# Florida Supreme Court Foils Governor's Plan to Pick New Justices

The Associated Press **reports** that Florida's next governor and not incumbent Gov. Rick Scott will get to pick three new justices to the state Supreme Court, the court ruled in a decision with major implications in this year's gubernatorial campaign.

"In a major rebuke to Scott, the Supreme Court concluded that the Republican governor exceeded his authority when he started the process to find replacements for the three justices," the AP reports.

Because of age limits of 70, three justices must retire at midnight Jan. 8, the same day Scott is scheduled to leave the governor's office. Scott, claiming he had authority to name the replacements, last month asked a nominating commission to start accepting applications with a Nov. 10 deadline.

**Read the AP article**.

---

# Firms Cite 1851 Law in Fatal

# Missouri Duck Boat Accident, Seek Mediation

Two companies facing multiple lawsuits over a summer tourist boat accident in Missouri that killed 17 people have invoked an 1851 law that allows vessel owners to try to avoid or limit legal damages as they also seek settlement negotiations with victims' family members, **reports** the *Chicago Tribune*.

"If a judge concluded that the federal law cited by Ripley [Entertainment Inc.] and Branson Duck Vehicles applies, claims for damages over the July 19 accident on Table Rock Lake near Branson, Missouri, could be consolidated into a single federal court case," explains the article, from the Associated Press. "The companies' petition states that under the federal law, they would not owe any damages because the boat carried no freight and was a total loss."

**Read the *Chicago Tribune* article**.

---

# Dallas Firm Named Tops in U.S. Law for Business Disputes

Dallas business trial law firm **Loewinsohn Flegle Deary Simon** won the No. 1 spot for the **Elite Trial Lawyers** award, based on research by *VerdictSearch*, *The National Law Journal* and Law.com.

Three of the firm's co-founders, **Alan Loewinsohn**, **Craig Simon**, and **Matt Ray**, accepted the award during a reception at the Las Vegas Bellagio Hotel on October 5.

The firm's recent litigation includes a trial victory that resulted in a $6 billion verdict – the largest verdict of 2017 and one of the Top 10 verdicts in U.S. history.

**Read details about the honor**.

---

# Champagne Remark May Cost Lawyer $289 Million Bayer Award

The lawyer most responsible for winning a $289 million verdict against Bayer AG may end up wiping it out, according to a **Bloomberg Law** report.

Brent Wisner, the lead trial attorney who in August convinced

a jury that Monsanto Co.’s Roundup weed killer caused his client’s cancer, irked the judge handling the case so profoundly that she’s considering tossing the verdict and ordering a new trial.

From the Bloomberg report: “The lawyer told jurors that Monsanto executives in a company board room were ‘waiting for the phone to ring’ and that ‘behind them is a bunch of champagne on ice,’ according to a court filing. He said that ‘if the damages number isn’t significant enough, champagne corks will pop.’”

**Read the Bloomberg Law article**.

---

# Recent Oil and Gas Verdict Highlights Importance of FLSA Compliance

A recent case from the United States District Court for the Western District of Pennsylvania highlights how expensive a Fair Labor Standards Act case can be when an employee prevails for unpaid overtime compensation, writes **Jay Carr** in Vorys, Sater, Seymour and Pease’s **Energy & Environmental Law Blog**.

The article describes *Sammy Mozingo v. Oil States Energy Services L.L.C.*, in which oil field workers in Texas filed a class action alleging that their employer Oil States had misclassified them as exempt from overtime laws. Most of the employees settled, but eight went to trial, resulting in Oil

States paying damages, fees, and costs totaling $3,385,884 for just these eight employees.

**Read the article**.

---

# New Decision Highlights (Again) the Importance of Defining 'Commercially Reasonable Efforts'

If your client is going to contractually commit to using *commercially reasonable efforts* to do something – and if your client expects that obligation to require something less than "all reasonable efforts" – then you'll want to make that expectation clear in the contract itself, advises **D.C. Toedt III** in the **On Contracts Blog**.

He discusses a case in which the influential Delaware chancery court noted the chasm between the meaning of that term to transactional lawyers versus to courts.

"Seemingly disregarding practitioners' views, the chancery court continued the Delaware trend –which that court itself started – of treating *commercially reasonable efforts* as requiring the obligated party to take 'all reasonable steps.'"

**Read the article**.

---

# Discrimination Defense Lawyer Confirmed for Trump Civil Rights Post

Bloomberg Law **reports** that the U.S. Senate has confirmed Eric Dreiband, a Jones Day attorney who defends companies accused of discrimination, to lead the Justice Department office that enforces anti-bias laws and investigates police civil rights cases.

"Dreiband represented the University of North Carolina when it implemented policies under the state's since-repealed 'bathroom bill,' requiring people to use gender-designated restroom facilities based on the biological sex listed on their birth certificates," writes Bloomberg's **Chris Opfer**. "He also won a case for R.J. Reynolds Tobacco that made it harder for workers to sue for age discrimination under federal law."

**Read the Bloomberg Law article**.

---

# In Rare Bipartisan Move, 31 States Ask SCOTUS to Undo Ban on Consumer Antitrust Claims

Reuters **points to an effort** illustrating a rare show of bipartisanship as state politicians rally around the cause of overturning U.S. Supreme Court precedent that protects monopolists from consumer suits.

**Alison Frankel** writes that "31 state attorneys general from across the political spectrum united in an amicus brief asking the Supreme Court to overturn its 1977 precedent in *Illinois Brick v. Illinois*, which blocks downstream purchasers from asserting antitrust claims under federal law. The state AGs – including GOP stalwarts from Texas and Florida as well as activist Democratic AGs from New York, California and Massachusetts – argue that the Supreme Court's *Illinois Brick* doctrine was ill-advised, judge-made policy that has been repudiated by decades of antitrust litigation under state laws passed in its wake."

**Read the Reuters article**.

---

# Texas Lawyer Who Claimed

# Political Donations Influenced Appeal Faces Possible Discipline

Plaintiffs' lawyer John McCraw of Dallas is facing possible disciplinary action because he filed a motion asking two appellate court justices to remove themselves from a case, implying that the pair voted to overturn his clients' $1 million jury verdict because of donations they'd received from two political action committees.

*Dallas Observer* **reports** that the justices not only declined to recuse themselves, they and their fellow justices sent McCraw's name to the general counsel of the State Bar of Texas for possible disciplinary action for insulting the court.

A three-judge panel of the 5th Court of Appeals had overturned a $1 million award to McCraw's clients, two women who had sued their apartment owner after an intruder entered through a window and violently assaulted both women.

Reporter **Nashwa Bawab** writes: "McCraw asked the entire 13-member appeals court to reconsider – minus Justices Craig Stoddart and Molly Francis, two of the three judges who unanimously voted to overturn the verdict. Stoddart and Francis each received $2,000 from the Texans for Lawsuit Reform PAC and the Apartment Association of Greater Dallas PAC a few days apart from each other and less than a month before they were assigned the case."

**Read the *Dallas Observer* article**.

# Feds Settle Huge Whistleblower Suit Over Medicare Advantage Fraud

MedCity News **reports** that one of the nation's largest dialysis providers will pay $270 million to settle a whistleblower's allegation that it helped Medicare Advantage insurance plans cheat the government for several years.

**Fred Schulte** explains:

> The settlement by HealthCare Partners Holdings LLC, part of giant dialysis company DaVita Inc., is believed to be the largest to date involving allegations that some Medicare Advantage plans exaggerate how sick their patients are to inflate government payments. DaVita, which is headquartered in El Segundo, Calif., did not admit fault.
>
> **Read the MedCity News article**.

# Contracting Around Class

# Actions, a Win for Employers

A recent Ninth Circuit ruling that Uber's arbitration agreements did not violate the National Labor Relations Act provides a major victory to Uber by requiring each plaintiff to separately arbitrate his or her claims.

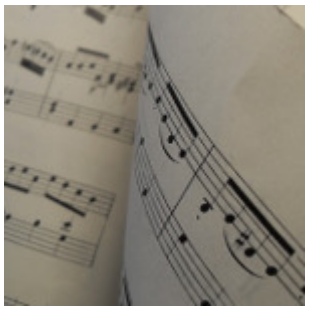
**Christine M. Fitzgerald**, writing in the Jackson Lewis **California Workplace Law Blog**, explains that plaintiffs filed a putative class action against Uber for failure to remit gratuity paid by customers, and for misclassification of the drivers as independent contractors and failing to pay their business expenses. The O'Connor plaintiffs sought an order declaring Uber's 2013 arbitration agreements unconscionable.

The panel rejected plaintiffs' argument that the lead plaintiffs constructively opted out of arbitration on behalf of the entire class.

**Read the article**.

---

# Copyright or Copycat? Rock Classic 'Stairway to Heaven' Case Sent Back to Trial Court



A dispute over the songwriting credit for the iconic “Stairway to Heaven” took a surprising twist last week when a California appellate court reversed a 2016 copyright victory for Led Zeppelin and ordered a new trial, according to a post on the website of **Androvett Legal Media & Marketing**. The Ninth Circuit ruling means that the estate of Randy Wolfe (aka Randy California) has a second chance to convince a jury that one of classic rock’s most recognizable guitar riffs was based on work by the largely forgotten 1960s-era performer.

In 2016, a Los Angeles jury took just 15 minutes to find that “Stairway to Heaven” was not substantially similar to “Taurus” written by Wolfe’s band Spirit. The Ninth Circuit judges found that the trial judge had failed to advise jurors that while individual elements of a song may not qualify for copyright protection, a combination of sufficiently original elements may qualify.

Copyright lawyer **Amanda Greenspon** of Dallas-based **Munck Wilson Mandala** said there’s no clear legal criteria to use in determining what a “combination of sufficiently original elements” is and courts have reached inconsistent conclusions. She said last week’s decision appears to reflect the sentiment behind the 2015 ruling awarding the estate of Marvin Gaye more than $7 million after a jury found that Robin Thicke and Pharrell Williams had copied portions of Gaye’s “Gotta Give it Up” in their 2013 hit “Blurred Lines.”

“That case has been criticized for allowing the copyright holder to protect a style as opposed to an actual composition,” she said. “That’s not the express precedent from the case which had a number of procedural issues, but it definitely resonates in the decision to remand it back to the trial court and essentially provide jury instructions that certain common elements can be protected under copyright even when they may be standard to a genre.”

Greenspon notes that copyright law offers protections against claims of infringement for certain works in books, plays and films that are common to a genre. “There is no analogous doctrine in music, but we see the same concept play out all the time,” she said. “Songs within a genre of music often share common elements. How musicians handle that is often based on the two songs’ relative commercial success. In some instances, it’s easier to acknowledge credit and not litigate.”

---

# Morrison & Foerster Will Eat $16M in Fees, Costs Pursuing Vets’ Claims

The law firm that spent nine years fighting and winning health care for veterans subjected to government-administered human testing of chemicals including sarin, mustard gas, and LSD was awarded $3.4 million in fees, a small fraction of the value of the hours the firm said it put into the case.

Bloomberg Law **reports** that Morrison & Foerster LLP accepted a fee award from the U.S. Army that’s $16 million less than the fee the firm could have sought.

“The fee award is the latest and nearly last chapter in the litigation by soldiers subjected to the government’s decades-long human testing program who were seeking recognition and health care above what they could get at the Veterans

Administration for injuries they suffered," writes Bloomberg's **Joyce Cutler**.

**Read the Bloomberg Law article**.

---

# Law Firm Admits 'Unjust Enrichment,' Agrees to $23 Million Settlement

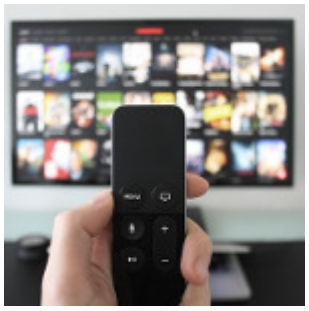
The Ohio law firm owned by disbarred attorney Stan Chesley has agreed to pay $23.5 million to hundreds of the firm's former clients after a now-four-year battle over money a judge said they are owed, according to ***The Cincinnati Equirer***.

Reporter **Kevin Grasha** writes that Chesley's attorneys agreed there was "unjust enrichment" to the firm when it took millions of dollars more in fees than it should have as part of a class-action lawsuit.

Chesley, who was disbarred in Kentucky over his actions, was the sole owner of the firm, Waite Schneider Bayless & Chesley. Legal action against him will continue, said Angela Ford, the attorney who represents the 382 former clients.

**Read the *Cincinnati Enquirer* article**.

# Vizio Reaches Potential Settlement for Its Spying TVs – And Victims Could Receive Less Than a Dollar



Vizio has announced a potential $17 million settlement in a recent class action lawsuit, which could result in a pay-out that is as little as a few cents for each of the millions of people claiming the company's smart TVs collected and shared their private viewing data without their consent, reports the ***New York Daily News***.

A ProPublica 2015 expose alleged Vizio used its smart TVs to spy on an estimated 16 million Vizio TV owners who purchased and connected their televisions to the internet between Feb. 1, 2014 and Feb. 6, 2017, writes reporter **Jessica Schladebeck**.

"After payment of notice and administration costs and any approved award of attorneys' fees, costs and service awards, all funds remaining in the settlement fund will be distributed to the class," according to court documents.

**Read the *NY Daily News* article**.

# Founder of Tea Party Nation Has Been Disbarred for Trying to Scam Timeshare Owners

The *Orlando Sentinel* **is reporting** that the founder of Tea Party Nation has been disbarred for trying to swindle timeshare owners into thinking they canceled their timeshares.

Tennessee attorney Judson Wheeler Phillips, a senior partner with Nashville-based Castle Law Group and founding member of the conservative Tea Party group, was accused of taking off with the money he earned from the fraudulent transactions, the Tennessee Supreme Court has ruled.

Federal lawsuits were filed against Phillips by Westgate Resorts and Orange Lake Resorts, both based in Orlando, as well as Las Vegas-based Diamond Resorts and Fort Lauderdale-based Berkley Resorts. More than 90 consumer fraud complaints also were filed.

**Read the *Orlando Sentinel* article**.

# Class Action Royalty Litigation in the Shale Plays

A **recent article** posted on the website of Haynes and Boone analyzes nationwide trends in the filing and certification of royalty class action cases, which result in much greater exposure to producers than individual royalty owner cases. For example, in the past five years, producers have settled class actions for amounts in excess of $80 million.

“Ninety-six putative class actions filed during the period from 2001 to the present are analyzed in this article. Since Congress enacted the Class Action Fairness Act of 2005 (CAFA), most of these cases were litigated in federal court,” write **David Ammons** and **Mike Stewart**.

“These cases deal almost exclusively with alleged underpayment of natural gas royalties (oil royalty litigation rarely arose during the period analyzed).”

**Read the article.**

---

# Overqualified? Or Too Old? Ex-GC’s Age Discrimination

# Case Takes Aim at Biased Recruiting Practices

The *Chicago Tribune* **tells the story** of a former general counsel who had been unemployed and job hunting for three years when he came across a position that seemed promising, but for this part of the ad: "3 to 7 years (no more than 7 years) of relevant legal experience," it said.

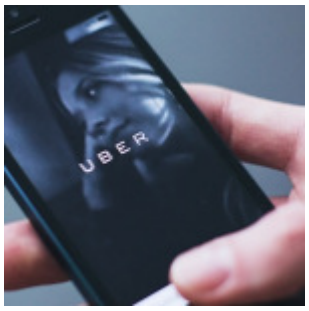
The story of Dale Kleber, who was 58 at the time, illustrates a bigger story of the critical question about whether job applicants can pursue lawsuits at all in such cases, explains reporter **Alexia Elejalde-Ruiz**.

"The federal Age Discrimination in Employment Act prohibits discrimination against people over 40, but there is dispute about whether Congress intended for the law to protect external job applicants, not just current or former employees, against policies that appear to be neutral but have a disproportionate adverse effect on older people," she writes.

Kleber's experience includes a stint as general counsel at Dean Foods and, most recently, as CEO of a dairy products trade group.

**Read the *Chicago Tribune* article**.

# Federal Appeals Court Rules Uber Can Force Drivers Into Individual Arbitration, Voids Class-Action




A federal appeals court Tuesday ruled that Uber can force its drivers into individual arbitration over pay and benefit disputes, voiding an effort by thousands of drivers to join in a class-action suit against the ride-hailing company, according to the ***Los Angeles Times***.

The U.S. 9th Circuit Court of Appeals in San Francisco overturned a lower-court order that had certified the drivers' class-action effort.

The court's opinion cited a 5-4 U.S. Supreme Court decision in May that employers could enforce arbitration agreements that require workers to give up the ability to collectively pursue claims that they were shortchanged or treated unfairly.

**Read the *LA Times* article**.

# Florida Supreme Court Deals Blow to Geico in 'Bad Faith' Dispute

In a case stemming from a fatal car accident a dozen years ago, the Florida Supreme Court has backed a jury's conclusion that GEICO General Insurance Co. acted in "bad faith" in the way it handled a customer's claim, reports ***The Daytona Beach News-Journal***.

The 4-3 ruling came in a multimillion-dollar case that has been watched by the insurance industry and trial attorneys," writes reporter Jim Saunders. "The ruling reinstated a bad-faith verdict against GEICO after the 4th District Court of Appeal had overturned the jury's decision."

The court's opinion disputed the appeals court's conclusion that there was "insufficient" evidence that GEICO had acted in bad faith. It said that the appeals court had not properly applied legal precedents in its decision.

**Read the *News-Journal* article**.