

ATRA Legislative Watch

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Editor: Matt Fullenbaum, Director of Legislation

Mark Your Calendars: ATRA will hold its Annual Membership Meeting and Legislative Outlook at the Grand Hyatt in Washington, DC, on Tuesday, March 9th. Registration materials are attached, and agenda details are forthcoming.

State Activity

*****Please note that the following states are not scheduled to meet in regular session this year: MT, NV, ND, and TX.**

Arizona

H.B. 2062 (Andrew Tobin – R) is legislation that would adopt the *Daubert* standard for admitting expert witness testimony and expert evidence; Arizona Courts currently embrace the less stringent *Frye* standard. The bill was introduced in the House on January 13, 2010, and referred to the House Judiciary and Rules Committees. For additional information, please contact Glenn Hamer of the Arizona Chamber of Commerce at ghamer@azchamber.com.

Florida

H.B. 285 (Mike Horner – R) is legislation that provides that motorsport liability release signed by a minor is valid if the release also is signed by a minor's parent and guardian. The bill also authorizes natural guardians to waive and release, in advance, any claim or cause of action of minor child to same extent that adult may do so on his or her own behalf. H.B. 285 currently is pending in the House Civil Justice & Courts Policy Committee. For additional information, please contact William Large of the Florida Justice Reform Institute at william@fljustice.org.

H.B. 689 (Gary Aubuchon – R) provides that if a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the establishment had actual or constructive knowledge of the condition and should have taken action to remedy it. The bill also provides that constructive knowledge may be proven by circumstantial evidence. H.B. 689 was filed on January 15, 2010. Identical Senate legislation, S. 1224, was introduced on January 14, 2010. For additional information, please contact William Large of the Florida Justice Reform Institute at william@fljustice.org.

H. 437 (Seth McKeel – R) is legislation that would prohibit the Department of Legal Affairs of the Office of the Attorney General from entering into contingency fee contracts with private attorneys unless the Attorney General makes a written determination prior to entering into such a contract that contingency fee representation is both cost effective and in the public interest. Moreover, the bill requires the Attorney General, upon making his or her written determination, to request proposals from private attorneys to represent the Department of Legal Affairs on contingency-fee basis unless the Attorney General determines in writing that requesting such proposals is not feasible under the circumstances. H. 437 provides that written determination does not constitute final agency action, and it also provides that request for proposals and contract award are not subject to challenge under the Administrative Procedure Act. Finally, the bill requires maintenance of specified records, limits the amount of contingency

fee that may be paid to private attorney pursuant to contract with the Department of Legal Affairs, and requires Internet posting of specified information. On January 12, 2010, the bill was reported favorably out of the House Civil Justice and Courts Policy Committee by a vote of 7-3. The Senate version of the legislation, S. 712 (John Thrasher – R), was reported favorably out of the Senate Judiciary Committee on January 19, 2010, by a vote of 5-3. For additional information, please contact William Large of the Florida Justice Reform Institute at william@fljustice.org.

H.B. 433 and S.B. 744 are bills ensuring that in all product liability cases, the jury has the opportunity to consider the fault of those who caused the accident, as well as continuing to consider the fault of the manufacturer for any alleged defect which caused the greater injuries. This bill stems from the consequences of the Florida Supreme Court's 2002 decision in *D'Amario v. Ford Company*, in which the court barred trial courts from admitting evidence of how and why the accident occurred. Consequently, Florida juries are left in the dark about even the most basic accident-causing facts and can only apportion responsibility, upon finding of liability, to the manufacturer. For example, trial lawyers now sue auto manufacturers even if their clients actually caused the accident—even though the client may have been drunk, high on cocaine or marijuana, or fell asleep at the wheel—because the jury will never hear those facts. For additional information, please contact William Large of the Florida Justice Reform Institute at william@fljustice.org.

Indiana – Take Action Now!

On Tuesday, January 26, 2010, the House Labor and Employment Committee is expected to hear H.B. 1128 (David Tyler – D), legislation that would modify the state's statute of repose in asbestos cases. Contacts advise that if this bill passes, 1,600 cases would be revived that are currently time-barred due to Indiana's statute of repose and statute of limitations. This will impact hundreds of Indiana employers ranging from retailers and suppliers to plumbing companies. A single, Indianapolis-based personal injury lawyer stands to benefit from this law.

ATRA strongly encourages members with an interest in Indiana to engage their local lobbyist and/or counsel to oppose this legislation. Please coordinate efforts with the Indiana Manufacturers Association (IMA), which is leading the effort to defeat this bill, by contacting Ed Roberts of IMA at eroberts@imaweb.com.

On Tuesday, January 26, 2010, the House Labor and Employment Committee is expected to hear H.B. 1255, legislation that would prohibit a court from admitting into evidence a write-off, discount, or other deduction associated with a collateral source payment in a personal injury or wrongful death action. By way of background, current Indiana law allows courts to allow evidence of payments made by "collateral sources," such as health or auto medical payments insurance, to allow jurors to see that another party has made payments on behalf of the injured party, and is entitled to reimbursement. As often is the case, the medical provider agrees to accept less than the amount listed on the bill and the vast majority of the time the patient is not responsible for payment of any balance. Current law allows evidence to be presented to show what expenses actually have been incurred by the injured party. H.B. 1255 changes this and will allow the injured party to collect for expenses they had no obligation to pay. These phantom damages amount to a windfall profit for the plaintiff and especially for the personal injury attorney. The bill would have courts award nonexistent damages as money in the name of "repaying" the plaintiff for services he never owed and never paid. This may be a relatively small amount on a single-case basis, but the profits add up quickly for the personal injury attorney who will retain as much as half of the amount awarded over many cases. This bill cancels out the medical cost saving for all consumers intended through preferred provider and similar arrangements for medical services, and shifts these dollars from consumers to primarily personal injury lawyers. **ATRA strongly encourages members with an interest in Indiana to engage their local lobbyist and/or counsel to express opposition to members of the Committee. For additional information, please contact Ed Roberts of the Indiana Manufacturers Association at eroberts@imaweb.com.**

Iowa

H.F. 758 is legislation that would allow recovery of damages for wrongful death to include loss of enjoyment of life. The bill passed the House on March 24, 2009, by a vote of 58-41, and is currently pending in the Senate Judiciary Committee. For additional information, please contact John Gilliland of the Iowa Association of Business and Industry at jgilliland@iowaabi.org.

Kentucky

H.B. 185 (Jim Wayne – D) is legislation that would extend government employee whistleblower reprisal protections to: certain statements made by any supervisor of an employing agency; certain statements regarding any facts or information relative to action taken which prevents the dissemination of scientific opinion or alters technical findings without scientifically valid justification; certain statements regarding any facts or information relative to breaches of existing professional ethical canons; certain statements regarding any facts or information relative to noncompliance with standards set by regulatory and accrediting agencies; and objections or refusals to engage in activity the employee has reasonable cause to believe is in violation of a law or regulation. The bill was introduced on January 5, 2010, and referred to the House State Government Committee. For additional information, please contact Matt Fullenbaum, ATRA, at mfullenbaum@atra.org.

Maryland

On January, 15, 2010, Senator Bobby Zirkin (D) introduced S.B. 118 and S.B. 119, bills that would raise the threshold for cases that can demand a jury trial from \$10,000 to \$20,000. Observers advise that this will result in higher dollar claims being filed against businesses in the District Court. Both bills were referred to the Senate Judicial Proceedings Committee and are scheduled for a hearing on February 19th. For additional information, please contact Ron Wineholt of the Maryland Chamber of Commerce at rwineholt@mdchamber.org.

S.B. 187 is legislation that would create the Maryland False Claims Act. This bill is similar in nature to S.B. 830 from 2009. Contacts in Annapolis expect the Governor to have his own health care false claims act bill, yet to be filed, for which he has \$20 million in receipts contingent in the state budget. For additional information, please contact Ron Wineholt of the Maryland Chamber of Commerce at rwineholt@mdchamber.org.

Michigan

The civil justice reform community, led by the Michigan Chamber of Commerce, is closely monitoring several liability-expanding bills carried over from 2009. They report very good news on a package of bills (H.B. 4316, H.B. 4317, H.B. 4318) that would retroactively repeal Michigan's FDA defense. On January, 13, 2010, the Senate took a vote on a motion to discharge the bills from committee, but the vote on the discharge motion was delayed until December 31, 2010 (sine die). Therefore, if these bills are going to see action, they will need to be moved out of committee and cannot bypass that process (as the discharge motion was aiming to do).

Another bill under close scrutiny is H.B. 4915, legislation that would expand the Michigan Consumer Protection Act (MCPA) to over 80 different businesses, trades and professions already regulated by and subject to penalties under state and federal laws, as well as contracts and common law. Under current law, companies and individuals regulated by state and federal laws must comply with a wide range of requirements and are subject to regulatory oversight, lawsuits, and penalties under their regulatory statute(s) for a wide range of alleged wrongdoings. H.B. 4915 ignores these existing penalties and remedies and seeks to subject Michigan employers to parallel tracks of litigation, including class action lawsuits, under the MCPA. In December 2009, the House was poised to vote on the bill, but it was pulled from consideration after intense opposition from the civil justice and business communities.

Finally, the last trial lawyer bill that is being closely monitored is H.B. 4571, legislation that would weaken the expert witness and affidavit of merit requirements under Michigan's

medical liability law. The bill passed the House on December 3, 2009, by a vote of 57-46, and is currently pending in the Senate Judiciary Committee.

Please direct any questions about the above bills to Wendy Block of the Michigan Chamber of Commerce at wblock@michamber.com.

Mississippi

H.B. 439 (Sherra Hillman Lane – D) is legislation that would create the Mississippi False Claims Act and would include qui tam provisions. The legislation was introduced on January 7, 2010, and referred to the House Judiciary B Committee. For additional information, please contact Brian Perry of Mississippians for Economic Progress at bp@brianperry.ms.

S.B. 2136 (David Baria – D) is legislation that is slightly different from H.B. 439, and also creates the Mississippi False Claims Act with qui tam provisions. The bill was introduced on January 6, 2010, and referred to the Senate Judiciary, Division A Committee. For additional information, please contact Brian Perry of Mississippians for Economic Progress at bp@brianperry.ms.

New Jersey

S. 480 (Raymond Lesniak – D) is legislation that would limit the amount a defendant can be required to pay to secure the right to appeal a decision in civil litigation to the total value of the judgment or \$50 million, whichever is less. The bill was introduced on January 12, 2010, and referred to the Senate Judiciary Committee. For additional information, please contact Marcus Rayner of the New Jersey Lawsuit Reform Alliance at mrayner@njlra.org.

New York

On January 11, 2010, Senator Eric Schneiderman (D) introduced S. 6433, the “Whistleblower Empowerment and Notification Act.” This particular proposed false claims act legislation goes farther than what is outlined in the Federal Deficit Reduction Act by requiring notice of whistleblower protections, including applying this requirement to all industries; the existing New York False Claims Act already has been ruled DRA compliant. S. 6433 requires employees of companies receiving (directly or indirectly) more than \$300,000 from state to provide: specified information about the New York FCA and a fraud hotline phone number; information about how to file qui tam cases, including potential for case awards of up to maximum amount allowed by statute; and information about protections against retaliation. The bill also provides that compliance with notification provision is a material condition of payment – otherwise, any business the contractor does with the state is a false claim due to non-notification. Finally, S. 6433 provides that the failure to comply with notice provision can lead to a penalty of 10% of the value of the contract or \$5,000, which is greater, assessed through administrative action or summary court proceeding. Defendant is first entitled to notice and opportunity to cure. For additional information, please contact Mark Kriss of NewYorkTortReformNow.org at mkriss@krisslaw.com.

North Carolina – Take Action Now!

The North Carolina Chamber of Commerce is seeking signatories to a statement (see attached) that will be circulated to lawmakers opposing H.B. 813 in its current form. The bill would move North Carolina from contributory negligence to comparative fault, but would not make corresponding changes to joint and several liability. In addition to North Carolina, three other states (Alabama, Maryland, and Virginia) plus the District of Columbia, embrace the doctrine of contributory negligence. **ATRA encourages members with a presence or operations in North Carolina to add their organization to the statement by contacting John McAlister of the North Carolina Chamber of Commerce at jmcalister@ncchamber.net or (919) 836-1403.**

Oklahoma

S.B. 1379 (Anthony Sykes – R) is legislation based on ALEC's *Private Attorney Retention Sunshine Act* to regulate the practice of government hiring private attorneys on a contingency fee basis to represent the state. Specifically, S.B. 1379 includes the following highlights: requires a request for proposal to be filed for legal contracts reasonably expected to exceed \$5,000 and for those RFP's to be posted to the web; requires gubernatorial review of contracts expected to exceed \$500,000; and requires hired law firms to submit a variety of information following the close of a case, including hours spent on the case and a calculated hourly rate that cannot exceed \$1,000 per hour. For additional information, please contact Mike Seney of the Oklahoma Chamber of Commerce at mseney@okstatechamber.com.

Pennsylvania

On Tuesday, January 26, 2010, the House Judiciary Committee is scheduled to hear H.B. 2202 (Michael Gerber – D), legislation that would expand recovery of damages for wrongful death by providing that plaintiffs are entitled to recover damages for mental anguish and sorrow incurred by the surviving spouse, dependent children, parents or next of kin. H.B. 2202 was introduced on January 11th of this year.

At the same hearing, a wrongful death bill carried over from 2009, H.B. 1095 (Jesse White – D), will be considered, as well. H.B. 1095 expands recovery for wrongful death to include damages for mental anguish and grief.

For additional information, please contact Kevin Shivers of the NFIB/PA at kevin.shivers@nfib.org.

Rhode Island – Legislature Votes to Override Governor Carcieri's Veto of Two Liability-Expanding Bills

On January 5, 2010, both houses of the Rhode Island Legislature voted to override Governor Donald Carcieri's veto of H. 5738 A, legislation that allows for the recovery of punitive damages in wrongful death lawsuits. The trial bar and other proponents of the legislation tied the legislation to the tragic 2003 Station nightclub fire in West Warwick that killed 100 people and injured hundreds more. To his credit, Governor Carcieri vetoed the bill in November 2009. For additional information, please contact Matt Fullenbaum, ATRA, at mfullenbaum@atra.org or (202) 682-1163.

On January 5, 2010, both houses of the Rhode Island Legislature voted to override Governor Carcieri's veto of H. 5135, legislation that overturns *Horn v. Southern Union* by adding a three-year statute of limitations to the Rhode Island Civil Rights Act. For additional information, please contact Matt Fullenbaum, ATRA, at mfullenbaum@atra.org or (202) 682-1163.

South Carolina

S. 350 (Senator Larry Martin – R) is comprehensive civil justice reform legislation that includes: limits on noneconomic damages; limits on punitive damages; a limit on what a defendant is required to pay to appeal a civil decision; class action reform; a provision based on ALEC's *Private Attorney Retention Sunshine Act*; admissibility of seat belt usage/non-usage evidence; consumer protection reform; and products liability reform. The Senate tort reform subcommittee has been holding hearings on the bill, the next of which was scheduled for this week, but it was postponed until next week. Senator Luke Rankin was called to trial and requested that the hearing be postponed so he could attend. House companion legislation is H. 3489 (Speaker Bobby Harrell – R). For additional information, please contact Cam Crawford of the South Carolina Civil Justice Coalition at sciviljusticecoalition@yahoo.com.

Vermont

S. 185 (Randolph Brock – R) is legislation that creates the False Claims Act with *qui tam* provisions. The bill was introduced on January 5, 2010, and referred to the Senate Judiciary

Committee. For additional information, please contact Matt Fullenbaum, ATRA, at mfullenbaum@atra.org or (202) 682-1163.

Washington – Take Action Now!

S.B. 6508 (Darlene Fairley – D) is legislation that would allow parents of a deceased adult child to recover for wrongful death. This legislation is similar to a bill two years ago that was the top priority of the trial bar, and defeated by the civil justice reform community, led by the Washington Liability Reform Coalition (LRC). S.B. 6508 was introduced on January 15, 2010, and referred to the Senate Government Operations & Elections Committee. A hearing is scheduled for Tuesday, January 26th. **ATRA encourages members with an interest in Washington to help defeat this legislation. For more information about how to become involved, please contact Dana Childers of the Washington Liability Reform Coalition at dana@walrc.org.**

The substitute of S.B. 5144 (Adam Kline – D) would create a state false claims act enforceable by the Attorney General and private whistleblower plaintiffs. The bill essentially tracks the federal FCA, with exceptions including that it has no statute of limitations, does not appear to have public disclosure defense, and purports to be mindful of the state's budget problems by: requiring the Attorney General to bring suit only if monies are appropriated for it; and requiring private plaintiff to get and pay for Attorney General review of all settlement offers, but allowing successful private parties to recover those costs from defendants. The bill was heard in the Senate Judiciary Committee on January 15, 2010. For additional information, please contact Dana Childers of the Washington Liability Reform Coalition at dana@walrc.org.

West Virginia

H.B. 4015 (Charlene Marshal – D) is legislation that expands the current Medicaid fraud law to create a retroactive False Claims Act with *qui tam* provisions. The bill was introduced on January 13, 2010, and referred to the House Judiciary Committee. For additional information, please contact Matt Fullenbaum, ATRA, at mfullenbaum@atra.org or (202) 682-1163.

Wisconsin

On January 19, 2010, the Senate passed S.B. 203 (Jeffrey Plale – D) by a voice vote; no roll call vote was taken. The bill would allow parents of an adult child to recover for loss of society and companionship if the adult child's injury was the result of medical malpractice. For additional information, please contact Bill Smith of the Wisconsin Civil Justice Council at bill.smith@nfib.org.

S.B. 447 (Julie Lassa – D) is legislation that would retroactively expand the existing Medicaid-only False Claims Act (FCA) to extend the law to non-Medicaid defendants, with weak public disclosure jurisdictional defenses. The bill was introduced on January 7, 2010, and referred to the Ethics Reform and Government Operations Committee. For additional information, please contact Bill Smith of the Wisconsin Civil Justice Council at bill.smith@nfib.org.

A.B. 367 (Kim Hixson – D) is legislation that would allow a job applicant to sue an employer based on credit history and provides for recovery of punitive damages and compensatory damages up to \$300,000. The bill was carried over from 2009. For additional information, please contact Bill Smith of the Wisconsin Civil Justice Council at bill.smith@nfib.org.

A.B. 354 (Kelda Helen Roys – D) is legislation that would increase the statute of limitation for intentional torts from two to three years. The bill was introduced in July 2009 and favorably reported out of the House Judiciary and Ethics Committee on September 16, 2009, by a vote of 6-4. The civil justice reform community is closely monitoring the bill. For additional information, please contact Bill Smith of the Wisconsin Civil Justice Council at bill.smith@nfib.org.