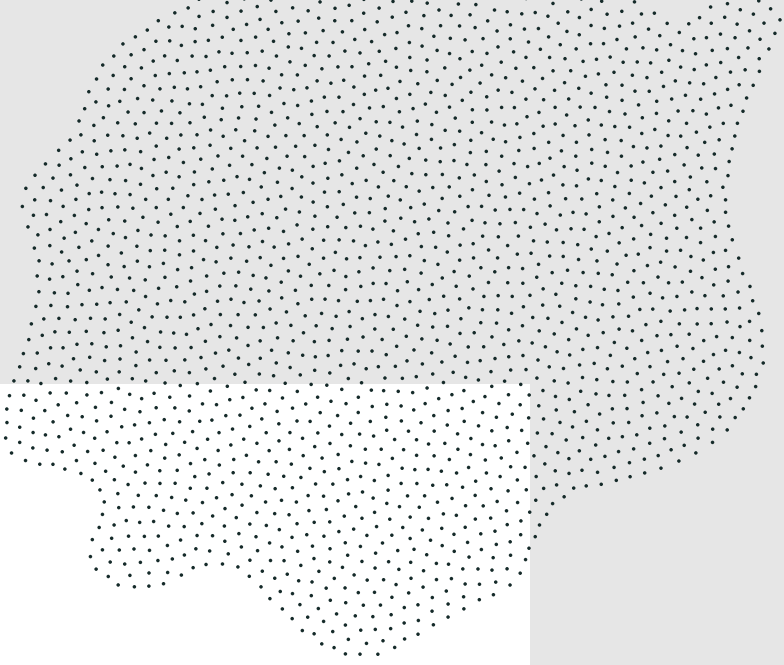


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Civil Justice

2018 YEAR IN REVIEW

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Dear Friends and Clients:

Welcome to Shook, Hardy & Bacon’s inaugural civil justice year-in-review report! We hope you find it valuable. It provides a recap of the major civil justice, tort reform and liability initiatives in Congress, state legislatures and the courts. It also looks ahead to key trends expected in 2019.

For nearly 20 years, our Public Policy Group has worked with our clients and their trade associations to improve liability laws and the overall civil litigation environment. This year, we filed more than 30 *amicus* briefs in the United States Supreme Court, state Supreme Courts and U.S. Courts of Appeals. We also testified on dozens of bills in state legislatures and authored scholarship on cutting-edge tort and procedural theories affecting corporate liability. We also have successfully opposed plaintiff-lawyer initiatives to expand corporate liability.

We are not alone in advancing this agenda. We very much appreciate our partnerships with civil justice groups, think tanks and public policy organizations that cover all types of businesses and other defendants and their counsel across the political spectrum. Accordingly, we have included in this report a summary of what these groups achieved for their members in 2018.

Please let us know how we and our allies can help address your most concerning liability issues. Collectively, we have decades of experience pushing back against unsound liability theories and abusive litigation tactics. We know that when liability is not fair and predictable, it interferes with your ability to maximize your value to your customers and employees.

Thank you for reading this report, and please let us know if you have any questions or suggestions, or if you want to learn more about any of the included issues, cases or legislation.

Sincerely,



Phil Goldberg



Mark Behrens



Victor Schwartz

Co-Chairs | Shook’s Public Policy Group

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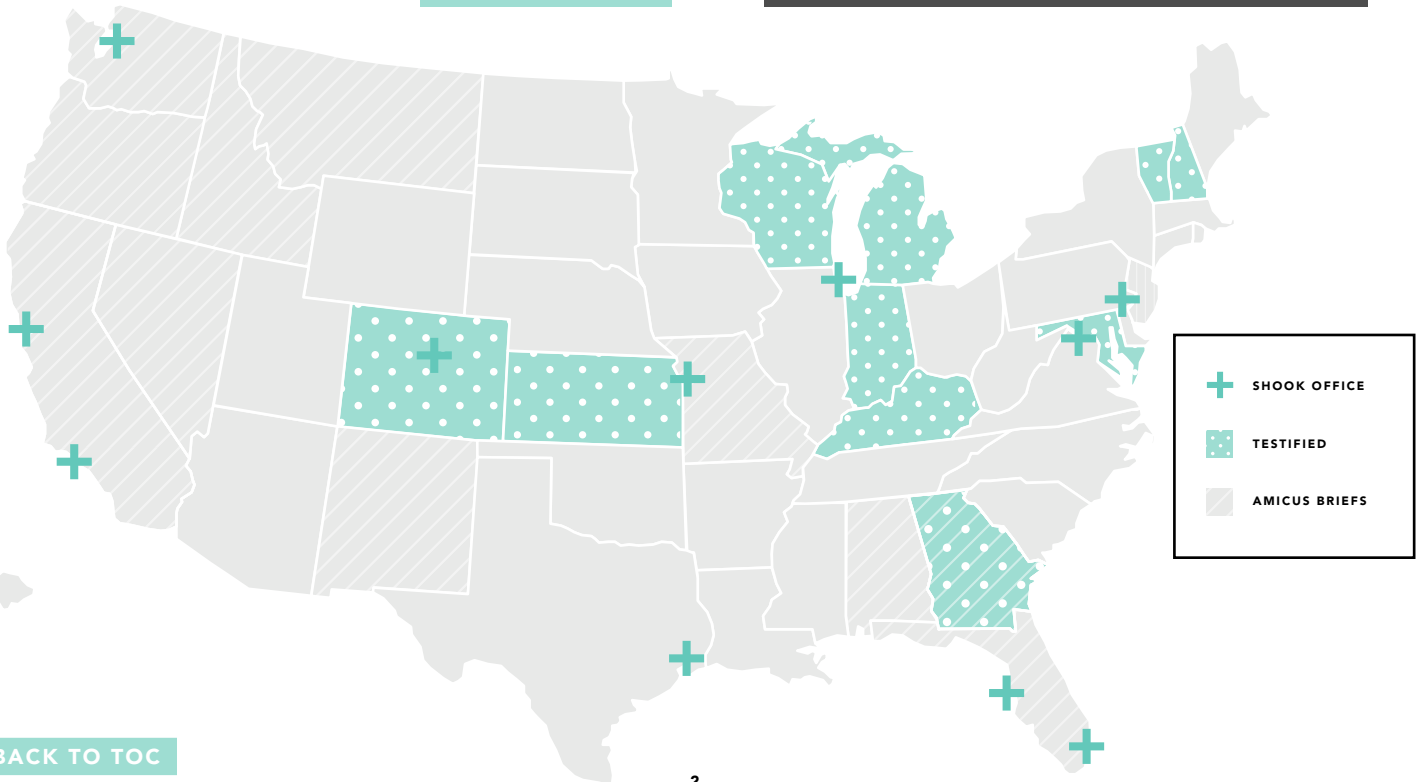
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CIVIL JUSTICE

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Federal Legislative Update

House of Representatives Passes Significant Civil Justice Reforms

The U.S. House of Representatives passed several key civil justice reforms this past term that would have significantly improved the litigation environment. Unfortunately, none of the bills were taken up by the Senate.

The Fairness in Class Action Litigation Act: Addressing Abuses in Class Action, Mass Tort Litigation

The Fairness in Class Action Litigation Act (FICALA), H.R. 985, would have had a broad impact on class action and mass tort litigation, particularly over consumer products, pharmaceuticals and medical devices. First, it would have stopped no-injury litigation by requiring a party seeking class certification to show that each proposed class member suffered the same type and scope of injury as the named class representative(s). Second, it ensured that class actions would primarily benefit class members, not lawyers, by limiting attorney fees to a percentage of payments

actually distributed to the class. Third, it would have reduced pressure on defendants to settle meritless cases by staying discovery until after the court ruled on a motion to dismiss and providing an immediate right to appeal a class certification order. Finally, it required disclosure of third-party litigation funding.

The Furthering Asbestos Claim Transparency Act: Preventing Fraud in Asbestos Litigation

Included in H.R. 985 was the Furthering Asbestos Claim Transparency Act (FACT Act). This legislation would have amended the federal bankruptcy code to require asbestos liability trusts to disclose information about claimant demands and payments from the trusts in an effort to identify inconsistent information filed with the trusts and in asbestos court cases. With this requirement, the legislation would have guarded against manipulation of claims of alleged exposures to asbestos that result in unwarranted recoveries.

The Innocent Party Protection Act: Adopting a Uniform “Plausibility” Standard for Fraudulent Joinder

The Innocent Party Protection Act (IPPA), H.R. 725, responded to plaintiff-lawyer attempts to prevent out-of-state corporate defendants from removing a case to federal court by naming a local individual or business as an additional defendant (fraudulent joinder). Plaintiffs’ lawyers often name small businesses, such as retailers and distributors, or an individual employee of a company, to keep claims in local jurisdictions. Federal courts have long recognized the fraudulent joinder doctrine; the doctrine allows them to disregard the citizenship of a non-diverse defendant, dismiss the claim against that defendant without prejudice and retain jurisdiction over the action. The IPPA would have set a unified standard for federal courts to follow to determine whether there has been fraudulent joinder, directing them to evaluate whether the plaintiff has stated a plausible claim for relief against the non-diverse defendant and has a good-faith intention to seek a judgment against a non-diverse defendant. While H.R. 725 did not become law, it has influenced courts to help curb frivolous joinder.

Lawsuit Abuse Reduction Act

The Lawsuit Abuse Reduction Act (LARA), H.R. 720, would have provided defendants facing frivolous lawsuits with a viable remedy. The one-page bill would have reversed changes to Federal Rule of Civil Procedure 11 adopted in 1993 that, in the words of Justice Antonin Scalia, rendered the rule “toothless.” As he predicted, Rule 11 largely goes unenforced today, as defendants would be ill-advised to spend time and money pursuing sanctions without a reasonable likelihood of receiving compensation for the harm they have suffered. LARA leaves intact the existing standard for evaluating whether a claim or defense is frivolous, eliminates a 21-day safe harbor that allows the opposing lawyer to withdraw the frivolous lawsuit without penalty, makes sanctions mandatory, and allows a court to award sanctions for the purpose of reimbursing all litigation costs incurred in defense of a frivolous claim.

Looking Ahead to the 116th Congress

We anticipate that significant efforts will be made by the plaintiffs’ bar to push their agenda in this new Congress. Plaintiffs’ lawyers and their trade association, the American Association for Justice, were among the largest supporters of the current leadership in the U.S. House of Representatives, including the House Judiciary Committee. We anticipate legislation that would expand liability and nullify pre-dispute arbitration agreements, among other such initiatives. •



State Legislative Update

A. Idaho

Idaho codified the traditional common law rule that land possessors owe only limited duties to trespassers, preventing courts from adopting the radical duty standard for land possessors found in the Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm. Specifically, the new law states that land possessors owe no duty of care to trespassers except to refrain from injuring them by intentional or willful and wanton acts. Idaho preserved the common law doctrine of attractive nuisance for injuries to child trespassers. *See* Idaho H.B. 658 (Reg. Sess. 2018) (codified at Idaho Code §§ 6-3101 through 6-3103). Idaho is the 24th state since 2011 to preemptively rebuff this expansive liability provision in the new Restatement.

B. Kansas

Kansas enacted asbestos bankruptcy trust claim transparency legislation in an effort to stop double-dipping and prevent plaintiff-lawyer gamesmanship in asbestos litigation. *See* Kan. H.B. 2457 (Reg. Sess. 2018) (codified at Kan. Stat. Ann. §§ 60-4912–4918). A person alleging harm from asbestos exposure has two paths for recovery: the trusts set up by the many asbestos companies that have filed for bankruptcy, and the tort system against companies that often are, at most, tangentially related to the alleged harm. The problem is that judges found lawyers telling different exposure stories to the trusts than in the litigation in order to maximize recoveries in each forum. In many instances, both stories could not be true. To address this

problem, this new law requires plaintiffs to seek recovery from bankruptcy trusts before going to trial and producing their trust claims to the litigants. This way, the trust claims are subject to sunlight, and the litigation can be decided in the context of exposure allegations related to a plaintiff's asbestos-related injury.

In addition, Kansas established a \$25 million appeal bond cap. *See* Kan. S.B. 199 (Reg. Sess. 2018) (codified at Kan. Stat. Ann. § 60-2103). The appeal bond legislation also provides that a small business hit with a judgment that exceeds \$2.5 million shall receive a lower appeal bond cap—\$1 million plus 25 percent of any amount in excess of \$1 million, up to \$25 million—unless the appellee proves that the appellant is dissipating or diverting assets.

C. Kentucky

Kentucky enacted Transparency in Private Attorney Contracting (TiPAC) legislation to require the state attorney general or other agency head seeking to enter a contingency fee agreement with private attorneys to provide a written assessment of the need and propriety of such an agreement before entering it and to make the contract for legal services available on a public website. *See* Ky. H.B. 198 (Reg. Sess. 2018) (codified at Ky. Rev. Stat. Ann. § 45A.717). The legislation also expressly limits the amount of a private attorney's contingency fee based on the state's recovery in a legal action and requires a written accounting of expenses.

D. Michigan

Michigan enacted asbestos bankruptcy trust claim transparency legislation similar to the one in Kansas. *See* Mich. H.B. 5456 (Reg. Sess. 2018) (codified at Mich. Code Ann. §§ 600.3010–.3016). This new law requires that “[n]ot later than 180 days before the initial date set for the trial of an asbestos action,” a plaintiff must provide the court and parties with a sworn statement indicating that all asbestos trusts claims that can be made have been completed and filed. The plaintiff must also provide the parties with copies of all trust claims materials, and those materials will be deemed admissible at trial.

E. Missouri

Missouri amended its Transparency in Private Attorney Contracting (TiPAC) law, originally adopted in 2011, to establish clear limits on the amount private attorneys may recover under a contingency fee agreement with the state. *See* Mo. H.B. 1531 (Reg. Sess. 2018) (codified at Mo. Rev. Stat. § 34.378). The legislation limits the contingency fee based on the amount of the state’s recovery, excluding any amount attributable to a fine or civil penalty.

Missouri also enacted Business Premises Safety Act legislation to reduce liability for landowners. *See* Mo. S.B. 608 (Reg. Sess. 2018) (codified at Mo. Rev. Stat. §§ 537.349, 537.785, 537.787). The Act provides that a person owning or controlling real property is not subject to liability for the injury of a trespasser substantially impaired by alcohol or a controlled substance, unless the land possessor’s “willful and wanton misconduct” is the proximate cause of the harm. The Act also states that a business is responsible for criminal or harmful acts on its property only when it knows or has reason to know that such acts are likely to be committed and can prevent the crime. The law provides businesses with additional common-sense affirmative defenses for such injuries.

F. North Carolina

North Carolina enacted asbestos bankruptcy trust claim transparency legislation similar to those in Kansas and Michigan. *See* N.C. S.B. 470 (Reg. Sess. 2018) (codified at N.C. Gen. Stat. § 1A-1, Rule 26(b) (2a)). Within 30 days of filing a civil action for asbestos-related personal injuries, a plaintiff must provide the parties with “a sworn statement indicating that an investigation of all bankruptcy trust claims has been conducted and that all bankruptcy trust claims that can be made by the plaintiff have been filed.” The plaintiff must also produce copies of all trust claims materials. If a defendant has a reasonable belief that the plaintiff can file additional asbestos trust claims,

the defendant may move the court for an order to stay the action until the plaintiff files the additional trust claims. The law also provides for the admissibility of asbestos trust claims materials.

G. Ohio

The Ohio legislature rebuffed another American Law Institute (ALI) project. At the ALI’s 2018 Annual Meeting, the organization approved a proposed final draft of a new Restatement of the Law, Liability Insurance. The project has been controversial because several provisions expand liability without being grounded in existing court rulings. *See* W.J. Kennedy, ‘Wacko’: Insurance Law Project Puts Spotlight on American Law Institute’s Direction, FORBES.COM, Aug. 1, 2017; *see also* Tiger Joyce, Editorial, Tort Lawyers Take Over the American Law Institute, WALL ST. J., June 29, 2017. Ohio enacted legislation stating that this Restatement does not constitute the public policy of the state. *See* Ohio S.B. 239 (Reg. Sess. 2018) (codified at Ohio Rev. Code § 3901.82).

H. Vermont

Governor Phil Scott vetoed two bills that would have expanded civil liability. First, he vetoed legislation that would have created a broad new cause of action for medical monitoring. Under this bill, someone with no injury from exposure to a toxic substance could sue the manufacturer, employer or other company for medical monitoring. *See* Vt. S. 197 (Reg. Sess. 2018). Scott explained that such individuals “may have an indistinguishable change in risk compared to the general public,” such that it is inappropriate to award them “unlimited medical monitoring, without any proof that a medical condition is even likely to develop.” Second, Scott vetoed a bill that would have voided liability waivers by establishing a presumption of unconscionability with respect to contracts that limit an individual’s remedies or ability to pursue a claim. *See* Vt. S. 105 (Reg. Sess. 2018). This year, Scott received the U.S. Chamber Institute for Legal Reform’s State Leadership Award “in appreciation of his key role in improving the business climate of Vermont by vetoing liability-expanding bills during the 2018 legislative session.”

I. West Virginia

West Virginia enacted venue reform legislation to curb forum-shopping abuse. *See* W. Va. H.B. 4013 (Reg. Sess. 2018) (codified at W. Va. Code §§ 6-9A-6, 14-2-2a, 56-1-1). Under the new law, a nonresident plaintiff may not bring a legal action in the state unless all or a substantial part of the acts or omissions giving rise to the claim occurred in West Virginia. The venue law provides an exception in situations

where a nonresident’s claim cannot proceed where the action arose because the local court cannot obtain jurisdiction over the defendant, unless the action is time-barred there. In addition, the law provides that in multiple plaintiff cases, each plaintiff must independently establish proper venue.

J. Wisconsin

Wisconsin enacted a comprehensive civil litigation reform bill to address, among other things, discovery, third-party litigation funding and class actions. *See Wis. A.B. 773 (Reg. Sess. 2018)*. The discovery reforms are among the first adopted at the state level to ensure that discovery is “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” A court may also shift the cost of discovery to the requesting party, limit discovery of electronically stored information and limit the length and amount of depositions and interrogatories. Other bill provisions require disclosure of any agreement in which a third-party funder receives a contingency fee on any recovery, provide a right to interlocutory appeal of class certification decisions, reduce the statute of limitations for certain claims and adjust interest rates for overdue claims. •

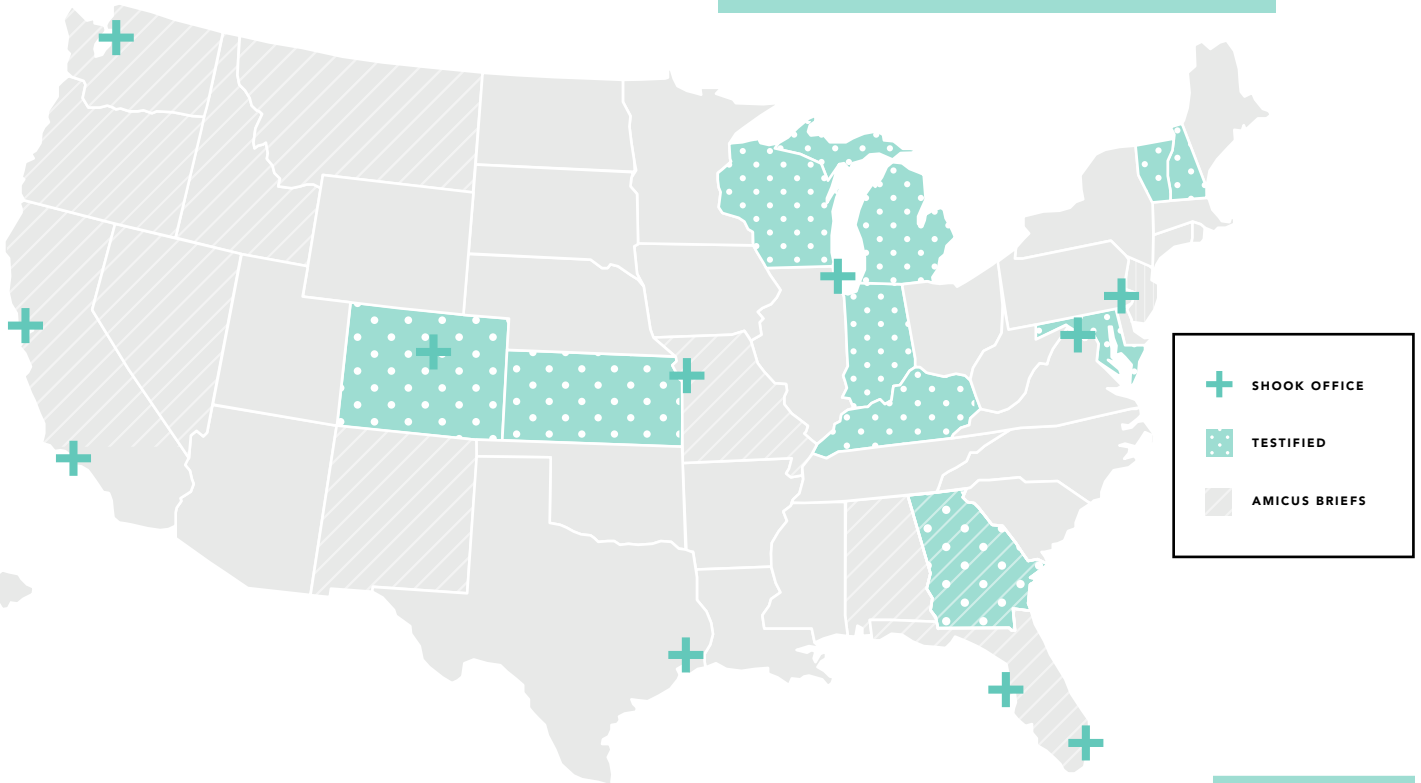
CIVIL JUSTICE

2018

STATE LEGISLATIVE TESTIMONIES

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- ASBESTOS TRUST CLAIM TRANSPARENCY + MEDICAL CRITERIA
- APPEAL BOND REFORM
- PUNITIVE DAMAGES REFORM
- SUCCESSOR ASBESTOS-RELATED LIABILITY REFORM
- NONECONOMIC DAMAGES
- REVIVING TIME-BARRED CLAIMS
- MEDICAL MONITORING CAUSE OF ACTION
- MARKET SHARE LIABILITY
- VENUE REFORM

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[BACK TO TOC](#)

U.S. Supreme Court Rulings

NLRB v. Murphy Oil USA, Inc.

The Supreme Court heard a trilogy of cases over whether pre-dispute arbitration agreements in employment contracts can bar class actions. The National Labor Relations Board (NLRB) argued that such clauses were barred under the collective bargaining powers of employees. The Court, in a 5-4 decision, held that pre-dispute arbitration agreements providing for individualized proceedings must be enforced pursuant to the Federal Arbitration Act (FAA).

China Agritech, Inc. v. Resh

In the 1970s and 1980s, the Supreme Court created an equitable tolling doctrine to extend the deadlines for lawsuits should a class action fail. It held that individuals that would have been members of a class could wait to see if the class would succeed before filling their own claims, even if the statute of limitations would have expired during the pendency of the class action. Here, the Court, in a unanimous decision, held that this equitable tolling doctrine applies only to later-filed individual actions—not later-filed class actions.

Jesner v. Arab Bank, PLC

The Supreme Court, in a 5-4 decision, held that common law liability under the Alien Tort Statute (ATS) does not extend to a foreign corporate defendant. U.S. citizens who were victims of terrorist attacks in Israel, the West Bank and Gaza sued the Arab Bank for maintaining funds it knew would be used to fund terrorism. The Court explained that the purpose of the ATS was to avoid foreign-relations issues by ensuring that federal courts would hear lawsuits from foreign nationals alleging that U.S. companies violated international law. Allowing the U.S. to hear cases against foreign companies would have the opposite effect, creating diplomatic tensions.

Cyan Inc. v. Beaver County Employees Retirement Fund

The Supreme Court, in a unanimous decision, held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) does not strip state courts of their long-standing jurisdiction to adjudicate class actions brought under the Securities Act of 1933. Violations of the 1933 Act, which require public companies to publish accurate disclosures of relevant information, can be enforced in both state and federal courts. By contrast, the Court found that Congress gave federal courts exclusive jurisdiction over the Securities Exchange Act of 1934.

Digital Realty Trust, Inc. v. Somers

The Supreme Court considered whether the anti-retaliation provision for whistleblowers in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 extended protection to individuals who did not report the alleged misconduct to the Securities Exchange Commission (SEC). In a unanimous decision, the Court answered “no.” The Dodd-Frank Act protects only those who report alleged misconduct to the SEC. The Supreme Court decision upholds the Act’s purpose to aid the SEC’s enforcement efforts by providing incentives for people to report violations to the SEC.

National Association of Manufacturers v. Department of Defense

The Clean Water Act grants federal district courts and courts of appeals jurisdiction over different parts of the Act. After the Obama Administration issued the “Clean Water Rule,” which is also known as the Waters of the United States Rule, many challenges were filed against the Rule. It was unclear whether the challenges needed to be filed in district or appellate court. The Supreme Court, in a unanimous decision, held that challenges to the Rule must be filed in district court.

Merck Sharp & Dohme Corp. v. Albrecht (Cert. Granted/Case Undecided)

On July 27, 2018, the Supreme Court granted certiorari in a case where it will consider the preemptive effect of Food and Drug Administration (FDA) decisions on state law failure-to-warn claims. Previously, the Supreme Court held that FDA determinations preempt such cases when there is clear evidence that the FDA would not have approved the changes to the warning sought in the litigation. Here, the FDA rejected the drug manufacturer’s proposal to warn about the risk after being provided with the relevant scientific data. The Court will decide whether, in such situations, the case can go to a jury to determine why FDA rejected the proposed warning. The case will be decided this year.

ConAgra Grocery Products Co. v. California (Cert. Denied)

In 2018, the Supreme Court denied review in a case closely followed by the business community because of the expansive liability theories at play. The California Court of Appeal allowed counties to subject former lead paint manufacturers to liability under public nuisance theory for promoting and selling lead paint for use in homes even though it was common knowledge at the time that lead paint could be hazardous. The California court also allowed three remaining lead paint and pigment manufacturers to be jointly and severally liable for all of the lead paint in those counties, regardless of whether their paint was in any particular home. The California Supreme Court and the U.S. Supreme Court denied review, and there is concern that this formula could be replicated against any product with known or knowable risks.

FCA US LLC v. Flynn (Cert. Denied)

The Court also denied review in a case involving the standards for interlocutory appeal of a class certification order. The District Court certified the class action against Chrysler involving diminution of value claims over the perceived risk that its vehicles were hackable. A couple of researchers hacked into the system in a laboratory, and Chrysler recalled the product and closed the port the researchers found. No one’s vehicle was actually hacked and nobody suffered any injury. Chrysler sought interlocutory appeal because granting the class certification was manifestly erroneous given the Court’s recent rulings that plaintiffs who are not injured, or where no such injury is imminent, have no standing in federal court. The Court’s decision to not review this case could lead to more improper no-injury class actions. •

State Supreme Court Rulings

Arkansas Supreme Court Invalidates Tort Reform Ballot Initiative (*Martin v. Humphrey*, 2018 Ark. 295)

The legislature proposed a constitutional amendment to limit noneconomic and punitive damages to \$500,000 and cap attorney contingency fees to one-third of any recovery. It also sought to empower the state legislature to promulgate court rules of pleading, practice or procedure and to amend or annul rules created by the Arkansas Supreme Court. A citizen filed suit to block the amendment, arguing it violated the single subject rule of the Arkansas constitution, which requires the subsections of each new proposed amendment to be germane to each other or to a general purpose. The Arkansas Supreme Court ruled for the citizen, concluding the provisions regarding attorney's fees were not "reasonably germane" to the "legislature's ability to exert influence over judicial rule-making authority."

Arizona Supreme Court Rules that Employers Owe No Duty to Protect Public from "Take Home" Exposures to Asbestos (*Quiroz v. ALCOA, Inc.*, 2018 WL 2170175)

The family of a man who died from mesothelioma, allegedly caused by secondary exposure to asbestos fibers from the father's soiled work clothes, brought a negligence action against the father's former employer. The family argued the employer owed a duty

to the decedent to warn about the foreseeable risk of secondary asbestos exposure. The employer sought summary judgment on the basis that the state's common law expressly rejects the concept of foreseeability in determining a duty and that no special relationship or public policy supported such a duty. The Arizona Supreme Court agreed with the employer, finding the "employer owed no duty to the public regarding secondary asbestos exposure."

California Supreme Court Rules that Evidence of Industry Customs May Be Admissible in Vehicle Design Defect Actions (*Jae Kim v. Toyota Motor Corp.*, 2018 WL 4057248)

A motorist lost control of his vehicle, veered off a cliff and was seriously injured. He brought a design defect action against the vehicle manufacturer, alleging it failed to include "Vehicle Stability Control" (VSC) as a standard feature. At trial, the jury heard evidence that no vehicle manufacturer at the time included VSC as standard on the motorist's class of vehicle and returned a verdict for the manufacturer. The motorist appealed, arguing that the risk-utility test does not include industrywide custom and practices as factors. The California Supreme Court determined that industry custom, just as with state of the art technology, are factors that the jury may consider in whether a design is defective.

Delaware Supreme Court Overrules Case Law to Recognize Supplier Duty to Warn Worker’s Family Members about “Take-Home” Asbestos Exposure (*Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*, 2018 WL 3134525)

The estate of a woman who died from asbestos-related disease allegedly caused by exposure to asbestos from laundering her husband’s soiled work clothes sued the suppliers of asbestos products where the husband worked. The estate argued that the suppliers owned a duty to warn the wife about the risks of “take-home” asbestos exposure because it was foreseeable she would come into contact with asbestos and suffer injury. The trial court rejected this claim on the basis that Delaware Supreme Court precedent plainly rejected such a duty. The Delaware Supreme Court overruled its earlier case law and determined that the estate could bring a “take-home” asbestos injury claim against the suppliers.

Florida Supreme Court Invalidates State Legislature’s Adoption of *Daubert* Expert Evidence Standard and Reaffirms Adherence to the *Frye* Standard (*DeLisle v. Crane Co.*, 2018 WL 5075302)

A former industrial worker diagnosed with mesothelioma filed a personal injury action against manufacturers of asbestos-containing products and of the cigarettes he smoked and was awarded \$8 million. The defendants challenged the worker’s experts under a 2013 statute adopting the *Daubert* standard for screening expert witness testimony. The court of appeals overturned the verdict under *Daubert*, ruling the worker’s experts should not have been allowed to testify. The Florida Supreme Court reinstated the verdict, holding that the Florida Legislature’s adoption of the federal *Daubert* standard for the admission of expert evidence unconstitutionally intrudes on the Florida Supreme Court’s rule-making authority. It also affirmed its adherence to the *Frye* expert evidence standard.

Hawaii Supreme Court Rejects Federal “Plausibility” Pleading Standard in Favor of Traditional “Notice” Pleading (*Bank of America, N.A. v. Reyes-Toledo*, 2018 WL 4870719)

A bank obtained summary judgment in a foreclosure action against a homeowner. On appeal, the Hawaii Supreme Court vacated the foreclosure decree and

remanded the case for a determination of whether the trial court erred by dismissing the homeowner’s counterclaim before granting summary judgment to the bank. The mid-level appellate court upheld the counterclaim’s dismissal. The homeowner appealed, arguing the appeals court applied the wrong pleading standard to the counterclaim. The Hawaii Supreme Court vacated the appeals court judgment, holding that the adoption of the “plausibility” pleading standard is contrary to the court’s well-established historical tradition of liberal “notice” pleading and undermines citizen access to the courts and to justice.

Hawaii Supreme Court Holds that Estate of Unborn Child Can Recover Hedonic Damages Under State Survival Statute for Child’s Loss of Enjoyment of Life (*Castro v. Melchor*, 2018 WL 1282418)

The estate of an unborn child can recover hedonic damages in a negligence action for the child’s loss of enjoyment of life under Hawaii’s survival statute. An inmate who had a stillbirth while incarcerated sued correctional facility nurses, the state Department of Public Safety, and the state, alleging they did not provide her with timely and adequate medical care. In a bench trial, the court awarded the estate \$250,000 in hedonic damages for the stillborn child’s loss of enjoyment of life. The nurses and state appealed, arguing hedonic damages were not available under the state’s survival statute. The Hawaii Supreme Court affirmed, finding that hedonic damages were available under the survival statute and could apply to the loss of enjoyment of life of a viable fetus.

Massachusetts High Court Limits “Innovator Liability” Theory for Subjecting Branded Drug Manufacturers to Liability for Injury to a Patient Taking Only a Competitor’s Generic Drug When Reckless Conduct Is Involved (*Rafferty v. Merck & Co., Inc.*, 2018 WL 1354064)

A patient prescribed a generic drug to treat an enlarged prostate allegedly suffered sexual dysfunction and sued the manufacturer of the branded version of the drug for inadequate warnings. The manufacturer sought to dismiss the suit on the basis that it did not owe a duty of care to consumers of its competitor’s generic drug. The patient argued that there is such a duty because federal drug law requires the generic to carry the same warning as the branded drug. The Massachusetts high court upheld this decision with respect to claims sounding in negligence,

but reversed it for situations in which the branded manufacturer recklessly failed to adequately update its warnings.

Massachusetts High Court Upholds State Ban on Corporate Contributions to Political Campaigns (*1A Auto, Inc. v. Dir. of Office of Campaign and Political Fin.*, 2018 WL 4224259)

Two businesses sued the Massachusetts Office of Campaign and Political Finance (OCPF), challenging the constitutionality of a state statute prohibiting corporate contributions to political campaigns. The businesses argued that the ban violated their free speech and equal protection rights under the First Amendment. The OCPF moved for summary judgment, arguing the ban was a valid exercise of legislative authority. The state high court agreed with the OCPF, finding that Massachusetts' ban on corporate contributions to political campaigns, parties and candidate-focused political action committees does not violate free speech or equal protection rights under the First Amendment.

Mississippi Supreme Court Finds Hospital Liable for Discharged Patient's "Foreseeable" Suicide (*Singing River Health Sys. v. Vermilyea*, 2018 WL 1323581)

A man admitted to a hospital for psychiatric evaluation after threatening to jump off a bridge committed suicide by jumping off a bridge minutes after being discharged. His wife brought a medical negligence action against the hospital and emergency physicians, alleging they breached their duty to safeguard the decedent by prematurely discharging him. The hospital and physicians sought to dismiss the claim, arguing that recovery against a third party for another's suicide is limited to narrow circumstances in which the third party acts intentionally to cause an "irresistible impulse" to commit suicide. The Mississippi Supreme Court held that a hospital's duty to safeguard patients from known or reasonably apprehensible dangers includes guarding against a patient's suicide where that risk is foreseeable. It then concluded the hospital breached its duty by negligently failing to perform an adequate suicide risk assessment given the foreseeable risk of suicide.

Missouri Supreme Court Upholds Constitutionality of State's Affidavit of Merit Requirement for Medical Malpractice Claims (*Hink v. Helfrich*, 545 S.W.3d 335 (Mo. 2018))

A patient brought a medical negligence action against his surgeon for injury during a gallbladder removal procedure that required a second surgery. The surgeon sought to dismiss the action on the basis that the patient failed to submit an affidavit of merit by a qualified medical provider as required under the state's medical malpractice statutes. The trial court agreed with the surgeon and dismissed the suit. The patient appealed, alleging the affidavit of merit requirement violated the "open courts," right to trial by jury, and separation of power provisions of the Missouri Constitution. The Missouri Supreme Court rejected each of these arguments, finding the statute a lawful exercise of the legislature's authority.

New Jersey Supreme Court Adopts *Daubert* Expert Evidence Standard in Interpreting State Rules of Evidence (*In re Accutane Litig.*, 2018 WL 3636867)

Claimants brought a mass tort action against a pharmaceutical manufacturer alleging a causal connection between its acne medication and Crohn's disease. The manufacturer challenged the adequacy of the claimants' expert causation evidence, asserting it was unreliable and did not meet generally accepted scientific standards. The manufacturer also pointed to a number of epidemiological studies, all of which concluded that no causal relationship existed between the drug and Crohn's disease. The New Jersey Supreme Court, siding with the manufacturer, formally adopted the factors included in the federal *Daubert* expert evidence standard.

North Dakota Supreme Court Upholds Constitutionality of State Tort Claims Act Cap on Damages (*Larimore Pub. Sch. Dist. No. 44 v. Aamodt*, 2018 WL 1371248)

Parents of nine children injured in a school bus collision brought a negligence action against the school district. The school district asserted that the upper limit of its potential liability under the state's damages cap was \$500,000 and deposited \$500,000 with the trial court. The parents challenged the constitutionality of the cap, arguing it violated the open courts, right to jury trial, equal protection, and prohibited "special laws" provisions of the state Constitution. The North Dakota Supreme

Court held that the cap on damages for tort claims against a political subdivision, which limits damages to \$250,000 per person and \$500,000 for injury to three or more persons in a single occurrence, is constitutional.

Oklahoma Supreme Court Affirms Scope of Recovery for Negligent Infliction of Emotional Distress Is Limited to “Direct Victims,” Not Bystanders (*Ridings v. Maze*, 2018 WL 1166611)

The parents of a child struck by a car after exiting a school bus brought a negligent infliction of emotional distress (NIED) action for themselves and their other children, who had witnessed the accident, against the car’s driver, the driver’s parents and the school. The driver and school sought to dismiss the suit on the basis that recovery for NIED under Oklahoma law is limited to “direct victims” who were “directly physically involved in the accident.” The Oklahoma Supreme Court agreed, reaffirming that recovery for NIED under state law is limited to “direct victims” who are “directly physically involved in the accident” and share a close personal relationship with the accident victim—not bystanders.

Oregon Supreme Court Permits “Wrongful Birth” Claim by Parents of Child Born with Genetic Disorder (*Tomlinson v. Metropolitan Pediatrics, LLC*, 362 Or. 431)

Parents of a child born with a genetic disorder filed a medical malpractice action against the doctors and hospital for “wrongful birth.” They claimed they would not have had their second son if their health care providers had timely diagnosed and informed them of the likelihood of the disorder. The Oregon Supreme Court held that parents of a child born with a genetic disorder due to alleged medical malpractice may bring a tort action for “wrongful birth.” It stated the health care providers’ alleged failure to “reasonably protect the parents’ separate interests in avoiding the reproductive risks” of a child born with a genetic disorder was a cognizable claim for negligence.

Amicus Filings

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AMICUS BRIEFS
FILED



7

U.S. SUPREME
COURT

18

STATE HIGH COURT

4

CIRCUIT COURT
OF APPEALS



2

STATE LOWER
COURTS

Virginia Supreme Court Recognizes Employer Duty of Care to Family Members of Employees for “Take Home” Asbestos Exposures (*Quisenberry v. Huntington Ingalls Inc.*, 2018 WL 4925349)

The estate of a woman who died from mesothelioma from exposure to asbestos while laundering her father’s work clothes brought a personal injury action against the shipyard where her father worked. The estate argued the shipyard was negligent in failing to exercise reasonable care in educating and warning workers not to wear contaminated work clothes home. The shipyard moved to dismiss the suit, arguing it owed no duty to the employee’s family members with whom it had no relationship. A federal district court certified this question to the Virginia Supreme Court. The state high court held that employers owe a duty to employee family members when the employer’s conduct reaches beyond the workplace to those affected family members. The court based its holding on common law tort principles, and likened the case to a farmer’s duty to prevent his cows from wandering onto nearby roadways and posing safety hazards to motorists.

West Virginia High Court Rejects Innovator Liability Theories Against Branded Drug Company for Harms to Patients Taking a Generic Drug (*McNair v. Johnson & Johnson*, 2018 WL 2186550)

A patient who developed acute respiratory distress after taking a generic version of an antibiotic sued the manufacturer of the branded version of the drug for failure-to-warn and negligent misrepresentation. The branded drug manufacturer sought summary judgment, arguing that it could not be subject to liability for a competitor’s product it did not make or sell. The state high court agreed, stating that “there is no cause of action in West Virginia for failure to warn and negligent misrepresentation against a brand-name drug manufacturer when the drug ingested was produced by a generic drug manufacturer.”

Wisconsin Supreme Court Upholds Constitutionality of State Medical Malpractice Cap on Noneconomic Damages (*Mayo v. Wis. Injured Pat.’s and Fam.’s Comp. Fund*, 2018 WL 3132486)

A patient who had all four of her limbs amputated due to an untreated infection from an emergency room visit sued the treating hospital for medical malpractice. The suit went to trial, where the patient and her husband were awarded more than \$25 million in damages, including \$15 million in noneconomic damages. After the verdict, the hospital moved to reduce the noneconomic damages award to \$750,000, consistent with the state’s statutory cap. The trial court denied the motion, holding that the damages cap was unconstitutional. The Utah Supreme Court concluded the noneconomic damages cap was neither facially unconstitutional nor unconstitutional as applied to the patient. Rather, the court held that the cap was rational legislation to address the scope of medical malpractice damages. •



American Law Institute

www.ali.org

The American Law Institute (ALI) is the most influential private organization in the development of American law by courts. For nearly a century, the ALI has produced scholarly work products on a wide range of subjects in furtherance of the organization's mission to promote clarity and uniformity in the law. Judges often rely on ALI Restatements of Law when deciding issues of common law because of the ALI's reputation for "restating" the most thoughtful and balanced legal rules on a given topic. In 2018, courts cited Restatements more than 3,000 times.

A key reason ALI Restatements and other products influence courts is because the organization's membership is composed of distinguished judges, law professors and practitioners. The ALI also limits its total membership to help maintain a balance with respect to the viewpoints reflected in scholarship. There has been concern voiced recently that some ALI projects have advocated legal reform, rather than just restating the law.

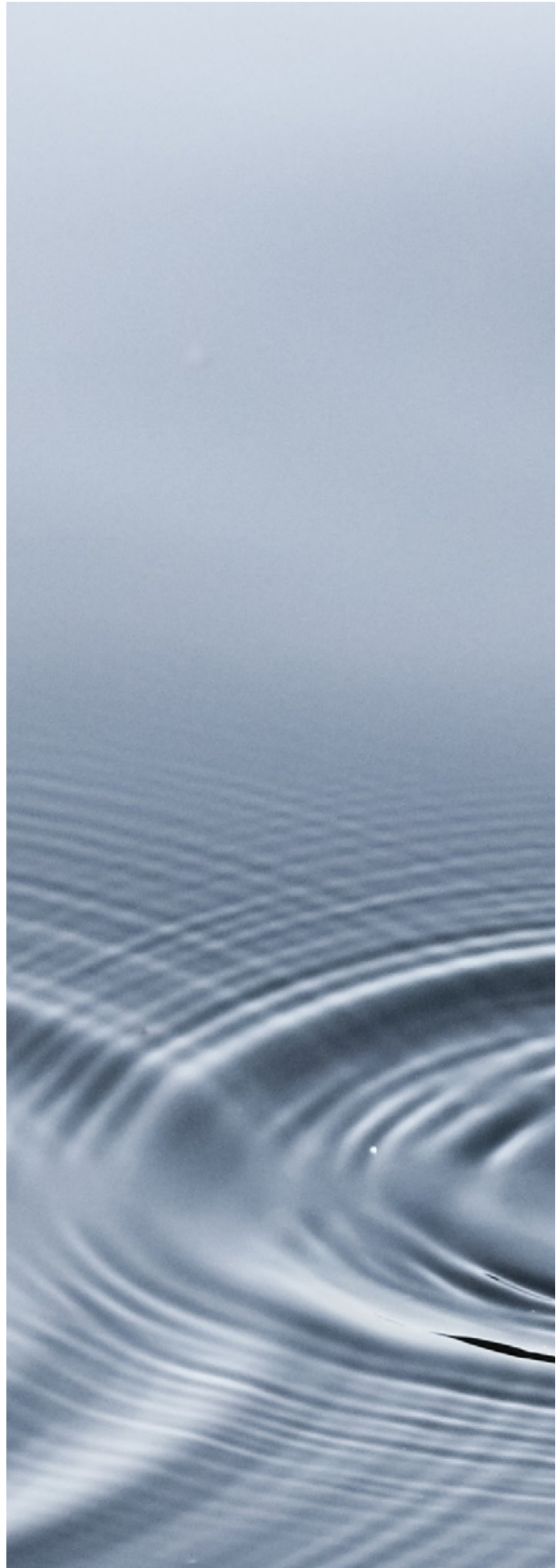
The recently completed and pending ALI Restatements of significant interest to members of the business community include:

- Restatement of the Law, Liability Insurance addresses topics such as liability insurance contract rules, management of potentially insured liability claims, and principles regarding the risks insured, and was completed at the ALI's 2018 Annual Meeting.
 - Restatement of the Law, Consumer Contracts proposes to set forth rules governing agreements between businesses and consumers, and is scheduled to be completed at the ALI's Annual Meeting in May 2019.
 - Restatement (Third) of Torts: Intentional Torts to Persons addresses intentional torts such as assault, battery, and false imprisonment as well as related concepts such as consent, self-defense, and other privileges. The project is still in its formative stages.
 - Restatement of the Law, Copyright proposes to "restate" different judicial interpretations of the Copyright Act and is the first ALI project directed at restating the application of a federal law, rather than state common law. The project is in its formative stages.
 - Restatement of the Law, Property addresses key issues of property ownership and property torts, including subterranean rights in the era of fracking and the torts of public and private nuisance. It is still in its formative stages.
- In addition to Restatements, the ALI has a number of pending Principles of Law projects that may be of interest, including:

- Restatement (Third) of Torts: Liability for Economic Harm addresses topics such as unintentional infliction of economic loss, negligent misrepresentation, public nuisance, interference with contract, and civil conspiracy, and was completed at the ALI's 2018 Annual Meeting.

- Principles of the Law, Data Privacy proposes to develop rules for businesses with respect to the collection, use, and sharing of personal data, and is expected to be completed at the ALI's Annual Meeting in May 2019.
- Principles of the Law, Compliance, Risk Management and Enforcement addresses issues and best practices regarding corporate compliance and enforcement. It is still in its formative stages, with key issues such as self-reporting and corporate compliance defenses being debated.
- Principles for a Data Economy proposes to develop rules for transactions in data as assets and tradeable items. The project was initiated in 2018, so it is likely many years from completion.

Shook Partners Victor Schwartz, Mark Behrens and Phil Goldberg, as well as Of Counsel Chris Appel, are active members of the ALI. If you would like to learn more about these projects, please let us know. •



Civil Justice Groups Update

AdvaMed

AdvaMed is the world's largest association of medical device and diagnostics makers. In 2018, AdvaMed advocated for numerous policy changes that would curb abuses that life sciences companies face in the civil justice arena. For example, AdvaMed partnered with Shook to file an *amicus* brief in the Utah Supreme Court, in *Burningham v. Wright Medical*, to urge the court to categorically adopt the unavoidably unsafe exception to strict liability ("comment k") for medical devices that went through either the 510(k)-cleared or PMA-approval process. AdvaMed spearheaded a coalition of leading industry groups including the National Association of Manufacturers, U.S. Chamber, American Tort Reform Association, PhRMA, and BioUtah. AdvaMed also stepped up its efforts on other civil justice reform fronts, including fighting a trend in trial courts in which device manufacturers are prohibited from introducing evidence at trial that they complied with FDA's processes and regulations for product clearance and approvals.

American Legislative Exchange Council

www.alec.org/issue/lawsuit-reform

ALEC is the nation's largest membership association for state legislators interested in limited government and free markets. The Civil Justice Task Force is at the forefront of the efforts to restore fairness and predictability to the civil justice system by protecting

the legal system from frivolous litigation that threatens reliability, strains judicial resources and hinders businesses' ability to innovate, employ and engender economic prosperity. In 2018, ALEC and ALEC Action were actively engaged with legislators to promote such lawsuit reform. ALEC staff monitored about 60 bills based on ALEC lawsuit reform model policy and a handful of problematic bills. Task Force lawsuit reform leadership and staff held ALEC Issue Briefings in two states, made presentations in eight states, worked with ALEC Action to communicate with legislators in a dozen states and sent 30 issue alerts in 10 states dealing with lawsuit reform proposals. In sum, the ALEC Task Force on Civil Justice educated more than 400 lawmakers in 2018 on lawsuit reform.

American Tort Reform Association

www.atra.org

ATRA is the only independent national organization dedicated exclusively to liability reform. Its members include nonprofit organizations and small and large companies, as well as trade, business and professional associations from the state and national level. In 2018, ATRA facilitated state civil justice reforms in Idaho, Kansas, Kentucky, Missouri, Michigan, North Carolina, West Virginia and Wisconsin. These new state statutes will prevent forum shopping, reduce discovery expenses, provide an interlocutory appeal of class certification orders, require

transparency when states hire private contingency fee lawyers and more. In 2018, ATRA released an Economic Impact Study that analyzed the excessive tort costs on state economies in California, Florida, Illinois, Louisiana, Missouri and West Virginia. ATRA also released a Trial Lawyer Advertising study that tracked spending in seven different cities across the country, and its signature annual Judicial Hellholes Report. Over the year, ATRA filed 29 amicus briefs in the U.S. Supreme Court, five federal circuits and six state high courts.

Institute for Legal Reform – U.S. Chamber

www.instituteforlegalreform.com

ILR is a campaign of the nation’s business community to promote civil justice reforms and mitigate liability risks through legislative, political, judicial and educational initiatives in the federal, state and international arenas. In 2018, ILR focused on reducing mass tort and class action abuses, as well as disproportionate government enforcement fines and penalties. ILR’s state legislative reforms ranged from requiring transparency in asbestos litigation to the hiring of outside counsel by state attorneys general. ILR also led federal legislative reforms such as the Fairness in Class Action Litigation Act and PROTECT Asbestos Victims Act, while working with federal agencies to pursue administrative solutions to abusive litigation. For example, ILR secured rulings from the Federal Communications Commission that would contain the explosion of “gotcha” class actions under the Telephone Communications Protection Act. Internationally, ILR is both fighting the spread of U.S.-style litigation and engaging in legal reform efforts in key jurisdictions, including Europe, Canada and Australia. For example, ILR is engaged in disrupting and radically improving a pending EU legislative proposal on class action. ILR is also working to curb the global growth of third-party litigation funding.

International Association of Defense Council

www.iadclaw.org/about/members/?committeeid=34

IADC’s Civil Justice Response Committee works to establish a nationwide information network that promotes the rapid dissemination of information about legislation, rulemaking, judicial selection and key elections likely to affect civil litigation and liability laws, in order to give IADC members and their clients timely opportunities to participate in these processes armed with information that can affect

the outcome of the debate or controversy. The IADC is a 2,500-member, invitation-only, peer-reviewed organization of distinguished corporate and insurance defense attorneys and insurance executives. In 2018, the IADC’s Civil Justice Response Committee filed comments to improve a proposed amendment to FRCP Rule 30(b)(6), persuaded the Mississippi Supreme Court not to adopt a FRCP Rule 23-like class action procedure for Mississippi state courts and published a series of articles highlighting the importance of state asbestos bankruptcy trust transparency laws and recent U.S. Department of Justice activities to combat fraud and abuse in the asbestos trust system. The Committee also holds monthly calls and engages in programming to further the interests of IADC members and their clients.

Law & Economics Center at George Mason Law School

www.masonlec.org

The George Mason University Law & Economics Center conducts research and education on the legal and policy issues confronting our nation. The Center believes that “judges and policymakers who understand economics will be more likely to make sound decisions that support the rule of law, thereby advancing innovation, job creation, and economic growth.” To promote that goal, the LEC holds dozens of educational programs each year designed to teach legal professionals how economics can be used in the analysis of legal questions, and why they must consider the unintended consequences and perverse incentives created by bad legal decisions. In 2018 alone, nearly 400 federal and state judges and more than 200 state AG staff attorneys attended at least one of the LEC’s educational programs covering a broad range of civil justice issues. The Center also hosts a monthly briefing for congressional staff on hot topics in tort litigation.

Lawyers for Civil Justice

www.lfcj.com

LCJ is a national coalition of leading corporate counsel, defense bar practitioners and law firms focused on restoring and maintaining balance in the civil justice system, particularly through assuring fair application of the Federal Rules of Civil Procedure. In 2018, LCJ focused on reforming multidistrict litigation practices, filing comments with the Federal Civil Rules Advisory Committee seeking six rule changes for MDLs. These include (1) mandating early vetting of claims, (2) allowing appellate review of dispositive motions, (3) establishing a consent procedure

for bellwether trials, (4) treating master complaints as pleadings, (5) providing a common standard for joinder, and (6) requiring disclosure of third-party litigation funding. LCJ also advocated for reforming Rule 30(b)(6) depositions, clarifying expert evidence standards, assuring proportionality in discovery and curbing class action abuse. It also filed several *amicus* briefs—including with the U.S. Supreme Court in *Frank v. Gaos*, arguing that Rule 23’s requirement that a settlement binding on class members be “fair, reasonable, and adequate” cannot be satisfied by a *cy pres* award when there is no direct relief to class members.

National Association of Manufacturers’ Center for Legal Action

www.nam.org/The-Center-For-Legal-Action

The MCLA is the leading voice of manufacturers in the courts. For decades, the NAM has successfully litigated on behalf of the 12 million men and women who make things in the U.S. and works to rein in regulatory overreach, protect hard-fought legislative gains and ensure a level playing field for manufacturers. In 2018, the MCLA’s robust *amicus* brief program netted significant victories on innovator liability, packaging class actions, evidentiary standards, and vicarious liability and single exposure theories in asbestos cases, among others. The MCLA also prevailed 9-0 in the U.S. Supreme Court on a significant procedural question hindering its legal challenges to the EPA’s 2015 “Waters of the United States” rule that clears the path for the appropriate court to decide its legal challenge to the rule. It also scored victories with the Occupational Safety and Health Administration (OSHA), implementation of the Toxic Substances Control Act (TSCA), key labor and employment issues, and issues before the EPA. NAM also established the Manufacturers Accountability Project to advocate against efforts to subject manufacturers to expansive liability for global climate change.

National Federation of Independent Business

www.nfib.com/foundations/legal-center

NFIB’s Small Business Legal Center is the voice for small business in the nation’s courts and the legal resource for small business owners nationwide. It partners with law firms, including Shook’s Public Policy Group, to advocate for legal reform nationwide. This includes legislation to abolish joint-and-several liability and cap excessive punitive damages. NFIB’s Legal Center also has pursued precedent-setting cases

to stop small businesses from becoming victimized by frivolous lawsuits and burdensome regulations. For instance, it joined a Shook *amicus* brief, in *Air Liquid Systems v. DeVries*, to caution against extending liability to manufacturers of component parts. At the state level, NFIB joined another Shook *amicus* brief in the Pennsylvania Supreme Court case, *BouSamra v. Excela Health*, to advocate for a strong attorney-client privilege where coordination with public relations consultants is necessary to a company’s ability to defend itself against civil litigation.

PLAC

PLAC (formerly the Product Liability Advisory Council) brings together corporations and selected private practitioners specializing in regulatory compliance and litigation to analyze, understand and shape the development of the law affecting product manufacturers in important ways in the U.S. and in international jurisdictions even before a company faces litigation. Its mission is to obtain fairness and balance in the common law. For more than 35 years, PLAC has submitted *amicus* briefs in state and federal courts in cases dealing with significant aspects of product liability law. It is well known for its work in areas such as preemption, punitive damages and expert testimony. PLAC contributed its assistance to the American Law Institute in the development of the Restatement of Torts, Third: Products Liability. During 2018, PLAC briefed cases at both federal and state levels related to such issues as personal jurisdiction, innovator liability and CAFA. It was successful in several cases before the U.S. Supreme Court and closed the year with a win related to the Arizona State Supreme Court decision in *Conklin v. Medtronic*, on whether federal law preempts an Arizona common law failure-to-warn claim based on a medical device maker’s alleged failure to send adverse event reports to the FDA.

Progressive Policy Institute

www.progressivepolicy.org/category/projects/center-for-civil-justice

PPI is a center-left think tank that develops fresh proposals for stimulating U.S. economic innovation and growth. Its Center for Civil Justice recognizes that America’s civil justice system is a “public good” that should produce predictable, accurate and just results. Accordingly, it defends the integrity of the legal system from litigation abuse and efforts to bypass legislatures to make policy in the courts. In 2018, the Center participated in the Congressional Civil Justice Caucus Academy briefing on “innovator

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liability,” the name for lawsuits against branded drug companies for claims involving generic drugs. It also published numerous opinion pieces on cutting-edge legal debates, including over new locality litigation where cities and towns sue manufacturers and other companies for downstream impacts of their products regardless of the company’s fault. These suits seek either money in lieu of spending tax revenue on local infrastructure projects or to regulate products, as with the climate change tort suits. Shook’s Public Policy Group Co-Chair Phil Goldberg helped found the Center and serves as its Director.

Washington Legal Foundation

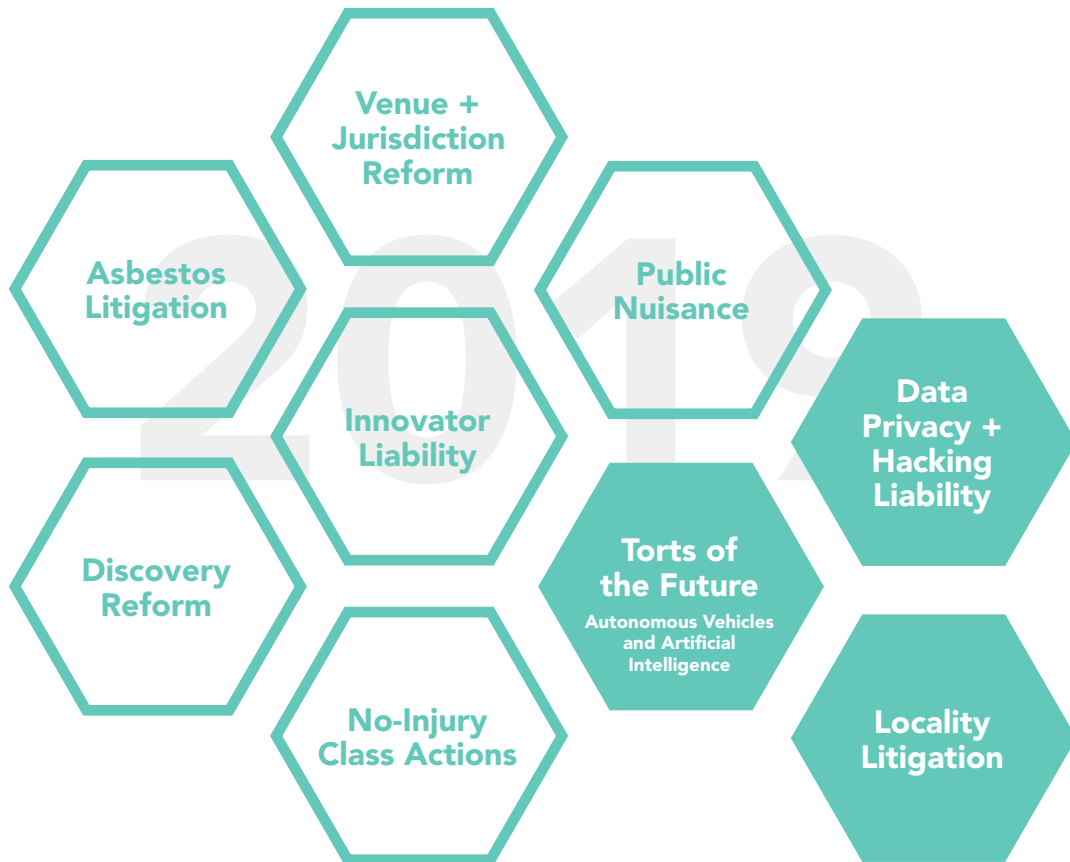
www.wlf.org

WLF is a national public-interest law firm and legal policy center. It defends American free enterprise by litigating, educating and advocating for a free market, a limited and accountable government, business civil liberties and the rule of law. In 2018, WLF filed *amicus* briefs in 13 cases with civil justice system implications in 2018, including six in the U.S. Supreme Court. The group’s briefs supported key victories in two cases involving “innovator liability,” *McNair v. Johnson* and *Dolin v. GSK*, and one from the First Circuit, *In re Asacol*, that could dramatically change nationwide class actions. Its publications included materials that actively support civil justice reform, including Shook attorneys on innovator liability and asbestos bankruptcy trust transparency. An October program and two scholarly papers advanced the cause of multidistrict litigation (MDL) rule reform. •

Liability Public Policy Trends

KEY TRENDS 2019

PUBLIC POLICY PROJECTS



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