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Pennsylvania Cases To Watch In 2014

By **Matt Fair**

Law360, Philadelphia (January 01, 2014, 10:08 AM ET) -- Courts across Pennsylvania are poised to address a number of key cases in 2014 that could significantly change forum selection rules in civil cases, lead to the adoption of updated tort laws, strike down the state's ban on same-sex marriage and more clearly define defenses that contractors can use in workplace injury suits.

Here are some of the cases winding their way through the state and federal court systems in Pennsylvania that attorneys will be watching closely in 2014.

Alexander Bratic et al. v. Charles Rubendall et al.

In a case that could upend Philadelphia's reputation as a plaintiff-friendly venue, the Pennsylvania Supreme Court is set to rule on how state judges should deal with forum non conveniens motions, a tactic defense attorneys use to transfer cases to different venues by arguing the plaintiff's choice of forum imposes an unfair burden.

Attorneys say a ruling making it easier for defendants to transfer cases out of a plaintiff's original venue could set a precedent that would result in product liability, personal injury and other high verdict-yielding lawsuits moving out of Philadelphia, which has long been known as a favorable venue for plaintiffs.

"I think it has the potential of changing litigation in general," said Joseph Podraza, an attorney with Sprague & Sprague representing the plaintiffs. "If the standard is relaxed, it would be the first time in jurisprudence throughout the country where the plaintiff's forum could be changed based on convenience rather than a higher harassment or oppression standard."

"Forum non conveniens would become routine," he added. "The greatest concern I have is that it could be manufactured with boilerplate affidavits that any entity could generate."

The case before the justices stems from a bid by Keefer Wood Allen & Rahal LLP to transfer a suit it was facing in Philadelphia County to Dauphin County. The firm was sued, alongside attorney Charles Rubendall and two insurance companies, in 2009 by Alexander Bratic and Joseph Proko, who alleged wrongful use of civil process and abuse of process. The suit was a response to an earlier case in which the insurers, Residential Warranty Corp. of Pennsylvania and Integrity Underwriters Inc., represented by Keefer Wood, unsuccessfully targeted Bratic and Proko for tortious interference.

After a Philadelphia County judge and a three-judge Superior Court panel agreed that the case should be transferred to Dauphin County, the home of all four defendants, an en banc Superior Court panel ruled that moving the case based simply on affidavits claiming that hearing the suit in Philadelphia would be "disruptive" ran counter to legal precedent.

Regardless of how the court rules, a decision should clarify the standards that parties need to meet when making venue decisions, often a hotly contested issue in civil litigation, said Chip Becker, an attorney with Kline & Specter PC in Philadelphia.

"Bractic is important because it will govern details of the venue-change analysis — the evidence needed to permit a venue transfer and trial court discretion over the transfer issue," he said.

The case was argued in November.

Rubendall is represented by Jeffrey Lerman of Montgomery McCracken Walker & Rhoads LLP and Stephen Kurens of Sirlin Lesser & Benson PC.

Bratic is represented by Joseph Podraza and Richard Sprague of Sprague & Sprague, Lloyd Parry of Davis Parry & Tyler PC, and Glenn Rosenblum.

The case is Alexander Bratic et al. v. Charles Rubendall et al., case number 21 EAP 2013, in the Supreme Court of the State of Pennsylvania.

Same-Sex Marriage Litigation

From the seven justices on the Pennsylvania Supreme Court to federal judges in both Philadelphia and Harrisburg, courts across the state are dealing with a series of actions challenging the constitutionality of a 1996 state law defining marriage as between a man and a woman.

The federal case relies on recent precedent from the U.S. Supreme Court, while the state court case is based on provisions of the Pennsylvania Constitution forbidding gender-based discrimination in the application of laws, making a two-pronged attack that attorneys say will be hard to overcome.

"Between the U.S. Supreme Court's Windsor opinion and the Commonwealth's strict Equal Rights Amendment, it's hard to see how Pennsylvania's same-sex marriage ban survives these challenges," said Maxwell Kennerly, an attorney with the Philadelphia-based Beasley Firm.

Launched in July, the first federal lawsuit claims the ban violates same-sex couples' due process and equal protection rights under the U.S. Constitution by denying them tax breaks, workers' compensation, estate claims and health care privileges regularly enjoyed by couples in heterosexual marriages.

While a federal judge in November shot down a bid by Gov. Tom Corbett's administration to dismiss the suit, the administration has filed a petition asking the Third Circuit for an interlocutory review.

A second federal suit launched in September challenges a provision of Pennsylvania's marriage law that refuses to recognize same-sex marriages from other jurisdictions. The Corbett administration filed a motion at the end of November asking a federal judge in Philadelphia to dismiss that suit.

Pending before the state's Supreme Court is a petition filed by Bruce Hanes, the elected register of wills

and clerk of orphans' court for Montgomery County, seeking an appeal after a Commonwealth Court judge ordered him to stop unilaterally issuing marriage licenses to same-sex couples.

Hanes had started issuing the licenses in the wake of the July lawsuit, after announcing that he believed the ban was unconstitutional. After the state's Department of Health filed a mandamus action against him to stop him from issuing the licenses, a Commonwealth Court judge agreed that it was not Hanes' role to weigh the constitutionality of state statutes.

Meanwhile, a group of same-sex couples who were issued marriage licenses by Hanes filed their own suit in Commonwealth Court in September claiming the state's ban violated both the due process and equal protection clauses of the federal and state constitutions. A second suit filed in Commonwealth Court in September likewise argues that the state's ban on same-sex marriage runs afoul of protections in the Pennsylvania Constitution.

The challengers are represented by the American Civil Liberties Union, Hangley Aronchick Segal Pudlin & Schiller, Begley Carlin & Mandio LLP, Ballard Spahr LLP, Lyman & Ash, Dechert LLP, and Morgan Lewis & Bockius LLP.

The administration is represented by Lamb McErlane PC.

The cases are Deb Whitewood et al. v. Michael Wolf et al., case number 1:13-cv-01861, in the U.S. District Court for the Middle District of Pennsylvania; Sasha Ballen et al. v. Thomas Corbett et al., case number 481 MD 2013, in the Pennsylvania Commonwealth Court; Commonwealth of Pennsylvania v. D. Bruce Hanes, case number 77 MAP 2013, in the Pennsylvania Supreme Court; Nicolla Cucinotta v. Commonwealth of Pennsylvania, case number 451 MD 2013, in the Pennsylvania Commonwealth Court; and Cara Palladino et al. v. Thomas Corbett, case number 2:13-cv-05641, in the U.S. District Court for the Eastern District of Pennsylvania.

Terrence Tincher et al. v. Omega Flex Inc.

In a case closely watched among product liability attorneys, the state Supreme Court is faced with the question of whether it should adopt a more recent body of tort law that attorneys say could result in a massive shift in the burden that plaintiffs face when bringing product liability lawsuits.

Omega Flex Inc. is pressing the court to adopt the Restatement (Third) of Torts in Pennsylvania over the Restatement (Second) after its steel tubing was found to have contributed to a house fire, and a broad ruling could determine which body of law governs product liability actions in Pennsylvania.

"This is a foundational question whose answer will broadly impact product liability litigation — from case selection to the evidence needed to prove liability to the exposure of defendants," Becker said.

Omega Flex has argued that both versions of the common-law doctrine require proof of a defective product and that the updated version simply added a requirement showing that an alternative design for the product was available.

However, attorneys for the plaintiffs have argued that the Third Restatement represented a "severe departure from the fundamental and deeply vested social policies underlying product liability actions in Pennsylvania" that would require plaintiffs in all product liability cases to prove that manufacturers should have foreseen the risks of their products.

The Third Restatement introduces negligence concepts into product liability claims. Under the Second Restatement, which the plaintiffs say Pennsylvania has used for nearly 50 years, plaintiffs can recover from manufacturers on the sole basis that a product was defective when used as intended. The Third Restatement, however, accounts for other factors, such as whether the manufacturer acted reasonably in designing the product and whether it could have foreseen the product's risks.

Omega Flex was hit with more than $1 million in damages after a Chester County jury found the company was strictly liable for damages after lightning struck a home in 2007, melting a hole in steel piping manufacted by Omega Flex and sparking a fire.

“This is the most hotly watched case for tort litigators,” said Kennerly, who expects the Second Restatement to be upheld.

"As much as defense interests like to read into the court taking the case as meaning the court is leaning towards adopting the Third Restatement, the grant of allocator here could just as well mean the court wants to correct the Third Circuit’s erroneous application of the Third Restatement," he said.

The case was argued in October.

The case is Terrence Tincher et al. v. Omega Flex Inc., case number 17 MAP 2013, in the Supreme Court of the State of Pennsylvania.

Earl Patton et al. v. Worthington Associates Inc.

In the area of workers' compensation, the state Supreme Court is expected to decide whether general contractors facing personal injury lawsuits can rely on the statutory employer defense, a body of state law protecting them from liability for injuries sustained by their workers.

Worthington Associates Inc. said a Bucks County trial judge and the state’s Superior Court had effectively robbed the general contractor of the defense in a pair of rulings finding that Earl Patton, the owner of a carpentry company, could not be considered a statutory employee and was therefore eligible to receive damages in a personal injury suit he brought after he was injured on a worksite.

Under the Pennsylvania Workers' Compensation Act, general contractors must provide workers' compensation benefits to their employees and, in the event their subcontractors don't provide it, to their subcontractors' employees as well. In exchange for taking on that responsibility, employers are given immunity from tort claims in the event of injuries.

The law immunizes general contractors from tort liability if they satisfy the so-called McDonald analysis. The test, named after the Supreme Court's 1930 decision in McDonald v. Levinson Steel Co., sets forth the five elements needed to create a statutory employer relationship, including whether the injured worker is an employee of a subcontractor. Worthington argues that the question of whether Patton was an employee was improperly put to the jury.

The justices agreed to hear the case in April, saying they'd consider whether the Superior Court's decision upholding the jury's finding that Patton wasn't an employee nullified the statutory employer doctrine by letting the jury decide the issue as a question of fact rather than the judge deciding it as a matter of law.

"Patton addresses whether a jury must also find that the plaintiff is a common-law employee of the general contractor, or whether that additional question improperly nullifies the statutory employer doctrine," Becker said.

The case was argued in November.

Worthington is represented by John Hare and Kimberly Boyer-Cohen of Marshall Dennehey Warner Coleman & Goggin PC and James Rohlfing of William J. Devlin Jr. & Associates.

Patton is represented by Carin O'Donnell and John Cordisco of Stark & Stark PC.

The case is Earl Patton et al. v. Worthington Associates Inc., case number 32 MAP 2013, in the Supreme Court of Pennsylvania.

Nelson v. Airco Welders Supply et al.

Product liability attorneys are also keeping a close eye on a conflict that has emerged between the state's Supreme Court and Superior Court over the admissibility of expert testimony in asbestos-related product liability cases, said Robert Byer, head of the appellate division of Duane Morris LLP's trial practice group.

A divided three-judge Superior Court panel junked an $14.5 million asbestos verdict against three welding companies in September in Nelson v. Airco Welders Supply et al. after ruling that the trial court had run afoul of Supreme Court precedent by admitting expert testimony stating that every exposure to the substance must be considered a cause of mesothelioma. However, the case was singled out for an en banc rehearing by the Superior Court in November.

The panel's decision found that expert testimony in the case ran afoul of the Supreme Court's landmark May 2012 decision in Betz v. Pneumo Abex LLC, which expressly rejected the admissibility of testimony finding that each and every breath of asbestos-containing products was a substantial factor in the development of asbestos-related illnesses.

The Superior Court's decision to hold an en banc rehearing in the case comes despite an opinion by the Supreme Court at the end of September in Howard et al. v. A.W. Chesterton Co. et al. reaffirming the conclusion that expert witnesses could not rely on the theory that every exposure to asbestos could be substantially linked to a plaintiff's injury.

"When the Supreme Court decided Betz, a lot of trial courts and the Superior Court seemed to say, 'Well that's OK in that case, but we're not going to follow it. We don't think they meant what they said,'" Byer said. "In Howard the justices said, 'We absolutely meant what we said.' I think the decision in Nelson was consistent with what the Supreme Court did in Howard. This looks like a battle between the Superior Court and the Supreme Court, and the Supreme Court is always going to win that battle."

The case is currently being briefed.

Hobart and Lincoln are represented by John Hare, Christopher Santoro and Joan Depfer of Marshall Dennehey Warner Coleman & Goggin PC.

Crane is represented by Nicholas Vari, James Insco II and Michael Ross of K&L Gates LLP and George Bruch of Swartz Campbell LLC.

Nelson is represented by Steven Cooperstein, John DiDonato and Laurence Brown of Brookman Rosenberg Brown & Sandler.

The case is Nelson v. Airco Welders Supply et al.; case numbers 865, 866, 867 and 889 EDA 2011; in the Superior Court of Pennsylvania.

--Additional reporting by Dan Packel and Kurt Orzeck. Editing by Jocelyn Allison and Elizabeth Bowen.
