

June 15, 2009

The best argument against democracy is a five-minute conversation with the average voter.

Sir Winston Churchill

Tort Law – Oklahoma Passes Tort Reform

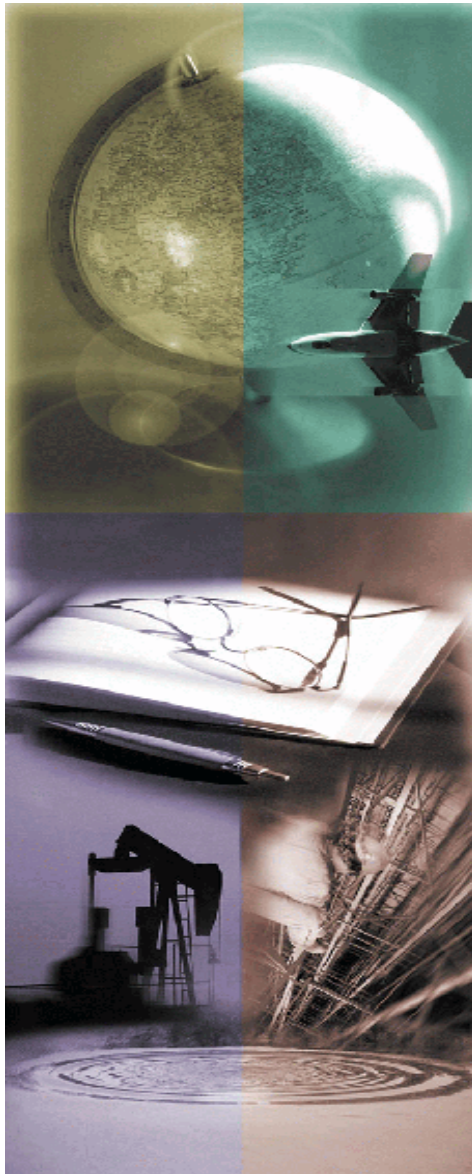
On May 21st, Governor Henry signed HB 1603 and passed some of Oklahoma's most comprehensive tort reform to date. Included in the new legislation is a \$400,000 cap on non-economic damages, which in cases of catastrophic injury or gross negligence can be waived. It also reformed joint and several liability, making those that are only partially liable for harm in a tort claim less responsible for damages than those that are most responsible. In addition to other strong improvements, junk science testimony rules were also improved.

Constitutional Law – The First Amendment Is Not Nonsense

U.S. District Court Judge James Selna recently ruled that a public high school teacher violated the First Amendment when he referred to creationism as "superstitious nonsense" during a history lecture. The First Amendment prohibits Congress from establishing a national religion and prevents government employees from making hostile comments in regard to religion.

Employment Law – Office Politics

State judge Ute W. Lally recently set aside a \$1 million verdict in favor of a woman who believed she lost her job because of her political affiliation. She claimed she was the only Democrat in her department.



Roberta Miller was laid off from her county job in January of 1992 along with 2,600 other employees due to a county-wide deficit of \$115 million. The jury returned a verdict of \$1 million, which would have been equivalent to Miller's back pay. The trial judge ordered a new trial after finding no clear evidence that Miller was laid off due to her political party affiliation.

Engineering Law – the Price of Ethanol

According to Joel G. Burken, Ph.D., a professor of environmental engineering at Missouri S&T, and his colleagues, the production of alternative fuel sources such as ethanol could greatly impact water quality and supplies in the Midwest. Ethanol, derived from corn grown in Nebraska, would require 50 gallons of water per mile driven. In Nebraska, it takes an estimated 800 gallons of water from crop irrigation to final processing to create a single gallon of ethanol. When divided by the average mileage of 16 miles per gallon, the result is 50 gallons of water per mile. Aside from water consumption, the production of ethanol is also likely to result in more water pollution due to soil erosion and increased use of pesticides. Researchers are requesting that federal regulators examine how an increased production of biofuels will affect water resources.

Employment Law – EEOC Clarifies Workplace Bias Based on Religion

The U.S. Equal Employment Opportunity Commission (EEOC) has issued Compliance Manual § 12 in an effort to address workplace discrimination, harassment, and retaliation based on religion. Section 12 does not set forth new laws or modify existing laws, but merely consolidates case law concerning Title VII of the Civil Rights Act of 1964 and the EEOC's position regarding religious issues into one document.

Section 12 will provide employers with tips on how to balance the employee's right to religious freedom with the employer's need to maintain a productive work environment, as well as help employers determine what practices actually constitute religion. Since each employee's religious act must be evaluated on a case-by-case basis, § 12 is also aimed at helping employers understand which religious beliefs must be accommodated, and stresses that an employer must assume that an employee's request for religious accommodation is sincere.

In addition, § 12 provides employers with guidance as to when a religious accommodation must be provided to an employee. It also states that it is an employee's duty to request an accommodation, not the employer's duty to offer an accommodation. After a request has been made, an employer cannot retaliate against the employee. However, the employer does not have to honor a request for a religious accommodation if the employer can prove that the request would cause undue hardship.

Corporate Law – New Changes to the False Claims Act

President Barack Obama recently signed a new law, the Fraud Enforcement and Recovery Act of 2009, which embodies the most significant changes in 23 years to the federal False Claims Act (FCA). The law will expand the potential liabilities of companies, including subcontractors and subgrantees, receiving federal funds.

The FCA was passed in 1863 in an effort to combat fraud by companies that sold supplies to the Union Army. The act contains *qui tam* provisions that allow private individuals to sue on the

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government's behalf those companies trying to defraud the government. The individuals usually share in up to 15% to 25% of the total amount recovered. Since 1986, the government has recovered more than \$20 billion.

Senators Patrick Leahy (D-VT.) and Charles Grassley (R-Iowa) said the primary purpose of the new law was to ensure that it covered fraud concerning federal economic stimulus funds. The law also reverses the 2008 Supreme Court decision in *Allison Engine Co. v. U.S.* Under the *Allison Engine* decision, a person or entity had to intend to cheat the government. The new law clarifies that a person or an entity can be liable even if there was no specific intent to be paid by the government, which also places subcontractors or subgrantees within the reach of the new law. Furthermore, Congress made the intent requirement retroactive to the date of the *Allison Engine* decision, which will affect numerous cases and will require years of litigation.

The new law also enhances the Justice Department's investigative tools, allowing the attorney general to delegate his authority to sign off on a prosecutor's requests for civil investigative demands (CIDs). Under the old law, only the attorney general could sign off on the requests, making it more difficult to complete the process.

The new law also expands liability to include those who knowingly retained overpayments by the federal government, even if the overpayments were innocently received initially.

Regulatory Law – Death, Taxes . . . and Federal Regulations

As Ben Franklin famously said, there are few things as certain as death and taxes, but you might want to add federal regulations to that list. This is especially true given the fact that the cost of complying with these regulations, approximately \$1.17 trillion, almost equals federal income tax collections. Congress sent 285 bills to the President for his signature in 2008. In contrast, federal agencies issued 3,830 "final" rules and that number is only expected to grow. There are currently over 4,000 regulations in the process of being implemented.

As a bit of a refresher, when Congress creates a bill and the President signs it into law it becomes part of the United States Code. These bills usually work at a high level and are used to create an agency or give the framework for a law. The federal departments, agencies and commissions, in turn, create regulations that are used to implement that law. Obviously, as the federal government grows, the number of regulations grows, as does the impact of these regulations.

Unlike other areas of the federal government, such as the federal budget, there is no federal guide or summary of these regulations. Fortunately, the Competitive Enterprise Institute does issue such an overview, entitled "Ten Thousand Commandments: An Annual Snapshot of the Federal Regulatory State," by Clyde Wayne Crews Jr., which can be found at <http://www.cei.org/issue-analysis/2009/05/28/ten-thousand-commandments>.

Employment Law – Employers Suing for Data Theft

It is no secret that one of the many consequences resulting from the state of our economy is downsizing and layoffs. Employees are losing their jobs, but they are not always leaving empty-handed. In fact, in a recent study by the Ponemon Institute, nearly 60% of the (former) employees admitted to stealing company data. And, this issue is not limited to lower-ranking

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employees. Several large companies, including Motorola and Microsoft, have brought data theft suits against executive-level employees.

The employees usually give one of several reasons for stealing the data. Often the employee plans to use the data to gain a competitive advantage at his new job, whether at a competitor or in starting his own business. In other cases, the data is stolen as retribution – the employee plans to use the data in a wrongful termination suit against the employer or to prove some other wrongdoing by the employer. Either way, the employer usually comes out ahead, by bringing claims of computer fraud and abuse against the employee.

Litigation – Metadata Grows in Legal Import

As reported in *The National Law Journal*, a new trend in the courts suggests that the earlier attorneys request metadata during discovery, the better the chances the request will be granted. Metadata can be broadly defined as all the hidden information associated with a particular electronic document, such as details concerning its creation and alteration. According to Lew R.C. Bricker, a partner at Chicago's SmithAmundsen, "[o]nce you know or should have known that data, or whatever you want to call it, is relevant to real or potential litigation, you have to preserve it." Bricker also said that all the recent metadata suits should signal a warning to companies about the importance of preserving electronic data that may be relevant in litigation.

Environmental Law – Two Nanoparticles to Require PMNs

The Environmental Protection Agency (EPA) has promulgated a new rule under Section 5(a)(2) of the Toxic Substances Control Act (TSCA) requiring those who intend to manufacture, import, or process regulated substances for an activity qualifying as a significant new use must provide EPA with a pre-manufacture notice (PMN) at least 90 days prior to commencement. The chemical substances subject to this new rule include two nanoparticles, Siloxane modified silica nanoparticles and Siloxane modified alumina nanoparticles. This notification will allow EPA to evaluate the use and restrict or prohibit as necessary. The new rule can be found at: <http://edocket.access.gpo.gov/2008/pdf/E8-26409.pdf>.

Environmental Law – EPA Suggests Reclassifying Drug Waste

The Environmental Protection Agency (EPA), in a newly-proposed rule, has suggested that hazardous pharmaceutical waste should be added to the Universal Waste Rule in order to make disposal more streamlined. Further under the new rule, generators are encouraged to dispose of non-hazardous pharmaceutical waste as a universal waste as well. Universal waste includes batteries, pesticides, mercury-containing equipment, and lamps. The new rule applies to generators of hazardous pharmaceutical waste, such as pharmacies, hospitals, physicians' offices, residential care facilities, and veterinary clinics. It does not apply to pharmaceutical manufacturing or production facilities. For further information on the proposed rule, visit <http://www.epa.gov/epawaste/hazard/wastetypes/universal/pharm.htm>.

Environmental Law – Agency Amends Container Containment Regulations

Pesticide formulators, agrichemical dealers, independent commercial applicators, custom blenders, and others could potentially be affected by a new final rule published by the Environmental Protection Agency (EPA), effective December 29, 2008, amending the pesticide

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container and containment regulations. These regulations provide safe storage and disposal practices for pesticides in order to protect human health and the environment pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Specifically, the new rule modifies labeling requirements and extends the labeling compliance date one year, establishes a definition for “released for shipment,” and changes the phrase “sold or distributed” to “released for shipment.” For further information, visit: www.epa.gov/pesticides/regulating/containers.htm.

Environmental Law – PCB Violations Net \$1.2 Million Plus 3-Year Removal Program

Alleged violations of the Toxic Substances Control Act for polychlorinated biphenyls (PCB), including improper PCB disposal, storage, marking, recordkeeping, and marketing at several of Memphis Light, Gas & Water Division (MLGW) facilities, resulted in \$1,220,576 in civil penalties and a requirement to conduct a Supplemental Environmental Project (SEP). This is the highest penalty in this type of enforcement action that includes a SEP. Under the SEP, MLGW will voluntarily accelerate a PCB removal program that within three years will significantly reduce the quantity of electrical and other equipment that contain regulated quantities of PCBs.

Criminal Law – Child Pornography Reporting Requirements

There is no doubt that child pornography is a serious and devastating crime, so much so that the federal government and many state governments are recruiting, if not outright commandeering, civilians in the fight against child pornography. The federal Victims of Child Abuse Act of 1990, requires that certain persons, “while engaged in a professional capacity or activity described [in the Act] on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section.” 42 U.S.C. 13031(a). The persons covered by this statute include health care professionals, mental health professionals, social workers and counselors, teachers and school administrators, child care workers, law enforcement personnel, foster parents, and commercial film and photo processors. The statute does not explicitly provide for fines for failing to submit the required report, but failure to do so would be a violation of federal law and could result in fairly serious consequences.

Like many states, Oklahoma has child pornography reporting requirements similar to the federal statute. While the Oklahoma statute does not cover as many people and professions, it does have several significant additions not included in the federal statute. The Oklahoma statute only applies to commercial film and photo processors and computer technicians. Computer technicians and photo processors are not required to actively search for pornography, but they are required to report it if they come across it during their work. The statute requires that persons who have knowledge of or observe child pornography shall immediately or as soon as possible report it by telephone to law enforcement and within 36 hours send a written report with a copy of the material attached. 21 O.S. 1021.4(A). The Oklahoma statute also provides that any person who fails to submit the required report can be subject to a \$500 fine and up to one year in jail.

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David Winfrey Named to Head Joyce & Paul Houston Office

David M. Winfrey has been named to manage the new office of Joyce & Paul, PLLC, in Houston. Mr. Winfrey, formerly associated with the Tulsa office of Gardere, Wynne & Sewell and more recently senior legal counsel of Waste Management, Inc., in Houston, will practice in areas including federal and state environmental regulatory, energy, transportation, and health and safety law, as well as transactional due diligence.

Mr. Winfrey received his Bachelor of Science degree in Political Sciences from Oklahoma State University in 1985, his J.D. from The University of Tulsa College of Law in 1988, and an LLM in environmental law from Northwestern School of Law at Lewis and Clark College in 1992. Mr. Winfrey's diverse background includes international law firm and in-house experience, as well as work as a staff attorney at EPA's Washington, D.C., headquarters.

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