems from a law Congress enacted in 1984 to facilitate wider availability of generic drugs.[68] The House Committee on Appropriations pointed out the potential for confusion among the public and providers if the same drugs came with different labels.[69]

An economic assessment of the FDA's proposed rule projects that the rule change could increase generic drug product liability costs by $4 billion per year—costs that would be borne by insurers and consumers.[70] A survey of doctors and pharmacists by the Generic Pharmaceutical Association found that healthcare providers are worried about additional liability and the amount of time it would take to stay current on changing drug labels.[71] As the House report observed, the potential for increased liability costs "may drive smaller companies from the market, increase the cost of generic medications, and lead to additional drug shortages."[72]

> *"FDA staff did not meet with drug makers, physicians, pharmacists, or health insurers when developing its proposed rule on generic drug labeling. But, a few months before publishing it, the FDA did meet with one group: AAJ."*

RECORD-BREAKING PUBLIC NUISANCE VERDICT

Over the past decade, plaintiffs' lawyers have repeatedly attempted to use public nuisance theory to target product makers when the claims made cannot meet longstanding product liability principles. These principles include the basic need for a plaintiff to show the product was defective when sold and to identify the company whose product allegedly caused the injury. For example, lawsuits have sought to impose liability on today's paint manufacturers for harms caused by the ingestion by children of flaking and deteriorating lead paint applied decades ago. These companies present a more attractive deep pocket to pay remediation expenses than landlords who have not properly maintained their properties. Courts have not been receptive to these theories,[73] which were advanced by private contingency fee lawyers who sold the idea to state and local governments.[74]

That may have changed in January 2014, when Judge James P. Kleinberg of the Santa Clara County Superior Court in California ordered three paint manufacturers to pay $1.15 billion—the second highest verdict of the year.[75] Judge Kleinberg ordered the companies to place the money into an abatement fund to pay for lead paint investigation and removal in ten cities and counties that joined the suit.[76] The court found in *People v. Atlantic Richfield Co.* that the paint companies could be held "liable for public nuisance if they 'created or assisted in the creation of the nuisance'" even when they did not own or control the property where the nuisance arose.[77]

> *"Over the past decade, plaintiffs' lawyers have repeatedly attempted to use public nuisance theory to target product makers when the claims made cannot meet longstanding product liability principles."*

The California court's decision is out of step with other states. It is the first ruling against a paint company on a public nuisance theory. Several other state high courts have soundly rejected similar lawsuits.[78]

As a trend leader in product liability law, if upheld on appeal, the California court's reasoning could encourage other state courts to mistakenly blend product liability and public nuisance theories. It remains to be seen if "creative counsel" can continue "'to move public nuisance theory far outside its traditional boundaries by using it [against] product manufacturers'—presumably because they have found these 'once-progressive' and now 'well-defined' principles of products liability inadequate to assure recoveries" that they desire.[79]

Gaming the Process

The plaintiffs' bar saves some of its toughest tactics for the courtroom, where they fight tooth and nail for admission of questionable scientific evidence and squabble over discovery in the hopes of gaining an advantage before courts consider the merits of a case.

REEMERGENCE OF JUNK SCIENCE?

In 1993, the U.S. Supreme Court sent a clear message to judges to separate sound science from fiction.[80] *Daubert v. Merrell Dow Pharmaceuticals* deputized trial court judges to act as "gatekeepers" over the admission of proposed expert testimony.[81] Federal judges took that call to heart and began to more carefully examine testimony by purported experts to ensure their theories are based in sound scientific methodology.[82] Although federal courts and most states now follow the *Daubert* standard, there is unrelenting pressure from the plaintiffs' bar to relax standards of admissibility for their "scientific" evidence. Such questionable testimony, which is likely to mislead jurors, has a significant impact in product liability litigation.

A recent analysis of civil filings[83] found that after federal courts adopted *Daubert*, plaintiffs accelerated their filings in state courts that kept the standard from *Frye v. United States*, which permits evidence to be admitted if it is "generally accepted" in the scientific community.[84] The same study found that civil plaintiffs changed their filing patterns in states that adopted *Daubert*-like standards because "a plaintiff no longer receives a strategic advantage through choice of venue" between federal and state courts.[85]

It should come as no surprise that the Florida Justice Association (the state's plaintiffs' bar) is urging the Florida Supreme Court to overturn the legislature's replacement of the state's lax standard with the *Daubert* approach.[86] That law brought Florida into the mainstream in 2013—two decades after the U.S. Supreme Court adopted the higher standard.

Even in federal courts, where *Daubert* is established law, legal scholars observe "an extraordinary undercurrent of rebellion by a minority of federal judges who implicitly object to the radical changes wrought by the '*Daubert* revolution.'"[87] Some federal judges are showing a fundamental misunderstanding of—or open defiance to—the gatekeeping role.

> *"The plaintiffs' bar saves some of its toughest tactics for the courtroom, where they fight tooth and nail for admission of questionable scientific evidence and squabble over discovery in the hopes of gaining an advantage before courts consider the merits of a case."*

An example of this judicial recalcitrance is a case the plaintiffs' bar uses "to educate courts about the limits of their gatekeeper role so that they understand they cannot second-guess scientists on issues involving the use of scientific judgment."[88] In *Milward v. Acuity Specialty Products Group,* the First Circuit found that a trial court abused its discretion when it excluded testimony offered by a plaintiff's expert on whether benzene could cause a specific type of leukemia.[89] Critics of the decision say the court erred by ignoring the federal rule governing admission of expert testimony, "relying on obsolete precedents," and "allowing 'weight of the evidence' testimony in lieu of applying the reliability test" for scientific evidence, among other missteps.[90] The decision also relied on a controversial comment contained in the new Restatement (Third) of Torts: Liability for Physical and Emotional Harm that suggested a weaker approach to establishing causation through expert testimony.[91] The plaintiffs' bar recognizes this comment as "a substantial retrenchment in judicial philosophy with respect to the admissibility and sufficiency of expert opinions on causation in toxic exposures cases."[92]

This summer, the Eighth Circuit, in reversing a district court's exclusion of unreliable expert testimony, declared that *Daubert* "greatly liberalized" admissibility standards.[93] The district court had granted summary judgment to the defendant manufacturer, finding that the plaintiff's experts did not adequately rule out alternative causes of an infant's development of meningitis, which the plaintiff blamed on contaminated formula.[94] Legal observers have recognized that the Eighth Circuit's recent approach to differential diagnoses, in which an expert identifies the cause of a medical condition by ruling out other potential causes, has become more flexible in recent years,[95] and is also contrary to other circuits.[96] The danger of taking a lenient approach to admitting differential diagnoses is that, if an expert does not consider and rule out all alternative causes of an injury, then his or her opinion is merely a hunch or guess that is likely to unduly sway the jury.[97]

A closely watched case came out of the Ninth Circuit, which also issued a *Daubert*-shredding ruling this year.[98] The decision arose in a case in which Pomona, California blamed the chemical manufacturer SQM North America Corp. for perchlorate contamination in the city's water system. The trial court, acting as a gatekeeper, excluded an expert witness for the city. The expert planned to use a "stable isotope analysis," to testify that a fertilizer produced by SQM was the dominant source of perchlorate in Pomona's water system. The trial court found the expert's testimony unreliable. The Ninth Circuit, applying "*Daubert's* liberal standard," disagreed and remanded the case for trial.[99] A judge applies *Daubert* to screen out "unreliable nonsense opinions," but must allow a jury to consider "shaky" evidence, the Ninth Circuit instructed.[100] The appellate court characterized the "test of reliability" as "flexible" and repeatedly said that the jury, not the court, is to consider flaws in the expert's approach.[101] SQM has filed a petition for *certiorari* with the U.S. Supreme Court.[102]

The SQM case is indicative of a split among the circuits as to whether a court's gatekeeping responsibility is limited to the reliability of the expert's methodology itself, as the Ninth Circuit found, or must also consider that an expert's method, even if sound, can result in nonsensical results if applied improperly or misused to reach a preordained result.[103] The Ninth Circuit's reasoning also exemplifies court rulings that find the accuracy of facts or data used by an expert to reach his or her opinion is for the factfinder's consideration, rather than integral to the reliability of the expert's opinion.[104]

LIABILITY BY SANCTION

Some plaintiffs' attorneys initiate discovery disputes to discredit a defendant in the judge's eyes and, when possible, generate sanctions.[105] Court-imposed sanctions can help contingency fee attorneys secure a significant damage award (and their fees), regardless of a case's merits.[106] Negative inferences can sway a jury in their favor, and the striking of a defendant's pleadings can win the case for them outright, without ever having to prove their case in court.

Given virtually unlimited amounts of electronic data, a defendant's duty to preserve information during litigation is often unclear. The destruction of documents that a defendant had a duty to preserve is known as spoliation. As Judge Lee Rosenthal, former chair of the Judicial Conference Committee on Rules of Practice and Procedure, has recognized: "Spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution."[107] When considering sanctions, courts have reached inconsistent results in requiring a plaintiff to show that a defendant acted in bad faith in failing to preserve documents and whether to presume that the plaintiff suffered prejudice as a result.[108]

> *"'Spoliation of evidence—particularly of electronically stored information—has assumed a level of importance in litigation that raises grave concerns. Spoliation allegations and sanctions motions distract from the merits of a case, add costs to discovery, and delay resolution.'"*

The largest verdict in a product liability case in 2014 (and reportedly the seventh-largest in U.S. history) was a $9 billion award against Japanese-manufacturer Takeda Pharmaceutical Co. Ltd. and its American partner Eli Lilly & Co. in ongoing litigation over the cancer risks of the diabetes medication, Actos.[109] Before that trial, U.S. District Judge Rebecca Doherty of the Western District of Louisiana heard allegations that spoliation of evidence prejudiced the plaintiffs' ability to present their case.[110] Judge Doherty recognized that "in a case of this magnitude extending over as many years as this one, and in this age of technology, one must expect a plethora of discoverable documents."[111] She commended Takeda for its "laudable participation in discovery," but found that the number of documents it had produced could not excuse its loss, documents and electronic data from 46 employee files.[112]

In ruling that the jury could hear evidence of how the defendant handled its files, Judge Doherty did not find that the company acted in bad faith, which would support the "full breadth of onerous sanctions."[113] Rather than enter a default judgment, as the plaintiffs sought, the court permitted the plaintiffs to inform the jury that the company had discarded the documents and electronic data.[114] Judge Doherty later instructed jurors they could infer that the files may have buttressed the plaintiffs' claims the company wrongfully hid the medication's health risks.[115] The jury awarded $1.5 million in compensatory damages, and $3 billion and $6 billion in punitive damages against Takeda and Lilly, respectively.[116]

Predictably, following the verdict, plaintiffs' lawyers reportedly quadrupled their spending on television advertising to recruit Actos plaintiffs from $328,000 in March to $1.2 million in April.[117] The court later reduced the verdict to $27.7 million against Takeda and $9.2 million against Lilly.[118]

The Judicial Conference of the United States adopted amendments to the Federal Rules of Civil Procedure in September 2014 that may ease the costly burdens of over-preservation of documents.[119] The changes emphasize that discovery should be "proportional to the needs of the case." The rules drafters deleted the clause permitting any discovery "reasonably calculated to lead to the discovery of admissible evidence," which they noted "continued to create problems" when courts used it to define a broad scope of discovery.[120] The revised rule for electronically stored information (ESI) requires parties "to take reasonable steps to preserve" ESI, which commentators suggest is meant "to reject the concept of strict liability" for loss of information.[121]

The rule changes now go to the U.S. Supreme Court for approval. They will take effect in 2015, if Congress does not act.

Class Action Litigation

Potentially, the most significant action from the perspective of consumer class actions was the U.S. Supreme Court's denial of *certiorari* in washing machine cases that manufacturers argued could not be certified in light of the prior term's *Comcast* ruling. As a result, the door remains open to certification of classes in which most members never experienced an injury. Whirlpool's experience shows that defendants can take these cases to trial—and win—but economic reality does not allow most companies to take such a high risk. The past year was also a busy time for lower federal courts, with conflicting decisions on several key areas affecting class certification. Federal appellate courts are showing increasing unwillingness to immediately review classes that should never have been certified, placing inordinate pressure on defendants to settle meritless cases.

Supreme Court Declines to Enter the Debate over Class Actions in Which Most Consumers Did Not Experience an Injury

One of the biggest disappointments to U.S. companies last year was the Supreme Court's denial of *certiorari* in two cases that were closely watched by the plaintiffs' class action bar—*Butler v. Sears, Roebuck & Co.* and *Whirlpool Corp. v. Glazer*.

Both cases involved allegations that defendants manufactured or sold front-load washing machines with a design defect that makes them prone to accumulate mold. The manufacturers in both cases had argued that certification was improper because the vast majority of consumers did not experience problems with their washers. The Sixth and Seventh Circuits concluded that class certification was nevertheless appropriate.

In 2013, the Supreme Court vacated and remanded both rulings for further consideration in light of its *Comcast* ruling, which rejected class certification in an antitrust case on the ground that the plaintiffs had proffered a theory of damages that was far broader than the narrower liability theory that had been certified for class treatment, and any effort to resolve the damages issue individually would destroy the efficiency of the class device. The ruling suggested that classes that sought damages in excess of the injury actually sustained by the class would be rejected as overbroad, and the Court's decision to send the washing machine cases back for further consideration gave hope to businesses generally that the law would swing away from overbroad class actions of all sorts. But that was not to be.

Both appellate courts affirmed their prior rulings in the washing machine cases, concluding that they were not called into question by the Supreme Court's holding in *Comcast*. In *Butler*, the Seventh Circuit distinguished the case from *Comcast*, concluding that "there is no possibility… that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis" because the damages at issue—i.e., mold and problems with the control units of the washers—all resulted from the two common defects alleged in the case.[122] The fact that not everyone in the class was injured did not create a problem like the one in *Comcast*, the court concluded, because damages could be resolved individually in subsequent proceedings after liability was resolved on a class-wide basis—a so-called "issues class" approach to class certification.

Similarly, the Sixth Circuit viewed the *Comcast* decision as limited to the question of whether damages could be resolved on a class-wide basis—a rule it found irrelevant in *Glazer* because the district court "certified only a liability class and reserved all issues concerning damages for individual determination."[123] The Sixth Circuit justified this narrow view of *Comcast* based on its belief that *Comcast* merely "reaffirms" the settled rule that "liability issues relating to injury must be susceptible to proof on a classwide basis" to establish predominance.[124] The defendants in *Butler* and *Glazer* once again petitioned for Supreme Court review. But the Court denied *certiorari* the second time around, declining the opportunity to clarify whether overbroad consumer class actions are viable under *Comcast*.

> *"The problem with the issues-class approach…is that it sanctions the use of a Frankenstein procedure that no one actually wants to litigate."*

The problem with the issues-class approach embraced by the Sixth and Seventh Circuits is that it sanctions the use of a Frankenstein procedure that no one actually wants to litigate. For plaintiffs, the promise of the class action device is significantly compromised because victory in the common phase means nothing in terms of a payday; damages, if any, would only be awarded in follow-on proceedings, which would potentially have to be litigated on an individual basis and often for small sums of money that would never cover the costs of trying the case. Defendants, likewise, will often prefer to settle such matters because doing so is substantially more cost-effective than litigating a common phase and countless follow-on trials. These problems are magnified in cases, like the washing machine cases, in which the claimed defect has manifested for only a small number of class members because few putative class members would have claims that could actually qualify for compensation.

Perhaps the most remarkable development in the area of issues classes over the last year was Whirlpool's decision to eschew settlement and go to trial in the *Glazer* case. After a three-week trial, the jury needed just two hours of deliberation to return a defense verdict on October 30, 2014, finding the plaintiffs had not shown a defect in the front-loading washing machines' design or breach of warranty.[125] While some may argue that Whirlpool's victory vindicates the view that defendants can win issues trials, Whirlpool should not have been forced to take a litigation risk that many companies cannot afford simply because class certification was improvidently granted.

> *"While some may argue that Whirlpool's victory vindicates the view that defendants can win issues trials, Whirlpool should not have been forced to take a litigation risk that many companies cannot afford simply because class certification was improvidently granted."*

It remains to be seen whether Whirlpool's victory will tamp down plaintiffs' counsel interest in issues classes going forward.

Unlike Whirlpool, most companies facing overbroad and unfair class actions are forced to settle claims because of economic realities. But even settlement of these sorts of cases has been problematic. Plaintiffs' attorneys are driven to collect a fee sufficient to cover their investment in the case, but because the vast majority of consumers are generally happy with their purchases, the settling parties have difficulty in attracting enough interest in the settlement to justify such a fee.

The Seventh Circuit has already had to confront this problem of its own creation in *Pella v. Saltzman*, a case involving allegedly defective windows. In *Pella*, the Seventh Circuit followed the same issues-only approach to class certification that it later employed in *Butler*, determining that class certification was appropriate with respect to one "common issue": "whether the windows suffer from a single, inherent design defect leading to wood rot," while the issue of damages could be dealt with in individual follow-on proceedings.[126] The case was remanded for further proceedings, which quickly led to settlement talks.

The resulting settlement was "inequitable—even scandalous," the Seventh Circuit recently found.[127] The primary object of the court's ire was the attorneys' fee of $11 million. While class counsel argued that the settlement was worth $90 million to the class, the Seventh Circuit noted that Pella estimated that the class would recover $22.5 million.[128] As the court explained, "the settlement did not specify an amount of money to be received by the class members as distinct from class counsel. Rather, it specified a procedure by which class members could claim damages"—a procedure that was "stacked against the class."[129] In particular, class members could submit a claim directly to Pella with a maximum award of $750, or submit a claim to arbitration with a $6,000 damages cap. Under the arbitration approach, Pella had the right to assert various defenses that could result in certain class members receiving zero compensation. The Seventh Circuit invalidated the settlement as one-sided.[130]

Instead of recognizing in the wake of *Pella* that the problem with overbroad class actions is that so few class members are actually injured, the Seventh Circuit appeared to embrace overbroad class actions once again in its next putative product class action: *In re IKO Roofing*.[131] In that case, plaintiffs' lawyers filed a class action on behalf of purchasers of roofing shingles that were allegedly deceptively marketed. The district court had ruled that the differences in consumers' experiences with the tiles prevented class certification under *Comcast* and the Supreme Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.[132] In particular, the district court read both of those Supreme Court cases as requiring "proof that the plaintiffs will experience a common damage and that their claimed damages are not disparate."[133]

On appeal, the Seventh Circuit reversed, holding that it could not affirm the district court's reading of *Comcast* "without overruling *Pella*."[134] And the court was not inclined to do that—even though it acknowledged the "problems encountered in an effort to settle" that case.[135] Instead, the court recommended that the *IKO* plaintiffs (and presumably plaintiffs in future cases) might prefer to seek uniform damages on behalf of the entire class on the theory that undisclosed defects make a product worth less than the class members paid for it, even absent manifestation. According to the Seventh Circuit, as applied to the *IKO* case, such damages could "reflect the difference in market price between a tile as represented and a tile that does not satisfy" certain industry standards as represented.[136] Such an approach flies in the face of the Seventh Circuit's long-held "no injury, no tort" philosophy, but the court did not seem concerned with that. Instead, its decision seemed to focus more on smoothing the road for consumer class actions.

The Seventh Circuit's ruling in *IKO* appears to trade one problem for another. The uniform-injury approach would do away with the need for issues classes and might solve the "problem" of generating settlement values that justify significant fees, but it would do so at the expense of contravening substantive law, at least in states that do not recognize such "overpayment" theories of injury based on defects that do not actually manifest in most products. It would also give rise to a potential conflict between the few class members who own products with real defects on the one hand and the vast majority who would stand to receive a gratuitous discount for perfectly functioning products on the other. Presumably, the owner of actually defective roofing tiles would like to receive replacement value for those tiles rather than get some fraction of his or her money back for whatever "difference in market price" there is—if any—between a tile that does meet an industry standard and one that does not. In short, the Seventh Circuit's proposed solution to its *Pella* problem appears to ask the handful of actually injured consumers to accept under-compensation in order to facilitate certification of a class and over-compensation for uninjured class members.

> "*[T]he Seventh Circuit's proposed solution to its* Pella *problem appears to ask the handful of actually injured consumers to accept under-compensation in order to facilitate certification of a class and over-compensation for uninjured class members.*"

The evolving justifications for class treatment of overbroad consumer classes in the Seventh Circuit underscore the difficulty in predicting how *Comcast* will ultimately play out in district courts. Notably, other courts have taken a less litigation-friendly view and have shut down classes presenting individualized damages issues and potential overbreadth problems.[137] Thus, notwithstanding the Supreme Court's decision to take a pass on the washing machine cases, it seems likely that the issue will eventually return to it in some fashion.

Ascertainability Takes Center Stage

Another area of class action law with significant activity over the past year is ascertainability—the requirement that class membership be easily determined using objective criteria. In other words, the court and the parties must be able to identify and verify who has a claim. Plaintiffs' lawyers vigorously oppose application of this basic requirement because it limits their ability to bring massive class actions on behalf of individuals who may not have suffered losses, collect attorneys' fees based on the full amount of the settlement, and then give unclaimed funds to charities or advocacy groups.

In May 2014, the Third Circuit denied a petition for rehearing en banc in *Carrera v. Bayer Corp.*,[138] a seminal class action case that recognized a defendant's fundamental due process right to challenge an individual's membership in a putative class. While *Carrera* has strengthened class certification law in the Third Circuit, some district courts have strongly criticized it.

In *Carrera*, the Third Circuit reversed a district court's order certifying a class of Florida purchasers of Bayer's One-A-Day WeightSmart multivitamin who alleged consumer fraud claims. The gravamen of the plaintiffs' suit was that Bayer falsely advertised the multivitamin as enhancing metabolism. The plaintiffs claimed that class membership could be determined based on online sales and loyalty card records or from purchaser affidavits. The Third Circuit disagreed. The court found the class was not viable because "extensive and individualized fact-finding or mini-trials" would be required to determine who purchased the product.[139] Since Bayer did not sell the product directly to consumers, and it was unlikely that purchasers retained documentary proof of purchase, the Third Circuit found that the class could not be sufficiently ascertained.[140]

Beyond recognizing that a court must evaluate ascertainability by employing a "rigorous analysis,"[141] *Carrera* recognized, to the chagrin of plaintiffs' lawyers, that a defendant has a "due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim."[142]

> ***"**Carrera **recognized, to the chagrin of plaintiffs' lawyers, that a defendant has a 'due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim.'"***

The Third Circuit noted that "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased [the product]" and the right to raise such an individual defense is not extinguished just because the plaintiff seeks to proceed on a class basis.[143] After all, "a class action cannot be certified in a way that eviscerates this right or masks individual issues."[144] Thus, the court held that plaintiffs' lawyers could not establish class membership simply by having proposed class members submit affidavits swearing that they purchased the product at issue and force defendants to take their word for it.[145]

The Third Circuit denied the plaintiffs' motion for rehearing en banc, but not without a dissent.[146] The dissent warned that "*Carrera* goes too far" and threatens to severely undermine low-value consumer class actions.[147] The dissent instead advocated a more "flexible" approach to ascertainability.[148] The dissenting judges went so far as to "suggest that the Judicial Conference's Committee on Rules of Practice and Procedure look into the matter."[149]

Carrera is just one of several recent judicial decisions to recognize the importance of ascertainability in class actions. In May 2014, a federal judge in California denied certification of a class of consumers seeking monetary and injunctive relief under California consumer protection laws for alleged misrepresentations regarding the "long-wearing" nature of SuperStay makeup products.[150] The court concluded that the class was not ascertainable because Maybelline did not keep purchaser lists, and it was unlikely that purchasers had retained any proof of purchase.[151] Further, the court was unwilling to allow class members to "self-identify," explaining that "given that the class period" covers multiple years, "it is doubtful that class members will precisely recall the items purchased, the quantity purchased, and the amount paid."[152] A number of other federal district courts have held similarly.[153]

Plaintiffs' lawyers will find comfort in other courts that have not been as vigilant about ascertainability. A few have strongly criticized the result in *Carrera*, with one court saying that *Carrera* "eviscerat[ed] low purchase price consumer class actions in the Third Circuit."[154] In that case, *McCrary v. Elations Co.*, which involved a dietary supplement drink, the defendant argued—much like Bayer in *Carrera*—that the proposed class was not ascertainable because there were no records identifying the purchasers of the product, and that allowing class members to "self-identify" would violate its due process right to challenge each individual's membership in the class.[155] The district court rejected these arguments, stating that if the defendant was right, "there would be no such thing as a consumer class action."[156] The court was even less persuaded by the defendant's due process argument. The court properly understood *Carerra* to mean that "in any case where the consumer does not have a verifiable record of its purchase, such as a receipt, and the manufacturer or seller does not keep a record of buyers," certification is prohibited.[157] "While this may now be the law in the Third Circuit," the court stated, "it is not currently the law in the Ninth Circuit."[158] At least two courts have followed this ruling.[159]

In sum, the *Carrera* ruling and many favorable rulings by district courts will make it more difficult for plaintiffs' lawyers to obtain class certification and pressure defendants to settle, in cases where those who experienced a loss, if any, cannot be reliably identified. Still, courts are split on the proper standards for evaluating ascertainability challenges to putative class actions, particularly within the Ninth Circuit. To date, the Ninth Circuit has consistently denied review in ascertainability cases, leaving district courts without any clear guidance on the rules of the road in that circuit. If the appellate court does finally rule, and if its ruling conflicts with *Carrera*, this may be the next class action issue to reach the U.S. Supreme Court.

Courts Split on Impact of Offers of Judgment on Class Certification

Courts have also spent much effort over the past year trying to resolve the thorny question of whether a class action can continue even after a defendant offers the plaintiff all of the individual relief he or she sought. At least some courts view Rule 68 of the Federal Rules of Civil Procedure, which provides a procedure for an offer of judgment, as rendering the action moot.

While courts have employed different approaches to the offer of judgment issue in the class context, there had long been a general consensus that an offer of judgment that undeniably offered the plaintiff all the relief he sought would moot his case irrespective of whether the plaintiff accepted it. That consensus was recently shot down, however, in the wake of the U.S. Supreme Court's split decision in *Genesis Healthcare Corp. v. Symczyk*.[160] In that 2013 case, an employee commenced a collective action under the Fair Labor Standards Act.[161] The district court dismissed the case for lack of subject matter jurisdiction after the defendant tendered a Rule 68 offer that fully satisfied the named plaintiff's claims. The Third Circuit reversed, agreeing that the named plaintiff's claims were moot, but holding that the collective action was not. The Supreme Court disagreed. In reaching its decision, however, the Supreme Court simply assumed—without deciding—that the Rule 68 offer mooted the plaintiff's individual claims, concluding that the issue had not been preserved.[162] The majority's opinion then focused on whether the plaintiff's action "remained justiciable based on the collective-action allegations in her complaint" and concluded that it did not.[163]

In a sharply worded four-justice dissent, Justice Elena Kagan criticized the Court for proceeding to resolve "an imaginary question" rather than "correcting the Third Circuit's view that an unaccepted settlement offer mooted [the plaintiff]'s claim."[164] According to the dissent, the Third Circuit's resolution of this issue was "wrong, wrong, and wrong again."[165] Relying on both basic principles of contract law as well as the plain language of Rule 68, Justice Kagan asserted that "an unaccepted offer of judgment cannot moot a case."[166] She warned the other courts of appeals, "Don't try this at home."[167]

Following the Supreme Court's split decision in *Genesis Healthcare*, federal courts have struggled with the question answered by Justice Kagan, but left open by a majority of the Supreme Court. Shortly after the Supreme Court handed down its decision, the Ninth Circuit considered this very question and heeded Justice Kagan's advice.[168] Other courts have also accepted this approach,[169] and the question is pending before still other courts.[170] By contrast, some courts have declined to follow Justice Kagan's approach, citing prior circuit precedent.[171]

In short order, Justice Kagan's vigorous dissent has already become the law of one federal circuit. It remains to be seen whether that opinion will gain further

> *A recent study…revealed that federal appellate courts granted less than one quarter of petitions for interlocutory review of class certification rulings filed in the last seven years.*

influence among other federal appeals courts in the near future. Until the Supreme Court finally resolves the question, plaintiffs' lawyers will argue that a defendant's offer of judgment to the individual who brought the lawsuit does not moot class action claims on behalf of other individuals.

Interlocutory Review of Class Certification Orders Is Waning

It is becoming increasingly rare for federal appeals courts to grant petitions to immediately review class certification rulings. As a result, plaintiffs' lawyers can pressure defendants to settle class actions that violate due process safeguards.

In 1998, subdivision (f) was added to Rule 23, which allows for permissive interlocutory appeal of orders denying or granting class certification. A driving impetus behind this amendment was the pressure on defendants to settle class actions—regardless of their merit—whenever they are certified. As the Advisory Committee's notes on this provision make clear, "[a]n order granting certification… may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[172] Thus, meaningful interlocutory review of improvidently certified class actions is an essential safeguard against unwarranted class settlements.

The best available data reveal that federal courts are reluctant to grant 23(f) review. A recent study conducted by Skadden Arps on behalf of the U.S. Chamber Institute for Legal Reform revealed that federal appellate courts granted less than one quarter of petitions for interlocutory review of class certification rulings filed in the last seven years.[173] The study analyzed 23(f) filings between October 31, 2006, and December 31, 2013, and the ultimate outcomes of these petitions.[174] The data contrast with those in an earlier report which found that federal appellate courts granted 36 percent of Rule 23(f) petitions filed between December 1, 1998, when the rule was adopted, and October 30, 2006.[175] In other words, federal courts of appeals are becoming less receptive to interlocutory class certification review.

The study also revealed that the decline in 23(f) review has disproportionately affected defendants. While defendants' petitions were granted far less frequently than previously (24.8%, down from 45%), the grant rate for plaintiffs' petitions dipped only slightly in recent years (20.5%, down from 22%). In addition, the study revealed stark differences among the federal circuits with respect to their approaches:

- The Fifth Circuit was the most receptive to interlocutory appeal of class certification rulings, granting 13 (46.4%) of the 28 petitions filed and decided there after October 30, 2006, down from 54% in the previous report.
- The second most receptive Rule 23(f) jurisdiction was the Third Circuit, which granted 24 (35.8%) of the 67 petitions filed and decided there (down from 86% previously).
- Of the jurisdictions that heard a significant number of petitions by defendants, the Seventh Circuit was one of those most likely to grant them, agreeing to hear 23 (36.5%) of the 63 decided petitions filed by defendants (down from 45% previously).
- The Third Circuit was one of the most receptive jurisdictions for plaintiffs. It granted 9 (31%) of the 29 decided petitions filed by plaintiffs (down from 83% previously).
- The First, Eighth, Ninth, Tenth and District of Columbia Circuits were the least friendly to Rule 23(f) petitions, with grant rates ranging from 5.4% in the First Circuit to 20.4% in the Tenth Circuit.

The rarity of courts of appeals granting petitions for interlocutory review of class certification rulings has troubling implications for defendants. It enables district courts to misapply class certification standards with little chance of correction. This could lead some district courts to push the boundaries of their discretion in ruling on class certification, potentially creating magnet jurisdictions for plaintiffs' attorneys in which lax certification standards become the norm. A key purpose of Rule 23(f)—diminishing settlement pressure on defendants—cannot be effectuated if courts deny over 75 percent of defendant's petitions for review.

Asbestos Litigation

Asbestos litigation, the nation's longest running mass tort, is constantly evolving. Plaintiffs' lawyers develop new theories of liability, identify new pools of potential clients, and expand their net of defendants to include solvent businesses remotely tied to asbestos. Most courts are rejecting liability-expanding theories, such as the scientifically unsupported view that "any exposure" to asbestos is enough to establish causation. On the other hand, courts in two large states allowed plaintiffs to circumvent workers' compensation laws and bring asbestos tort suits against employers, and asbestos litigation in New York City has tilted to strongly favor plaintiffs. Lung cancer claims with questionable ties to asbestos have increased in some jurisdictions. A federal bankruptcy court judge's landmark decision exposing "widespread and significant" suppression of evidence by several leading plaintiffs' firms proves the need for greater transparency in asbestos litigation.

Garlock and Asbestos Bankruptcy Trust Claim Transparency

In re Garlock Sealing Technologies, LLC[176] is one of the most significant decisions in the four decade history of ongoing asbestos litigation. After a lengthy evidentiary hearing, U.S. Bankruptcy Judge George Hodges refused to extrapolate Garlock's history of resolving mesothelioma claims in the tort system to estimate the company's liability for pending and future mesothelioma claims in bankruptcy. In his January 2014 order, Judge Hodges rejected the "settlement approach" to estimation offered by the asbestos plaintiffs' committee because he found that "[t]he withholding of exposure evidence by plaintiffs and their lawyers was significant and had the effect of unfairly inflating the recoveries against Garlock…."[177] Judge Hodges concluded that "Garlock's aggregate liability for present and future mesothelioma claims totals $125 million"[178]—about one billion less than the $1-1.3 billion requested by the plaintiff committees.

Prior to the Bankruptcy Wave of the early 2000s, asbestos lawsuits typically involved manufacturers of thermal insulation products. After those companies exited the tort system, plaintiffs' attorneys shifted their litigation strategy towards peripheral and new defendants associated with the manufacturing and distribution of alternative asbestos-containing products such as gaskets, pumps, automotive friction products (brakes), and residential construction products. Garlock, a manufacturer of gaskets and packing, was negatively impacted by this trend.

> *"Judge Hodges bluntly characterized Garlock's tort litigation as infected by a 'startling pattern of misrepresentation' that inflated plaintiffs' recoveries…"*

Evidence Garlock needed to attribute plaintiffs' injuries to insulation products "disappeared" once those companies filed bankruptcy.[179] "This occurrence," Judge Hodges said, "was a result of the effort by some plaintiffs and their lawyers to withhold evidence of exposure to other asbestos products and to delay filing claims against bankrupt defendants' asbestos trusts until after obtaining recoveries from Garlock (and other viable defendants)."[180]

For instance, in fifteen settled cases in which Garlock was permitted to have full discovery, "Garlock demonstrated that exposure evidence was withheld in *each and every one* of them."[181] "For fifteen plaintiffs represented by five major firms, the pattern of nondisclosure [wa]s the same," which Judge Hodges found to be "surprising and persuasive."[182] He also said that "it appear[ed] certain that more extensive discovery would show more extensive abuse."[183]

"In contrast to the cases where exposure evidence was withheld, there were several cases in which Garlock obtained evidence of Trust claims that had been filed and was able to use them in its defense at trial. In three such trials, Garlock won defense verdicts, and in a fourth it was assigned only a 2% liability share."[184]

Judge Hodges bluntly characterized Garlock's tort litigation as infected by a "startling pattern of misrepresentation" that inflated plaintiffs' recoveries against Garlock following the surge of asbestos bankruptcies by insulation defendants in the early 2000s.[185] "While it is not suppression of evidence for a plaintiff to be unable to identify exposures, it is suppression of evidence for a plaintiff to be unable to identify exposure in the tort case, but then later to be able to identify it in Trust claims," the court explained.[186]

IMPACT ON ASBESTOS LITIGATION

Delaware Superior Court Judge (ret.) Peggy Ableman has said, "there is no question that the *Garlock* decision … should be required reading for all judges who preside over asbestos personal injury cases."[187] According to Lester Brickman, a Cardozo Law School Professor who has researched asbestos litigation for more than twenty years and who testified on behalf of Garlock, the *Garlock* case has "laid bare the massive fraud that is routinely practiced in mesothelioma litigation."[188] "Until recently, the defense bar pointed to only a smattering of reported instances of th[is] type of deception…The Garlock opinion represents a stunning exposé of the breadth of the practice of withholding exposure evidence concerning the products of bankrupt entities."[189]

The *Wall Street Journal* editorialized that Judge Hodges' opinion is "a reminder to other judges that their courtrooms are supposed to be places that render justice, not rubber stamps for plaintiff scams."[190] *Forbes* decried the "shenanigans plaintiff lawyers have engaged in for years as they sucked billions of dollars out of otherwise solvent companies in search of money."[191] *Bloomberg Businessweek* declared that asbestos litigation "has reached a truly repulsive phase" where "ever-more-troubling evidence emerges that influential members of the plaintiffs' bar have lost their moral bearings."[192]

National Public Radio said the *Garlock* decision has been called a "watershed moment."[193] The *Huffington Post* said that plaintiffs who have played by the rules by honestly seeking compensation from the companies that actually caused them harm were losing out to plaintiffs willing "to become perjury pawns for those who would game the system."[194] A *New York Times* columnist offered three reasons that people should care about whether the right companies were being targeted: (1) future victims may wind up with less than they should; (2) the litigation "is an impediment to economic growth and job creation" by bankrupting innocent companies; and (3) plaintiffs' lawyers have "clearly flouted" the rule of law.[195]

In the wake of the *Garlock* decision, Wisconsin enacted legislation that requires asbestos plaintiffs to file all asbestos bankruptcy trust claims before trial. Ohio and Oklahoma have enacted similar laws. In addition, Congress is considering legislation, known as the Furthering Asbestos Claim Transparency (FACT) Act, which would require asbestos trusts to compile and release quarterly reports on claimants seeking payments for asbestos exposure.

MORE REVELATIONS ON THE HORIZON

Following the *Garlock* trial, a number of third parties, including *Legal Newsline,* an Internet-based newswire dedicated to coverage of litigation, along with several asbestos defendants, insurers, debtors, and service providers, sought public access to the sealed transcripts and evidence from the estimation hearing as well as Rule 2019[196] statements filed on behalf of persons alleging claims against Garlock.[197]

On October 31, 2014, Judge Hodges issued an order to unseal all materials in the record of the proceeding for estimation of mesothelioma claims, except for confidential personal information such as social security numbers, financial account numbers, and medical information unrelated to a claimed disease.[198] The parties are now in the process of redacting this material before release of the documents.

The unsealing of the court record is important because it may provide more specific information on how plaintiffs' lawyers allegedly suppressed evidence. It will also allow other defendants in the litigation to determine whether they were subject to the same or similar conduct, and, if so, to evaluate their options.

Courts Continue to Reject the "Any Exposure" Theory

In order to expand the number of companies subject to liability, plaintiffs' lawyers allege that exposure to a single asbestos fiber from a company's product is sufficient to cause that person's development of an illness. Courts have repeatedly rejected the testimony of plaintiffs' lawyer-paid experts who attempt to present this scientifically unsupported theory.[199]

The Texas Supreme Court is the latest to do so in *Georgia-Pacific Corp. v. Bostic.*[200] The court, which had previously rejected "any exposure" testimony in a case involving a brake mechanic diagnosed with asbestosis,[201] found that its reasoning applies equally to mesothelioma cases.[202] The Texas Supreme Court held that "even in mesothelioma cases proof of 'some exposure' or 'any exposure' alone will not suffice to establish causation."[203]

The court reasoned the "any exposure" theory "effectively negates the plaintiff's burden to prove causation by a preponderance of the evidence" because the theory "effectively accepts that a failure of science to determine the maximum safe dose of a toxin necessarily means that every exposure, regardless of amount, is a substantial factor in causing the plaintiff's illness."[204] "[T]he result essentially would be not just strict liability but absolute liability against any company whose asbestos-containing product crossed paths with the plaintiff throughout his entire lifetime."[205]

Further, "there are cases where a plaintiff's exposure to asbestos can be tied to a defendant, but that exposure is minuscule as compared to the exposure resulting from other sources."[206] In these instances, "[p]roof of any exposure at all from a defendant should not end the inquiry and result in automatic liability."[207]

[A] series of recent decisions has tilted the New York City Asbestos Litigation (NYCAL) as decidedly one-sided in favor of plaintiffs.

The Texas Supreme Court also found that the "any exposure" theory is "illogical in mesothelioma cases," because "it posits that any exposure from a defendant above background levels should impose liability, while the background level of asbestos should be ignored."[208] The court added, "We fail to see how the theory can, as a matter of logic, exclude higher than normal background levels as the cause of the plaintiff's disease, but accept that any exposure from an individual defendant, no matter how small, should be accepted as a cause in fact of the disease."[209]

The Texas Supreme Court's rejection of the "any exposure" theory as unscientific is in the legal mainstream.[210] Recently, for example, the Pennsylvania Supreme Court held that "[t]he theory that each and every exposure, no matter how small, is substantially causative of disease may not be relied upon as a basis to establish substantial-factor causation for diseases that are dose-responsive."[211] In an earlier case, that court unanimously found that the "any exposure" theory was in "irreconcilable conflict with itself" because "one cannot simultaneously maintain that a single fiber among millions is substantially causative, while also conceding that a disease is dose responsive."[212] The court added: "[W]e do not believe that it is a viable solution to indulge in a fiction that each and every exposure to asbestos, no matter how minimal in relation to other exposures, implicates a fact issue concerning substantial-factor causation in every 'direct-evidence' case."[213]

Plaintiffs' Lawyer Gains in New York City

New York City has long been a challenging jurisdiction for civil defendants, but a series of recent decisions has tilted the New York City Asbestos Litigation (NYCAL) as decidedly one-sided in favor of plaintiffs. The gigantic asbestos verdicts coming out of New York City reflect this unbalanced atmosphere.

PUNITIVE DAMAGES REINTRODUCED

In 1996, the judge presiding over the NYCAL docket amended the court's asbestos case management order to place claims for punitive damages on hold because it was the "fair thing to do for a number of reasons."[214] Justice Helen Freedman, now on the appellate bench, summarized some of those reasons:

> First, to charge companies with punitive damages for wrongs committed twenty or thirty years before, served no corrective purpose. In many cases, the wrong was committed by a predecessor company, not even the company now charged. Second, punitive damages, infrequently paid as they are, only deplete resources that are better used to compensate injured parties. Third, since some states do not permit punitive damages, and the federal MDL court precluded them, disparate treatment among plaintiffs would result. Finally, no company should be punished repeatedly for the same wrong.[215]

The considerations that led the court to defer punitive damages claims continue in today's asbestos litigation environment.[216] For example, the Philadelphia Court of Common Pleas recently chose to continue that court's longstanding practice of deferring punitive damages in asbestos cases.[217]

Nevertheless, in April 2014, the current judge overseeing the NYCAL docket, Justice Sherry Klein Heitler, lifted the nearly twenty year ban and held that "plaintiffs are no longer barred from applying to the NYCAL trial court judges for permission to seek punitive damages."[218] The court stressed the availability of due process safeguards to protect defendants from excessive awards and a concern about treating NYCAL plaintiffs differently than asbestos plaintiffs elsewhere in New York and differently than other personal injury plaintiffs in New York City itself.

The court downplayed the impact on businesses and future claimants if punitive damages awards play a role in forcing defendants into bankruptcy.[219] The court also acknowledged – but dismissed – defendants' concern that introduction of punitive damages evidence in consolidated trials would be highly prejudicial. The court said: "While this court appreciates the Defendants' concerns, at the end of the day the decision and the circumstances under which to consolidate lies within the discretion of the NYCAL trial Judges in accordance with the facts of the cases before them."[220]

The court rejected a request by the defendants to withdraw from the CMO because of the resulting loss of balance in NYCAL cases. The court said that while agreement of the parties is desirable for a case management plan, the court is "not required to obtain their consent to the CMO as a whole or for any of its parts for it to be a valid order of this court."[221]

> *"[I]n April 2014, the current judge overseeing the NYCAL docket, Justice Sherry Klein Heitler, lifted the nearly twenty year ban and held that 'plaintiffs are no longer barred from applying to the NYCAL trial court judges for permission to seek punitive damages.'"*

"The provision to promote litigation transparency had been one of the few bright spots for defendants in the NYCAL CMO, along with the deferral of punitive damages and an inactive docket to set aside the claims of the unimpaired."

As a practical matter, reintroduction of punitive damages in NYCAL will inflate settlement values (and profits for the plaintiffs' firms that dominate NYCAL litigation), even if such cases rarely go to trial.

RULING ALLOWS SUPPRESSION OF EVIDENCE

As the *Garlock* decision demonstrates, a major issue in asbestos litigation today involves the ability of solvent defendants to show alternative causes for a plaintiff's harm. Disclosure of the forms that claimants file with trusts established by companies that have filed for bankruptcy can promote honesty with respect to plaintiff exposure evidence, help juries reach fully informed decisions as to the actual cause of harm, and facilitate setoffs.

A 1996 NYCAL CMO revision added a requirement that plaintiffs identify all asbestos-containing products to which they allege exposure and disclose whether they have sought compensation from any asbestos bankruptcy trusts. A 2003 amendment mandated the standard interrogatories still used today. These interrogatories require plaintiffs to provide defendants with documentation of claims filed with asbestos trusts, which must be filed in advance of trial.[222]

The provision to promote litigation transparency had been one of the few bright spots for defendants in the NYCAL CMO, along with the deferral of punitive damages and an inactive docket to set aside the claims of the unimpaired.

In 2012, Weitz & Luxenberg, P.C., a leading NYCAL plaintiffs' firm, moved to abolish the trust transparency provision of the CMO. Judge Heitler refused the request, explaining that the "NYCAL CMO has guided the court and this litigation for more than two decades," the trust transparency provision "has been included in the CMO since 2003," and vacating this provision "which effects the intent of the parties would diminish the effectiveness of the CMO as a whole."[223]

This would seem to be good news for defendants. But that is not all. While the letter and spirit of the trust transparency provision is clear, the court placed a curious sentence in its opinion to open a path that plaintiffs' lawyers are seizing on to avoid filing trust claim forms before trial. The sentence states, "[T]he CMO requires Plaintiffs to file their *intended* claims with the various bankruptcy trusts within certain time limitations, not claims they may or may not *anticipate* filing."[224]

Contrary to the spirit of the CMO, plaintiffs' lawyers are likely delaying the filing of bankruptcy trust claims.[225] One leading New York plaintiffs' attorney has explained the plaintiffs' perspective:

> [Judge Heitler] put in what is in effect an intent standard into the disclosure…. So in New York, even though claims against bankruptcy trusts may be probable, I can predict that they are going to be filed, I am not under any requirement to file them. I only have to file the claims that my client intends to file before the trial. It is incredibly nuanced, and she did it for a reason. I am not going to get into all of the reasons behind it, but she did it for a reason.[226]

> *"Contrary to the spirit of the CMO, plaintiffs' lawyers are likely delaying the filing of bankruptcy trust claims."*

CONSOLIDATION OF DISSIMILAR CASES

A recent decision by a New York City trial court, affirmed by the First Department appellate court, vividly illustrates the permissive approach to consolidation of claims that are dramatically different in NYCAL cases.[227] The two asbestos cases involved different worksites, different occupations, different exposure periods, different diseases, different plaintiff health statuses, and different legal theories. The appellate court affirmed the trial court's consolidation of the cases, concluding that commonality existed because both plaintiffs were occupationally exposed to asbestos until the same year (though for different time periods) and both defendants allegedly failed to act reasonably by permitting the exposures.[228] This level of generality gives trial courts too much discretion to join cases that should not be joined at all. The defendant is seeking review by the New York Court of Appeals.

A permissive approach to consolidation gives an unjust advantage to plaintiffs' lawyers. One commentator has explained: "Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case."[229] Inflammatory facts in one case can color a jury's perception of joined cases and amount to guilt by association.

Empirical evidence shows that smaller consolidations, such as those in New York City, make settlements "more likely," because the risk of going to the trial is "extremely large" for defendants.[230] According to one study, "plaintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials…."[231]

The NYCAL permissive approach to consolidation cases runs counter to the prevailing trend nationwide. A "number of significant jurisdictions have ended or substantially curbed the use of trial consolidations in asbestos cases."[232] For example, in February 2012, the Philadelphia Court of Common Pleas, which handles a very large docket of asbestos cases, determined that asbestos cases should never be consolidated absent an agreement of all parties, unless the cases involve, among other factors: the *same* law, *same* disease, and *same* plaintiffs' law firm.[233] Delaware and San Francisco trial courts have also sharply limited asbestos trial consolidations.[234]

At the statewide level, the Michigan Supreme Court has precluded "bundling" asbestos cases for trial.[235] The Ohio Supreme Court amended the Ohio Rules of Civil Procedure to generally prohibit the joinder of asbestos cases for trial absent the consent of all parties.[236] The Mississippi Supreme Court has severed several multi-plaintiff asbestos-related cases.[237] Texas, Kansas, and Georgia have statutes that generally preclude the joinder of asbestos cases at trial.[238]

LIABILITY FOR OTHERS' PRODUCTS

In an attempt to further stretch the liability of solvent manufacturers, some plaintiffs' counsel are promoting the theory that makers of *uninsulated* products in "bare metal" form should have warned about potential harms from exposure to asbestos-containing external thermal insulation manufactured and sold by third parties and attached post-sale, such as by the Navy.[239] Plaintiffs' lawyers are also claiming that manufacturers of products such as pumps and valves that originally came with asbestos–containing gaskets or packing should have warned about potential harms from exposure to replacement internal gaskets or packing or replacement external flange gaskets manufactured and sold by third parties.[240]

"It is easy to see what is suddenly driving this novel theory: most major manufacturers of asbestos-containing products have filed bankruptcy and the Navy enjoys sovereign immunity."[241] "As a substitute, plaintiffs seek to impose liability on solvent manufacturers for harms caused by products they never made or sold."[242]

> *"Empirical evidence shows that smaller consolidations such as those in New York City make settlements 'more likely,' because the risk of going to the trial is 'extremely large' for defendants. According to one study, 'plaintiffs' probability of winning at trial increases by 15 percentage points when they have small consolidated trials rather than individual trials...'"*

Courts in non-asbestos cases have refused to impose liability on manufacturers of products that are used in conjunction with harm-causing products made by others.[243] Courts have also refused to impose liability on manufacturers for harms caused by replacement parts sold by third parties.[244]

In the asbestos context, courts have almost uniformly held that defendants are only responsible for harms caused by their own products.[245] New York City asbestos cases, however, have proceeded under a third party duty to warn theory, based on a single paragraph 2001 appellate decision that is devoid of legal analysis.[246] For example, a New York City trial resulted in a $32 million judgment against valve manufacturer Crain Co. for failure to warn about asbestos-containing external insulation and replacement packing made by third parties based on the theory that it was foreseeable that those products would be used in conjunction with its own valves on Navy ships. The First Department appellate court recently affirmed that decision,[247] in stark contrast to decisions by a federal judge in New York City[248] and the judge who manages the federal asbestos multidistrict litigation.[249] New York's highest court is reviewing the First Department's ruling.

IMPOSITION OF JOINT LIABILITY

When multiple parties contribute to a plaintiff's injury, New York law generally holds each defendant responsible for noneconomic damages in proportion to its share of fault.[250] NYCAL practices, however, routinely subject asbestos defendants to full joint liability. Since over 100 companies have filed for bankruptcy due to asbestos litigation, joint liability places unfair and disproportionate liability on solvent companies whose products or conduct may have played a small part in the plaintiff's exposure to asbestos.

Asbestos personal injury lawyers practicing in New York typically assert that a defendant acted "recklessly" in exposing their clients to asbestos. They understand that New York law applies joint liability upon a finding that a defendant "acted with reckless disregard for the safety of others."[251] NYCAL judges have been receptive to this tactic. Judges have submitted to juries a question of whether an asbestos defendant's conduct was reckless even when there is no evidence that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious

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indifference to the outcome," as New York's highest court requires for such a finding.[252]

Instead, NYCAL judges have instructed juries with a definition of recklessness that does not meet this high standard, watering down or omitting several of the required elements. Mere sale of a product, such as a boiler insulated with asbestos, may result in a finding of recklessness. Jurors are not told that finding recklessness will result in saddling one defendant with paying the plaintiff's entire damage award rather than the percentage of fault that the jury allocated to that defendant. As a result, in nearly all recent New York asbestos trials, juries find recklessness and subject defendants to joint liability that is contrary to the legislature's intent.

A Few Firms Drive a Rise in Lung Cancer Filings in Some Forums

In 2014, almost 225,000 new cases of lung cancer are expected to be diagnosed and almost 160,000 Americans are expected to die from lung cancer, according to the American Lung Association.[253] According to the Centers for Disease Control and Prevention (CDC), "[i]n the United States, cigarette smoking causes about 90% of lung cancers."[254] Radon is the second leading cause of lung cancer.[255] Other risk factors include occupational carcinogen exposures, such as asbestos, arsenic, diesel exhaust, and some forms of silica and chromium, family history, radiation therapy to the chest, and possibly diet, according to the CDC.[256]

Historically, lung cancer claims have played a lesser role in asbestos litigation than mesothelioma claims because they present more difficult causation issues (especially for smokers) and typically resolve for less money. That is changing, at least in a few jurisdictions.

Forbes' Daniel Fisher has written: "Having exhausted the pool of mesothelioma claimants, plaintiff lawyers are turning to lung cancer…They're filing thousands of cases on behalf of smokers who claim that stray asbestos fibers, not cigarettes, made them sick."[257]

Madison County, Illinois and Delaware are the most extreme examples of a rapid rise in lung cancer filings.[258] Lung cancer claims in these jurisdictions increased from less than 200 in 2000 to more than 1,200 in 2013.[259] Madison County has the largest asbestos docket in the county, and lung cancer filings helped push that docket to a new record in 2013.[260] A New York plaintiffs' firm that opened in Madison County a few years ago—Napoli, Bern, Ripka & Shkolnick, LLP—is spearheading the rise in lung cancer filings in these jurisdictions. Philadelphia, New York City, and Southern California have also experienced an increasing level of lung cancer filings.[261]

The trend has gained national prominence as highlighted by a lawsuit filed by New York Congresswoman Carolyn McCarthy. Reportedly a heavy smoker for more than forty years, Congresswoman McCarthy sued more than seventy companies saying she was actually sickened by asbestos fibers carried home on the clothes of her father and brothers, who worked on Navy ships and in utilities.[262] According to Joe Nocea of *The New York Times*, "[a]ll this has really accomplished is showing how asbestos litigation is a giant scam."[263]

Many of these cases present a small trial risk, but the high cost of defending such lawsuits could force defendants to consider settlements, "which in turn increases the economic incentive for further lung cancer filings by opportunistic plaintiff firms."[264]

Piercing the Workers' Compensation Exclusive Remedy

Plaintiffs' lawyers have had recent successes and failures in dragging a broad new pool of companies into costly asbestos litigation—employers whose liability for workplace injuries is traditionally limited to workers' compensation claims.

Employers in Pennsylvania and Illinois will be subject to lawsuits brought by former workers with asbestos and other occupational diseases as a result of recent decisions.[265] Courts found that because the states' workers' compensation statutes do not provide recoveries for occupational diseases that take many years to manifest, tort liability can fill the gap.

> *"Plaintiffs' lawyers have had recent successes and failures in dragging a broad new pool of companies into costly asbestos litigation—employers whose liability for workplace injuries is traditionally limited to workers' compensation claims."*

The Pennsylvania Supreme Court held that when an occupational disease manifests outside the 300-week time limit specified by the Pennsylvania Workers' Compensation Act, the exclusive remedy provision of the Act does not apply, and the employee can file a tort claim against the employer.[266] The court reasoned that the Act is "remedial in nature and intended to benefit the worker" so it should be liberally construed "to effectuate its humanitarian objectives."[267] Previously, "Pennsylvania employers had assumed that after 300 weeks no occupational disease could be brought in any forum."[268]

An Illinois appellate court applied similar reasoning in a case of first impression in Illinois. The court held that a plaintiff can bring a common law suit against his or her employer in situations where the 25-year statute of repose in the workers' compensation statute would bar the worker's claim before the worker learned of the injury and had had an opportunity to seek compensation under the Act.[269] The Illinois Supreme Court is reviewing the decision.

As a result of these decisions, businesses with older facilities in these states may find themselves blindsided by tort cases brought by former workers that the companies had assumed would be time-barred. These cases may be difficult to defend because employers never would have had an incentive to keep detailed records charting where employees worked and what they were exposed to within various operations.

Furthermore, employers could end up paying for injuries that are not their fault. It can be difficult to determine if a disease that manifests many years after employment was actually work-related. For example, lung cancer can be caused by some workplace exposures, such as exposure to asbestos, but there are also many other risk factors. The costs to employers in Pennsylvania and Illinois could be both substantial and unfair.

Plaintiffs' lawyers have also attempted to circumvent the workers' compensation system by arguing that an exception allowing tort claims for injuries stemming from intentional conduct applies in asbestos litigation. States adopted such exceptions to allow workers to continue to bring tort suits against employers that deliberately injure their employees. This exception was never intended to swallow the exclusive workers' compensation remedy provided to employees who are injured as a result of their work. Nevertheless, plaintiffs' lawyers have asked courts to expansively interpret "deliberate intent" to allow tort claims even when there is no evidence that an employer sought to harm a worker.

In a 5-4 decision, the Washington Supreme Court rejected such an attempt in an asbestos case against Boeing Co. in September 2014.[270] There, the plaintiffs' lawyers asked the court to find that any employer engaged in hazardous materials operations has deliberately intended to injure its work force simply because there is a possibility that such work may cause someone to develop an illness.

The Washington Supreme Court appreciated that knowing of a risk of injury in the workplace does not equal malicious conduct. The court also recognized that an asymptomatic cellular-level condition is not itself a compensable injury, but a risk of future injury. For that reason, even if an employer knew that exposure to asbestos would result in subcellular-level changes, the deliberate intention standard is not met.

Had the dissenting justices prevailed, the court would have eroded, if not eviscerated, the workers' compensation exclusive remedy construct in asbestos and other toxic tort cases, subjecting Washington employers to full-blown tort suits for employee injuries from any number of hazardous, occupational exposures. Washington employers would face asbestos lawsuits of the type that are recruited continuously by plaintiffs' law firms in television ads and on the Internet.

Securities and M&A Litigation

The burden on investors and our entire economy from unjustified securities class actions continues unabated. The number of securities class actions filed is up, and settlement amounts are also on the upswing. As in recent years, the primary targets of this element of the plaintiffs' bar are the healthcare, biotechnology, and pharmaceutical industries. New studies of these lawsuits document in ever greater detail both plaintiffs' lawyers abusive practices and the harm to investors resulting from an economically irrational litigation system. Decisions on the merits are as rare as hen's teeth, but settlements featuring huge payouts for the plaintiffs' bar are all too routine.

Meritless shareholder lawsuits challenging mergers and acquisitions (M&A) provide a case study of rampant litigation abuse and its adverse consequences. Multiple M&A lawsuits are routinely filed within days of a major corporate deal announcement in order to extract quick settlements from businesses that want to close deals so that their investors can reap the benefits of the transactions. Companies have begun to use "self help" to protect their shareholders against these suits—in the form of bylaws requiring that shareholder suits be brought in a particular state and that the losing party in these cases pay the winner's attorneys' fees. But the plaintiffs' bar and its allies, trying to protect their cash flow, are working hard to limit companies' ability to protect themselves.

Snapshot of Securities Class Action Litigation

According to the study of 2013 securities class action filings conducted by Cornerstone Research in cooperation with the Stanford Law School Securities Class Action Clearinghouse:[271]

- Filings in 2013 increased 9% over filings in 2012.
- Rule 10b-5 claims (those alleging intentional or reckless misstatements or omissions of material fact in connection with the purchase or sale of securities) remained steady at 84 percent of filings in 2013, after jumping from 71% in 2011 to 85% in 2012. The percentage of filings alleging false forward-looking statements dropped from 62% in 2012 to 54%.
- The majority of securities class actions continued to target the healthcare, biotechnology, and pharmaceutical industries (21% of all filings in 2013), even as filings against other sectors declined. Many smaller healthcare firms are targets.
- There was a modest uptick in federal filings against the financial sector, from 15 (9.8% of all filings) in 2012 to 18 (10.8% of all filings) in 2013.
- For the third year in a row, there were more than twice the average number of filings against the energy industry between 1997 and 2012, with 17 (10.2% of all filings) in 2013.
- Lawsuits are filed quickly—a quarter were filed within 5 days of the end of the class period alleged in the complaint, and the median within 15 days of the end of the class period, "among the shortest [lag periods] observed"—due to competition among plaintiffs' firms.

Cornerstone Research separately studied 2013's securities class action settlements:[272]

- The total amount expended on settlements nearly doubled (a 46% increase) compared to 2012.
- Due to a higher number of smaller settlements ($10 million or less), the median settlement size dropped 37%—from $10.3 million in 2012 to $6.5 million in 2013. By contrast, the average settlement size—$71.3 million—was 25% greater than the average for 2012.
- Significantly, "[m]ega-settlements (settlements in excess of $100 million)" made up "84% of total settlement dollars" in 2013—"the second highest proportion in the last five years."
- Although the trend in 2013 was cases to settle more slowly than in recent years, they are still settling with relative speed: 37% of settlements in 2013 "were resolved within 30 months of filing, the highest proportion in the past decade."

A separate study of 2013 settlements, conducted by NERA Economic Consulting, found that no securities class action was resolved through a judgment on the merits in 2013; every case that was not dismissed was concluded by settlement.[273] Also, "[a]ggregate plaintiffs' attorneys' fees and expenses for all federal settlements were $1.1 billion in 2013, almost twice as much as the previous year."[274]

New Research Confirms That Federal Securities Class Actions Are Plagued By Abusive Practices And Hurt Investors

Last year's report explained that securities class actions are again plagued by the same types of abusive practices that Congress sought to eliminate by enacting the Private Securities Litigation Reform Act (PSLRA) and the Securities Litigation Uniform Standards Act (SLUSA).[275] New research provides further evidence of these abuses and confirms that these lawsuits hurt investors and benefit only lawyers.

First, a Navigant Consulting study of 1,456 securities class action cases found that the filing of a securities class action lawsuit on average depresses the value of the defendant company's shares—imposing on investors "a cumulative loss of 4.44% of the stock price."[276] That means that shareholders lose $39 billion per year in wealth in order to collect $5 billion per year in settlement distributions and $1 billion in fees for plaintiffs' lawyers. "In other words, because of the filing of securities class actions, shareholders incrementally lost more than six times the settlement value (or more than seven and one-half times the amount that shareholders would receive after plaintiffs' attorneys' fees)."[277]

The study also examined how settlement funds are distributed among class members. Based on actual distribution data for 50 settlements, they found that, because of significant flaws in the method adopted for allocating the funds, "there was little relationship between the claimants' total net economic loss from the alleged fraud and their share of the settlement distribution."[278]

The study's conclusion:

> "Private securities class actions significantly harm investors and the economy, and they do not provide an efficient mechanism to compensate victims of alleged wrongdoing. Instead, they further harm the alleged victims (as well as other innocent shareholders). Ultimately, the current securities litigation system results in arbitrary wealth redistribution and the settlement amounts paid are relatively minor when compared to the actual investor wealth destroyed by such lawsuits."[279]

Second, a study by three law professors found that "[f]requent filers—professional plaintiff investors who file lawsuit after lawsuit" play a very significant role in securities litigation, notwithstanding

> *"[S]hareholders lose $39 billion per year in wealth in order to collect $5 billion per year in settlement distributions and $1 billion in fees for plaintiffs' lawyers."*

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Congress's attempt to eliminate professional plaintiffs when it enacted the Private Securities Litigation Reform Act.[280] Examining the new professional plaintiffs in securities class actions, pension funds managed by labor unions or by state and local governments, the study focused on two frequent filing states—Mississippi and Louisiana. It found that "the frequent filing by these states is fueled by campaign contributions made by class action attorneys to influential state politicians. The pay-to-play culture gives those attorneys an advantage in being selected as counsel in the biggest and highest profile cases."[281]

In cases brought under state law, such as shareholder derivative actions and merger and acquisition litigation, "repeat [individual] plaintiffs flourish…because states typically do not limit the number of lawsuits that individual plaintiffs are allowed to file. As a result, plaintiffs' lawyers can call upon the same individuals time and again to act as plaintiffs in their lawsuits."[282] The results are shocking:

> "Some individuals have filed 30, 40, or even 50 shareholder lawsuits. Other plaintiffs' lawyers have themselves served as repeat plaintiffs or named close family members as plaintiffs."[283] These professional plaintiffs of both types "may be less inclined to provide proper litigation oversight," which means that plaintiffs' lawyers may be able to collect unjustified fees and have "free rein to bring extortionate suits which corporations feel compelled to settle for nuisance value. The cost of these nuisance settlements… is ultimately borne by shareholders themselves with increased corporate expenses and reduced corporate profits."[284]

Third, the ILR report issued earlier this year—entitled "What's Wrong with Securities Class Action Lawsuits?"[285]—documents in comprehensive detail "the irrationality and ineffectiveness of these lawsuits as a mechanism for compensating investors"; the excessive control exercised by plaintiffs' lawyers, and the resulting abuses; and "the negligible deterrent effect of private class actions."[286]

Recent U.S. Supreme Court Rulings Will Do Little To Limit Abusive Securities Litigation

Two important U.S. Supreme Court decisions rejected legal arguments that would have limited abusive and economically irrational securities class actions. At least for now, the Supreme Court is unwilling to rein in unjustified securities class actions.

> *The decision in* Halliburton *is bad news for investors, who are forced to foot the bill for this economically-irrational litigation system.*

The securities class action industry was launched a quarter-century ago when the Supreme Court, adopted the "fraud on the market" presumption in *Basic Inc. v. Levinson*, holding that a plaintiff could prove reliance on the allegedly false statement—a critical element of most securities claims—by establishing a presumption of reliance based on economic theories regarding the presumed efficiency of securities trading markets. The real-world effect of that decision is that the vast majority of securities class actions that survive the pleading stage are likely to achieve class certification, forcing defendants to settle.

The Supreme Court considered whether to abandon the "fraud on the market" presumption in *Halliburton Co. v. Erica P. John Fund*. But it refused to do so, leaving the securities class action system largely unchanged.

The decision in *Halliburton* is bad news for investors, who are forced to foot the bill for this economically-irrational litigation system. Indeed, the decision in *Halliburton* almost certainly will make this litigation even more expensive by increasing the scope of the class certification inquiry (while not changing the result in many cases). That means even more money out of the pockets of shareholders and into the pockets of lawyers and economic experts.

The reason the Court gave for refusing to revisit *Basic*'s fraud-on-the-market is *stare decisis*—respect for precedent.[287] Ordinarily, the Supreme Court is very reluctant to overrule a prior decision interpreting a federal statute. The Court's view is that Congress has the power to correct errors in statutory construction. But *Basic* is far from a conventional statutory interpretation case: courts, not Congress, created the private cause of action for securities fraud; courts, not Congress, specified the elements that a plaintiff must prove to recover damages; and courts, not Congress, formulated the fraud-on-the market presumption as a substitute for proof of reliance.

For those reasons, many observers thought that the Supreme Court would examine *Basic* under the different, more flexible *stare decisis* standard applicable to judge-made federal common law (and decisions under statutes like the antitrust laws that delegate common-law authority to courts). That standard permits the overruling of precedent in a broader range of circumstances, recognizing that Congress has allocated to the courts principal responsibility for supervising those areas of law.

Justice Thomas—who wrote a separate opinion for himself and Justices Scalia and Alito—would have taken that that more expansive approach. As he explained, *Basic* "concerned a judge-made evidentiary presumption for a judge-made element of the implied 10b-5 private cause of action, itself 'a judicial construct that Congress did not enact in the text of the relevant statutes.'"[288] For that reason, the high bar to overruling precedent that governs statutory construction cases should not apply: "[W]hen it comes to judge-made law like "implied" private causes of action, which we retain a duty to superintend[,]…we ought to presume that Congress expects us to correct our own mistakes—not the other way around. That duty is especially clear in the Rule 10b-5 context, where we have said that "[t]he federal courts have accepted and exercised the principal responsibility for the continuing elaboration of the scope of the 10b-5 right and the definition of the duties it imposes."[289] In short, as Justice Thomas put it, "*Basic's* presumption of reliance remains our mistake to correct."[290]

The majority in *Halliburton* did not address these arguments, relying instead on the general rule that "[t]he principle of *stare decisis* has "special force in respect to statutory interpretation," and citing a decision involving the interpretation of statutory language enacted by Congress, not a case relating to judge-made law.[291] The majority also did not assess the merits of the arguments challenging *Basic*—instead dismissing them because they had been considered and rejected by the four-Justice majority in *Basic* or because they did not "so discredit[] *Basic* as to constitute 'special justification' for overruling the decision." The Court also refused to engage arguments concerning the harm to investors from the securities class action system, saying that "[t]hese concerns are more appropriately addressed to Congress."[292]

Justices Thomas, Scalia, and Alito did address these issues. They determined that the two assumptions underlying *Basic*'s presumption of class-wide reliance simply "do not provide the necessary support" for that presumption: "The first assumption—that public statements are "reflected" in the market price—was grounded in an economic theory that has garnered substantial criticism since *Basic*. The second assumption—that investors categorically rely on the integrity of the market price—is simply wrong."[293]

Moreover, these Justices recognized the reality that "in practice, the so-called 'rebuttable presumption' is largely irrebuttable"—"[o]ne search for rebuttals on individual-reliance grounds turned up only six cases out of the thousands of Rule 10b-5 actions brought since *Basic*," likely because of the "substantial in terrorem settlement pressures brought to bear by [class] certification." That is a critical failing, because "without a functional reliance requirement, the 'essential element' that ensures the plaintiff has actually been defrauded, Rule 10b-5 becomes the very '"scheme of investor's insurance"' [that] the rebuttable presumption was supposed to prevent."[294]

The result of the *Halliburton* majority's decision not to overrule *Basic* "'place[s] on the shoulders of Congress the burden of the Court's own error.'"[295]

After declining to reconsider *Basic*, the Supreme Court majority addressed what has been labeled the "middle ground" argument in the case: whether the Court should modify the factual showing that a plaintiff must make at the class certification stage in order to gain the benefit of the fraud-on-the-market presumption.

Basic's fraud-on-the-market theory holds that the market price "'reflects all publicly available information, and, hence, any material misrepresentations'"; that "the typical 'investor who buys or sells stock at the price set by the market does so in reliance on'…the belief that it reflects all material public information"; and that the investor therefore may be presumed to rely on any misrepresentations. The presumption can be rebutted "if a defendant could show that the alleged misrepresentation did not, for whatever reason, actually affect the market price, or that a plaintiff would have bought or sold the stock even had he been aware that the stock's price was tainted by fraud."[296]

Halliburton's "middle ground" argument was that *Basic*'s focus on market efficiency was misplaced, and that plaintiffs should be required to prove "price impact"—meaning that the defendant's alleged misrepresentation actually affected the stock price—in order to invoke the presumption of reliance. "In light of the [courts'] difficulties in evaluating efficiency," the amicus brief advancing this position argued, "the Court should shift the focus of fraud on the market inquiries from a market's overall efficiency to the question whether *the alleged fraud* affected market price."[297] It further urged the Court to limit the "out-of-pocket measure of damages…to cases in which the plaintiff can show actual reliance or that a material misstatement has distorted the market price for a security. If a plaintiff cannot make that showing, the remedy should be limited to disgorgement."[298]

The Supreme Court majority rejected these arguments and refused to alter the proof needed to invoke the presumption. It held only that a defendant may submit price impact evidence prior to class certification to demonstrate "that the alleged misrepresentation did not actually affect the stock's market price and, consequently, that the *Basic* presumption does not apply."[299]

Most observers believe that this ruling—which places the burden on the defendant to introduce price impact evidence sufficient to rebut the presumption—

"Most observers believe that this ruling—which places the burden on the defendant to introduce price impact evidence sufficient to rebut the presumption—will do little to change class certification results, but will certainly increase the cost and complexity of the fight over class certification"

will do little to change class certification results, but will certainly increase the cost and complexity of the fight over class certification as defendants submit expert analyses demonstrating the lack of price impact and plaintiffs commission their own studies to prove the opposite. As Professor Henderson, one of the two proponents of the price impact approach, explained: "The ruling will make these cases more expensive… without targeting the worst corporate actors….My prediction is that the average case will get longer and cost more, since defendant corporations will put on evidence that plaintiffs will have to respond to…So, all in all, I think this is very disappointing."[300] His co-author, Professor Pritchard, said: "We are adding to the expense. We are not getting rid of any weak lawsuits."[301]

The Supreme Court sided with plaintiffs' lawyers in a second case, *Chadbourne & Parke LLP v. Troice*, taking a narrow approach to the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Congress enacted SLUSA to prevent plaintiffs from using state court actions to avoid the federal reforms enacted in the Private Securities Litigation Reform Act. 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.

In *Troice*, the Court addressed the standard for determining when a misrepresentation is "in connection with" a securities transaction covered by SLUSA. The plaintiffs in that case had sued law firms, insurance brokers, and other investment advisers who had provided services to a Ponzi schemer. The Court concluded that SLUSA does not preclude state-law class actions where the alleged misrepresentations concerned securities that were not covered by SLUSA, even though the defendants had claimed that those securities were backed by securities that *are* covered by the statute. The U.S. Department of Justice and the Securities and Exchange Commission both sided with the defendants in arguing that the plaintiffs' claims were "in connection with" a securities transaction covered by SLUSA and therefore precluded, but the Supreme Court concluded that the claims could go forward.

The M&A Litigation Gravy Train Rolls On

Lawsuits challenging mergers and acquisitions continue to provide classic examples of runaway litigation abuse. As documented in a report prepared for the U.S. Chamber Institute for Legal Reform[302] and in last year's *Ecosystems* report,[303] just about every merger or acquisition that involves a public company becomes the subject of multiple class action lawsuits within weeks of its announcement. 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.

> *[J]ust about every merger or acquisition that involves a public company becomes the subject of multiple class action lawsuits within weeks of its announcement.*

According to an independent study, 94% of acquisitions valued at over $100 million announced in 2013 were challenged by an average of 5 shareholder lawsuits per deal.[304] "For the first time, the percentage litigated among smaller deals (valued under $1 billion) and larger deals (over $1 billion) was the same" at 94%, up from 35% and 81% respectively in 2008.[305]

Most deals—62%—"were litigated in more than one court."[306] An example is the February 2013 deal in which LINN Energy and LinnCo purchased Berry Petroleum for $4.3 billion, which sparked at least 14 lawsuits "in a record six different jurisdictions: Colorado, New York, and Texas federal courts; and Colorado, Delaware, and Texas state courts."[307]

Businesses continue to settle even meritless M&A lawsuits quickly, dealing with them as a cost of doing business in order to allow the transaction to move forward. "Of the 2013 cases resolved before the deal closed, 88 percent were settled, 9 percent withdrawn by plaintiffs, and 3 percent dismissed by courts."[308]

These settlements provide no real benefit for the shareholders in whose name they are brought: three out of four settlements in 2013 required only additional disclosures, not payments to shareholders—a percentage in line with recent years.[309] Ten years ago, more than half of the settlements resulted in cash awards for shareholders, and only 10% were limited to additional disclosures.[310]

While most shareholders get nothing, the lawyers bringing the cases do quite well. In these cases in which the shareholders do not receive a cent, the average attorneys' fee awarded in 2013 was $456,000 in the Delaware Chancery Court, and $545,000 in other courts.[311]

Corporations have resorted to self-help to protect their shareholders against the costs and delays of these abusive lawsuits. In a 2013 decision, Delaware's Court of Chancery authorized corporations to adopt bylaws requiring these lawsuits to be filed in Delaware.[312] Businesses have recognized that adopting these bylaws can eliminate the burdens imposed by simultaneous litigation in multiple states, which inevitably produces multiple settlements, and centralizing litigation in the expert Court of Chancery.[313] A study of companies' responses to the 2013 decision revealed that "many companies were comfortable acting quickly" to adopt exclusive forum bylaws: Between June and October 2013, 112 Delaware corporations "adopted or announced plans to adopt" exclusive forum bylaws.[314]

Other companies have adopted "fee shifting" bylaws that require the party that loses in shareholder litigation to pay the winner's fees—to protect their investors against the costs of illegitimate lawsuits. These bylaws are permissible under Delaware law., according to the recent decision of the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*. In that case, a corporation that operates a global professional men's tennis tour adopted a bylaw providing that any member or owner who "initiates or asserts" claims against the League, or otherwise "joins, offers substantial assistance to or has a direct financial interest in any Claim" against the League—but then "does not obtain a judgment on the merits that substantially achieves, in substance and amount, the full remedy sought"—is jointly and severally liable for attorneys' fees and litigation expenses.[315]

The court in *ATP Tour* noted that although "Delaware follows the American Rule, under which parties to litigation generally must pay their own attorneys' fees and costs," parties to contracts may change that default rule. And because nothing in the Delaware General Corporation Law forbids fee-shifting bylaws, the one that the League had adopted was "facially valid." The court cautioned that "the enforceability of a facially valid bylaw may turn on the circumstances surrounding its adoption and use," and that "it may be enforceable if adopted by the appropriate corporate procedures and for a proper corporate purpose."

More companies are adopting these bylaws to address the burdens of meritless shareholder suits. The Delaware Legislative considered, but failed to enact, legislation eliminating this self-help option, but the issue will come before the Legislature again when it reconvenes in 2015.

Finally, other States are recognizing, and taking action against, abusive M&A litigation. The State of Oklahoma recently enacted a statute requiring the loser to pay the winner's attorneys' fees in shareholder derivative actions.[316]

False Claims Act Litigation

False claims litigation has exploded over the last five years, providing a lucrative area of business for plaintiffs' lawyers. The number of private lawsuits filed under the federal False Claims Act (FCA), known as *qui tam* actions, peaked in 2013 and continued at this near record level in 2014. The Act, originally enacted during the Civil War and then revitalized in 1986 to address fraud in defense contracting, has become a means for plaintiffs' lawyers to privately enforce a broad swath of federal laws and regulations governing companies that do business with the government.

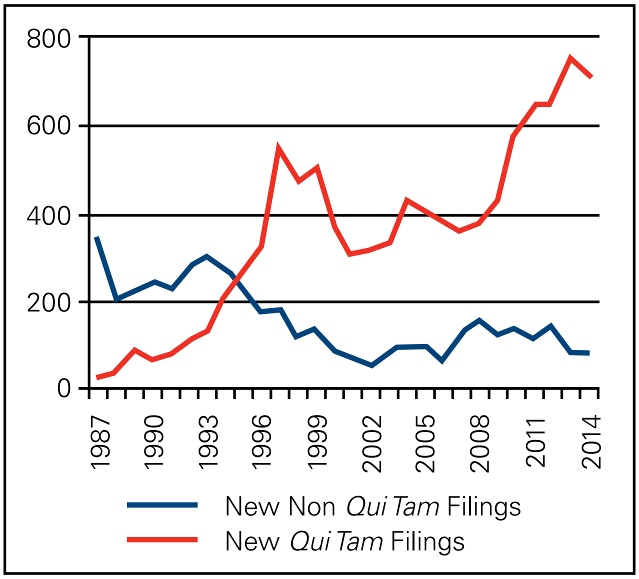
Most false claims actions today are filed under the federal FCA's *qui tam* provisions, which allow private citizens to file lawsuits alleging false claims on behalf of the government. The individual who brought the suit, known as the relator or whistleblower, receives a bounty between 15-25% of any government recovery.

The False Claims Act became more attractive to plaintiffs' lawyers in 2009, after Congress passed the Fraud Enforcement and Recovery Act (FERA). FERA substantially expanded the range of conduct subject to liability under the FCA and removed certain procedural requirements that the government and relators faced in pursuing FCA investigations and actions. The Affordable Care Act further increased the potency of the FCA by significantly weakening the FCA's public disclosure bar, which prevents private plaintiffs from collecting bounties by "whistleblowing" on conduct that is already in the public realm. "Over the past five years, numerous other traditionally personal injury-oriented firms have taken steps to either enter into or expand on their qui tam practices," reports the *Legal Intelligencer*.[317]

Going to trial on an FCA claim can be a bet-the-company gamble given the potential for treble (triple) damages and per-claim penalties ranging between $5,500 and $11,000. This was a hard lesson for Tuomey Healthcare Systems Inc. Last year, the community hospital was hit with a $237.5 million verdict in a *qui tam* action stemming from the manner in which it worked with physicians.[318] The provider is now struggling to find the cash needed to post a bond that will keep the government from attempting to collect the judgment, which it cannot afford to pay, during its appeal to the Fourth Circuit.[319]

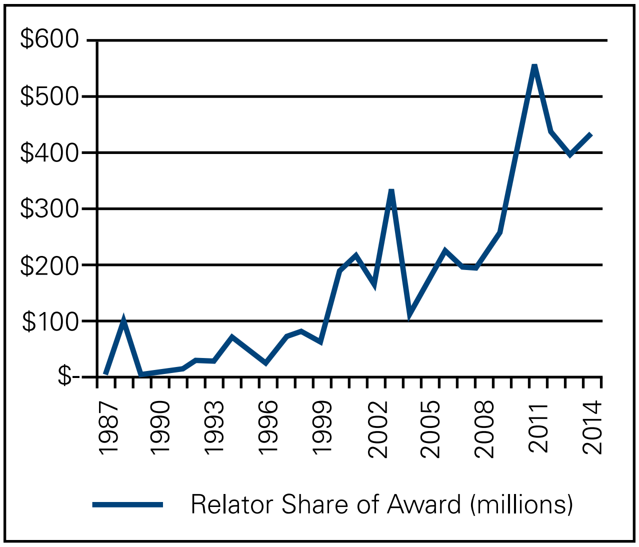
Litigation Continues at Near Record Levels

Qui tam lawsuits under the FCA ranged from 300 to 400 per year from 2000 to 2009. After Congress passed FERA and several massive recoveries were earned by whistleblowers, *qui tam* suits soared from 433 lawsuits in fiscal year 2009 to 753 lawsuits in fiscal year 2013. The FY 2013 figure was 101 more *qui tam* lawsuits than the prior record of 652 filings set in FY 2012.



In FY 2014, *qui tam* filings dipped to 713—the second highest level in history.

Damages and fines imposed in *qui tam* cases during fiscal year 2014 totaled $3 billion with *qui tam* plaintiffs and their lawyers sharing $435 million.[320] *Qui tam* plaintiffs and their lawyers took home a larger bounty only in FY 2011. The overall trend in *qui tam* awards makes clear that FCA litigation continues to grow.



Drug Makers Remain Focus, Financial Institutions Are Rising

Private lawyers, not government investigation and enforcement officials, drive false claims litigation alleging fraudulent healthcare claims. Through such lawsuits, plaintiffs' lawyers get a slice of millions, sometimes billions, of dollars collected by the federal government.

Two thirds of all federal *qui tam* actions filed in 2014 targeted healthcare-related businesses.[321] Nearly 80% of the money collected by *qui tam* plaintiffs and their lawyers stemmed from healthcare-related claims.[322]

The number of *qui tam* actions and the amount of damages imposed with respect to healthcare-related claims has doubled since 2008. Meanwhile, the overall trend is a significant decline in non-*qui tam* FCA actions brought directly by the federal government related to healthcare. In FY 2014, only 3.8% of the money collected in settlements or judgments stemming from allegations of healthcare fraud resulted from FCA lawsuits initiated by the federal government.[323]

Many *qui tam* actions assert that manufacturers promoted drugs to treat conditions for which they were not approved by the FDA, leading Medicare or Medicaid to overpay for prescriptions. Doctors may, and often do, prescribe drugs for "off label" purposes when they feel a patient might benefit from it. Scientists may also research and publish studies evaluating the effectiveness of a drug for treating conditions other than for which it was approved. Drug makers, however, are not permitted to suggest to doctors or the public that a drug may be helpful for conditions until the manufacturer requests, and the FDA finds, that the drug safely and effectively treats them. These "off-label" cases have led to massive settlements.[324]

> *"Nearly 80% of the money collected by* qui tam *plaintiffs and their lawyers stemmed from healthcare-related claims."*

False claims litigation related to defense contracts, the original motivation for the federal law, has remained stable for many years, but represents a declining percentage of *qui tam* suits—just 6% in FY 2014.[325]

The remaining *qui tam* actions, constituting about one quarter of the lawsuits, target companies in other industries. Plaintiffs' lawyers are expanding their targets as the number of *qui tam* actions outside of healthcare and defense industries hit a record 200 lawsuits in FY 2014.[326]

The financial services industry, in particular, saw a rise in FCA claims in FY 2014. For example, in March 2014, JPMorgan settled an FCA claim related to its mortgage loan practices for $614 million. The *qui tam* relator and his attorneys will receive more than $63 million of that amount for filing the suit.[327] It is uncertain how much three private plaintiffs and their lawyers will share of the federal government's $1.85 billion blockbuster settlement with Bank of America in August 2014.[328] In total, mortgage and loan-related FCA claims accounted for $3.1 billion of the $5.7 billion FCA settlements and judgments in FY 2014.[329]

> *[T]he federal government's increased role in healthcare resulting from the Affordable Care Act all but assures that plaintiffs' lawyers will find opportunities to bring FCA claims.*

Shifting Theories

Pharmaceutical and medical device makers are likely to remain significant targets for the foreseeable future under theories of liability beyond off-label marketing. For example, the federal government's increased role in healthcare resulting from the Affordable Care Act all but assures that plaintiffs' lawyers will find opportunities to bring FCA claims.[330] The law's expansion of Medicare and Medicaid, and an influx of people enrolling in federally-subsidized health insurance plans are likely to lead to further concentration of FCA claims in the healthcare area. Plaintiffs' lawyers are also likely trolling through a trove of physician billing practices data released by Medicare in April 2014 for possible theories of liability.[331] The new online database of pharmaceutical company payments to doctors mandated by the ACA's Physician Payments Sunshine Act may also provide a new source of information for use in developing FCA lawsuits.

In addition, both plaintiffs and defense lawyers have observed an uptick in "worthless services" cases. These are FCA claims in which a business such as a hospital or nursing home provided the contracted service, but a *qui tam* plaintiff claims that it was so deficient in quality that the service was as if it were not provided. Courts have set a high standard for such claims. Most have not been successful, though some have resulted in settlements.[332] Most recently, for example, the U.S. Court of Appeals for the Seventh Circuit threw out $19 million in FCA fines resulting from a verdict in a *qui tam* case alleging substandard nursing home care.[333] The court distinguished lawsuits alleging that a contractor submitted a false or fraudulent claim for payment to the government, which can be addressed through the FCA, from lawsuits alleging that a contractor provided low-quality service.

As the FY 2014 statistics show, plaintiffs' lawyers are developing FCA litigation in other areas and may more frequently attack financial institutions.

Courts Consider Further Expanding Liability

Attorneys who represent *qui tam* relators are advancing theories in the courts that would allow them to bring more FCA lawsuits. As explored below, these theories would:

- reduce the evidence of a false claim needed to bring a lawsuit;
- retroactively apply liability-expanding amendments;
- weaken further the important public-disclosure bar;
- impose excessive penalties;
- allow FCA claims based purely on alleged violations of regulations;
- extend the statute of limitations; and
- undermine the rule that prevents duplicative FCA claims.

Courts are grappling with such issues. Some judges have broadened FCA liability while others have constrained it. The U.S. Supreme Court will weigh in on at least two of these issues this term.

> "*Attorneys who represent* qui tam *relators are advancing theories in the courts that would allow them to bring more FCA lawsuits.*"

PLEADING WITH PARTICULARITY (ARE VAGUE ASSERTIONS OF FRAUD SUFFICIENT?)

Courts have reached inconsistent decisions as to the level of detail of fraud that relators must allege in *qui tam* cases under Rule 9(b) of the Federal Rules of Civil Procedure. Half of the federal circuits to rule on the issue require a plaintiff to show "representative samples" of the alleged fraudulent conduct, specifying the time, place, and content of the acts and the identity of the actors, while the other half have taken a more permissive approach, holding that it is sufficient for a plaintiff to allege "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted."[334]

As the Fourth Circuit recognized, the higher standard, which requires relators to show an actual fraudulent claim in a complaint, prevents frivolous suits, provides notice to defendants, avoids fishing expeditions and costly discovery, and protects a defendant's reputation.[335] The U.S. Supreme Court, in March 2014, declined to resolve the split by considering the Fourth Circuit case. Three months later, however, the Third Circuit went in the other direction, adopting a more lenient approach.[336]

RETROACTIVITY (CAN PLAINTIFFS IMPOSE NEW LIABILITY ON OLD CONDUCT?)

Courts are considering the retroactivity of the liability-expanding amendments to the FCA. This is an important issue because *qui tam* actions settled today often relate to conduct that occurred over a decade ago.

In December 2013, the U.S. Court of Appeals for the Fourth Circuit ruled that the 2010 ACA amendments to the FCA did not apply to a lawsuit based on conduct that occurred before enactment of the amendments, even when filed after enactment.[337]

PUBLIC DISCLOSURE (CAN INDIVIDUALS BRING "WHISTLEBLOWER" LAWSUITS AND PROFIT BASED ON INFORMATION ALREADY PUBLICLY AVAILABLE?)

Courts have reached widely varying results as to whether information was publicly disclosed, whether the suit is based on the public disclosure, and whether the plaintiff qualifies as the "original source" of the information (an exception to the bar on lawsuits based on publicly disclosed information). For example, while most courts require relators to provide independent knowledge that materially adds to any publicly disclosed allegations or transactions,[338] the Fourth Circuit is alone in more narrowly reading the public disclosure bar to allow such suits so long as the relator's allegations are not "actually derived from the public disclosure itself."[339] Where the information that the whistleblower brings forward in a case has already been made available to the government, a *qui tam* claim only siphons the public's potential recovery.

A particularly questionable refusal to apply the public disclosure bar occurred in March 2014 in a case involving a military contractor, Unisys. Upon learning of allegations of overbilling, the company conducted an internal investigation, found unacceptable conduct, and reported its findings to the Department of Defense's Office of Inspector General. Despite the contractor's disclosure directly to the agency involved, the U.S. District Court of the Eastern District of Virginia permitted a former employee who had learned of the internal investigation to proceed with a *qui tam* claim in March 2014.[340] That court deviated from several others that found direct disclosure to a responsible government official is a "public" disclosure that bars *qui tam* suits.[341]

COMPUTING FINES (ARE DEFENDANTS SUBJECT TO PENALTIES OF $5,500 TO $11,000 PER CLAIM SUBMITTED, OR PER COURSE OF CONDUCT?)

A driver of the massive settlements in FCA litigation is the possibility that a court will multiply the amount of civil penalties provided by the Act by every prescription filed, letter sent, or form submitted over several years. While application of the FCA in this manner is extremely lucrative for *qui tam* plaintiffs, in many instances it results in wildly disproportionate penalties that may constitute a violation of the Eighth Amendment. For example, this would occur where companies submit large numbers of low-dollar claims to the government.

In one recent case, a district court presented with such a situation imposed a single fine for one course of conduct related to defense shipping contracts, rather than multiply the statutory penalty 9,000 times to reflect the number of allegedly false invoices at issue. The difference was a penalty of $5,500 rather than potential liability of $50 million to $100 million. The Fourth Circuit reversed and ordered the company to pay a "compromise" of $24 million, which the court found not excessive.[342] The parties and *amici* have asked the U.S. Supreme Court to review the case.

REGULATORY VIOLATIONS (CAN PLAINTIFFS BRING FCA ACTIONS PREMISED ON NONCOMPLIANCE WITH A FEDERAL REGULATION?)

Courts have split over the circumstances in which *qui tam* plaintiffs can claim that a company violated the FCA because it allegedly violated a regulation in making or selling a product for which the federal government paid.[343] Such an approach, if broadly construed, poses the risk of turning the FCA into an "all-purpose antifraud statute," a transformation the Supreme Court has sought to avoid.[344]

For example, one court allowed a *qui tam* claim based on a university's non-compliance with a condition of participation in a student loan program.[345] Other courts, however, have begun to turn the tide.

A recent example is a Fourth Circuit ruling that a pharmaceutical service provider had improperly packaged drugs in the same facility as penicillin drugs, leading to potential contamination.[346] The court found that unless compliance with the regulation is a prerequisite to payment by the government, there is no FCA violation.[347] As the court recognized, "When an agency has broad powers to enforce its own regulations, as the FDA does in this case, allowing FCA liability based on regulatory non-compliance could 'short-circuit the very remedial process the Government has established to address non-compliance with those regulations.'"[348]

TOLLING (CAN PLAINTIFFS BRING CLAIMS OUTSIDE THE ORDINARY TIME DEADLINE?)

In March 2013, the Fourth Circuit found that a little-known law, the Wartime Suspension of Limitations Act, applies to FCA *qui tam* actions. The ruling not only suspends the statute of limitations in cases alleging fraud in military contracting, but applies to any FCA action, including those involving healthcare and financial services. Due to ongoing military action in Iraq, the court found in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter* that the time period for filing civil FCA claims is suspended as of October 11, 2002.[349]

The ruling allows the filing of FCA lawsuits long after the FCA's six-year statute of limitations and ten-year statute of repose. Under the Wartime Act, the statute of limitations remains tolled until five years

> *"When an agency has broad powers to enforce its own regulations allowing FCA liability based on regulatory non-compliance could 'short-circuit the very remedial process the Government has established to address non-compliance with those regulations.'"*

> *[I]f courts toll the statute of limitations for* qui tam *actions during the ongoing military conflicts, plaintiffs' lawyers will have an incentive to delay filing claims to maximize awards.*

after a war ends. Unless Congress or the President formally announces an end to hostilities in Iraq and Afghanistan, contractors could be subject to indefinite FCA liability.

As Judge G. Steven Agee recognized in his dissent, if courts toll the statute of limitations for *qui tam* actions during the ongoing military conflicts, plaintiffs' lawyers will have an incentive to delay filing claims to maximize awards.[350] Plaintiffs' lawyers know that the older claims become, the more difficult they are for companies to fairly defend, since records are lost or discarded, memories fade, and key employees move on.

Some district courts have agreed with Judge Agee.[351] Others have found the Wartime Act suspends the time to file civil FCA claims, but did not rule in the context of a *qui tam* action.[352] The Fourth Circuit is the only federal appellate court to address the issue. The U.S. Supreme Court decided to consider the issue in its upcoming term.

FIRST-TO-FILE RULE (CAN PLAINTIFFS SUE REPEATEDLY FOR THE SAME CONDUCT?)

In the same KBR case, the Supreme Court will also decide whether the FCA's "first-to-file" rule, which prevents duplicative *qui tam* lawsuits stemming from the same alleged conduct, is an absolute bar to subsequent claims. The Fourth Circuit joined the Seventh and Tenth Circuits in holding that the first-to-file rule does not prohibit FCA lawsuits when the earlier action is no longer "pending" due to dismissal.[353]

The D.C. Circuit, however, joined the First, Fifth and Ninth Circuits in April 2014, finding that "allow[ing] an infinite number of copycat qui tam actions . . . cannot be reconciled with [the FCA's] goal of preventing parasitic [suits]."[354] These courts have recognized that once an action is filed, the government is on notice of the alleged fraud and can pursue an action on its own.[355] While the government can bring follow-on FCA suits stemming from the same conduct, *qui tam* plaintiffs cannot.[356]

State False Claims Acts Provide Additional Opportunities to Sue

False claims litigation not only continues to surge at the federal level, but plaintiffs' lawyers are also gravitating toward new opportunities to bring *qui tam* claims under state false claims acts.

Congress provided an incentive for states to adopt false claims laws through offering increased federal Medicaid funding in the Deficit Reduction Act of 2005 (DRA). States qualify for an additional 10% of Medicaid fraud settlements if they pass laws with *qui tam* provisions authorizing private

> *State legislatures that have already passed false claims acts are being forced to revisit them to match the liability-expanding amendments to the federal law.*

lawsuits on behalf of the government that are "at least as effective" as the federal False Claims Act, have consistent liability provisions, and have penalties that are at least as high at the federal law.

Approximately two-thirds of states have now enacted their own false claims acts. In addition, several major cities, including New York City, Chicago, and Philadelphia, have passed false claims laws with *qui tam* provisions.

State legislative activity is continuing. Since 2013, at least twenty states have considered legislation that would amend their state's false claims act.[357] State legislatures that have already passed false claims acts are being forced to revisit them to match the liability-expanding amendments to the federal law. The Department of Health and Human Services' Office of Inspector General (HHS-OIG), which reviews and certifies state laws as DRA-compliant, has required state lawmakers to modify their laws if they wish to remain qualified for the higher percentage of federal funds. In addition, states that initially enacted laws applying only to healthcare fraud (to meet DRA compliance) are broadening the laws to apply to all government contracting.

Over the past two years, the HHS-OIG has certified new or amended false claims acts of fourteen states as DRA-compliant: California, Colorado, Delaware, Hawaii, Illinois, Massachusetts, Minnesota, Montana, Rhode Island, Tennessee, Texas, Washington, and, most recently, Georgia and New York.[358] Nevada amended its false claims act in May 2013, but HHS-OIG did not certify the law as DRA-compliant because the federal law's anti-retaliation provisions apply to a wider range of conduct than the state law.[359] In addition, a new Wyoming Medicaid False Claims Act enacted in July 2013 has yet to receive an HHS-OIG compliance determination.[360]

In 2014, the West Virginia Legislature considered a plaintiffs'-lawyer sponsored proposal to enact a state false claims act. A national organization, Taxpayers Against Fraud, whose largest donors include individuals and lawyers who obtain millions of dollars in *qui tam* bounties, drove the legislation.[361] The West Virginia House of Delegates ultimately rejected the bill due to concerns that it would duplicate existing anti-fraud laws, damage the state's business climate, and lead to more lawsuits that primarily benefit plaintiffs' lawyers.[362]

As an in-depth exploration of state false claims acts published by ILR observed, states may receive a 10% bump in their recovery in multi-state federal FCA settlements, but that increase may be more than offset by the state's obligation to pay a 20% bounty of any funds received to the relators who filed suit under the state law and the administrative cost of reviewing FCA litigation brought by private plaintiffs' lawyers.[363]

Bolstering liability under state False Claims Acts also makes it increasingly likely that private lawyers will seek to work alongside AGs in representing states and pursue novel and creative theories of liability on a contingency fee basis. While such litigation has often led to large settlements, plaintiffs' law firms representing two states suffered significant setbacks this year when state supreme courts tossed a $1.2 billion verdict in Arkansas and a $330 million verdict in Louisiana challenging Johnson & Johnsons' marketing of Risperdal. The Pennsylvania Supreme Court also threw out an $80 million state false claims act judgment associated with prescription drug pricing practices brought by contingency fee lawyers on behalf of the Commonwealth. The court placed responsibility for "overreaching" and ten years of wasted litigation at the feet of the government and its private lawyers.

Patent Troll Litigation

Patent trolling is the new high-stakes litigation prospecting scandal of the 21st century. This type of patent litigation, involving shell companies that exist solely to file lawsuits, has dramatically risen in recent years. It has resulted in an overwhelming response from policymakers at all levels of government and from all corners of the ideological spectrum. In the meantime, defendants are fighting the trolls in court and finding ways to prevail in these cases and reduce future troll litigation.

The term "patent troll" refers to an entity that buys patents, which often are old, vague, and never commercialized, and then uses speculative litigation to generate licensing fees from those patents. Their "play" is to leverage the high costs, ambiguities, and inefficiencies of the patent litigation system. They identify targets, assert that the targets are infringing on their patents, regardless of whether that assertion is provable in court, and then offer to settle for well below the target's cost of defending the lawsuit.

Rise of Patent Litigation Abuse

Patent trolling is a major problem in the consumer electronic, technology, and software industries where securing a patent can be inexpensive, patents are often vague as to what technologies they cover, and companies continually develop upgrades and advancements that may or may not implicate existing patented technology.[364]

Patent trolls, also called Patent Assertion Entities (PAEs),[365] generally adhere to one of two business models. Primarily, a PAE sues large companies that sell or use technology that it claims is covered by its patents. For example, a PAE sued Barnes & Noble and other online retailers claiming that the search engines on their websites infringed on its patent for allowing searches to return results that do not exactly match the words put into a search field.[366] Others have sued banks over ATM technology. Microsoft, Google, and others report that trolls regularly sue them over their software products, with Apple and Amazon named more than any other company.[367] The trolls know that it can cost upwards of one or two million dollars for their targets to defend even a basic patent infringement suit. So, they offer to settle the claims for less.

The second litigation play is for a PAE to broadly send demand letters to thousands of small businesses threatening to sue them for using consumer technology that trolls claim violate their patents. In one well-known situation, a PAE wrote to businesses saying it owned patents for attaching any scanned document to an email and demanded $1,000 per employee to license the technology. The company reportedly operated through 40 shell companies to "shield it from paying fees and costs in the event its letter's recipients prevail in litigation."[368] Litigation is rarely filed, but many small businesses pay the licensing fee because they believe the accusations, fear litigation, and find the licensing fee less than the cost of seeking legal counsel.

The scope of this patent troll problem has mushroomed over the past few years. As recently as 2010, patent troll litigation accounted for less than 30 percent of all patent cases filed. But, in 2012, that number jumped to 62%.[369] The trend continued in 2013, a year in which patent troll suits accounted for 67% of all new patent infringement cases.[370] Patent troll lawsuit filings rose from 3,042 to 3,608 (19%) between 2012 and 2013,[371] meaning that not only were patent troll suits a bigger piece of the patent litigation pie, but the pie itself was growing. Patent troll litigation is concentrated in five district courts.[372] The Eastern District of Texas, known for its "rocket docket," accounted for 38% of filings by patent trolls in 2013 and has

> *"The rise in patent litigation is taking a huge toll on the American economy."*

almost double the average patent troll success rate.[373] It is anticipated that 2014 will be the second most litigious year for patent lawsuits, exceeded only by a 2013 record.[374]

The rise in patent litigation is taking a huge toll on the American economy. An oft-cited economic study pegged the overall impact of PAEs in terms of "lost wealth" at $83 billion per year, with legal costs in 2011 amounting to $29 billion, up from $7 billion in 2005.[375] The impact of these costs on individual companies can be a large burden, particularly for smaller innovators that do not have resources to mount a full defense of their intellectual property. As David Friend of Carbonite told the Federal Trade Commission at a hearing last year, while his company ultimately prevailed against a PAE that sued them for 20% of their assets, the suit "depressed our stock price and prevented us from growing…Also relations among my Board members were strained as arguments ensued over whether to settle or fight."[376]

This abuse of the patent litigation system has reverberated throughout the policy-making branches of government, with calls for reform coming at all levels of government and from all corners of the political spectrum. The challenge that reformers have faced is that changes to the patent litigation system that can curb troll abuse can also make it more difficult for innovators to legitimately protect their intellectual property. The ability to protect one's intellectual property is a fundamental right in the United States and a key generator of America's economy. Reforms to the patent litigation system, they argue, must reinforce, not undermine, the strength of the U.S. patent system.

Federal Patent Troll Reform: One Step Forward, One Step Back

Federal reform efforts began in earnest in spring 2013. In June 2013, President Barack Obama issued several executive orders to address aspects of patent trolling. Further, his public acknowledgements that PAEs "don't actually produce anything themselves," but "see if they can extort some money" from others, opened the door for members of Congress from both parties to work on patent litigation reforms.[377] Throughout 2013, members of Congress introduced several bills, and in December, the House of Representatives passed the Innovation Act with a broad bipartisan majority of 325 to 91.

The Innovation Act was a comprehensive reform bill sponsored by House Judiciary Committee Chair Bob Goodlatte.[378] It offered reforms of both the patent approval process and litigation in an effort to reduce a PAE's leverage to drive settlements. Reforms to the patent process included a requirement that patent holders disclose to the U.S. Patent and Trademark Office all entities with a financial interest in the patent or a license to enforce the patent so that PAEs could not hide behind shell companies.

The legal reforms included fee-shifting so that anyone who brings an unreasonable claim would have to pay the defendant's legal costs, pleading requirements that would require a plaintiff to show how the defendant was violating its patents in order to file the lawsuit, and phased-in discovery to first resolve questions about the plaintiff's patent before getting into the allegations of infringement. The result of the bill would be to increase the requirements and stakes for those who bring patent infringement suits. Again, these reforms were targeted at trolls, but would apply to all patent holders. Consequently, concern developed that some provisions could make it more difficult for innovators to legitimately protect their intellectual property.

In the Senate, Judiciary Committee Chair Patrick Leahy managed the negotiations to arrive at a compromise bill between the technology companies and retailers who were advocating for the reforms and those who did not want the reforms to interfere with legitimate enforcement of their patents. After months of negotiations, it appeared that a deal was essentially reached in May. But, Senate Majority Leader Reid reportedly told Senator Leahy to pull the bill in response to opposition from the trial lawyer lobby.[379]

Senator John Cornyn, closely involved in the negotiations with Senator Charles Schumer, expressed the frustration of those involved: "It's disappointing the majority leader has allowed the demands of one special-interest group to trump a bipartisan will in Congress and the overwhelming support of innovators and job creators."[380]

The trial bar's opposition to patent troll reform, according to the reports, was not about defending patent trolling. The trial lawyers were concerned that the reforms, including the proposed fee-shifting standards, might "serve as a template" for other legal reforms the trial bar opposed.[381] Leahy told the *Burlington Free Press* a couple of months later, "I told trial lawyers I didn't give a damn what their feelings were, because it didn't affect them anyway."[382]

Significant efforts to enact comprehensive reform have taken a step back, at least temporarily. In July, the House Commerce Committee's Subcommittee on Manufacturing and Trade approved a discussion draft of legislation called the Targeting Rogue and Opaque Letters Act (TROL Act) sponsored by Congressman Lee Terry. This legislation would make it a violation of federal deceptive trade practices law to send patent demand letters written in "bad faith." The FTC and state attorneys general have expressed concern that the bill's definition of "bad faith" is vague.[383]

The outcome of the midterm elections has increased optimism among patent reform advocates that Congress will revisit and act on the issue in 2015.[384] What approach Congress takes, and whether a bill can gain sufficient bipartisan support to pass, is uncertain.

> *"The aspect of 'patent trolling' garnering the most attention at the state level is the indiscriminate sending of large numbers of demand letters to small businesses, non-profits, and other customers of the allegedly infringing technology."*

State Patent Troll Reform: A Flurry of Enactments

The aspect of "patent trolling" garnering the most attention at the state level is the indiscriminate sending of large numbers of demand letters to small businesses, non-profits, and other customers of the allegedly infringing technology. By focusing on demand letters, state legislators are trying to carve out a niche for state enforcement under unfair trade practices and consumer protection laws before a patent infringement case is filed. They make the point that small business and non-profit consumers of technology cannot be expected to check the patents of products they use and that "trolls" should not take advantage of the fact that they are not knowledgeable on patent law.

More than half the states have considered anti-patent troll legislation based on the Vermont model. So far, more than twenty states have enacted such laws.

The first state-based anti-troll efforts arose in spring of 2013 when the state attorney general in Vermont initiated an investigation of complaints that MPHJ Technology Investments LLC sent demand letters to businesses throughout that state.[385] Attorneys general in Massachusetts, Minnesota, Nebraska, and New York, among others, launched similar investigations. In May 2013, to facilitate the attorney general's efforts, the Vermont legislature enacted a law to make clear that its attorney general has enforcement authority to take action against bad faith assertions of patent infringement in demand letters under the state's deceptive trade practices statute.[386]

More than half the states have considered anti-patent troll legislation based on the Vermont model. So far, more than twenty states have enacted such laws. Generally speaking, these bills do not define "bad faith" with certainty, but provide indicia for what constitutes bad faith versus good faith assertions of patent infringement. The indicia of bad faith include a variety of factors, such as subjective determinations of whether the sender put sufficient analysis into the claim before making the assertion, adequately specified how the target is infringing on its patent, and is seeking a "reasonable" demand or licensing fee.

Enforcing the statute is generally up to the state attorney general, though most bills also give the target a private right of action to sue the entity asserting infringement. These parts of the bills have come under criticism from those who both commercialize and enforce their intellectual property. They have suggested that arming anyone who receives a patent infringement demand with a private state-based cause of action could chill legitimate patent holders from enforcing their patents against companies they reasonably believe are violating their patents. Bad faith assertion would become a counterclaim to nearly any patent assertion, thereby raising the risk of bringing even legitimate patent infringement claims.

In an effort to address these concerns, Virginia and other states have exempted certain types of patents from the bills—namely pharmaceutical patents. These patents are not subject to troll activity because, unlike software and consumer electronic patents, drug patents are expensive to secure and highly specific. Other ideas for tailoring state bills to reduce troll activity is to apply them only once an entity has sent demand letters to more than 10 or 20 entities in a given year, or only to assertions against customers, not other innovators or manufacturers.

The first challenge to these new state laws is arising in the Vermont Attorney General's pursuit of MPHJ. MPHJ sought to move the case from state to federal court, arguing that federal courts have exclusive jurisdiction of patent law and the Vermont statute requires courts to determine the validity and/or enforceability of MPHJ's patent. In April, a federal district judge rejected this argument and remanded the case back to state court.[387] The judge concluded that the state's case was based solely on Vermont law because the Attorney General was alleging bad faith conduct in the way MPHJ pursued alleged infringers in the state, namely by sending threatening letters containing false or misleading information.

In November 2014, the U.S. Federal Trade Commission also entered a settlement with MPHJ, marking the first time the FTC took action using its consumer protection authority against a PAE.[388] The agreement provided that MPHJ would not make deceptive representations when asserting infringement, such as threatening to initiate a lawsuit if the recipient does not pay a licensing fee or other compensation.[389]

Supreme Court Offers Tools for Fighting Trolls

The U.S. Supreme Court has also stepped in over the past year to take away some of the leverage PAEs have to take advantage of the patent litigation system. In short, the Supreme Court has made it easier for patent defendants to seek legal fees in highly speculative suits and has tried to reduce the ambiguity in certain types of patents.

In April, the Court decided two cases related to fee-shifting. The statutory standard for when the losing party in a patent case must pay the attorneys' fees of the prevailing party is when the case is "exceptional."[390] The Federal Circuit, which is the appellate court specializing in patents, had ruled that "exceptional cases" are only those where a party engaged in litigation misconduct or the litigation was both brought in bad faith and objectively baseless.[391] In *Octane Fitness v. Icon Health & Fitness*, the Supreme Court held that "an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigation position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated."[392] The Supreme Court, therefore, made it easier for targets of patent trolling to get their attorneys' fees paid.

The Supreme Court also gave lower courts the authority to be better gatekeepers for keeping patent troll cases out of court. In *Octane Fitness*, the Court stated that "District Courts may determine whether a case is 'exceptional' in the case-by-case exercise of their discretion."[393] In another case, *Highmark v. Allcare Health*

> *"[T]he Supreme Court has made it easier for patent defendants to seek legal fees in highly speculative suits and has tried to reduce the ambiguity in certain types of patents."*

Management Systems, the Supreme Court held that the Federal Circuit can overturn a district court's ruling on attorneys' fees only when there is an abuse of discretion.[394] As a result, courts are now more empowered to award fees, which reduce the ability for trolls to take advantage of the inequities of the patent litigation system.

In June, the Supreme Court addressed the increasing ambiguity in many patents. As discussed above, PAEs take advantage of this ambiguity because when patents are vague, innovators may not be able to determine whether their inventions infringe on existing patents. Only litigation can resolve the issue. In 2001, the Federal Circuit made this problem worse when it said that patents are valid so long as their terms are not "insolubly ambiguous."[395] The Supreme Court, in *Nautilus v. Biosig Instruments*, rejected this standard, ruling that a patent must inform someone skilled in the art "with reasonable certainty" as to what technology the patent covers.[396]

Early indications are that federal district courts are accepting their new responsibility. Before these Supreme Court rulings, awarding attorneys' fees in patent litigation was rare. In the few months since these rulings, though, courts have begun

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awarding fees in cases brought by PAEs. For example, in a case involving the PAE Lumen View Technology, U.S. District Court Judge Denise Cote ordered Lumen to pay the attorneys' fees of the targeted company, saying, "Lumen's motivation in this litigation was to extract a nuisance settlement from [the defendant] on the theory that [the defendant] would rather pay an unjustified license fee than bear the costs of the threatened expensive litigation."[397]

District court judges are also using their discretion more frequently to address allegations of patent ambiguity earlier in the litigation process. In some cases, they will put off discovery related to the infringing activity until after defining the exact scope of the patent being asserted, which puts some initial burdens and risks on PAEs that base their claims on vague patents.

Finally, the Judicial Conference of the United States has taken a step that many believe will have a "large-sized effect on patent trolls that mass-file suits."[398] Until recently, the form for filing a patent infringement suit allowed "bare bones" pleading; someone could simply state that the defendant was infringing a patent. Under the rules as amended, a plaintiff would have to provide specific information about how each defendant infringed the patent. "If the troll is required to investigate the companies it wants to sue in order to provide a specific description for each suit then the cost of the mass suing goes way up and there's less incentive to shotgun lawsuits around."[499]

Future Outlook

Federal and state reforms may slow the recent rise in patent trolling, and there is some evidence that it subsided in late 2014.[400] Even before these legislative enactments and court rulings, a number of companies heeded the lessons learned in other areas long subject to abusive litigation: fight, don't settle. While less expensive in the short-run, settling specious claims can encourage and fund the filing of lawsuit abuse.[401]

A prominent face of the "don't settle" movement is Newegg General Counsel Lee Cheng. Cheng was named to *National Law Journal*'s list of 50 Outstanding General Counsel for his anti-patent troll efforts.[402] Under his leadership, Newegg has invalidated a number of patents and won attorneys' fees and costs in multiple litigations.[403] Cheng is highly outspoken, developing fight patent troll T-shirts saying, "Settling Feeds Trolls."[404]

Over the next year, courts will help determine whether defendant self-help and better laws are enough to defeat trolls. In addition, Congress will likely renew efforts to enact legislation that balances efforts to stop trolling with legitimate patent assertions.

Social Media at Work: Plaintiffs' Bar and the NLRB Go Viral

The proliferation of social media use in the workplace has become fulfilling fodder for enterprising plaintiffs' attorneys trolling for new ways to indict employers. By studying companies' research on social media sites to vet job applicants, these attorneys can uncover evidence that hiring managers knew of applicants' legally protected traits—allowing plaintiffs' lawyers to claim employers relied on those traits in making discriminatory hiring decisions. These attorneys can also make hay of employers' monitoring of social media use. Such monitoring may establish that employers had legal "notice" of workplace harassment, unpaid overtime, or other events that give rise to employment claims. The NLRB has issued a steady stream of anti-employer rulings related to social media, paving even more new roads for suits by plaintiffs' lawyers, and by natural extension, labor unions. For U.S. businesses, all of this foretells an increase in employment litigation and a heightened risk of liability.

Social media is radically transforming the way companies do business—so much so that what was once referred to as "using social media for business purposes" is now, simply, "social business." Among the redesigned business processes encompassed by this newly-coined concept are those involving company brand promotion, marketing of products and services, and communicating with customers, consumers, suppliers, and shareholders, among others.

> *Plaintiffs' lawyers closely scrutinize employer use of social media in bringing federal and state employment discrimination claims.*

Branded social media pages on third-party services, such as Facebook and Twitter, help companies establish a social media presence and gain followers, fans, consumers, and subscribers. Companies can then leverage their social media presence as a platform for promotions, contests, and other events that encourage consumers to submit substantive descriptions and favorable reviews of company products and services. Social media sites also allow for word-of-mouth marketing via blogs, tweets, and chat room comments, all of which can be far more powerful than company-sponsored direct marketing programs.

Accompanying the increase in social media-focused business processes is a growing trend by companies to allow employee social media use at work. Many have even hired "bloggers," "endorsers," or employees with similarly unconventional job titles to focus exclusively on social business. These employees address public relations issues and provide near instantaneous online customer service. Companies must capitalize on the opportunities offered by social media if they hope to remain competitive in the global business environment. But as with any paradigm shift in business models and practices—particularly those that directly involve employee communications and increased information sharing—employers must caution against a heightened exposure to evolving employment law claims.

Significant New Liability Risks for Employers

Plaintiffs' lawyers closely scrutinize employer use of social media in bringing federal and state employment discrimination claims. This topic was a focal point of a March 12, 2014 Equal Employment Opportunity Commission (EEOC or Commission) meeting, where a "panel of experts" convened to provide the Commission with "information about the growing use of social media and how it impacts the laws the EEOC enforces."[405] The panel "explained … [that] [t]he use of social media has become pervasive in today's workplace and, as a result, is having an impact on the enforcement of federal laws."[406]

Two key issues addressed by panelists were: (1) hiring practices that may give rise to claims that employers based job candidate selections on protected characteristics learned through social media research; and (2) employee conduct on social media sites that may give rise to claims of discriminatory hostile work environment.[407] Both areas provide plaintiffs' lawyers with bases for lawsuits and expose U.S. businesses to considerable legal risks.

> *Use of social media is a double-edged sword for employers when screening job candidates.*

HIRING DISCRIMINATION CLAIMS

Use of social media is a double-edged sword for employers when screening job candidates. On one hand, social media sources are a potential treasure trove of applicant information that can help employers win the war for talent while steering clear of applicants who commit résumé fraud or otherwise exaggerate their educational and work experiences. On the other hand, by researching applicants online, employers may provide plaintiffs' lawyers with a basis to claim employment discrimination.

Employers may unwittingly learn of applicants' protected characteristics, such as religion, sexual orientation, or familial status, and/or about their lawful off-duty conduct, such as firearm possession, tobacco use, or political activity (which are protected by various state employment laws). In many instances, an employer would not know such information but for its social media research. By that research, employers thus open themselves to claims that they relied on protected information when making hiring choices. As one legal publisher so aptly asked recently, "is the potential risk worth the potential reward?"[408]

This same dilemma was explained in a Press Release by the EEOC about its March 2014 meeting on workplace social media issues:

> The use of sites such as LinkedIn and Facebook can provide a valuable tool for identifying good candidates by searching for specific qualifications … [b]ut the improper use of information obtained from such sites may be discriminatory since most individuals' race, gender, general age and possibly ethnicity can be discerned from information on these sites.[409]

An EEOC representative at the meeting reported on two recent Commission "informal, procedural" rulings involving social media-related employment claims in the federal sector.[410] One involved a claim by a 61-year-old who alleged age discrimination based on an employer's use of Facebook to recruit candidates to fill the position for which she had applied and been denied.[411] In addition to arguably advancing an intentional/disparate treatment theory of liability (a "fuzzy" proposition, in the words of the reporting EEOC representative[412]), the claimant also presented a novel theory of disparate *impact* liability:

> [B]y recruiting for the position in issue through social media, the employer discriminated on the basis of age because its social media recruiting focus "put older workers at a disadvantage," as "older people use computers less often and less fluently than younger people.[413]

An Administrative Law Judge (ALJ) had dismissed the claim for lack of evidence that the employer's use of social media to recruit for the position at issue actually had any age-based disparate impact.[414] On appeal, the EEOC approved the ALJ's decision for the same stated reasons, adding that the claimant also had produced no evidence that the employer had recruited *exclusively* through social media.[415]

As for court cases involving social media-based hiring discrimination claims, there are few reported decisions. In *Gaskell v. Univ. of Kentucky,*[416] a federal district court in Kentucky held that a hiring employer-defendant's knowledge of an applicant-plaintiff's protected trait (there, her strong conservative religious beliefs)—about which the employer had learned through online applicant screening—sufficed, when coupled with plaintiff's other supporting evidence, to preclude summary judgment dismissal of her discriminatory failure-to-hire claim.

In a federal district court case in Illinois, *Nieman v. Grange Mutual Ins. Co.*,[417] a 42-year-old unsuccessful job applicant claimed he had been disqualified for a position due to his age and in retaliation for his having sued his former employer—information about which, he alleged, was learned from his LinkedIn profile by the employer's hiring manager while researching job candidates. The court did not reject the plaintiff's theory of liability as invalid, but ruled that he lacked factual evidence to support it, where the record showed that the hiring manager did *not* use social media to research job candidates, among other things.[418]

Overall, the available legal guidance suggests that a hiring employer's knowledge of an applicant's protected characteristic will be treated under the same legal standards—regardless of whether that knowledge was derived from social media sources or from other, more traditional ones. For this reason, plaintiffs' lawyers now routinely seek information on an employer's use of social media during discovery. They look for any knowledge gained by the employer that could raise a factual issue, preclude summary judgment, and add pressure to settlement demands even when an employer had entirely legitimate reasons for a hiring decision.

> “*[P]laintiffs' lawyers now routinely seek information on an employer's use of social media during discovery.*”

HOSTILE WORK ENVIRONMENT CLAIMS

In the context of discriminatory harassment claims, plaintiffs' lawyers look to social media activity as another potential source of evidence against an employer. Courts view social media—like e-mail and other technological platforms—as an extension of the workplace for which employers bear responsibility and may bear liability for hostile work environments.

Recent court decisions demonstrate the liability risks for employers in this area. In *Espinoza v. County of Orange*,[419] for example, a California state jury found an employer liable to an employee for disability harassment where his co-workers had posted offensive social media blogs about his "claw" hand (a birth defect by which he had only two fingers). On appeal, the employer argued that it did not maintain the blog site at issue and that it could not determine that the postings (which were made anonymously) actually came from its employees during the investigation into plaintiff's internal complaint.[420] The court denied the appeal and upheld the jury's verdict for plaintiff, reasoning that there was sufficient evidence for the jury to impute responsibility to the employer for the offensive blog posts because the harassing employees had accessed the blog site using the employer's computers and their blogs discussed workplace issues.[421]

Also illustrative is *Yancy v. U.S. Airways*,[422] where a female employee sued her employer for harassment based in part on her male co-worker's posting a photograph on Facebook that depicted her leaning over a desk, exposing part of her underwear. Based on the totality of evidence, including that the company had investigated and taken appropriate remedial measures when plaintiff complained, as well as that she, herself, had made social media postings of an even more graphic nature, the Circuit Court upheld the dismissal of the claim on summary judgment.[423]

These cases are representative of recent others that involve claims of workplace harassment carried out in whole or in part through social media activity.[424]

The Current Uncertain, and Largely Anti-Business, Legal Landscape

Compounding the significance of companies' vulnerabilities from workplace social media use is a dearth of any clear or consistent nationwide legal guidance. What does exist is a smattering of pro-employee state statutes, each with its own unique verbiage, nuances, enforcement mechanisms (or

> *"Courts view social media—like e-mail and other technological platforms—as an extension of the workplace for which employers bear responsibility and may bear liability for hostile work environments."*

> *The number of potential 'bystanders' with access to the webpage, tweet, etc., is irrelevant, and the protected 'communication' can be minimal—such as 'liking' a post on Facebook.*

lack thereof), and different sets of social media circumstances exempted from the statutes' otherwise broad restrictions on employer rights.[425] Added to this mishmash are an increasing number of National Labor Relations Board (NLRB or Board) rulings in individual cases that further limit employers' rights in this area.

UNFAIR LABOR PRACTICE CHARGES

Through aggressive prosecution of unfair labor practice charges based on novel legal arguments,[426] unprecedented rule-making,[427] and pro-employee/pro-union decisions,[428] the NLRB and its General Counsel have expanded the agency's jurisdiction into non-union workforces and provided plaintiffs' lawyers representing otherwise at-will employees with a new litigation theory to challenge employment actions.

As part of its pro-employee/pro-union agenda, the NLRB has focused much of its attention on the use of social media in the workplace. Notably, this focus applies to unionized and nonunionized workplaces alike. Initially, the NLRB and General Counsel considered employee social media communications as protected activity to the extent they (a) discuss terms and conditions of employment, and (b) are between or among more than one employee. This standard applies regardless of whether the communication occurs solely on social media; for example, tweeting a comment that sparks a face-to-face or other oral conversation among employees satisfies part (b) of the test. The number of potential "bystanders" with access to the webpage, tweet, etc., is irrelevant, and the protected "communication" can be minimal—such as "liking" a post on Facebook.[429] Conversely, an employee's comments on social media are generally not protected if they are mere gripes not intended to advance collective action to improve wages, hours or working conditions.[430]

In *Design Technology Group*,[431] a group of employees lodged complaints with their manager about their supervisor. Subsequently, on Facebook, the employees discussed their complaints and disparaged the supervisor. The manager saw the Facebook post, leading to the employer's discharging of the employees. In concluding that the employer had violated the National Labor Relations Act (NLRA),[432] the NLRB found that the employees were engaged in protected, concerted activity and that the complaints on Facebook "were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment."

In *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, the NLRB concluded that merely clicking Facebook's "like" button was protected, concerted activity shielded by labor law.[433] The social media discussion involved employees who had been discharged for posting comments that the restaurant's owners "couldn't even do the tax paperwork correctly," or for just "liking" those comments. The NLRB concluded that an employee's "like" was effectively an endorsement of her coworker's complaint that she owed money on her taxes due to her employer's tax-withholding error, an issue directly related to her compensation.[434] After Triple Play failed to prove that the statement was "maliciously untrue," the NLRB ruled that both the statement and the "like" endorsement were protected, and the employee terminations unlawful.[435]

The NLRB then addressed and invalidated Triple Play's "Internet/blogging" policy, including its prohibition on "inappropriate discussions" about the company, management or other workers. Specifically, the NLRB concluded that employees could reasonably interpret the policy to bar protected activities.

The Board's *Triple Play* decision is consistent with *Costco Wholesale Corp.*,[436] where the NLRB found the company violated the NLRA by maintaining a rule prohibiting employees from electronically posting statements that "damage the Company… or damage any person's reputation."[437] In reaching this conclusion, the NLRB stated that a violation is dependent on a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity;[438] (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[439] In applying this analysis to find a violation of the NLRA there, the NLRB ignored the employer's good faith intent not to apply the policy to protected activity.

The Board in *Costco* also invalidated four other employer policies implicating social media communications as impermissibly interfering with employees' rights to engage in protected, concerted activity. The invalidated policies had prohibited employees from: (a) "unauthorized posting, distribution, removal or alteration of any material on Company property"; (b) discussing "private matters of members and other employees…includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."; (c) "shar[ing], transmit[ing], or sort[ing] for personal or public use without prior management approval…[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information"; and (d) sharing "confidential" information such as employees' names, addresses, telephone numbers, and email addresses.[440]

By protecting employee social media communication and invalidating policies that inhibit such communication, as well as union communications, the NLRB has placed employers at greater risk of unfair labor practice charges from terminated employees and unions seeking to organize employer workforces.

> *[T]he NLRB has placed employers at greater risk of unfair labor practice charges from terminated employees and unions seeking to organize employer workforces.*

DIGITAL ORGANIZING CAMPAIGNS

The foregoing NLRB rulings have also cleared the way for union-driven, digital organizing campaigns and social media-marshalled mass demonstrations. Surreptitious digital organizing campaigns allow unions to organize employees without employer knowledge or counter-campaign, virtually ensuring majority support well in advance of the filing of an NLRB representation petition. Not surprisingly then, the AFL-CIO developed its #1u Digital Training Series,[441] certifying union organizers as "labor digital ninjas."[442]

On a broader scale, the SEIU and other unions have joined social media-organized fast-food workers in staging a one-day walkout of hundreds, if not thousands, of employees working in restaurants in over fifty cities.[443]

These campaigns often spark or arise naturally out of wage and hour class actions and other employment suits, which unions exploit—both as fuel for their campaign material and leverage for subsequent collective bargaining.

Social Media in Litigation

Compounding the difficulties for employers posed by the above-described events, plaintiffs' lawyers are increasingly using social media information in traditional employment litigation. In some circumstances, social media content can also be helpful to employers. The importance of social media evidence in discrimination and wage and hour claims cannot be understated. Indeed, it can often be outcome-determinative.

DISCRIMINATORY HARASSMENT LITIGATION

Demonstrative in this regard is a recent sexual harassment case, *Debord v. Mercy Health System of Kansas, Inc.*[444] The case arose when an employer discharged a female employee for making Facebook posts via her cell phone during work hours. The employee then sued, seeking to hold the employer liable for sexual harassment. She argued that a male supervisor had sexually harassed her, and that the employer should have been aware of the harassment by virtue of her posting statements about it on Facebook. The court ruled for the employer on summary judgment. The court reasoned that the female employee's Facebook posts did not constitute proper notice sufficient to trigger the employer's duty to take corrective action because there was no evidence that the employer was monitoring its employees' social media activity, and that when coworkers brought the posts to the attention of Human Resources, the employer conducted an investigation and otherwise acted promptly and properly in response.

The *Debord* decision has dual-fold significance. First, it demonstrates that the disposition of a harassment lawsuit can turn on whether an employer monitors its employees' social media activity. In *Debord*, the employer consistently did not, which ultimately meant it could not be held liable for having notice of an employee's complaints of harassment via social media. Had the employer been monitoring employees' social media activity, but not been consistent in doing so, the outcome in the case likely would have been different. The current inconsistency among state social media statutes, however, will make it difficult, if not impossible, for multi-state employers to treat all employees the same with respect to social media monitoring. Second, *Debord* illustrates the importance of an employer being able to conduct an investigation into alleged misconduct by reviewing an employee's social media posts. The employer in *Debord was* able to do so, and it *did so* appropriately—ultimately leading to exoneration for any harassment liability in the suit. But in states with laws that prohibit such investigations, employers will not be able to do so and will likely face a different fate in litigation.

WAGE AND HOUR LITIGATION

Social media content can be critical for employers in wage and hour suits, which have increased for seven straight years to reach a record high.[445] A plaintiff-employee's social media activity can be evidence of hours spent working—which may confirm or refute a claim for unpaid overtime hours—and can be evidence of the employee's actual daily job duties—which may confirm or refute allegations of employer misclassification for overtime eligibility.

In *Palma v. Metro PCS Wireless, Inc.*,[446] for example, current and former employees sought unpaid overtime wages under the Fair Labor Standards Act (FLSA). The employer sought discovery (through interrogatories and document production requests) of "all posts to Plaintiffs' social media accounts from 2010 to the present that relate to 'any job descriptions or similar statements about this case or job duties and responsibilities or hours worked which Plaintiffs posted on LinkedIn, Facebook or other social media sites'…including "all private messages Plaintiffs sent from these sites."

> *"Social media content can be critical for employers in wage and hour suits, which have increased for seven straight years to reach a record high."*

The employer argued that this sought-after information was relevant to its affirmative defense that plaintiffs were not entitled to overtime pay because they were properly classified as exempt and/or they did not actually work more than 40 hours per week (as plaintiffs may have made posts regarding their actual job duties and/or online comments that contradicted their testimony regarding breaks taken during work hours). After the employees refused to produce the documents, the court denied the employer's motion to compel, reasoning that the requests were overbroad and speculative.

Similarly illustrative is *Mancuso v. Florida Metropolitan University, Inc.*,[447] an FLSA action where a non-exempt employee sought back overtime wages from his employer. Following the employee's deposition, during which he was questioned about his use of Facebook and MySpace, the employer issued subpoenas *duces tecum* to online social media providers. Although admitting that time spent using Facebook and MySpace during work hours could bear on the amount of back overtime wages he was due, the plaintiff moved to quash the subpoenas and/or for entry of a protective order to narrow the subpoenas' scope. The court held that plaintiff *did* have standing to quash the subpoenas, relying on other courts' decisions, including one that held that "an individual has a personal right in information in his or her profile and inbox on a social networking site and his or her webmail inbox in the same way that an individual has a personal right in employment and banking records."[448] (Ultimately, the court denied plaintiff's motion due to procedural defects in his papers.)

These court cases instruct that, although social media activity by employee-plaintiffs may indeed be highly relevant to an employer's ability to present a substantive defense to employment claims, courts may side with plaintiffs' lawyers to bar employers from obtaining that information in discovery.[449] The potential preclusion of such discovery in litigation underscores the importance of employers being lawfully entitled to monitor and amass such social media information *before* litigation. Indeed, had the *Palma* case employer done so, it might have learned that its employees were wrongly classified and working hours for which they should have been paid overtime, leading to corrective measures to remediate the situation—avoiding litigation all together.

As demonstrated by the foregoing, social media information may be critical to enabling employers to adequately defend their interests in litigation, but waiting to obtain that information in discovery will often be too late. Predictability for employers regarding the right to obtain that information in the regular course of business, *before* litigation, is thus that much more critical.

Energy Regulation through Litigation

Establishing national policies for extracting and using energy resources takes careful balancing of interests. Plaintiffs' lawyers and environmental activists who are frustrated with the regulatory process repeatedly try to impose emissions requirements through the courts. They have also attempted to pin responsibility on energy producers for damage stemming from hurricanes and floods. Thus far, these types of lawsuits have fallen flat with judges. They recognize that how our nation maintains an affordable energy supply that is vital for our economy and security, while protecting the environment and addressing climate change, are decisions for policymakers, not plaintiffs' lawyers.

The first lawsuits were tort claims alleging climate change injuries against private energy companies. Plaintiffs' lawyers sued energy producers for the costs of hurricane damage and flooding (even relocating a village), as well as injunctive relief. This section also discusses two other attempts to regulate emissions though the courts: public trust lawsuits against regulators, and tort claims against power plants over local impacts of electricity generation.

While these types of claims have failed to gain traction, plaintiffs' lawyers are exploring new interest in regulating fracking through the courts. Of course, some plaintiffs' lawyers are still driven by money, and no report on energy litigation would be complete without exposing the "no injury" claims against BP that have turned the Deepwater Horizon settlement into an ATM.

The End of Climate Change Lawsuits?

After a series of high-profile defeats in the courts, climate change litigation appears to be temporarily waning.

CLIMATE CHANGE TORT SUITS AGAINST THE PRIVATE SECTOR

One of the highest profile efforts to regulate the use of energy through litigation has been the climate change tort suits filed in the early 2000s. These lawsuits have failed at all levels of the federal and state judiciary. The most prominent of these cases was *Connecticut v. American Electric Power Co.* ("*AEP*") because it went all the way up to the Supreme Court of the United States.[450] In this case, several state attorneys general and the City of New York, along with some land trusts, sued six utility companies. The 2003 lawsuit asked the Court to require, through injunctive relief and abatement orders, a three percent reduction in GHG emissions per year for ten years.

The Supreme Court unanimously rejected this lawsuit in 2011, explaining that the role of the courts is not to regulate emissions, but to enforce the law. It explained that Congress "delegated to EPA the decision [of] whether and how to regulate carbon-dioxide emissions," and that there is "no room for a parallel track" of tort litigation for these emissions.[451] The Court recognized that the judiciary simply does not have the institutional competence to determine "[t]he appropriate amount of regulation" for sources of carbon dioxide and engage in the "complex balancing" needed to assess the impact such a decision would have on the "energy needs" of the American people.[452]

Plaintiffs' lawyers also brought two other climate change tort cases on behalf of individuals who sought money for "climate change injuries." In *Kivalina v. ExxonMobil Corp.*, the small Alaskan Village of Kivalina sued many of the same energy producers for causing global climate change and, in turn, the polar ice wall protecting their arctic village to melt.[453] The plaintiffs sought the costs of moving their village to an area less vulnerable to arctic floods.

The U.S. Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of the *Kivalina* lawsuit in 2012, finding that regulation of emissions by Congress did not leave room for federal common law public nuisance actions addressing emissions, regardless of who brought the suits and whether they seek money damages or injunctive relief.[454] The court explained, "[i]f a federal common law cause of action has been extinguished by Congressional displacement, it would be incongruous to allow it to be revived in another form."[455]

In *Comer v. Murphy Oil*, Mississippi residents whose properties were damaged by Hurricane Katrina filed a class action against several dozen energy companies for their property damage.[456] They alleged that global climate change made Hurricane Katrina more intense and that the energy companies should have to pay for damages caused by that increased intensity. The case took several twists and turns, with two different trial judges dismissing the claims as political questions.[457] The U.S. Court of Appeals for the Fifth Circuit put the final nail in the case in 2013, when it affirmed the second district court's dismissal on *res judicata* grounds.[458]

In these lawsuits, the plaintiffs' lawyers have acknowledged their goal of short-circuiting the political process to regulate emissions through the courts.[459] In *AEP*, then-Connecticut Attorney General and now United States Senator Blumenthal said, "this lawsuit began with a lump in the throat, a gut feeling, emotion, that CO2 pollution and global warming were problems that needed to be addressed…[Action] wasn't coming from the federal government…[We were] brainstorming about what could be done."[460]

Plaintiffs' counsel in Mississippi said that "primary goal was to say [to defendants] you are at risk within the legal system and you should be cooperating with Congress, the White House and the Kyoto Protocol."[461] By deciding which companies to name in their lawsuits, they were choosing which companies and products should be "blamed" for climate change.

The Supreme Court, as well as lower courts in these cases, appreciated these dynamics. The common theme in their rulings is recognition that to adjudicate these claims, courts must set emissions policy. It does not matter whether the cases seek injunctive relief or monetary damages, are brought by state attorneys general or individuals, or are brought under state or federal law. The courts have stated clearly that the judiciary is not the place for making energy policy.

> *"[P]laintiffs' lawyers have acknowledged their goal of short-circuiting the political process to regulate emissions through the courts."*

Rather, maintaining proper balance among energy sources is central to America's national energy policy and should be driven by Congress. Unlike courts, Congress can balance environmental concerns against the need Americans have for affordable energy to turn on their lights, heat their homes, and drive their cars.

PUBLIC TRUST SUITS

A second round of lawsuits intended to circumvent Congress on climate change policy were filed as the above cases were on their way out. A group called "Our Children's Trust" organized these lawsuits and filed them on behalf of children in nearly every state and the District of Columbia.[462] These suits targeted environmental regulators, not the private sector, alleging that federal and state regulators have independent "public trust" obligations to protect the atmosphere from global climate changes.

Specifically, these lawsuits asked judges to issue injunctions setting an upper limit of 350 parts per million on the total permissible emissions worldwide and then force federal and state governments to impose a comprehensive regulatory regime based on that standard. If allowed, Congress and state legislatures would be silenced by judicial decree. The emissions agenda of this group of advocates would overtake the judgment of elected policymakers on whether and how to reduce GHG emissions.

> “The courts have stated clearly that the judiciary is not the place for making energy policy.”

In June 2014, the U.S. Court of Appeal for the D.C. Circuit dispatched the case filed in the federal court without the need for a hearing.[463] The court found that no such cause of action exists under federal law: “plaintiffs point to no case . . . standing for the proposition that the public trust doctrine—or claims based upon violations of that doctrine—arise under the Constitution or laws of the United States.”[464]

The cases filed in state courts have received a comparably hostile reception. Most recently, the Supreme Court of Alaska rejected the public trust claim filed in that state.[465] In its September 2014 ruling, the court held that the claims were either non-justiciable under the political question doctrine or were not ripe for the court’s consideration: “Although declaring the atmosphere to be subject to the public trust doctrine could serve to clarify the legal relations at issue, it would certainly not ‘settle’ them. It would have no immediate impact on greenhouse gas emissions in Alaska, it would not compel the State to take any particular action, nor would it protect the plaintiffs from the injuries they allege.”[466]

Several public trust lawsuits are still working their way through the state judiciaries.

LAWSUITS AGAINST POWER PLANTS

A third way plaintiffs’ lawyers and environmental advocates have sought to use litigation to regulate emissions is by suing power plants, not for the alleged global effects of GHG emissions, but the local effects of coal-fired electricity generation. This includes alleged impacts from traditional emissions and coal ash deposits. The result of allowing liability in these situations would be the same as in the climate change tort cases: courts, not regulators, would have the ultimate decision on what emissions or other operations are “unreasonable” such that they can give rise to liability.

The first case brought with respect to the local effects of power plant emissions was *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*.[467] The U.S. Court of Appeals for the Fourth Circuit rejected the claims in 2010 as preempted by federal law because these emissions are already highly regulated and approved under federal permitting programs. The court detailed the complex regulatory regime under the Clean Air Act governing these emissions and concluded that allowing liability would put courts in the position of second-guessing “decades of thought by legislative bodies and agencies.”[468] The result could be “multiple and conflicting standards” that would undermine, not advance, national energy policy.[469]

In this situation, the Fourth Circuit explained, EPA directly involved the state in developing regulations for the power plant emissions at issue in the litigation. Consequently, state and local communities already contributed to determinations over how these risks would be handled. The permits did not require the plant to generate electricity without impact, but set the level of emissions that were reasonable for that plant. Any judicial determination that such emission levels are unreasonable, therefore, must be preempted or such rulings would "scuttle the nation's carefully created system for accommodating the need for energy production and the need for clean air."[470]

Last year, a similar action against GenOn Power reached the U.S. Court of Appeals for the Third Circuit.[471] In this case, property owners located near the coal-fired power plant sued over sediment and other alleged localized harms from the plant's operations. The plaintiffs did not allege violations of the Clean Air Act, but claimed that the approved emissions caused them harm nonetheless. The trial court dismissed the case on preemption grounds, saying that a finding for liability here "would undermine the [Clean Air Act's] comprehensive scheme, and make it impossible for regulators to strike their desired balance in implementing emission standards."[472]

The Third Circuit reversed, finding that the power plant's compliance with federal and state air quality regulations did not shield it from local tort claims. It leaned on the Supreme Court's ruling in *International Paper Co. v. Ouellette*, which allowed state tort claims under the Clean Water Act.[473] The Supreme Court did not grant *certiorari* in either case, leaving a circuit split.[474]

The legal theory the Third Circuit allowed would not stop with power plants; it could be applied to any facility that emits substances permitted by EPA. For example, the Supreme Court of Iowa allowed nearby property owners to pursue tort claims against a grain processing plant operating pursuant to EPA permits under a similar legal theory.[475] Here, though, the court put off the most important question of whether the <u>remedy</u> for the claim is preempted by the Clean Air Act: "We simply cannot evaluate the lawfulness of injunctive relief that has not yet been entered. Such an evaluation must await the development of a full record and the shaping of any injunctive relief by the district court."[476]

The fundamental problem with these lawsuits, regardless of how packaged, is that they provide power plants with no objective regulatory standards or notice of what emission levels could lead to liability. As the Fourth Circuit stated in *TVA*, "no matter how well-meaning, [a power plant] would be simply unable to determine its obligations ex ante."[477]

Another type of public nuisance suit plaintiffs' lawyers have brought against power plants involves coal ash. Coal ash is a byproduct of coal-fired electricity generation and is stored in landfills near power plants. Coal ash can be re-used in concrete, dry-wall and other materials. Early coal ash lawsuits focused on allegations from local residents that coal ash stored in unlined landfills contaminated their water supplies.

In 2008, coal ash received national attention after a retaining wall of a coal ash deposit failed in Tennessee. Since then, plaintiffs' lawyers have filed litigation to stop coal ash landfills and the secondary use of coal ash. Also, environmentalists saw this litigation as yet another vehicle for regulating coal-fired plants. They have sued plants over local impacts of coal ash deposits and the government to achieve greater coal ash regulations. Their end-game is to make coal-fired power generation more costly and burdensome and view coal ash litigation as part of their climate change litigation strategy.

> *"Governor Bobby Jindal, who vehemently disagreed with the lawsuit, accused the levee authority of being 'hijacked' by plaintiffs' lawyers."*

The point of lawsuits targeted at power plant operations is to use the courts to make national energy policy; courts would have to rule on these allegations by looking at the environmental allegations in isolation. Because of the nature of private civil litigation, courts would be unable to larger energy picture and take into consideration the many other policy issues that go into establishing energy policy, including the need to maintain a large domestic source of affordable energy.

IMPOSING THE COST OF GUARDING AGAINST FLOODING ON THE OIL & GAS INDUSTRY

The most recent climate change-related lawsuit came to an abrupt end this year in Louisiana. Contingency fee lawyers hired by the Southeast Louisiana Flood Protection Authority-East (SLFPA-E), which is the local levee authority, had been pursuing a lawsuit against some 100 oil and gas companies.[478]

The lawsuit, filed in July 2013, accused the companies of damaging Louisiana wetlands through the building of pipelines and canals, and claimed that these projects made the area more vulnerable to flooding during hurricanes. It asked for what could have amounted to billions of dollars to pay for the local levee districts' share of costs for levee improvements and future storm surge protection projects.[479] If they forced a verdict or settlement, the lawyers would have received 32.5% of the first $100 million paid by the companies and a percentage based on a sliding scale for anything above $100 million.[480]

Governor Bobby Jindal, who vehemently disagreed with the lawsuit, accused the levee authority of being "hijacked" by plaintiffs' lawyers.[481] He demanded that the Authority fire the attorneys who filed the suit, saying they were hired in violation of state law that requires their hiring to be approved by the governor.[482] Governor Jindal also pointed out that Louisiana voters had already approved a constitutional amendment dedicating offshore energy company revenues to coastal restoration and hurricane protection projects in Louisiana's master plan. The lawsuit, on the other hand, would only benefit a small group of trial lawyers.

The lawsuit ended in June 2014 when the Louisiana legislature approved, and Governor Jindal signed, legislation that allowed only certain entities to bring lawsuits against companies for their activities along the coast.[483] The co-sponsors of the bill, Senators Bret Allain and Robert Adley, said that the measure was needed to help avoid "enriching lawyers and certain individuals" through "frivolous lawsuits."[484] The new law essentially barred the levee district's lawsuit from proceeding.

Governor Jindal also signed separate legislation this year curbing so-called "legacy lawsuits" against the oil and gas industry.[485] In these claims, plaintiffs' lawyers targeted businesses of all sizes to pay the costs of alleged environmental damage stemming from drilling activity that occurred decades ago. The lawsuits had discouraged oil and gas exploration and production, cost Louisiana 1,200 new oil and gas wells over eight years, and resulted in a loss of $6.8 billion in lost drilling investments and 30,000 jobs.[486]

Fracking Lawsuits May Rise

The next growth area that plaintiffs' lawyers and environmentalists hope to cash in on and regulate through the courts appears to be fracking. Plaintiffs' lawyers are running hundreds of television advertisements in states, such as Louisiana and Texas, recruiting clients for both property contamination and worker injury lawsuits stemming from fracking and other aspects of energy exploration.[487] A recent Texas verdict may spur plaintiffs' lawyers to increase their efforts.

> *"Plaintiffs' lawyers are running hundreds of television advertisements…recruiting clients for…lawsuits stemming from fracking"*

Typical concerns related to hydraulic fracking generally include complaints of groundwater contamination allegedly associated with chemicals used, water use, proper wastewater disposal, or seismic activity. While the number of lawsuits stemming from fracking may be rising, few have resulted in verdicts. To date, courts have either dismissed the cases or the parties have settled them.[488]

In April 2014, a Texas jury awarded nearly $3 million to landowners who claimed that a nearby gas well, which had been hydraulically fractured, had hurt the value of their property and their health. In that case, *Parr v. Aruba Petroleum,*[489] a family that lives near Fort Worth, Texas, alleged that extensive exploration and production activity had created a "private nuisance." They alleged that the activity contaminated the air near their home and led to health effects like headaches and nausea. The company responded that it had complied with air quality regulations and disputed that its activities caused the family's health issues. The award included $275,000 for the drop in their property value, $2.4 million for past physical suffering and mental anguish, and

$250,000 for future harm. In July, the trial court judge denied a motion to overturn the multimillion dollar jury award.[490]

The media has referred to the award as "1st-of-its-kind fracking judgment."[491] Legal observers point out, however, that the plaintiffs complained about activities that are commonly required to drill almost any oil or gas well, such as flaring, construction activity, trucking traffic, and the emission of gas and chemicals into the air.[492] These types of activities may occur even if a well is not hydraulically fractured. Defense attorneys view the *Parr* verdict as a "one-off case" revolving around personal injuries allegedly caused by toxic exposure. It is seen as a fact-specific case that may ultimately not survive an appeal.[493]

Nevertheless, the verdict and media coverage may embolden plaintiffs' lawyers to bring more lawsuits in an effort to "regulate" oil and gas exploration. The result of this anti-fossil fuel agenda is only going to raise the price of energy and make it more expensive for people to turn on their lights, heat their homes, and drive their cars.

BP Fights Payment of Claims to Those Who Suffered No Harm

Falling into the traditional litigation abuse category are the "no injury" suits from the BP settlement in the Gulf states. When BP settled litigation to pay economic losses stemming from the 2010 oil spill disaster, it never foresaw that, years later, it would be paying $173,000 to an adult escort service, $662,834 to a nursing home shut down before the spill,[494] $23.1 million to an alligator farm that earned profits the year of the spill,[495] or $21 million to a rice mill whose revenues rose the year of the spill.[496] Thus far, BP has paid more than $12 billion in claims, far exceeding its initial estimate of about $7.8 billion.[497] BP's pleas to stop payment of absurd claims, which result from an overbroad reading of the settlement terms, have not been successful.[498]

Plaintiffs' lawyers contend that their clients do not have to show that losses are directly linked to the spill, but that a loss of business is assumed to have resulted due to the economic effect of the spill on the region. The claims administrator interpreted the settlement as compensating claimants "without regard to whether such losses resulted or may have resulted from a cause other than the Deepwater Horizon oil spill."[499] Plaintiffs' lawyers have relied on this interpretation, which was upheld by a district court judge and a divided Fifth Circuit, to urge people to file claims, regardless of whether they have any injury that was caused by the oil spill.[500]

The Fifth Circuit found that the settlement agreement "does not require a claimant to submit *evidence* that the claim arose as a result of the oil spill."[501] All it requires, the court found, is for claimants to attest on a form that they had losses due to the spill, meaning that they only need to assert some "causal nexus."[502] The panel denied a petition for rehearing in May. The Fifth Circuit rejected, by an 8-5 vote, a request that the entire court consider the case.[503]

Judge Edith Brown Clement authored a scathing dissent joined by two other judges that certification of the settlement class cannot stand if those eligible for compensation includes people who suffered no harm traceable to BP.[504] Their findings were reminiscent of Judge Jack's ruling that exposed fraud in unimpaired silica and asbestos claims. Judge Clement wrote, "the class of people who will recover from this settlement continues to include significant numbers of people whose losses, if any, were not caused by BP." She found that the court's decisions "would allow payments to 'victims' such as a wireless phone company store that burned down and a RV park owner that was foreclosed on before the spill." "Left intact," Judge Clement said, "our holdings funnel BP's cash into the pockets of undeserving non-victims." She decried these "absurd results" and accused the court of becoming "party to this fraud" through its unreasonably broad interpretation of the settlement.[505]

As Paul Barrett of *Businessweek* observed, Judge Clement "is waving her arms, jumping up and down—heck, doing everything but setting her office furniture on fire—to draw the attention of the U.S. Supreme Court to the zany goings on in New Orleans concerning BP and its oil spill liability."[506]

"As Paul Barrett of Businessweek observed, Judge Clement 'is waving her arms, jumping up and down—heck, doing everything but setting her office furniture on fire—to draw the attention of the U.S. Supreme Court to the zany goings on in New Orleans concerning BP and its oil spill liability.'"

BP filed its petition for *certiorari* with the Supreme Court on August 1, estimating that it has already paid "more than $76 million to entities whose losses had nothing to do with the spill, as well as an additional $546 million to claimants that are located far from the spill and are engaged in businesses whose revenues and profits bear no logical connection to the spill."[507] Approximately 130,000 claims are pending and plaintiffs' lawyers continue to file them.[508] Nevertheless, the high court denied BP's request to stay payment of claims until the appeal is decided.

In the midst of the litigation over interpretation of the settlement, U.S. District Court Judge Carl J. Barbier appointed former FBI Director Louis J. Freeh as Special Master. His initial mission: investigate the resignation of a staff attorney and ethical violations or other misconduct in the settlement program office, and recommend measures to ensure the integrity of the process.[509] Freeh's 98-page report, issued in September 2013, revealed several troubling conflicts of interest and ethical lapses among the staff, a result of just two months of investigation.[510]

Following that report, Judge Barbier expanded Freeh's role, empowering him to "examine and investigate…any past or pending claims submitted to the [settlement program] which are deemed to be suspicious; make any necessary referrals to the United States Department of Justice or to other appropriate authorities; initiate legal action to 'clawback' the payment of any fraudulent claims; and do this in a manner which does not delay or impede the payment of legitimate claims."[511]

This summer, Freeh obtained a court order stemming from his initial investigation, requiring a shrimper and his lawyers to return $357,000.[512] Freeh's work continues. In October 2014, he requested that Judge Barbier order an Alabama boat captain to return nearly $240,000 in settlement money. Freeh's investigation found that 80% of the company's revenue in 2009 came from marine cleanup work, not shrimping, as it claimed.[513] Days before Freeh filed the action, the shrimper's attorney returned his share of the recovery, $43,223 of the original $282,742 in claims payments, and resigned as the shrimper's counsel. While the attorney is not named in Freeh's motion, Steve Olen, who serves on the executive committee of the Alabama Association for Justice, signed the attached claims documents.[514]

Telephone Consumer Protection Act Litigation

Since ILR published a warning about Telephone Consumer Protection Act (TCPA) litigation in October 2013,[515] lawsuits filed under this federal law have continued at a quickening pace. Indeed, sources reported more than 1,900 TCPA lawsuits filed by September 30, 2014—an over 30% increase from the same timeframe in 2013.[516] Lawsuit abuse in TCPA litigation is rampant. Plaintiffs' lawyers take advantage of uncertainties in the law to muscle companies into ever-increasing large dollar individual and class settlements.

Congress enacted the TCPA in 1991 to address the problems caused by aggressive cold-call telemarketing that used random or sequential dialers to barrage the American public with calls.

Section 227(b)(3) of the TCPA limits certain autodialed calls, prerecorded calls, and facsimiles. It also establishes a private right of action for consumers to bring claims under the TCPA for $500 per violation caused by these types of calls when they did not consent to receive them. Cell phones (which in 1991 were a very different animal than today's smart phones) got their own special treatment under this section. Section 227(c)(5) created the federal Do Not Call (DNC) list and established a private right of action for "up to" $500 per violation for certain telemarking calls made in violation of a consumer's status on the DNC list.

Significantly, for the past several years, plaintiffs' lawyers have brought the vast majority of TCPA litigation under the 227(b) portion of the statute, which was intended to apply to aggressive telemarketers and thus has no built-in affirmative defenses as in Section 227(c). The suits have targeted companies for calls (often, non-telemarketing calls) that plaintiffs' lawyers allege were made without the requisite levels of prior consent. A cadre of plaintiffs' law firms has filed hundreds of TCPA lawsuits throughout the country.[517]

The Litigation Driver: Uncapped Statutory Damages

The TCPA's base damages for $500 per violation (or $1,500 if willful) are often multiplied several times for just a single plaintiff. For example, a marketing campaign making three total calls each to 50,000 customers could spawn a class claim seeking $225 million in statutory damages with allegations that the requisite consent for such calls did not exist and that the caller was willful. A single person who is inadvertently sent text messages can seek hundreds of thousands of dollars, as occurred when a restaurant chain sent 876 food safety text alerts to a number it believed to be that of a quality assurance employee before learning the carrier reassigned the number after the employee lost his phone.[518]

Because of the private right of action and uncapped damages available in 47 U.S.C. § 227(b), and because of developments through case law and FCC orders to a 23-year-old statute that Congress has never revisited, the situation has become dire. Companies who attempt to communicate with their own customers or under existing business relationship rules are finding themselves nonetheless subject to the threat of draconian penalties.

TCPA Class Settlement Amounts Continue to Rise

Recently, class plaintiffs and companies accused of violating the TCPA have reached record settlements. Generally, plaintiffs' class counsel requests 25-30% of the settlement fund in fees, and individual plaintiffs who submit claim forms are entitled to seek a pro-rata share of the remainder (estimated in some of these settlements, such as in the *HSBC* and *Bank of America* settlements listed below, to be likely to provide somewhere between $20-$40 to each claimant).

Several recent, significant TCPA class settlements from 2014 (preliminary and final) are listed below, with settlement amounts in decreasing order.

Case	Source Claim	Settlement Amount	Date
In re Capital One TCPA Litigation **No. 12-cv-10064 (N.D. Ill. 2014)**	Alleged ATDS and/or prerecorded calls to cellular telephones without prior express consent.	$75.5 M	July 2014 [Preliminary
Hageman v. AT&T Mobility LLC **No. 13-cv-00050 (D. Mont. 2014)**	Alleged ATDS and/or prerecorded calls to cellular telephones without prior express consent.	$45 M	September 2014 [Preliminary]
Wilkins v. HSBC Bank Nevada NA **No. 14-cv-00190 (N.D. Ill. 2014)**	Alleged ATDS and/or prerecorded calls to cellular telephones without prior express consent.	$39.975 M	October 2014 [Preliminary]
Rose v. Bank of America Corp. **No. 11-cv-02390 (N.D. Cal. 2014)**	Alleged ATDS and/or prerecorded calls and texts to cellular telephones without prior express consent.	$32 M	August 2014 [Final]
Fauley v. Metropolitan Life Ins. Co. **No. 14-CH-1353 (Cir. Ct., Lake County, Ill.)**	Alleged unsolicited fax advertisements.	$23 M	August 2014 [Preliminary]
Steinfeld v. Discover Financial Servs. **No. 12-cv-01118 (N.D. Cal. 2014)**	Alleged ATDS and/or prerecorded calls and texts to cellular telephones without prior express consent.	$8.7 M	March 2014 [Final]
Michel v. WM Healthcare Solutions, Inc. **No. 10-cv-00638 (S.D. Ohio 2014)**	Alleged unsolicited fax advertisements.	$4.4 M	February 2014 [Final]

Notably, in some of these class settlements, district courts have allowed significant incentive payments to class representatives. In two recent settlements, the District of Montana and the District of Arizona both allowed class representatives to receive in excess of $10,000.[519] In other words, TCPA plaintiffs and their counsel continue to be over-incentivized to seek class certification for TCPA claims.

The FCC Is Slow to Address TCPA Issues, Adding Pressure on Defendants to Settle

On March 25, 2014, FCC Commissioner Michael O'Reilly, on the official FCC blog, noted the 30% increase in TCPA lawsuits over the past year and a backlog of petitions pending at the FCC.[520] He recognized the importance of ruling on these issues "as soon as possible."[521]

Then, on August 1, 2014, more than a dozen members of Congress sent a letter to the FCC urging it to take swift action on TCPA petitions pending before it, prompted in part by the concern that state and federal government bodies may not be able to use efficient means to contact the millions of people who owe public debt.[522] Their letter notes that the TCPA is being "unfairly applied with great unintended consequences" to non-telemarketing calls.[523] They observe that "the TCPA has turned a vehicle to protect consumers from unwanted random solicitations into a booming practice for opportunistic attorneys to take advantage of ambiguous rules and profit personally by receiving millions of dollars by suing businesses and overburdening the courts while providing only nominal relief to their clients."[524] Congress urged the FCC to rule quickly on the petitions.

> *"'[T]he TCPA has turned a vehicle to protect consumers from unwanted random solicitations into a booming practice for opportunistic attorneys to take advantage of ambiguous rules and profit personally by receiving millions of dollars by suing businesses and overburdening the courts while providing only nominal relief to their clients.'"*

Even after finally issuing an order related to opt-out language on solicited faxes, however, the FCC has a backlog of 49 petitions as of October 28, 2014 involving the TCPA[525] that it plans to address—several of which have been pending for years. The FCC has not moved quickly enough in issuing orders to stem the flood of litigation. Defendants facing lawsuits alleging millions or even billions of dollars in statutory damages feel pressured into settlements, and some settle only to find (maybe years later) that their acts would not have been considered a violation of the TCPA.

For example, the FCC recently issued an order in response to a series of petitions (filed as early as 2010) about the opt-out language required on faxes to consumers who had previously agreed to receive such fax ads.[526] Multiple companies under siege by TCPA lawyers filed petitions seeking various forms of relief from a Commission rule requiring that an opt-out notice be included on fax ads sent with the prior express invitation or permission of the recipient.[527] Several petitions contended that the Commission offered confusing and conflicting statements regarding the applicability of the rule to solicited faxes.[528] Several petitions sought retroactive waivers on the basis that strict compliance with the opt-out rule would be burdensome and inequitable.[529]

In an October 30, 2014 order, the FCC affirmed that opt-out notices are required on all fax ads (whether solicited or unsolicited), and that such notices must conform to the rules adopted by the Commission in its 2006 Junk Fax Order. However, and very significantly, the FCC granted retroactive waivers of this requirement to provide opt-out notices.[530] Further, fax senders have a six-month window from October 30, 2014 to come into full compliance with the opt-out notice requirement for solicited faxes.[531] For companies that already settled unsolicited fax advertisement suits, in the years the FCC spent deciding this issue, the decision (which could have impacted some cases) comes too late. Moreover, in recent years, TCPA lawsuits brought related to faxes have dwindled as companies have moved away from faxes as a preferred mode of communication.

> *"Because the FCC has not provided its opinion on several key topics behind the swell in TCPA litigation…and because courts are issuing conflicting opinions, TCPA lawsuits are a thriving cottage industry."*

Because the FCC has not provided its opinion on several key topics behind the swell in TCPA litigation (such as those discussed in the next section), and because courts are issuing conflicting opinions, TCPA lawsuits are a thriving cottage industry.

Four Primary Issues Fueling TCPA Litigation

"CAPACITY" TO AUTODIAL IS HOTLY CONTESTED

The TCPA defines an automatic telephone dialing system (ATDS) as "equipment which has the capacity (a) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers."[532] A lively debate continues as to whether "capacity," as used in the statute, refers to a system's present actual capacity, or includes a system's potential capacity. Because of the lack of clarity, any telephone call placed with equipment that is not an old-fashioned rotary dial telephone may encourage plaintiffs' lawyers to take a shot at a TCPA lawsuit.

Several courts have recently rejected the theory that any technology with the potential capacity to store or produce and call telephone numbers using a random number generator constitutes an ATDS. For example, a federal court in Washington noted that such a conclusion would lead to "absurd results" and would "capture many of contemporary society's most common technological devices within the statutory definition."[533]

But other courts have accepted the "potential" capacity argument forwarded by the plaintiffs' bar. A federal judge in California, for example, has held that the question is "whether the dialing equipment's present capacity is the determinative factor in classifying it as an ATDS, or whether the equipment's potential capacity with hardware and/or software alterations should be considered, regardless of whether the potential capacity is utilized at the time the calls are made."[534] Thus, a defendant whose employees are dialing calls that use any form of a computer in the process might find itself a target in a TCPA lawsuit. Even when calls could not have been placed unless a human representative initiated the one-to-one call, the plaintiffs' bar argues that a system's *potential* capacity is what triggers liability, regardless of the actual and present capacity.

Since 2012, petitions have been pending before the FCC requesting that the FCC address the meaning of "capacity." In one petition, the FCC is asked in part to confirm that "capacity" under the TCPA means present ability, at the time the call is made, to store, produce, or dial phone numbers.[535] Another petitioner asked the FCC to define the term as the current ability to operate or perform an action, when placing a call, without first being modified or technologically altered.[536] There is no indication when the FCC may rule. With courts divided on the definition of "capacity," lawsuits alleging persons were contacted via an ATDS continue to flourish.

CALLS MADE TO RECYCLED CELL PHONE NUMBERS ARE GENERATING NEW SUITS

On a daily basis, companies across the country make calls or send texts or faxes to numbers provided to them by their customers, and for which consent existed for such contacts. Cell phone numbers, however, can be easily relinquished and reassigned without notice to anyone, let alone businesses that were provided the number as a point of contact by their customer. Then, when the company reaches out to its customer at the provided number, it unintentionally reaches the new owner of the number. This seemingly innocent mistake has become the most significant driver of new TCPA litigation.

A rash of TCPA litigation has arisen from recycled number fact patterns, encouraged by recent decisions in the Seventh Circuit[537] and Eleventh Circuit.[538] Those courts held that the "called party" with a right to sue under § 227(b)(1) means the person subscribing to the called number at the time the call is made (i.e., the new owner of the cell phone number).[539] Because the new subscriber has not provided consent to the company with his or her number on file, these courts have reasoned that there is no prior consent to receive autodialed and/or prerecorded messages.

> *[A] statute intended to cover abusive telemarketing has morphed into one making 'gotcha' claims against well-intentioned companies attempting only to communicate with their own customers.*

Thus, a statute intended to cover abusive telemarketing has morphed into one making "gotcha" claims against well-intentioned companies attempting only to communicate with their own customers, generally for transactional or informational purposes.

Defendants in some suits have turned to the FCC for assistance, and the FCC is currently considering whether it is appropriate to hold companies that find themselves in this situation liable under the TCPA. One petitioner, United Healthcare, proposes a number of solutions to the FCC, such as declaring that the term "called party" under the TCPA "encompasses both the consenting party and the new subscriber to the reassigned number until the caller learns from the call recipient that the two parties are not the same."[540] Another petitioner requests that the FCC recognize a safe harbor for autodialed "wrong number" non-telemarketing debt collection calls to wireless numbers.[541] The FCC has taken up these petitions and received comments from a number of companies explaining the impossibility of avoiding calls to reassigned phone numbers. Defendants are thus desperately turning to the FCC to revisit the archaic TCPA statute because Congress has (as of yet) shown no inclination to do so, and because so much of it does not make sense in light of modern technologies, like smart phones, that simply did not exist when the statute was enacted in 1991.

While the FCC ponders this issue, companies find themselves targeted in TCPA lawsuits brought by individuals who let the calls roll in, often without providing any notice to the caller that the number was reassigned. Indeed, the restaurant chain noted earlier, which sent food safety text messages to a reassigned number, has asked the FCC to consider adding an affirmative, bad-faith defense that vitiates liability upon a showing that the called party purposefully and unreasonably waited to notify the calling party of the reassignment in order to accrue statutory penalties.[542] The company further asks the Commission to confirm that the TCPA does not apply to intra-company messaging systems never intended to reach the public.[543]

With the state of the law so in flux, and with plaintiffs' lawyers focusing their claims in circuits in which calls to recycled phone numbers are considered actionable offenses of the TCPA, lawsuits are multiplying.

VICARIOUS LIABILITY THEORIES ARE TARGETING NEW DEFENDANTS (IN PARTICULAR, THOSE WITH DEEP POCKETS)

It is no longer just the entity placing a call or faxing a document that needs to worry about defending a TCPA lawsuit. In a 2013 order long-anticipated by the plaintiffs' bar, the FCC opined that vicarious liability could attach under the TCPA to companies that themselves had not initiated the calls in question, so long as the calls were placed "on behalf of" the company, using the federal common law of agency.[544] Now, in 2014, the first circuit courts to weigh in have also found that vicarious liability can attach to a company that did not send the alleged communication.

In a matter decided on September 19, 2014 by the Ninth Circuit, the Campbell-Ewald marketing company was hired by the U.S. Navy to conduct a marketing campaign, and instructed a third-party vendor to send text messages on behalf of the Navy.[545] Campbell-Ewald argued that it could not be held liable under the TCPA because it outsourced the text messages to a vendor and did not make any calls on behalf of the U.S. Navy itself. The Ninth Circuit rejected Campbell-Ewald's position, reasoning that Congress intended to incorporate "ordinary tort-related vicarious liability rules" and concluded that it made "little sense to hold a merchant vicariously liable for a campaign he entrusts to an advertising professional, unless that professional is equally accountable for any resulting TCPA violation."[546]

> *"[V]icarious liability can attach to a company that did not send the alleged communication."*

The Eleventh Circuit followed suit in an October 30, 2014 ruling, finding a solo practitioner dentist could be vicariously liable for fax advertisements even though he was not aware that his marketer/receptionist had hired a fax blaster to send advertisements.[547] While the district court had granted summary judgment for the dentist, who had never approved his marketer's choice to embark on a limited fax campaign, the Eleventh Circuit found that on the record before it (in which the dentist had given "free reign" to his assistant to conduct marketing), a jury could find the dentist liable for the fax advertisements.[548]

The FCC's vicarious liability order and these recent court decisions make clear that the plaintiffs' bar can reach up the chain, trying to get to the defendant with the deepest possible pocket. This, in turn, has led to a dogpile of lawsuits brought against equipment manufacturers for calls mentioning their branded equipment (even when the calls were not made to sell that equipment, but rather the caller's own services). Further, plaintiffs' lawyers have filed claims against major corporations for third-party calls made by independent contractors not authorized to call as, or on behalf of, the company.

This increase in vicarious liability litigation is not anticipated to soon abate, as it will take court rulings and some common sense to reign in these creative TCPA lawsuits plaintiffs' lawyers are filing throughout the country.[549]

ARGUMENTS ABOUT REVOCATION OF PRIOR EXPRESS CONSENT ALSO DRIVE NEW LAWSUITS

A fourth breeding ground for TCPA litigation occurs when a company calls its customer, at the customer-provided number, but then the recipient claims to have revoked consent for further calls. The Third Circuit stood alone in 2013 when it held that the TCPA provides consumers with the right to revoke their prior express consent to be contacted on cellular telephones by autodialing systems.[550]

This year, the Third Circuit was joined by the Eleventh Circuit, which held that, absent contractual restriction, a debtor and/or his roommate could orally revoke any consent given to a creditor to call the roommate's cellular telephone number in connection with the debtor's credit card debt.[551] In addition, the Eighth Circuit recently remanded a case for further proceedings where the district court did not address plaintiff's argument that he revoked his consent to be called.[552] The problems with revocation when larger businesses are making informational and/or transactional calls (sometimes through a variety of vendors) is that TCPA plaintiffs and their lawyers are now hoping to generate suits by "revoking consent" for further calls.[553]

There is a significant problem in that the judicial decisions noted above do not address how quickly a business must implement a "revocation of consent." Thus, plaintiffs' lawyers have argued that revocation under the TCPA should be instantaneous. This position does not give a business the time needed to receive and process DNC requests from its vendors and/or adjust its outbound calls. In contrast, a business knows that DNC prohibitions attach to a number 30 days after it is entered into the DNC list. Similarly, businesses are provided a specified time—15 days—to process written requests to stop collections calls under Fair Debt Collection Practices Act rules. A contrary position in TCPA cases leads to even more "gotcha" litigation.

Signs of More TCPA Litigation to Come

TCPA litigation is now so lucrative that plaintiffs' lawyers are harnessing new technologies to maximize the number of potential lawsuits. For example, Lemberg Law, a plaintiff-focused TCPA firm, has launched an Android app called "Block Calls Get Cash Free." As described in the Android Store, "Block Calls Get Cash helps you identify and report callers who may be violating the Telephone Consumer Protection Act (TCPA). Using your reports created with Block Calls Get Cash, the participating law firm will investigate and prosecute your TCPA claim. Proceed with the case and you could receive up to $1,500 per call. There are no legal or other fees unless we win."[554]

With the combination of in-phone apps designed to generate TCPA litigation and the many websites clamoring for potential clients for TCPA litigation—at no cost to the plaintiff—it is no wonder the number of TCPA lawsuits has increased so rapidly. There is no end in sight to this growth spurt.

The Plaintiffs' Lawyer Alliance with State Attorneys General

The "alliance" between plaintiffs' lawyers and state attorneys general (AGs) developed out of what was viewed at the time as the unique situation of the multi-state tobacco litigation. Now, plaintiffs' lawyers routinely pitch lawsuit ideas to government officials and, all too often, state AGs contract out the law enforcement duties of the state to private attorneys. The alliance provides benefits to both plaintiffs' lawyers and the state AGs that hire them, but often comes at the public's expense.

By bringing a lawsuit in the name of the state rather than an individual client or as a class action, contingency fee lawyers can often seek recoveries or fines that are not available to, and often far exceed those recoverable by, private litigants. They can also circumvent core legal requirements of civil litigation, such as the need to show an actual injury, or evade due process safeguards applicable to class actions. They further can eliminate defenses ordinarily available to those targeted. Plaintiffs' lawyers deputized by the state also are cloaked with the moral authority of suing on behalf of "the People," which gives credibility to the novel legal theories that courts might be more hesitant to accept in private litigation.

Long-prohibited by common law doctrines like champerty, barratry, and maintenance, contingency fee agreements developed in the United States to allow individuals to hire counsel to protect their legal rights—not provide a tool for state governments with a staff of lawyers and significant resources. Yet private attorneys have urged state AGs to enter into such arrangements, often claiming they are "risk-free" opportunities for the state to fill its coffers.

Last year's Ecosystems report, for example, exposed a proposal circulated by former tobacco lawyers seeking to represent states in bringing lawsuits against food and beverage companies to hold them financially responsible for medical costs associated with obesity-related conditions.[555] *Politico* found that the law firm behind the proposal had circulated it to AGs in at least sixteen states.[556] Proposals like this exemplify the type of liability-expanding, financially-motivated litigation that results if contingency fee lawyers are allowed to drive state law enforcement and regulatory policy.

Besides potentially large recoveries, state AGs also can benefit in other ways from hiring private counsel. They can bring lawsuits asserting novel or sweeping legal theories that they otherwise would not pursue and can undertake litigation without legislative appropriation. In addition, unless the state has adopted contracting safeguards similar to those applicable when governments purchase other goods and services—and many have not—state AGs can award no-bid contracts to campaign contributors, political supporters, and former (or future) colleagues at private firms. Such arrangements create, at minimum, an appearance of impropriety.

Despite the representations of private law firms, contingency fee contracts are not "free," and taxpayers lose out as a result of the effect of profit-motivated lawyers on what is supposed to be the objective, fair enforcement of state law. By choosing to retain outside counsel to represent the state rather than government lawyers, state officials give away millions of dollars in each case that results in a judgment or settlement to a handful of private lawyers.

> *"This type of litigation hurts the business environment in the state and the public's trust in government."*

For example, Mississippi AG Jim Hood, one of the most prolific users of contingency fee lawyers, paid private lawyers approximately $56.5 million in fees between August 31, 2012 and September 25, 2014.[557] To put that figure into perspective, it is triple the state legislature's appropriation to the AG's office for its operations in FY 2013 and 2014 combined.[558]

This type of litigation hurts the business environment in the state and the public's trust in government. For instance, if a state paid its police officers a percentage of the money they collect for issuing speeding tickets, citizens would lack confidence in the propriety of the system, suspecting traps and over-enforcement. The same is true when those who bring law enforcement actions in court get a significant cut of the damages and fines they impose. As recent court decisions throwing out several massive verdicts show, such overreaching can and does occur.[559]

For these reasons, the federal government does not enter such agreements, and many state AGs, from both parties, conduct litigation solely through government staff attorneys absent special circumstances. Some state AGs, such as Alabama's Luther Strange, have moved away from the controversial, highly-criticized practices of their predecessors, who often retained outside counsel on a contingency fee basis. Nevertheless, more than half of states have, in recent years, chosen to hire contingency fee lawyers to pursue claims on behalf of the government.[560]

The Targets Expand

The primary targets of the state AG-contingency fee lawyer alliance have expanded from tobacco companies to encompass pharmaceutical companies, financial institutions, and the oil and gas industry. Cases also have been brought against former makers of lead paint. Securities litigation brought on behalf of public pension funds against a wide range of companies is a specialized and particularly active area in which states often retain outside counsel. Because state pension funds are such large investors, contingency fee counsel can often leverage their representation of the state to gain lead-counsel status in securities class actions and considerably increase their fees.

In what may be the newest trend, following a jackpot verdict in New Hampshire last year, plaintiffs' lawyers are focusing on bringing lawsuits on behalf of states against gasoline refiners under environmental and pollution-based theories, paradoxically for following EPA-approved practices. Refiners added methyl tertiary-butyl ether ("MTBE") to their gasoline to fulfill requirements designed to reduce air pollution set by Congress in the 1990 Clean Air Act amendments. The EPA specifically approved its use to create cleaner-burning gas and reduce smog. As a result of leaking storage tanks at gas stations that the refiners did not own, some MTBE entered the water supply. Rather than take action against gas stations that did not properly maintain their tanks, contingency fee lawyers are teaming up with state AGs to target the refiners, who, although they actually followed EPA rules, are viewed as deeper pockets.

In April 2013, contingency fee lawyers representing New Hampshire won a record-breaking $236 million verdict in an MTBE suit against Exxon Mobil. Fifteen other companies originally named in the lawsuit settled before trial for a total of $136 million, with $35 million of the sum going to contingency fee lawyers.[561] Sher Leff LLP, a California law firm, and Pawa Law Group, P.C., a firm with offices in Boston and Washington, D.C., represented the state in the lawsuit. In a clear demonstration of how the use of contingency fee counsel can pervert the public welfare, New Hampshire AG Joseph Foster has appealed the trial court's decision to place $195 million from the verdict into a trust fund to ensure the money is actually used for testing and cleaning up any contamination, and not given to the plaintiffs' lawyers for fees.[562]

Following the New Hampshire verdict, Vermont AG William H. Sorrell hired the same Pawa Law Group, along with two national plaintiffs' lawyer powerhouses, Baron & Budd PC and Weitz & Luxenberg PC, to file a similar lawsuit against virtually every gasoline refiner that does business in his state.[563] The lawsuit, filed in June 2014, sets forth a variety of vague theories and seeks compensatory damages to cover environmental testing and cleanup costs, punitive damages, and attorneys' fees and costs.[564] Six months before they were hired, Baron & Budd, Russell Budd (its principal), Dorothy Budd (his wife), and Scott Summy (who leads the firm's MTBE litigation practice) each gave $2,000 to AG Sorrell's re-election campaign.[565] The amount constituted nearly one-third of AG Sorrell's reported contributions over $100 during that period.

Pennsylvania Governor Tom Corbett and Attorney General Kathleen Kane also filed two MTBE lawsuits against 50 refiners.[566] The actions, filed in June 2014, seek compensatory damages, civil penalties, and attorneys' fees. The state hired a team of outside attorneys, including Daniel Berger and Tyler Wren of Berger & Montague PC; Stewart Cohen, Robert Pratter, Michael Coren of Cohen Placitella & Roth PC; and Stephen Corr of Stark & Stark PC to bring the lawsuits. When running for AG in 2012, AG Kane received over $70,000 from Berger & Montague and Cohen Placitella & Roth attorneys, according to campaign finance records.[567]

Delegating Subpoena Power

Typically, state AGs hire outside counsel after the government determines that there is a need for litigation (or is convinced of such a need by private lawyers seeking to represent the state). However, some state AGs and other government officials appear to be hiring plaintiffs' law firms even before deciding to file suit. Rather, they retain private firms to investigate businesses for potential violations of law and delegate to them government subpoena power in order to carry out those investigations.

Plaintiffs' firms that take on an investigatory role on behalf of governments also obtain a distinct tactical advantage in terms of their ability to obtain information before filing suit. In purely private actions, both parties have discovery obligations during a pending case. However, government subpoena power can require companies to produce internal documents before a lawsuit is filed, even if the government ultimately decides not to pursue an action. Yet, plaintiffs' law firms still have obtained and viewed that information, and the temptation to use information, materials, and thoughts and impressions developed while representing the government to aid them in private litigation raises serious questions of ethics and fundamental fairness.

For example, Mississippi AG Jim Hood retained the Washington, D.C.-based class action law firm Cohen Milstein Sellers & Toll, PLLC, in February 2014, to investigate the major national credit reporting agencies for potential violations of Mississippi and federal law.[568] The retainer agreement between the AG and Cohen Milstein gives the firm discretion to "investigate, research, and file the claims in an appropriate Court or before any appropriate government agency."[569] In another case, Cohen Milstein was retained to investigate a potential suit on behalf of the City of Chicago and issued subpoenas in the name of the city to drug companies seeking years of documents related to marketing of painkillers.[570] The firm then sued several major drug makers on behalf of Chicago in June 2014, claiming the companies, whose products were approved by the FDA, are responsible for emergency room visits and escalating medical costs associated with drug overdoses.[571]

Obviously, a plaintiffs' firm that agrees to investigate on behalf of a state or city also has a financial interest in finding that there has been actionable conduct, because it can then urge the government to hire them to pursue litigation so they can collect a contingency fee through a settlement or judgment. Inevitably, considerations of justice and prosecutorial discretion are likely to take a back seat to outside counsel's private financial motives.

Expanding to Cities and Counties

Plaintiffs' lawyers are expanding their potential client-bases beyond state AGs by pitching contingency fee work to local governments. Representing a major city or populous county often presents equally attractive opportunities for large settlements (and attorneys' fees) as representing states. In addition, some localities may have their own specific laws creating bases for relief apart from or in addition to state causes of action, like municipal false claims acts, environmental regulations, and public nuisance laws.

Private attorneys may take this route when a state AG is unwilling to litigate through outside counsel and relies upon its own lawyers. For example, as noted in last year's Ecosystems report, a number of coastal counties and municipalities in Alabama hired plaintiffs' law firms to bring BP oil spill-related litigation when AG Luther Strange discontinued a contingency fee agreement entered by his predecessor, Troy King.[572]

Cities and local governments also present plaintiffs' lawyers the opportunity for unprincipled prosecution, in which a government entity brings litigation asserting claims similar or identical to those already resolved by another government official or regulator.[573] An example is Cohen Milstein's representation of Chicago in suing makers of FDA-approved opioids. The firm has also filed a lawsuit making substantially the same allegations against the same defendants on behalf of Santa Clara and Orange counties in California.[574] Both of these lawsuits are strikingly similar to litigation initially brought a decade ago by West Virginia AG Darrell McGraw—also using contingency fee lawyers—against Purdue Pharma claiming it was liable for abuse of the prescription painkiller Oxycontin. That litigation resulted in a $10 million settlement in November 2004, of which $3.3 million went to contingency fee law firms (who, incidentally, also collectively contributed $47,500 to McGraw's reelection campaigns). Cohen Milstein, also the lead counsel on that case, reportedly received $1.1 million of the settlement—the largest share of the bounty.[575]

The First State AG-Contingency Fee Suit Filed Under Federal Law

As the 2013 Ecosystems report predicted, contingency fee lawyers are looking to a rising number of federal laws that provide for state AG enforcement for new legal theories and sources of fees.[576] A variety of federal laws provide state AGs with co-enforcement authority over federal statutes and regulations, including the Consumer Product Safety Improvement Act, the Health Information Technology for Economic and Clinical Health (HITECH) Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act. While the federal government does not itself hire contingency fee counsel,[577] nothing in these or any other federal laws prohibits state AGs from retaining private counsel, including on a contingency fee basis, to pursue such cases.

It appears that anticipated trend has now begun. In May 2014, Mississippi alleged violations of Dodd-Frank in what may be the first case of contingency fee lawyers suing on behalf of a state seeking enforcement of a federal law.[578] The lawsuit, filed by AG Jim Hood in coordination with solo practitioner Wynn E. Clark of Gulfport, Mississippi, and Cohen Milstein, alleges, among other claims, that the conduct of credit reporting company Experian constituted unfair and deceptive acts and practices in violation of Dodd-Frank. The lawsuit seeks various remedies available under Dodd-Frank, including restitution, disgorgement, and the federal law's substantial civil penalties. Given Dodd-Franks sweeping scope, which encompasses much of the financial sector and many companies beyond, it is likely that this suit is merely the first in a new wave of private-public litigation.

Supreme Court Ruling May Fuel the Alliance

Yet another development with the potential to bolster the alliance between state AGs and the plaintiffs' bar is a decicion handed down by the U.S. Supreme Court in January 2014. In an antitrust case brought by Mississippi AG Hood, *Mississippi ex rel. Hood v. AU Optronics Corp.*, the Court ruled that the Class Action Fairness Act (CAFA) does not apply to *parens patriae* antitrust lawsuits filed by state AGs.[579]

Parens patriae suits are cases in which state AGs sue in the place of allegedly harmed state residents and seek monetary damages on their behalf. Such cases closely resemble class action lawsuits filed by private plaintiffs. However, private class actions are subject to CAFA's removal provision, which allows neutral federal courts, rather than state courts in which local plaintiffs' lawyers have more influence, to decide multi-state cases seeking millions of dollars. By working in tandem with state AGs to bring such claims as *parens patriae* suits rather than class actions, however, contingency fee lawyers can avoid the application of CAFA under the Supreme Court's decision.

AU Optronics Corp. and other LCD makers had argued that one such action brought by AG Hood qualified as a "mass action" and thus was subject to CAFA. In that instance, AG Hood, one of the most frequent hirers of contingency fee lawyers, had retained A. Lee Abraham, Jr., a politically-connected plaintiffs' lawyer, to represent the state as it sued as *parens patriae* on behalf of Mississippi residents for alleged antirust damages related to the sale of LCD screens.[580] In fact, the lawsuit was essentially a carbon copy of earlier-filed private class actions; 176 of the complaint's 206 paragraphs were identical or nearly identical to a civil complaint in multi-district litigation pending in the U.S. District Court for the Northern District of California.[581] As such, the LCD makers asserted that AG Hood's *parens patriae* suit was, in

> *Enterprising plaintiffs' attorneys also may be able to leverage parens patriae suits to 'double-dip,' by bringing both a private class action and an action through the state attorney general seeking damages for the same alleged conduct.*

fact, precisely the type of case that CAFA was intended to cover—a lawsuit brought by a private plaintiffs' lawyers on behalf of numerous people against out-of-state companies in a local court that was likely to be a more favorable venue for the plaintiffs.

The U.S. Court of Appeals for the Fifth Circuit agreed with the LCD makers and found that CAFA applied to the Mississippi suit, allowing its removal from state to federal court. Three other federal appellate courts, however, had found that other *parens patriae* suits did not fall under CAFA. A unanimous Supreme Court resolved the split in favor of AG Hood and reversed the Fifth Circuit, concluding that CAFA did not apply to the AG's *parens patriae* antitrust action.

The Supreme Court's ruling is especially troubling given the realities of the well-documented alliance between contingency fee lawyers and AGs. As noted in the 2013 Ecosystems report, nearly all of the *parens patriae* cases that defendants have tried to remove under CAFA were brought by contingency fee lawyers on behalf of states. The Court, in essence, has told these and other class actions lawyers that they are on the right track and can easily bypass CAFA's safeguards for defendants—which are among the more significant federal legal reforms of the last decade—by forming and strengthening alliances with state AGs. Enterprising plaintiffs' lawyers also may be able to leverage *parens patriae* suits to "double-dip," by bringing both a private class action and an action on behalf of the state AG seeking damages for the same alleged conduct.[582] Because the *parens patriae* suit is not removable under CAFA, they can then try what is essentially the same case in a more friendly state-court forum and leverage that advantage in the parallel private suit.

False Claims Acts – Another Route?

State False Claims Acts (FCAs) provide another opportunity for plaintiffs' lawyers to ally with state AGs. In fact, FCAs really present two separate avenues for the plaintiffs' bar to bring actions seeking significant damages and penalties. First, because such laws generally provide for enforcement by state AGs, contingency fee lawyers can lobby state AGs to hire them to bring FCA actions directly on behalf of states (as they did in Medicaid fraud cases recently overturned in Arkansas and Louisiana).

Second, many FCAs contain procedurally unique "*qui tam*" provisions that allow contingency fee counsel to bring FCA claims through an individual client, called a "relator," without having to be hired by the state. About two-thirds of states have FCAs with *qui tam* provisions. When these private lawsuits are filed, the state AG has a choice of intervening and taking over the action, dismissing the case, or taking no position. Unless the state AG moves to dismiss, the relator—as well as contingency fee counsel—will receive a share of any recoveries, including treble damages and penalties, recovered by the state. Essentially, *qui tam* provisions provide much of the advantages of direct contingency fee arrangements with state AGs but in a manner expressly sanctioned by state law.

Unsurprisingly, the plaintiffs' bar is using these provisions aggressively to pursue FCA cases and collect substantial recoveries. As a result, state AG offices have been flooded with FCA cases that they are required by law to review. The burden of developing the expertise to determine if suits are meritorious, the cost of discovery, and the commitment of manpower falls upon the individual AG's office. As a result, many state AGs are unable to complete full reviews and often leave such cases pending without any action by the state. Plaintiffs' lawyers thus often have free reign by default to pursue these lawsuits, which are often based on specious claims, on behalf, and in the name, of the state.

At the same time, adroit *qui tam* plaintiffs' lawyers also can benefit if the AG decides to intervene and take over the case. When the state intervenes, the odds of recovery go up significantly, as such cases are likely to settle. Plaintiffs' lawyers who have strong relationships with state AGs thus have an advantage if they are able to convince the AG of the merits of the FCA case and thereby increase the odds of recovering their share of any money obtained by the state.

AGs notably have a third option beyond doing nothing or intervening and taking-over: they can move to dismiss the case, a doomsday scenario for relators and their counsel. An interesting development on this front is currently playing out in Florida, where Attorney General Pam Bondi has taken the position that she has the authority not only to intervene or take no action on an FCA suit, but an unconditional right to dismiss a *qui tam* action that the government deems frivolous, even without intervening.[583] Unsurprisingly, the relator's counsel, who also simultaneously represented the Florida Justice Association (the state's plaintiffs' bar) in the appeal, argues that the AG lacks authority to dismiss a *qui tam* case,[584] even though the lawsuit is brought in the name of the state, if the state has not intervened. A divided appellate court declined to rule on the issue in October for procedural reasons, kicking the case back to the trial court.[585] If AG Bondi is ultimately successful, the decision likely will make it harder for other state AGs to claim they have no power to stop plaintiffs' law firms from reaping windfall settlements in the name of the state where the state itself has not actually concluded that it has been harmed.

Court Challenges to the Alliance

Businesses that face state law enforcement actions brought by private contingency fee lawyers have repeatedly challenged the constitutionality of such arrangements or the state AG's authority to enter into them.

Several courts, including the Supreme Courts of California and Rhode Island,[586] have scrutinized such arrangements. Courts have required legal service contracts between state AGs and private lawyers to include safeguards intended to ensure that the government maintains complete control over major litigation decisions.

The most recent ruling to address the propriety of arrangements between private counsel and a state AG comes from South Carolina, where a trial court judge found that, despite the objections raised by the defendant, the state's attorney general could hire private lawyers to enforce the state's Unfair Trade Practices Act. In that instance, Attorney General Alan Wilson hired Ken Suggs of Janet, Jenner & Suggs, to pursue Cephalon, a subsidiary of Teva Pharmaceuticals, for allegedly marketing three drugs for purposes not approved by the FDA.[587] Suggs filed a suit in the name of South Carolina seeking civil penalties of up to $5,000 per alleged violation—fines that would likely rise into the millions of dollars. When the drug maker challenged this arrangement, the trial court in June 2014 reached the conclusion that there is "no realistic possibility" that linking a private lawyers' compensation to the fines imposed would affect the government's decision-making and lead to overzealous prosecution.[588] Cephalon, with *amici* support from the U.S. Chamber and Pharmaceutical Research and Manufacturers of America (PhRMA), appealed to the South Carolina Supreme Court in November. The case is pending.

> *"As a lawyer for the company observed, the Nevada case continued 'because they have a class-action law firm running this. The attorney general is not running this.'"*

Two recent Nevada cases clearly show the issues that can arise from state AGs' use of contingency fee counsel, although the underlying litigation settled before the Nevada Supreme Court had the opportunity to address the merits of a challenge to the propriety of the AG's use of outside counsel. In the first case, Nevada AG Catherine Cortez Masto hired attorneys at Cohen Milstein Sellers & Toll PLLC, to sue Lender Processing Services (now renamed Black Knight Financial Services) over its alleged misconduct in providing support services for mortgage lenders.[589] Although 49 states and the District of Columbia settled the same claims with the company, Nevada, which also was the only state to hire contingency fee lawyers for the case, sought a bigger payday and filed suit. As a lawyer for the company observed, the Nevada case continued "because they have a class-action law firm running this. The attorney general is not running this."[590]

The company challenged the AG's arrangement with Cohen Milstein as violating a Nevada law mandating legislative approval for the AG's use of outside counsel, among other grounds. As this challenge to the arrangement was pending in the state supreme court,[591] Clark County District Judge Elizabeth Gonzalez sanctioned the Nevada AG's office for discovery abuses in January 2014 and ordered the state to cover the company's legal costs associated with its attempts to obtain any documentary evidence supporting a number of violations alleged by Cohen Milstein on behalf of the state.[592] During the sanctions hearings, Judge Gonzales was pointedly skeptical of Cohen Milstein's role, chiding:

> One would think that when the State of Nevada enters into an agreement with a firm from outside the state of Nevada to handle a case for them that [the State] would receive some benefit from entering into that arrangement. It does not appear that the resources which were scarce from the Attorney General's Office which allegedly caused them to hire your firm have been added to based upon the review of the information that has been provided to the Court.[593]

Two weeks after Judge Gonzalez's sanctions order, before the AG's office was required to pay the company's substantial legal fees, AG Masto settled the case.[594] As a result, the Nevada Supreme Court did not have a chance to rule on Lender Processing Services' challenge to the AG's hiring of Cohen Milstein.

More recently, a separate lawsuit in which AG Masto hired two personal injury law firms to pursue Pfizer picked up where the Lender Processing Services challenge left off, but also recently settled before the Nevada Supreme Court addressed Pfizer's arguments against the AG's use of outside counsel. In that case—in which the state again faced allegations of discovery misconduct, this time that it disregarded its legal obligation to preserve evidence that could be relevant to litigation[595]—Pfizer petitioned Clark County District Judge James Bixler to find that the Nevada AG is not authorized to hire outside counsel without express legislative authorization.[596] Nevada was represented in the case by Zoe Littlepage and Rainey Booth of Littlepage Booth (which markets itself as "Your Personal Legal Team for Drug Litigation"), and Peter C. Wetherall of Wetherall Group Ltd. (which touts itself as obtaining the largest personal injury verdict affirmed on appeal in Nevada).

Judge Bixler denied Pfizer's motion to disqualify the contingency fee lawyers from representing the state, but only after Pfizer assured him during oral argument that it would seek review in the Nevada Supreme Court. In October, however, the parties settled the underlying case,[597] resulting in Pfizer withdrawing its challenge to the contingency fee arrangement.[598] Under the settlement agreement, Pfizer will make an $8 million charitable donation to a medical school and pay the state $1.5 million "to offset the State's investigatory costs."[599] Presumably, this payment to the state will largely go to paying the private lawyers' contingency fee.

As for Cohen Milstein, that firm again faces a challenge to a contingency fee arrangement with a government, this time

> *[F]ederal appellate courts have yet to rule on whether a defendant's due process rights are violated by a state government's contracting out of law enforcement power to private attorneys who are paid based on the damages they recover or fines they collect.*

with respect to its representation of Chicago to sue makers of FDA-approved opioids, described above. One of the defendants, Purdue Pharma, has moved the federal district court to disqualify Cohen Milstein on the grounds that Linda Singer, one of the firm's lead attorneys on the case, was the AG of the District of Columbia in 2007 when her office settled with the company over essentially the same allegations related to the marketing of its products.

Purdue's motion argues that she is prohibited by ethical rules from representing a party in a subsequent suit against the same party for the same conduct.[600] Also, in the same case, Purdue and its co-defendants Cephalon, Endo Health Solutions, Janssen Pharmaceuticals, and Johnson & Johnson, have moved to void Cohen Milstein's contingency fee agreement with the city on different grounds, namely that the agreement violates an anti-corruption law that prohibits the city from delegating government enforcement authority, including subpoena power, to a financially-interested private party.[601] Both challenges are pending before Judge Elaine E. Bucklo of the U.S. District Court for the Northern District of Illinois.

Although a handful of state high courts have addressed such arrangements, federal appellate courts have yet to rule on whether a defendant's due process rights are violated by a state government's contracting out its law enforcement power to private attorneys who are paid based on the damages they recover or fines they collect. One case reached the Sixth Circuit this year, after a federal judge found that due process concerns did not preclude Kentucky AG Jack Conway from using contingency fee lawyers to pursue Merck for claims related to its marketing of Vioxx. Merck argued that the outside counsel, Garmer & Prather, appeared to be calling all the shots, and presented specific examples showing how the government attorney charged with overseeing the litigation lacked real involvement.[602] Like other cases, however, Merck's appeal was voluntarily dismissed in January 2014 when the underlying litigation settled, before the Sixth Circuit had the opportunity to rule on Merck's appeal.

The Alliance Takes a Hit

Despite the uneven record of court challenges to retainer agreements, contingency fee lawyers and the state officials that hire them do have reason to be cautious about overreaching, as they suffered significant setbacks on the merits in three state supreme courts in lawsuits brought against pharmaceutical makers.

A number of states have hired contingency fee lawyers to bring claims that drug makers have unlawfully marketed their products, and as a result defrauded consumers and state Medicaid programs. Common targets have been those companies that made second-generation anti-psychotic drugs, such as Zyprexa, Seroquel, and Risperdal. Such lawsuits typically have alleged that the manufacturers overstated the effectiveness of the medications, while downplaying the risk of diabetes on FDA-approved warning labels. The litigations have sought damages and civil penalties and fines that, in total, have amounted to billions of dollars. Yet, although some suits have led to significant settlements and recoveries over the last several years, there are signs that the bonanza for trials lawyers is reaching an end.

In March, the Arkansas Supreme Court overturned a $1.2 billion civil penalty against Johnson and Johnson's subsidiary Janssen Pharmaceuticals—a $5,000 penalty for each of the 239,000 Risperdal prescriptions that were filled by Arkansas Medicaid patients between 2002 and 2006.[603] The state supreme court concluded that the company did not violate Arkansas's Medicaid Fraud and False Claims Act by distributing a drug with FDA-approved labeling that the agency later amended to require additional warnings. Had the verdict stood, Bailey Perrin Bailey (now Bailey Peavy Bailey), which represented Arkansas in the case (as well as many other states in other lawsuits involving similar drugs), would have received a contingency fee of over $180 million.[604]

The Arkansas decision came on the heels of the Louisiana Supreme Court's reversal of a $330 million Medicaid false claims verdict in January 2014, also stemming from Risperdal marketing.[605] That verdict included $258 million in civil penalties ($7,250 for each of 35,542 letters sent to doctors and marketing calls) and $73 million in attorneys' fees, costs and expenses. The high court found that the state failed to meet its burden of connecting the manufacturer's allegedly unlawful act (i.e., false or misleading marketing messages concerning a drug's safety, efficacy or side effect profile) to the presentment of any false or fraudulent claim for payment to that state's Medicaid program. Louisiana AG Buddy Caldwell's predecessor, Charles Foti, had hired Houston-based Bailey Perrin Bailey to bring that action, but the state also hired a slew of local lawyers in Opelousas, Baton Rouge, New Orleans, Lafayette, and Natchitoches as well.[606]

Notably, both Arkansas and Louisiana opted out of a $2.2 billion federal/multi-state false claims settlement over Risperdal marketing in order to pursue their own suits. In addition, rather than seek actual Medicaid damages, the contingency fee lawyers over-reached and sought statutory penalties, attorneys' fees and costs. Now, unlike other states, Arkansas and Louisiana will receive nothing. Again, taxpayers are the ultimate losers in these arrangements between state AGs and contingency fee counsel.

The alliance between contingency fee lawyers and state AGs also suffered a major loss this year in another area of serial lawsuits against pharmaceutical makers: Average Wholesale Price litigation. In a series of cases, many states have sued virtually the entire pharmaceutical industry alleging fraud in their 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 independent price reporting services calculate based on a variety of pricing data produced by drug makers. In the AWP litigation, states have alleged that they were unaware that 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. The Alabama-based plaintiffs' firm Beasley Allen has led the litigation for several states and has received millions of dollars in fees as a result of settlements of those cases.

> *"Rather than seek actual Medicaid damages, the contingency fee lawyers over-reached and sought statutory penalties, attorneys' fees and costs. Now, unlike other states, Arkansas and Louisiana will receive nothing. Again, taxpayers are the ultimate losers in these arrangements between state AGs and contingency fee counsel."*

In June 2014, however, the Pennsylvania Supreme Court threw out an AWP lawsuit against fourteen drug makers that had resulted in $80 million in damages against Johnson & Johnson and Bristol-Myers Squibb Co.[607] The high court reversed the trial court, citing the "Commonwealth's failure, by any measure, to offer a rational accounting for the billion dollars in rebate monies which Commonwealth agencies received from the drug manufacturers it has hauled into court."[608] The justices also noted that Commonwealth's case was severely undermined by the testimony of its own witnesses, who recognized that government officials were well aware that AWP did not reflect actual reimbursement rates.[609]

Pennsylvania hired five plaintiffs' law firms to bring that case: Haviland Hughes LLC, Eichen Levinson & Crutchlow, Siezikowski PC, J.P. Meyers Associates, and Platt Fleischaker LLP. The Pennsylvania Supreme Court concluded its opinion by placing responsibility for ten years of wasted litigation squarely with the government agencies who hired the private lawyers:

> Parenthetically, we note that substantial concern has been expressed about the use by public agencies of outside counsel, with personal financial incentives, to spearhead litigation pursued in the public interest, including AWP litigation. At the very least, close supervision is required in such relationships, and, of course, the state agencies in whose name the cause is pursued bear the ultimate responsibility for the sort of overreaching which we find to have occurred here.[610]

States are Adopting Safeguards against Abuses

State legislatures and other officials have not been deaf to the objections and concerns related to the alliance between the plaintiffs' bar and government lawyers. Since 2010, ten states have enacted laws mandating transparency when state AGs hire private contingency fee lawyers.[611] Wisconsin, North Carolina, and Louisiana[612] are the most recent to join in late 2013 and 2014.

"'At the very least, close supervision is required in such relationships, and, of course, the state agencies in whose name the cause is pursued bear the ultimate responsibility for the sort of overreaching which we find to have occurred here.'"

While these laws and rules vary from state-to-state, they generally require state officials to use an open public bidding process to select a law firm, require government lawyers to control the litigation, reduce the potential for excessive contingency fees, and require posting of the contract and any payments to private lawyers online.

The new Louisiana law is particularly significant. AG Caldwell has often hired friends among the personal injury bar to represent the state, a practice that locally has been dubbed "the Buddy System."[613] In so doing, AG Caldwell has "worked around" a Louisiana Supreme Court decision that prohibits such arrangements unless explicitly authorized by the legislature[614] by having defendant companies directly pay the fees of the lawyers who represent the state.

As the practice of state AGs delegating law enforcement power to private lawyers with a financial interest in prosecuting companies and inflicting the highest fines, such legislative efforts and court challenges are likely to continue.

American Law Institute Projects Quietly Reshape Civil Litigation

No other organization is more influential in the development of American law than the American Law Institute (ALI). For over ninety years, judges have looked to ALI projects as a source of balanced rules when deciding whether to adopt or change the law of their state. The plaintiffs' bar is likely to closely watch several ALI projects for opportunities to ask courts to expand liability and allow new lawsuits.

The ALI is an elite private organization established in 1923 to promote the clear and rational development of American law.[615] It is comprised of the nation's most distinguished judges, law professors, and practitioners. For that reason, the organization's projects are often highly influential with courts, which perceive the work as objective in nature and reflective of the "best" legal rules and principles.

Development of Restatements, Principles Projects & Model Laws

ALI projects are generally intended to educate judges about a legal topic, often functioning like a legal Bible for judges. The ALI publishes three basic work products: Restatements, principles projects, and model laws.

First and most well-known are Restatements of the Law. They are directed at judges to assist in their development of common law. The legal rules included in a Restatement are supposed to be supported by at least some existing court decisions. Restatements seek to utilize the soundest legal rules, which may not always be the majority rule.

Second, the ALI's principles projects are guidelines that may be directed at either courts or legislatures. Principles projects do not have to be based on existing case or statutory law. While judges often follow the guidelines of principles projects, they do not have the influence of Restatements.

Third, the ALI, on occasion, develops model statutory law. The premiere example is the Model Penal Code, which has been adopted in whole, or in part, in many states.

The legal topics selected for an ALI project are decided by the organization's leadership. Project authors, called "Reporters," are then appointed by the leadership to develop work products that are ultimately voted on by ALI members after several years of discussion and debate. Accordingly, the ALI seeks to ensure a project reflects all legal "interests" and is not dominated by either the plaintiff or defense bars.

The Influence of the ALI's Restatements

Restatements have driven the development of law on a wide range of subjects. Judges around the country routinely rely on these projects when applying, creating, or modifying legal rules in their state.

The doctrine of "strict liability" for product defects, for instance, was launched in significant part by the ALI's 1965 publication of the Restatement (Second) of Torts § 402A.[616] At the time the ALI approved § 402A, California was the only state to recognize strict products liability.[617] Nevertheless, the ALI included the doctrine in that Restatement, and within a decade, it was adopted by most states and generally became the "law of the land."

In 1998, the ALI published an updated Restatement on Products Liability.[618] Courts have cited it thousands of times. It is a fair and balanced work that puts rational rules in so-called strict product liability. It made clear that manufacturers should not be strictly liable in an absolute sense for the design of their products or their failure to warn about them; those aspects of product liability law should be based on fault.[619] It preserved strict liability for areas such as construction or manufacturing defects where injuries resulted from a failure of quality control.[620]

Two years later, the ALI published a Restatement on "Apportionment of Liability." This project addressed some controversial topics, such as joint and several liability, comparative fault or comparative responsibility, contribution and indemnity.[621] It is also a fair and balanced work that is embraced by courts.

On Occasion, ALI Restatements Move to the Edge of Tort Law

Although ALI projects are viewed by most judges as balanced, provisions in some projects occasionally push the envelope, endorsing pro-liability positions that are not followed in most jurisdictions.

A recent example is the ALI's Restatement Third of Torts: Liability for Physical and Emotional Harm project, which, among its myriad of provisions, recommends that courts impose a duty on property owners to exercise reasonable care for all entrants on their property, including unwanted trespassers.[622] The ALI's recommendation that courts adopt such a rule led at least sixteen state legislatures to codify existing premises liability law applied to trespassers, preventing expanded liability.[623]

The enormous power of ALI projects, particularly Restatements, is not lost on the plaintiffs' bar. ALI members who primarily represent plaintiffs actively participate in the development of ALI projects. Their views may favor expanding liability by recognizing new types of claims or eliminating traditional defenses. For example, ALI member and former president of the

Association of Trial Lawyers of America (now called the American Association for Justice) Larry Stewart teamed up with the Reporter of an ALI Restatement to write an article for a national personal injury lawyer magazine publicly characterizing a Restatement project as a "powerful new tool" for "[t]rial lawyers handling tort cases."[624]

Potential Impact of Current ALI Projects

There are at least six ALI projects that the plaintiffs' bar is likely watching for ways to expand liability. If a project faithfully "restates" the law, as is the ALI's usual practice, there is generally not major cause for concern. But, if a project strays from this goal, the result could significantly increase litigation. It is important to recognize that Restatements are "organic." In some instances, projects initially include extreme provisions, but, through the course of deliberation, the end result is a mainstream presentation of the law.

RESTATEMENT OF DATA PRIVACY PRINCIPLES: A NEW HYBRID ALI PROJECT

One of the ALI's newest and potentially most important multi-year projects is the Restatement Third, Data Privacy Principles.[625] This project involves the legal duties of companies in their course of collecting, processing, and using personal data. As discussed in detail in this report, data privacy class actions are a hot area for the plaintiffs' bar.

This is the ALI's first "hybrid" project. It is called a "Restatement," which means it must follow some existing law, but is also labeled "Principles," which traditionally means it has latitude to incorporate some novel concepts. When the project focuses on the traditional common law claims for invasion of privacy, the project will likely follow some existing case law, but when it focuses on duties to protect the privacy of customer and employee information, it may not.

The initial drafts of this Restatement set forth legal obligations for entities collecting, processing, and using personal information. For example, the latest draft imposes various requirements on companies related to notice and consent to use personal data, and maintaining data quality, access, and confidentiality.[626]

> *"If a project faithfully 'restates' the law, as is the ALI's usual practice, there is generally not major cause for concern. But, if a project strays from this goal, the result could significantly increase litigation."*

> *Another new ALI project proposes to chart an unprecedented course in contract law by establishing a different set of rules for 'consumer contracts' than for all other types of contracts.*

In addition, the latest draft would create new avenues for potential liability where entities fail to provide a mechanism to correct errors in collected personal data[627] or fail to destroy personal information that is no longer "necessary."[628] The draft would also require companies to develop written data privacy policies and procedures, and "train all employees sufficiently" in their implementation.[629] Under the draft's provisions, companies would be exposed to liability, including the potential for emotional harm and punitive damages, when an individual "suffers harm as a result of the unlawful or unauthorized use of his or her personal data."[630]

RESTATEMENT OF THE LAW, CONSUMER CONTRACTS

Another new ALI project proposes to chart an unprecedented course in contract law by establishing a different set of rules for "consumer contracts" than for all other types of contracts. This novel project combines elements of consumer protection law and contract law with the likely result of expanding potential liability for companies that use consumer contracts. After issuing an initial "pre-draft" of the project in late 2013, the ALI, ever mindful of its goal of producing a balanced work product, appreciated the controversial nature of the project's intended scope and default rules, and temporarily suspended the project.[631] In October 2014, the project's Reporters issued a significantly revised draft of the project that addressed a number of the concerns that had been raised, but still embarks on establishing a separate legal framework for evaluating consumer contracts.[632]

The basic idea of establishing two systems of governing law for contracts is likely to remain a subject of debate within the ALI. Indeed, no state has recognized such a distinction under its common law.

The latest draft of the project recognizes that courts have widely enforced provisions where a consumer assents to an agreement by clicking "I Agree" or through some other similar means. Rather than attempting to rebut or reverse this case law, the draft's provisions focus on establishing clear requirements for companies using consumer contracts, such as providing notice to the consumer of the agreement's "boilerplate" or standard terms and a meaningful opportunity to reject them.[633]

The latest draft, however, additionally expands the ability of consumers to challenge contract terms as unconscionable or deceptive.[634] For example, the draft states that a provision in a consumer contract is unconscionable if it is both procedurally and substantively unconscionable, while further providing that any boilerplate or standard contract terms are procedurally unconscionable.[635] The draft also includes a presumption that a consumer contract provision is unenforceable if any representation was inconsistent with a contract's standard terms, or any consumer charge was obscured.[636]

RESTATEMENT THIRD, TORTS: LIABILITY FOR ECONOMIC HARMS

One of the more developed and balanced ALI projects covers torts that result only in economic harm and not physical injury. The Restatement Third, Torts: Liability for Economic Harm project began in 2010 and is nearing completion. It includes topics such as unintentional infliction of economic loss and liability for fraud that results in pure economic loss, which apply to many different types of litigation.[637]

Thus far, the project has remained true to the fundamental purpose of Restatement projects to "restate" existing law. This balance is also, in part, due to relative consistency among most states with respect to economic harm liability rules and because the Restatement has yet to tackle topics where rules might be less uniform.

RESTATEMENT THIRD, TORTS: INTENTIONAL TORTS

Another new Restatement will cover a number of seminal intentional tort actions, including assault, battery, and false imprisonment, in which very modest changes to recommended liability rules could have major impacts on different types of litigation.[638]

This Restatement project will also develop rules on fundamental tort concepts, such as transferred intent and consent, which could similarly affect other areas of litigation.[639] Any expansion in the traditional scope or application of these concepts would likely permit new types of claims and benefit plaintiffs' lawyers.

In addition, this Restatement could broaden the scope of what might be deemed intentional conduct and thus lessen requirements for bringing certain actions or support new claims. For example, actions for false imprisonment that are of particular importance to retailers when responding to shoplifting concerns, could be "restated" in a way that bases liability merely on a person's subjective belief that their mobility is restricted, or revised to clear a path for punitive damages to be awarded in cases with greater frequency.

The project, which is still in its early stages, has experienced, responsible Reporters and has not veered in any unsound directions. Rather, it appears to fit the traditional mold of balanced ALI projects and will hopefully stay that way throughout the course of its completion.

"The position adopted by the ALI on some areas of employment law may endorse a way to sue employers that may not exist, or be as broadly defined, under a particular state's law."

RESTATEMENT THIRD, EMPLOYMENT LAW

The ALI approved a new Restatement of Employment Law at its 2014 Annual Meeting.[640] By establishing fixed liability rules in a highly diverse and dynamic field of law where state laws vary widely, the new Restatement could fuel plaintiffs' lawyer attempts to expand liability in some states.

The Restatement outlines numerous legal theories under which employees may sue their employers. These include defamation,[641] wrongful interference with employment or prospective employment,[642] negligent provision of false information,[643] and various privacy-related claims.[644] The position adopted by the ALI on some areas of employment law may endorse a way to sue employers that may not exist, or be as broadly defined, under a particular state's law.

For example, states employ different rules on the basic issue of whether employees are considered "at-will" such that an employer is generally free to terminate employment, or whether an employer must show "just cause" to fire someone. The existence of an employment contract adds an additional layer of complexity for which the Restatement sets forth rules and principles to evaluate the validity of an employer's contract provisions.[645] The Restatement also endorses a tort action for wrongful discharge in violation of public policy that is not recognized in some states and broader than a number of states that do recognize such a claim.[646]

RESTATEMENT OF THE LAW OF LIABILITY INSURANCE

A final ALI project with potential to expand liability began as a Principles project, not a Restatement. As explained, this means that the project's Reporters had the ability to engineer legal rules that may not reflect existing state law. But, in October 2014, the leadership of the ALI made the unprecedented decision to convert the Principles of the Law of Liability Insurance project into a new Restatement.

The switch to a Restatement has major implications. It will likely mean that many, and possibly all, of the provisions of the Principles project will need to be revisited to determine whether they are suitable for inclusion in a Restatement. The Principles project, which began in 2010 and was over halfway complete at the time of the ALI's announced conversation, recommended that courts adopt a number of novel legal rules that are not part of any state's law. A Restatement, in comparison, must include rules that are grounded in at least some existing law.

A new draft of the project recast as a Restatement is not expected until March 2015. It will cover topics that the ALI membership previously approved for the Principles project, which include the effect of an insured's misrepresentation in a policy agreement,[647] the circumstances and scope of an insurer's duty to defend a claim,[648] and an insurer's potential liability for failing to make "reasonable" settlement decisions on behalf of an insured.[649]

The new Restatement may also provide rules with respect to coverage provisions and the allocation of insurance proceeds.[650] It remains unclear whether the project will further develop rules on highly controversial insurance topics such as "bad faith" actions since these actions are often based on statutory law and outside the scope of a Restatement (as opposed to Principles).

How the ALI addresses insurance law issues may impact countless policies. Any unsound expansion in the ways plaintiffs can sue insurers will increase insurance costs ultimately borne on all policyholders through higher premiums.

In several key areas, the Principles project supported minority rules that would have increased litigation and the cost of insurance. For example, in the scenario where an insured makes a material misrepresentation in his or her policy application, the Principles project adopted a rule limiting rescission of the policy to instances where the insurer could prove an intentional or reckless misstatement.[651] This rule runs contrary to the law in most states, which recognize that any material misrepresentation affects whether the insurer would have issued the policy in the first place and should provide a basis to cancel the agreement.

In addition, the Principles project adopted a novel system for an insurer to reserve its rights to contest coverage under a policy, which could have led to significant collateral litigation.[652] Insurers, for instance, could have been required to send multiple, potentially duplicative, notices to insureds or risk losing their basic ability to contest amounts paid out on a claim.[653]

The ALI will revisit such provisions in light of the Principles project's conversion into a Restatement. The conversion underscores that this project, like most of the others discussed, is still a work in progress and will be subject to significant ongoing debate and refinement in order to satisfy the ALI's goal of providing judges with a balanced and helpful final work product.

Joining the ALI

As indicated, the ALI's membership is a prestigious group. Information for joining the organization can be found at www.ALI.org.

Defendants Fight Back

Businesses are fighting back when plaintiffs' lawyers cross the line by filing fabricated claims, withholding crucial evidence, manipulating the legal system, or unjustly tarnishing the company's reputation in the press. It is tempting to settle lawsuits due to the heavy cost of litigation, to avoid the risk of a jackpot verdict in a plaintiff-friendly court, or to stop unfavorable media coverage. While a settlement may make a particular lawsuit "go away," a company's willingness to pay one lawsuit may attract ten more claims against that company or similar businesses. Some businesses have learned this lesson. Rather than settle, these defendants have turned the tables on plaintiffs' lawyers who go too far.

Fighting Fire with Fire: RICO

Several businesses targeted in lawsuits have brought their own lawsuits against the lawyers and law firms that sued them, charging that the underlying claims crossed the line between zealous advocacy and misconduct.

Court rules against frivolous lawsuits provide little solace to defendants who spend millions of dollars to defend against frivolous or fraudulent claims. The applicable Federal Rule of Civil Procedure, Rule 11, makes imposition of sanctions discretionary, not mandatory, does not permit use of monetary sanctions for the purpose of reimbursing a wronged party, and may result in a fine paid into the court, rather than to a defendant. Many states have modeled their own rules off the federal rule.

Given the lack of a remedy, some businesses are fighting fire with fire, filing civil claims against plaintiffs' lawyers, law firms, and others with whom they work under the Racketeer Influenced and Corrupt Organizations Act (RICO),[654] a statute enacted for the purpose of combating organized crime. The law permits private parties to sue someone for engaging in a racketeering enterprise in which wire fraud, mail fraud, or other illegal acts are involved. If a party is found to have violated RICO in a private civil action, then that party is "liable for treble damages, costs, and attorney's fees."[655] Businesses have also brought claims against plaintiffs' lawyers for common law fraud and conspiracy.

CSX FIGHTS FRAUDULENT ASBESTOS DIAGNOSES

CSX Transportation successfully used RICO to address collusion between plaintiffs' lawyers, screening companies, and doctors in filing fabricated asbestos lawsuits. The railroad obtained a $1.3 million verdict, with the potential for an additional multi-million dollar award to reimburse its defense costs, which is now on appeal.

CSX initially alleged in late 2005 that Pittsburgh law firm Peirce Raimond & Coulter PC and attorney Robert V. Gilkison knowingly and negligently aided a client in pursuing a fraudulent asbestosis claim against CSX. The suit claimed that the firm submitted the x-ray of a client, Danny Jayne, who tested positively for asbestosis to support the asbestos claim of another client, Ricky May, who tested negative, and that CSX settled the claim for $8,000.[656] Although May testified that Gilkison suggested the scheme, the attorney and firm claimed they had no involvement in or knowledge of their clients' deception, and that the firm stopped representing May upon learning of his actions.[657] This became known as the "May-Jayne Incident."

Two years later, CSX expanded its allegations, adding claims for civil RICO violations, common law fraud, and civil conspiracy. The amended complaint named three of the firm's lawyers, Robert Peirce, Jr., Louis Raimond, and Mark Coulter, and a radiologist who assisted them, Dr. Ray Harron, as individual defendants (Mr. Coulter was later voluntarily dismissed from the suit). CSX alleged that the defendants "embarked upon a calculated and deliberate strategy to participate in and to conduct the affairs of the Peirce firm through a pattern and practice of unlawful conduct, including bribery, fraud, conspiracy, and racketeering," by "orchestrat[ing] a scheme to inundate CSX[ ] and other entities with thousands of asbestosis cases without regard to their merit."[658]

CSX alleged that the firm used mass screenings to recruit thousands of asbestos plaintiffs and hired doctors who recklessly or deliberately read x-rays to reach unusually high numbers of positive diagnoses to support filing lawsuits.[659] The railroad specifically identified nine (later expanded to eleven)[660] examples of alleged fraud, which CSX charged was representative of a broader practice. In those instances, Dr. Harron, a radiologist frequently used by plaintiffs' lawyers to review x-rays of lungs for asbestos and silica-related illnesses, "first determined a claimant's x-ray not to have markings consistent with asbestosis, but then later, based on a second x-ray, determined that the patient exhibited signs of asbestosis despite the objectively unchanged condition of the patient's lungs."[661]

About six months before CSX filed its initial complaint, the judge overseeing silica litigation in the federal courts, Janis Graham Jack, made headlines when she issued an opinion finding that Dr. Harron made thousands of positive silicosis diagnoses at the behest of plaintiffs' lawyers.[662] In some instances, Dr. Harron never saw or read his own reports, allowing his untrained secretarial staff to fill them out, stamp his name, and submit them.[663] In several cases, Dr. Harron diagnosed the same individual with asbestosis for purposes of an asbestos lawsuit as he had diagnosed with silicosis for purpose of a silica lawsuit.[664] Judge Jack concluded that Dr. Harron's findings "can only be explained as a product of bias—that is, of Dr. Harron finding evidence of the disease he was currently being paid to find."[665] The diagnoses, Judge Jack found, "were driven by neither health nor justice – they were manufactured for money."[666]

A federal district court initially dismissed CSX's RICO claims and all but two of the fraud counts, finding that the railroad should have uncovered the fraud and brought a claim earlier, and that CSX could not present sufficient evidence of fraud. CSX argued, however, that it could not individually investigate thousands of claims when they were filed and could not have reasonably known of the fraud earlier than Judge Jack's decision.[667] The district court allowed a fraud and conspiracy claim related to the May-Jayne Incident to proceed to trial, but barred CSX from introducing evidence showing that the firm continued representing May in litigation against parties other than CSX after the x-ray swap. The district court entered judgment for the plaintiffs' firm on those claims.

The U.S. Court of Appeals for the Fourth Circuit reinstated the RICO and fraud claims.[668] It affirmed judgment for the law firm on the May-Jayne Incident.[669]

> *"CSX's success is likely to lead businesses that believe they were defrauded by plaintiffs' lawyers to closely consider using the federal anti-racketeering statute in response."*

After seven years of litigation, a federal jury in Wheeling, Virginia found Peirce, Raimond, and Harron violated RICO. In its December 2012 verdict, the jury held the lawyers and doctor jointly liable for $429,240 in penalties. Judge Frederick P. Stamp Jr. tripled the damages pursuant to the RICO statute to $1,287,721.41 in September 2013.[670] Judge Stamp did not rule on CSX's request for more than $10 million in attorneys' fees and costs, pending resolution of any appeal of the verdict.[671]

The defendants appealed the judgment to Fourth Circuit.[672] Just one week after the federal appellate court held oral argument, the lawyers, law firm, and Dr. Harron's estate dropped their appeal and settled the action for $7.3 million.[673] In so doing, they agreed to pay the full amount of the judgment, interest, and an additional $6 million. CSX's success is likely to lead businesses that believe they were defrauded by plaintiffs' lawyers to closely consider using the federal anti-racketeering statute in response.[674]

> *Garlock filed adversary complaints alleging conspiracy, fraud, and RICO claims against five plaintiffs' law firms and several of their principals.*

GARLOCK ATTACKS HIDING OF EXPOSURE EVIDENCE

An asbestos defendant has asserted that plaintiffs' lawyers violated RICO in a different way than in the CSX lawsuit—by hiding evidence that firm clients were exposed to asbestos from sources other than the named defendants.

In January 2014, a federal bankruptcy judge who was evaluating the asbestos liability of Garlock Sealing Technologies, a manufacturer of gaskets and packing, found that the company's past history of settling claims did not accurately reflect its liability.[675] Judge George Hodges carefully reviewed evidence to find that plaintiffs' lawyers routinely withheld information showing that their clients were exposed to asbestos products of other companies during civil litigation against Garlock.[676] After settling with Garlock (and sometimes before entering a settlement), plaintiffs' lawyers pinned their clients injuries on those other companies, collecting compensation from trusts the businesses established upon entering bankruptcy.[677] By not disclosing this exposure evidence during discovery, Garlock may have been deprived of valid defenses and paid inflated settlement values.

The day before Judge Hodges' decision, Garlock filed adversary complaints under seal in the U.S. Bankruptcy Court for the Western District of North Carolina alleging conspiracy, fraud, and RICO claims against five plaintiffs' law firms and several of their principals. The firms include Belluck & Fox and Shein Law Center in Philadelphia, and Simon Greenstone Panatier Bartlett, Waters Kraus, and Stanley-Iola in Dallas.[678]

A Garlock spokesperson told *Forbes* that the complaints "allege that these firms concealed evidence about their clients' exposure to asbestos products and concealed it in litigation" against Garlock.[679] Garlock is seeking treble damages under RICO as well as punitive damages, according to a company spokesperson.

The cases remain at an early stage.

CHEVRON CLAIMS PLAINTIFFS' OBTAINED ECUADORIAN JUDGMENT THROUGH BRIBERY & DECEIT

Businesses targeted in asbestos litigation are not the only ones that have used RICO to strike back against plaintiffs' lawyers who go too far.

In 2011, after eight years of litigation, an Ecuadorian provincial court entered a breathtaking $18.2 billion judgment against

Chevron Corporation. The verdict resulted from allegations that Texaco, which later merged with Chevron, was responsible for environmental contamination in an impoverished area of the Amazon from its oil production activities between 1964 and 1992. The case went up to the country's high court, which affirmed the result, but reduced the award to $9.5 billion. The verdict was a major victory for U.S. attorney Steven Donziger, who had turned the cause into a media sensation.

As Paul Barrett discusses in his recently published book, "Law of the Jungle,"[680] the Ecuadorian judgment raised significant questions. How did the presiding judge, Nicolás Zambrano, issue a 188 single-spaced page decision based on 200,000 pages of testimony and scientific data within two months of closing the evidentiary phase and four months of his assignment to the case?[681] How did Judge Zambrano understand and cite to French, British, Australian, and American legal authorities in his opinion when he spoke neither English nor French?[682] How did Judge Zambrano review reams of evidence, research international law, and draft the decision so quickly with only the aid of an 18-year-old assistant, a recent high school graduate?

> *"'There is no 'Robin Hood' defense to illegal and wrongful conduct.'"*

Anticipating an adverse outcome, Chevron filed a civil RICO case in federal court in Manhattan, claiming that Donziger and others directed a scheme to extort and defraud Chevron. Rather than seek monetary damages, Chevron sought an injunction prohibiting Donziger from attempting to collect the judgment.

After three years of litigation, Judge Lewis Kaplan ruled in favor of Chevron, finding that Donziger used "corrupt means" to obtain the 2011 verdict in Ecuador.[683] Judge Kaplan issued a nearly 500-page decision in March 2014 with extensive factual findings. The decision documented how the plaintiffs' legal team, led by Donziger, ghostwrote both a supposedly independent court-appointed expert's damages report and Judge Zambrano's decision against Chevron.[684] Judge Kaplan found that the plaintiff-lawyer written judgment, signed by the Ecuadorian judge, was secured through bribery and deception. The federal court's decision prohibited enforcement of the judgment in the United States.

As Judge Kaplan concluded, "Justice is not served by inflicting injustice. The ends do not justify the means. There is no 'Robin Hood' defense to illegal and wrongful conduct. And the defendants' 'this-is-the-way-it-is-done-in-Ecuador" excuses—actually a remarkable insult to the people of Ecuador—do not help them. The wrongful actions of Donziger and his Ecuadorian legal team would be offensive to the laws of any nation that aspires to the rule of law, including Ecuador—and they knew it."[685]

The RICO suit and its aftermath led to unwanted attention for Patton Boggs,[686] and ultimately contributed to its demise.[687]

Chevron named the powerhouse D.C. law and lobbying firm as a nonparty co-conspirator in the action. The firm, at the prompting of then-partner, James Tyrrell, Jr. entered the litigation in 2009.[688] The firm's primary role was to attempt to enforce the judgment in multiple jurisdictions, forcing Chevron into a quick settlement.[689] In exchange, Patton Boggs would receive a share of any amount recovered.[690] As Judge Kaplan found, the firm played a critical role in obtaining new investments in the litigation, authoring a plan known as the "Invictus Memo."[691] That document detailed a multi-national strategy to enforce the judgment and attack Chevron's assets. It helped spur Burford Capital to invest $4 million in the litigation with a promise of $11 million more.[692]

Patton Boggs became heavily involved in the litigation, both in the provincial court and in U.S. litigation.[693] For example, the firm was intricately involved in preparing a new expert report on damages after Chevron questioned the neutrality of the earlier report, Judge Kaplan found.[694] Donziger and Patton Boggs attorneys' referred to this activity as the "cleansing process."[695] Named as a co-conspirator in the RICO suit, the firm retained separate legal representation and attempted to disassociate itself from Donziger.[696]

In separate rulings, the court granted leave to Chevron to file counterclaims against Patton Boggs[697] and dismissed the firm's case against Chevron to enforce the judgment.[698]

In May, Patton Boggs agreed to pay $15 million to Chevron to settle the litigation and withdraw as counsel in any litigation against Chevron related to the Ecuadorian case.[699] The firm also issued, as agreed in the settlement, an unusual public statement of regret.[700] Later that month, Patton Boggs, an independent law firm for 50 years, announced its merger into Squire Sanders.[701] Tyrrell, who orchestrated Patton Boggs' entrance into the rainforest lawsuit, did not enter the combined Squire Patton Boggs. He moved to Edwards Wildman Palmer LLP soon after the Patton Boggs settlement.[702] Ironically, Edwards Wildman may merge with Locke Lord Edwards, a firm whose partners backed away from merging with Patton Boggs due to concern about the Chevron litigation.[703]

The litigation continues. Donziger continues to deny wrongdoing and has appealed Judge Kaplan's ruling to the U.S. Court of Appeals for the Second Circuit.[704] Although Chevron did not seek monetary damages, if Judge Kaplan's ruling is affirmed, the company is entitled to recover its attorneys' fees and costs. Judge Kaplan deferred a ruling on Chevron's request for $32.3 million in fees until the Second Circuit decides Donziger's appeal.[705] In addition, some are urging the U.S. Attorney to bring criminal charges against Donziger, given the extensive evidence of wrongdoing meticulously documented by Judge Kaplan.[706]

The RICO action against Donziger has implications for all American businesses that have operations abroad. While the underlying litigation in Ecuador represents an extreme example, plaintiffs' attorneys are increasingly bringing lawsuits against transnational businesses in foreign countries where courts may lack impartial tribunals and procedures compatible with due process of law.[707] At the same time, countries are embracing class-action-type procedures, providing a new incentive for lawsuits.[708] As plaintiffs' lawyers file lawsuits in countries prone to corruption, the risk of fraud significantly rises. The Second Circuit has an opportunity to reaffirm and amplify Judge Kaplan's message that fraudulent judgments obtained abroad will not be tolerated at home.

Making a Federal Case Out of It: Challenging AG Contingency Fee Arrangements

State attorneys general and other state and local officials are increasingly hiring contingency fee lawyers to enforce state law. Businesses are concerned that their rights are violated by arrangements in which lawyers representing the government are motivated to impose the highest damages and fines possible. Frustrated that state courts have allowed this practice so long as the contingency fee agreement states that government lawyers oversee the litigation, targeted companies are taking their court challenges to a new level—the federal courts.

After Kentucky Attorney General Jack Conway hired contingency fee lawyers to sue Merck for its marketing of Vioxx, the company turned the tables and sued back. Merck filed its own lawsuit in federal court seeking an injunction prohibiting the AG from continuing to pursue the litigation through private contingency fee counsel, arguing the arrangement violates the due process guaranteed by the U.S. Constitution. Merck argued that Kentucky's outside counsel, Garmer & Prather, appeared to be calling all the shots. The company presented specific examples of how the government attorney charged with overseeing the litigation lacked involvement in the case.

A federal judge agreed with Merck that the AG's office, in allowing its outside counsel to cut-and-paste the alleged violations from a lawsuit it brought in another state into the Kentucky complaint, took a "disappointingly casual approach."[709] The court also found it "troubling" that the government attorney responsible for overseeing the litigation did not know whether the state had retained expert witnesses.[710]

The court was unconcerned, however, with the government lawyers' lack of familiarity with the case or appearance in court, or failure to revise key documents. Nor did the court find it disconcerting that a private attorney on private law firm stationary signed a letter rejecting a settlement offer. A government attorney admitted that no attorney from the AG's office had seen this rejection letter before it was sent.[711] The court concluded that while the government attorneys did not always take an active role in the litigation, they retained sufficient control to avoid a violation of due process.[712]

Merck appealed to the U.S. Court of Appeals for the Sixth Circuit, which would have been the first federal appellate court to consider the issue. Before the Sixth Circuit could rule, the underlying litigation settled. The parties voluntarily dismissed the federal case in January 2014.[713]

Requesting Sanctions: Show Me the Evidence

When a state attorney general, litigating through contingency fee lawyers, makes incendiary accusations against a company, in court documents and the press, is it too much to expect the government to produce evidence supporting its charges? That is the question a mortgage lender raised in a Nevada court, which took the rare action of sanctioning an attorney general.

While a challenge to AG Catherine Cortez Masto's authority to hire the plaintiffs' lawyers was pending in the state supreme court,[714] the defendant, Lender Processing Services, alleged that the state violated its discovery obligations by failing to produce requested documents supporting its claims.[715]

As LPS wrote in its brief:

> When the Attorney General accuses a publically-traded company, that provides technology and services to the financial services industry, of facilitating fraudulent residential foreclosures, extorting kickbacks and manipulating lawyers to accelerate the foreclosure process, abusing the elderly and disabled, causing countless wrongful evictions, and eliminating lawful competition, the firestorm of public and institutional reaction is understandably—and predictably—severe. The reputational and financial consequences to the company are immediately disastrous. Stock value plummets. Staffing cuts are made. Lawsuits abound. For some companies, the allegations alone are a death sentence.[716]

Clark County District Judge Elizabeth Gonzalez agreed. She sanctioned the Nevada AG's office in January 2014, ordering the state to cover the lender's legal costs associated with the company's attempts to enforce court orders that entitled it to documentary evidence of the alleged violations.[717] Two weeks later, before the AG's office was required to pay the company's substantial legal fees, the case settled.[718]

LPS is not alone in taking such action. In a separate lawsuit in which AG Masto hired two personal injury law firms to pursue Pfizer, Littlepage Booth and Wetherall Group Ltd., the drug maker charged that neither the AG nor its private counsel properly instructed state agencies of their legal obligation to preserve evidence potentially relevant to litigation.[719] In its June 2014 motion, Pfizer charged that "the State has uniformly ignored virtually all of its discovery obligations, instead attempting to prosecute this case through generalizations and innuendo."[720]

Pfizer has asked the Clark County District Court to restrict claims the AG can pursue and the evidence the AG can introduce, eliminate all but one of the state's claims, and instruct the jury that it should presume the lost evidence would support the company's defense.[721] Pfizer also requested attorneys' fees and permission to bring a counterclaim for abuse of process against the State, its Attorney General, and its private counsel.[722] The court has not yet ruled on Pfizer's motion for sanctions.

Turning Bad Press into Good

In recent years, plaintiffs' lawyers have flooded the courts with class action lawsuits against food makers, alleging that companies misrepresented their products in advertising or labeling. Two companies, Anheuser-Busch and Taco Bell, turned the tables by using the lawsuits to showcase their products, sense of humor, and company values.

Many of these food class actions are working their way through the courts. Courts have dismissed some of the most ridiculous of the cases. Other cases, such as one that alleged that the maker of Nutella misled consumers into believing the chocolate-hazelnut spread is nutritious, have settled for millions of dollars.

Anheuser-Busch took its case directly to the public when plaintiffs' lawyers claimed that the company "systematically waters down its products."[723] Five copycat suits were filed around the country, leading to coordination of the cases in federal multi-district litigation. NPR investigated the claim itself and its requested test found no significant variation from the label.[724]

Rather than settle the lawsuit, the brewer used it as an opportunity to spread word of the 71 million cans of drinking water it donates each year to the American Red Cross and disaster relief organizations worldwide.[725] The ad, showing a can of water and titled "They Must Have Tested One of These," ran in the *New York Times* and *Houston Chronicle*.

In June 2014, the federal court overseeing the beer claims dismissed the lawsuits, finding that the alcohol content of the products varied less than 0.3 percent, an amount "not significant enough to be actionable."[726] Such minor variations are legally permissible under federal labeling regulations that are followed by states.[727] (By way of contrast, a series of class action lawsuits against Subway claiming that its "Footlong" sandwiches are, on average, closer to 11 inches than 12 inches, is reportedly likely to settle.[728])

Anheuser-Busch likely learned from the approach taken by Taco Bell after plaintiffs' lawyers charged that the company falsely represented its products as "beef" when they are no more than "taco meat filling."[729] The company responded with full-page newspaper ads entitled "Thank you for suing us," televisions commercials, radio spots, and YouTube videos. The national advertising campaign detailed the quality of its beef and recipe, and showcased the pride of its executives, employees, and customers in its products.[730] When the plaintiffs' firm that brought the lawsuit ultimately withdrew it, Taco Bell ran another set of ads in *The New York Times*, *Wall Street Journal*, *USA Today*, *Los Angeles Times*, and *Orange County Register* asking, "Would it kill you to say you're sorry?"[731]

Endnotes

1 *See Elite Trial Lawyers: The 50 Leading Plaintiffs Firms in America*, Nat'l L.J., Sept. 29, 2014, *at* http:// www.nationallawjournal.com/home/id=1202671494029/.

2 *See* Robert B. Yallen, *Guest Opinion: The Emergence of Mass Tort Marketing,* Response Magazine, July 1, 2013.

3 *See* Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, Bloomberg Businessweek, Dec. 12, 2013.

4 *See* Lead Publisher, Mass Tort, Legal Leads, *at* http://www.leadpublisher.com/mass-tort-leads.html (last visited July 21, 2014); *see also* Exclusive Attorney Leads, *at* http://exclusiveattorneyleads.com/mass_tort_leads.html (last visited July 22, 2014) (same rates).

5 *See* Mass Tort Legal Group, Contact Mass Tort Legal Group, *at* http://masstortlegalgroup.com/contact-us/ (last visited July 21, 2014).

6 *See* MCM Service Group, Attorney Resources: Interested in Building a Mass Tort Practice?, *at* http://.com/attorney-resources-interested-in-building-a-mass-tort-practice/ (last visited July 21, 2014).

7 *See, e.g.,* Practice Made Perfect, *at* http://www/pmpmg/mass-torts-groups.html (last visited July 21, 2014).

8 *See* Barrett, *supra*.

9 *Id.; see also* Missouri Attorney General Chris Koster, Press Release, Att*orney General Koster Reaches Settlement With Pennsylvania Telemarketer*, April 25, 2012, *at* http://ago.mo.gov/newsreleases/2012/AG_Koster_Reaches_Settlement_For_No_Call_Violations/.

10 Barrett, *supra.*

11 *See* Services to Lawyers, *at* http://servicestolawyers.com and Med Recall News, *at* http://www.medrecallnews.com/home/actos/actos-may-cause-bladder-cancer.html (last visited July 29, 2014).

12 The FDA issued a safety alert warning that long-term use of Actos may be associated with an increased risk of bladder cancer, but has chosen not to recall the drug. *See* U.S. FDA, *FDA Drug Safety Communication: Update to Ongoing Safety Review of Actos (pioglitazone) and Increased Risk of Bladder Cancer*, June 15, 2011, *at* http://www.fda.gov/drugs/drugsafety/ucm259150.htm (last visited July 29, 2014).

13 *See, e.g.*, Mass Tort Leads Buyer/Seller Group, *at* https://www.linkedin.com/groups/Mass-tort-leads-buyer-seller-5164619 and Mass Tort Lead Generation Group, *at* https://www.linkedin.com/groups/Mass-Tort-Lead-Generation-4962293 (last visited July 22, 2014).

14 *See* Barrett, *supra.*

15 *See id.* (quoting Ryan Thompson of Watts Guerra in San Antonio).

16 *See, e.g.,* Silverstein Group, *Mass Tort Advertising Monthly Report*, June 2014. The Silverstein Group states that it uses data provided by Kantar Media's Campaign Media Analysis Group to analyze advertising by lawyers and law firms in 211 media markets and on 11 national broadcast networks and more than 80 cable networks. *See* Silverstein Group, *Mass Tort Advertising Data*, *at* http://www.silversteingroup.net/mass-tort-advertising-data.html (last visited July 17, 2014).

17 Silverstein Group, *Mass Tort Advertising Monthly Report*, Nov. 2014 (providing Oct. 2014 estimate).

18 U.S. Food & Drug Admin., Press Release, FDA Drug Safety Communication: *FDA Evaluating Risk of Stroke, Heart Attack and Death With FDA-Approved Testosterone Products*, Jan. 31, 2014.

19 Silverstein Group, Massive "Low T" attorney ad buys signal mass tort tsunami, *Mass Tort Ad Watch Blog,* Mar. 30, 2014, *at* http://www.silversteingroup.net/mass-tort-ad-watch-blog/spike-in-testosterone-attorney-ads-indicates-coming-litiagation-tsunami.

20 *See id.; see also* Silverstein Group, *Mass Tort Advertising Monthly Report*, Mar. and Apr. 2014.

21 *See* Larry Bodine, *How Lead Generation Companies Connect Consumers to Lawyers*, National Trial Lawyers, Apr. 17, 2014, *at* http://www.thenationaltriallawyers.org/2014/04/how-direct-marketing-companies-connect-consumers-to-lawyers/ (quoting Mary Ann Walker of Walker Advertising in Los Angeles).

22 *See id.* (stating that while lead generation has "not produced many cases yet. The campaigns are 'marinating' on various media now, and we expect a big breakout in the coming months.") (quoting Ms. Walker); *see also* Low-Testosterone Lawsuits Filed in Philadelphia, Amaris Elliott-Engel, Nat'l L.J., Mar. 25, 2014 (reporting the filing of three cases); P.J. D'Annunzio, *'Low T' Drug Cases Could Be Next MDL, Mass Tort*, Legal Intelligencer, Mar. 4, 2014 (reporting that Thomas R. Kline of Kline & Specter, who is currently handling a testosterone drug case, says "low T" cases remind him of the Vioxx litigation).

23 Silverstein Group, *Mass Tort Advertising Monthly Report*, June 2014 (providing May 2014 estimate).

24 Silverstein Group, *Mass Tort Advertising Monthly Report*, Nov. 2014 (providing Oct. 2014 estimate).

25 Daniel Schaffzin, *Warning! Lawyer Advertising May Be Hazardous to Your Health: A Call to Fairly Balance Commercial Solicitation of Clients in Pharmaceutical Litigation*, 8 Charleston L. Rev. 319 (2014).

26 *See New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illnesses*, Eli Lilly & Co. (June 13, 2007), https://investor.lilly.com/releasedetail.cfm?releaseid=248836 (discussing results of survey conducted jointly by Eli Lilly and the National Council for Community Behavioral Healthcare).

27 *See, e.g.*, Evan Levine, *Your Medication Can Kill You; Call Your Lawyer!*, The Leftist Review (May 19, 2012), *at* http://www.leftistreview.com/2012/05/19/your-medication-can-kill-you-call-your-lawyer/evanlevine/ (in which the author, a cardiologist in New York and a Clinical Assistant Professor of Medicine at Montefiore Medical Center – Albert Einstein College of Medicine, discusses a patient who, after watching a television advertisement portraying the blood thinner, Pradaxa, as problematic and dangerous, stopped using the drug, placing himself at risk of a stroke, because he was concerned that the drug could cause him to hemorrhage to death).

28 Although legal advertising is subject to rules and codes of professional conduct in each state, lawyers have relatively wide latitude in deciding how they advertise. ABA Aspirational Goals for Lawyer Advertising, American Bar Association (ABA), http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_ethics_in_lawyer_advertising/abaaspirationalgoals.html (last visited July 25, 2014).

29 AAJ recently formed litigation groups targeting pharmaceuticals and medical devices including Xarelto, General Motors Ignition Defect, ED Drugs/Melanoma, St. Jude's Riata Defibrillator Leads, Risperdal, Testosterone Therapy, Stryker ShapeMatch Cutting Guide Software, Biomet Metal on Metal Hip Implants, Medtronic Infuse, Dialysis Equipment, Wright Hip, and Stryker Rejuvenate and ABG II Hip Implant litigation. *See* American Ass'n for Justice, Litigation Groups, https://www.justice.org/membership/litigation-groups (last visited Nov. 4, 2014).

30 *See* U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report – Distribution of Pending MDL Dockets by District (Oct. 17, 2014).

31 *See* Letter from Julio L. Mendez, Super Ct. of N.J. to All Multi County Litigation Attorneys re: Atlantic County Multi County Litigation Caseload Reallocation, Sept. 15, 2014 (informing attorneys of transfer of 1,563 cases involving C.R. Bard pelvic mesh and 7,049 cases involving Gynecare pelvic mesh from Atlantic to Bergen County).

32 *See* Laura Gillespie, *Houston Lawyer Gets Client $73 Million Award in Pelvic Mesh Case*, Houston Chron., Sept. 16, 2014.

33 U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report – Distribution of Pending MDL Dockets by District (Aug. 15, 2014) (reporting 146 actions currently pending in *Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, MDL No. 2151, out of 425 historically filed).

34 *See* Final Order Approving Class Action Settlement, *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales*

Practices, and Prods. Liab. Litig., No. 8:10ML 02151 (C.D. Cal. July 24, 2013); Order Regarding Motion for Attorneys' Fees, Reimbursement of Expenses, and Compensation to Named Plaintiffs, at 2-3, 20, *In re: Toyota Motor Corp. Unintended Acceleration Marketing, Sales Practices, and Prods. Liab. Litig.*, No. 8:10-ML-2151 (C.D. Cal. July 24, 2013).

35 *See* Linda Sandler, Margaret Cronin Fisk & Patrick G. Lee, *Plaintiffs' Lawyers Compete To Lead Ignition Switch Battle*, Bloomberg BNA Prod. Safety & Liab. Rep., Aug. 11, 2014 (reporting that candidates for lead counsel include leaders of three West Coast class-action law firms, Steve W. Berman of Hagens Berman Sobol Shapiro LLP in Seattle; Elizabeth Cabraser of Lieff Cabraser Heimann & Bernstein LLP in San Francisco; and Mark P. Robinson Jr. of Robinson Calcagnie Robinson Shapiro Davis Inc. in Newport Beach, California).

36 Saranac Hale Spencer, *Judge OKs NFL Concussion Settlement*, The Legal Intelligencer, July 8, 2014.

37 U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report – Distribution of Pending MDL Dockets by District (Oct. 15, 2014) (reporting 13 active cases filed by NCAA Student Athletes tor Concussions).

38 *See In re: Nat'l Hockey League Players' Concussion Injury Litig.*, MDL No. 2551 (Aug. 19, 2014) (order granting motion for coordinated or consolidated pretrial proceedings and transferring pending cases to District of Minnesota).

39 U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report – Distribution of Pending MDL Dockets by District (Oct. 15, 2014).

40 U.S. Judicial Panel on Multidistrict Litig., MDL Statistics Report – Distribution of Pending MDL Dockets by District (Oct. 15, 2013).

41 *See* Restatement of Torts, Third: Products Liability § 1 (1998) (outlining three distinct categories of product defect, including manufacturing, design, and warning).

42 *See Barlett v. Mutual Pharmaceuticals Co.*, 133 S. Ct. 2466, 2475 (2013) (finding in the case of a generic drug manufacturer that redesigning a drug would require FDA approval).

43 Restatement (Second) of Torts § 402A, comment k (1965) recognizes that some products are incapable of being designed in a manner that is safe for all people for their intended use. The comment recognizes that products like prescription drugs, with "known but apparently reasonable risk," will not be considered defective or unreasonably dangerous if they are manufactured correctly and include adequate warnings of risks.

44 Max Mitchell, *Justices' Pharma Ruling Could Open New Avenue for Recovery*, Legal Intelligencer, Jan. 28, 2014 (quoting Shanin Specter of Kline & Specter).

45 *See, e.g.*, Philip N. Yannella et al., *Plaintiffs May Assert Negligent Design Claims for Prescription Drugs, Pa. Supreme Court Holds*, Ballard Spahr LLP, Jan. 23, 2014, *at* http://www.jdsupra.com//plaintiffs-may-assert-negligent-design-c-52077/.

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

47 *Id.* at 461 (emphasis added). The court's reasoning looked to the Restatement Third of Torts, Products Liability, to open a narrow window for a negligent design claim when "the foreseeable risks of harm posed by the drug or medical device are sufficiently great in relation to its foreseeable therapeutic benefits that reasonable health-care providers, knowing of such foreseeable risks and therapeutic benefits, would not prescribe the drug or medical device *for any class of patients*." Restatement of Torts, Third: Products Liability, § 6(c) (1998) (emphasis added). Comment b to this section emphasizes the rarity of such cases by noting that "a prescription drug or medical device that has usefulness to any class of patients is not defective in design even if it is harmful to other patients."

48 *Id.* at 457 n.33.

49 *Barlett*, 133 S. Ct. at 2478 ("Our pre-emption cases presume that an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability.").

50 Geoffrey M. Drake & Victoria C. Smith, *The Case Against Negligent Design Claims*, For the Defense, at 21 (Oct. 2012).

51 *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). Contrast this decision with *Wyeth v. Levine*, 555 U.S. 555 (2009), which held that a state law claim for failure-to-warn brought against a brand-name drug manufacturer was *not* preempted by federal law.

52 *Mensing*, 131 S. Ct. at 2578.

53 *See* 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*, 81 Fordham L. Rev. 1835, 1852 (2013).

54 *See* W. Page Keeton, Prosser & Keeton on Torts 358 (5th ed. 1984) (recognizing that duty is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection").

55 James M. Beck, *Scorecard: Innovator Liability In Generic Drug Cases*, Drug & Device Law Blog, http://.blogspot.com///non-manufacturer-name-brand.html (maintaining compilation of case cites).

56 *See Eckhardt v. Qualitest Pharmaceuticals, Inc.*, 751 F.3d 674 (5th Cir. 2014) (applying Texas law); *Lashley v. Pfizer, Inc.*, 750 F.3d 470, 472 (5th Cir. 2014) (applying Mississippi and Texas law); *Strayhorn v. Wyeth Pharmaceuticals*, 737 F.3d 378, 401- 06 (6th Cir. 2013) (applying Tennessee law); *Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1281-84 (10th Cir. 2013) (applying Oklahoma law); *Fullington v. PLIVA, Inc.*, 720 F.3d 739, 744 (8th Cir. 2013) (applying Arkansas law); *Guarino v. Wyeth*, 719 F.3d 1245, 1251-53 (11th Cir. 2013) (applying Florida law); *Bell v. Pfizer, Inc.*, 716 F.3d 1087, 1092-93 (8th Cir. 2013) (applying Arkansas law); *Demahy v. Schwarz Pharma, Inc.*, 702 F.3d 177, 182-83 (5th Cir. 2012) (applying Louisiana law); *Smith v. Wyeth, Inc.*, 657 F.3d 420, 422 (6th Cir. 2011) (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).

57 *See In re Darvocet, Darvon, and Propoxyphene Prods Liab. Litig.*, 756 F.3d 917, 939 (6th Cir. 2014).

58 *See Huck v. Wyeth, Inc.*, Slip Op., No 12-0596, at 36 (Iowa July 11, 2014).

59 *Wyeth, Inc. v. Weeks*, No. 1101397, 2013 WL 135753 (Ala. Jan. 11, 2013) (withdrawn).

60 *Wyeth, Inc. v. Weeks*, No. 1101397, 2014 WL 4055813 (Ala. Aug. 15, 2014).

61 Supplemental Applications Proposing Labeling Changes for Approved Drugs and Biological Products, 78 Fed. Reg. 67,985-99 (proposed Nov. 13, 2013).

62 *Examining Concerns Regarding FDA's Proposed Changes to Generic Drug Labeling*, Hearing Before the H. Subcomm. On Health of the H. Comm. on Energy and Commerce, 113th Cong. (Apr. 1, 2014) (statement of Dr. Janet Woodcock, Dir., Ctr. For Drug Evaluation and Research, FDA).

63 Comment by J. Burton LeBlanc, Pres., Am. Ass'n for Justice, to Janice L. Weiner, Ctr. For Drug Evaluation and Research, FDA (Mar. 13, 2014), *at* http://www.justice.org/cps/rde/xbcr/justice/AAJ_Comment_Generic_Rule_3-13.pdf.

64 *See* Generic Drugs, Take Justice Back (last visited July 8, 2014), http://www.takejusticeback.com/Generic_Drugs.

65 *Examining Concerns Regarding FDA's Proposed Changes to Generic Drug Labeling*, Hearing Before the H. Subcomm. On Health of the H. Comm. on Energy and Commerce, 113th Cong. (Apr. 1, 2014) (testimony of Dr. Janet Woodcock, Dir., Ctr. For Drug Evaluation and Research, FDA).

66 Meeting participants included Sarah Rooney (regulatory counsel for AAJ), Michael Forscey of Forscey LLC (AAJ lobbyist), and Ed Blizzard of Blizzard, McCarthy & Nabors (AAJ member and personal injury attorney specializing in pharmaceutical claims) who met with Elizabeth Dickinson, Chief Counsel; Denise Esposito, Deputy Chief Counsel for Program Review for Drugs And Biologics; Leslie Kux, Assistant Commissioner for Policy; Donald Beers, General Attorney in the Office of Chief Counsel; and Daniel Sigelman, Senior Regulatory Policy Advisor in the Office of Policy. Brian Mahoney, *GOP Reps. Want Minutes of FDA Meeting With Trial Lawyers*, Law 360, Apr. 1, 2014.

67 Letter from Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary, and Sen. Lamar Alexander, S. Comm. on Health, Education, Labor & Pensions, to Howard A. Shelanski,

Admin., Office of Info. & Regulatory Aff. (June 25, 2014), *available at* http://freepdfhosting.com/94dd59e88d.pdf.

68 Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), Pub. L. 98-417, 98 Stat. 1585.

69 H.R. Rep. No. 113-468, at 61-62 (2014).

70 Alex Brill, *FDA's Proposed Generic Drug Labeling Rule: An Economic Assessment*, Matrix Global Advisors (Feb. 5, 2014), *at* http://www.gphaonline.org/media/cms/Economic_Impact_Study_FDA_Labeling_Rule_-_MGA.pdf.

71 Ed Silverman, *Lawmakers Ask White House to Review FDA Rule for Generic Label Changes*, Wall St. J. Pharmalot, June 26, 2014, *at* http://blogs.wsj.com/pharmalot/2014/06/26/lawmakers-ask-white-house-to-review-fda-rule-for-generic-label-changes/.

72 H.R. Rep. No. 113-468, at 62.

73 *See generally* Victor E. Schwartz, Phil Goldberg & Corey Schaecher, *Game Over?: Why Recent State Supreme Court Decisions Should End the Attempted Expansion of Public Nuisance Law*, 62 Okla. L. Rev. 629 (2010).

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75 Sindhu Sundar, *Top Product Verdicts of 2014 – And the Firms That Won Them*, Law360, July 11, 2014.

76 *People v. Atlantic Richfield Co.*, 1-00-cv-788657, Amended Statement of Decision, at 109 (Cal. Super. Ct., Santa Clara County, Mar. 26, 2014).

77 *People v. Atlantic Richfield Co.*, Amended Statement of Decision, *supra*, at 31.

78 *See, e.g., State v. Lead Indus. Ass'n*, 951 A.2d 428, 435-36 (R.I. 2008); *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115-16 (Mo. 2007*); In re Lead Paint Litig.*, 924 A.2d 484, 494 (N.J. 2007).

79 Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 948.

80 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

81 *See generally* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 218 (2006).

82 *See* Lloyd Dixon & Brian Gill, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision*, RAND Monograph Report (2001).

83 Andrew W. Jurs & Scott DeVito, *Et Tu Plaintiffs? An Empirical Analysis of* Daubert*'s Effect on Plaintiffs, and Why Gatekeeping Standards Matter (a Lot)*, 66 Ark. L. Rev. 975, 977 (2013).

84 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

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87 David Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 Notre Dame L. Rev. 27, 28-29 (2013).

88 Steve Baughman Jensen, *Reframing the* Daubert *Issue in Toxic Tort Cases*, Trial, at 50 (Feb. 2013).

89 *Milward v. Acuity Specialty Prods. Grp., Inc.*, 639 F.3d 11, 26 (1st Cir. 2011).

90 Bernstein, *supra*, at 55-62.

91 *Milward*, 639 F.3d at 17-18 (relying upon Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 28, Reporter's Note on Comment c).

92 Baughman Jensen, *supra*, at 50.

93 *Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 562 (8th Cir. 2014).

94 *Id*. at 560-61.

95 *See* Amy R. Fiterman & Lariss Jude, *8th Circ.'s "Liberal Admission" Standard Stands Out*, Law360, July 15, 2014 (contrasting *Johnson v. Mead Johnson* and *Tedder v. American Railcar Indus., Inc.*, 739 F.3d 1104, 1108 (8th Cir. Jan. 9, 2014), in which the Eighth Circuit found differential diagnoses "presumptively admissible" with *Bland v. Verizon Wireless L.L.C.,* 538 F.3d

893 (8th Cir. 2008), and *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202,. 1208 (8th Cir. 2000), in which the court took a more conservative approach to admission of such testimony).

96 *See id.* (citing *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010); *Myers v. Illinois Central R. Co.*, 629 F.3d 639 (7th Cir. 2010); *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329 (11th Cir. 2010)).

97 *See* Schwartz & Silverman, *Draining of Daubert*, *supra*, at 248-56.

98 *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036 (9th Cir. 2014).

99 *Id.* at 1049.

100 *Id.* at 1044.

101 *See id.*

102 *SQM N. Am. Corp.* v. *City of Pomona,* No. 14-297 (petition for *certiorari* filed Sept. 8, 2014).

103 *See* Amicus Brief for the Am. Coatings Ass'n et al., *SQM N. Am. Corp. v. City of Pomona*, No. 14-297, at 5 (U.S., filed Oct. 14, 2014). The Ninth Circuit rejected the Third Circuit's approach, which finds that "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible," whether it alters or misapplies an otherwise reliable methodology. *See In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994) (finding that "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible," whether it alters or misapplies an otherwise reliable methodology). The Second, Fifth, Tenth and Eleventh Circuits follow the Third Circuit approach. *See* Amicus Brief, *supra*, at 5 (citing cases).

104 *See* Amicus Brief, *supra*, at 10 (citing Second, Third, and Sixth Circuit decisions requiring trial courts to analyze the facts underlying expert testimony, while First, Seventh, and Eighth Circuit rulings have limited *Daubert* review to the framework of the expert's analysis and left the accuracy of the expert's conclusions based on the analysis to the factfinder).

105 *See* Sherman Joyce, *The Emerging Business Threat of Civil "Death Penalty" Sanctions,* Wash. Legal Found., Sept. 10, 2009.

106 Nathan L. Hecht, *Discovery Lite! — The Consensus for Reform,* 15 Rev. Litig. 267, 270 (1996) ("By racking up enough sanctions during discovery, the merits of the case might never be reached at all.").

107 *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

108 *See* Brad Harris & Hon. Ronald J. Hedges, *Spoliation Uncertainty—The Impact of Recent Case Law*, Corp. Counsel, Nov. 7, 2013.

109 Sindhu Sundar, *Top Product Verdicts of 2014 – And the Firms That Won Them*, Law360, July 11, 2014.

110 *In re Actos (Pioglitazone) Prods. Liab. Litig.*, MDL No. 6:11-md-2299, 2014 WL 2872299 (W.D. La. June 23, 2014).

111 *Id.* at *36.

112 *Id.*

113 *Id.* at *37.

114 *Id.* at *37-39.

115 Jef Feeley & Kanoko Matsuyama, *Takeda, Lilly Jury Awards $9 Billion Over Actos Risks*, Bloomberg, Apr. 8, 2014.

116 Hiroyuki Kachi, *Takeda, Lilly Ordered to Pay $9 Billion in Diabetes-Drug Case*, Wall St. J., Apr. 8, 2014.

117 Silverstein Group, *Mass Tort Advertising Monthly Report*, May 2014.

118 *See Allen v. Takeda Pharma. N. Am.*, No. 6:12-cv-00064-RFD-PHJ, at 99 (W.D. La. Oct. 27, 2014) (Memorandum Ruling: Defendants' Rule 59 Motion for New Trial). While Judge Doherty significantly reduced the judgment as constitutionally excessive, her opinion appears to urge appellate courts that will review her decision to allow higher punitive damage awards in personal injury cases against large businesses than otherwise supported by U.S. Supreme Court precedent. The opinion views the single-digit ratio expressed in *State Farm v. Campbell* as "dicta," criticizes courts for "the seductive lure of the siren of simplicity" in following it, applies a punitive-to-compensatory damage ratio of 25:1 to both parties, and examines the net worth of the defendants to support the punitive damage award.

119 Zoe Tillman, *Federal Judiciary Approves Civil Discovery Rules Changes*, Legal Times (blog), Sept. 16, 2014; *see also* Litigation Cost Survey of Major Companies, U.S. Chamber Institute for Legal Reform, Lawyers for Civil Justice & Civil Justice Reform Group, Statement to 2010 Conference on Civil Litigation at 2 (2010) (noting that a survey of Fortune 200 companies found an average outside litigation cost of $115 million in 2008 – a cost that increased between 2000 and 2008 at the rate of 9 percent per year).

120 Advisory Committee on Civil Rules, Report to the Standing Committee, May 2, 2014 Meeting, Agenda Book for Committee on Rules of Practice and Procedure, May 29-30, 2014 Meeting, at 85, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf#pagemode=bookmarks.

121 Thomas Allman, Standing Committee OKs Federal Discovery Amendments, Law Technology News (June 2, 2014), *at* http://www.lawtechnologynews.com/id=1202657565227/Standing-Committee-OKs-Federal-Discovery-Amendments%3Fmcode=0&curindex=0&curpage=ALL.

122 *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013).

123 *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 852 (6th Cir. 2013).

124 *Id.* at 860.

125 *See* James F. McCarty, *Federal Jury Rejects Class-Action Lawsuit Brought Against Whirlpool Front-loading Washing Machines*, Plain Dealer, Oct. 31, 2014.

126 *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010).

127 *Eubank v. Pella Corp.*, No. 13-2091 et al., 2014 U.S. App. LEXIS 10332, at *9 (7th Cir. June 2, 2014).

128 *Id.* at *15-16.

129 *Id.* at *17, *21.

130 The Seventh Circuit threw out the settlement on a number of other grounds, including that lead counsel was the named plaintiff's son-in law and was also involved in disciplinary proceedings with the Illinois Attorney Registration and Disciplinary Commission at the time the settlement was negotiated. 2014 U.S. App. LEXIS 10332, at *18-20.

131 *In re IKO Roofing Shingle Products Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014).

132 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

133 *In re IKO Roofing*, 757 F.3d, at 602.

134 *Id.*

135 *Id.* at 603.

136 *Id.*

137 *See, e.g.*, *Bussey v. Macon Cnty. Greyhound Park*, 562 F. App'x 782 (11th Cir. 2014) (holding in light of *Comcast* that district court abused its discretion in certifying class of electronic bingo players where damages were individualized); *In re Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 253 (D.C. Cir. 2013) (vacating grant of class certification under *Comcast* where district court failed to recognize that plaintiffs' damages model yielded the same results for shippers with legacy contracts as it did for others, even though those shippers could not have suffered any injuries).

138 *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2014).

139 *Id*. at 305 (internal quotation marks and citation omitted).

140 *Id.* at 305.

141 *Id.* at 306.

142 *Id.* at 307.

143 *Id.*

144 *Id*.

145 *Id*. at 307-11.

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

147 *Id.* at 3.

148 *Id.* at 5.

149 *Id.* at 6.

150 *Algarin v. Maybelline, LLC*, 300 F.R.D. 444 (S.D. Cal. 2014).

151 *Id.* at 456.

152 *Id.*

153 *See, e.g.*, *Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2014 WL 815253, at *3 (S.D. Fla. Mar. 3, 2014) (relying on *Carrera* in refusing to certify nationwide false advertising class involving dietary supplement where the defendant did not have a record of individuals who purchased the product, making it virtually impossible to ascertain class membership), *pet. to appeal denied*; *see also Sethavanish v. ZonePerfect Nutrition Co.*, No. 12-2907-SC, 2014 WL 580696, at *5 (N.D. Cal. Feb. 13, 2014) (finding "the reasoning of *Carrera* . . . persuasive," concluding that class of purchasers of "all natural" nutrition bars was not ascertainable because there was no accurate way to determine who had purchased the bars at issue); *Jones v. Conagra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, at *35 (N.D. Cal. June 13, 2014) (class of purchasers of food product was not ascertainable because "[e]ven assuming that all proposed class members would be honest, it is hard to imagine that they would be able to remember which particular Hunt's products they purchased from 2008 to the present"); *In re POM Wonderful LLC*, No. 10-02199 DDP (RZx), 2014 WL 1225184, at *6 (C.D. Cal. Mar. 25, 2014) (decertifying class of purchasers of Pom Wonderful's 100% juice product because "[n]o bottle, label, or package included any of the alleged misrepresentations" and "[f]ew, if any, consumers, are likely to have retained receipts during the class period"); *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at *3 (N.D. Cal. Jan. 7, 2014) (class of purchasers of "all natural" ice cream was not sufficiently ascertainable because there was no means to identify whether the products potential class members purchased contained cocoa processed with "natural" or "synthetic" alkalis).

154 *See McCrary v. Elations Co., LLC*, No. 13-00242 JGB (OPx), 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014).

155 *Id.*

156 *Id.* (internal quotation marks and citation omitted).

157 *Id.*

158 *Id.*

159 *See Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK-MRWx, 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014) (defendants did not have a due-process right to challenge class membership because "[their] aggregate liability is tied to a concrete, objective set of facts—[their] total sales—that will remain the same no matter how many claims are submitted"); *Werdebaugh v. Blue Diamond Almond Growers*, No. 12-CV-2724-LHK, 2014 U.S. Dist. LEXIS 71575, at *40-41 (N.D. Cal. May 23, 2014) (relying on *McCrary* and declaring that "in the Ninth Circuit[,] '[t]here is no requirement that the identity of the class members . . . be known at the time of certification'") (citation omitted); *see also, e.g.*, *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2014 WL 1652338, at *2 (N.D. Cal. Apr. 24, 2014) (argument that proposed class was not ascertainable because the company did not keep records of purchasers of its products, and consumers did not keep receipts was "not persuasive"); *Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 567 (S.D.N.Y. 2014) (certifying a class of olive oil purchasers who claimed that the defendants sold a product labeled "100% pure olive oil" when in fact the oil contained an industrially processed substance called pomace; while the ascertainability difficulties were formidable, they "should not be made into a device for defeating the action"), *pet. to appeal denied*.

160 *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

161 *Id.* at 1527.

162 *Id.* at 1529.

163 *Id.* at 1528-29.

164 *Id.* at 1532, 1537 (Kagan, J., dissenting).

165 *Id.* at 1533.

166 *Id.*

167 *Id.*

168 *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 954-55 (9th Cir. 2013).

169 *See, e.g.*, *Church v. Accretive Health, Inc.*, 299 F.R.D. 676, 679 (S.D. Ala. 2014) (a rule that allows defendants to "pick off . . . a putative class representative via unaccepted offer of judgment" "recently faced a withering attack from four U.S. Supreme Court Justices in

Genesis Healthcare Corp.*") (internal quotation marks and citation omitted); *Yaakov v. ACT, Inc.*, 987 F.Supp.2d 124, 128 (D. Mass. 2014) ("With no controlling precedent in the First Circuit, this Court has looked to the reasoning expressed by other courts on this issue, and is persuaded by that expressed by the Ninth Circuit in *Diaz* and by Justice Kagan's dissent in *Genesis Healthcare*.").

170 *See, e.g.*, *Keim v. ADF Midatlantic LLC*, No. 13-13619 (11th Cir.) (appeal pending).

171 *See, e.g.*, *Hanover Grove Consumer Hous. Coop. v. Berkadia Commercial Mortg., LLC*, No. 13-13553, 2014 U.S. Dist. LEXIS 11918, at *15, *17 n.3 (E.D. Mich. Jan. 31, 2014) ("[a]lthough the Court sees Justice Kagan's dissent in *Genesis Healthcare* as the right decision, it is limited with binding Sixth Circuit precedent"; "[b]ecause defendant's Rule 68 Offer of Judgment covered all of plaintiff's individually requested relief, the claims effectively became moot"); *Bank v. Spark Energy Holdings LLC*, No. 4:11-CV-4082, 2013 WL 5724507, at *2 (S.D. Tex. Oct. 18, 2013) (noting that the Supreme Court declined to resolve the issue in *Genesis Healthcare*; "[t]hus this Court will continue to follow Fifth Circuit precedent").

172 Fed. R. Civ. P. 23 advisory committee's note to 1998 amendments.

173 John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings, Apr. 29, 2014, *at* http://.skadden.com//reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings (last visited Aug. 13, 2014) (attaching data).

174 Data on the cases reviewed is current through March 15, 2014.

175 *See* Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(f): A Note on Law and Discretion in the Courts of Appeals*, 246 F.R.D. 277, 283 (2008).

176 *In re Garlock Sealing Techs., LLC,* 504 B.R. 71 (W.D.N.C. Bankr. 2014).

177 *Id.* at 86.

178 *Id.* at 97.

179 *Id.* at 73.

180 *Id.* at 84.

181 *Id.* at 85.

182 *Id.*

183 *Id.* at 86.

184 *Id.*

185 *Id.*

186 *Id.*

187 Peggy L. Ableman, *The* Garlock *Decision Should Be Required Reading for All Trial Court Judges in Asbestos Cases*, 37 Am. J. Trial Advoc. 479, 488 (2014); *see also* Peggy L. Ableman, *A Case Study From a Judicial Perspective: How Fairness and Integrity in Asbestos Tort Litigation Can Be Undermined by Lack of Access to Bankruptcy Trust Claims*, 88 Tul. L. Rev. 1185 (2014).

188 Michael Tomsic, *Case Sheds Light on the Murky World of Asbestos Litigation*, Nat'l Pub. Radio, Feb. 4, 2014, *available at* http://www.npr.org/2014/02/04/271542406/case-sheds-light-on-the-murky-world-of-asbestos-litigation; *see also* Lester Brickman, *Fraud and Abuse in Mesothelioma Litigation*, 88 Tul. L. Rev. 1071 (2014).

189 *See* Ableman, 37 Am. J. Trial Advoc. at 483; *see also* Mark D. Plevin, *The* Garlock *Estimation Decision: Why Allowing Debtors and Defendants Broad Access to Claimant Materials Could Help Promote the Integrity of the Civil Justice System*, 23 No. 4 J. Bankr. L. & Prac. NL Art. 2 (Aug. 2014); William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts, 2014 Update – Judicial and Legislative Developments and Other Changes in the Landscape Since 2008*, 23 Widener L.J. 675 (2014); Mark Behrens & Cary Silverman, *The Garlock Bankruptcy Order and What it Means for Defense Counsel*, 56 No. 5 DRI For the Def. 10 (May 2014).

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217 *See* Pa. Ct. Com. Pl. Phila. Cnty. Gen. Ct. Reg. No. 2012-01, *In re* Mass Tort and Asbestos Programs, Protocol (Feb. 15, 2012); Pa. Ct.

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

219 *Id.*

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221 *Id.*

222 Pursuant to the 2003 amendment, "[a]ny plaintiff who intends to file a proof of claim form with any bankrupt entity or trust shall do so no later than ten (10) days after plaintiff's case is designated in a FIFO Trial Cluster, except in the in extremis cases in which the proof of claim form shall be filed no later than ninety (90) days before trial."

223 *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A), 966 N.Y.S.2d 347, 2012 WL 6554893, at *10 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 15, 2012).

224 *Id.* at *9.

225 *See In re Garlock Sealing Techs., LLC,* 504 B.R. at 85 (describing a New York case settled by Garlock for $250,000 during trial. "The plaintiff had denied any exposure to insulation products. After the case was settled, the plaintiff's lawyers filed 23 Trust claims on his behalf—eight of them were filed within twenty-four hours after the settlement.").

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427 For example, the NLRB passed a rule requiring employers to post a notice explaining employee rights under the NLRA, which was later enjoined by federal appellate courts.

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525 *See, e.g.,* Kelley Drye & Warren LLP's "TCPA FCC Petitions Tracker," *available at* http://www.kelleydrye.com/publications/client_advisories/0905 (last visited Nov. 10, 2014).

526 *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 and Junk Fax Prevention Act of 2005, Order on Application for Review filed by Anda, Inc., Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission's Opt-Out Requirement for Faxes Sent with the Recipient's Prior Express Permission*, CG Docket No. 02-278 and CG Docket No. 05-33847 (issued Oct. 15, 2014) (Order re Anda Application).

527 In 2012 Anda, Inc. (Anda) filed its Application for Review. *See generally Junk Fax Prevention Act of 2005, Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rules Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, CG Docket No. 05-338, Application for Review filed by Anda, Inc. on May 14, 2012 (Application for Review); *see also Petition of All Granite & Marble Corp. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or Waiver*, CG Docket No. 02-278, 05-338 (filed Oct. 28, 2013)(All Granite Petition); *Petition of Forest Pharmaceuticals, Inc. for Declaratory Ruling and/or Waiver Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) of the Commission's Rules and for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket No. 05-338 (filed June 27, 2013) (Forest Petition); *Petition of Futuredontics, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 18, 2013) (Futuredontics Petition); *Petition for Declaratory Ruling and/or Waiver of Gilead Sciences, Inc. and Gilead Palo Alto, Inc., Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Faxes Sent with the Recipient's Prior Express Invitation or Permission*, CG Docket Nos. 02-278, 05-338 (filed Aug. 9, 2013) (Gilead Petition); *Petition of Magna Chek, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed March 28, 2014) (Magna Petition); *Petition for Declaratory Ruling and/or Waiver of Masimo Corp.*, CG Docket Nos. 02-278, 05-338 (filed Apr. 1, 2014) (Masimo Petition); *Petition of Staples, Inc. and Quill Corporation for a Rulemaking to Repeal Rule 64.1200(a)(3)(iv)*, CG Docket Nos. 02-278, 05-338 (filed Jul. 19, 2013) (Staples Petition); *Petition of Douglas Paul Walburg and Richie Enterprises, LLC, for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.2100(a)(3)(iv) and/or for Waiver*, CG Docket Nos. 02-278, 05-338 (filed Aug. 19, 2013) (Walburg Petition).

528 *See, e.g.,* All Granite Petition at 4; *Petition of American CareSource Holdings, Inc. for Declaratory Ruling to Clarify the Scope and/or Statutory Basis for Rule 64.1200(a)(4)(iv) and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Jul. 1, 2014) (American Petition) at 8; *Petition of Best Buy Builders, Inc. for Declaratory Ruling and/or Waiver*, CG Docket No. 05-338 (filed Apr. 7, 2014) (Best Buy Petition) at 4; *Petition of CARFAX, Inc. for Declaratory Ruling and/or Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (July 11, 2014) (CARFAX Petition) at 6-8; Futuredontics Petition at 4; Gilead Petition at 13; *Petition for MedLearning, Inc. and Medica, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Jul. 16, 2014) (Medica Petition) at 6-9; *Petition of Merck and Company, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014) (Merck Petition) at 5-9; Staples Petition at 5; *Petition of UnitedHealth Group, Inc. for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed July 11, 2014) (UnitedHealth Petition) at 5-7.

529 *See*, *e.g.,* All Granite Petition at 10; American Petition at 8; Best Buy Petition at 11-12; *Petition of Cannon & Associates LLC D/B/A Polaris Group for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed May 15, 2014) (Cannon Petition) at 12-13; CARFAX Petition at 11-12; *Petition of Crown Mortgage Company for Declaratory Rulings and/or Waiver of the "Opt Out" Requirement*, CG Docket Nos. 02-278, 05-338 (filed Feb. 21, 2014) (Crown Petition) at 17-20; Forest Petition at 11; Futuredontics Petition at 13-14; Gilead Petition at 11; Magna Petition at 9-12; Masimo Petition at 10-12; Medica Petition at 13; Merck Petition at 16-17; Walburg Petition at 13-15; *Petition of Power Liens, LLC for Declaratory Ruling and/or Waiver of Section 64.1200(a)(4)(iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Sept. 18, 2014) (Power Liens Petition) at 13-15; *Purdue Pharma Petition for Declaratory Ruling Regarding the Statutory Basis for the Commission's Opt-Out Notice Rule with Respect to Solicited Faxes, and/or Regarding Substantial Compliance with Section 64.1200(a)(4)(iii) and (iv) of the Commission's Rules*, CG Docket Nos. 02-278, 05-338 (filed Dec. 12, 2013) (Purdue Pharma Petition) at 17-19; *Petition of Prime Health Services, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Dec. 17, 2013) (Prime Health Petition) at 13-15; *Petition of S&S Firestone, Inc., d/b/a S&S Tire for Declaratory Ruling and/or Waiver*, CG Docket No. 02-278, 05-338 (filed May 7, 2014) (S&S Petition) at 10-11; *Petition of Stericycle, Inc., for Declaratory Ruling and/or Waiver Regarding 47 C.F.R. § 64.1200(a)(4)(iv)*, CG Docket Nos. 02-278, 05-338 (dated June 6, 2014) (Stericycle Petition) at 15; *Petition of TechHealth, Inc. for Declaratory Ruling to Clarify Scope and/or Statutory Basis for Rule 64.1200(a)(3)(iv) and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Jan. 6, 2014) (TechHealth Petition) at 15-16; *Petition of Unique Vacations, Inc., for Declaratory Ruling and/or Waiver*, CG Docket Nos. 02-278, 05-338 (filed Aug. 20, 2014) (Unique Petition) at 9-11; UnitedHealth Petition at 9.

530 Order re Anda Application, *supra*, at 11.

531 *Id.* at 14.

532 47 U.S.C. § 227(a)(1).

533 *Gragg v. Orange Cab. Co.,* 995 F. Supp. 2d 1189, 1192-93 (W.D. Wash. 2014); *see also Hunt v. 21st Mortg. Corp.*, No. 2:12-cv-2697-WMA, 2013 WL 5230061, *4 (N.D. Ala. Sept. 17, 2013) (noting that, as, "in today's world, the possibilities of modification and alteration are virtually limitless," this reasoning would subject all iPhone owners to 47 U.S.C. § 227 as software potentially could be developed to allow their device to automatically transmit messages to groups of stored telephone numbers).

534 *Mendoza v. UnitedHealth Grp. Inc.*, No. C13-1553 PJH, 2014 WL 722031, at *2 (N.D. Cal. Jan. 6, 2014).

535 *See Petition for Rulemaking of ACA International*, CG Docket No. 02-278, at 1-2, 12 (filed Jan. 31, 2014) (ACA Petition).

536 *See In re Professional Association for Customer Engagement's Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278 (filed Oct. 18, 2013) at 3. *See also Petition for Expedited Declaratory Ruling and Clarification of TextMe, Inc.*, CG Docket No. 02-278 (filed Mar. 18, 2014) at 1 (seeking similar clarification).

537 *Soppet v. Enhanced Recovery Company, LLC*, 679 F.3d 637, 643 (7th Cir. 2012).

538 *Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265, 1167 (11th Cir. 2014); *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1251 (11th Cir. 2014).

539 *Soppet*, 679 F.3d at 643; *Breslow*, 755 F.3d at 1267; *Osorio*, 746 F.3d at 1251.

540 *Petition for Expedited Declaratory Ruling filed by United Healthcare Services, Inc.*, CG Docket No. 02-278, at 1 (filed Jan. 16, 2014).

541 ACA Petition, *supra*, at 2.

542 *Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling*, CG Docket No. 02-278, at 7 (filed Aug. 15, 2014).

543 *Id.* at 7-8.

544 *See In the Matter of The Joint Petition Filed By DISH Network, LLC, the United States of America, and the States of California, Illinois. North Carolina, and Ohio for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules*, Declaratory Order, CG Docket No. 11-50 (issued Apr. 13, 2013).

545 *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 877 (9th Cir. 2014).

546 *Id.* at 879.

547 *Palm Beach Golf Center-Boca, Inc. v. Sarris,* 2014 WL 5471916, -- F.3d -- (11th Cir. Oct. 30, 2014).

548 *Id.* at *9.

549 The Ninth Circuit did—in an unpublished July 2014 opinion—shoot down arguments that Taco Bell Corp. was vicariously liable for text messages sent in 2005 in Chicago on behalf of a collective of stores to promote Nachos Bell Grande. *See Thomas v. Taco Bell Corp.,* No. 12-56458, 2014 WL 2959160 (9th Cir. July 2, 2014). The Ninth Circuit agreed that the corporation would not be vicariously liable when it did not control or have the right to control the marketing company sending the texts, or the manner and means of the text message campaign it conducted. *See id.* at *1.

550 *Gager v. Dell Financial Servs., LLC*, 727 F.3d 265, 272 (3d Cir. 2013).

551 *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255-56 (11th Cir. 2014).

552 *Brenner v. American Educ. Services*, 575 Fed. Appx. 703 (8th Cir. 2014).

553 For example, Davis Law Firm of Jacksonville, Florida, recently posted an article providing 5 steps to "stop calls" from a targeted company and to potentially make money under the TCPA. *See* http://davispllc.com/lawyer/2014/04/16/Consumer-Protection/How-to-Get-DirecTV-to-Stop-Calling-You-_bl12785.htm (last visited Nov. 6, 2014). Step 2 instructs cell phone owners to say "I revoke my consent for you to call me" and then to hang up. Thereafter, the firm asks the cell phone owner to keep a detailed call log regarding any additional calls to be the basis of a TCPA lawsuit. *See id.*

554 https://play.google.com/store/apps/details?id=com.&hl=en (last visited Nov. 10, 2014).

555 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).

556 Helena Bottemiller Evich, *The Plot to Make Big Food Pay*, Politico, Feb. 2, 2014.

557 *See* Office of the Mississippi Attorney General, Attorney General Contingent Fund Attorney Fees & Expenses Through September 25, 2014, *at* http://www.ago.state.ms.us/wp-content/uploads/2014/09/Contingent-Fund-Attorney-Payments1.pdf (last visited Nov. 12, 2014).

558 The Mississippi Legislature's annual funding of the attorney generals' office for FY 2013 and 2014 was $8.4 million and $8.5 million, respectively, a combined $16.9 million. *See* Joint Legislative Budget Committee, State of Mississippi, Budget Fiscal Year 2014, at 6. One firm, Copeland Cook Taylor & Bush PA, received nearly $30 million during this two-year period for its representation of the state in Average Wholesale Price (AWP) litigation against pharmaceutical companies. *See* Attorney General Contingent Fund Attorney Fees & Expenses Through September 25, 2014, *supra*.

559 *See, e.g., Ortho-McNeil-Janssen Pharm., Inc. v. State*, 432 S.W.3d 563 (Ark. 2014); *Caldwell v. Janssen Pharm., Inc.*, 144 So. 3d 898, (La. 2014).

560 *See Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector* (U.S. Chamber Inst. for Legal Reform 2013) (reporting that, in response to requests under the Freedom of Information Act, 36 of 50 jurisdictions indicated that the state's attorney general had hired private attorneys on a contingency fee basis outside of the tobacco litigation).

561 Lynne Tuohy, *NH Appeals Order to Set Aside $195m of Exxon Award*, Assoc. Press, Oct. 3, 2013.

562 *See* Mark Chenoweth, *Another View -- NH's Shameful Jackpot Justice Case Against Oil Companies*, Union Leader, June 11, 2014.

563 *Vermont v. Atlantic Richfield Co.*, No. 340-6-14 (Vt. Super. Ct., filed June 5, 2014). The list of defendants includes Valero Refining-Texas LP, Valero Marketing and Supply Company, Valero Energy Corporation, Ultramar Energy Inc., TRMI-H LLC, Total Petrochemicals & Refining USA Inc., TMR Company, Sunoco Inc. (R&M),

Shell Trading (US) Company, Shell Petroleum Inc., Shell Oil Products Company LLC, Shell Oil Company, PDV Midwest Refining LLC, Motiva Enterprises LLC, Mobil Corporation, Irving Oil Limited, Highlands Fuel Delivery LLC, Hess Corporation, ExxonMobil Oil Corporation, Exxon Mobil Corporation, Equilon Enterprises LLC, El Paso Merchant Energy-Petroleum Company, ConocoPhillips Company, Coastal Eagle Point Oil Company, CITGO Refining and Chemicals Company LP, CITGO Petroleum Corporation, Chevron U.S.A. Inc., BP Products North America Inc. and Atlantic Richfield Company.

564 *See* Office of the Attorney General, Press Release, Vermont Attorney General Files Suit Against MTBE Producers and Refiners to Protect Vermont Groundwater, June 5, 2014.

565 The contributions were each made on December 10, 2013 and constituted $8,000 of the $25,800 received during that reporting period. The report lists "Scott Lummy" rather than "Summy," which appears to be a typographical error. *See* William H. Sorrell, Campaign Finance Disclosure Form, filed Mar. 14, 2014, *available at* https://www.sec.state.vt.us/media/473271/Sorrell-Bill-3172014-AG.pdf (last visited Nov. 21, 2014).

566 *Pennsylvania v. Exxon Mobil Corp*., No. 140602881; *Pennsylvania v. BP PLC*, No. 140602880 (Philadelphia County Ct. of Common Pleas) (complaints filed June 19, 2014).

567 Pennsylvania Dept. of State Campaign Finance Online Reporting, Kathleen Kane for Attorney General, https://www.campaignfinanceonline.state.pa.us/pages/CFReportSearch.aspx.

568 *See* Retention Agreement between Mississippi Attorney General Jim Hood and Linda Singer of Cohen Milstein Sellers & Toll, PLLC (dated Feb. 19, 2014), *available at* http://www.ago.state.ms.us/wp-content/uploads/2014/02/credit-report-agencies.pdf.

569 *Id*. at 2.

570 *See* Meghan Morris, *Second Drug Company Confirms Chicago Subpoena*, Crain's Chicago Business, Nov. 19, 2013; Barry Meier, *Chicago Said to Weigh Suit Over Marketing of Painkillers*, N.Y. Times, Nov. 14, 2013.

571 *City of Chicago v. Purdue Pharma L.P.*, No. 14L005854 (Cir. Ct., Cook County, Ill., filed June 2, 2014), removed to federal court *sub nom*. *City of Chicago v. Purdue Pharma L.P. et al.*, No. 1:14-cv-04361 (N.D. Ill.).

572 *See* John O'Brien, *Ala. AG Strange Proud He Didn't Use Private Lawyers in BP Oil Spill Case*, Legal Newsline, Oct. 25, 2012; *see also* Riley & Jackson, P.C., Gulf Oil Spill Litigation, *at* http://www.rileyjacksonlaw.com/pages/Oil-Spill-Litigation/ (last visited July 17, 2014).

573 *See* Andrew J. Pincus, *Unprincipled Prosecution, Abuse of Power and Profiteering in the New "Litigation Swarm,"* (U.S. Chamber Inst. For Legal Reform 2014).

574 *See* John Tozzi, *California Counties Sue Drugmakers Over Painkiller Abuse*, Bloomberg BusinessWeek, May 23, 2014; Scott Glover & Lisa Girion, *Counties Sue Narcotics Makers, Alleging 'Campaign of Deception'*, L.A. Times, May 22, 2014.

575 John O'Brien, *McGraw Hasn't Done What Company Asked with OxyContin Settlement*, W. Va. Record, May 1, 2008.

576 *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.

577 *See* Exec. Order No. 13433, *Protecting American Taxpayers from Payment of Contingency Fees*, 72 Fed. Reg. 28,441 (May 17, 2007).

578 *Mississippi v. Experian Information Solutions, Inc*., No. 14-1212 (filed Harrison County, Miss., Chancery Ct., May 16, 2014), *removed to federal court*, No. 1:14-cv-243 (S.D. Miss. filed June 12, 2014).

579 *Mississippi ex rel. Hood v. AU Optronics Corp*., 134 S. Ct. 736 (2014).

580 *See* Retention Agreement, *at* http://www.ago.state.ms.us/wp-content/uploads/2013/07/LCD-Outside-Legal.pdf (last visited Nov. 13, 2014).

581 *See* Brief for Respondents, *Mississippi ex rel. Hood v. AU Optronics Corp*., at 7, No. 12-0136 (filed Sept. 2013).

582 Other actions brought by contingency fee lawyers on behalf of state AGs also closely resemble private lawsuits. *See, e.g.*, Emily Field, *Ariz. Launches $3B Suit Against GM Over Safety Defects*, Law 360, Nov. 20, 2014

(discussing *Arizona v General Motors LLC*, No. CV2014-014090 (Ariz. Super. Ct., Maricopa County) (filed Nov. 19, 2014), in which Hagens Berman Sobol Shapiro LLP filed a consumer protection claim on behalf of Arizona); Jessica Liu, *Hagens Berman Sobol Shapiro Files $10 Billion Lawsuit Against GM*, Inside Counsel, June 19, 2014 (discussing similar private class action the firm filed against GM in a federal court in California).

583 *See* Kelly Knaub, *Fla. AG Can Toss 'Frivolous' State FCA Case, Court Told*, Law 360, June 11, 2014 (reporting on Florida v. Barati, No. 1D13-4937 (Fla. 1st DCA, argued June 11, 2014)).

584 *See id.*

585 *Florida v. Barati*, No. 1D13-4937 (Fla. 1st DCA Oct. 7, 2014).

586 *County of Santa Clara v. Super. Ct. (Atlantic Richfield)*, 235 P.3d 21 (Cal. 2010); *State of Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008).

587 *Cephalon, Inc. v. Wilson*, No. 2012-CP-40-07317 (S.C. Ct. Com. Pleas, 5th Jud. Cir., June 2, 2014).

588 *See id.* at 16-17.

589 *Nevada v. Lender Processing Servs. Inc.*, No. A-11-653289-B (8th Jud. Dist. Ct., Clark County, Nev.); *see also* Amanda Bronstad, *Cohen Milstein Role Under Fire in Robo-Signing Case*, Nat'l L.J., June 3, 2013.

590 Tim O'Reiley, *Sanctions Could Cost Nevada Attorney General $1 Million or More*, Las Vegas Review-Journal, Jan. 30, 2014 (quoting Mitchell Berger).

591 *Lender Processing Servs. Inc. v. The Eighth Jud. Dist. Ct.*, No. 61387 (Nev.), *appeal dismissed.by stipulation* Mar. 4, 2014.

592 *See* Andrew Scurria, *Nev. AG Sanctioned In Lender Processing Fraud Suit,* Law 360, Jan. 31, 2014.

593 Transcript, Hearing on Motion to Compel, *Nevada v. Lender Processing Servs. Inc.*, No. A-11-653289-B (8th Jud. Dist. Ct., Clark County, Nev.), at 29 (Nov. 19, 2013).

594 *See* Ken Ritter, *Nevada AG Takes Deal in Lender Fraud Civil Lawsuit*, Elko Daily Free Press, Feb. 16, 2014.

595 *See* Defendants' Motion for Sanctions Based on the State's Spoliation of Evidence and Discovery Abuses, *Nevada v. Wyeth*, No. A575980 (Dist. Ct., Clark County, filed June 13, 2014).

596 Defendants' Notice of Readiness and Request for Setting and Order Setting Hearing/ Decision on Defendants' Motion To Disallow the Attorney General's Retention of Private Counsel in Violation Of Nevada Law, or in the Alternative, Motion To Stay, *Nevada v. Wyeth*, No. A575980 (Dist. Ct., Clark County, filed June 12, 2014).

597 Ashley Perry, *Pfizer's $9.5M Settlement with AG Masto Includes $8M Donation to University of Nevada*, Legal Newsline, Nov. 6, 2014.

598 NRAP 42(b) Stipulation for Dismissal of Writ of Mandamus, *Wyeth v. Eighth Jud. Dist. Ct.*, No. 66155 (Nev., filed Nov. 6, 2014).

599 *See* Settlement Agreement, *Nevada v. Wyeth*, No. A-08-575980 (dated Oct. 27, 2014).

600 Motion to Disqualify Linda Singer and Cohen Milstein Sellers & Toll PLLC, *City of Chicago v. Purdue Pharma et al.*, No. 1:14-cv-04361, Dkt. No. 102 (N.D. Ill. Aug. 21, 2014).

601 Defendants' Joint Motion for Relief from Improper Delegation of Governmental Police Power to a Financially-Interested Private Party, *City of Chicago v. Purdue Pharma et al.*, No. 1:14-cv-04361, Dkt. No. 148 (N.D. Ill. Sept. 19, 2014).

602 *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp.2d 733 (E.D. Ky. 2013); *see also* Alison Frankel, *Judge: Kentucky AG Can Use Contingency-fee Lawyers in Case vs Merck*, Reuters, May 28, 2013.

603 *Ortho-McNeil-Janssen Pharm., Inc. v. State*, 432 S.W.3d 563 (Ark. 2014).

604 Nate Raymond, *Johnson & Johnson Hit with $1.2 Billion Judgment in Arkansas Risperdal Case*, Am. Lawyer, Apr. 12, 2012.

605 *Caldwell v. Janssen Pharm., Inc.*,144 So. 3d 898, (La. 2014).

606 For example, lawyers listed as representing the state on appeal included Patrick C. Morrow, James P. Ryan, and Jeffrey M. Bassett of Morrow & Morrow; James B. Irwin, David W. O'Quinn, Kim E. Moore, Monique M. Garsaud, and Douglas J. Moore of Irwin, Fritchie, Urquhart & Moore, LLC; Michael W. Perrin and

Fletcher V. Trammel of Bailey, Perrin & Bailey; Kenneth T. Fibich of Fibich, Hampton; Kenneth W. DeJean; Robert Lyle Salim; and Robert Cowan.

607 *Commonwealth v. TAP Pharm. Prods., Inc.*, 94 A.3d 350 (Pa. 2014).

608 *Id*. at 352.

609 *See id*. at 357.

610 *Id*. at 363 n.19. (citing Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. Mich. J.L. Reform 281 (2007)).

611 These states include Alabama, Arizona, Florida, Indiana, Iowa, Louisiana, Mississippi, Missouri, North Carolina and Wisconsin. Several other states passed laws addressing state hiring of outside counsel between 1999 and 2005, soon after controversy arose stemming from the award of billions of dollars to contingency fee lawyers representing states in the tobacco litigation.

612 2013 Wis. Act 105 (amending Wis. Stat. 14.11 (2) (b) and 108.14 (3m) and creating Wis. Stat. 20.9305); N.C. Session Law 2014-110 (amending N.C. Gen. Stat. Chapter 114 and adding a new Article 2A); Act No. 796 (La. 2014) (amending La. Rev. Stat. 42:262, 49:259(A), (C)).

613 Melissa Landry, *The Curious Buddy System of Louisiana AG Caldwell*, La. Record, May 20, 2013.

614 *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997).

615 *See* About ALI, American Law Institute, *at* http://www.ali.org/index.cfm?fuseaction=about.overview. The early leadership of the ALI included such individuals as former President and Chief Justice of the U.S. Supreme Court William H. Taft, and esteemed judges Benjamin N. Cardozo and Learned Hand.

616 *See* Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 Pepp. L. Rev. 551, 553-55 (2011) (discussing influence of Restatement (Second) of Torts § 402A).

617 *See Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963).

618 *See* Restatement Third of Torts: Products Liability (1998).

619 *See id.* § 2(b), (c) (determining defects in design and warnings based on the foreseeable risks of harm and ability to reduce the risk through a reasonable alternative design or reasonable instructions or warnings).

620 *See id.* § 2(a) (providing that a product contains a manufacturing defect when it "departs from its intended design even though all possible care was exercised in the preparation and marketing of the product").

621 *See* Restatement of the Law Third, Torts: Apportionment of Liability (2000).

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

623 *See* Ala. Code § 6-5-345; Ariz. Rev. Stat. Ann. § 12-557; Ga. Code Ann. § 51-3-3; H.B. 2447 (Kan. 2014) (effective July 1, 2014); H.B. 5335 (Mich. 2014) (effective June 26, 2014); Mo. Rev. Stat. § 537.351; N.C. Gen. Stat. §§ 38B-1 *et seq.*; N.D. Cent. Code §§ 32-47-01 *et seq.*; Ohio Rev. Code Ann. § 2305.402; Okla. Stat. tit. 76, § 80; S.D. Codified Laws §§ 20-9-11.1 *et seq.*; Tenn. Code Ann. § 29-34-208; Tex. Civ. Prac. & Rem. §'75.007; Utah Code Ann. §§ 57-14-102, 57-14-301; Va. Code Ann. §;8.01-219.1; Wis. Stat. § 895.529. A number of other states, namely Arkansas, Colorado, Florida, and Kentucky, enacted legislation over a decade ago codifying the traditional duties owed by land possessors to trespassers, which similarly prevents courts in those states from altering the common law. *See* Ark. Code Ann. § 18-60-108; Colo. Rev. Stat. § 13-21-115; Fla. Stat. § 768.075; Ky. Rev. Stat. Ann. §§ 381.231-.232. By way of contrast, the Nevada Supreme Court, in 2012, became the first and only state to expressly adopt the Restatement rule. *See Foster v. Costco Wholesale Corp.*, 291 P.3d 150, 156 (Nev. 2012).

624 *See* Michael D. Green & Larry S. Stewart, *The New Restatement's Top 10 Tort Tools*, Trial, April 2010, at 44. In response, *see* Victor E. Schwartz & Cary Silverman, *The New Restatement: Blunting this Potentially Dangerous Trial Lawyer Weapon* (U.S. Chamber Inst. for Legal Reform, May 2011).

625 Restatement of Data Privacy Principles (Preliminary Draft No. 2, Oct. 24, 2014); *see also* Restatement, Third: Information Privacy Principles ix (Preliminary Draft No. 1, Aug. 19, 2013).

626 *See id.* at § 3-6, 9.

627 *See id.* at § 9.

628 *Id.* at § 10.

629 *Id.* at § 13.

630 *Id.* at § 14.

631 *See* Reporters' Memorandum, Pre-Draft Provisions for Restatement Third, The Law of Consumer Contracts (Dec. 2013).

632 *See* Restatement of the Law of Consumer Contracts (Preliminary Draft No. 1, Oct. 28, 2014).

633 *See id.* at § 2-3.

634 *See id.* at § 5-6.

635 *See id.* at § 5.

636 *See id.* at § 6.

637 *See* Restatement Third, Torts: Liability for Economic Harm (Tentative Draft No. 2, Apr. 7, 2014).

638 *See* Restatement Third, Torts: Intentional Harms to Persons (Council Draft No. 2, Sept. 16, 2014).

639 *See id.* at §§ 110-119.

640 *See* Restatement Third, Employment Law (Proposed Final Draft, Apr. 18, 2014).

641 *See id.* at §§ 6.01-.02.

642 *See id.* at § 6.03.

643 *See id.* at § 6.06.

644 *See id.* at §§ 7.01-.05.

645 *See id.* at §§ 2.01-.07.

646 *See id.* at § 5.01.

647 *See* Principles of the Law of Liability Insurance §§ 7-8 (Tentative Draft No. 1 – Revised, Jan. 6, 2014).

648 *See* Principles of the Law of Liability Insurance §§ 16-26 (Tentative Draft No. 2 – Revised July 23, 2014).

649 *See id.* at §§ 27-32.

650 *See* Principles of the Law of Liability Insurance §§ 35-46 (Preliminary Draft No. 7, Aug. 7, 2014).

651 *See* Principles of the Law of Liability Insurance §§ 7-8 (Tentative Draft No. 1 – Revised, Jan. 6, 2014).

652 *See* Principles of the Law of Liability Insurance § 17 (Tentative Draft No. 2 – Revised July 23, 2014).

653 *See id.* at cmt. d (stating "an insurer may be required to provide multiple notices" of a reservation of rights to contest coverage).

654 *See generally* Tiger Joyce, *Companies Find a New Way to Fight Fraudulent Lawsuits*, Pittsburgh Post-Gazette, Oct. 17, 2013.

655 18 U.S.C. § 1964(c).

656 *CSX Transp. v. Gilkison*, No. 05-cv-202 (N.D. W. Va.) (complaint filed Dec. 22, 2005).

657 *See CSX Transp. Inc. v. Gilkison,* 406 F. App'x 723, 735 (4th Cir. 2010).

658 *Id. at* 726-27 (quoting amended complaint filed July 5, 2007) (alterations in original).

659 *Id.* at 727.

660 *See* Amaris Elliott-Engel, *Two Pittsburgh Asbestos Lawyers Liable in Fraud* Cases, Legal Intelligencer, Dec. 31, 2012.

661 Amended Complaint, ¶ 70.

662 *See In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563 (S.D. Tex. 2005).

663 *See id.* at 638.

664 *See id.*

665 *Id.*

666 *Id.* at 635. Dr. Harron had his medical license stripped in several states as a result of findings in the litigation. *See* Editorial, *The Silicosis Abdication*, Wall St. J., Apr. 7, 2009 (noting that Dr. Harron lost his medical license in California, Florida, Mississippi, New Mexico, New York, North Carolina, and Texas). Most recently, a Mississippi appellate court, in affirming the Mississippi Board of Medical Licensure's decision to order Dr. Harron to not renew his Mississippi license, found that "[h]is actions attacked the integrity of the legal system, had at least the potential to harm his claimant/patients, and were a discredit to his profession, and to his

Mississippi medical license." *Miss. State Bd. of Med. Licensure v. Harron*, No. 2013-SA-00654-COA (Miss. Ct. App., Sept. 16, 2014).

667 *See* Brief of Plaintiff-Appellant, *CSX Transp. Inc. v. Gilkison*, No. 09-2135, at 28-29 (4th Cir., filed Jan. 11, 2010).

668 *See Gilkison,* 406 F. App'x at 726.

669 *See id.* at 734-36.

670 *CSX Transp. Inc. v. Peirce*, No. 5:05-cv-00202 (N.D. W. Va. Sept. 25, 2013) (Memorandum Opinion and Order Granting CSX's Motion to Amend the Judgment to Reflect Statutorily-Mandated Trebling of RICO Damage).

671 *CSX Transp. Inc. v. Peirce*, No. 5:05-cv-00202 (N.D. W. Va. Sept. 25, 2013) (Memorandum Opinion and Order Staying Sua Sponte Motion for Attorneys' Fees and Ruling on Bill of Costs).

672 *CSX Transp. Inc. v. Peirce*, Nos. 13-2235(L), 13-2252, and 13-2325 (4th Cir.); *see also* John O'Brien, *Asbestos Attorneys Appeal $1.3M Fraud Ruling Against Them*, Legal Newsline, Oct. 11, 2013.

673 Release and Settlement Agreement between CSX Transportation, Inc., Robert N. Peirce, Jr., Louis A. Raimond, Robert Peirce & Associates, P.C., and Carolyn S. Harron, as executrix of the estate of Ray Harron, M.D. (dated Nov. 5, 2014).

674 *See* Paul M. Barrett, *After CSX Settlement, More Trial Lawyers Will Be Sued Under RICO*, Bloomberg Businessweek, Nov. 10, 2014.

675 *See In re Garlock Sealing Technologies, LLC*, 504 B.R. 71, 86 (U.S. Bankr. W.D. N.C. 2014).

676 *See id.* at 85-86.

677 *See id.*

678 Greg Ryan, *Garlock Sues 5 Law Firms for Asbestos Fraud*, Law360, Jan. 13, 2014.

679 Daniel Fisher, Embattled Gasket Maker Sues Asbestos Lawyers for Fraud, Forbes, Jan. 10, 2014.

680 *See* Paul M. Barrett, Law of the Jungle 197-211(New York: Crown Publishers 2014).

681 *See Chevron Corp. v. Donzinger*, 974 F.Supp.2d 362, 487-88 (S.D.N.Y. 2014).

682 *See id*. at 486-87.

683 *Id. at* 644.

684 *See id*. at 459-60, 482-502.

685 *Id*. at 385-86.

686 Steve Mufson, *Why Chevron is Suing One of D.C.'s Most Powerful Lobbying Firms Over… the Amazon Jungle?*, Wash. Post, July 2, 2013.

687 *See* Paul M. Barrett, *The Fall of the House of Boggs*, Politico, Sept. 15, 2014.

688 *See Donzinger*, 974 F.Supp.2d. at 474-75.

689 *See id*. at 475.

690 Barrett, *The Fall of the House of Boggs*, *supra* (reporting that Patton Boggs would receive a quarter of Donzinger's contingency fee).

691 *See Donzinger*, 974 F.Supp.2d at 475-78.

692 *Id.* at 476.

693 *See id*. at 475.

694 *See id*. at 479-81.

695 *See id*. at 480.

696 *See* Barrett, Law of the Jungle, at 203-04.

697 *Patton Boggs LLP v. Chevron Corp.*, No. 12-cv-9176 (S.D.N.Y. Mar. 31, 2014).

698 *Patton Boggs LLP v. Chevron Corp.*, No. 12-cv-9176 (S.D.N.Y. Apr. 29, 2014).

699 Stipulation and [Proposed] Order of Dismissal With Prejudice, *Patton Boggs LLP v. Chevron Corp.*, No. 12-cv-9176 (S.D.N.Y., filed May 7, 2014) (Exhibit A: Settlement and Release Agreement Between Chevron Corp. and Patton Boggs LLP), *available at* http://www.theamazonpost.com/wp-content/uploads/2014-05-07-Executed-Stipulation-and-Exhibit-A.pdf.

700 *See* Statement by Patton Boggs on Chevron Settlement, May 7, 2014, *available at* http://www.theamazonpost.com/wp-content/uploads/Statement-by-Patton-Boggs-5.7.14.pdf; *see also* Christine Simmons, *Patton Boggs Admits Regret for Role in Chevron Case*, N.Y.L.J., May 8, 2014.

701 *See* Jennifer Smith, *Partners Approve Law Firm Merger of Patton Boggs and Squire Sanders*, Wall St. J. (law blog), May 23, 2014.

702 Martin Bricketto, *Patton Boggs Litigator Tyrrell Joins Edwards Wildman*, Law360, June 2, 2014.

703 *See* Andrew Strickler, *In Twist, Locke to Welcome Patton Atty Pilloried by Chevron*, Law 360, Sept. 10, 2014.

704 *See Chevron Corp. v. Donzinger*, No. 14-832 (2d Cir.).

705 *Chevron Corp. v. Donzinger*, No. 1:11-cv-00691 (S.D.N.Y. Apr. 29, 2014) (order terminating motion for attorneys' fees).

706 *See* Roger Parloff, *Where's Preet? The Unanswered Question in Chevron v. Donziger*, Fortune, Sept. 17, 2014.

707 *See* Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 Sw. J. Int'l L. 31, 32-34 (2011).

708 *See* William J. Crampton, *Following Each Other's Lead: Law Reform in Latin America* 3-4 (U.S. Chamber Inst. for Legal Reform, Aug. 2014).

709 *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp.2d 733, 747 (E.D. Ky. 2013).

710 *Id*. at 745.

711 *See id.* at 749-50.

712 *See id.* at 752; *see also* Alison Frankel, *Judge: Kentucky AG Can Use Contingency-fee Lawyers in Case vs Merck*, Reuters, May 28, 2013.

713 *See Merck, Sharp & Dohme Corp. v. Conway*, No. 13-5792 (6th Cir.) (voluntarily dismissed on Jan. 6, 2014). Bristol-Meyers Squibb Co. (BMS) made a similar challenge after Mississippi AG Jim Hood hired two plaintiffs' firms to sue BMS under the state's consumer protection law for its marketing of the blood thinner, Plavix. That case reached a federal court through a different route than the Kentucky case. AG Hood filed the action in Mississippi state court, but BMS removed the case to federal court on the basis that, in suing on behalf of the state's consumers, the lawsuit was subject to federal jurisdiction under the Class Action Fairness Act (CAFA). The Mississippi federal court transferred the case to multidistrict litigation in New Jersey federal court where BMS filed a motion to disqualify the private attorneys. *See* Motion for Summary Judgment, *Hood v. Bristol-Myers Squibb Co.*, No. 13-cv-5910, MDL No. 2418 (D. N.J.) (filed Nov. 18, 2013). Before the federal district court ruled on the motion, the U.S. Supreme Court held in *AU Optronics* that *parens patriae* suits are not subject to federal jurisdiction under CAFA. As a result, the federal court ruled that the case must go back to state court in Mississippi. *Hood v. Bristol Myers Squibb Co.*, No. 13-cv-5910, MDL No. 2418 (letter order dated July 22, 2014).

714 *Lender Processing Servs. Inc. v. The Eighth Jud. Dist. Ct.*, No. 61387 (Nev.).

715 *See* Defendants' Supplemental Brief Concerning Sanctions on Motion to Compel Responses to Defendants' First Set of Interrogatories and First Request for Production of Documents, *Nevada v. Lender Processing Servs. Inc.*, No. A-11-653289-B (8th Jud. Dist. Ct., Clark County, Nev. filed Jan. 10, 2014).

716 *Id*. at 2.

717 *See* Andrew Scurria, *Nev. AG Sanctioned In Lender Processing Fraud Suit,* Law 360, Jan. 31, 2014.

718 *See* Ken Ritter, *Nevada AG Takes Deal in Lender Fraud Civil Lawsuit*, Elko Daily Free Press, Feb. 16, 2014.

719 *See* Defendants' Motion for Sanctions Based on the State's Spoliation of Evidence and Discovery Abuses, *Nevada v. Wyeth*, No. A575980 (Dist. Ct., Clark County, filed June 13, 2014); *see also* Andrew Scurria, *Pfizer Says Nev. AG Hid Doc Destruction in Hormone Drug Suit*, Law360, June 16, 2014.

720 Defendants' Motion for Sanctions, *supra*, at 47.

721 *See id.* at 52-53.

722 *Id*. at 53.

723 Dan Bobkoff & Bill Chappell, *Budweiser May Seem Watery, But It Tests at Full Strength, Lab Says*, NPR, Feb. 27, 2013, (quoting Josh Boxer, lead attorney for the plaintiffs).

724 *See id.*

725 *See* Lee Moran, *Anheuser-Busch Responds to 'Watered Down' Budweiser Lawsuit with Funny Ad Campaign*, N.Y. Daily News, Mar. 4, 2014; Adam Taylor, *Anheuser-Busch Launches Campaign to Fight Watered-Down Beer Accusations*, Business Insider, Mar. 3, 2013.

726 *See In re: Anheuser-Busch Beer Labeling Marketing & Sales Practices Litig.*, No. 1:13 MD 2448, at 31 (N.D. Ohio June 2, 2014) (Memorandum Opinion and Order).

727 *See id.* (citing 27 C.F.R. § 7.71(c)(1)); *see also* Lisa Brown, *Judge Dismisses Lawsuits Alleging A-B Waters Down Beer*, St. Louis Post-Dispatch, June 3, 2014l.

728 Jacob Gershman, *Subway Reaches Tentative Deal With Plaintiffs Over 'Footlong' Claims*, Wall St. J. (blog), Apr. 2, 2014.

729 *Obney v. Taco Bell Corp.*, No. 8:11-cv-101 (C.D. Cal.) (Complaint filed Jan. 19, 2011).

730 *See* Julie Jargon, *Taco Bell, in New Push, Defends Its Beef*, Wall St. J., Feb. 28, 2011.

731 *See* Landon Hall, *Taco Bell Has A Beef, Wants Apology Over Suit*, Orange County Register, Apr. 20, 2011.

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