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The Voice

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This Week's Feature

Duty and the Design Professional

by Kimberly Shields

Recent decision expands scope of duty owed to third parties claiming economic loss from design professional malpractice.

In the absence of a contract, to whom do design professionals owe a duty, and what is the scope of that duty in the context of third-party claims alleging economic loss?

In most jurisdictions, the days when an architect or engineer could successfully defend third-party claims for malpractice on the grounds of lack of privity of contract are gone. However, courts are still considering the extent of the duty owed in the context of third-party claims. Recently, California enlarged the scope of duty owed by design professionals to third-party purchasers of residential condominium units, thus widely-expanding the class of potential plaintiffs who may bring negligence claims against a design professional.

Currently, in the majority of jurisdictions such as California, Florida, North Carolina, and Maryland, absence of privity does not preclude a plaintiff from recovering economic losses from a design professional. A minority of states, however, including Illinois and Georgia, continue to hold that a design professional must have a contractual relationship with a plaintiff as a prerequisite to recovering any economic loss damages from an architect or engineer.

While several California appellate decisions have already extended architects' and engineers' duties of care to third parties in the absence of contractual privity, this past July the California Supreme Court expanded the scope of that duty. In *Beacon Residential Community Association v. Skidmore, Owings & Merrill, LLP, et al.,* (2014) 59 Cal.4th 568, the California high court found that future homeowners of residential buildings can hold principal architects liable for damages caused by design defects, even when there was an absence of any written contract between the architects and the plaintiff-homeowners. Central to the decision was the issue of whether residents of a condominium complex could state a claim against the architects for design flaws that caused overheating, cracks and other structural defects. *Id.* at 572. The architects had no contractual relationship with the homeowners, nor had they built the project or had final say over construction decisions. *Id.* at 581. The California Supreme Court unanimously held that the trial court erred in sustaining the architects' demurrer to the homeowners' negligence claim based on lack of duty. *Id.* at 588.

The court did hedge, however, saying that this duty does not raise the prospect of "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 583. Noteworthy, the fact that the architects knew up-front that the finished units would be sold as condominiums and used as residences was critical to the decision. *Id.* at 583–84.

Florida, Maryland, and South Carolina likewise follow the rule that design professionals can be held liable to third parties for non-economic damages incurred as a result of design defects under certain circumstances. *See* ; *Council of Co-Owners Atlantis Condominium, Inc. v. Whiting-Turner Contracting Co.,* (1986) 308 Md. 18, 22; *A.R. Moyer, Inc. v. Graham* (1973) 285 So. 2d 397.

In contrast, however, the Supreme Court of Illinois has held that absent a contractual relationship, a tort action will not lie against the design professional where the plaintiff has suffered only economic loss. *2314 Lincoln Park West Condominium Ass'n v. Mann, Gin, Ebel & Frazier, Ltd.* (1990) 136 Ill. 2d 302. In

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2314 Lincoln Park West, the plaintiff sought an damages from an architect for the cost of making certain repairs to the building in which the association members resided. *Id.* at 303. The architect had previously entered into an agreement with the association to develop plans and design specifications and to certify the final completion of the project. The association assumed control of the property after the project was completed. *Id.* at 305.

The Illinois high court rejected the plaintiff's argument that because an architect supplies information to be used by others, a claim for architectural malpractice absent contractual privity was proper. *Id.* at 313. In declining to adopt this reasoning, the court held that while it may be the case that an architect supplies information relied on by others, the character of that function should not be overstated. *Id.* The Illinois Supreme Court concluded that while the economic loss rule attempts to define the contours of duty, an architect's responsibilities are defined by contract, and as such, the duty should be measured accordingly. *Id.* at 315, 317.

Similarly, the Supreme Court of Indiana held that a professional engineer was not liable for purely economic loss caused by negligence, since contract law governs damages to products/services themselves and economic losses arising from the failure of the product or service to perform as expected. *Indianapolis-Marion County Public Library v. Charlier Clark & Linard, P.C.* (2010) 929 N.E. 2d 722, 727. Other jurisdictions that have declined to impose liability on design professionals for economic injuries absent a contractual agreement include Ohio, Hawaii, and New York. *See Leis Family Ltd. Partnership v. Silversword Engineering* (2012) 126 Hawaii 532, 538–39; *Floor Craft Floor Covering, Inc. v. Parma Community General Hospital Ass'n* (1990) 54 Ohio St. 3d 1, 3; *Gordon v. Holt* (1979) 65 A.D.2d 344, 349.

Going forward design professionals and their counsel should take care to understand the architects' and engineers' contractual relationships with their clients, and to pay close attention to any third-party tort exposure to which they may still be subject in their respective jurisdictions. Design professionals in states such as California, Florida, North Carolina and Maryland should be especially aware of this potential area of concern, and should familiarize themselves with the details of the controlling cases.

Kimberly Shields is a director at **Murphy, Pearson, Bradley & Feeney** in its San Francisco office. Her practice emphasizes the professional liability defense of architects, engineers, design, and construction professionals. She additionally represents public entities in contract negotiation matters as well as employment, premises, catastrophic injury and construction defect litigation. Ms. Shields is a member of the DRI Professional Liability and Women in the Law Committees.

DRI News

Register by September 24 to Save $200

The advance registration for **DRI's 2014 Annual Meeting is Wednesday, September 24**. You have just over two weeks secure your registration at the $795 rate before it increases to $995 on September 25. Don't miss your opportunity to experience world-class CLE and exciting networking opportunities that will provide you with a unique opportunity to expand your practice and grow your professional network. Download the 2014 **DRI Annual Meeting brochure** to view the complete listing of programming available this October. Don't delay, **register today!**

Registration fee includes

- Admission to all CLE programs
- Admission to all non-ticketed events
- Comprehensive CD-ROM containing course materials, speaker, and session information
- Access to the Annual Meeting feature on the DRI App
- Continental breakfast each morning
- Refreshment breaks
- Daily networking receptions including Thursday night's event at AT&T Park
- Opportunity to purchase tickets to the Awards Luncheon, Women's Networking Luncheon, and President's Gala
- Name included on the Annual Meeting attendee list and Annual Meeting feature in the DRI App if registered by September 24

Going Paperless: Adapt to Survive and Thrive, September 24 Webcast

Going Paperless: Adapt to Survive and Thrive, September 24's webcast, will feature speakers with real world experience and expertise to address software options, internal office practices that work, how to use and benefit from the electronically stored documents, and the common pitfalls and ethical problems to avoid. Efficient storage and organization, and effective utilization of, electronic documents and data are essential for firms to stay competitive. Firms that embrace this progression in the industry will keep up with their clients and their clients' expectations. Firms that do not embrace such a practice will not. Once a "paperless" practice is implemented, firms wonder how they functioned without it. Of course, implementing and utilizing such a system involves pitfalls and ethical considerations. **Register now**.

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DRI's Drug and Medical Device Litigation Primer, September 30 in Chicago

DRI's Drug and Medical Device Litigation Primer , September 30 in Chicago, has long been lauded by companies and outside counsel alike as the perfect training for junior defense lawyers. Attendees will learn in an informal classroom style from leading experts in the field about such essential topics as the applicable FDA regulations, typical claims and defenses, medical causation and epidemiology, discovery and expert witness issues, and in-house counsel's expectations. No other training is as comprehensive or cost-effective. **Online registration is no longer available. Please call DRI Customer Service at 312.795.1101 to register.**

Rules of Engagement: Effective Construction Scheduling, October 1 Webcast

Construction projects inevitably experience events that challenge the schedule. Implementation of a timely protocol, akin to "rules of engagement," is a cost effective approach that reduces expensive dispute resolution. Responsibility can be nebulous, but effective schedule analysis can significantly improve performance

and reduce unnecessary cost and frustration. Attendees of DRI's October 1 webcast, **Rules of Engagement: Effective Construction Scheduling**, will learn how adopting a well-defined approach to a contemporaneous schedule impact analysis is a valuable risk mitigation tool that provides a basis for a timely decision to recover or extend the schedule time. The webcast's panel will highlight two different project approaches to demonstrate the difference in transactional costs to resolve disputes. **Click here** to register.

DRI's 2014 Complex Medicine Seminar, November 13–14 in San Diego

DRI's 2014 Complex Medicine Seminar , November 13–14 in San Diego, will bring you up-to-date on emerging topics and trends in cases involving complex medical issues and injuries. Attorneys and medical experts from across the country will address timely and complex medical topics, including chronic pain allegations, traumatic brain injury, fetal death, unconscious pain and suffering, and more. Attendees will learn advanced strategies to prepare for Frye and Daubert challenges, get innovative tools to defend catastrophic injury cases, gain tips on defending growing emotional distress claims under the new DSM-V, and hear how to rebut life care plans in the age of the Affordable Health Care Act. **Register now.**

DRI Neutral Database

DRI members have access to a myriad of benefits. One benefit we added in the past year is that all DRI members now have immediate access to NADN's live database of more than 900 top-rated, litigator approved neutrals via dri.org. The new **DRI Neutral Database** allows defense counsel to search by state, type of civil dispute, ADR practice expertise and other criteria important to defense counsel. NADN has rigorous interview procedures, and because of this, DRI members can be assured that the neutrals resulting from any searches are considered amongst the top ADR practitioners, rated by both defense and plaintiff's attorneys in any given state. The NADN.org live calendar functionality will also prove useful to DRI members who may wish to confirm which of the top local mediators or arbitrators are available on a preferred date. Log on today at **dri.org/neutrals**.

And The Defense Wins

Steve Straus

New York **Traub Lieberman Straus & Shrewsberry LLP** ("TLSS") partner and DRI member **Steve Straus** obtained summary judgment for his client, Max Specialty Insurance Company ("MSIC"). Signal International, LLC ("Signal") owned a ship repair dry dock known as AFDB-5, located off the coast of Port Arthur, Texas. After AFDB-5 sank, Signal tendered claims to certain insurers seeking coverage for property loss, wreck removal, and business interruption.

The primary layer property insurer paid its $10 million limit for the loss. MSIC paid the remaining $3.6 million for the dry dock's represented value and lost rental equipment under an excess property policy issued to Signal. When Signal's marine liability insurer failed to pay to have the wreck removed from the harbor, Signal initiated a declaratory judgment action against that insurer in federal court in Texas. Signal and the marine insurer resolved the claim, with Signal assigning its rights to seek contribution for wreck removal costs from MSIC and another insurer that allegedly issued pollution coverage to Signal. The marine insurer then commenced suit in federal court in New York seeking

contribution from MSIC and the other insurer. Signal filed a cross-claim against MSIC seeking approximately $12 million for alleged business interruption losses.

Discovery revealed that AFDB-5 was dangerously dilapidated when it sank. In its submission for coverage, Signal provided a single engineer's report that stated the dry dock was in generally good repair. There were multiple additional engineers' reports that painted a very different picture: namely, that AFDB-5 was decrepit and doomed to catastrophic failure unless extensive and prohibitively expensive repairs were performed. None of these reports were provided to insurers during the application process.

Upon learning the true history and condition of the dry dock, MSIC sought to void the policy *ab initio* based on Signal's material misrepresentations and to recoup payments made for Signal's property loss claim. In an earlier ruling, the court held that maritime law did not apply to the MSIC policy because the dry dock was not a "vessel." MSIC's rescission claim would thus be adjudicated under state law, rather than the vastly more relaxed burden applicable to rescission claims under maritime law.

Signal and MSIC filed summary judgment motions on MSIC's rescission claim. Signal argued that Texas law applied and that the rescission claim should be dismissed as a matter of law because MSIC could not prove intentional misrepresentation. MSIC argued that Mississippi law applied and its less onerous material misrepresentation standard dictated that summary judgment awarding rescission should be entered. The court agreed with MSIC and applied Mississippi law, under which a material misrepresentation is a prerequisite to rescission but no proof of intent is required as is the rule in Texas. The court held that Signal's omission of information regarding the condition of the dry dock during the application stage was material as a matter of law. The court pointed to the statements of MSIC's underwriter, who testified that the property policy would not have been issued had Signal disclosed such information. The court thus voided the policy *ab initio* and also awarded MSIC summary judgment on its recoupment claim, which amounted to approximately $4 million including interest. *Fireman's Fund Ins. Co. v. Great Am. Ins. Co.* , 2014 U.S. Dist. LEXIS 45843.

Michael S. Knippen and James M. Eastham


Chicago attorneys and DRI members **Michael S. Knippen** and **James M. Eastham** of **Traub Lieberman Straus & Shrewsberry LLP** ("TLSS") recently received a ruling granting summary judgment in the U.S. District Court for the Southern District of Illinois finding that coverage was not afforded to Miller Contracting Services, Inc., for injuries to Miller's independent contractor and the derivative loss of consortium claim brought by the contractor's spouse. The policy at issue included a "Contracted Persons" exclusion that precluded coverage for "bodily injury" sustained by any person who is contracted with the insured for services or employed by any entity contracted with the insured for services. The underlying lawsuit alleged that a subcontractor was contracted with the insured to perform excavating and concrete services for the construction of a barge loading facility in Mt. Vernon, Indiana. Further, the underlying complaint alleged that at all relevant times the plaintiff was an employee of the insured's subcontractor, and that the plaintiff was injured in the course and scope of his employment. The underlying plaintiff and his wife sought recovery for severe bodily injury and loss of consortium and services, respectively, due to the alleged negligence of the insured while constructing the facility.

While the insured largely conceded that the injuries to the injured plaintiff were precluded by the "Contracted Persons" exclusion, the insured claimed that the exclusion did not preclude a defense duty premised on the wife's loss of consortium claim. Instead, the insured claimed that the wife's "loss of consortium" claim independently triggered a duty requiring the carrier to defend and indemnify the insured for the underlying lawsuit.

The District Court, however, agreed with TLSS's argument that the wife's claim for "loss of services, society, and marital rights" (i.e., consortium) does not satisfy the definition of "bodily injury" in the policy which requires that *actual physical injury* be alleged. Thus, there was no independent right to coverage for

the wife's loss of consortium claim against the insured. Moreover, while "bodily injury" sustained by the contractor himself would include damages for care, loss of services or death resulting at any time from the "bodily injury," the claimant's "bodily injury," and thus, the wife's derivative claim for loss of consortium damages included within that same "bodily injury," were precluded by the "Contracted Persons" exclusion. Put another way, the District Court agreed that as the "bodily injury" at issue—the claimant's physical injuries suffered on the job—were precluded by the policy's "Contracted Persons" exclusion, the derivative claim for loss of consortium included within that same "bodily injury" was likewise barred by "Contracted Persons" exclusion. Consequently, the District Court granted TLSS's motion for summary judgment holding as a matter of law that there no coverage afforded for the underlying lawsuit.

Matthew J. Malinowski, Ida Nassar, Edward S. Sledge, and Fredrick G. Helmsing




On July 2, 2014, just weeks before this case was slated for trial, the United States District Court for the Middle District of Alabama granted summary judgment in favor of Novartis Pharmaceuticals Corporation ("Novartis") in the pharmaceutical products liability case, *Garrison v. Novartis Pharmaceuticals Corporation*, 2:11-cv-00589 (M.D. Ala. July 2, 2014). Representing Novartis in this matter were **Matthew J. Malinowski** and **Ida Nassar** of **Hollingsworth LLP**, and **Edward S. Sledge** and **Fredrick G. Helmsing** of **McDowell, Knight, Roedder & Sledge, LLC**. Hollingsworth LLP acts as national counsel for Novartis in the Aredia/Zometa litigation.

The district court held that the plaintiff failed to prove proximate causation when there was no evidence that additional or different warnings would have changed the prescribing oncologist's decision to prescribe the drugs, nor the treatment by her dental providers. The court also held that the plaintiff failed to prove specific causation because plaintiff's designated expert failed to conduct a "scientifically sound" differential diagnosis under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). The district court cited a string of Novartis wins in the Aredia/Zometa litigation on proximate causation. *Garrison* at n. 13. Deborah Garrison alleged that Novartis's drugs Aredia and Zometa caused her to develop osteonecrosis of the jaw ("ONJ") after she had a tooth extracted. Aredia and Zometa are FDA-approved medications prescribed to prevent or significantly delay the deep bone pain, pathologic bone fractures, and spinal cord collapse that are complications of the plaintiff's multiple myeloma.

The district court found two meritorious grounds to grant summary judgment for Novartis. First, in finding no proof of proximate causation, the district court recognized that the prescribing oncologist Dr. Morrison's testimony is "unambiguous that an earlier warning would not have affected his decision to prescribe bisphosphonates, and Ms. Garrison has not refuted his testimony to create a genuine dispute of material fact." *Id.* at 21. The district court held that Dr. Morrison's disregard of the risk of ONJ disrupts Ms. Garrison's theory that Novartis's inadequate warnings were the proximate cause of her injuries. *Id.* at 20. "The court must ask "whether [Dr. Morrison's] decision to prescribe [Aredia] to [Ms. Garrison] ultimately hinged on the information (accurate or inaccurate) that he obtained from [Novartis]. . . ." *Id.* Dr. Morrison stated that he "still would have prescribed Aredia and Zometa because the benefit (i.e., the prevention of bone deterioration, especially in Ms. Garrison's already vulnerable spine) outweighed the risk that she might develop ONJ." *Id.* at 17. Separately, the district court found that "Ms. Garrison's contention that her tooth extraction was medically necessary proves rather than defeats Novartis's argument that proximate cause is lacking. (*See* Doc. # 63, at 4–5.) That is to say, Ms. Garrison's unavoidable need for oral surgery was an intervening cause of the onset of ONJ, and an adequate warning would not have prevented the need to extract her tooth. *Cf. Eberhart*, 867 F. Supp. 2d at 1254–56 (concluding that the plaintiff failed to raise a genuine issue of fact for

trial when she failed to furnish evidence to support her theory that a tooth could have been saved and an extraction avoided)." *Id.* at 21.

Second, the district court found that Ms. Garrison could not prove specific causation because her designated expert failed to conduct a "scientifically sound" differential diagnosis to support his opinion that Aredia or Zometa caused plaintiff's ONJ . *Id.* at 26. The district court held that in order to survive a *Daubert* challenge "[i]t is not enough for the expert to simply assert that he performed differential diagnosis in reaching his opinion; he must take 'serious account of other potential causes.' *Id.* (citing *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999)).

This case was slated to begin trial on July 28, 2014 but the district court vacated the trial date in June while it considered Novartis's summary judgment and *Daubert* motions.

Novartis has obtained dismissal or summary judgment in over 250 other cases originally in the Aredia/Zometa MDL. Novartis has also secured complete defense wins in nine trials, and has received twenty four appellate judgments in its favor in the Aredia/Zometa litigation.

Edward B. Ruff, III

DRI member **Edward B. Ruff, III**, partner at **Pretzel & Stouffer** in Chicago, Illinois obtained a defense verdict for his client.

The plaintiff underwent a total right knee replacement for severe osteoarthritis. The plaintiff claimed that the popliteal artery was severed by the surgical saw at the level of the tibial plateau and that the defendant doctor damaged nerves and veins intra-operatively. Post-operatively, the patient developed severe pain, numbness, and swelling in the right knee and calf while in the post-anesthesia care unit. The defendant ordered a vascular consult and an emergent arteriogram for a suspected arterial injury. The arteriogram showed a complete transection of the popliteal artery. Plaintiff underwent a popliteal artery reconstruction with saphenous vein graft and 4 compartment fasciotomy on an emergent basis due to potential limb loss. During the vascular repair procedure, the vascular surgeon observed that the popliteal artery was completely transected and the anterior tibial artery was shredded. As a result of the arterial injury, the plaintiff underwent numerous subsequent surgeries and complained of permanent sensory loss, motor loss, daily swelling, pain and severe disfigurement. The defendant testified that an arterial injury is a known complication of the surgery and was unavoidable based on the plaintiff's severe osteoarthritis and deformity. He also testified that the key with this known complication is in the timely follow up care, within 6–7 hours. The plaintiff underwent the vascular repair surgery in under four and a half hours. The plaintiff asked for $2,035,816 at trial and medical specials totaled $355,000. The jury returned a verdict in favor of the defense after deliberating for only 47 minutes.

The case was tried in the Circuit Court of Cook County, Illinois.

Gary Zipkin and Josh Van Gorkom

DRI Members **Gary Zipkin** and **Josh Van Gorkom** of **Guess & Rudd P.C.** in Anchorage, Alaska obtained summary judgment for Susitna Valley Unit #35 of the American Legion Auxiliary on the issue of vicarious liability in a case filed in the Alaska State Superior Court in Palmer, Alaska.

A member of Unit #35 was driving to a districtwide (multi-unit) auxiliary convention, carrying with her a variety of patriotic clothing that she hoped to sell

at the convention as part of her personal efforts to support American troops and veterans. Along the way, she hit a patch of ice, crossed the center line, and struck a vehicle occupied by four members of a family. The family brought suit against Unit #35, alleging that the member was acting as an agent of the Unit at the time of the accident and that the Unit should therefore be held vicariously liable for her conduct.

Unit #35 moved for summary judgment, emphasizing that the member was not asked or instructed to attend the convention, was not compensated for doing so, and that Unit #35 had not paid for the patriotic clothing she was transporting and would have no control over the proceeds of any sales. Rejecting the family's contention that the member's history of active involvement in Unit #35 created a question of fact for the jury, the trial court granted summary judgment in favor of the Unit, concluding that the member was acting in her personal capacity at the time of the accident and was not subject to the control of Unit #35. The court also ruled in favor of Unit #35 on the family's claim of "negligent training and/or supervision," explaining that the Unit did not have a duty to either "train" or "supervise" the member with regard to driving because she was neither an employee nor an agent of the Unit.

Kenneth Ward, Sharon C. Collier, and Teresa Li



DRI members **Kenneth C. ("KC") Ward** and **Sharon C. Collier** of the California law firm of **Archer Norris** obtained a verdict in the client's favor in a vehicular accident case, *Delara v. Continental Tire/Sears* in the Fresno County Superior Court of California.

This action, alleging negligent auto service, stemmed from a single vehicle rollover accident in June 2010. Plaintiff Brandon Horn was driving his 2002 VW Jetta on his way to a camping trip with friends when the left rear tire de-treaded on the highway. He lost control of the vehicle, went off the highway, and rolled down an embankment. The vehicle landed on its roof. Brandon Horn sustained multiple spinal fractures and a mild traumatic brain injury.

He underwent a single screw fixation procedure to repair an unstable odontoid fracture. Horn claimed permanent cognitive deficits from the brain injury, chronic pain, and the need for future fusion surgeries. He claimed $280,000 in past medical expenses, $780,000 in future medical expenses, and $2.7 million in past and future wage loss. Horn asked the jury for $1 million in past non-economic damages. Horn did not demand a specific number for future non-economic damages, but implied it should be substantial to compensate for the pain and suffering he will endure the rest of his life.

The client, Sears, serviced the vehicle in January and July 2009. In January 2009, Sears sold Horn two new tires, which Sears placed on the front axle of the vehicle in violation of its internal policy to place the better tread tires on the rear axle. The 2002 VW Jetta owner's manual, however, said better tread tires should be placed on the front axle. In July 2009, Horn returned to Sears because his right rear tire de-treaded. He purchased a new tire for the right rear, but claimed he did not replace the left rear because the Sears sales associate told him it was fine and did not need to be replaced. Horn claimed Sears was negligent in failing to recommend replacement of the left rear tire and for not rotating the older tires to the front axle in compliance with Sears's internal policy to place the better tread tires on the rear axle. He claimed that he would have maintained control of the vehicle if the tire that de-treaded had been moved to the front axle.

The On Call Trial Team, led by Mr. Ward and Ms. Collier, with the help of DRI member **Teresa Li**, argued that Sears should not be held responsible for the injuries to Horn. At the time of the accident plaintiff had driven 5,951 miles since Sears had serviced the tires ten months before. Additionally, no one contended the delamination of the tire could be foreseen or predicted.

After a 6-week trial, the Fresno jury found Sears was negligent, but the negligence was not a substantial factor in causing his harm. All important evidentiary motions on this case were granted in the client's favor.

New Member Spotlight

Katherine Elrich is an appellate attorney and leads the appellate and litigation support section of **Hermes Sargent Bates LLP** and is a firm partner practicing from Dallas. Her practice is devoted primarily to handling post-trial and appellate matters in both state and federal courts, as well as providing related support to clients in all stages of civil litigation.

Ms. Elrich has provided appellate and litigation representation in civil matters, including labor and employment, business torts, commercial, health care, directors and officers liability, professional liability, insurance, consumer finance, personal injury, transportation, product liability, and premises liability, among others.

Ms. Elrich has presented numerous oral arguments to courts of appeals throughout the state of Texas and in the United States Court of Appeals for the Fifth Circuit. She has been recognized as a Texas Rising Star honoree from 2005 through 2012 in *Texas Monthly*. In 2014, she was recognized as a Texas Super Lawyer in *Texas Monthly* and was listed among the Best Lawyers in Dallas in *D Magazine*.

Ms. Elrich received a juris doctorate, magna cum laude, from Texas Tech University School of Law in Lubbock, Texas in 1998. She served as the business manager of the executive board of the *Texas Tech Law Review* and was a member of the Order of the Coif. Ms. Elrich also received a bachelor of business administration degree, cum laude, from the University of Texas at Arlington in 1995.

Did You Know…?

Completing your **MyDRI profile** will help you gain even more individual exposure when members search the membership directory looking for a lawyer in a specific area of practice. DRI often refers journalists to DRI member profiles to secure media opportunities. Having a current profile helps to generate even more exposure to you and your firm. Please take a few minutes to log in to the website at **dri.org** and complete your profile by including your member photo, practice areas, member bio, and firm location.

Quote of the Week

"The longer I live—especially now when I clearly feel the approach of death—the more I feel moved to express what I feel more strongly than anything else, and what in my opinion is of immense importance, namely, what we call the renunciation of all opposition by force, ..."
—Letter from Leo Tolstoy (b. Sept. 9, 1828) to Mohandas Gandhi, Sept. 7, 1910.

Legislative Tracking

The Young Lawyers Legislative Subcommittee is led by co-chairs **Baxter Drennon** of *Wright, Lindsey & Jennings LLP* in Little Rock, Arkansas, and **Katie LaFevers** of *Gordon & Rees LLP* in San Francisco, California, along with co-vice chairs **Jennifer L. Dlugosz** of *Jenner & Block LLP* in Chicago, Illinois, and **Jeremy Falcone** of *Ellis & Winters LLP* in Raleigh, North Carolina. Special thanks to these leaders, along with all of the other federal and state contributors. This week's tracking covers **New Hampshire, New Jersey, and Ohio.**

NEW HAMPSHIRE (Contributor: Pierre A. Chabot, *Wadleigh, Starr & Peters, P.L.L.C.*, Manchester, New Hampshire)

CORPORATE COUNSEL

HB 565, authorizing the bank commissioner to investigate and prosecute certain deceptive practices

- Would require plaintiffs bringing certain actions under the New Hampshire Consumer Protection Act, RSA 358-A, to first complain to the banking commissioner, the director of securities regulation, the public utilities commission, or the regulator of another state, as appropriate. If the regulator either finds against the regulated company, or fails to take any enforcement action within 90 days, the plaintiff could then proceed in court.
- 1/3/2013, introduced in the House and referred Commerce and Consumer Affairs Committee.
- 11/25/2013, amended (No. 2013-2299h) to remove any administrative exhaustion requirement for RSA 358-A plaintiffs; instead, the amended bill creates a new class of unfair business practices pursuant to the Consumer Protection Act, punishable by criminal sanctions. The amended bill also authorizes the banking commissioner to levy fines and delegate investigation and enforcement activities to the Department of Justice for certain practices in consumer credit transactions and installment sales of motor vehicles. The Committee recommends passage of the bill as amended.
- 1/8/2014, HB 565, as amended by 2013-2299h, is passed by the House.
- 3/27/2014, HB 565 introduced in the Senate and referred to Commerce Committee
- 4/30/2014, Commerce Committee recommends HB 565 pass with Amendment No. 2014-1614s, which would remove the private right of action created in the House version of the bill. As amended, Commerce Committee recommends passing the bill.
- 5/8/2014, HB 565 is amended from the floor by Amendment No. 2014-1753s, which would remove consumer credit transactions from the purview of the bill.
- 5/8/2014, As amended by 2014-1614s and 2014-1753s, bill passes the Senate.
- 5/14/2014, House concurs with Senate amendments to HB 565.
- 7/01/2014, HB 565 signed into law by Governor Hassan; codified as 2014 N.H. Laws Chapter 153.

EMPLOYMENT AND LABOR LAW

HB 591, prohibiting “abusive work environments” for public employees

- As introduced, would essentially make the State or its political subdivisions, and individual public employees, liable for bullying in the workplace.
- 1/3/2013, introduced and referred to Labor, Industrial and Rehabilitative Services Committee.
- 3/6/2014, Committee offers amendment no. 2013-0761h, which would alter the structure of the proposed bill, with appeals of employment decisions going to the Commissioner of the Department of Labor rather than to Court, and would remove political subdivisions of the state from coverage. As amended, Committee recommends passing the bill.
- 3/20/2013, As amended by no. 2013-0761h, HB 591 passes the House.
- 3/21/2013, introduced in the Senate and referred to Executive Departments and Administration Committee.
- 1/15/2014, Committee offers amendment no. 2014-0104s, which would remove the statement of intent found in the House versions and attempts to enumerate what constitutes an “abusive” working environment. As amended, Committee recommends passage.
- 1/30/2014, bill is amended from the floor by no. 2014-0319s, which removes “micromanaging a worker’s time and tasks” from the definition of “abusive conduct” in the bill. As amended, this version of HB 591 passes the Senate.
- 5/14/2014, House requests a Committee of Conference.
- 05/27/2014, Committee of Conference recommends passage of HB 591 as amended by the Senate.
- 06/04/2014, both the House and the Senate adopt the Conference Committee Report, passing HB 591 as amended by 2014-0319s.
- 06/04/2014, HB 591 is enrolled by the Senate.
- 6/18/2014, HB 591 is enrolled by the House.
- 7/28/2014, HB 591 is **vetoed** by Governor Hassan.

HB 1168, relative to employer verification of worker eligibility

- This bill would amend RSA 275-A:4-a to prohibit employment of any person whose eligibility to work in the United States has not been confirmed through documentation "that satisfies the requirements of federal law." The proposed law requires this documentation to be on file on or before the first day of employment, and forces contractors to require that their subcontractors maintain such documentation.
- 12/13/2013, introduced and referred to House Labor, Industrial and Rehabilitative Services Committee.
- 2/6/2014, Amended (No. 2014-0116h) to remove language concerning timing of obtaining documentation and to remove requirements relating to contractors
- 2/6/2014, passes House as amended.
- 3/27/2014, introduced in the Senate and referred to Commerce Committee.
- 5/1/2014, Commerce Committee amends the bill (no. 2014-1613s) to make it track federal I-9 requirements, removing all additional requirements (including having documentation on file before the first day of work). As amended, Committee recommends passing the bill.
- 5/8/14, Senate passes HB 1168 as amended by 2014-1613s.
- 5/14/2014, House concurs with Senate Amendments.
- 6/16/2014, Governor Hassan signs HB 1168 into law, codified as 2014 N.H. Laws, Chapter 123.

HB 1188, relative to paycheck equity

- As introduced, would forbid employers from paying women less than men for "equal work that requires equal skill, effort and responsibility and is performed under similar working conditions." The bill as introduced contains criminal penalties for violations.
- Includes a list of systems that allows "different wage rates" to be paid to employees—for example, seniority or earnings based on quantity or quality of production would presumptively be allowed.
- 12/13/2013, introduced and referred to House Labor, Industrial and Rehabilitative Services Committee.
- 2/14/2014, Committee Reports on Bill, recommends it be passed
- 2/19/2014, passes House.
- 3/13/2014, HB 1188 is introduced in the Senate and referred to the Commerce Committee.
- 5/7/2014, Senate offers amendment no. 2014-1741s, which removes the misdemeanor-level criminal sanctions for employers who are natural people (though a misdemeanor-level charge is still authorized for corporate employers who pay their employees differently because of their s*x). As amended, Committee recommends passing HB 1188.
- 5/15/2014, HB 1188 passes Senate as amended by 2014-1741s.
- 05/22/2014, House requests Conference Committee
- 05/27/2014, Conference Committee suggests one additional amendment, 2014-1936c, which would slightly modify the language of RSA 275:41-b, II, which protects employees from adverse job action for revealing their pay, salary or benefit information; otherwise, the Conference Committee recommends adopting the Senate version of HB 1188.
- 6/04/2014, both House and Senate adopt Conference Committee report.
- 6/04/2014, Senates enrolls HB 1188.
- 6/18/2014, House enrolls HB 1188.
- 7/22/2014, Governor Hassan signs HB 1188 into law; 2014 N.H. Laws Ch. 250.

HB 1368, prohibiting employer inquiries about applicants' criminal histories prior to making conditional offers of employment

- As proposed, would prevent employers from asking about applicants' criminal histories until after a conditional offer of employment has been made. This would include questions during interviews as well as on applications, with exceptions when the applicant is applying for law enforcement positions, positions requiring fidelity bonds, or positions where a criminal history automatically disqualifies applicants under federal or state law. The proposed bill sets forth a list of criteria to be considered if an applicant has a criminal history; and requires a written disclosure to that applicant if she is denied employment because of the criminal background. The law would be enforced by the N.H. Department of Labor; it is unclear whether any private right of action would exist against employers otherwise.

- 1/8/2014, introduced and referred to House Labor, Industrial and Rehabilitative Services Committee
- 2/14/2014, House Labor, Industrial and Rehabilitative Services Recommends passage as amended (No. 2014-0450h). The amendment removes most of the proposed bill's language and would limit its impact to boards or commissions granting licenses, permits, registrations, etc., for particular trades. Such boards could deny the license to practice a trade only after evaluating "the nature of the crime and whether there is a substantial and direct relationship to the occupation, trade, vocation, or profession for which the person has applied; information about the rehabilitation of the convicted person; and the amount of time that has passed since the conviction or release."
- 2/19/2014, passes House as amended.
- 3/13/2014, Introduced in Senate and referred to Executive Departments and Administration Committee
- Public hearing scheduled for 05/7/2014 in Room 100 of the Senate hall.
- 5/8/2014, Committee makes non-substantive changes to the bill via amendment no. 2014-1783s. As amended, the Committee recommends passing the bill.
- 5/15/2014, as amended, Senate passes HB 1368.
- 5/21/2014, House requests Conference Committee
- 5/28/2014, Conference Committee recommends passing the Senate version of HB 1368.
- 6/04/2014, both House and Senate adopt Conference Committee Report.
- 6/04/2014, Senate enrolls HB 1368.
- 6/25/2014, House enrolls HB 1368.
- 8/01/2014, Governor Hassan signs HB 1368 into law, 2014 N.H. Laws Ch. 302.

HB 1407 relative to privacy in the workplace and social media

- As proposed would forbid employers from requesting or requiring passwords to employees' or applicants' social media sites, personal email accounts, or other electronic services. The bill would also forbid employers from requiring employees' to "add" any person or organization as a social media contact, and from requiring employees to change their social media "privacy settings."
- 1/8/2014, introduced and referred to House Labor, Industrial and Rehabilitative Services Committee.
- 1/28/2014, 1:45 pm, public hearing scheduled in room 307 of the Legislative Office Building.
- 2/14/2014, Committee reports that bill "ought to pass."
- 2/19/2014, passes House.
- 3/13/2014, HB 1407 is introduced in the Senate and referred to the Commerce Committee
- 3/25/2014, a public hearing before the Commerce Committee is scheduled for 1:55 pm in LOB room 101.
- 5/08/2014, Commerce Committee offers amendment no. 2014-1745s, which add further exceptions to the general prohibitions in the bill for specific factual situations. As amended, committee recommends passing the bill.
- 5/15/2014, full Senate passes HB 1407 as amended by no. 2014-1745s.
- 5/22/2014, House requests Committee of Conference.
- 5/28/2014, Conference Committee recommends passing HB 1407 with Senate amendments
- 6/04/2014, both House and Senate adopt Conference Committee report.
- 6/04/2014, HB 1407 enrolled by Senate.
- 6/25/2014, HB 1407 enrolled by House.
- 8/01/2014, Governor Hassan signs HB 1407 into law, 2014 N.H. Laws Ch. 305.

SB 0207, relative to paycheck equity

- As proposed is very similar to HB 1188, discussed above.
- 1/8/2014, Introduced and Referred to Senate Commerce Committee.
- 3/6/2014, Commerce Committee recommends that SB 207 ought to pass with amendment 2014-0871s, which removes the legislative findings in the originally proposed bill, among other changes.
- 03/13/2014, SB 207 is amended (no. 2014-0976s) to change one introductory phrase in one subsection.
- 03/13/2014, SB 207 passes Senate as amended by Nos. 2014-0871s and 2014-0967s.

- 03/20/2014, SB 207 is introduced in the House of Representatives and is referred to House Labor, Industrial and Rehabilitative Services Committee.
- 4/17/2014, Committee recommends passage of SB 207 by an 11-8 majority.
- 5/8/2014, Committee offers amendment 2014-1629h, which adds a one-year statute of limitations. As amended, the committee recommends passing the bill.
- 5/14/2014, the full Senate passes SB 207 without the one-year statute of limitations. As passed, it is identical to HB 1188.
- 5/22/2014, both houses approve an "enrolled bill amendment" adding a posting requirement concerning equal pay requirements of both SB 207 and federal law.
- 6/04/2014, both House and Senate enroll SB 207.
- 7/14/2014, Governor Hassan signs SB 207 into law, 2014 N.H. Laws Ch. 227.

INSURANCE LAW

HB 227, Making certain changes in laws relative to property and casualty insurance

- Would expand insurance company record retention required relative to property and casualty claims;
- Would clarify that auditable policies must have the audit completed within 120 days after expiration or cancellation of the policy; failing completion of such an audit, premium refunds would be due automatically at the conclusion of 120-day period.
- Would add a $1,000 per day administrative fine for insurers violating the statute governing return of premiums.
- Would require that insurance companies pay out claims even if an insured has committed fraud, concealment or misrepresentation, so long as the claim is made by an "innocent insured or other third party."
- Makes various other changes to statutes governing property and casualty policies.
- 1/3/2013, referred to House Commerce and Committee Affairs Committee
- 11/25/2013, Committee recommends that bill ought to pass with amendment 2013-2298h, which removed the $1,000/day administrative fine and numerous other proposed changes to the law.
- 2/6/2014, passes House as amended.
- 2/19/2014, HB 227 is introduced in the Senate and referred to the Commerce Committee.
- 4/3/2014, Committee recommends passage of HB 227.
- 4/17/2014, Senate passes HB 227.
- 4/28/2014, HB 227 is amended for technical reasons.
- 5/8/2014, HB 227 is enrolled by both House and Senate.
- 5/27/2014, HB 227 is signed by Governor Hassan; 2014 N.H. Laws, Chapter 31.

HB 1193, relative to flood insurance

- As introduced would require homeowners' insurers to clearly state that flood damage is not a covered risk, and gives recommended language for doing so. Failure to comply would not invalidate flood exclusions.
- 1/8/2014, introduced and referred to House Commerce and Consumer Affairs Committee
- 3/7/2014, Commerce and Consumer Affairs Committee recommends that HB 1193 pass with amendment no. 2014-0844h, which changes the effective date of the bill to January 1, 2015.
- 3/12/2014, passes House as amended.
- 3/13/2014, introduced in the Senate and referred to Commerce Committee.
- 4/16/2014, Committee recommends passage of HB 1193.
- 4/24/2014, HB 1193 passes the Senate.
- 5/1/2014, HB 1193 enrolled by Senate.
- 5/5/2014, HB 1193 enrolled by House.
- 5/28/2014, HB 1193 is signed by Governor Hassan and is chaptered as 2014 N.H. Laws 0052.

MEDICAL LIABILITY AND HEALTH CARE LAW

HB 489, to authorize and alter the Medical Malpractice Joint Underwriters' Association

- As introduced would replace the administrative rules enabling the Joint Underwriting fund, and would, among numerous changes to the fund's operation, prevent health care provider members from obtaining a vested interest in any surplus generated by the fund.
- 1/3/2013 introduced and referred to Commerce and Consumer Affairs.
- 3/6/2013 Committee Reports bill ought to pass with amendment (No. 2013-0670h)
- 3/13/2013, passes House as amended
- 3/21/2013, introduced in Senate and referred to Executive Departments and Administration Committee
- 5/23/2013 re-referred to Committee
- 1/23/2014, Committee reports bill "ought to pass" with amendment no. 2014-0111s, which effectively alters purpose of bill to set up a Commission to study future changes to JUA.
- 1/30/2014, passes Senate as Amended.
- 4/23/2014, House non-concurs with Senate amendments, requests Committee of Conference.
- 5/15/2014, Senate accedes to request for committee of conference.
- 5/22/2014, Conference Committee proposes an amendment making a technical change to the wording of RSA 404-C:14, V; otherwise, Conference Committee recommends passing Senate version of bill.
- 6/04/2014, both houses adopt Conference Committee report.
- 6/04/2014, Senate enrolls HB 489.
- 6/25/2014, House enrolls HB 489.
- 8/01/2014, Governor Hassan signs HB 489 into law, 2014 N.H. Laws Ch. 293.

HB 582, repealing the "early offer" system of resolving medical injury claims

- As introduced would immediately repeal RSA 519-C, the "early offer" statute adopted in 2012.
- 1/3/2013, introduced and referred to House Judiciary Committee
- 11/18/2013, Committee recommends that HB 582 pass with amendment no. 2013-2318h; the amendment would allow claimants to reject early offers without any consequence to a subsequent lawsuit rather than repealing the entire early offer statute.
- 1/22/2014, passes House as amended.
- 2/19/2014, introduced in the Senate and referred to Judiciary Committee.
- 5/7/2014, Senate Judiciary Committee offers amendment no. 2014-1746s, which would not repeal the early offer system; instead, the amended bill would ensure that 30 days passed form the date of the injury to the date of any waiver under the early offer system, and would increase the period of time, from 5 days to 21 days, for claimants to consider early offers. As amended, Judiciary Committee recommends passing the bill.
- 5/15/2014, Amendment no. 2014-1853s is offered from the floor—it would do away with the 30-day "cooling off" period before a waiver could be valid under amendment no. 2013-1746s; otherwise, is substantially the same as that amendment.
- 5/15/2014, HB 582, as amended by no. 2014-1853s, passes the Senate.
- 5/22/2014, House requests a Committee of Conference
- 5/30/2014, Senate reports that Conference Committee cannot come to agreement on terms of HB 582.
- 6/02/2014, House reports failure of Conference Committee to agree on terms of HB 582.

HB 597, relative to a drug-free workplace for licensed healthcare facilities and providers

- As introduced would require mandatory random drug screening of all employees of licensed healthcare facilities a minimum of four times per year per employee.
- 1/3/2013, introduced and referred to House Health, Human Services and Elderly Affairs Committee
- 11/12/2013, Committee reports that HB 597 ought to pass with amendment no. 2013-2261h; amendment would require imposition of a "drug free workplace policy" in licensed facilities. That program would have to include drug testing, at a minimum, where "reasonable suspicion exists," and would exempt some employees.

- 1/22/2014, passes House as amended.
- 2/19/2014, HB 597 introduced in the Senate and referred to Health, Education and Human Services Committee.
- 4/10/2014, Committee recommends passage of HB 597.
- 4/17/2014, Senate passes HB 597.
- 5/28/2014, HB 597 is signed by Governor Hassan, chaptered as 2014 N.H. Laws 0036.

HB 658, relative to registration of medical technicians

- As introduced would create a medical technician registration board and require technicians working in New Hampshire to be registered by such Board.
- 1/3/2013 introduced and referred to House Executive Departments and Administration Committee
- 11/25/2013, Committee reports that HB 658 ought to pass with amendment no. 2013-2342h, which makes minor technical changes.
- 1/29/2014, referred to House Ways and Means Committee
- 3/19/2013, Ways and Means Committee reports that HB 658 ought to pass as amended by amendment no. 2014-0977h, which makes minor technical modifications to the law relative to fees and costs.
- 3/19/2014, passes House of Representatives as amended by N0. 2014-0977h.
- 3/27/2014, HB 658 is introduced in the Senate and referred to Executive Departments and Administration Committee.
- 4/17/2014, Committee recommends passage of HB 658
- 4/24/2014, Senate refers bill to Finance Committee pursuant to Committee rules.
- 5/08/2014, Finance Committee adds an amendment, no. 2014-1811s, which removes an appropriation of $20,672 to pay for the establishment of a board of registration of medical technicians.
- 5/15/2014, Senate passes HB 658 as amended by 2014-1413s and 2014-1811s.
- 5/21/2014, House requests a Committee of Conference.
- 5/28/2014, Conference Committee recommends passing HB 658 as amended by the Senate
- 6/04/2014, both bodies adopt Conference Committee report.
- 6/04/2014, Senate enrolls HB 658.
- 6/25/2014, House enrolls HB 658.
- 8/01/2014, Governor Hassan signs HB 658 into law, 2014 N.H. Laws Ch. 295.

PROFESSIONAL LIABILITY

HB 469, adding a “statute of limitations” to the statute enabling administrative actions against certain professional licensees.

- As introduced would add a statute of limitations under RSA 332-G, which governs regulatory board investigations/actions for the boards regulating a wide range of professions in New Hampshire. The proposed statute of limitations is keyed to the time limits set forth in each individual board or commission’s enabling statute.
- 1/3/2013, introduced and referred to House Executive Departments and Administration Committee.
- 11/22/2013, Committee recommends that HB 469 ought to pass with amendment 2013-2374h; the amendment created an across-the-board five year statute of limitations, with a statutory “discovery rule;” exempted the Real Estate Appraisal Board from the new statute of limitations; and gave the regulatory boards 9 additional months to hold hearings from the date the accused licensee received notice of a complaint.
- 1/8/2014, HB 469 passes House as amended.
- 2/19/2014, introduced in Senate and referred to Executive Departments and Administration Committee.
- 4/10/2014, Committee recommends passage of HB 469.
- 4/17/2014, Senate passes HB 469.
- 5/8/2014, HB 469 is enrolled by the Senate with minor technical amendments.
- 5/14/2014, HB 469 is enrolled by the House with minor technical amendments.
- 5/28/2014, HB 469 is signed by Governor Hassan and is chaptered as 2014 N.H. Laws 0034.

NEW JERSEY (Contributor: Allison Semaya, *Harris Beach PLLC, New York, New York*)

EMPLOYMENT AND LABOR LAW

A1999, relating to "The Opportunity to Compete Act"

- Establishes certain employment rights for persons with criminal record
- 1/16/2014 – introduced and referred to Assembly Labor Committee
- 6/23/2014 – transferred to Assembly Budget Committee
- 6/23/2014 – reported from Assembly Comm. as a Substitute, Second Reading
- 6/26/2014 – passed by the Assembly (41-35-1)
- 6/26/2014 – received in the Senate without Reference, Second Reading
- 6/26/2014 – senate Amendment (25-2) (Cunningham)
- 6/26/2014 – substituted for S2124 (2R)
- 6/26/2014 – passed by the Senate (32-1)
- 6/26/2014 – received in the Assembly, Second Reading on Concurrence
- 6/26/2014 – passed Assembly (Passed Both Houses) (49-24-0)
- 8/11/2014 –approved P.L.2014, c.32.

S783, relating to the "Unfair Wage Recovery Act"

- Requires reporting of public contractor employment information
- 1/14/2014 – introduced in the Senate and referred to Senate Labor Committee
- 3/17/2014 – reported from Senate Committee, 2nd Reading
- 3/27/2014 – passed by the Senate (21-13)
- 5/8/2014 – received in the Assembly, Referred to Assembly Labor Committee
- 5/15/2014 – reported out of Assembly Committee, Second Reading
- 6/16/2014 – substituted for A2349 (ACS)
- 6/16/2014 – passed Assembly (Passed Both Houses) (49-26-3)
- 8/11/2014 – conditional Veto and received in the Senate

A1440, relating to employment discrimination based on applicant employment status

- Prohibits an employer or employer's agent, representative, or designee from discriminating against an applicant for employment in any employment decisions with regard to hiring, compensation or the terms, conditions or privileges of employment because the applicant is, or has been, unemployed.
- 2/27/2014 – introduced in the Senate and referred to Senate Labor Committee
- 3/17/2014 – reported from Senate Committee with Amendments, 2nd Reading
- 5/12/2014 –passed by the Senate (22-14)
- 5/15/2014 – received in the Assembly, Referred to Assembly Labor Committee
- 5/15/2014 – reported out of Assembly Comm. with Amendments, 2nd Reading
- 6/16/2014 –substituted for A2910 (1R)
- 6/16/2014 –passed by the Assembly (53-22-3)
- 6/16/2014 – received in the Senate, Second Reading on Concurrence
- 6/30/2014 – passed Senate (Passed Both Houses) (30-5)
- 8/18/2014 – absolute Veto, Received in the Senate

MEDICAL LIABILITY AND HEALTH CARE LAW

S2337, relating to Medicaid and NJ FamilyCare coverage and reimbursement for health care services provided through telemedicine

- Provides that, unless specifically prohibited or limited by federal or State law or deemed to be clinically inappropriate, in-person contact between a health care provider and a patient is not required for health care services delivered by telemedicine as a condition of provider reimbursement under the Medicaid or NJ FamilyCare program, if the services otherwise would be eligible for reimbursement.
- 8/11/2014 – introduced in the Senate and referred to Senate Health, Human Services and Senior Citizens Committee

S2338, **relating to health insurance carriers, SHBP, and SEHBP to provide coverage for telemedicine**

- Requires health insurance carriers, the State Health Benefits Program, and the School Employees' Health Benefits Program to provide coverage for telemedicine delivered to a covered person in a health care facility to the same extent that the services would be covered if they were provided through in-person consultation.
- 8/11/2014 – introduced in the Senate and referred to Senate Commerce Committee

TOXIC TORTS & ENVIRONMENTAL LAW

S1041, **relating to the treatment, discharge, disposal, application of wastewater or other byproducts from natural gas exploration**

- Prohibits the treatment, discharge, disposal, or storage of any wastewater, wastewater solids, sludge, drill cuttings or other byproducts resulting from hydraulic fracturing for the purpose of natural gas exploration or production in any state.
- 1/30/2014 – introduced in the Senate and referred to Senate Environment and Energy Committee
- 3/17/2014 – reported from Senate Committee with Amendments, Second Reading
- 5/12/2014 – passed by the Senate (32-5)
- 5/15/2014 – received in the Assembly, Referred to Assembly Environment and Solid Waste Committee
- 6/23/2014 – reported out of Assembly Committee, 2nd Reading
- 6/26/2014 – substituted for A2108 (1R)
- 6/26/2014 – passed Assembly (Passed Both Houses) (62-16-1)
- 8/11/2014 – absolute Veto and received in the Senate

S2322, relating to the establishment of the Office of River Maintenance

- Establishes an Office of River Maintenance in the Department of Environmental Protection (DEP), charged with the responsibility for conducting all stream cleaning and desnagging projects and bank stabilization or restoration projects in the State.
- 8/11/2014 – introduced in the Senate and referred to Senate Environment and Energy Committee

WORKERS' COMPENSATION

S2332, relating to the location of workers' compensation hearings

- Amends the workers' compensation law, R.S. 34:15-1 et seq., to modify the law's requirements regarding the location of hearings on workers' compensation claims.
- 8/11/2014 – introduced in the Senate and referred to Senate Labor Committee

OHIO (Contributor - Michael J. Gray, *Dinsmore & Shohl, LLP*, Cincinnati, Ohio)

COMMERCIAL LITIGATION

HB 9, relating to the receivership law

- Provides a way for a receiver to sell real estate, free and clear of liens, without a foreclosure proceeding
- Provides more authority for receivers and modifies requirements for service as a receiver
- 01/30/13 – Introduced in House
- 04/10/13 – Passed in House
- 12/04/13 – Passed in Senate
- 12/11/13 – House refused to concur in Senate amendments
- 1/14/14 – Committee conference for House and Senate on bill

CONSTRUCTION LAW

SCR 25, urging Ohio government entities to not use LEED v4

- Expresses dissatisfaction at the use of LEED v5 in government contracts
- Contains language that purportedly “bans LEED,” though as a Concurrent Resolution is not enforceable
- Encourages use of alternative private sector green building rating systems
- 10/31/13 – Introduced in Senate
- 02/26/14 – Passed in Senate
- 02/27/14 – Introduced in House

EMPLOYMENT & LABOR LAW

HB 420, relating to prohibiting businesses from forbidding employees from storing firearms in their car while at work

- Prohibits an employer from enforcing policies that ban employees with concealed carry licenses from storing firearms in their vehicle while parked on company property.
- 01/29/14 – Introduced in House

HB 235, relating to asking about conviction for a felony

- Prohibits an employer from including any question on any form for application for employment with the employer concerning whether the applicant has been convicted of or pleaded guilty to a felony
- The bill does not include a penalty for violating this prohibition
- 07/25/13 – Introduced in House

HB 152, providing employees the right to refrain from joining labor unions

- State that employees have the right to "engage in or refrain from engaging in other concerted activities for the purpose of collective bargaining or other mutual aid and protection"
- Removes law that requires that non-members of labor unions pay fees to the union
- 05/02/13 – Introduced in House

SB 45, relating to social media passwords

- Prohibits employers from asking or requiring an applicant or employee to provide access to the individual's electronic accounts
- A violation of any of the bill's prohibitions is an unlawful discriminatory practice under Ohio's Civil Rights Law
- 02/19/13 – Introduced in Senate

GOVERNMENTAL LIABILITY

HB 238, relating to the hiring of outside counsel by the government

- Requires contingency fee lawyers working for the government to keep detailed logs of expenses and time spent
- Requires the Attorney General to make a written determination that private representation cost-effective and in the public interest
- Applies tiered limits to contingency fees
- 07/31/13 – Introduced in House

INSURANCE LAW

HB 117, providing for the operation of captive insurance companies ("CICs")

- CICs are wholly owned subsidiaries created to provide insurance to their non-insurance parent companies
- Allows for the operation of CICs, including protected cell captive insurance companies, in Ohio
- 04/08/13 – Introduced in House
- 06/04/13 – Passed House
- 06/05/13 – Introduced in Senate
- 05/28/14 – Passed in Senate
- 06/10/14 – Sent to Governor
- 09/17/14 – Effective date

MEDICAL LIABILITY & HEALTHCARE LAW

HB 276, relating to medical malpractice claims

- Provides immunity to medical facilities for the actions of independent medical practitioners if certain notification requirements are met
- Provides that a health care provider's, employee's, or representative's statements or affirmations expressing error or fault made to the victim of an unanticipated outcome are not admissible
- Provides that the direct and proximate cause of the injury, death, or loss is established by evidence showing that it is more likely than not that the defendant's act or omission was a cause in fact of the injury, death, or loss
- Provides that any loss or diminution of a chance of recovery or survival by itself is not an injury, death, or loss for which damages may be recovered
- 09/30/13 – Introduced in House

RETAIL AND HOSPITALITY

SB 260, prohibits Registrar of Motor Vehicles from issuing dealer licenses to automobile manufacturers

- Prevents an automobile manufacturer, parent company, subsidiary, or affiliated entity of a manufacturer obtaining a dealer license to sell automobiles
- Reportedly a response to online sales of automobiles by Tesla Motors
- Modified by the House to allow Tesla to operate three stores in Ohio
- 12/23/13 – Introduced in Senate
- 04/1/14 – Passed Senate
- 04/2/14 – Introduced in House
- 05/14/14 – Passed House
- 05/14/14 – Passed in Senate
- 05/20/14 – Sent to Governor
- 09/04/14 – Effective date

TOXIC TORTS & ENVIRONMENTAL LAW

HB 375, relating to a severance tax on horizontal wells

- Creates a 2.5% severance tax on unconventional oil and gas wells
- Creates the 11-member Ohio Shale Gas Regional Commission to administer and award a portion of oil and gas severance tax revenue to subdivisions in the shale region
- 12/4/13 – Introduced in House
- 05/14/14 – Passed House

HB 506, relating to CO2 emission standards

- Requires the Ohio EPA to set CO2 emissions standards based on what is achievable through efficiency improvements and other measures that can be employed by individual electric generating units
- Allows Ohio EPA to adopt less stringent standards or use a longer compliance timeline than the federal government
- Requires Ohio EPA to consider energy reliability and cost of CO2 emission standards
- 03/25/14 – Introduced in House
- 06/04/14 – Passed in House
- 06/09/14 – Introduced in Senate

TRIAL TACTICS

HB 225, relating to offers to settle

- Provides that if a plaintiff rejects a defendant's offer and the final judgment is one of no liability or for an amount less than 75% of the offer, the defendant may recover attorney's fees and litigation expenses from the date of rejection of the offer through the entry of judgment
- Provides that if a defendant rejects a plaintiff's offer and the final judgment is for an amount greater than 125% of the offer, the plaintiff may recover attorney's fees and litigation expenses from the date of rejection of the offer through the entry of judgment
- 06/26/13 – Introduced in House

WORKERS COMPENSATION

HB 493, relating to improvements to the Workers Compensation System

- Requires the Administrator of Workers' Compensation to calculate workers' compensation premiums for most employers on a prospective, rather than retrospective, basis
- Requires most employers to pay premiums on an annual basis, rather than semi-annually as under current law
- Allows the Administrator to provide limited other-states' coverage to provide workers' compensation coverage for Ohio employees who are temporarily working in another state in addition to other-states' coverage
- Eliminates the requirement that an employers that has other-states' coverage segregate payroll on the employer's annual payroll report based upon whether an employee is covered under other-states' coverage
- 03/18/14 – Introduced in House
- 04/09/14 – Passed in House
- 04/10/14 – Sent to Senate
- 05/28/14 – Passed in Senate
- 06/10/14 – Sent to Governor
- 09/17/14 – Effective date

DRI CLE Calendar

Construction Law
September 10–12, 2014
Hard Rock Hotel San Diego, San Diego, CA

Data Breach and Privacy Law
September 11–12, 2014
Conrad Chicago, Chicago, IL

Nursing Home/ALF Litigation
September 18–19, 2014
Swissôtel Chicago, Chicago, IL

Going Paperless: Adapt to Survive and Thrive (webcast)
September 24, 2014

Defending Drug and Medical Device Litigation Primer
September 30, 2014
Sidley Austin LLP, Chicago, IL

Rules of Engagement: Effective Construction Scheduling (webcast)
October 1, 2014

DRI 2014 Annual Meeting
October 22–26, 2014
San Francisco Marriott Marquis, San Francisco, CA

Asbestos Medicine
November 6–7, 2014
Hilton San Francisco Union Square, San Francisco, CA

Fire Science and Litigation
November 6–7, 2014
FireSky Resort, Scottsdale, AZ

Complex Medicine
November 13–14, 2014
The Westin San Diego, San Diego, CA

Insurance Coverage and Practice
December 4–5, 2014
New York Marriott Marquis, New York, NY

Professional Liability
December 4–5, 2014
New York Marriott Marquis, New York, NY

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