A JOURNAL FOR CIVIL DEFENSE & CORPORATE COUNSEL AND INDUSTRY PROFESSIONALS

FEDERATION OF DEFENSE & CORPORATE COUNSEL
FDCC
DEFENSE LAWYERS. DEFENSE LEADERS.

Insights

SPECIAL ISSUE

A Year In Review

Looking Back While Focused on the Future

FDCC's Substantive Law Sections Provide Their Observations and Predictions

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This publication is also available on the FDCC On Demand section of the FDCC Website.

The Federation of Defense and Corporate Counsel (the "FDCC") is a not-for-profit corporation with a national and international membership comprised of more than 1,500 leading defense and corporate counsel working in private practice, as in-house counsel, and as insurance claims representatives.

Members are peer selected through a rigorous process evaluating both competence and commitment to the judicial system. The FDCC constantly strives to protect the American system of justice. Since 1936, its members have established a strong legacy of representing the interests of civil defendants, including publicly and privately-owned businesses, public entities and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice.

The Federation also leverages the intellectual capital and subject matter expertise of members within the 25 Substantive Law Sections organized in the areas of law of greatest relevance to the members and their respective clients. Members of the Sections collaborated to evaluate the events, court opinions, and other developments occurring in 2022, and to evaluate what lies ahead. We are pleased to share the collective experience and views of the membership in this report, and trust you will find it of interest and value.

Disclaimer: The articles contained within this publication are a general discussion and should not be considered to be legal advice.

FEDERATION OF DEFENSE & CORPORATE COUNSEL

FDCC

DEFENSE LAWYERS. DEFENSE LEADERS.

Dear FDCC Colleague:

I always brag about how talented our members are, how knowledgeable they are about their areas of practice, how deep their expertise and insights run, and how dedicated they are to the education and improvement of our profession. The publication you have before you now stands as a testament to all of those things.

This publication contains seventy-one articles contributed by eighteen different substantive law sections of the FDCC. These articles discuss cutting edge topics, prognostications for the future in various practice areas, useful best practices, traps for the unwary, and much more -- all written by subject matter experts in their field.

These articles were the result of efforts by countless contributors, including the authors, the chairs and vice chairs of our substantive law sections, the leaders of the Projects and Objectives Committee, and the team at FDCC Headquarters. The substantive sections of the FDCC are the lifeblood of the knowledge component of the FDCC's mission. They are also one of the primary paths through which the connections and relationships among and between our members are forged. Respect and friendships grow as people accomplish great things and have fun doing it.

On behalf of the Board, the Officers, myself personally, and the entire membership of the Federation that stands to benefit from this tremendous work product, thanks to all who contributed to this special publication. I am very proud of it. You all should be as well.

And to our members, please share this publication with your clients and colleagues. What better way to demonstrate the firepower and depth of the FDCC, and by implication, the value of your membership in it. We hope this is a continuing project going forward. Consider participating in the next round and demonstrating your expertise to your peers.

Very truly yours,

Howard A. Merten
FDCC President

TABLE OF CONTENTS

Alternative Dispute Resolution

Civil Rights and Public Entity Law

What Lies Ahead for Claims Against Governmental Entities

Construction Law

Data Privacy Law

Employment Law

Energy & Intellectual Property Law

Extra-Contractual Liability Law

Healthcare Practice Law

Insurance Coverage Law

Law Practice Management

Life, Heath & Disability Law

Products Liability Law

Professional Liability Law

Toxic Tort Law

Transportation Law

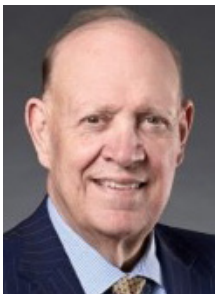
Trial Tactics Section

FDCC Substantive Law Sections

Alternative Dispute Resolution

It is Time for Negotiators and Mediators to be More Savvy About Cultural Differences Among the Parties

By John C. Trimble



John C. Trimble

It is highly likely that the vast majority of FDCC members have represented international clients in litigation in the US. It is a certainty that every one of us has defended a case in which one or more Plaintiffs were international. Further, with the diversification of our society, every community has immigrant populations who are assimilating into the community and who may eventually end up in litigation.

The majority of our members are lawyers who were born, raised, and educated in the US. That means that our views of the judicial system, our knowledge of our culture, and our experience with negotiation have all been shaped by our US upbringing. While we may think that we can know how persons from other countries or cultures may think, the reality is that unless we train ourselves, our assumptions about the decision making of international clients and opponents may be flawed.

For the last 35 years I have been a defense lawyer and a part time mediator. ("Part time" means roughly one-third of my practice.) During those years I have been involved with hundreds of negotiations involving international parties. What I have learned is that many, many international parties do not trust our system, and despite a friendly relationship with their lawyers, they do not fully trust us. Because of their lack of trust, they may not be as forthcoming as they should be in responding to discovery, and they may be less likely to accept and act upon their lawyer's advice. In negotiations they are frequently unwilling to give their lawyers the insight about settlement authority that good negotiators like to know as they craft a strategy to settle.

My pitch to you today, whether you are exclusively a defense lawyer or a mediator and defense lawyer, is to educate yourself about cultural views toward litigation and negotiation. And, I have a starting point for you. There is a magnificent book entitled, "*Kiss, Bow, or Shake Hands: The Bestselling Guide to Doing Business in More Than 60 Countries.*" Kiss, Bow, or Shake Hands . For many years I have sworn by this book. Any time that I have a negotiation with

an international party on either side of a case I refer to it. I have learned that Germans do not like small talk and they don't prefer to be asked personal questions. Mexicans are very conscious of formality and respect. Certain Asian cultures will nod their heads and smile and appear to agree with you when all they are doing is signifying that they understand what you are saying. Other cultures believe that everyone lies in negotiation and that it is acceptable for them to lie as well. Most importantly, there are many cultures in which it may appear to a US negotiator that a deal has been accepted when it is actually their intention to seek further terms.

In addition to the examples I have just offered, the book I am suggesting teaches about how other cultures make decisions. Some cultures decision making is collective and the lead negotiator will have to confer with the group and obtain consensus. In others, decision making is done by the leader of the group after input from others. Importantly, negotiators should know whether the culture of decision making of the group is collectivist or individualistic.

1. I could go on, but the point of my pitch is that we lawyers must be sensitive to cultural differences and we cannot merely assume that we know how others make decisions. As FDCC members we are expected to be the best of the best, and if you want to be the best, then it is time to educate yourself about how international litigants think. Through education you will improve your relationships with your clients, and you will succeed in obtaining better outcomes.

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"Your future is behind you and your past is catching up" The James Hunter Six, The Gypsy

By H. Mills Gallivan

H. Mills Gallivan

2022 was to be the year COVID-19 ended and life returned to normal; well so much for predictions…

The conventional wisdom pre-pandemic was that remote/virtual mediation would never work and was a futuristic fantasy. We quickly learned that the future of mediation was behind us, and that we had some catching up to join the brave new virtual mediation world. Before 2019 only the most tech savvy lawyers had heard of Zoom and now it is so commonplace that every lawyer has some basic Zoom skills. The closure of the courts for trials resulted in litigators turning more quickly to online mediation as a means for closing cases.

Takeaways from the new world of virtual mediations:

1. Planning – Mediation is no longer treated as a mere steppingstone to the courthouse. The parties are much more engaged in negotiations regarding the timing, location, and pre-mediation discussions with the mediator. The parties are coming to mediations better prepared, and with more intentional and definitive strategies to achieve a favorable resolution.

2. Participation – Pre-pandemic, many adjusters and inhouse risk managers attended the mediation plenary session and opening statements via telephone, citing "travel restrictions" as the reason they could not attend in person. When that occurs, defense counsel keeps his or her clients apprised of the demands and relays their offers and thoughts to the mediator. These participants were not only remote but were not fully engaged in the mediation process. Virtual mediation assures that decision makers can be present throughout the mediation process and that the mediator has access to them. The fact that the decision makers are present and observing the mediation process has resulted in better prepared and more engaged defense counsel. It also gives defense counsel a lot of one on one time with their clients to discuss other matters and to develop relationships.

3. Persistence – COVID-19 changed many things and the transition to virtual mediations also created a paradigm shift in how parties approached and conducted mediations. Mediation is being viewed as the best pretrial opportunity for resolving cases. Lawyers are consistently demonstrating increased interest in resolving cases at mediation or in follow-up negotiations. Parties are much more likely to adjourn a mediation than to ask the mediator to declare an impasse. Adjournment often results in new ideas, assessments, continued negotiations, and a settlement.

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Demands Not Tethered to Medical Expense Totals Become More Common

By Marc Harwell

Marc Harwell

Demands from plaintiffs that are not tethered to the medical expenses are becoming more common. The days of case valuations using an "X" factor from the medical expenses is becoming a distant memory. Medical expenses are just one of many factors that are available for the discussion of case value from the perspective of the plaintiff and the defendant.

In my work as a neutral and in my work as a defense advocate, I understand that in certain cases the medical expenses might well detract from the story that the plaintiff wants to tell to maximize a recovery. In states that only allow the plaintiff to introduce the medical expenses paid rather than billed, the plaintiff may not want to present to the jury a story that uses medical expenses as a base line. Even in states such as Tennessee that only allow the medical expenses billed to be presented to the jury, I have seen more plaintiffs changing the focus of their damages presentations away from the medical expenses and toward less tangible non-economic damages such as pain and suffering and loss of enjoyment of life.

In cases where the medical expenses are not substantial, but the plaintiff has good proof of non- economic loss, the plaintiff's counsel may find the medical expenses to limit the potential recovery if the deliberations about value begin at the insubstantial number.

If the plaintiff has photographs or video evidence, property damage, and witnesses that all tell a compelling story of substantial force causing significant trauma and associated physical injury, such evidence is being used by skillful plaintiff's counsel to begin its narrative. If the plaintiff can develop that story line compelling medical evidence of permanent injury and associated impairment that support non-economic loss of pain and suffering and loss of enjoyment of life, the plaintiff's attorney only creates an environment for an award without self-imposed limitations.

This type of damages presentation strategy seems to me to be consistent with plaintiff's counsel application of the reptile theory. In that application, plaintiff's counsel creates a narrative that seems reasonable unless and until the fallacy of premise is revealed. The narrative is designed to create fear and vulnerability. The next step is to empower change through retribution to eradicate the source

that created the unsafe condition or allowed the unsafe condition to exist. This formula has no self-imposed limitations – only potential.

Similarly, a damages presentation with only potential and no self-imposed limitations based upon a medical expense number seems to be a developing trend.

From a practical presentation perspective, reading a medical deposition transcript about a list of medical expenses as being reasonable, necessary, and causally connected to the matter in question may not be as compelling story-telling fodder as photographs, videos, recreation demonstrations, etc.

From the defense perspective, knowledge can be power and can be useful in the right hands.

In mediation, counsel for the plaintiff and counsel for the defendant should provide the neutral the information that is necessary for the parties to engage in a meaningful discussion that cuts through narratives of the advocates.

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Three of the Biggest Mistakes that Lawyers Make in My Mediation Room

By Jean M. Lawler

Jean M. Lawler

Three of the biggest mistakes that I see attorneys make when they're in my mediation room, whether in an office conference room or in a zoom room, tend to be the same. Simply put, they are:

1. Not having the decision maker in attendance and/or not participating in the mediation.

   Not having the decision maker there, the one who can write the check or agree to settlement terms, can mean that the mediation is over with before it even begins. Not only can it be insulting to the other party and their attorney, but it can be detrimental for the party whose decision maker is not participating. Whether the missing person is a board member, family member, business partner or insurance claims representative, the fact that they are not present and actively participating definitely makes a difference. With Zoom and/or hybrid mediation sessions being commonplace now, there should be no reason to not have the right people 'in the room".

2. Sacrificing strategic negotiation to the emotions of the client.

   Every dispute and lawsuit triggers emotions – whether due to the issues in dispute or nuances of the involved personalities. When there are emotions at play or frustrations that boil over, they cloud one's judgement. When I see lawyers adopting their clients angst, anguish, and emotional outbursts, that tells me that the ability of those lawyers to be strategic has been compromised.

   Emotions for clients are fine of course – litigation is not an easy experience. But for the lawyer who's supposed to be guiding the client, don't consciously or unconsciously adopt the emotions of the client. Nobody, including the lawyers, should be screaming at the mediator, rolling their eyes and acting out at being so disgusted with the other party that they are ready to throw in the towel. Lawyers should be counseling their clients to be calm and to not do these things. Being mindful that most cases settle, it is important that clients have lawyers who are in the frame of mind to help them get over the emotional humps so that the client can make informed decisions and have their best shot at trying to get the case settled that day or to at least set the stage for a future settlement.

3. Making (in)credible demands or offers and /or giving up too soon.

   The best way to maintain credibility and reach a settlement is for demands and offers to be numbers that are not in the "insult zone" for purposes of that particular case. How to know that zone? By knowing your case, the liability and damage issues and exposures. And then negotiate accordingly. It is not impressive and hijacks precious time from the negotiations if one or both parties need to be talked down from the clouds or up from the floor, to then start having serious negotiations. As I say to parties from the outset: "Opening demands and opening offers – are never accepted. So don't be offended."

   By the same token, giving up too soon happens more often than one might think. You have to think positively. Some lawyers think that threatening to walk out or actually walking out is a good strategy. I would say to you I don't think that it is. Hang in there. Make the time count. Use the time you have to try and get to the best deal that you can - or at least to narrow the gulf between the last offer and last demand. If you don't settle in mediation, you will be talking settlement again. The judge will be sure to see to that. So do your best and never give up too soon. Keep an open mind. Mediation is a process, and you can't always shortcut it successfully.

Ultimately, be prepared. Have your client's decision maker participate in the negotiations, counsel your client to behave with civility, don't let a client's emotions hijack your strategic thinking, avoid negotiating in the "insult zone", and don't give up too soon. Let the process work for your client. They will appreciate what a wonderful lawyer you are and will thank you for what you accomplished on their behalf.

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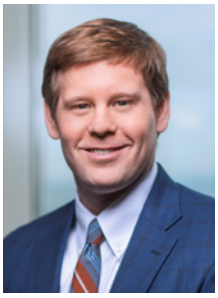
2023 and Beyond Forecast

By C. Bailey King, Jr., Bradley LLP



C. Bailey King, Jr.

In looking ahead to the coming year and beyond, we went to the stable of accomplished mediators, arbitrators, and neutrals to get their predictions for what they see coming in 2023. As Mills Gallivan eloquently noted, "[o]ur 'future is behind us, and our past is catching up,' as we evolve to more meaningful and better mediations." With that in mind, here is what they see coming in 2023:

- "Third Party Litigation Funding will continue to expand its geographic presence and will undergo increased opposition in "red States." This funding is impactful to litigation in general and ADR too." Marc Harwell

- "While lawyers and clients are slowly returning to in person mediation, there is no question that hybrid mediation in which some parties attend by Zoom and others attend in person, is here to stay for good." John Trimble

- Mediation will continue to evolve as the preferred forum for resolving cases and eliminating risk. The parties will increase their involvement in pre-mediation planning and preparation because mediation offers the best option for controlling outcomes. H. Mills Gallivan

- Plaintiff's lawyers will no longer agree to decision makers participating by phone for limited segments of the mediation. Virtual mediation has clearly demonstrated that all parties can be present and fully participate in the entire mediation which results in a better process and outcome for all concerned. H. Mills Gallivan

- Both sides of the "v." understand the efficacy and efficiency of mediation. Consequently, they will be persistent in pursuing closure of cases through artful negotiation and mediation. Fewer and fewer lawyers see trial as the Best Alternative To a Negotiated Agreement. H. Mills Gallivan

- Online mediations in civil litigation will, without question, be established as the new norm, especially in large cities, with about 75-80% of mediations being conducted online. Jean M. Lawler

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Civil Rights and Public Entity Law

Supreme Court Continues to Uphold Qualified Immunity

By Nathaniel Jordan

Nathaniel Jordan

Pop-culture media didn't use to talk about qualified immunity all that much. But that's changed in the last couple years, with new scrutiny on law enforcement conduct, and with positions in the public eye staked out on both sides of whether qualified immunity should stay or go. How much does public opinion impact the world of civil rights legal practice? It's hard to say, but new attention to qualified immunity has left practitioners wondering whether the courts would take a different approach to the doctrine. And, particularly, the Court that sets policy for all others.

The answer of late has been that the Supreme Court has continued to uphold the doctrine. Most notably in the last 18 months, the Court decided *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4 (2021), and *City of Tahlequah, Okla. v. Bond*, 142 S. Ct. 9 (2021), each a per curiam opinion in favor of qualified immunity that reversed the appellate opinion below.

- In *Rivas-Villegas*, the Court granted qualified immunity to an officer who briefly kneeled on the back of a knife-carrying man in response to a domestic violence incident involving a chainsaw. A prior appellate case denying qualified immunity to an officer who, responding to a noise complaint, dug his knee into the back of an unarmed man wasn't enough to put the Rivas-Villegas officer on notice that kneeling in his situation violated a constitutional right.

- In *City of Tahlequah*, the Court granted qualified immunity to officers who shot a man who raised a hammer as if to attack after officers engaged in conversation with him and followed him into his garage. A prior appellate case involving officers responding to a "potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands" did not clearly establish that the City of Tahlequah's officers' conduct was reckless or unlawful.

That is, in both *Rivas-Villegas* and *City of Tahlequah*, existing precedent did not clearly establish a constitutional violation under similar circumstances. Since then, these two cases have been collectively cited in over 400 other cases, broadcasting the continuing vitality of the qualified immunity defense.

Meanwhile, the Supreme Court has denied certiorari in other qualified immunity cases, leaving in place appellate court rulings that had upheld qualified immunity. See *Tucker v. City of Shreveport, La.*, 142 S. Ct. 419 (2021); *Ramirez v. Guadarrama*, 142 S. Ct. 2571, 2572 (2022); *Cope v. Cogdill*, 142 S. Ct. 2573 (2022). And since *Rivas-*

Villegas and *City of Tahlequah*, where the Supreme Court has referenced the doctrine following the grant of cert, it has been supportive, writing "officers are still protected … by qualified immunity." *Thompson v. Clark*, 142 S. Ct. 1332, 1340–41 (2022). As Justice Sotomayor noted in a June 2022 opinion in which she concurred in part and dissented in part, "The doctrine of qualified immunity will continue to protect government officials from liability for damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Egbert v. Boule*, 142 S. Ct. 1793, 1821 n.5 (2022) (Sotomayor, J., concurring in part and dissenting in part) (cleaned up).

The lesson for practitioners is that qualified immunity remains a doctrine to take seriously. Counsel for individual defendants named in civil rights cases should evaluate the possibility of qualified immunity motion practice in every case, whether in early stages or late. It might not always be the right fit for a case, but it's important to consider.

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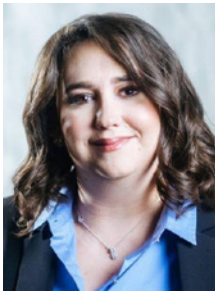
Sex and Section 1983: Consent and the #MeToo Movement[1]

By Jamie Huffman Jones



Jamie Huffman Jones

The #MeToo Social Media Movement has placed the concept of "consent" centerstage in popular culture. While the impact of #MeToo continues to be debated in gossip rags and academia alike, researchers have determined that reporting of sex crimes increased by 10%[2]. However, "prison inmates [have been] largely left out of the #MeToo discussion, particularly women and gender minorities.[3]" While the popular discourse may not include prison inmates, the topic of consent arises when there is a claim of sexual assault by a law enforcement officer (often in detention cases) as a violation of constitutional rights pursuant to 42 U.S.C. Section 1983. When such allegations occur, the question becomes whether consent is a defense under Section 1983.

Under most criminal statutes, consent cannot be a defense because of the superior relationship of the prison official and the cases are treated as statutory rape. Some circuits have adopted this reasoning into the civil scheme. *Lobozzo v. Colorado Dep't of Corr.*, 429 F. App'x 707, 711 (10th Cir. 2011) ("[i]t is uncontested that Lobozzo, an inmate, could not legally consent to sexual activity with Martinez, a guard."). This is a minority rule.

Under the civil scheme of Section 1983, however, consent is available as a complete defense in some circuits. *Freitas v. Ault*, 109 F.3d 1335 (8th Cir. 1997). In the last ten years, this was the majority rule, but it has become eroded into a rebuttable presumption. Under that presumption:

> the prisoner is entitled to a presumption that the conduct was not consensual. The state may rebut this presumption by showing that the conduct involved no coercive factors… explicit assertions or manifestations of non-consent indicate coercion, but so too may factors, privileges, or any type of exchange for sex. Unless the state carries its burden, the prisoner is deemed to have established the fact of non-consent.

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1 Thank you to Chris Stevens, Fuqua, Campbell, P.A. for assistance in a previous version of this article.

2 Levy, Ro'ee and Mattson, Martin, The Effects of Social Movements: Evidence from #MeToo (March 16, 2022). Available at SSRN: https://ssrn.com/abstract=3496903 or http://dx.doi.org/10.2139/ssrn.3496903)

3 Nika Arzoumanian, Consent Behind Bars: Should it be a Defense Against Inmates' Claims of Sexual Assault, University of Chicago Legal Forum, Article 11 (2019).

Wood v. Beauclair, 692 F.3d 1041, 1049 (9th Cir. 2012). See also *Landau v. Lamas*, 2022 U.S. Dist. LEXIS 47243 (M.D. Pa. 2022); *Walker v. Cty. Of Gloucester*, 581 F.Supp.3d 673 (D.N.J. 2022).

As the discussion of consent continues in popular culture, it will likely impact the availability of the consent defense in civil rights cases. Arguably, it has already been felt as, in less than ten years, consent as a full defense has gone from a majority to a minority rule and rebuttable presumption has become the majority rule. Accordingly, practitioners should be aware of the erosion of the consent defense, and pay particular attention to facts that would rebut a presumption of non-consent.

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The Changing Landscape of Police Liability in Washington State

By Ann Trivett

Ann Trivett

Defense attorneys who represent law enforcement agencies know this: times are changing. The past five years have brought monumental changes to the way the public thinks about all aspects of police work and the way our jury pools see policy liability, as well as verdict values. Across the country, defense attorneys have been learning to adapt in the way we evaluate our cases, advocate for our clients, and effectively communicate our message. Here in Washington, we are also learning to adapt to changing state law.

For many years, claims against governmental entities were evaluated under the public duty doctrine, which recognizes that a public entity does not owe a duty to an individual member of the public when that duty is one owed to the public in general. See *Osborn v. Mason County*, 157 Wn.2d 18, 134 P.3d 197 (2006). For example, plaintiffs cannot state a claim for negligent police training, because a municipality's duty to train its police force is a duty owed to the public in general, not to any particular person. A plaintiff wishing to sue a municipality or police officer for negligence would have the burden to prove that one of four enumerated exceptions to the public duty doctrine applied. Over time, however, Washington courts have found numerous exceptions to a traditional application of the public duty doctrine, and its effectiveness has been eroding.

In its most recent opinion, *Norg v. City of Seattle*, 522 P.3d 580 (2023), the Washington Supreme Court "clarified" (but in reality held for the first time) there are two separate avenues for establishing governmental liability: (1) conduct specifically related to governmental actions, which requires a public duty doctrine analysis; or (2) an affirmative interaction with a member of the public, which triggers a common law duty to use reasonable care. In *Norg*, that common law duty applied as soon as a 911 dispatcher told a woman that paramedics were on the way. Because the paramedics went to the wrong building, delaying their medical response, the plaintiff could maintain a common law negligence claim against the municipality for the harm allegedly caused by the delayed response.

Norg is only the latest of a series of opinions "clarifying" Washington law and creating a legal framework whereby plaintiffs have a greater probability of asserting actionable negligence claims against police officers. While Washington state law

claims do not allow a prevailing plaintiff to recover attorney's fees or punitive damages, the municipality is vicariously liable for employees' actions within the course and scope of employment, and there is no qualified immunity. Negligence claims also typically involve significant factual disputes, based on 20/20 hindsight, which makes it difficult to obtain summary judgment dismissal.

What does this mean for Washington defense attorneys? More municipal liability lawsuits include either both federal and state law claims or only state law claims. It is more difficult to get cases dismissed at summary judgment, and the cases usually involve a wide range of factual inquiries and criticism of police decisions and tactics that lead up to a significant event or use of force. And while we may be able to reduce exposure to attorney's fees and punitive damages, inflated jury awards pose serious risk, especially depending upon the venue. This is the bottom line: it is more important than ever that we get involved in potential lawsuits early, stay creative with resolution strategies, and focus on story-telling, communication, and powerful visual exhibits to effectively educate the judge and, if necessary, the jury who will ultimately decide the case.

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One State's Attempt to End Qualified Immunity

By R. Jeffrey Lowe

R. Jeffrey Lowe

In the wake of the George Floyd incident and the civil unrest that followed, the cries to end qualified immunity intensified and some in the nation called for Congress to pass legislation to prevent the use of qualified immunity. Over the last two years, legislation has been presented to Congress to prevent the use of the defense of qualified immunity in federal claims, but the proposed legislation has found no real traction. While there has not seemed to be an appetite in Congress to end the defense, the events related to tragic death of Tyre Nichols in Memphis are sure to reignite the debate regarding qualified immunity. Although the End Qualified Immunity Act has not gotten out of Committee in Congress, one state has taken the step to end the use of qualified immunity in state proceedings. In 2021, the New Mexico Legislature passed the New Mexico Civil Rights Act (the "Act") which tracks in some relevant parts the language 42 U.S.C. Section 1983 and creates a private remedy for money damages for violations of the New Mexico bill of rights. N.M.S.A. section 41-4A-1 et seq.

The Act proclaims that a public body shall not subject any New Mexico resident or other person within the state to a deprivation of any rights, privileges or immunities secured by New Mexico's bill of rights. Like Section 1983, the Act provides any person subjected to a deprivation of their rights under the New Mexico bill of rights the ability to bring an action to establish liability and recover actual damages or equitable relief in any New Mexico district court.

While opponents of qualified immunity decry that qualified immunity precludes holding individual officers responsible for the damages they cause, the New Mexico Act does not remedy that argument because it only allows the action to be brought against the public body, not the individual officers. That is a significant departure from Section 1983 which allows claims against individual officers, but also subjects those claims to qualified immunity. The Act also requires the public body to pay any judgment awarded in claims under the Act and requires the public body to pay all litigations costs and attorney fees for any defendant named in the suit.

Also, different from the federal counterpart is that the public body in claims under the Act are responsible for the actions of the state official acting under color of or within the course and scope of the authority of the public body, whereas in claims under Section 1983, there is no vicarious liability for the public body and public body liability must be based on a practice, policy or custom of the public body that is the motivating force for the alleged constitutional violation.

Another significant difference in the Act and the federal counterpart and the case law interpreting it, is the Act's treatment of the defense of qualified immunity. In the Act, the New Mexico Legislature prevented the use of qualified immunity for any claim under the Act. Therefore, the Act did what Congress has been unable to do for the last two years, specifically end the use of qualified immunity in claims based on constitutional violations.

The Act also declared the State of New Mexico shall not have sovereign immunity for itself or any public body within the state for claims under the Act and precludes the State or its actors from asserting the defense of sovereign immunity in such claims. Therefore, the Act not only precludes the assertion of qualified immunity, it precludes the State from asserting a defense that is traditionally used in claims for damages against the State in federal court pursuant to Section 1983 for a violation of the United States Constitution. One federal district court in New Mexico has found that despite the abrogation of sovereign immunity in state court proceedings under the Act, the federal court could not exercise jurisdiction over the plaintiff's state law claims brought pursuant to the Act in federal court. Despite prohibiting the use of qualified immunity and sovereign immunity, the Act does not preclude the use of judicial immunity, legislative immunity or any other constitutional, statutory or common law immunity.

Significantly, the Act also states the remedies provided in the Act are not exclusive and are in addition to any other remedies prescribed by law or available pursuant to common law. Thus, the Act creates an argument that a plaintiff may maintain a claim against the public body for both a violation of the Act and federal constitutional

rights. Given that claims under the Act can only be brought in New Mexico state court, there also exists an argument that parallel actions could be brought in state and federal court for the same incident.

The Act only permits prospective application and does not apply to claims occurring prior to July 1, 2021. The Act also imposed a one-year written notice requirement for claims against law enforcement officers under the Act, unless the claim is one for wrongful death with has an 18-month notice requirement. However, the Act also exempted claims from the written notice requirement if the governmental entity had actual notice of the occurrence. Claims under the Act are subject to a three-year statute of limitations, unless state law provides a longer statute of limitations.

The Act also permits the recovery of a reasonable attorney fees and costs for a prevailing plaintiff similar to the ability to recover attorney fees and costs pursuant to 42 U.S.C. section 1988. The recovery under the Act, however, includes the recovery of attorney fees and costs in its damages cap, which as of the time of enactment, was $2,000,000.00 per claimant. The damages cap, however, is subject to an annual cost of living adjustment. The cost of living adjustment will never allow the cap to drop below $2,000,000.00.

The Act shows that state legislatures may be more willing to remove the protections provided by qualified immunity than Congress which may subject governmental entities and their employees to liability that does not exist in the federal system. The question remains, however, whether other states will follow New Mexico's lead and create a private right of action for violation of state constitutions to avoid the use of qualified immunity for constitutional claims and thereby provide another avenue for plaintiffs allegedly aggrieved by governmental action to recover for damages without the potential use of qualified immunity. Governmental entities, and the attorneys representing them, will be well-served to monitor state legislatures to ensure attempts to circumvent the protections provided by qualified immunity are properly opposed and limited.

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What Lies Ahead for Claims against Governmental Entities

Based on the articles presented herein, it seems as if the Supreme Court and Congress are not likely to upset the qualified immunity doctrine in any real or appreciable manner in the foreseeable future. The Court has now had opportunities post-George Floyd to shape or restate the doctrine and has not taken any steps to weaken the doctrine. Additionally, Congress has introduced bills to end qualified immunity, but the bills have not advanced to a stage where they are likely to be passed.

What that has done, however, is caused some states to take the matter into their own hands. New Mexico followed several other states in creating a private right of action for money damages for violations of the state constitution's bill of rights, and in doing so, prevented the use of qualified immunity in those claims. Washington state courts have expanded the rights of plaintiffs in claims against governmental entities by creating exceptions to the public duty doctrine. These efforts may lead more plaintiffs out of federal court and cause them to bring claims in state courts to enforce what were previously federal claims. Given the outcry against qualified immunity that gained so much attention after George Floyd and the potential for nuclear verdicts created by social inflation, it will certainly become much more difficult to defend these state law claims against governmental entities and their employees. Governmental entities and the lawyers who represent them will need to be ever-vigilant to protect the rights of governmental entities from these social factors that could potentially increase jury awards against them.

Commercial Litigation Law

Clawing Your Way to the Top in the Age of Computer-Assisted Review

By Robert E. Sumner IV and Joel Anderson Berly IV

Robert E. Sumner IV

Joel Anderson Berly IV

Have you ever tried to personally review 15,000,000 pages of electronic documents for privilege and relevance? There comes a time in the discovery process when manual, human review of documents is not only inefficient, but a practical impossibility. The management of large volumes of electronically stored information (ESI), including emails with attachments and families, Word documents, PDF's, Excel spreadsheets, PowerPoints, photos, and texts, has forced lawyers and law firms to implement technology-assisted review (TAR) or computer-assisted review (CAR) protocols in lieu of the traditional document review process.

The benefits of TAR and CAR review are countless, but there are unavoidable downsides to an objective review process that lacks human intuition and judgment. Stated simply, the problem is that TAR and CAR are not perfect and there are still scenarios in which privileged information can be missed and inadvertently produced to opposing counsel.

With this backdrop, the issue of clawing back inadvertently-produced privileged or sensitive information has emerged at the top of most litigators' list of worries. Under ordinary circumstances, claw-back questions are governed by Fed. R. Evid. 502(b). In order to show that a disclosure does not constitute a waiver of attorney-client privilege under Rule 502(b), the party who made the disclosure must demonstrate: (1) the disclosure was inadvertent; (2) the holder of the privilege took reasonable steps to prevent disclosure; and (3) the holder of the privilege took reasonable steps to rectify the error. But the Rule 502(b) matrix creates uncertainties that are ripe for argument, including what constitutes inadvertence, reasonableness, and reasonable measures to cure the disclosure problem. The only certainty under this matrix is that a claw-back request can easily become time-intensive and expensive.

The uncertainties and unpleasantness of a Rule 502(b) dispute can be avoided, however, with the use of a Rule 502(d) Order ("502(d) Order"). Rule 502(d) provides that "[a] federal court may order that the privilege or protection is not waived by disclosure connected with litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding." In other words, Rule 502(d) gives the Court the authority to issue an order declaring that an inadvertent disclosure of documents does not constitute a waiver of privilege. The elegance of a 502(d) Order is that it can peremptorily make such a proclamation and altogether eliminate the Rule 502(b) inquiry from a case.

502(d) Orders are not a novel concept. Case law research reveals that 502(d) Orders have been employed across the county, particularly in United States District Courts in New York, West Virginia, Florida, and South Carolina since as early as 2012. In fact, the Advisory Committee Notes for Rule 502(d) state: "The rule provides a party with a predictable protection from a court order – predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention." The authors' experience with the District Court in South Carolina confirms that courts generally react favorably to such an approach.

There are a few practices that will increase the likelihood of a court entering a 502(d) Order. First, it is recommended that the parties confer and submit a proposed 502(d) Order jointly or by consent. It is usually an easy sell to opposing counsel because the protections from the 502(d) Order are advantageous to all parties who produce documents in the litigation. Second, it is recommended that the 502(d) Order be submitted as a separate and freestanding document from the consent protective order. While there is nothing to prevent the inclusion of Rule 502(d) protections within a protective order, utilizing a separate order helps to identify and highlight the preemptory effect of the order. Finally, while there is no "magic language" required in a 502(d) Order, it is recommended that counsel include sufficient details to address handling of a claw-back dispute and to ensure efficient dispute resolution under the order. As such, businesses and individuals involved in document-intensive litigation should consult with their attorneys toward the beginning of litigation to ensure that an effective and robust 502(d) Order is drafted and submitted to the Court for approval.

The ability to use a 502(d) Order to preempt a prolonged fight over an inadvertent disclosure and the factors listed under 502(b) is an invaluable resource to lawyers, their clients, and the judicial system. The practice increases judicial efficiency and provides an added layer of protection that is becoming ever more important with the evolution of ESI. In light of the complexities of modern discovery and ESI management, innovative litigators across all jurisdictions should employ 502(d) Orders to protect themselves and their clients from the ill-effects of protracted claw-back proceedings. Don't let complacency or prior good fortune distract you; get on board with 502(d) Orders before you inadvertently disclose a privileged document and it is too late.

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Construction Law

EEOC and Construction Employers

By Helen Holden

Helen Holden

Over the past several years, industry leaders in construction have increased the focus on Diversity, Equity, and Inclusion ("DEI") goals for construction companies. For example, in 2018, the Association General Contractors of America released a report on the Business Case for Diversity & Inclusion on the Construction Industry. Since then, a number of construction companies have implemented more formal DEI programs.

In 2022, diversity issues in the industry came to the attention of federal regulators. The Equal Employment Opportunity Commission held a hearing in May, 2022 centered around allegations of race, national origin, and sex discrimination and harassment in the industry. EEOC Chair Charlotte Burrows stated at that time that "many women and people of color have either been shut out of construction jobs or face discrimination that limits their ability to thrive in these careers." *Id*. Since May, 2022, the EEOC has demonstrated its ongoing focus on the industry. The EEOC's actions targeting construction companies include filing two lawsuits in Florida, alleging that contractors allowed an atmosphere of racial and ethnic harassment to permeate the workplace. Further, these companies failed to take action when individuals complained about the remarks.

The EEOC has also entered into a number of settlements of prior lawsuits with construction companies following the hearing in May, 2022, in which employers have been required to conduct training, hire workplace monitors, implement new policies, and provide reports to the EEOC. Settlements in these lawsuits ranged from $50,000 to more than a $1 million. The settlements include:

- In one Nevada lawsuit involving allegations of sexual harassment, the EEOC alleged that employees were threatened if they refused sexual advances. The employer, a plumbing contractor and related companies, agreed to pay a class of employees $500,000 to resolve the matter, and further agreed to provide specialized training and to hire an external equal employment opportunity monitor.

- In a Texas lawsuit, the EEOC alleged that four companies involved in oil pipeline construction engaged in discrimination and harassed a number of male employees based on race and national origin, as well as their sex (male). The EEOC also alleged that the companies retaliated against those who complained by firing them. The settlement provides for $1.75 million in relief to ten men,

and required the employers to provide specific targeted training to managers, and also to terminate the individual who was accused of harassment.

With the EEOC focused on the industry, companies should ensure they are following best practices to improve diversity and inclusion, as well as to reduce the risk of EEOC action. For example, construction companies may want to implement robust training programs to educate managers about discrimination and retaliation, and have systems in place to investigate all claims of discrimination or harassment. Even a seemingly minor complaint can cause issues if it is not investigated. This is because if a complaining party believes the employer has failed to act, the individual may turn to the EEOC or an attorney for assistance. Moreover, if the individual does proceed, a thorough investigation can often provide the employer with excellent defenses. With the agency focused on the industry, a small amount of attention to prevention is well worthwhile.

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Construction Contracts & Beyond: Actual Notice is Not Substantial Compliance in Texas

By Shelly Masters and Brian Pounds

Shelly Masters

Brian Pounds

In *James Construction Group, LLC v. Westlake Chemical Corporation*, the Texas Supreme Court reaffirmed and strengthened the long-standing doctrine that, when it comes to contract interpretation, the plain language of the provision at issue is gospel and Texas courts are no friend to parties seeking to avoid or ignore that language.

Although the facts of *James v. Westlake* are lengthy, at its core the relevant dispute is a simple contractual notice issue. Westlake and James entered into a construction contract that allowed Westlake to terminate the contract for default, and recover excess damages, only after satisfying the express condition precedent of providing James with three (3) separate written notices. Sometime after the project commenced, Westlake sent James numerous emails alleging various safety allegations and eventually decided to terminate James. However, it was undisputed that Westlake never provided any written notice of termination; instead, Westlake terminated James orally at a meeting.

James argued that this failure to provide written notice meant that Westlake had not complied with the contract, and therefore, James was not obligated to pay Westlake's excess costs. The Texas Supreme Court agreed.

The court explained that "substantial compliance is the appropriate standard when evaluating whether a party complied with a contractual notice condition, and under Texas law, "a party's minor deviations from a contractual notice condition that do not severely impair the purpose underlying that condition and cause no prejudice do not and should not deprive that party of the benefit of the bargain." But the court then made it clear that "substantial compliance with a condition precedent requiring written notice may not be achieved without a writing in some form." Accordingly, James was not liable for Westlake's excess damages.

The potential implications of the court's opinion are numerous and may provide a formidable legal tool, especially for defense litigators. What is seemingly crystal clear is that where a contract states that written notice is required, written notice means written notice. For construction lawyers, this has the potential to arise in any number of disputes. For example, the AIA A201-2007 specifically requires written notice for, among other things, notice of claims (§ 15.1.3), claims for additional costs (§ 15.1.4), and claims for additional time (§ 15.1.5). While the term "written" has

specifically been deleted in multiple provisions of the AIA A201-2017, this most recent version contains almost 40 references to provisions with some sort of writing requirement. For any dispute involving these provisions, defense litigators may be able to avoid potential liability, or at the very least limit potential damages, where no writing was provided. For those negotiating and drafting construction contracts, whether using the AIA A201 or not, insisting upon written notice requirements may ultimately be an important tool in both establishing the duties of all parties involved and clarifying the scope of disputes and potential consequences. As stated by the court, "[p]arties may still disagree about whether a writing is sufficient, but unlike with an alleged oral conversation, they cannot disagree about what has actually been said."

Furthermore, the written notice requirement is by no means limited to the construction context. The *James v. Westlake* opinion itself makes reference to contractual notice requirements in cases involving insurance litigation, family law, mechanic's liens, and general breach of contract cases. Thus, it is not unreasonable to infer that the strict interpretation of contractually required written notice requirements could, and does, apply to any situation where the parties have agreed that written notice is a condition precedent to some occurrence in the contract. It's easy to imagine how this principle could arise in cases involving real property, employment, landlord/tenant, and insurance defense, among others. Again, depending on the facts of the case in these situations, the failure to give contractually written notice may provide an important tool to limit, or avoid, liability.

However, the strict requirement of written notice is not without limit and must be considered in context. First, the written notice requirement is likely to be limited to the disputed provision at issue and its purpose. In *James v. Westlake*, the court went on to explain that, while the failure to give written notice relieved James of their obligation to pay for Westlake's excess damages, it did not relieve James from complying with other provisions of the contract, including indemnifying Westlake for a suit brought against Westlake for wrongful death arising out of the project. As the court explained, the failure to give contractual written notice here was simply a condition precedent to James's liability for Westlake's excess costs. It was not a covenant giving rise

to an independent cause of action for damages or a material breach excusing the non-breaching party from performance of the entire contract.

Accordingly, failure to give written notice required by a contractual provision does not automatically constitute a material breach of the contract excusing performance of the entire contract. Instead, whether a lack of written notice constitutes a material breach of the contract must still be interpreted within the context of the provision at issue, the contract at issue, and the facts of the case. Moreover, given the principle that minor deviations from a contractual notice provision must "severely impair the purpose underlying the condition," the requirement of the writing likely must be integral to the purpose of the contract at issue to constitute a material breach.

Second, what constitutes a "writing," and whether that writing is sufficient, is still open to interpretation and may be a substantial point for dispute. As you'll remember, in *James v. Westlake*, there were three contractually required written notices. It was undisputed that the third—written notice of termination—was never provided. However, while skeptical, the court was not definitively clear on whether the first—written notice that "in its reasonable opinion James has serious safety violations"—was satisfied. There, Westlake had forwarded an email discussing a recent safety violation and discussed conducting a safety review with James, which eventually occurred. The court eventually concluded that it was "questionable whether the email qualified as the requisite first notice."

There are several takeaways from this portion of the opinion. For starters, there may be a relativity low threshold as to what constitutes a "writing." Email seemingly complies. To that end, it's arguable that text messages, other digital direct messages, handwritten notes, and other forms of writing may satisfy the condition that notice must be given in writing. The court's reference to *Barbier v. Barry*—where the court held that the failure to send notice of cancellation by registered mail, as required by the contract, satisfied the condition precedent where the notice was received—supports this argument. Accordingly, parties to a contract and their agents should carefully consider the form of "writing" that may constitute written notice under a contract.

Additionally, the court's opinion seems less strict in considering whether the content of a writing satisfies a contractual provision, as compared to whether there was a writing at all. Notably, the court cited In re G.D.H, a family law case wherein the Amarillo court of appeals held that a mother's failure to give all detail of a child's vacation to the father, as required by the custody agreement, did not mean the mother had not complied with the condition precedent because "it contained the bulk of the requisite information." As a result, while the court was skeptical of the email exchange in *James v. Westlake*, what is clear is that, unless specified by the contract, the contents of a writing are more open to satisfaction that the failure to give a writing at all. Accordingly, the burden is placed on those drafting contracts to clearly specify what a writing must contain to satisfy the particular provision at issue. The same is obviously true for those whose duty it is to comply with those writing provisions.

In any event, while it has been steadfast that Texas courts will not ignore the clear terms of a contract to bail a party out of its contractual duties, this opinion reinforces the scope of that principle and provides a clear mandate to those who must comply with its terms.

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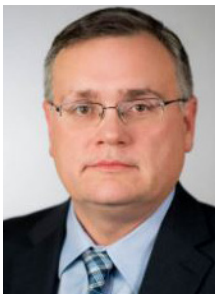
Mandatory Mediation: Now Shake Hands and Be Friends!

By Kenneth McLellan



Kenneth McLellan

Mediation and many forms of Alternative Dispute Resolution ("ADR") can be helpful in addressing construction defect and construction-related personal injury cases. In my experience, the pandemic has caused parties and insurers to become more receptive to mediation in all forms, including virtual and hybrid-virtual and in-person. New York Courts encourage mediation, and, of late, sometimes even require it.

Recent Cases

One of my recent construction defect cases involved a project on the Lower East Side of Manhattan. A developer sought to demolish a number of low-rise buildings, but preserve a landmark, iconic delicatessen, and build around it a mixed-use luxury building with condominiums and a high-end gym. A neighboring building leaned over more than 4 inches during the underpinning procedure causing alleged damage and delays.

This matter was extremely contentious, and involved depositions of investors who testified from Russia. All counsel agreed that the matter would best be mediated in person. This resulted in 30 attorneys and claims people in the room, but, one of the main players, a developer, in an attempted "power-move," refusing to appear in person but demanding to participate from his palatial Manhattan apartment. This generated the quintessential New York style interaction: Q.: "We're all here in person. Why couldn't you bother to show up?" A.: "Never mind where the [expletive omitted] I am! Make an offer!" After that inauspicious start to the mediation, many hours in person, and many more hours of phone calls and text messages, the matter was able to be resolved, but only due to a lot of work on all parties' parts and the assistance of a great mediator.

Another recent matter in which I'm involved has to do with a New York State Labor Law Section 240 claim. This statute is very favorable to construction workers and renders Owners and General Contractors absolutely liable in certain situations involving "gravity related" injuries, specifically workers falling from a height or objects falling on workers. Plaintiff claimed injuries after an electrical subcontractor's employee dropped a roll of electrical wire that rolled through an opening on the floor above and struck the Plaintiff.

Mediation resulted in all parties generally being able to come to a consensus on the

settlement value of the claim, but the defendants could not agree on an allocation of settlement contributions among themselves. The excellent mediator involved in the case proposed a creative solution, where all defendants agree on the amount of aggregate damages, thereby capping the damages, and then arbitrating liability allocations amongst the three defendants with a panel of three arbitrators.

Advantages of ADR

Mediation and other forms of alternative dispute resolution have become increasingly important as way to deal with construction cases. These cases present complicated factual scenarios and technical information often better suited to be mediated or decided by an educated trier of fact (i.e., an arbitration panel) familiar with industry practices and scenarios than a busy trial judge and lay jurors.

Recent Appellate Level Case Law Arguably Shows Mediation is Favored

In a recent New York case, New York's Appellate Division, First Department, enforced a pre-suit mediation clause. On January 12, 2023, in *Centennial Elevator Industries, Inc., v. JRM Construction Management, LLC*, Case No.: 2022-01092, ___ A.D.3d ___, the Court affirmed the Motion Court's decision dismissing Plaintiff's complaint. In the Motion Court's decision, it was noted that Defendant hired Plaintiff to perform elevator modernization work. In this case, however, the decision indicates that the agreement was contained in a Purchase Order. The Purchase Order provided as follows:

> The parties agree that they will negotiate in good faith JRM's Master Subcontractor Agreement (MSA) and anticipate to enter the MSA within a reasonable time. The Parties further agree that until such time . . . the terms of this Purchase Order and the MSA shall govern this Work.

The MSA provided that: "In the event of a dispute arising out of or relating to this Agreement or a Purchase Order, the parties shall attempt to resolve such dispute by mediation[.]"

The Motion Court dismissed Plaintiff's Complaint because Plaintiff did not engage in mediation, pre-suit, and that was a condition precedent of the agreement.

The Appellate Division, First Department, affirmed, finding that the "mediation provision was enforceable against plaintiff even though plaintiff did not sign the MSA because the language of the purchase order, which plaintiff signed, unambiguously reflected the parties' intent that the MSA govern the parties' relationship until the parties formally execute the MSA[.]"

It can be inferred from this decision that New York Courts are likely to encourage parties to explore mediation as part of the litigation process.

Some Courts Employ Mandatory Mediation

The New York State Supreme Court, County of New York, Commercial Division, where many construction case matters are heard, has a robust ADR Program. A Justice can issue an Order of Reference to an Alternative Dispute Resolution Program, which is a mediation program where neutrals attempt to facilitate settlement discussions.

Notably, New York State's Commercial Division requires that counsel for any party in Division cases certify that counsel has discussed ADR possibilities with his client at each status conference. In the construction case context, if parties do opt for dispute resolution by arbitration, the American Arbitration Association has provisions allowing for discovery and for optional appeal of the arbitral process.

The Takeaway

Where parties are involved in litigation in New York's Commercial Division Courts, where many construction cases are heard, the Court will sometimes require the Parties to mediate. New York Courts will enforce pre-suit mediation provisions. It would behoove parties to construction contracts to address dispute resolution in some detail in alternative dispute provisions. Even if there is not a pre-suit mediation provision and the matter heads to litigation, parties should anticipate that the Court could require mediation. If parties include an arbitration provision in their construction contracts, they do have the opportunity to exert some control over the process by providing for some limited discovery, perhaps, or the right to appeal. New York Courts have an ADR program built into its system. That demonstrates that the Courts, in complex cases, are inclined to encourage parties to seriously explore ADR, and, in some cases may require it.

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The Stormy Waters of Price Escalation and Balancing the Ship

By Jacob J. Liro

Jacob J. Liro

According to an economic survey by The Associated General Contractors in 2022, the price of materials and services for construction has jumped more than 21% from March 2021 to March 2022. Year-over-year percent increases in Steel Mill Products have risen 27%, with aluminum, gypsum, and concrete not far behind. This unprecedented increase in labor and material costs has caused various issues for contractors and their respective subcontractors, including project delays, lost profits, legal disputes, and damaged reputations.

While takeoffs have always been subject to uncertainty due to changes in the markets and supply chains, the raw unpredictability of unforeseen factors has had an otherwise unprecedented impact on the price of building materials. Pricing effects arising from the Covid-19 crisis and the Russo-Ukrainian War have created an unacceptable level of volatility in bidding. Although we cannot predict the future, options can help mitigate the harmful consequences of drastic price escalations.

Whether you are an owner, contractor, or supplier, implementing an escalation clause into written contracts for construction projects is one of the most valuable options to protect yourself from rapidly increasing prices. While these contractual clauses have long existed, the tool has not been an essential resource to contractors and subcontracts in recent memory.

While there are a multitude of ways to structure escalation clauses, material escalation clauses allow for adjustments in costs or extensions of time for certain types of material after a baseline price has already been established. After establishing the contract price and the baseline prices for each material, the parties can agree to include an escalation clause that specifies certain price thresholds for each type of material. If the price of a certain material exceeds this maximum price established by the parties, then this provision could allow for the parties to reconvene and adjust the contract to reflect the drastic price increase.

Alternatively, such clauses frequently place some of the risks of material price increases back on the contractor by way of providing for a percentage allowance threshold that a particular material price must exceed before that contractor is entitled to an increase. Other contractual mechanisms include a timing component

wherein the contractor must accept certain pricing fluctuations over a period of time before they could trigger a cost escalation right.

Regardless of the form, escalation clauses protect a contractor from taking massive losses that eat into profits and provide an opportunity for some level of "price insurance." The question then becomes, what incentive does an owner have in agreeing to include such a clause?

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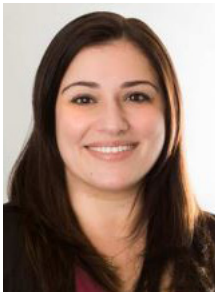
Washington Contractors Be Wary: One-Year Warranty Limitations Are Unconscionable

By Natasha A. Khachatourians



Natasha A. Khachatourians

In late October 2022, in a narrow 5-4 decision, Washington's Supreme Court struck another blow to general contractors—this time hitting them with a ruling holding that a one-year limitation period to file a lawsuit under a residential construction contract is "substantively unconscionable" and "void and unenforceable."

In Tadych v. Noble Ridge Construction, Inc., et al., 200 Wn.2d 635, 519 P.3d 199 (2022), the plaintiffs entered into a written agreement with the defendant-general contractor for the construction of their personal residence. The construction contract, like most agreements in this area, contained a warranty provision. The warranty provision contained the following statement, in pertinent part:

Any claim or cause of action arising under this Agreement, including under this warranty, must be filed in a court of competent jurisdiction within one year (or any longer period stated in any written warranty provided by the Contractor) from the date of Owner's first occupancy of the Project or the date of completion as defined above, whichever comes first. Any claim or cause of action not so filed within this period is conclusively considered waived. *Id.* at 638-39. The plaintiffs reviewed the contract for a month before executing it without any evidence of objection to the warranty provision or the limitation period contained therein.

Plaintiffs moved into the residence by April 2014. Within 10 months, they experienced significant issues with their residence—so much so that they hired a construction

expert to inspect the residence and who identified defects with the residence. Over the next year and a half, plaintiffs submitted concerns with the residence to the contractor, who promised to make repairs, but none were made. By April 2017, the plaintiffs had not heard from the contractor for several months, and they hired another construction expert, who opined that there were significant defects with the residence.

The plaintiffs filed suit against the contractor in August 2017—over three years after taking occupancy in the residence and over two years after initially discovering defects. The contractor successfully dismissed the plaintiffs' claims on summary judgment, which was affirmed at the appellate level.

In reversing the lower two courts, Washington's Supreme Court acknowledged that Washington generally follows the "black letter law of contracts that parties to a contract shall be bound to a contract by its terms" but noted that contractual provisions "that are unconscionable are not enforceable." Id. at 641. The factors analyzed for unconscionability included: "(1) the manner in which the contract was entered, (2) whether [the parties] had a reasonable opportunity to understand the terms of the contract, and (3) whether the important terms were hidden in a maze of fine print, to determine whether a party lacked a meaningful choice." *Id*. at 635 (*citing* Burnett v. Pagliacci Pizza, Inc., 196 Wn.2d 38, 470 P.3d 486 (2020)).

The *Tadych* court held that the one-year limitation in the warranty provision was substantively unconscionable because it deprived the plaintiffs of the six-year statute of repose under RCW 4.16.310.[1]

In addition, the court considered the "expertise or sophistication of the parties, which party drafted the contract, and whether the term at issue was separately negotiated or bargained for." I*d*. at 645. The court held that the limitation period appeared to benefit the contractor more than the plaintiffs, highlighting that the plaintiffs were laypersons.

That said, there is no indication from this opinion that *all* contractual limitation periods will be deemed unconscionable. Moving forward, it would be prudent for contractors to ensure that limitation-periods are set out in bold with large writing and easily distinguishable from the other provisions of the contract. Consider requiring a separate set of initials for the limitation provision. Correlate the cost of the contract with the limitation provision to show that the provision was "bargained for." Most importantly, consider *with whom* you are entering the contract: is it an average individual? If so, that alone may be enough to void the limitation provision, because lest we forget, the plaintiffs in *Tadych* had a month to review the contract, did not object to provisions, and hired experts early on to inspect their residence. They were far more careful than the average "layperson," and they were still able to convince the Washington Supremes that this limitation provision was unconscionable.

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1 The court also indicated that a homeowner has a six-year period to discovery a defect and bring a claim under RCW 4.16.326(1)(g), but this is an affirmative defense for claims that did not accrue within the statute of repose or were not filed within the statute of limitations.

Data Privacy Law

Has The Ohio Supreme Court Opened A New Battlefield in the Cyber Coverage Wars?

By Michael F. Aylward

Michael F. Aylward

The Ohio Supreme Court has ruled in *EMOI Services, L.L.C. v. Owners Ins. Co.*, 2022 WL 17905839 (Ohio Dec. 27, 2022) that a property insurance policy did not cover a ransomware claim in which malware was attached to the insured's computer, encrypting access to stored files and data. Although EMOI had argued that the hack was covered by the policy's electronic equipment endorsement which insured "costs to research, replace or restore information on 'media' which has incurred direct physical loss or damage," the court declared that "software is an intangible item that cannot experience direct physical loss or direct physical damage" and that "[c]omputer software cannot experience "direct physical loss or physical damage" because it does not have a physical existence."

Emoi is the first salvo in a new front of the on-going struggle over so-called "silent cyber," that is to say policyholder efforts to obtain commercial property coverage under policies that do not expressly include provisions insuring cyber losses. To date, most of these cases have involved phishing claims in which the issue is whether the insured's mistaken transmission of funds to fraudsters involve the use of computers so as to trigger a policy's computer fraud coverage, *See G&G Oil Company of Indiana, Inc. v. Continental Western Ins. Co.*, 165 N.E.3d 82 (Ind. 2021) (finding a sufficient causal connection between spear-fishing incident and the resulting loss to satisfy the requirement "that it had resulted directly from the use of a computer") and *City of Unalaska v. Nat'l Union Fire Ins. Co.*, 2022 U.S. Dist. LEXIS 51387 (D. Alaska March 18, 2022)(a reasonable person would understand "use of a computer" to extent to a broad range of activities, including e-mails, and not just computer hacking as AIG had argued).

Computer fraud insurance covers the theft of money or securities through the use of a computer. It has been around for quite a while and pre-date the modern surge of cyber-crime. More importantly, this first party coverage form does not require proof of direct physical loss. By contrast, the claims at issue in EMOI were for the loss of access to data due to a ransomware attack rather than the cost of the ransom paid. Also, unlike the computer crime fraud wordings at issue in these other cases, the electronic equipment endorsement in the Owners Insurance policy required that there be direct physical loss to the insured's property.

The meaning of "direct physical loss" has been the central issue in the nationwide struggle over coverage for COVID business insurance losses that property insurers and U.S. businesses have waged since March 2020. Interestingly, the Ohio Supreme Court's decision in EMOI relied significantly on *Santo's Italian Café, L.L.C. v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021), a leading federal appellate decision holding that loss of use or functionality without physical damage to property is not a covered "direct physical loss" in the context of COVID business interruption claims. Can it be that the COVID virus coverage cases are fated to cross-pollinate with these computer virus disputes?

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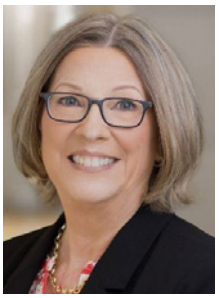
BIPA Claims Uniformly Have a 5-Year Statute of Limitations

By Laura Foggan



Laura Foggan

On February 2, 2023, the Illinois Supreme Court ruled that all Biometric Information Privacy Act ("BIPA") claims are uniformly subject to a five-year statute of limitations, expanding liability for businesses collecting biometric information[1]. In Tims v. Black Horse Carriers, Inc., the court found that a longer, uniform statute of limitations for all claims under BIPA best fulfilled the legislative intent to hold private entities accountable and provide redress for data subjects.[2]

The *Tims* decision partially reversed an appellate court's interlocutory decision that applied a one-year statute of limitations to some sections of BIPA, while applying a five-year statute of limitations to others[3]. This highly anticipated decision will allow companies to understand and manage their liability risk and will also likely fuel the growth of future BIPA lawsuits.

Background

The matter arises from a class action lawsuit filed by Jorome Tims against his former employer, Black Horse Carriers, Inc. ("Black Horse"), alleging that when Black Horse scanned his fingerprints, the company violated BIPA sections 15(a), 15(b), and 15(d).

The Illinois Biometric Information Privacy Act is the country's first comprehensive biometric privacy legislation. BIPA contains five obligations for private entities collecting biometric information:

- 15(a) requires entities to develop and make public an information retention policy;
- 15(b) prohibits a private entity from collecting biometric information without first obtaining informed consent from the data subject;
- 15(c) prohibits a private entity from profiting from the sale of biometric information;
- 15(d) prohibits disclosure of biometric information without the consent of the subject; and
- 15(e) requires entities to protect biometric information from disclosure[4].

Statutory damages can be steep and add up quickly, accruing per violation[5]. A company that negligently violates a provision of BIPA is liable for damages of $1,000

1 Tims et al. v. Black Horse Carriers Inc., case number 127801, at 10.
2 Id.
3 Tims v. Black Horse Carriers, Inc., 184 N.E.3d 466 (2021).
4 740 ILCS 14/15.
5 740 ILCS 14/20.

per violation, while a company that intentionally or recklessly violates a provision is liable for damages of $5,000 per violation[6]. Plaintiffs are also entitled to pursue attorney fees, and actual damages in the event the actual damages are higher than the statutory amount[7]. The courts are currently evaluating what is considered a violation under BIPA, in particular, whether BIPA liability accrues per data subject or per incidence – in other words, per scanned employee or per fingerprint. At up to $5000 per violation, a per incident accrual would significantly increase possible damages for entities collecting biometric data and make even small businesses liable for huge sums.

Illinois Supreme Court Decision

The Illinois Supreme Court relied on legislative intent to determine the statute of limitations for BIPA claims in *Tims*[8]. The court declined to apply two different limitations as to "reduce uncertainty and create finality and predictability."[9] The court contemplated the practical impact of multiple time constraints, noting that "[t]wo limitations periods could confuse future litigants about when claims are time-barred, particularly when the same facts could support causes of action under more than one subsection of [BIPA]." Considering "the intent of the legislature, the purposes to be achieved by the statute, and the fact that there is no limitations period in [BIPA]," the court found that the five-year catchall limitation period would best apply[10]. The court believed policy considerations were best served by a longer limitation period because of "the fears of and risks to the public surrounding the disclosure of … biometric information." The longer limitation period would enhance the ability for an aggrieved party to seek redress and lengthen the time a company could be held liable of noncompliance[11].

Key Takeaways

A Potential Increase in Claims, Costs and Damages

The expansion of liability resulting from the extended five-year statute of limitations will open the door to an increased number of BIPA actions, expanding both the number of possible plaintiffs and the number of possible claims. All BIPA cases that had been stayed awaiting the *Tims* decision will now be allowed to proceed under the expanded statute of limitations. Additional cases may be brought that had previously been outside the one-year limitation. Further, cases that would have once excluded claims under 15(c) and 15(d) due to the one-year limitation may now be expanded to include such claims. Litigation under the expanded statute of limitations may be costlier given the likely increase in claims. Additionally, because damages accrue per violation under each claim, defendants may see damages increase significantly.

Reduce Liability Through Transparency

Organizations contemplating the use of biometric technologies for personnel management should be thoughtful about transparency in their implementation, for example by (i) providing employees with the opportunity to consent to biometric data capture, and (ii) publishing a robust privacy policy that outlines the use and retention of their biometric information. A majority of the biometric litigation filed over the past two years have largely been based on the issue of notice and organizations can significantly mitigate their risk by establishing a culture of transparency in their business.

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6 Id.
7 Id.
8 Tims et al. v. Black Horse Carriers Inc., case number 127801.
9 Id at 5.
10 Id at 11.
11 Id at 13.

Employment Law

The DOL's Rotating Menu Of Tips: Trying To Stay On Top Of The Latest Rules For Operating A Tip Pool

By Eric Kinder

Erik Kinder

The Department of Labor (DOL) revised its practices and issued new regulations toward the end of the Trump Administration (though many courts chose not to defer to the revised guidance) and then abruptly changed position. It withdrew rules before their effective dates and promulgated new rules with the switch to the Biden Administration. Here is where we currently stand on "tip pools" for tipped employees.

Under the ("FLSA"), while tipped employees are to receive and keep all tips they receive, there is a carve out that allows for "the pooling of tips among employees who customarily and regularly receive tips." A "Tip Pool" is an arrangement whereby employees contribute a portion (or all) of their tips to a general pool to be shared by others, for instance servers sharing tips with those who bus tables. This is different from a tip sharing arrangement which is a voluntary process among employees to share received tips; the DOL does not technically regulate tip sharing arrangements, but considers truly voluntary tip sharing agreements to be rare; with any employer involvement, they the DOL will treat arrangement to be a tip pool and subject to the tip pool regulations.

In general, tip pools are valid so long as the tip pool does not include: (1) employees who do not perform customer service functions or (2) managers. If the tip pool includes either group of impermissible employees, the tip pool is invalid and the employer is not permitted to take a tip credit, which means the employer failed to pay minimum wage. If an employer maintains an invalid tip pool, it will also likely have to repay the tipped employees for any improperly withheld tips that were contributed to the invalid tip pool. "Front of house" employees such as servers, hosts, and bartenders generally receive tips and may be included in a tip pool, while "back of the house" employees such as cooks, dishwashers, and janitors may not be included in a tip pool.

In 2018, Congress amended the FLSA to prohibit employers from keeping tips received by their employees, regardless of whether the employers take a tip credit under section 3(m). This had been the long-standing policy of the DOL, but a circuit split had developed whether the DOL interpretation comported with the law. Subsequently, while it was trying to rescind the 80/20 Rule, the DOL also revised its rules on tip pools to mesh with the congressional change. Under these revised rules, the DOL affirmed that an employer and managers cannot keep employees' tips under any circumstances, including through tip pools (though managers can

keep tips provided to them for services they personally offered). These revisions also established than an employer who pays the full minimum wage and takes no tip credit may allow employees who are not tipped employees (the "back of house" employees) to participate in the tip pool. The Final Rule also established that any employer who collects tips as part of a mandatory tip pool generally must fully redistribute the tips within the same pay period.

To minimize the risk and administrative burden of the 80/20 Rule and tip pooling rules, which can confound even experienced wage and hour practitioners and are difficult to administrate, employers may simply pay all their employees at least minimum wage and not take a tip credit. Doing so avoids the 80/20 Rule and the associated headache of tracking tipped employees' non-tipped work. It also allows the employer to expand tip pools to include "back of house" employees (but still not itself or managers), which is often viewed as more egalitarian, and avoids significant potential consequences with an improperly managed tip pool (which can include liquidated damages).

Employers also have the option of adding a mandatory service charge, or a required additional charge that is normally stated directly on a bill. These service charges are considered part of the employer's gross receipts, and the employer can share, or not share, these service charges among its employees as it deems fit. Bear in mind that adding sample calculations for possible tips is, according to Internal Revenue, not the same as adding a service charge because the customer ultimately determines the amount of the tip (or leaves the amount blank). Of course, imposing a mandatory service fee can create customer unrest as the customers bristle at the increased mandatory cost, and HR concerns as tipped employees see the fees cutting into their expected tips.

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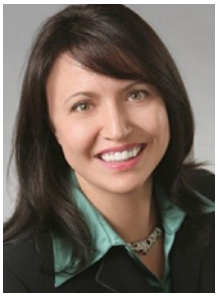
Big Brother is Watching You Employers: Section 7 Rights & Workplace Electronic Surveillance

By Dessi Day & Jean Faure



Dessi Day

Jean Faure

On October 31, 2022, the Office of General Counsel for the National Labor Relations Board ("NLRB") issued a memorandum on "Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights" (hereinafter "the Memorandum"). The focus of the Memorandum is on technological advances which employers increasingly use to monitor and manage employees within the workplace and beyond. The General Counsel notes that these advances in monitoring capabilities raise multiple issues for employers under the National Labor Relations Act ("the Act"). One area of specific concern for the General Counsel appears to be the "omnipresent surveillance and other algorithmic-management tools" used by employers, which may impair or discourage employees' abilities to engage in protected activities and keep any such activities confidential from the employer.

Many employers who do not have unionized workers may not be aware that they too are subject to the requirements of the Act. The Act applies to most private employers, granting employees the right to unionize, collectively bargain, and, **even in nonunion settings**, engage in concerted activity for their "mutual aid and protection" – **commonly known as Section 7 rights**. Employees' rights under the NLRA include permission to discuss the terms and conditions of employment, and employees now more often than not use technology to do so.

The Memorandum provides examples of potential but otherwise legitimate practices that may interfere with concerted activities, including the following:

- Recording employee conversations at work, especially prevalent in warehouse settings,
- Using keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day for employees using computers—whether in call centers, offices, or at home,
- Tracking movement using wearable devices, security cameras, and radio-frequency identification badges, and
- GPS tracking devices and cameras keeping tabs on drivers on the road.

The Memorandum also identifies afterhours monitoring as a potential red flag when "employers continue to track employees' whereabouts and communications using employer-issued phones or wearable devices, or apps installed on workers' own devices."

Key Take Aways for Employers: Given the proposed framework and guidance from the Office of General Counsel, employers should expect closer scrutiny of their electronic surveillance and automated management practices by the NLRB. To ensure compliance with the Act, it is important for employers to consider the following:

1. analyze electronic monitoring and automated management practices to determine if they inhibit employees' rights to engage in concerted activities;
2. if section 7 rights may be impacted by surveillance rules, ensure that employers have well documented legitimate business reasons for implementing the monitoring practices;
3. assuming such reasons exist, take steps to limit the scope of electronic surveillance to work hours and work areas only and analyze overall surveillance practices to ensure that they are narrowly tailored to business needs;
4. with regard to pre-employment screening, avoid social media monitoring;
5. beware of reliance on electronic and automated tools in discipline and discharge; and
6. as a general rule, promote transparency by disclosing any surveillance and productivity monitoring practices to employees, and limit those who have access to the data that is gathered through these practices.

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California's New Pay Disclosure and Pay Reporting Requirements

By Michele Ballard Miller and Elena Hillman

Michele Ballard Miller

Elena Hillman

On January 1, 2023, California Senate Bill 1162 took effect. This new law imposes significant new obligations on employers regarding job posting and pay data reporting. SB 1162 reflects California's continuing effort to eradicate discriminatory pay disparities in the workplace. Employers should prepare now for these new changes in California's pay transparency laws.

Effective January 1, 2023, California employers with 15 or more employees must include the pay scale for a position in any job posting. If the employer engages a third party to post or publish its job postings, the employer must provide pay scale information to the third party, who must include the information in the job posting. "Pay scale" is defined as the "salary or hourly wage range that the employer reasonably expects to pay for the position."

The new law is silent as to whether the pay data disclosures are required only of California employers with 15 or more employees in California or 15 or more employees anywhere. Because the law does not explicitly define a covered employer as having 15 or more employees in California, however, employers should assume that it applies to employers in California with 15 or more employees anywhere. The new law also is silent about whether the requirements apply to remote work job positions (where that job may be performed outside of California) or if it applies to employers headquartered outside of California who have remote workers in California.

SB 1162 also adds a document retention requirement to Labor Code § 432.3, requiring employers to maintain records of job titles and wage rate histories for each employee for the duration of their employment and for an additional three years after the end of their employment and directing that such records be open and available for inspection by the Labor Commissioner. The law creates a rebuttable presumption in favor of an aggrieved employee when such records are not maintained by the employer.

Finally, SB 1162 also expands existing requirements under Government Code Section 12999 for private employers in California with 100+ employees to submit an annual pay data report to the California Civil Rights Department (CRD, formerly the DFEH). The current law applies to private employers with 100+ employees who also are required to file EEO-1 reports with the Equal Employment Opportunity Commission. With SB 1162, all private employers with 100+ employees (even those not required to file EEO-1 reports) will now need to file a report with the state agency. The current law requires covered employers to report annually the number

of employees working in or assigned to a California establishment by job category, race/ethnicity and sex, pay band, and hours worked during a snapshot period in the prior reporting year. Covered employers will now also have to submit the median and mean hourly rate "for each combination of race, ethnicity, and sex" within each job category. Private employers with 100+ employees hired through labor contractors, such as temporary staffing agencies, also must submit a separate pay data report to the CRD. Finally, the date for submission of the report will change from March 31 of each year to the second Wednesday in May, beginning in 2023. EEO-1 reports, which do not contain the required pay data information (pay bands, hours worked, and now the mean and median hourly rate), cannot be submitted in lieu of the pay data report required by the state.

California's new law allows courts to impose civil penalties of $100 per employee for the first violation for failure to file a pay data report and up to $200 per employee for each subsequent violation. For violations of Labor Code Section 432.3, the new law authorizes the Labor Commissioner to order an employer to pay a civil penalty of no less than $100 and no more than $10,000 per violation.

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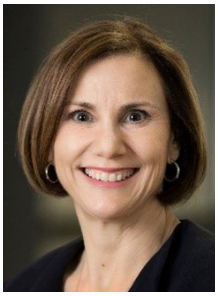
We Need To Talk About It At Work: Mental Health In The Workplace

By Helen Holden



Helen Holden

The conversation about mental health is seemingly everywhere. Publications like the *New York Times* and the *Harvard Business Review* have recently featured the topic, and the blogosphere and podcasting worlds are similarly awash with opportunities to engage on the topic.

There is good reason for the explosion of mental-health related information. According to one study, 46% of Americans will meet the criteria for a diagnosable mental health condition sometime in their adult life[1]. These conditions range from mood disorders, such as bipolar disorder or chronic mild depression, to anxiety disorders, and to neurological disorders such as autism or attention deficit hyperactivity disorder.

Many individuals with severe mental health issues do not work, but most with milder or even moderate cases are employed. One recent study found that 76% of employed individuals stated they experienced at least one symptom of a mental health condition in the past year[2]. Through the pandemic, reports of "Covid-fatigue" and burnout were frequent. Against this background, employers have begun to identify proactive measures for employees. These measures include education and providing mental health and well-being digital tools and applications through health plans and otherwise. These tools are critical to successfully navigating mental health concerns in the workplace.

When issues do arise, employers must understand their obligations under the Americans with Disabilities Act, and be prepared for ensuing disputes with employees. A number of recent cases highlight the need for vigilance when it comes to accommodations for employees with mental health concerns.

One recent case involved an employer that declined an employee's request to use non-revolving doors, contending that entering the workplace was not an essential function of the position. Unfortunately for the employer, the courts disagreed. The lesson this employer learned has implications for other employers, in that companies must provide accommodations that allow employees with mental disabilities to access the workplace as well as accommodations that allow employees to perform other essential functions of the position.

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1 https://pubmed.ncbi.nlm.nih.gov/15939837/
2 https://www.mindsharepartners.org/mentalhealthatworkreport-2021

In another recent case, the employer provided leave under the Family and Medical Leave Act ("FMLA") to an employee with an anxiety disorder. The employee returned, and was provided with a reduced schedule accommodation for 30 days. However, the employer declined the employee's request for a change in supervisor, and invited the employee to suggest additional accommodations. The employee provided a list of 18 requests, noting that these would allow her to maximize productivity. The employer declined to implement any of the requested accommodations after considering them in light of the essential functions of the position and the purpose of an accommodation. The court agreed with the employer's decision not to implement the proposed accommodations, as they did not relate to performance of the essential functions of the position.

Mental health concerns are increasingly common, and are prevalent in all walks of life. Inevitably, those considerations appear in the workplace. Employers should foster conversation about the topic, but also be prepared to manage legal issues in a compliant manner.

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What's In Store For 2023? A Review Of Potential Developments In Employment Law

By Robert Lockwood

Robert Lockwood

In 2023, it seems like all things old will be new again. The Biden administration continues to unwind many of the policies implemented under President Trump. Here's a list of potential developments in the labor and employment sector for 2023.

1. The Department of Labor will revise its rules on classifying independent contractors.

Many businesses use independent contractors to provide services. Independent contractors are not entitled to overtime under the Fair Labor Standards Act – that right only belongs to "employees." On its way out the door in January 2021, the Trump DOL released a final rule making it easier for businesses to classify workers as independent contractors. The Trump DOL's rule focused on two core factors: (1) the nature and degree of control over the work; and, (2) the worker's opportunity for profit or loss. Generally, this rule was considered employer-friendly.

The Biden Administration immediately began work to replace that rule. On October 11, 2022, the DOL issued a notice of proposed rulemaking that re-works the test to focus on six factors:

1. Opportunity for profit or loss depending on managerial skill
2. Investments by the worker and employer
3. Degree of permanence of the work relationship
4. Nature and degree of control
5. Extent to which the work performed is an integral part of the employer's business
6. Skill and initiative

According to the DOL, this new test will focus on the "economic realities" of the relationship between the worker and employer. We expect a Final Rule in 2023, but also anticipate legal challenges that might extend the time before it becomes effective.

2. The DOL will probably increase the minimum salary necessary for FLSA overtime exemptions.

Currently the annual salary threshold for the Executive, Administrative and Professional exemptions to the FLSA is $35,586.00. The Obama administration attempted to raise the threshold to $47,476.00, but that effort was blocked in federal court. Nevertheless, the Biden DOL is intent on attempting another increase. In November 2022, a DOL spokesperson told HRdive.com: "The Wage and Hour Division is still developing a proposal updating overtime regulations under the Fair Labor Standards Act. The division held multiple stakeholder listening sessions in 2022, and DOL continues working toward this proposal."

In short, employers can expect DOL to announce an increase. But, also be prepared for litigation similar to that during the Obama administration.

3. Will the Federal Trade Commission successfully end non-competition agreements?

On January 5, 2023, the Federal Trade Commission issued a Notice of Proposed Rulemaking that would ban post-termination non-competition agreements and require employers to rescind existing ones. The proposed rule would make it illegal for an employer to: enter into or attempt to enter into a noncompete with a worker;

maintain a noncompete with a worker; or, represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

Importantly, the term "worker" is broad and includes an: "independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a client or customer." Similarly, the scope of prohibited agreements includes any: "contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." The FTC gave two examples of such "de facto" non-competition clauses:

1. A non-disclosure agreement that is written so broadly that it effectively precludes the worker from working in the same field after the conclusion of the worker's employment with the employer.

2. A contractual term between an employer and a worker that requires the worker to pay the employer training costs if the worker's employment terminates within a specified time period -- where the required payment is not reasonably related to the actual costs incurred by the employer.

The FTC's proposed rule will pre-empt any inconsistent state law. It will also require active steps by employers to rescind existing agreements. Under the rule, employers would be required to rescind previously entered non-compete provisions and provide notice on paper or in a digital format (text or e-mail) that the agreement is no longer in effect and will not be enforced.

The FTC is accepting public comments on the proposed rule through March 10, 2023. The final rule will follow at some point thereafter but almost certainly be subject to extensive litigation in federal court.

4. Pregnant employees will be entitled to reasonable accommodations.

On December 29, 2022, President Biden signed a government funding bill that included the Pregnant Workers Fairness Act. One of the primary purposes of the PWFA is to provide workplace accommodations for pregnant employees that might not otherwise be available under existing law. The accommodation process under the PWFA is expected to mirror the ADA – it will not require elimination of essential functions of a job and accommodations won't be required if they impose an "undue hardship."

The PWFA goes into effect on June 27, 2023 and requires employers with 15 or more employees to provide reasonable accommodations to job applicants and employees with conditions related to pregnancy or childbirth. The PWFA makes it an unlawful employment practice to:

1. not make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

2. require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through an interactive process;

3. deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee;

4. require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation

can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee; or

5. take adverse action in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.

The EEOC is supposed to issue regulations, which will include "examples of reasonable accommodations addressing known limitations related to the pregnancy, childbirth, or related medical conditions," by December 23, 2023.

5. Breastfeeding parents will receive new protections.

President Biden also signed the PUMP Act on December 29, 2022. The PUMP Act amends the Fair Labor Standards Act and requires that employers provide a reasonable break time for an employee to express breast milk each time the employee has a need to express the milk. Such breaks must be provided for one year after the child's birth. Employers must also provide a place for the employee to express breast milk. That place cannot be a bathroom, must be shielded from view and free from intrusion. If the employee is completely relieved from duty during the break, the time spent breastfeeding is not compensated.

The Affordable Care Act of 2010 provided these protections to nonexempt/hourly employees. The PUMP Act extends the protections to nonexempt and exempt employees. Certain workers in the transportation industry are excluded from the PUMP Act.

With some exceptions, employees must provide employers with notice of an alleged PUMP Act violation and give the employer a 10-day cure period before filing a suit. Employers with fewer than 50 employees may rely on the small employer exemption, if compliance with the law would cause undue hardship because of significant difficulty or expense.

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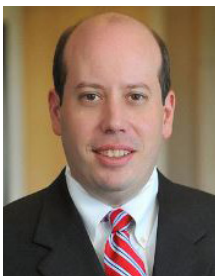
Energy & Intellectual Property

Protecting Your Enterprise: Requirements And Remedies Under The Federal Defend Trade Secrets Act

By Benjamin M. Watson & P. Ryan Beckett



Benjamin M. Watson

In 2016, Congress enacted the Defend Trade Secrets Act, 18 U.S.C. § 1831 et seq. The DTSA is based largely on the language of the Uniform Trade Secrets Act, which, to date, has been adopted by 48 states, as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Unlike the UTSA that provides no independent basis for federal jurisdiction beyond diversity jurisdiction, the DTSA opened federal courts to trade secret litigation under 28 U.S.C. § 1331.[1] It also provides federal courts with wide-ranging authority to craft different and distinct remedies to address trade secret misappropriation. These remedies include injunctive relief as well as compensatory damages and other forms of monetary relief. The DTSA provides a myriad of options to victims of trade secret misappropriation, and this article will provide an overview of those various rights, remedies and obligations.

P. Ryan Beckett

WHAT ARE TRADE SECRETS?

First, what is a trade secret? Not all information or data is of a nature that qualifies for protection from theft and use under the DTSA. Accordingly, the scope of information protected is included tin he definition of a "trade secret" as provided in 18 U.S.C. § 1839(3):

> the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--
>
> > (A) the owner thereof has taken reasonable measures to keep such information secret; and

1 18 U.S.C. §1836(c).

> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information;

The categories of information that qualify as trade secrets are very broad. Accordingly, there is wide application for the protections of the DTSA, and many industries generate and maintain data that qualify as a trade secret. When a client suspects that information may have been compromised or stolen, it is important to consider whether it qualifies as a trade secret, and if so, what remedies may be available to mitigate the situation.

Of course, trade secret owners must be proactive in protecting their trade secrets as lax security can exclude the information from qualifying as a trade secret. What are some of the "reasonable measures" that owners can take to keep the information secret? The language of the statute is broad, but some of the measures include restrictions in employment and other contracts with third parties. Such restrictions might include a clear provision that the information that the employee or contractor will have access to contains trade

secrets and requires, as a condition of the contractual relationship, that the third party agree to keep the information confidential and to not use or disclose the information for reasons unrelated to their tasks undertaken on behalf of the owner of the trade secret.

Furthermore, most trade secrets are stored electronically. It is important that access to that information is closely restricted. Some of these restrictions relate to who can access the information. For example, employees and contractors who do not have a need to access the information should be excluded from the ability to view or download the information on shared systems. Additionally, for those who do require access to the trade secrets, strict security protocols should be in place such as two factor authentication and access logs to determine who has accessed the trade secrets and when such access took place. Although not required by the statute, periodic audits of the access records can identify access issues and possibly prevent theft of the information.

WHAT IS MISAPPROPRIATION?

It is not enough that another person or entity is in possession of another's trade secret. Under the DTSA, the information, assuming it qualifies for trade secret status, must be "misappropriated." Misappropriation is defined as:

> (A) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
>
> (B) disclosure or use of a trade secret of another without express or implied consent by a person who--
>
> > (i) used improper means to acquire knowledge of the trade secret;
> >
> > (ii) at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was--
> >
> > > (I) derived from or through a person who had used improper means to acquire the trade secret;
> > >
> > > (II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or
> > >
> > > (III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or
> >
> > (iii) before a material change of the position of the person, knew or had reason to know that--
> >
> > > (I) the trade secret was a trade secret; and
> > >
> > > (II) knowledge of the trade secret had been acquired by accident or mistake;[2]

Accordingly, the three bases for misappropriation are acquisition, disclosure, and use. With respect to

2 18 U.S.C. § 1839(5).

acquisition, this implicates not only the person or entity that takes the information through improper means, but also any person or entity that ultimately acquires the information and knows or should know that the information was acquired through improper means. Misappropriation through disclosure also requires that the person or entity making the disclosure or receiving the disclosure knows or should know that the trade secret was acquired through improper means.

Furthermore, any person or entity that "uses" a trade secret that knows or should know that it was acquired through improper means has also misappropriated the trade secret. As discussed below, damages, unjust enrichment, or royalties are based on misappropriation of the trade secret. In many cases, it is the use, not merely the acquisition or the disclosure, that leads to damages.

THERE MUST BE A NEXUS TO INTERSTATE COMMERCE BUT IT IS NOT A JURISDICTIONAL REQUIREMENT

18 U.S.C. § 1836(b)(1) provides that "[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce." There is no reference to jurisdiction in this establishment of a private cause of action for misappropriation of a trade secret. In fact, 18 U.S.C. § 1836(c) provides a separate jurisdictional statement that "[t]he district courts of the United States shall have original jurisdiction of civil actions brought under this section." Thus, the required nexus to interstate commerce is an element of the cause of action and is not a requirement for subject matter jurisdiction.

See Providence Title Co. v. Truly Title, Inc., No. 4:21-CV-147-SDJ, 2021 WL 2701238 (E.D. Tex. July 1, 2021), *reconsideration denied,* No. 4:21-CV-147-SDJ, 2021 WL 5003273 (E.D. Tex. Oct. 28, 2021) (concluding that the required nexus to interstate commerce set forth in 18 U.S.C. § 1836(b)(1) is not a jurisdictional limit on the power of the Court to hear a DTSA case, but rather is an element of the cause of action under the DTSA.)

More broadly, the Supreme Court of the United States has made clear that elements of a cause of action or other statutory limits on a plaintiff's right to recovery are not jurisdictional limitations unless the statute "clearly states" as much. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, 126 S. Ct. 1235, 163 L. Ed.2d 1097 (2006). If the statute does not label an element as jurisdictional, then courts should not treat it as such. *Id.* at 516, 126 S. Ct. 1235. *See also*, *United States v. Vargas*, 673 F. App'x 393, 395 (5th Cir. 2016) ("The commerce clause nexus element in [a] statute is not 'jurisdictional' in the sense that a failure of proof would divest the federal courts of adjudicatory power over [a] case.").

However, when pleading the elements of a claim under the DTSA, it is important that the plaintiff allege a sufficient connection between the misappropriated trade secrets and a product or service used in or intended for use in interstate commerce. For example, in *Providence Title*, the plaintiff alleged that it "provided title services to out-of-state purchasers of Texas properties and worked with out-of-state underwriters on Texas title insurance policies alleged that its title services were integral to an interstate transaction" to satisfy that element of their claim. *Id.* at *1.

THE DTSA LIMITATIONS PERIOD

Because the theft of trade secrets is often done covertly without the knowledge of the owner, it can sometimes be months or years before the owner is aware that it has a claim. Accordingly, the DTSA's limitations period is based on the owner's discovery of the misappropriation:

> A civil action under subsection (b) may not be commenced later than 3 years after the date on which the misappropriation with respect to which the action would relate is discovered or by the exercise of reasonable diligence should have been discovered. For purposes of this subsection, a continuing misappropriation constitutes a single claim of misappropriation.[3]

Of course, a trade secret owner cannot remain deliberately unaware of the theft but must "exercise reasonable diligence" in discovering the misappropriation. Accordingly, as previously discussed, it is important that a trade secret owner monitor access to its information and remain vigilant against theft. Furthermore, if the misappropriation continues over a period of time, it constitutes a continuing misappropriation.

WHAT REMEDIES ARE AVAILABLE FOR MISAPPROPRIATION OF A TRADE SECRET?

The DTSA provides for both injunctive and monetary relief and is necessarily flexible to ensure that the remedy best suits the need. With respect to injunctive relief, the Court may grant an injunction "to prevent any actual or threatened misappropriation . . . on such terms as the court deems reasonable . . . ."[4] It is important that any such injunction identify the trade secrets with specificity, rather than identify broad categories of information that may include materials that do not qualify for trade secret protection. *See Mallet & Co. v. Lacayo*, 16 F.4th 364 (3d Cir. 2021) (preliminary injunction prohibiting use of trade secrets vacated and remanded because it did not identify the trade secrets with specificity). However, the injunction may not:

> (I) prevent a person from entering into an employment relationship, and that conditions placed on such employment shall be based on evidence of threatened misappropriation and not merely on the information the person knows; or
>
> (II) otherwise conflict with an applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business;[5]

In addition, the injunction may require "affirmative actions . . . be taken to protect the trade secret."[6] Furthermore, where an injunction would be inequitable, the Court may condition "future use of the trade secret upon payment of a reasonable royalty for no longer than the period of time for which such use could have been prohibited."[7]

In addition to injunctive relief, the DTSA also provides different options for the calculation of damages. The

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3 18 U.S.C. § 1836(d).
4 18 U.S.C. § 1836(b)(3)(A)(i).
5 18 U.S.C. § 1836(b)(3)(A)(i)(I)-(II).
6 18 U.S.C. § 1836(b)(3)(A)(ii).
7 18 U.S.C. § 1836(b)(3)(A)(iii).

DTSA provides that a court may award:

> (i)(I) damages for actual loss caused by the misappropriation of the trade secret; and
>
> (II) damages for any unjust enrichment caused by the misappropriation of the trade secret that is not addressed in computing damages for actual loss; or
>
> (ii) in lieu of damages measured by any other methods, the damages caused by the misappropriation measured by imposition of liability for a reasonable royalty for the misappropriator's unauthorized disclosure or use of the trade secret.[8]

The first measure of damages is a trade secret owner's actual loss that is caused by the misappropriation. One example of actual loss would be a situation where the trade secret is misappropriated and the owner no longer has access to the trade secret. Without access, the owner loses revenue and, ultimately, profits. However, the more common situation is where the owner still has possession of the trade secret, but it has been replicated and used by a competitor. The owner would have to prove that it lost profits through that misappropriation by the competitor.

The second category of damages does not require an owner to prove its actual loss. Instead, the owner may recover the unjust enrichment gained by the person or entity that misappropriated the trade secret. Most commonly, a court looks to the use of the trade secret and the gross profit resulting from the misappropriation.

Finally, a court may award a reasonable royalty as the measure of damages caused by the misappropriation. Presumably, this method would allow for future damages if the misappropriation is ongoing into the future.

A COURT MAY AWARD EXEMPLARY DAMAGES AND ATTORNEYS' FEES

"If the trade secret is willfully and maliciously misappropriated," the court may "award exemplary damages in an amount not more than 2 times the amount of the [compensatory] damages awarded."[9] The statute does not define the terms "willfully" and "maliciously," so the courts that have considered the issue have looked to a number of factors. For example, in *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, No. 3:13CV82-CRS, 2021 WL 863203, *7 (W.D. Ky. March 8, 2021), the court approved a jury instruction stating that "[w]illful and malicious means behavior motivated by spite or ill will and a disregard for the rights of another with knowledge of probable injury." Put another way, "willful and malicious conduct is calculated, deliberate, and reprehensible." *Id.* (analyzing claim made under UTSA rather than the DTSA, whose languages are substantially similar). In another important case, the court looked to considerations such as "the degree of reprehensibility associated with the wrongdoer's actions," "the duration of appropriative misconduct," the defendant's consciousness of resulting injury and any efforts to cover up malfeasance," "the need to deter similar misconduct in the future," the amount of compensatory damages awarded," and "the wealth of the particular defendant." *See Proofpoint, Inc. v. Vade Secure, Inc.*, No. 19CV04238-MMC, 2021 WL 5407521, *2 (N.D. Cal. Nov. 18, 2021).

Additionally, if the misappropriation is willful and malicious, or the trade secret claim is made in bad faith, the court may also award "reasonable attorney's fees to the prevailing party."[10] Given the complexity of most trade secret litigation, the amount of attorneys' fees incurred by both sides can be significant. However,

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8 18 U.S.C. § 1836(b)(3)(B)(i)-(ii).
9 18 U.S.C. § 1836(b)(3)(C).
10 18 U.S.C. § 1836(c).

unlike other statutory provisions that award attorneys' fees to the prevailing party, under the DTSA, a party must do more than prevail to be entitled to fees. Ultimately, a party must prove that the misappropriation was willful and malicious, or that the claim was brought in bad faith.

CONCLUSION

The DTSA is a significant step in curbing the theft of trade secrets. It provides an important framework for protecting trade secrets and statutory remedies including injunctive relief, damages, and exemplary damages in the appropriate circumstances. However, a trade secret owner must be vigilant and must protect the information in order to qualify for its protections. In any industry, a proactive program to identify, monitor and protect the information is a must.

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Extra-Contractual Liability Law

Dramatic Changes to Florida's Property Insurance Laws

By Michael K. Kiernan & Ryan Jones

Michael K. Kiernan

Ryan Jones

The proliferation of property insurance litigation in Florida over the past decade is no secret to anyone in the insurance industry. The property insurance market has become so toxic to property insurance carriers that increasingly carriers are either pulling out of the state altogether or significantly limiting their exposure in the sunshine state. Insurance carriers have dropped hundreds of thousands of policies or requested significant rate increases. In the meantime, the State run insurance carrier of last resort, Citizens Property Insurance Corp., experienced a dramatic increase in the number of policies in force, to over 1.14 million during the last fiscal year. The result is an insurance market where the availability and exorbitant cost of homeowners insurance for the average Floridian has left the state in dire need of insurance reform.

Much of the blame for this predicament lies in the fact that over 79% of all lawsuits related to property insurance claims nationally are filed in Florida! And that is despite the fact that Florida accounts for only 9% of the homeowners property insurance claims filed nationwide. A primary reason for this proliferation in property insurance-related litigation can be attributed to the state's one-way fee statute. Historically in Florida, if an insured brings an action against their insurance carrier, they are entitled to an award of attorney's fees if they prevail – no matter the significance of the result. (i.e. if the insured recovers only $1, they are entitled to attorney's fees).

In December, 2022 the Florida Legislature in a special session, enacted sweeping changes to the troubled property insurance system, including the elimination of the one-way fee statute. Hopefully over time these changes will bring much needed relief to both carriers and their insureds. Set forth below are several of the highlights of Senate Bill 2 (SB2). While many of these measures will not affect current litigation of pending claims, it is hoped that over time these changes will greatly resuscitate the ailing Florida property insurance market. Obviously, these highlights are for informational purposes only and one should refer to the full text of the statute for more detail.

1. The Elimination of the one-way fee statute:

   A. F.S. 626.9373 (for surplus lines carrier) and F.S.627.428 (for admitted carriers) was amended to *remove* the right to attorney's fees in suites "arising under a residential or commercial property insurance policy".

B. It is expected that the courts will apply the "*Menendez* rule" and hold any claim lawsuit arising from a policy issued before the effective date of the statute will continue to carry exposure to attorney's fees

Notably, the elimination of the one-way fee statute only applies to property insurance claims. Hence disputes involving other forms of insurance coverage, such as CGL policies, will continue to face the exposure to attorney's fees if the carrier is not successful in a coverage action. One seemingly unanticipated issue is whether an insured seeking coverage for a third party claim under the liability portion of a homeowner's policy will be able to recover fees. Insurers could argue fees are not available because the suit "arises under" a property insurance policy. However, the insureds will likely argue that the liability section of the policy is separate and distinct and therefore should be treated as such.

2. Bad Faith pre-requisites for property insurance claims:

A. F.S. 624.1551 was amended to require a finding of breach of contract through an diverse adjudication by a court of law *before* a bad faith lawsuit can be filed; the amendment also specifically states acceptances of statutory proposal for settlement or payment of an appraisal award does not meet this requirement.

B. An issue we anticipate is a dispute over when this pre-requisite will take effect. Ideally for insurers, it would be effective immediately upon enactment of the law. However, we expect courts will likely apply the "*Menendez* rule" because the law arguably impacts an insured's ability to bring suit. This would make the law applicable to claims and suits arising from policies issued after the statute was enacted in December 2022.

3. Binding Arbitration:

A. F.S. 627.70154 creates the right to include a mandatory binding arbitration endorsement under certain conditions.

4. Claim Handling Obligations/Homeowners Bill of Rights:

A. F.S. 627.70131 was amended to modify certain claim-handling obligations imposed on carriers and their adjusting staff. These include:

i. an insurer must now respond to communications within 7 days;

ii. an insurer must now "begin such investigation as is reasonable" within 7 days of receiving a proof of loss;

iii. an insurer must now conduct a physical inspection within 30 days of receiving a proof of loss;

iv. an insurer may now use "electronic methods to investigate the loss";

v. an insurer must now "send the policyholder a copy of any detailed estimate of the amount of loss within 7 days after the estimate is generated";

vi. an insurer must now keep specifically-outlined "claim records";

vii. The "factors beyond the control of the insurer" that extend certain deadlines are now defined;

viii. An insurer must now pay or deny claims within 60 days of receiving notice; and

ix. These requirements can be tolled in certain circumstances as defined in the statute.

B. In addition, s. 627.70132 was amended to reduce the time in which claims must be reported from 2 years to 1 year after the date of loss, and reduce the time to report a supplemental claim from 3 years to 18 months

5. Assignments of Benefits:

A. F.S. 627.7152(13) eliminated policyholders' ability to assign post-loss benefits under any residential or commercial property insurance policy (with certain exceptions).

B. The same section states that it applies to policies "issued on or after January 1, 2023" and that any attempt to assign benefits under such a policy will be "void, invalid, and unenforceable."

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California (sort of) Provides New Rules (guidelines, really) For Time-limit Settlement Demands (sometimes)

By Jeffrey V. Commisso

Jeffrey V. Commisso

In California, it is bad faith for a liability insurer to unreasonably fail to accept a reasonable settlement demand. And California bad faith means California-size damages, including punitive damages. Consequently, for years claimants' lawyers have made settlement negotiations into a cat-and-mouse game; making demands crafted to not be accepted, but to lapse or be rejected and thus laying the foundation to argue that the insurer acted in bad faith.

Effective January 1, California has introduced new rules into the game. Under California's new Code of Civil Procedure § 999 et seq., a time-limited settlement demand must check a few boxes to be deemed "reasonable." As always, any demand must be for an amount within the policy's liability limit, offer to settle all claims and satisfy all liens, and offer a complete release from past and future liability. What's new is that "reasonable" demands must be in writing, properly addressed (to the claim handler or company-designated address), labeled as a time-limited demand, and provide the date and location of the occurrence. "Reasonable demands" must also give the insurer at least 30 days to respond. So we can at least say goodbye to 10-day deadlines dropped in the mail at 5:00 p.m. the day before Thanksgiving. Finally, "reasonable demands must describe the claimant's injuries and include "reasonable proof" supporting demand, such as medical records and bills.

Lawyers being lawyers, and legislators being legislators (and usually lawyers too), the new statute has two big areas for dispute. First, a demand need only "substantially comply" with the new rules to be considered reasonable. In this sense, the new § 999, like the pirate code, "is more what you'd call 'guidelines' than actual rules." "Substantial compliance" is undefined, so whether a demand measures up is something insurers and claimants' lawyers will litigate about. Second, "reasonable proof" to support a demand also isn't defined, adding another layer of uncertainly.

There are also new rules for responding to time-limited demands. Insurers must respond to time-limited demands in writing. If an insurer accepts, then it must accept the demand's material terms "in their entirety." And if an insurer rejects, then it must provide a written explanation for its decision that "shall be relevant" in

future bad faith litigation. Insurers should expect their "here's why" letters to be subject to intense scrutiny.

Now for the caveats: First, the new rules only apply to demands made by lawyers. So insurers should look forward to — and look out for — ghost-written pro se demands. Second, the rules don't apply after litigation starts or someone demands arbitration. Claimants may now be quicker to file suit. Third, the new rules do not prohibit claimants from including other conditions (like a declaration from the insured that they have no other insurance, no assets, etc.). As a result, onerous conditions will not disappear from demands. They will remain and continue to be judged on a "reasonableness standard." Finally, the rules only apply to demands with time limits, i.e., that have a deadline for acceptance. Insurers should expect claimants to try to skirt the new rules by making demands ostensibly without a time limit, only to withdraw them later on some pretext. In short, the rules have changed a bit, but the game will stay mostly the same.

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New Jersey's Bad Faith Statute

By Scott Tredwell

Scott Tredwell

Until recently, New Jersey uninsured (UM) and underinsured (UIM) claims were subject to common law bad faith claims. See *Pickett v. Lloyd's*, 621 A.2d 445 (N.J. 1993). Insurers could successfully defend (or avoid) such an action by showing that their conduct was "fairly debatable." See Pickett, 621 A.2d at 454. In practice, this meant that extra-contractual damages were rarely awarded (or even sought).

Given this nearly insuperable standard for demonstrating an insurer's bad faith, Last year, the New Jersey legislature created a statutory cause of action, the New Jersey Insurance Fair Conduct Act (the "IFCA"), N.J.S.A. 17:29BB-1, *et seq*. Under the statute, insurers can now be sued for either:

- An "unreasonable" delay or denial in coverage; or
- A violation of any of the sixteen enumerated unfair claim settlement practices under the UCSPA.

What's more, if bad faith can be shown, the statute allows insureds to recover:

- Up to three (3) times the policy limit;
- Counsel fees;
- Litigation expenses;
- Pre- and post-judgment interest, and;
- Other "actual damages."

Numerous questions remain unanswered. Among the first is the effective date of the IFCA. The statute itself states it "take[s] effect immediately." But it does not contain language explaining whether the Act applies only to policies issued after the effective date, to claims made after the effective date, or more generally to bad faith conduct occurring after the effective date. As a consequence, courts have been struggling. One case has made it to appeal, *Stankovits v. Penn National Insurance et al.*, Docket No. MID-L-6851-20, but as of the writing of this article, no decision has been issued.

While we await guidance, some litigants are turning arguing from analogous statutes. *James v. New Jersey Manufacturers*, 83 A.3d 70 (N.J. 2014) (applying "step down" statute prospectively); *Bunk v. Port Auth. of New York & New Jersey*, 144 N.J. 176, 676 A.2d 118 (1996) (applying New Jersey statute barring state employees from simultaneously obtaining accidental disability pension benefits and

workers' compensation benefits to pending claims). Others have looked to similar statutes in neighboring jurisdictions. See *Coyne v. Allstate Insurance Co.*, 771 F.Supp. 673 (E.D.Pa.1991) (Pennsylvania bad faith statute applies only to conduct after effective date); *Okkerse by Okkerse v. Prudential Property and Cas.* Ins. Co., 625 A.2d 663, 665-66 (Pa. Super. 1993) (same).

The IFCA also seems to allow claims adjusters to be sued ***personally***. Specifically, the statute allows "insurers" to be sued, but defines that term broadly enough to include the claims representative working on the case:

> ***"Insurer" means any individual***, corporation, association, partnership or other legal entity ***which issues***, executes, renews or delivers an insurance policy in this State, ***or which is responsible for determining claims*** made under the policy. "Insurer" shall not include an insurance producer as defined in section 3 of P.L.2001, c.210 (C.17:22A-28) or a public entity.

(emphasis added). In fact, this definition is so broad that other individuals could theoretically be sued, including an agent selling policies (if involved with the claim at issue) and perhaps even a defense lawyer assigned to the case. To date, no New Jersey courts have addressed, let alone resolved, such questions.

Certainly, the threat of personal liability may have a chilling effect on the handling of claims. This alone should be sufficient cause for concern over this aspect of the statute.

What's more, there may be good strategic reason for insureds to sue an adjuster personally. Diversity jurisdiction necessary to remove cases to Federal Court can be destroyed by naming an adjuster who resides in New Jersey. The insurer's only recourse would then be to argue that the joinder is "fraudulent." See *Abels v. State Farm Fire & Cas.* Co., 770 F.2d 26, 32 (3d Cir.1985). But given the relatively clear wording of the statute's provisions defining an insurer to include an "individual," such fraudulent joinder arguments do not seem winnable.

Of course, given the ongoing development of guiding jurisprudence on these questions, and it is too soon to tell whether the above concerns will be met. We do know, however, that the IFCA will leave ample room for argument.

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The Eleventh Circuit Holds a Consent Judgment Constitutes an "Excess Judgment" to Satisfy the Causation Element in a Bad Faith Action

By Michael K. Kiernan & Susan L. Deng

Michael K. Kiernan

Susan L. Deng

Bad faith litigation abounds in Florida, and a hotly contested aspect of proving a bad faith claim is the "causation" element—that is, whether the insurer's conduct caused the insured's loss when the insurer failed to settle a lawsuit. A means for proving causation is demonstrating that the insured suffered an "excess judgment" as a result of the insurer's actions.

Recently, in *McNamara v. Gov't Employees Ins. Co.*, 30 F.4th 1055 (11th Cir. 2022), the Eleventh Circuit Court of Appeals provided clarification on whether a qualifying "excess judgment" must be based on a verdict following a trial or if it may be based on a consent judgment that memorializes a settlement agreement. *McNamara* involved an automobile accident where Emily McNamara ("McNamara"), while driving a vehicle owned by Williard Warren ("Warren"), caused a collision that injured Deborah Bennett ("Bennett"). At the time of the accident Warren was insured with GEICO, and the insurance policy provided bodily injury coverage up to $100,000 per person. After failing to reach a settlement with GEICO within the policy limits, Bennett sued Warren and McNamara in Florida state court. Pursuant to the policy, GEICO provided Warren and McNamara with a lawyer.

Bennett subsequently served both Warren and McNamara with proposals for settlement pursuant to Fla. Stat. § 768.79. The proposal directed towards Warren totaled $474,000, and the proposal directed towards McNamara totaled $4,740,000. The proposals were conditioned on two factors: (1) Warren and McNamara had to consent to the entry of judgments against them in the amounts of the proposals, and (2) GEICO had to confirm that it would not assert that Warren and McNamara had breached the policy by accepting the proposals. GEICO was informed of the proposals and advised that it would not assert that Warren or McNamara had breached the policy if the proposals were accepted. Both Warren and McNamara accepted Bennett's proposals, and the state court entered final judgments against them.

Warren and McNamara then sued GEICO for bad faith, seeking to recover the amounts of the final judgments entered against them that exceeded the $100,000

policy limit and contending that GEICO had breached its fiduciary duty to them. GEICO removed the case to federal court and sought summary judgment. The district court granted summary judgment in GEICO's favor, holding that the consent judgments entered against Warren and McNamara did not qualify as "excess judgments" and they could not prove causation in their bad faith action. The district court based its holding on the Eleventh Circuit's unpublished decision in *Cawthorn v. Auto-Owners Ins. Co.*, 791 F. App'x 60 (11th Cir. 2019), where the Court determined that only a judgment following a trial after a verdict qualified as an "excess judgment" for bad faith purposes under Florida law.

On appeal, the Eleventh Circuit reversed the district court's decision, finding that Florida bad-faith law did allow a consent judgment to constitute an "excess judgment." The Court found cases decided by the Florida Supreme Court particularly instructive in reaching its decision, specifically *Perera v. United States Fid. & Guar. Co.*, 35 So. 3d 893 (Fla. 2010) and *Fridman v. Safeco Ins. Co.*, 185 So. 3d 1214 (Fla. 2016). In *Perera*, the Florida Supreme Court never discounted the idea that a final judgment based on a settlement agreement could constitute proof of causation in a third-party bad faith action. Moreover, the Florida Supreme Court expressly held in *Fridman* that, in the context of a statutory first-party bad faith action, the insured was not obligated to obtain a determination of liability and damages through a trial and could utilize other means of doing so, such as in an agreed settlement or stipulation before initiating a bad faith cause of action. Also significant was the fact that *Fridman* confirmed that first-party bad faith claims and third-party bad faith claims should be treated in the same manner.

Based upon the reasoning of the Florida Supreme Court, the Eleventh Circuit concluded that, under Florida law, it did not matter that the judgments against Warren and McNamara resulted from stipulated settlements instead of verdicts. The final judgments entered against Warren and McNamara constituted "excess judgments" because they exceeded the policy's $100,000 available coverage. As a result, both Warren and McNamara could prove causation in their bad faith action. The Eleventh Circuit also specifically declined to follow *Cawthorn*, noting that the decision incorrectly analyzed Florida bad faith law. In retreating from its prior decision, the Eleventh Circuit expounded upon the fact that a consent judgment is a "judgment," in the sense that the settlement becomes a court judgment when sanctioned by the judge, thus creating a legal obligation on the part of the insured, against whom the judgment is entered, to pay that amount.

While it is still too early to say with certainty what effect *McNamara* will have on litigation in Florida, the change may lead to an increase in the number of bad faith claims. The Eleventh Circuit's decision has greatly expanded an insured's ability to establish bad faith claims in Florida by removing a significant barrier to demonstrating the causation element. By expressly confirming that a verdict after trial is not a prerequisite for an "excess judgment," the Eleventh Circuit has potentially emboldened insureds to bring claims that may lead to bad faith actions because an agreed settlement or an agreed stipulation is sufficient to constitute the basis for an "excess judgment" if the amount exceeds available coverage under the applicable insurance policy. However, an insured must still prove the other elements of a bad faith claim and, as noted by the Eleventh Circuit, a consent judgment is enforced against the insurer only to the extent that the judgment itself is reasonable and untainted by bad faith on the part of the insured. See *Steil v. Fla. Physicians' Ins. Reciprocal*, 448 So. 2d 589 (Fla. 2d DCA 1984). In light of this decision, and *Perera* and *Fridman*, insurers should continue to thoughtfully consider any settlement offers and endeavor to always act in good faith with regard to their insureds.

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2023 Forecast For Extra Contractual Developments

By Michael K. Kiernan, Andrew B. Downs, and Linda Knight

Michael K. Kiernan

Andrew B. Downs

Linda Knight

Set forth below are some trends we believe we will be forced to address in 2023 and beyond, in both the first-party and third-party arenas. This list is by no means meant to be exhaustive nor is it arranged in any particular order.

First-party Forecast:

1. Company's internal file hygiene continues (Yes! After all these years and countless training sessions…) to be a significant problem. Not only in terms of the actual content of claim notes but record keeping as a whole. This may very well lead to an increase the need for more PTS searches to locate missing documents.

2. Perhaps one of the unanticipated effects of the pandemic was that it greatly reduced the number of "boots actually on the ground" in claims handling, and the resulting information gap is going to continue to cause problems. This lack of actual face-to-face contact has invariably led to an increase in the utilization of emails and text messaging in the claims handling process. The loss of good "bedside manners" plays right in to the hands of smart policyholder lawyers and public adjusters who will increasingly easier to set up the claims handler – in writing. Claims of "You never returned my call…" are now more routine than ever.

Third-party Forecast:

- Nuclear Verdicts:

Remember the good old days when liability limits of $1M seemed more than sufficient? As we have all seen over the past several years, especially since the pandemic, multi-million dollar verdicts/settlements are now the norm. As one veteran defense counsel (who tries cases in a particularly liberal jurisdiction) recently observed, "I can still win and get a defense verdict, but now when I lose, I lose BIG!"

Indeed, although not an everyday occurrence, it is no longer abnormal to see a 9-figure settlement or verdict. It can be safely assumed there are far more of these types of settlements than one can imagine since they have strict confidentiality and thus never publicized.

Here to provide context, are a few recent examples of these "nuclear" or at best, "outrageous" verdicts:

1. $1 Billion in a wrongful death action brought by a Florida college student when a truck struck him from behind while stuck in traffic. ($100M in compensatory/$900M in punitive damages).

2. $7.37 Billion against a Communications contractor for a systemic failure of safety processes that led to the robbery and stabbing death of an 83-year old woman by a cable repairman.

3. $155.5 Million verdict against an employer in an EPL case wherein the Plaintiff alleged he was wrongfully terminated.

4. $125 Million against Walmart for employment discrimination in a case brought by a 16-year-old employee with Downs Syndrome ($150K in compensatory and $125M in punitive damages).

Where this is heading is anyone's guess, but the trend is not subsiding in any way by all accounts. Look for several industries (trucking for example) to seek legislative help on the state and federal levels. No matter what happens in the near future, one must keep this trend in mind when evaluating third-party exposure for an insured.

- Attacks on Attorney-Client Privilege:

We have all seen the very troubling erosion of the attorney-client privilege between carriers and their retained coverage/ EC counsel. This trend continues across the country. We can no longer assume that an attorney's correspondence with their carrier client, where counsel has been retained to represent the carrier only in a first-party or third-party situation is protected. Increasingly, courts are judicially determining that the role of counsel may evolve from one of legal representation to more of a claims handling function, hence eviscerating the privilege. (See, *Menapace v. Alaska National Ins. Co.*, Civil Action No. 20-cv-00053-REB-STV, 2020 U.S. Dist. LEXIS 191695 (D. Colo. Oct. 15, 2020).

It is more important than ever to carefully define the role of counsel from the very outset of retention. Perhaps including why counsel is being retained and the scope of that representation. Careful consideration must be given to exactly what tasks counsel is undertaking, such as the retention of an expert to assist in the adjusting of a claim, evaluating for the carrier a property loss, etc. Furthermore, careful consideration need

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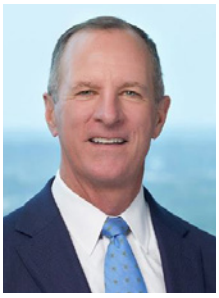
Healthcare Practice

Recent Decisions Related to Prosecutions Under the Controlled Substances Act – "Pill Mill" Cases

By Jim Hoover



Jim Hoover

On June 27, 2022, the Supreme Court of the United States (SCOTUS) heard an appeal emanating from a conviction of a local doctor in Mobile, Alabama and a different conviction of a doctor in Wyoming for violating the Controlled Substances Act (CSA). The case is *Ruan v. United States*, No. 20-1410 (June 27, 2022).

The opinion heavily scrutinized a particular sentence in the CSA. 21 U.S.C. § 841 makes it a federal crime for any person *except as authorized* to knowingly or intentionally manufacture, distribute or dispense a controlled substance. As provided by the regulatory framework, a prescription is only authorized when a doctor issues the prescription "for a legitimate medical purpose . . . acting in the usual course of his/her professional practice." The Department of Justice ("DOJ") argued that "knowingly or intentionally" merely refers to the knowing or intentional distribution of a controlled substance. However, the Supreme Court held that once a defendant-doctor meets the burden of producing evidence that his or her conduct was "authorized," the DOJ "must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner" in order to secure a conviction for improper prescribing.

The justices specifically examined the convictions of Dr. Xiulu Ruan of Alabama and Dr. Shakeel Kahn of Wyoming, who are each serving prison sentences of more than 20 years. Both physicians actively practiced medicine and possessed licenses permitting them to prescribe controlled substances. The DOJ charged each of them with unlawfully dispensing and distributing drugs in violation of the CSA. Each doctor argued that the drugs were dispensed pursuant to a valid prescription and were for a legitimate medical purpose by each of them acting in the usual course of their professional practice. The doctors further argued that each of their prescriptions complied with the above standard, and even if the prescriptions did not, the doctors did not knowingly or intentionally deviate from this standard.

In Dr. Ruan's case, the Eleventh Circuit Court of Appeals held that a doctor's subjective belief that he/she is meeting a patient's medical needs by prescribing controlled substances is not a complete defense. Rather, the Eleventh Circuit held that whether a doctor-defendant acts in the usual course of his professional practice must be evaluated based upon an objective standard, not a subjective standard.

The Supreme Court ruled that prosecutions under the CSA for excessive prescribing of opioids and other addictive drugs must prove that the doctors knew the prescriptions lacked a legitimate medical purpose. The Court vacated the circuit court of appeals opinions that upheld the underlying convictions and directed them to consider whether the jury instructions given at the conclusion of the trial were consistent with the Supreme Court's standard.

Upon remand from the Supreme Court, on January 5, 2023, the United States Court of Appeals for the Eleventh Circuit, and on February 3, 2023, the United States Court of Appeals for the Tenth Circuit, both ruled that the jury instructions used to convict the doctor-defendants were inconsistent with the Supreme Court's opinion and were not harmless error. Both Court of Appeals generally recognized that to obtain a conviction under 21 U.S.C. § 841(a), the government must prove beyond a reasonable doubt that a defendant (1) knowingly or intentionally dispensed a controlled substance, and (2) knowingly or intentionally did so in an unauthorized manner. Both courts concentrated on the defendants' subjective *mens rea*. The Eleventh Circuit panel provided the following clarification: "[W]ithout further qualification, the phrase 'good faith' encompasses both subjective and objective good faith. In the context of § 841 though, as the Supreme Court has explicitly held, only the subjective version is appropriate. The instruction given by the district court did not contain any qualification to make this clear to the jury." Thus, both Court of Appeals vacated the doctors' controlled substances convictions and remanded the cases to the district courts for further proceedings consistent with the Court of Appeals' opinions.

While it is still too early to measure the impact these rulings have on prosecutions for violations of the Controlled Substances Act, the rulings have provided defense counsel additional arguments. Particularly in prosecutions of physicians, raising reasonable doubt that the physician lacked subjective good faith that he/she prescribed controlled substances in an unauthorized manner should be substantially easier in all but the most extreme fact patterns.

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The Continuing Battle Over Audit Trails

By W. Mitchell Hall, Jr.

W. Mitchell Hall, Jr.

Plaintiffs in medical-related litigation continue to demand production of audit trails and other electronic medical record (EMR) metadata. Litigation over audit trail requests can take on a life of its own, shifting the focus of the case from whether appropriate care was given to allegations that the health care provider is attempting to hide something by refusing to provide an audit trail and the patient's EMR in its "native" format. The health care provider frequently must retain its own EMR expert to respond to an affidavit or testimony from the plaintiff's EMR expert that the patient's complete EMR has not been produced and that producing the EMR in native format does not impose an unreasonable burden on the defendant. The defendant's IT employees typically are drawn into these disputes as witnesses, sometimes having to sign affidavits about the EMR capabilities and sometimes even being deposed. Discovery disputes over EMRs and audit trails are time-consuming, expensive, lead to extensive judicial intervention (with corresponding judge frustration), and detract from the standard of care issues that should be the focus of the litigation.

Plaintiffs' counsel rely on federal regulations under HIPAA and the HITECH Act to support their argument that a plaintiff has a right to inspect all of his or her protected health information (PHI) and that PHI includes everything in the EMR.[1] Plaintiffs' counsel are citing to recent rules proposed under the 21st Century Cures Act as further support for the argument that audit trail data, including metadata associated with a patient's EMR, is included in the patient's right of access under federal law.[2] In response, defense counsel argue that the language in the federal statutes and regulations demonstrates that an audit trail is not a part of a patient's "qualified electronic health record" or "designated record set" that must be produced in litigation.[3] An audit trail does not contain information about the actual treatment related to a patient, nor does it contain patient health

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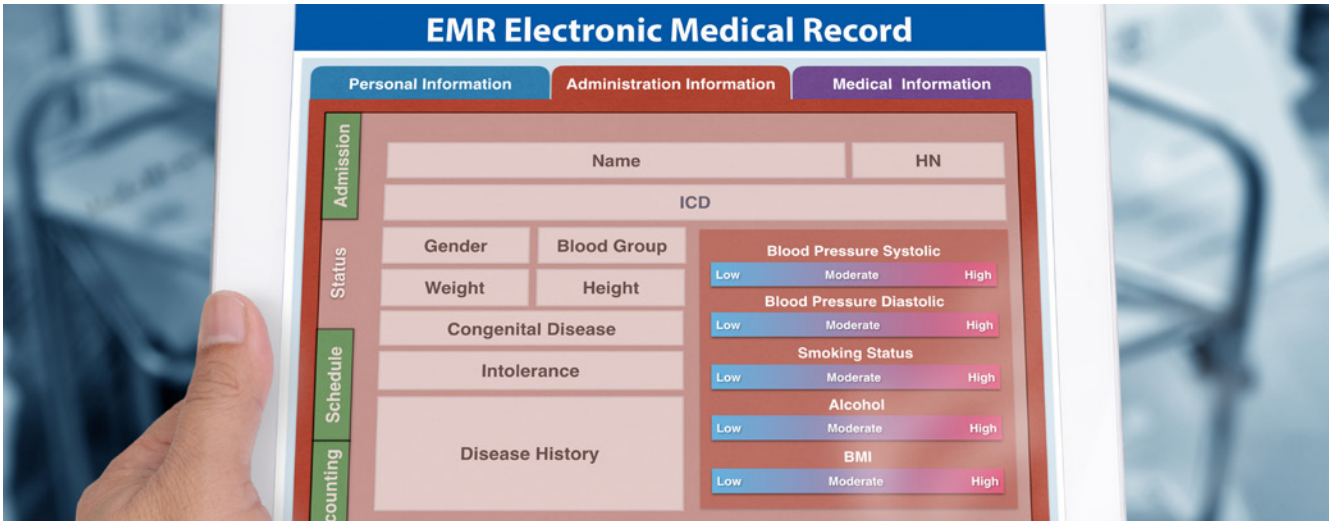
1 See 45 C.F.R. § 164.523(a)(1); 45 CFR § 160.103 (definition of protected health information).

2 See 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 85 Fed.Reg. 25642, 25697-98, 25794 (May 1, 2020); 45 C.F.R. § 170.315(b)(10).

3 See 42 U.S.C.A § 3000jj (definition of "qualified electronic record set"); 45 C.F.R. § 164.501 (definition of designated record set).



information, and thus, cannot be a part of a patient's medical record.[4]

In response to these disputes, the courts are more frequently requiring production of EMRs and audit trails in some format, at least in those cases where the plaintiff can establish cause for the defendant to produce such information (*e.g.*, based on allegations or evidence that a medical record was altered). Trial courts are increasingly finding that an audit trail is part of a patient's medical record to which the plaintiff is entitled in such cases.[5] Some courts have required that audit trails and EMR metadata be produced in pdf or "read only" format on a flash drive.[6] The Kansas Supreme Court recently held, in a case involving Kansas' open records law, that the "only accurate reproduction of an electronic file is a copy of the electronic file" and required that a patient be given her EMR in its native format.[7] In other cases, the courts have ordered the defendant to give the plaintiff's counsel and EMR expert "live" access to the plaintiff's EMR, typically in the context of a corporate representative deposition in which the health care provider's IT employee is the witness.[8]

In one extreme case involving negligence claims arising from a birth injury, following three years of litigation over the hospital's alleged noncompliance with multiple court orders to provide access to the plaintiff's EMR and audit trail information, including on-site, *in camera* inspections supervised by the judge, the trial court granted the plaintiff's motion for sanctions. As a sanction, the court struck the defendant's Answer

4 See Paige Krueger, Metadata – How Technology Has Changed Routine Disclosures, UIC Law Review, April 22, 2021.

5 See *Wiese v. Riverton Memorial Hospital, LLC*, 520 P.3d 1133 (Wyo. 2022); *Luterek v. Schneider Regional Medical Center*, 2022 VI Super 35U (V.I. Super. Mar. 18, 2022); *Picco v. Glenn*, 2015 U.S. Dist. LEXIS 58703 (D. Col., May 5, 2015); *Moan v. Mass. Gen. Hospital*, 2016 Mass. Super. LEXIS 28; *Hall v. Flannery*, 2015 U.S. Dist. LEXIS 57454 (D. Ill., May 1, 2015); *Hirsch v. CSP Nova, LLC*, 2018 Va. Cir. LEXIS 49 (Va. Cir., April 3, 2018); *Wheeler v. United States*, 2018 U.S. Dist. LEXIS 74018 (D. Kan., April 30, 2018); *Gilbert v. Highland Hosp.*, 31 N.Y.S.3d 397, 2016 N.Y. Misc. LEXIS 1672 (N.Y. Super., March 24, 2016); *Vargas v. Lee*, 170 A.D.3d 1073, 2019 N.Y. App. Div. LEXIS 2071; *Miller v. Sauberman*, 2018 N.Y. Misc. LEXIS 5954 (N.Y. Sup. Ct., December 4, 2018); *Borum v. Smith*, 2017 U.S. Dist. LEXIS 109249 (W.D. Ky., July 14, 2017).

6 See *Pe*terson v. Matlock, 2014 U.S. Dist. LEXIS 152994 (D. N.J., October 29, 2014) (denying motion to require defendant to produce electronic medical record in "native readable format"); *Myers v. Riverside Hosp., Inc.* 2016 Va. Cir. LEXIS 53 (Va. Cir., April 21, 2016).

7 *Roe v. Phillips* County Ho*spital*, 122,810, 2023 WL 117359 (Kan. Jan. 6, 2023).

8 *Picco v. Glenn*, 2015 U.S. Dist. LEXIS 58703 (D. Col., May 5, 2015)

and entered judgment of liability against the defendant, leaving only the issue of damages in the case.[9] The court relied on HIPAA's "right of access" rule, the HITECH Act, and the Cures Act to conclude that audit trail data and EMR metadata was included in the plaintiff's right of access and that the defendant had violated the court's previous orders to produce complete information to the plaintiff. The court criticized the inconsistencies between information learned during *in camera* inspections of the EMR and statements in affidavits of the defendant's IT representative that had been filed with the court.

Plaintiffs have learned that protracted litigation over audit trails and EMR metadata can distract from the underlying care issues, create the impression with the judge that defendants are not being candid or forthcoming, and open the door to seek sanctions against defendants. To address these pitfalls and avoid costly litigation over production of EMRs, in some cases (in certain jurisdictions) defendants are electing to provide EMR metadata voluntarily, early in litigation, sometimes by webcam for *in camera* inspection by the plaintiff's expert. Defense counsel are finding that this approach can demonstrate to the plaintiff's counsel and plaintiff's expert how complex the EMR system is and that it does not produce helpful information for the plaintiff. A plaintiff who has been given such access will have no reason to complain to the court that the defendant is being obstructive.

New rules and case law trends seem to be providing increased support for plaintiffs seeking audit trails and EMR metadata where good cause is shown. Audit trail disputes will likely be a continuing reality in medical litigation. Defendants can and should continue to resist blanket requests for metadata and audit trails, particularly when plaintiffs have failed to establish good cause for requesting such data. Federal statutes and regulations continue to support arguments that audit trails are not considered a part of a patient's designated record or qualified electronic health record. However, in appropriate jurisdictions and cases in which a showing of cause has been made, defendants might consider making EMR metadata available before engaging in prolonged motion practice with court involvement. Providers are understandably protective of their EMR systems, but this approach can demonstrate that the defendant has nothing to hide and that there is nothing in the EMR that adds to the plaintiff's case. It can demonstrate to the court that the defendant is cooperating in discovery, it can put to bed a plaintiff's persistent requests and conspiracy theories, and it can return the focus of the litigation to the care provided, which frequently is the weakest part of the plaintiff's case.

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9 *Angelo Prieto v. Rush University Medical Center, et al*, Circuit Court of Cook County, Illinois, Civil Action No. 2018 L 003531 (January 18, 2022).

Expert Review Biases in Radiology Malpractice Cases

By Scott Salter

Scott Salter

The classic medical malpractice action against a radiologist involves the allegation of a missed radiological finding. Studies have addressed different biases that a radiology expert witness may have when reviewing a medical malpractice action. These biases include "contextual bias," "hindsight bias," and "outcome bias" on the medical side. They include "selection bias," "compensation bias," and "affiliation bias" on the legal side. Studies have demonstrated that these biases can affect an expert witness's interpretation of the images during an expert review.[1] Cognitive of these potential biases, attorneys should seek to minimize their potential impact on an expert's review. By minimizing these biases, you can bolster the credibility of the expert witness.

The American College of Radiology has established a Practice Parameter for radiologists serving as expert witnesses in medical malpractice actions.[2] The recommended guidelines of conduct provide that the expert witness should strive to minimize all potential sources of conscious and subconscious bias when reviewing case materials. "Images and other relevant material presented in a blinded fashion to the expert in a malpractice lawsuit strengthens the credibility of the opinion rendered by the expert."

There are a minimum of three biases that a reviewing radiology expert may have based on having access to information that the defendant radiologist did not have. "Contextual bias" arises from the fact that the expert reviewer, even without any other information, knows the review is related to a legal action. This can increase the level of detail and the diagnostic threshold of the reviewer. Second is "hindsight bias." Hindsight bias is when the expert witness knows the specific finding or alleged "miss" in question. This results in the radiologist, despite his/her best efforts, looking for a specific finding. One study has demonstrated that radiologists were more likely to detect strokes on a CT scan when they had knowledge that an MRI had already shown evidence of a stroke.[3]

The third medical bias is "outcome bias." This refers to the reviewing radiologist having knowledge of the patient's ultimate outcome/injury. This is information

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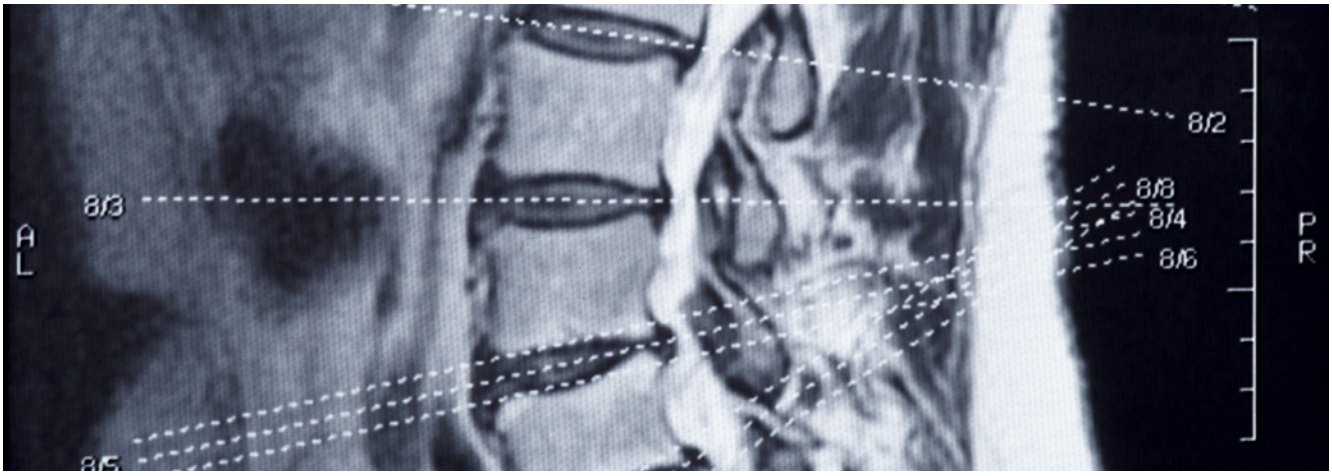
1 *Expert Witness Blinding Strategies to Mitigate Bias in Radiology Malpractice Cases: A Comprehensive Review of the Literature*, J Am Coll Radiology 2014; 11: 868 – 873.

2 American College of Radiology, Practice Parameter, Expert Witness Radiology and Radiation Oncology.

3 *Impact of Hindsight Bias on Interpretation of Nonenhanced Computed Tomographic Head Scans for Acute Stroke*, Early WK, J. Computer Assisted Tomography 2010; 34:229 – 32.



that the defendant radiologist would not have had at the time of the reading. Studies demonstrate that "expert witnesses are more likely to conclude that negligence occurred when they are told that the patient had a poor outcome."

There are also legal or litigation biases. One is "compensation bias." This encompasses the fact that an expert witness knows that if he has an unfavorable opinion for the requesting attorney, there is no further work and no additional income in that case. It also makes it more likely the attorney will not consult the radiologist for additional expert witness reviews in the future. There is also "affiliation bias." This arises from knowing the side of the case, plaintiff or defendant, that is requesting the review.

To remove or minimize these biases, a blind review is recommended. While there is no perfect method to achieve a blind review and remove all biases, from a practical standpoint, a potential expert witness can be contacted by telephone or by letter in a blinded manner. The attorney can make the request for a review without disclosing the fact that there is litigation, without disclosing the side that he/she represents, and without disclosing the specific finding, and ultimate outcome at issue. The attorney can request that the radiologist perform no searches to determine their identity, where they work, or who they may represent. The attorney can arrange to provide the reviewing radiologist with a set of radiological studies, incorporating the study at issue. This can be done live or by providing a thumb drive with multiple radiological studies. The images should not contain any personal health information, such as patient names, dates of birth, medical record numbers, or other identifying information. The attorney should ask the reviewing radiologist to read each individual study and provide his/her interpretation and report. If followed, this process for review can eliminate contextual bias, hindsight bias, outcome bias, compensation bias, and affiliation bias. This process allows an unbiased review of whether the defendant radiologist met the standard of care.

After obtaining the blind review of each study, the attorney can reveal the specific study at issue, the alleged missed finding, and patient outcome. While not all biases can be removed, this process removes most biases, conscious and subconscious, strengthening the radiologist's credibility as a testifying expert. While there are different methods to achieve a blind review, from the defense's standpoint it is important to bolster the credibility of your radiology expert by removing or minimizing as many biases as possible.

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Courtesy Defense for Depositions of Former Employees of Long-Term Care Facilities: A Powerful Weapon for the Defense in the Fight for the Truth

By Luke Sbarra

Luke Sbarra

All defense lawyers who have recently defended a long-term care provider are acutely aware of the dangers lurking during a plaintiff's deposition of a former nursing employee regarding the medical care at issue. Plaintiff's deposition of a former employee is often an intimidating prospect for a former employee and dangerous for the defense because the employee is no longer employed with the facility, may no longer have any fidelity to the facility, may have ill will toward the facility, and may not have looked at all of the facility's records or considered the medical care or medical circumstances at issue since leaving employment. These factors, among others, naturally place the former employee in a position of vulnerability before the deposition even begins.

During the deposition, plaintiff's counsel's questions relating to "Reptile Tactics" or "safety rules," which are often conflated with questions relating to facility policies and procedures and federal and state regulations, can lead to a disastrous result and may bend or shame an unprepared former employee into saying "yes" to virtually any question asked. A bad deposition from a former key care provider hampers the defense prospectively and puts a ball and chain on the defense case for the duration of the litigation. What better or more potent argument from the plaintiff attorney to the jury than the argument that a former key provider for the resident for the treatment at issue *admitted* in deposition testimony harmful facts regarding the medical care at issue?

Defense lawyers have traditionally employed two paths to former nursing employee depositions. First, examining the witness at deposition with relevant documents from a resident's medical file and establishing the defense theme through documents and testimony elicited during deposition. Second, if the defense attorney learns before the deposition of significant adversity from the former employee because of ill will, a prior termination, or other reasons, the defense can engage in either a destructive cross examination or a combination of the first strategy and a destructive cross examination.

However, given the rise in Reptile Tactics, Nuclear Verdicts, and anti-establishment and anti-institution sentiment among jurors and witnesses, the first two traditional approaches to the deposition of a former nursing employee are often insufficient to protect the interests of the long-term care defendant. A third very beneficial option exists for the defense when employed properly and carefully: the selective courtesy defense to the former nursing employee. This strategy allows defense counsel to represent the former employee for purposes of the deposition only, and the defense can be re-evaluated for trial testimony. The benefits of the courtesy defense are manifold to both the long-term care facility defendants and the prospective former employee client.

First, once defense counsel is engaged, plaintiff's counsel must cease ex parte contact with a former employee, preventing plaintiff counsel from speaking with or obtaining affidavits from former nursing employees. Second, the courtesy defense establishes an attorney-client relationship and allows attorney-client deposition preparation, preparation, and more preparation. A former nursing employee walking into a deposition or trial without any preparation for a seasoned plaintiff's attorney is like a deer in the road for an on-coming truck. The courtesy defense allows the defense lawyer to prepare the former employee as much as necessary, mock the deposition preparation, and represent the employee at the deposition or, potentially, at trial.

The courtesy defense, however, may be improper and defense lawyers need to be aware of certain ethical limitations on this defense. First, since the defense lawyer may already be representing at least the long-term care facility, defense counsel needs to make sure concurrent representation of another individual does

not conflict with representation of existing clients. The substance of the American Bar Association Model Rules of Professional Conduct is generally in effect in each state and should be reviewed in conjunction with other ethical guidance from each appropriate licensing jurisdiction before commencing a courtesy defense. For example, Rule 1.7 prohibits a concurrent conflict of interest with a current client and contains requirements for dual representation of multiple clients. This rule should be reviewed in-depth before considering a courtesy defense. Defense counsel will generally be unable to represent a former employee whose interests are materially adverse or antagonistic to the interests of the existing client(s) of the defense attorney, most specifically the entity defendant or group of existing medical defendants.

Defense counsel should not expect to be able to cross-examine at deposition the deponent whom defense counsel is defending through a courtesy defense! If the deponent's interests are so far materially adverse to those of the existing clients, and the defense counsel makes this determination before the courtesy engagement, a courtesy defense should not be provided. A risk of disqualification exists if defense counsel proceeds, at minimum. In addition, at least one case found defense counsel cannot solicit employment of a courtesy defense. See *Rivera v. Lutheran Medical Center*, 866 N.Y.S.2d 520, 22 Misc.3d. 178 (2008), aff'd 899 N.Y.S.2d 859 (App. Div. 2010). Other cases are inapposite. See, e.g., *Sullivan v. Saint-Gobain Performance Plastics Corporation*, 2018 WL 11321826 (D. Vermont 2018) (unpublished). A review of the case law indicates Rivera may be limited to its facts and not have much following. One distinction appears to be the fact that a significant motive for solicitation of a courtesy defense is typically not financial gain, which is prohibited in the usual rules against solicitation for legal services under Model Rule of Processional Conduct 7.3.

In light of the ethical issues that may arise from the provision of a courtesy defense, the better approach to a courtesy defense may be for a prospective deponent to ask defense counsel for the defense as opposed to defense counsel asking or soliciting the deponent if defense counsel can provide the defense, for an insurer to assign the courtesy defense directly without involvement of counsel, or for a facility to provide the defense itself and to avoid involving counsel in the initial decision to assign counsel.

The use of a courtesy defense in long-term care defense litigation, when deployed appropriately and utilized appropriately, can be a powerful weapon against a seasoned plaintiff's attorney ready to pounce on a helpless former employee.

** This article is not intended to form an attorney-client relationship between the author and reader, nor the author's law firm and the reader, nor is this article intended to provide legal or ethical guidance for any specific circumstance.*

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What to Expect in 2023: Illinois Nursing Home COVID-19 Litigation "Quarantined" in Appellate Court

By Anne M. Oldenburg

Anne M. Oldenburg

Illinois nursing homes and long-term care facilities are under fire in the aftermath of the COVID-19 pandemic. Hundreds of actions have been filed against nursing homes and long-term care facilities in Cook County alone. As the number of actions rise, the future of these cases is still unclear as litigation is presently making its way through the Appellate Court. In the interim, the various circuit courts continue to take varied and inconsistent positions.

On March 9, 2020, Illinois Governor J.B. Pritzker declared a First Gubernatorial Disaster Proclamation and issued an Executive Order in response to the COVID-19 outbreak pursuant to the Illinois Emergency Management Agency Act.[1] Shortly after, on April 1, 2020, Governor Pritzker issued Executive Order 2020-19 ("Order"), which directed health care facilities to render assistance in support of the State's response to the disaster by undertaking "measures such as increasing the number of beds, preserving personal protective equipment, or taking necessary steps to prepare to treat patients with COVID-19."[2] In exchange for their assistance, the Order granted immunity from civil liability for any injury or death that occurred when rendering that assistance to the State unless it could be established that the injury or death was caused by gross negligence or willful and wanton misconduct.[3] This Order remained in effect through the duration of the Gubernatorial Disaster Proclamation.

Despite these protections, numerous civil actions were filed against long-term care facilities starting in May of 2020. However, instead of limiting complaints to allegations of willful and wanton acts or omissions so as to stay outside the scope of the Order, plaintiffs have also made allegations of ordinary negligence, wrongful death, and violations of the Illinois Nursing Home Care Act and Illinois Survival Act.

Unsurprisingly, throughout the state, the circuit courts have not been aligned in their interpretation of Governor Pritzker's Order when faced with complaints alleging negligence and violations of seemingly protected acts. Accordingly, courts

1 *See* First Gubernatorial Disaster Proclamation (Mar. 9, 2020).
2 EO 2020-19 §2 (Apr. 1, 2020).
3 *Id.*

have issued a wide variety of rulings depending largely on venue. For example, defendants recently found success when a DuPage County Circuit Court partially granted a defendant nursing home's motion to dismiss, holding it was covered under the Order and defendant was entitled to immunity.[4] However, defendants in Cook County have been wholly unsuccessful in persuading the court to dismiss complaints because of immunity.

Kane County, a western region of the state, has at least recognized the differences of opinion in interpreting the extent of immunity granted by Governor Pritzker's Order. On April 29, 2022, the Sixteenth Circuit certified a question to the Appellate Court pursuant to Supreme Court Rule 308, asking whether the Executive Order 2020-19 provides "blanket immunity for ordinary negligence to healthcare facilities that rendered assistance to the State during the COVID-19 pandemic".[5] In doing so, the Appellate Court was tasked for the first time with evaluating the scope of immunity provided to health care facilities in Governor Pritzker's Order. The Sixteenth Circuit has stayed all discovery while this question makes its way through the Appellate Court. Cook County, on the other hand, has disregarded the appeal and has ordered parties to move forward with discovery.

After parties began to brief the certified question, the Appellate Court allowed the Illinois Trial Lawyers Association ("ITLA") to file an Amicus brief in support of the Plaintiffs. ITLA argued that the plain language of the Order did not provide immunity for ordinary negligence to healthcare facilities that remained operational during COVID-19, and that an interpretation of the Order that gives defendants blanket immunity would be "nonsensical."[6] Shortly after ITLA filed its brief, the Appellate Court ordered the Attorney General ("AG") to file an Amicus brief to elucidate the State's position on the immunity issue. The AG also relied on the theory of statutory construction and agreed that the Order does not provide blanket immunity.[7] The Appellate Court is expected to hear oral arguments on this issue in March or April of this year.

As of this point, the future of COVID-19 nursing home litigation is unknown and largely depends on the higher courts' interpretation of Executive Order 2020-19. We hope to receive decisions from the Appellate Court this year, although a petition for leave to appeal to the Supreme Court is likely.

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4 *Wayne v. Providence Operations LLC, et al.*, Civ. Action No. 2021L001356 (18th Dist., Jan. 10, 2023).
5 *Doneske v. Geneva Nursing and Rehab. Ctr., LLC*, Civ. Action No. 2020L00259 (16th Dist. Apr. 29, 2022).
6 Ill. Trial Lawyers Assoc.'s Amicus Brief, *Doneske et. al, v. Geneva Nursing and Rehab. Ctr., LLC*, 2-22-0180 (Sept. 1, 2022).
7 Atty. Gen.'s Amicus Brief, *Doneske et. al, v. Geneva Nursing and Rehab. Ctr., LLC*, 2-22-0180 (Jan. 1, 2023).

Insurance Coverage Law

Developments & Trends in Insurance Coverage

By Michael Aylward, Sean Griffin, Kim Jackson, Dan Kohane; and Gena Sluga[1]

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While society continues its struggle to return to normal in the post-2020 environment, insurance coverage issues continue to evolve at the same rapid pace that they did pre-pandemic. While Covid coverage claims dominated the coverage news cycle for a while, the end result was a largely consistent and boring holding that the Covid-19 virus did not cause physical impairment to property like restaurants and other business locations, a fact that even Dr. Edward Jenner knew.

But coverage litigation, like Covid, continues to evolve. The coverage practitioner must be ever vigilant to be prepared for the variants of coverage decision throughout our web of 50 states' appellate courts and their Erie doctrine guessing Federal counterparts. In an effort to assist that preparation of the coverage lawyer and claims professional, the Insurance Coverage Section of the FDCC has prepare its review of developments and trends in this dynamic area of the law. Below, the Section discusses five topics that reflect significant trends in the law, as reflected by both case law and coverage opinions.

We begin by pointing out that, sometimes, trends in the law that have nothing directly to do with insurance coverage, end up becoming quite important.

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The Sexual Abuse Survivors Statutes And the Missing Insurance Policy

In response to changing attitudes towards sexual abuse survivors and reporting, many states have passed laws eliminating, or significantly expanding, the statute of limitations for civil sexual abuse claims and/or providing revival periods during which victims can bring previously time-barred claims. These "Child Victim Acts" (CVAs) provide a remedy for sexual abuse victims who, for a variety of reasons, were unwilling or unable to confront their abusers within a more traditional limitation period; they simultaneously create significant issues for institutional defendants and their insurance companies who are now being compelled to track down potentially decades-old liability policies to evaluate coverage for the newly-revived claims.

At least twenty-four states have enacted revival statutes and/or expansive statutes of limitations laws, and similar bills are pending in myriad others[2]. Perhaps most recently, the "Eliminating Limits to Justice for Child Sex Abuse Victims Act of 2022" (Public Law No. 117-176) was signed by President Biden on September 16, 2022; this Act became effective on September 16, 2022, and abolished the statute of limitations for over a dozen federal civil causes of action relating to child sex abuse. Experts believe this federal legislation may prompt state legislatures, previously reluctant to consider such acts, to respond in kind. At least one advocacy group has called for all U.S. jurisdictions to adopt the "gold standard," which they describe as the elimination of all criminal and civil SOLs and the revival of all previously-expired civil claims[3].

In practice, revival claims are being brought against not only the abusers, but also the entities that had employed them, including churches, school districts, and other employers. Because commercial general liability (CGL) insurance is occurrence based, these entities are turning to insurers for coverage based on policies in effect when the abuse occurred. In cases alleging abuse that occurred decades prior to reporting, any relevant materials would have been created long before electronic recordkeeping had become common practice and years beyond the document retention period for most companies. Accordingly, the potentially applicable policies might no longer be available.

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2 *See* https://childusa.org/wp-content/uploads/2022/07/12.16.2022-2021-SOL-Report-FINAL.pdf

3 *I.D.*

It is well established in insurance law that the party alleging coverage of a particular claim has the initial burden of proving: (1) the existence of the policy (i.e., they were insured under an active policy of insurance at the time of the alleged abuse); and (2) the material terms of the policy. The majority rule is that this must be proven by a preponderance of the evidence, but some jurisdictions impose a clear and convincing standard. Once an insured meets this initial burden, the burden shifts to the insurer to prove that the applicable policy included an exclusion or other provision that might preclude coverage.

Although Federal Evidence Rule 1002 requires an "original writing" to prove the contents of the writing, the rules allow introduction of secondary evidence to prove a writing's contents when the introducing party can establish: (1) the original is lost and/or destroyed; (2) the proponent of the document did not act in bad faith in losing and/or destroying the document; and (3) a diligent search for the original document has proven unsuccessful. Courts accept numerous forms of secondary evidence, including declarations pages or other portions of the policy[4]; premium payment records[5]; letters from the insurer; insured business records citing insurance[6]; insurance agency materials[7]; and testimony from witnesses[8]. Because insurers often issue similar policies in adjacent years or to similar entities, policies other than the one at issue can also be used as secondary evidence[9]. Insurers can similarly rebut the existence of coverage in a variety of methods.

Once the lost policy is recreated to the extent possible, insureds still face additional hurdles to recovery. For example, if the insured had knowledge of the abuse when it occurred but did not notify the insurer until the revival claim is brought, the insured could be excluded from coverage for failing to notify the insurer in a timely manner. In other cases, it is possible the abuse is covered by the policy, but recovery is not available because the insured has already exhausted the policy limits. Many liability policies implicated by the revival claims had limits in the low hundreds of thousands of dollars. After considering inflation, even if the limits have not already been reached, the potential recovery for the victims could be low when considered in 2022-dollars.

The heightened focus on victim's rights following the #MeToo movement and the recently enacted Federal legislation are almost certain to continue to expand recovery options for victims of sexual abuse. As more and more claims are made based upon years-old conduct, insurers will continue to face the challenge of evaluating coverage under lost policies and the probability that Courts will allow policyholders to be prove coverage through the use of secondary evidence. We anticipate more claims involving the issue or proving coverage (or denying coverage) through secondary evidence in the coming years as these statutes grow in use.

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4 *See, e.g., Travelers Indemnity Co. v. Rogers Cartage Co.*, 2017 IL App (1st) 160780; *Americhem Corp. v. St. Paul Fire and Marine Ins. Co.*, 942 F.Supp. 1143 (W.D. Mich. 1995).

5 *MAPCO Alaska Petrol., Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991).

6 *See, e.g., Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, modified, 642 F. Supp. 1020 (S.D.N.Y. 1986); *Lamorak Ins. Co. v. Kone*, 2018 IL App (1st) 163398 ¶32-38; *Southern Union Co. v. Liberty Mut. Ins. Co.*, 2008 WL 8564532 (D. Mass.)

7 *See, e.g., Township of Haddon v. Royal Ins. Co. of America*, No. 95-701 (JEI), 1996 WL 549301 (D. NJ. 1996).

8 *Boston Gas Co. v. Century Indem. Co.*, 529 F.3d 8 (1st Cir. 2008), certified question answered, 454 Mass. 337, 910 N.E.2d 290 (2009).

9 *Danaher Corp. v Travelers Indemnity Co.*, 2019 WL 5636967 *18 (S.D. N.Y.); *Milligan v. Grinnell Mut. Reinsurance Co.*, 2013 WL 6631783 *5 (S.D. Ill.); *Epperson v. Connecticut Fire Ins. Co.* (10th Cir 1063), 314 F.2d 486, 489

Cyber-Insurance Attacks And Policy Attacks

Cyberinsurance will face major challenges in 2023. Increased ransomware and other cyberattacks against the United States have pushed up cyberinsurance premium costs and will continue to do so. Additionally, cyberattacks arising from the Ukraine invasion or other sources will raise the question of coverage, as insurers consider using their policies' war exclusion to deny coverage for attacks arising from an armed conflict, or simply write policies excluding state-sponsored cyberattacks from coverage.

The historic justification for war and hostile act exclusions in insurance, especially property insurance, go back to colonial America when policies were based on the British property insurance model. In 1752, when the greatest urban threat to high-density homes and businesses (all built with wood) was fire, Benjamin Franklin himself was involved in creating a Philadelphia insurance model based on a London firm[10]. To ensure solvency, exclusions for war, a common but unpredictable event, were common and enforced.

10 Andre Beattie, The History of Insurance in America, INVESTOPEDIA, note 40: https://www.investopedia.com/articles/financial-theory/08/american-insurance.asp [https://perma.cc/6LAW-58U5] [hereinafter Beattie, History of Insurance] (last updated Dec. 11, 2019).

But war itself has evolved, perhaps more than the policies and the war exclusions. As an example, September 11, 2001 presented a different type of "war" related insurance catastrophe: no declaration of war, no state actor, but a definite military type of objective. The result was very similar to traditional war: large scale destruction of lives and buildings through explosive and deadly force.

Cyber-attacks are similarly difficult to pinpoint but have many of the elements of "war." Some attacks are conducted by rogue actors, independent of state sponsorship or support, targeting non-state entities. State-sponsored cyber-warfare, however, exists and has many parallels to traditional warfare. The attacks may be state sponsored and supported. Many states have known offensive (and defensive) cyber-warfare capabilities and programs. And the targets, like in traditional war, can be state related or private industry (e.g., infrastructure or other destabilizing industries)[11]. Thus, the further development of the law as "war-like" and "state sponsored" cyber-attack exclusions continue to evolve, as do the attacks themselves, is imminent. State-sponsored attacks raise the specter of the catastrophic attack intended to be excluded by the very first war exclusions – that is, an attack that can take down a company or information service system important enough to affect an entire system or area of the country. And the federal government will have to react to protect the system. Indeed, the Treasury Department, among others, is already considering how it will react to a systemic attack.

If you're involved in cyberinsurance, expect this area to change rapidly for the next year or more.

Feeling the Pain – Opioid Coverage

As the focus of opioid litigation shifts from pharmaceutical companies to large drug store chains that allegedly facilitated and failed to check excess prescriptions for Oxycontin and other addictive pain drugs, there has been a recent surge in coverage litigation in Delaware in the wake of the Delaware Supreme Court's ruling in *Ace American Insurance Company v. Rite Aid Corp.*[12], that suits by two Ohio counties seeking to recover opioid-related economic damages did not seek damages "for" or "because of" bodily injury. In the wake of *Rite-Aid*, the Chancery Court rejected arguments by CVS that its own declaratory judgment action should go forward alone in Rhode Island, ruling in *In Re: CVS Opioid Insurance Litigation*[13], that there was no "race to the courthouse" in this instance and that the insurers' filing in Delaware therefore should be given some deference as being first-filed.

The force of *Rite-Aid* was amplified in September when, a year after hearing oral argument, the Ohio Supreme Court overturned an intermediate appellate court's declaration and ruled 5-2 in *Acuity Insurance v. Masters Pharmaceuticals*[14], that law suits brought by governmental entities in Michigan, Nevada and West Virginia only seek damages for their own economic losses and not because of bodily injury. The court found that "[t]he repeated use of the phrase 'the bodily injury' suggests that the damages sought in the underlying suit need to be tied to a particular bodily injury sustained by a person or persons in order to invoke coverage under the policies."

As we begin 2023, the impact of *Rite-Aid* is already apparent. In *Westfield Nat. Ins. Co. v. Quest Pharmaceuticals*[15], a Kentucky case argued in the Sixth Circuit on October 22, 2022, and decided on

11 https://cilj.law.uconn.edu/wp-content/uploads/sites/2520/2022/02/Cyberwar-By-Almost-Any-Definition-Wolff-CILJ-Vol.-28.1.pdf

12 270 A.3d 239 (Del. 2022).

13 No. 22C-02-045, 2022 Del.Super. LEXIS 335 (Del. Super. Aug. 12, 2022).

14 2022-Ohio-3092 (Ohio Sept. 7, 2022).

15 2023 U.S.App. LEXIS 851 (6th Cir. 2023).

January 13, 2023, the Sixth Circuit followed the holding of *Rite-Aid* and held that the lawsuits brought by local governments to recover costs incurred due to the opioid epidemic did not seek to recover for any specific bodily injury and thus did not trigger the insurer's duty to defend or indemnify.

The Influence of The Restatement of Insurance Coverage

The ALI Restatement of the Law, Liability Insurance ("Restatement"), was widely criticized as being counter to the purpose of prior Restatements. Rather than attempting to state the "consensus" of the law, or at least the majority position, as had been prior Restatement's purposes, this Restatement, it is alleged, was heavily influenced by the insured's coverage bar and pushed several legal positions that were consistently (1) detrimental to the insurance company's interests, and (2) also minority opinions. In other words, the Restatement had become an advocate of what one interest thought the law should be, not a "restatement" of what the law was.

As a result, some states have acted to limit or legislatively "disrespect" the Restatement.[16] Some statutes actually state the Restatement should not be relied upon by Courts in reaching decisions on liability insurance law.[17]

Whether, and to what degree, the Restatement will influence future decisions in states with gaps in the law, or even influence a change of direction in the law, remains to be seen. But there is some undeniable influence in some opinions, especially with filling in the gaps and Federal courts trying to be faithful to Erie in the absence of controlling authority. Which leads us to the final topic today.

The Right To Reimbursement In The Absence of a Policy Provision

Now that the Restatement has been in place for three years, it does not appear to be influential in changing established precedents in courts with controlling state law. But this is a minor victory. There are insurance law gaps in many states that State appellate courts have left to fill, and the prevalence of Federal court practice in coverage is high, thus leaving the Federal courts and the Erie doctrine guessing to

16 https://flapartners.com/2019/10/02/florida-beware-ali-restatement-of-the-law-liability-insurance/
17 *Id., e.g., Ohio Statutes 3901.82, North Dakota 26.1-02-34; Michigan 500.3032*

what a particular state's highest court may do. And in such cases, the Restatement may provide influence. Examples of each of these cases were seen in 2021 and 2022, both involving the question of whether an insurance company could seek reimbursement of its defense expenses where (1) the insurance company had already paid defense costs, (2) when a court ruled that the insurer owed not duty to defend, (3) the insurer had reserved the right to seek reimbursement of its defense costs in a reservation of rights letter, but (4) the policy did not provide for the right to seek reimbursement.

In *Nautilus Ins. Co. v. Access Med*,[18] the Nevada Supreme Court was asked to make the law of Nevada on the issue of seeking reimbursement after successfully defeating coverage in a declaratory judgment action. The Court opinion decided 4-3 in favor of reimbursement, the majority rule, but contrary to the conclusion of the Restatement. Ironically, in rejecting the Restatement, the majority relied explicitly on a different Restatement, this one the Restatement of the Law, Unjust Enrichment. The dissent, conversely, sought to adopt the Restatement's rule denying an insurer the right to reimbursement where the policy did not explicitly provide for it.

In Georgia, there is no controlling state appellate court opinion on this question. Over the last decade, several Georgia federal court decision have weighed in on the issue of an insurer's ability to recoup defense costs in the absence of a policy provision permitting same. Some opinions permitted it, noting it was the majority rule. A few did not. During 2002, the issue was addressed again in *Mt. Hawley Ins. Co. v. East Perimeter Pointe Apartments LP*, where the insurer sought to recoup costs it incurred defending the insured against a lawsuit after it prevailed in a declaratory judgment action where the 11th Circuit affirmed a ruling that the insurer had no duty to defend. The policy at issue had no provision explicitly allowing the insurer to recover defense costs where it owed no duty to defend. The insurer reserved the right to recoup in its reservation of rights letter and the insured accepted the defense.

In reaching its decision, the judge, like many before him, evaluated the majority rule, which allows an insurer to recoup defense costs on an unjust enrichment and implied-in-contract theory, and evaluated the minority rule, which does not allow such recoupment on the theory that doing so in the absence of specific policy language is tantamount to allowing the insurer to unilaterally alter the policy through its reservation of rights letter, and found the minority rule to be persuasive. But unlike prior opinions dealing with this issue over the last decade, there was a new factor in the Court's decision. The Court also argued that the Restatement was in its favor. The Restatement did not adopt the majority rule, and instead adopted and supported the minority rule in favor of insureds. As noted above, Restatements historically were supposed to declare the consensus or majority rules of law on their subject.

While there is not a trend of Courts relying on the Restatement to change existing precedence, there have been several decisions in the years since the Restatement was published that followed or relied upon the Restatement to make new precedent or, as was done here, follow the Restatement in the absence of binding precedence.

In Georgia, a different Federal judge is still free to permit reimbursement, as several others have done. But the most recent opinions have trended against reimbursement, and the Restatement will add to the challenge until Georgia's and other states' appellate courts provide a binding precedent.

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18 482 P.3d 683 (Nev. 2021).

The Year Ahead

What lies ahead in 2023 will no doubt be driven by the FDCC's Insurance Coverage Section members. Opioid Litigation will continue forward but with serious coverage concerns for the target defendants as CGL policies seek declaratory judgment relief for the claims of local, state, and other subdivisions of government. Long ago sexual abuse claims will continue to be filed as more states pass revival legislation and more victims comes forward, requiring further development of the law of lost policies. As we enter year four of the Restatement of Law, Liability Insurance, more states are expected to legislatively rebuke the Restatement, but other courts may, as some have already done, rely upon it to fill the gaps and make holdings that go contrary to the majority rule. And finally, as the stability of the arguably most peaceful decades in history[19] passes, we enter a time where war and state sponsored attack exclusions and the immense liability potential of cyber-insurance come to a head.

These are the sexy headlines. But coverage professionals must never forget first principles: do the allegations of the Complaint state a claim within the coverage agreement.

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19 Steven Pinker, The Better Angels of Our Nature: Why Violence Has Declined (2011); see also, https://www.huffpost.com/entry/we-enjoy-the-most-peaceful-period-on-earth-ever_b_57ab4b34e4b08c46f0e47130

Law Practice Management

Dealing with the Remote Work Conundrum: Six Best Practices

By Stephen Embry

Stephen Embry

Certainly, law firms have been grabbling with this thorny issue of remote work for some time. And policies have been in flux as the pandemic ebbed and flowed. Also, the increased legal workload and shortage of lawyers to handle that load may have forced firms to somewhat reluctantly throw in the towel. They began to let lawyers and associates work where and when they wanted. But when the hot legal market began to cool, firms began to do an about face and require lawyers to be in the office, at least some of the time. But should that be certain days of the week, like Tuesday through Thursday? Should it be every day? Should it be left to the discretion of individual lawyers? Practice groups?

"Management needs to think carefully about why and when it wants lawyers in the office and why lawyers, particularly younger lawyers, so embrace remote work."

It is hard to believe that remote work is not here to stay. As the pandemic made clear, technology allows lawyers to work remotely and be just as productive, if not more so, than working in the office. And there are clear benefits, at least to lawyers, from working from home. A good policy takes into account firm needs, firm culture, and the needs and wants of its lawyers. So, any analysis of remote policies should start with management appreciating the new reality. Management needs to think carefully about why and when it wants lawyers in the office and why lawyers, particularly younger lawyers, so embrace remote work.

Six Tips for A Sound Remote Work Policy

So, given all this, what should a firm do? Here are some suggestions:

1. Make sure you have a good reason for demanding associates come to the office. Don't just make them be there to be there. Have structured training programs on in-office days, for example.

2. Allow associates to have some choice and control about returning to the office. Most will make the right decisions; if they don't, weed them out. After all, firms have little trouble weeding out associates who don't fulfill other work obligations. Most associates have not gotten where they are because they need close monitoring to prevent sloughing off.

3. Place more control with practice groups and individual partners leading case teams. They know best when the work requires people to be in the office.

4. Have expectations for partners as well as associates. If you embrace flexibility and individual decision making, make sure the partner honors that and doesn't just pay lip service to it.

5. Be transparent. If you will require associates to be present every day, make sure everyone knows that. When you recruit, make sure everyone knows that. If you are going to be flexible, announce that too. But make sure your advancement is true to your policy: don't penalize associates that work from home when the firm ostensibly allows it.

6. Whatever your policy is, make it consistent with your culture. Don't say we value independence and flexibility when you don't. Don't say we value in-person office time and then let some work remotely and others not. Some firms want lawyers who can make individual choices and are okay with living and working with a more flexible arrangement.

Other firms can't stomach that: they should hire people who want more structure. Either way, say what you mean and mean what you say. Don't have secret unwritten rules.

Bottom Line

Firms will need to face this issue in 2023 and will have to make some decisions. And the decisions need not be the same for every firm. So how should firms answer the remote work conundrum? If firms believe in their culture, they should let their culture and strategic planning govern how they answer this question. And once they answer it, they should trumpet that answer to those they want to hire.

Bottom line: recognize why you want people in the office and promulgate your reasoning. Recognize what associates want and try to accommodate them when you can. Weed out those who abuse your system instead of making arbitrary rules for everyone. Remote work isn't going away, so deal with it from a needs-based analysis.

Stephen Embry is a member of the FDCC Evolve and Law Practice Management Committees as well as a faculty member of FedTechU. He can be reached at sembry@techlawcrossroads.com. The full article has been published in the PLI Chronicle: Insights and Perspectives for the Legal Community, https://plus.pli.edu.

The Pros and Cons of Remote Work for Lawyers: Questions for Law Firm Leaders

By: John Trimble

John C. Trimble

Anywhere that lawyers gather, the discussion usually turns to the future of the workplace. Managing partners, in particular, are concerned about productivity of their lawyers, utilization and leasing of space, technology, firm culture, and employee turnover. All of these concerns are impacted by the question of whether to continue to allow lawyers, paralegals, and staff to work remotely.

Many of us have seen major employers in the business world go completely virtual. Businesses are giving up or downsizing their offices. Technology is continually being adapted for virtual chatting, meeting, and remote access from anywhere. So, the question is whether this model of working can apply to law firms?

The short answer is that we know it can work.

However, I have learned that your view of this topic is influenced by your age and experience. More senior lawyers, in general, find greater comfort in the traditional law firm setting because that is what they know. I say "in general" because there are many senior lawyers who got a taste of retirement during COVID, and they loved working from Florida, France, a lake house, or the deck of a boat somewhere.

Younger lawyers, who have grown up with technology and a differing sense of work-life balance, have embraced virtual work more readily, and many would be happy to work remotely full time. Many of them see their counterparts in the business world working from the local coffee shop, and it has attraction to them.

Here are the questions that I hear from law firm leaders:

Will associates working remotely be able to engage in the internal relationship building and cross-marketing that they will need to become partners some day?

How will younger lawyers be mentored by more senior lawyers if they are not physically present in the office?

If law for young lawyers is akin to an apprenticeship, how will they get experiential learning from tagging along with partners and sitting in on client meetings?

Will lawyers of all ages working remotely be sufficiently engaged in bar associations, civic affairs, networking, and all of the rainmaking activities that are needed for a firm to survive?

Will communication break down if it is all done by text message, email, and the occasional phone call or Zoom meeting?

Can we expect lawyers to be disciplined enough to be as productive as they might be in an office setting?

Can a firm maintain a culture that will attract and keep lawyers and employees if they do not see one another regularly?

There are many more questions, but these are the big ones. Unfortunately for firm managers there are no "yes" or "no" answers to these questions. There is no "one size fits all" answer.

My advice to law firm leaders is that now is a prime time for strategic planning.

- For planning to be successful, firms must include all of the generations of the firm and key non-lawyers in the planning process.
- Senior lawyers need to express their ideas and concerns with younger lawyers and younger lawyers need to express their views to the more senior lawyers.
- Frankly, some good implicit bias training within firms would also benefit all generations in understanding one another.
- Ultimately, the planning process should be intended to address these questions, and any plan should have buy-in from all ages.
- The plan should be consistent with your view of your firm's culture.
- Further, more than ever, strategic plans will need to be continually reviewed and tweaked as the firm experiences success or failure with aspects of the plan.
- Firm culture will have to be monitored regularly.

The best that any of us can do in this period of transition is to enter into planning with an open mind and a spirit of flexibility. If something doesn't work, change it. But we can no longer run a law firm with the attitude that "you will do it this way because that is how we have always done it." That simply will not work.

Let me know if you have ideas for how to approach these issues, and I will share them. Be patient with yourself and one another. Good luck!

John Trimble is a senior partner and firm General Counsel at Lewis Wagner in Indianapolis, IN. He can be reached at jtrimble@lewiswagner.com.

Advancing Your DEI Plan and Building it into Your Firm Culture

Law Firm Leaders are Critical to Firmwide DEI Success

By: Jody Briandi

Jody Briandi

In 2023, most law firms have already put DEI initiatives into place. While having DEI as a part of your firm's values is critical, equally important is law firm leaders making DEI a strategic priority across their firms through ownership, active participation, and providing guidance to their teams. There is often a high level of engagement at the beginning of a rollout or new initiative, such as DEI; however, the challenge is to maintain it and achieve long-term success. This is where leadership's role is crucial. Ensure all company leaders are part of the plan and understand your company's goals and vision. Leadership buy-in and backing is essential. And firm leaders are also your best messengers.

Eliminating bias in the workplace and in the recruitment cycle is a critical first step in advancing DEI efforts across your firm. At a basic level, bias in the workplace leads to employees feeling like they don't belong, and can also create an undesirable work culture. You cannot achieve inclusivity while tolerating unconscious bias during the hiring process, performance reviews and when decisions are made on advancement–all initiatives that are led by law firm leaders. Some things you can do as a leader include ensuring your firm is examining recruitment channels. Is your firm in the right space that will result in a diverse candidate pool? Create an interview team and train the interviewers. Make sure that the interview process is structured and that your team has planned questions. Is your firm providing the necessary foundation for advancement—especially as more attorneys are working from home? It's important to provide equal opportunities to all employees through mentorship and leadership training. As a leader, are you holding people accountable? Action items here including issuing surveys to assess the impact of DEI in your organization and leadership's role. Consider implementing an anonymous reporting system. And once you've done all of these things, listen and respond to the data.

While outcomes are important, which you can measure by collecting data, effort

is also important. Is your organization being deliberate in efforts to recruit diverse employees, retain employees, provide opportunities and advance employees? To this effect, our law firm sought out a way to not only collect diversity recruitment, retention, opportunity and advancement data but to track effort. Mansfield Rule certification enabled us to accurately track and analyze our successes, and also to assess our shortcomings and where we needed to improve. For those unfamiliar, the goal of the Mansfield Rule Program is to increase the representation of diverse lawyers in leadership by broadening the pool of women, LGBTQ+ lawyers, lawyers with disabilities, and/or racial/ethnic minority lawyers who are considered for entry-level and lateral attorney job openings, leadership opportunities, equity partner promotions, and opportunities to connect with clients. By examining and tracking not just the outcomes, but also the effort, as a leader. you continue to engrain this intentional mindset in attorneys.

Other ways your company can further build DEI goals into its culture include creating employee resource groups (affinity groups) that focus on self-advocating, work-life balance, educational opportunities for professional development and advancement and promotion. Affinity groups consist of employees with similar backgrounds, interests, or demographic factors such as gender or ethnicity and can take many forms, such as women's leadership groups, LGBTQ groups, and caregiver groups. It is important to have members of the leadership team in these groups and actively participating.

If your firm does not have the resources to employ a full-time Diversity Officer, empower someone on your leadership team to take on that role and rely on external professionals such as consultants, educators, facilitators, and strategists. It is critically important for leadership to take ownership of prioritizing DEI. As with most law firm initiatives, it starts from the top.

Making DEI a top-level priority at your firm and moving these initiatives forward to engrain them into your firm's culture, are where many law firms are at in 2023. While there are always challenges, as a law firm leader, putting DEI on the same level as other critical business components and taking an ownership role through active participation and providing guidance to your teams, will set your law firm up for success.

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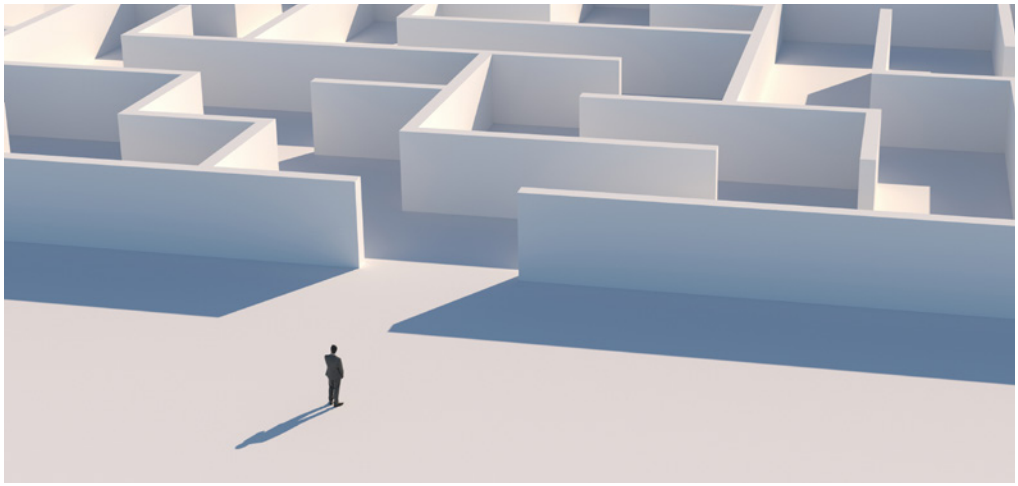
Alternative Business Structures: The Non-Lawyer Owned Law Firm in Arizona

By Alicyn M. Freeman

Alicyn M. Freeman



In 2020, the Arizona Supreme Court eliminated Ethics Rule 5.4 and created a regulatory framework to license "Alternative Business Structures" effective January 1, 2021. The Alternative Business Structure is an entity that provides legal services and has non-lawyer ownership or decision-making authority in the business. According to the Task Force on the Delivery of Legal Services' Report and Recommendation from October 4, 2019, the purpose of the Alternative Business Structure program is "rooted in the idea that entrepreneurial lawyers and nonlawyers would pilot a range of different business forms" that will ultimately improve access to justice and the delivery of legal services. According to *azcourts.gov*, the advantages of allowing the formation of an Alternative Business Structure include:

- Greater technological innovations in the deliverer of legal services to the public
- Additional capital to be infused in legal firms
- Attraction of the "best and brightest" nonlawyer partners (as they desire equity in a firm just as lawyers want to be firm partners)
- Allow for "one-stop shops" to provide legal and non-legal services to a client.
- 62.3% of Arizonans support the Alternative Business Structure

An Alternative Business Structure must employ a "Compliance Lawyer" who is an active member of the State Bar of Arizona to practice law and supervise the Alternative Business Structure. The Arizona Supreme Court appointed a Committee on Alternative Business Structures to review applications for licensure under Arizona Supreme Court Rule 33.1 and Arizona Code of Judicial Administration § 7-209. In 2021 the Arizona Supreme Court certified 15 applicants and approved two for certification. In 2022, the Supreme Court certified an additional 38 Alternative Business Structures. As of February 1, 2023, the Arizona Supreme Court has licensed the following 40 Alternative Business Structures:

Arete Financial SoLutions
Arizona Redwood Partners, LLC
Axiom Advice & Counsel, LLC
Bad Drug Law Firm, PLLC
Bar Pilot, LLC
Bay Point Legal Partners, PLLC
Big Auto-Accident Attorneys, PLLC
BOSS Advisors
Bridgemont Group, ABS
Cactus Blossom Legal, LLC
Copper Wren Law, LLC
eLegacy Law, LLC
ElevateNext US, LLC
Elias Mendoza Hill Law Group, LLC
Eos Law, LLC
Esquire Law, LLC
Fidelity Legal, LLC
G Law Services, LLC
Globiliti Legal, LLC
Hive Legal, LLC
Law on Call, LLC
LegaFi Lawe, LLC
Legal Help Partners, PLLC
LS5 Legal, LLC
LZ Legal Services, LLC
Magic Law Group, Inc.
Motion Law, LLC
National Mass Tort & Class Action Law Firm, PLLC
Novus Lex, LLC
PatentVest, Inc.
Radix Professional Services, LLC
Saddle Rock Legal Group, LLC
Scout Law Group, LLC
Singular Law Group, PLLC
Sunridge Law Group, LLC
The Meadow Law Firm, LLC
Trajan Estate, LLC
Vantage Law Firm, LLC
Wilkie Puchi, LLP
10xLaw.com, Inc.

Some of these companies are up and running and some do not yet appear to have an online presence. The question remains whether these Alternative Business Structures are fulfilling the goals identified by the Task Force on the Delivery of Legal Services. The websites of these Alternative Business Structure license holders describe the following areas of practice:

- Tax, accounting, estate planning and associated legal services
- Support for tech companies
- Personal injury, products, class action, mass tort
- Family law/bankruptcy/criminal law
- Immigration
- Legal service to law firms including business and human resources support
- Renewable energy and commercial real estate
- Partnerships with national or global legal service providers

Some of the Alternative Business Structures advertise as Arizona law firms. Others advertise as based in Arizona or do not identify a geographic limitation on their home page website. Non-lawyer investors from states other than Arizona are investing in Arizona Alternative Business Structures. The Scout Law Group made headlines in September 2022 with reports of funding from Miami-based private investment firm, 777 Partners. Some Alternative Business Structures are advertising as pioneers in changing the way legal

services are provided. www.lawoncall.com advertises a per month subscription for unlimited phone calls and a set rate schedule for additional legal services based on years of experience.

In August 2022, the American Bar Association adopted Resolution 402 reaffirming Resolution 00A10F as follows:

> The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.

The full resolution is available by clicking here. The resolution was also adopted by the Illinois, New York and New Jersey State Bar Associations.

For further argument that nonlawyer owned law firms are not succeeding in their goal of providing increased access to justice see the October 19, 2022 journal article The Pitfalls and False Promises of Nonlawyer Ownership of Law Firms by Stephen P. Younger. The article discusses Arizona and the Utah experimental regulatory sandbox for Alternative Business Structures which runs through August 2027. Utah is currently the only other state to license Alternative Business Structures (although Washington D.C. does have a revised and more lenient version of Ethical Rule 5.4). Younger also discusses California and Florida's exploration of non-layer owned law firms. Neither state has adopted any such provisions and the activity in these states in 2022 did not show any momentum for nonlawyer owned law firms in those jurisdictions.

It remains to be shown whether the 40 Arizona Alternative Business Structures are achieving the goal of increased access to justice and at what cost to the practice of law.

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What Issues are on the Horizon for Law Firm Leaders in 2023? A "Short List" of What Keeps Me Up at Night

By: Jody Briandi

Jody Briandi

What are the issues on the horizon for Law Firms, Law Firm Leaders, and Managing Partners?

Many law firms will continue to navigate the talent war, Great Resignation or Great Return – which one is it?

We are in a period of transition. While the Great Resignation seems to have slowed, the talent war continues. This is due in part to supply and demand. There are less workers entering the workforce than are leaving, and workers are evaluating benefits, firm culture and work/life balance with greater scrutiny. The "Great Return" of employees returning to their jobs, while happening, is happening slowly and with more intentionality. These topics are not going away and still among the largest concerns for law firms.

Recruitment, hiring and retention.

Employee turnover hurts a law firm. It's not only expensive but impacts morale and culture. Increasing the likelihood of retaining lawyers starts with smart recruitment, targeted interviewing and hiring, intentional onboarding and mentorship. If you are large enough, consider adding a Director of Talent Acquisition and Management. If you are not, establish practices targeted at achieving the desired goal of retention. Focus on workplace culture, as workers are more and more evaluating culture when considering offers.

Managing expenses and growing revenue.

Law firms are not immune to inflation, rising payroll costs and a competitive job market. When revenue does not rise at the same rate as other costs, then you must look at how to right the ship. This means examining your rates and implementing a system of regularly applying increases; assess your firm's productivity rate in achieving billable hour targets; analyze realization rates; and understand collections. By focusing on these areas now, the potential devastating impact of inflation will not be felt later.

Technology: improving efficiencies and automation.

The crush of the inbox continues to be the enemy of a busy practicing lawyer. The focus on creating efficiencies in practice and automating tasks that free up time for

legal work will continue. During the pandemic, we saw a shift to virtual meetings, conferences and trainings. Post-pandemic, we have seen a hybrid approach of virtual and in-person. Clients and employees will expect more on the technology front.

Role of non-lawyers in operations, marketing, client development and human resources.

Many law firms are turning to non-lawyers to manage the business side of the firm. More mid-size law firms are hiring Chief Operating Officers, Chief Financial Offers and Directors of Marketing, Human Resources and Client Development. Looking ahead, we are likely to see law firm marketing departments expand into more areas. Similarly, law firm HR departments are expanding into more focused talent acquisition strategies, the development and implementation of diversity strategies and law firm culture.

Client satisfaction and client relations.

In a highly competitive environment, law firms will continue to look for ways to provide value to their clients. Tracking key performance metrics is one way to do that through transparent reporting. With advanced document and case management systems, things like case outcome, the speed in which you close a case and client guideline compliance are all things that can be tracked. Providing value-adds to clients, including trainings and legal alerts. Regularly speaking with clients to assess how you're doing, which also leads to cross-marketing.

DEI.

Achieving DEI goals is as important as ever for law firms. It remains a key part of strategic planning for firms, in recruitment, hiring and retention. DEI platforms are integral to a law firm's growth strategy, as well part of law firm culture. DEI will also continue to matter to clients who are similarly focused on moving their own initiatives in this area forward.

Work life balance – where does one begin and the other end?

The hybrid work environment has created flexibility but also makes the distinction between work life and home life less apparent. We know that work life balance matters but finding ways to implement it will continue to be at the forefront of law firm management.

Law Firm culture.

Fostering culture will remain a priority for firms because it is tied to employee satisfaction, retention, performance, and productivity. Workers will continue to prioritize culture when making decisions about where to work. The focus on mental health, well-being, community service and inclusive culture are important components of promoting a positive culture.

Remote work or hybrid work or work in the office.

This debate continues to rage on. The question for most firms is how to balance the benefits of flexibility against the needs of the business, practice areas and clients.

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Life, Heath & Disability Law

The Seventh Circuit Demands Greater Specificity When Pleading Excessive Pension Fee Claims: Albert v. Oshkosh Corp.

By Brooks Magratten

Brooks Magratten

The Seventh Circuit in *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022), affirmed the dismissal of a class action complaint alleging various ERISA claims stemming from allegations that Administrators overpaid for Plan recordkeeping, investment advisor and investment management fees.

The court previously held that claims for breach of fiduciary duties with respect to pension plan offerings could not be sustained so long as the plan offered a mix of better performing investment options to offset alleged "bad" options. See *Divane v. Northwestern Univ.*, 953 F.3d 980 (7th Cir. 2020). The Supreme Court vacated Divane in *Hughes v. Northwestern Univ.*, 142 S. Ct. 737 (2022). The Hughes court concluded that it did not matter that a plan offered a mix of good and bad investment options, the administrator's fiduciary obligations could be breached simply by failing to prune bad options from the plan's menu of investment options.

Faced again with a fact pattern similar to *Divane*, the Seventh Circuit again upheld the dismissal of a class action complaint, but for different reasons. The *Albert* complaint alleged that Oshkosh plan administrators breached fiduciary duties because they had not regularly sought bids or proposals from vendors for recordkeeping and investment advisor services. Consequently, plaintiffs allege, the Oshkosh plan paid more in service fees that comparable plans.

The *Albert* court observed that the failure to solicit bids or proposals from vendors on a regular basis does not, by itself, equate to a breach of fiduciary duty resulting

in harm to plan participants. Further, the fact that a plan pays higher than average fees for services does not suggest a breach of fiduciary duty without comparing the services provided by the vendor in question with those offered by others in the market. The *Albert* plaintiffs failed to address how the services purchased at higher-than-market rates compared with those of other vendors.

The *Albert* plaintiffs proposed a novel theory not normally seen in excessive fee class actions: that the plan should have offered higher-cost share classes of certain mutual funds. Plaintiffs suggested that the net expense of those funds could be lower in light of revenue sharing agreements between the plan and service providers. The *Albert* court found no basis in ERISA to allow this theory to proceed and was reluctant to do so, reasoning the fees associated with any specific plan investment option cannot be the sole factor considered when determining whether the option is appropriate for the plan.

The *Albert* plaintiffs also charged that the fees charged with respect to some of the plan's actively managed funds were too high. The court dismissed this claim summarily. "[A] complaint cannot simply make a bare allegation that costs are too high, or returns too low.... Rather, it 'must provide a sound basis for comparison – a meaningful benchmark.'" 47 F.4th at 581 (quoting *Davis v. Washington Univ. in St. Louis*, 960 F.3d 478, 484 (8th Cir. 2020)).

The *Albert* plaintiffs attempted to repackage their claims of overpaying for investment advice in terms of a breach of the duty of loyalty. This too the court rejected where the plaintiffs failed to identify any comparator investment advisors by which the court could assess the reasonableness of fees charged.

The *Albert* plaintiffs also suggested that the plan administrator's payment of excessive fees to an investment manager and advisor constituted a prohibited transaction under 29 U.S.C. §1106(a)(1). While the court acknowledged that a literal reading of §1106(a)(1) could bar the transactions addressed by Albert, that section has been interpreted to prevent uses of plan assets that are harmful to the plan. 47 F.4th at 584-85 (citing *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996)). Because the *Albert* plaintiffs hat yet to plead sufficient harm to the plan, the prohibited transaction claims were properly dismissed.

Finally, the Albert plaintiffs alleged that the administrators failed to disclose fees charged to participants and, specifically, the method of calculating revenue-sharing fees. The court affirmed the dismissal of these claims because DOL regulations do not clearly require the disclosure of such information.

At bottom, *Albert* supports that an excessive fee ERISA class action cannot survive a motion to dismiss on threadbare allegations. Pleadings must be specific and provide evidence of comparative vendors providing similar services for lower fees. Further, an investment option is not necessarily imprudent simply because its expense ratio is at the higher end of the spectrum.

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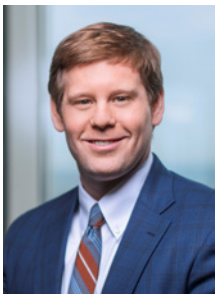
Untying the Knot: Revocation-Upon-Divorce Statutes Create Confusion for Life Insurance Companies, Policyholders, and Beneficiaries

By C. Bailey King, Jr.



C. Bailey King, Jr.

Revocation-upon-divorce statutes, which traditionally divested an ex-spouse named as a beneficiary in his or her former spouse's will, have been extended by a growing number of states to also cover beneficiary designations for life insurance policies. Under these statutes, a majority of states now assume that a decedent would not want their former spouse to be the beneficiary of their life insurance policies, notwithstanding an executed beneficiary designation providing just that. Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 Quinnipiac Prob. L.J. 83, 84 and 103 (2004).

The policy behind revocation-upon-divorce statues may be sound, but applying them to life insurance beneficiary designations has left the state of the law in knots. In 2018, the United States Supreme Court held in *Sveen v. Melin*, 138 S. Ct. 1815 (2018) that the application of a revocation-upon-divorce statute to void a life insurance beneficiary designation made before the statute's enactment did not violate the Contracts Clause of the United States Constitute. The fallout from this decision has created a landscape where determining whether a divorce revokes a beneficiary designation in favor of a former spouse can lead to complicated conflicts of law issues, an analysis of whether a particular statute applies prospectively only or retroactively to divorces finalized before the particular statute's passage, and the application of statutes with different standards for determining what is required to overcome the presumption of revocation. These issues are frequently litigated, with different and often inconsistent results.

Currently, at least thirty-five states have revocation-upon-divorce. Despite the similarities among the participating states' statutes, there are important differences. For example, some statues expressly exclude life insurance policies, while others do not; some statutes expressly provide that they apply only to designations made or divorces that occur after the statute's enactment, while others do not; and some statutes allow extrinsic evidence to rebut the presumption of revocation, while others do not. In addition, where the statutes are silent on these issues, the inconsistent application and interpretation by the courts creates even greater uncertainty.

Life insurance companies must now take steps to protect themselves from claims from former spouses designated as beneficiaries under their policies. Accordingly, life insurance companies should consider updating beneficiary designations provisions on new policies to make clear that a divorce will be deemed to have revoked any designation in favor of a spouse. Similarly, for already issued policies, life insurance companies should consider outreach to agents and policyholders reminding them of the need to update beneficiary designations after divorce, as a post-divorce designation answers these questions definitively. Finally, when faced with a claim from a former spouse, life insurance companies should consider whether to interplead the death benefit before paying, or not paying, a former spouse.

Finally, it appears that help may be on the way, as legislatures are now aware of the problem and taking steps to provide clarity. For example, the Pennsylvania General Assembly passed a bill requiring all divorce include a provision that expressly states that a life insurance beneficiary designation in favor of either of the spouses must be updated if either intend to keep the other as a beneficiary of the policy. By including such a provision, there should be no question as to whether a life insurance owner intended to keep his or her former spouse as the beneficiary.

Statutes such as this will hopefully untie the knot created by the extension of revocation-upon-divorce statutes to life insurance policies. In the meantime, though, life insurance companies should proceed with caution. You can learn more about this issue in Lincoln Financial Group Senior Counsel Matt Creech's and Bailey King's article on the subject in *For the Defense's* In-House Quarterly.

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If You Want to Exclude Coverage under AD&D Policy for Injuries or Death While Drunk Driving, Just Say So! (And Don't Waive Your Arguments!)

By Jennifer Johnsen

Jennifer Johnsen

> "The solution for insurance companies . . . is simple: add an express exclusion in policies covering accidental injuries for driving while under the influence of alcohol, or for any other risky activity that the company wishes to exclude." *Kovach*, 587 F.3d at 338. This would allow policyholders "to form reasonable expectations about what type of coverage they are purchasing without having to make sense of conflicting bodies of caselaw that deal with obscure issues of contractual interpretation." *Id.*

Wolf v. Life Insurance Company of North America, 46 F.4th 979 (9th Cir. 2022).

In a case decided last August, the Ninth Circuit held that death sustained by an intoxicated insured during a motor vehicle accident was "accidental" under an ERISA-governed accidental death and dismemberment (AD&D) policy. One reason the court reached this decision is because the insurer forfeited its argument that the policy's definition of "accident" applied when it, instead, applied a higher, more stringent standard in its decision-making, and it did not raise the argument until appeal. The decision was also based on insufficient evidence in the record to support the decision and the lack of clarity in the policy. The underlying facts are as follows.

The decedent, a 26-year-old male, was driving the wrong way down a one way service road when he hit a speed bump at 65 mph (the speed limit was 10 mph), lost control, hit several tree stumps and landed upside down in a body of water. His blood alcohol content at the time of the accident was .20. The medical examiner determined he suffered blunt-impact injuries to his head and neck and died as a result of drowning. The manner of death was noted to be "Accident (Drove automobile off roadway into bay while intoxicated)." *Id.* at 982.

The decedent's father brought a claim for accidental death benefits under a group AD&D policy issued to him by Life Insurance Company of North America ("LINA"). LINA denied the claim, concluding that the son's death was a "foreseeable outcome of his voluntary actions, and thus, the loss was not a result of a *Covered Accident* as

that term is defined" under the policy. *Id.* Plaintiff appealed the denial and during the administrative review, LINA retained a toxicologist who opined that an individual with a BAC above .18% has a loss of sense of care and caution, slower perception and reaction time, loss of coordination, and less ability to multi-task. He also opened that the decedent's immunity to pain, loss of coordination and inability to perceive his dangerous situation were all impacted by his gross intoxication. *Id.* at 983. Based on these opinions and applying a reasonable person standard – i.e., would a reasonable person have viewed the resulting injury or death as a probable consequence highly likely to occur as a result of the conduct – LINA upheld the denial of benefits. LINA explained that "highly likely to occur" is interpreted as entailing a level of inevitability that is of a significant or large degree. *Id.* at 984

The father filed suit against LINA and the district court reversed the decision on cross motions filed by the parties. The court held that although the son engaged in extremely reckless behavior, a reasonable person would not have viewed his injury as substantially certain to occur as a result of his actions. Therefore, his death was accidental under the policy. Id. LINA appealed the decision.

Applying a de novo standard of review to the district court's decision, the appellate court addressed how to define the word "accident." Relying on its prior decision in *Padfield v. AIG Life Insurance Co.*, 290 F.3d 1121 (9th Cir. 2002), in which it endorsed the framework for espoused in *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077 (1st Cir. 1990) to determine whether an event is an "accident," the court noted that the analysis involves an overlapping subjective and objective inquiry. *Id.* It first examined the subjective portion of the inquiry but determined there was insufficient evidence in the record to determine the driver's subjective expectation at the time of his death, although it noted he was wearing his seatbelt and had turned on his hazard lights. *Id.* at 985.

It then turned to the objective analysis and applied the "substantially certain" test. In doing so, it foreclosed LINA's argument that because the policy defines "accident" as a "sudden, unforeseeable, external event," the question before the court was whether his death was "reasonably foreseeable" not "substantially certain." *Id.* LINA, however, did not raise "reasonably foreseeable" as a basis for its denial, and instead, applied the higher standard. The court determined it would be unduly prejudicial to the plaintiff to allow LINA to present that argument for the first time on appeal. *Id.* at 986. Of importance to the court was that "reasonably foreseeable" and "substantially certain" are fundamentally different standards. Therefore, applying the "reasonably foreseeable" standard on appeal would constitute a new, "post hoc rationale" for the denial and would be unduly prejudicial to the plaintiff because he had not internally appealed the denial on that basis nor was he given the opportunity to present evidence and arguments on that basis. *Id.* at 986-7.

As such, the court applied the "substantially certain" test to determine whether the death was an accident. Reviewing decisions from other jurisdictions applying a de novo standard of review and holding that drunk driving deaths were accidental, the court noted that the insured's conduct here was as reckless or less reckless than the decedents' in those cases. *Id.* at 989. The court further noted that the record contained little information to assess the likelihood of death to the insured from his actions. *Id.* It characterized the toxicologist's findings as nothing more than common knowledge that the probability of accidents increases as one gets more intoxicated and noted the lack of data in the record regarding drunk driving fatalities in relation to the incidents of drunk driving generally. *Id.* Upholding the decision of the district court, the court explained:

> There is no doubt that "drunk driving is ill-advised, dangerous, and easily avoidable." *Kovach v. Zurich Am. Ins. Co.*, 587 F.3d 323, 330 (6th Cir. 2009). But many accidents, if not most, involve an element of negligence or even recklessness on the part of the insured. People all too frequently fail to heed stop signs, drive while intoxicated, or exceed the speed limit. Death caused by such conduct is, however, a statistical rarity, and the record before us does not show that Scott's particular act of drunk driving was substantially certain to result in his death. The district court therefore correctly determined that Scott's death was an "accident" and thus covered under his father's insurance policy.

Id. at 990.

Significantly, the court concluded that if LINA had expressly excluded coverage for injuries sustained while driving under the influence, the court would not have had to construe the word "accident" which was "an inherently difficult concept to capture." *Id.*

ERISA practitioners and claim administrators faced with these kinds of cases should carefully consider the plan/policy language to determine if the definition of "accident" supports application of a less stringent standard in determining if an event is accidental. That standard should be applied and preserved at all levels of decision-making and appeal. Even better, in the context of drunk driving (and other risky conduct), insurers should consider inclusion of an express exclusion excluding coverage for death or injuries that occur while the insured is driving drunk. Doing so would eliminate the need for the court to construe the term "accident" under what may be an ambiguous definition or under more stringent federal common law standards.

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"Suicide by Cop" Excluded Under Life Policy

By Russell S. Buhite

Russell S. Buhite

If an insured decides to goad police offers into shooting and killing him, can a life insurer deny coverage under the suicide exclusion? In *North American Co. for Life and Health Insurance v. Caldwell et al.*, 55 F.4th 867 (11th Cir. 2022), the Eleventh Circuit addressed just such a scenario. In this case, Caldwell had shown "signs of suicidal intent" on Oct. 8, 2020, after he learned his wife, Michelle Caldwell, wanted a divorce. His wife eventually called 911 to report that her husband was in the garage with several firearms and that he "wanted to die by law enforcement." Id. at 869. Although police officers who responded to the scene tried urging the insured to surrender peacefully, when he lifted a rifle apparently to fire at the officers, they shot and killed him. Id.

At the time of his death Caldwell held two life insurance policies with North American with each carrying a $1 million death benefit. One of the policies named an irrevocable trust managed by trustee Michael Harner as beneficiary, while the other named Michelle as beneficiary. The carrier, relying on the suicide exclusions, denied coverage for the beneficiaries' claims. *Id.* at 868. The carrier then filed a declaratory judgment action in the S.D. Florida based on the exclusions in the two policies. *Id.* at 867. On motion for judgment on the pleadings filed by the beneficiaries, U.S. District Judge Aileen M. Cannon granted their motion holding that "[t]he plain meaning of the term 'suicide' encompasses the act of killing oneself — not the killing of a person by another." *North American Co. for Life and Health Ins. v. Caldwell*, 580 F.Supp.3d 1265 (S.D. Fla. 2022). The district court's decision found that the exclusions were clear and unambiguous in failing to exclude death caused by another. *Id.* at 1271.

The North American policy exclusions were nearly identical in stating that "If the Insured commits suicide, while sane or insane, within two years from the Policy Date, Our liability is limited to an amount equal to the total premiums paid." 580 F.Supp.3d at 1267.

In the district court, the beneficiaries argued that the death, directly caused by the SWAT team shooting the insured, was more akin to a homicide than a suicide where the decedent actively pulls the trigger. *Id.* at 1269. Following consideration of the arguments, Judge Cannon held that, "based on the plain terms of the policies and the undisputed fact that SWAT team officers shot and killed Justin on October 8, 2020, Justin did not commit "suicide," and hence the "suicide" exclusion in the Policies does not apply to preclude coverage." *Id.* at 1269. In arriving at the decision below, the court noted that the policies did not define "suicide" so it applied an "everyday

meaning" test and relied on *Black's Law Dictionary, American Heritage*, and W*ebsters Collegiate* dictionary definitions of "suicide" that defined it in terms like "self-killing" or "self-destruction." *Id.* The court also relied on an 1876 Supreme Court case, *Bigelow v. Berkshire Life Ins. Co.*, 93 U.S. 284, 23 L.Ed. 918 (1876)("dying by one's own hand"), and a Florida Statute, Fla. Stat. § 782.08(1)(a)(b)("voluntary and intentional taking of one's own life"), as well as case authority from Florida and Maryland which distinguished between death resulting from self-harm and "assisted self-murder." Id. at 1269-70 [citations omitted].

On appeal, the Eleventh Circuit panel disagreed with the court below and held that the carrier could rely on the suicide exclusion to deny death benefits to the family of a man who succeeded in his plan to engage in "suicide by cop", reversing the lower court decision. 55 F.4th 871-872. The court agreed with North American that a death must be deemed a suicide when someone purposely instigates it. "The requirements for a suicide are a person's intent to die, his voluntary act on that intent, and his resultant death," the panel said. *Id.* at 870. "The specific method is irrelevant." *Id.* It stated that the definition of "suicide" in various dictionaries covers "any method used by someone to end his own life" and is not restricted to a "limited set of qualifying acts that involve no third parties." *Id. See also* Bryan A. Garner, Suicide, *Garner's Dictionary of Legal Usage* 861 (3d ed. 2011) ("Suicide and self-killing are broad terms that include every instance in which a person causes his or her own death within the legal rules of causation.")". 55 F.4th at 870. In rejecting the beneficiaries' arguments that the death was more akin to homicide rather than suicide, the court observed that "it is well known that cops are trained to use deadly forced to stop a person who threatens their own lives. As such, a civilian who provokes them into this predictable response is not much different than a man who throws himself in a train's path anticipating the "lethal outcome of being run over." *Id.* at 871.

In ruling for the carrier, the court cautioned that "To be clear, we do not decide that the ordinary meaning of 'suicide' covers all imaginable instances of suicide-by-cop," the panel said. "Indeed, many instances may require factual determinations regarding the decedent's intent or actions. But here ... no factual question exists." 55 F.4th at 871.

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Forecast for 2023 and Beyond

By Russell S. Buhite

Russell S. Buhite

While it is difficult to have a crystal ball into what 2023 and 2024 has in store for legislation and the law pertaining to life, health, and disability insurance and ERISA matters, several trends stand out for discussion.

A. Health Insurance

First, in the health insurance context, we should expect to see greater emphasis in Congress towards helping consumers lower healthcare costs through greater price transparency, further attempts to lower prescription drug prices in Medicare through price negotiation with manufacturers, and continued attempts to find common ground on lowering healthcare costs generally such as happened with "surprise billing" legislation. Congress may find some common ground surrounding expanding access to mental health services. But with the GOP in charge in the House, we should expect greater scrutiny and challenges to President Biden's Inflation Reduction Act and greater oversight of the DOL.

In addition, employers will continue to grapple with the effects of the Supreme Court's *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) decision as more states restrict access to abortion, and sometimes institute criminal penalties, while trying to provide benefit plan options for employees. In the wake of *Dobbs*, employers with health plans that cover abortion services will have to determine whether or how to provide continued access of this benefit, with some employers deciding to attempt to address the issue through medical expense reimbursement benefits while trying to avoid "aiding and abetting" liability from certain states. We also expect that litigation over Mental Health Parity Act compliance will continue apace.

B. Disability Insurance

In the ERISA disability context, Congress (through the Senate Health, Education, Labor, and Pensions committee) will continue to fight over the "Employee and Retiree Access to Justice Act" which would deem arbitration clauses, class action waivers, and discretionary clauses in employer benefit plans unenforceable under ERISA. While many states already have discretionary clause bans, and arbitration clauses have been the subject of recent litigation, several high-powered groups such as the U.S. Chamber of Commerce, the American Retirement Association, and the American Benefits Council have lined up in opposition to the Bill and it is unlikely to be passed in its current form if at all. Litigators have also seen a recent trend in courts allowing discovery not only in abuse of discretion cases, but also in those decided under the de novo standard of review, and we see this trend as likely to continue although the approaches vary substantially by federal circuit.

C. Life Insurance

In the life insurance context, litigation continues over lapses of policies as well as cost of insurance class actions (though many of the big targets such as Transamerica, John Hancock, and Nationwide have already been sued and settled for large amounts). Although waning, we probably have also not seen the end of stranger-owned life insurance litigation. While many states have adopted anti-STOLI legislation, others like Florida prior to its statutory ban, have taken a more pro-investor stance *(See Wells Fargo Bank, N.A. v. Pruco Life Ins. Co.*, 200 So.3d 1202, 1204 (Fla. 2016)), and others have refused to apply statutory bans retroactively.

D. ERISA Retirement Plans

ERISA litigation over retirement plan investments will also likely continue to grow in 2023 and 2024 as a result of the recent economic downturn as more class actions for alleged breach of fiduciary duty will be filed over plan recordkeeping and administration fees, plan investment choices, and stock drops following the Supreme Court's decision in *Retirement Plans Comm. of IBM v. Jander*, 140 S.Ct. 592 (2020) with much of this litigation centering on whether the plaintiff has suffered sufficient harm to have standing to sue.

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Products Liability Law

The Design Defect MSJ That You Should Be Filing

By Kelly Brilleaux

Kelly Brilleaux

On January 20, 2022, Judge Sarah Vance of the Eastern District of Louisiana granted a Motion for Summary Judgment on behalf of Crown Equipment Corporation ("Crown"). In the suit, the plaintiff claimed that Crown's product, an RM6000, was defectively designed under the Louisiana Products Liability Act ("LPLA") and that the alleged defective design caused injuries that ultimately resulted in a below-the-knee leg amputation.

Crown filed a Motion for Summary Judgment arguing that, under the LPLA, the plaintiff had failed to meet the elements of a design defect claim. In particular, Crown argued, the plaintiff failed to identify an alternative design that was both capable of preventing his alleged injury and, additionally, that satisfied the risk-utility test set forth in the applicable statutory provisions. Just two weeks ahead of a five-day jury trial set to begin on February 7, 2022, Judge Vance issued an Order granting Crown's Motion and finding that the plaintiff was unable to meet his burden of proving his design defect claim as a matter of law. The case was dismissed with prejudice.[1]

In its Motion, Crown argued that it was entitled to summary judgment because the plaintiff could not meet his burden of establishing that the product at issue was unreasonably dangerous in design pursuant to any of the criteria outlined in the statute. Namely, the plaintiff had not proposed an alternative design for the RM6000 that he claimed could have prevented his injury. In response, the plaintiff argued that he had, in fact, proposed several alternative designs for the RM6000—including, primarily, the addition of a door to the operator compartment, but also a proposed backrest sensor and a foot pedal modification—and that those purported alternative designs were outlined in the reports of more than one expert witness. Crown, however, pointed out that the plaintiff and his experts had merely suggested a "concept" rather than an alternative design within the meaning of the LPLA. Specifically, Crown argued that, without specifications for the purported "alternative design"—including the material from which the proposed door would be constructed; the size, weight, height, and thickness of the proposed door; and the manner in which the proposed door latches and/or otherwise closes the operator compartment—there was simply no starting point from which to evaluate whether any such design was capable of preventing the plaintiff's injury.

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1 The district court decision is *Dawson Vallee v. Crown Equipment Corp. of Ohio, et al.*, No. CV 20-1571, 2022 WL 179532 (E.D.La. Jan. 20, 2022). The plaintiff appealed the decision, which was fully brief and later argued before the United States Fifth Circuit Court of Appeals on October 3, 2022. The appeal is still pending.

The District Court agreed. In a 30-page opinion, the Court found that "[c]ourts applying the LPLA have found expert design testimony insufficient when the proffered expert fails to *identify and describe a specific alternative design,* and *explain how that design would apply to the product at issue*."[2] Accordingly, the Court concluded, "*there was no valid alternative design presented*[,]" notwithstanding the existence of reports submitted on behalf of Plaintiffs' experts. Holding that Plaintiff was unable to satisfy his burden of proof under the LPLA, the Court granted summary judgment in favor of Crown and dismissed the case with prejudice.

Of course, the law regarding what, exactly, a plaintiff must prove to establish a prima facie design defect claim (and survive summary judgment) varies by jurisdiction, and each state has its own product liability statutes and/or case law on the issue. Under Louisiana law, for example, the LPLA has a particularly stringent statutory requirement for such claims, providing:

A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:

> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

La. R.S. 9:2800.56. Other states with similarly stringent design defect statutes include Alabama and Texas.

In Alabama, for instance, the Courts have interpreted AL ST § 6-5-521 to require both that "the plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design" and that

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2 *Dawson Vallee v. Crown Equipment Corp. of Ohio, et al.*, No. CV 20-1571, 2022 WL 179532, at p. 12 (E.D.La. Jan. 20, 2022).

"taking into consideration such factors as the intended use of the product, its styling, cost, and desirability, its safety aspects, the foreseeability of the particular accident, the likelihood of injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used." *General Motors Corp. v. Jernigan*, 883 So. 2d 646 (Ala. 2003). This language is quite similar to the LPLA language relied on by Judge Vance in granting summary judgment in the *Vallee* matter.

In Texas, "to recover for a products liability claim alleging a design defect, a plaintiff must prove that (1) the product was defectively designed so as to render it unreasonably dangerous, (2) a safer alternative design existed, and (3) the defect was a producing cause of the injury for which the plaintiff seeks recovery." *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex.2009). Thus, a similar summary judgment motion would be viable under Texas law, as well. And in many other states (such as Connecticut, Kentucky, Maine, Maryland, Wisconsin), while the law is not quite as clear as it is in Louisiana, Alabama, and Texas, there is nonetheless case law indicating that a similar result could be viable under certain circumstances.

If your case involves a design defect claim and the plaintiff has failed to propose a reasonable alternative design for your product, you now know what to do! First, put the summary judgment deadline on your calendar immediately; second, research your jurisdiction's laws on the prima facie showing required of a plaintiff asserting a design defect claim; and third, begin analyzing the ways in which you can establish the impossibility of meeting that burden under the law of the jurisdiction.

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Contrary to Popular Belief, the Consumer-Contemplation Test Still Applies to Wisconsin Design Defect Claims

By Richard T. Orton and Aaron R. Wegrzyn

Richard T. Orton

Aaron R. Wegrzyn

The Wisconsin Supreme Court closed out 2022 with a question of first impression—how to interpret Wisconsin's products liability statute enacted in 2011, Wis. Stat. § 895.047. The most notable aspect of the court's decision in *Murphy v. Columbus McKinnon Corporation*, 405 Wis. 2d 157, 982 N.W.2d 898 (2022), is its conclusion that the state legislature "created a unique, hybrid products liability claim" that incorporates elements from Section 2 of the Restatement (Third) of Torts as well as from Wisconsin's common law precedents founded in Section 402A of the Restatement (Second) of Torts.

The case arose out of an accident involving the transportation of old electrical line poles. The plaintiff, a utility company technician, used a truck-mounted boom equipped with specialty "Dixie" tongs to hoist downed poles onto a truck bed. As the plaintiff moved one of these poles, the tongs lost their grip and the pole fell onto the plaintiff, causing severe injuries. He brought both a strict product liability design defect and common law negligent design claim against the manufacturer of the Dixie tongs. The trial court granted the defendant summary judgment on both claims, which the intermediate court of appeals reversed.

Although the Wisconsin Supreme Court issued a splintered decision, with majority, concurring, and dissenting opinions, the justices agreed on several key points:

1. Despite section 895.047(1)'s inclusion of language taken directly from the Restatement (Third), each justice agreed that the statute did not entirely abolish the consumer-contemplation test recognized under Wisconsin common law (and derived from the Restatement (Second)). Only one justice—who happened to author the majority opinion—indicated that the pre-statute common law (presumably including the consumer-contemplation test) could continue to provide persuasive authority for both the defect and unreasonably dangerous elements of a design defect claim under the statute. The remaining six justices took the position that the consumer-contemplation test now only applies to the unreasonably dangerous element (but they disagreed as to whether the test had been satisfied in the case presented).

2. All the justices agreed that in order to prove a design defect, the statute requires plaintiffs to demonstrate a reasonable alternative design, the omission of which renders the product at issue "not reasonably safe." All the justices also declined to adopt any specific test from the Restatement (Third) (particularly comment f.). Only the three dissenting justices explicitly acknowledged the legislature's conscious policy decision not only to depart from the consumer-contemplation test for this element, but to embrace the reasonable-alternative-design test for defectiveness from the Restatement (Third)—"at least in part." Further, six justices (the three concurring and three dissenting) noted that while the legislature did not incorporate any comments from the Restatement (Third) and the Court did not need to do so to resolve this case, the comments may prove persuasive and useful in applying this test in future cases.

3. Based on Wis. Stat. § 895.047(6)'s express disclaimer of the statute's application to "actions based on a claim of negligence or breach of warranty," all of the justices rejected the defendant's argument that section 895.047 effectively eliminated common law claims for negligent design.

The key takeaway from the *Murphy* decision is that the consumer-contemplation test remains alive and well for strict liability design defect claims in Wisconsin (at least with respect to the inquiry as to whether a product is unreasonably dangerous) and common law precedents will continue to guide Wisconsin courts in determining whether that standard is met. As demonstrated by the dissent in *Murphy*, different judges will approach the consumer-contemplation test from different perspectives, with varying interpretations of what an "ordinary consumer" looks like in a particular context.

This decision is particularly notable given the history of products liability law in Wisconsin. In multiple decisions spanning more than a decade, the Supreme Court rejected requests to discard the consumer-contemplation test from the Restatement (Second) in favor of the risk-benefit test under the Restatement (Third). Many viewed the 2011 enactment of section 895.047 as the legislature stepping in to put the issue to rest by statutorily establishing the Restatement (Third) standard as Wisconsin law. But, with *Murphy*, the Supreme Court has unanimously interpreted the statute as a hybrid of standards from both Restatements, resurrecting the consumer-contemplation test once again.

Thus, the fight continues. Your move, legislature.

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A Look at Florida's Recent Supreme Court Decision on Punitive Damages in Wrongful Death Cases

By Dick Caldwell and Brittney Polo

Dick Caldwell

Brittney Polo

In a recent 5-1 decision, the Florida Supreme Court struck down a $16 million punitive damages award as excessive. Drawing attention from around the country, the recent opinion confirms that under both federal and state law, the punitive damages in the tobacco case were excessive when compensatory damages were merely $150,000. Under Florida Statute 768.73, punitive damages greater than a 3:1 ratio is presumed invalid unless the facts and circumstances give rise to a reason to exceed that amount. Further, Florida Statute 768.74 delineates five specific criteria courts can consider when deciding whether damages are excessive. Namely, the statute clearly states the amount of damages be related to both the compensatory damages and the injury.

Underlying & Procedural History

In *Coates v. R.J. Reynolds Tobacco Co.* (RJR), decedent Lois Stucky's sister Brinda Coates brought suit as personal representative on behalf of her sister after she died of cigarette-related lung cancer. Out of the four causes of action Coates brought, she was only successful on her strict liability count. The jury awarded decedent's three adult children $100,000 each for loss of parental companionship, instruction, and guidance from their mental pain and suffering because of losing their parent. After taking into account decedent's 50% comparative negligence, the total remaining compensatory amount was $150,000. There were no surviving spouses named. After the jury awarded $16 million in punitive damages, RJR filed a motion for remittitur or a new trial.

The trial court denied RJR's motion and they appealed. On appeal, the Fifth District Court of Appeal ("Fifth DCA") reversed and remanded the case after concluding the punitive damages were excessive under both state as well as federal law. After rephrasing the question, the Fifth DCA certified it as a matter of public importance to the Florida Supreme Court.

The Florida Supreme Court looked at three factors in affirming the Fifth DCA's decisions. First, Florida Statute §768.74(5)(d), requires a punitive damages award to have a "reasonable relation to the amount of damages provided and the injury suffered." Here, Coates' compensatory damages, after reduction, were $150,000, so

the punitive damages of $16 million were grossly out of proportion. Second, the cause of action for wrongful death in Florida is not common law but instead a creature of the legislature. Florida's Wrongful Death Act (WDA) has always focused on compensation to the survivors, not the decedent. Therefore, in Florida, the death of a person gives rise to significantly less opportunity to recover damages than a serious injury to that person. Both Coates and the dissent take issue with this. However, in sticking to the letter of the law the Florida Supreme Court declined to step on the toes of the Florida Legislature by allowing death to serve as the cognizable injury for purposes of a punitive damages claim. Third, in applying the law to the undisputed facts, the Court found the trial court abused its discretion when denying RJR's motion for remittitur or a new trial.

Impact

This case garnered national attention as groups including Florida Defense Lawyers Association, Product Liability Advisory Counsel, Inc. and Washington Legal Foundation submitted amicus briefs in this matter. The way the Court adhered to the text of the statute have some believing this opinion is a win for textualism as it shows the Court's willingness to follow the law as it is. Likewise, with the recent change to the Florida Appellate Procedure Rules allowing for interlocutory appeals for motions to include punitive damages may cause delays in litigation. Whether parties will be deterred from seeking punitive damages based upon the rule change and recent opinion is unknown. Instead, what this case solidifies is that if a party is awarded damages in excess of the 3:1 ratio in a wrongful death case, it must be reasonably related the injuries and damages. Similarly, a party in Florida can safely assume courts will not rewrite the Florida Legislature's policy choice to exclude death as a cognizable injury for purposes of seeking punitive damages under the WDA and instead recognize the statutory beneficiaries injuries suffered.

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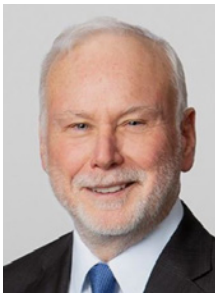
A Facelift for Cosmetics: Modernization of Cosmetics Regulations Act of 2022

By Michael Walsh



Michael Walsh

As 2022 came to an end so too did the cosmetic industry's comfortable position largely outside FDA regulation. The federal Food Drug and Cosmetics Act (FDCA) is the foundational law governing everything that goes on or in or comes in contact with anything that goes on or in humans or animals, and for decades cosmetic products have been largely outside of FDA's regulatory scheme – until now.

While the law may be new, the issue has been brewing for decades. FDA Commissioner, Robert Califf put it this way:

> The debate about regulation of the cosmetics industry to protect the public health has gone unresolved for more than a century. Unlike drugs and devices used for diagnosis and treatment, Congress has never required cosmetic manufacturers to obtain premarket approval before selling a new product.... Nor does any regulatory body evaluate claims about the safety or effectiveness of these products. The FDA's role with regard to cosmetics is thus similar to that of police, who can act only if they become aware of something that gives them "probable cause" to investigate. The challenge for regulators is daunting... JAMA June 26, 2017

Buried in the middle of the 4155-page Consolidated Appropriations Act of 2023 is the *"Modernization of Cosmetics Regulation Act of 2022"* (MOCRA), requiring registration and providing enhanced FDA oversight for cosmetic products.

Definitions

- Cosmetic: The term 'cosmetic product' was already defined under the FDCA as (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap (21 U.S.C. 321(I)). MOCRA focuses the definition on finished products defining cosmetic as "a preparation of cosmetic ingredients with a qualitatively and quantitatively set composition for use in a finished product."

- Facility: The term "facility' is defined to include any establishment (including an establishment of an importer) that manufactures, or processes cosmetic products distributed in the United States."

- Responsible Person: The term 'responsible person' means the manufacturer, packer, or distributor of a cosmetic product whose name appears on the label of such cosmetic product under the Act of the Fair Packaging and Labeling Act. Under MOCRA, the designated Responsible Person is the point person for the FDA.

MOCRA excludes beauty shops, retailers, medical providers, hotels, labelers, packagers, and distributors. The Act further provides small business exemption from certain registration and good manufacturing requirements, except for injectables, ocular products, internally applied or products that alter the appearance for more than 24 hours.

When?

- 1 year - Registration: By December 31, 2023, existing "Facilities" must register and every 2 years thereafter. For contract manufactured products, a single registration may be submitted by either the contract manufacturer or the "Responsible Person" for the "manufacturer" (i.e., the entity whose name is on the product). The registration must include brands, product categories and Product Listing, including ingredients, fragrances and colors, but not formulas or recipes.

- 2 years - GMP: By December 31, 2024, FDA is required to publish Good Manufacturing Practice regulations generally conforming to international standards. Whether FDA will meet this deadline is unknown but, with history as a guide, the regulations will not likely be issued any sooner.

- 18 months - allergens: The FDA is required to issue a proposed rule within 18 months identifying fragrance allergens.

- 1 year - asbestos: FDA has until January 2024 to propose regulations for testing to detect asbestos in talc-containing cosmetics. Asbestos is naturally found in or near talc and may be present in body powders, facial powders, eye shadow. FDA has issued consumer advisories in the past regarding certain cosmetic products for the presence of asbestos.

- 3 years - PFAS: FDA has until January 2026 to "publish its report on the assessment of the use of PFAS in cosmetic products and the scientific evidence regarding the safety of such use in cosmetic products, including any risks associated with such use. In conducting such assessment, the Secretary may, as appropriate, consult with the National Center for Toxicological Research." Per- and polyfluoroalkyl substances (PFAS) are man-made chemicals widely used or added as ingredients in some cosmetic products, including lotions, cleansers, nail polish, shaving cream, foundation, lipstick, eyeliner, eyeshadow, and mascara. PFAS may also be present in cosmetics unintentionally as the result of raw material impurities or due to the breakdown of PFAS ingredients that form other types of PFAS. PFAS are used to condition and smooth the skin, making it appear shiny, or for product consistency and texture.

- Animal Testing: Congress found "it is the sense of Congress that animal testing should not be used" for safety testing and should be phased out but "with the exception of appropriate allowances."

Enforcement

Cosmetics are now subject to adverse event reporting and 15-day reporting requirement for serious adverse events. Adverse event records must also be maintained for 6 years.

- Cosmetic manufacturers are now required to demonstrate an "adequate substantiation of safety." The term "adequate" is defined to mean testing, research, or other evidence. For "substantiation" FDA relies on the standard the Federal Trade Commission has applied requiring "competent and reliable scientific evidence" to support claims of benefits and safety. The term "safe" is generally and broadly defined requiring that a cosmetic ingredient or cosmetic shall not be considered "injurious to users solely because it can cause minor and transient reactions or minor and transient skin irritations in some users."

- Recalls: MOCRA brings cosmetics into the fold of FDA regulated products subject to mandatory recall authority. For cosmetic manufacturers, this authority will require due diligence in auditing suppliers, manufacturers and ensuring insurance and the ability to handle a recall.

- Prohibited Acts: Section 331 is also amended to ensure a violation is a "prohibited act," which is subject to criminal sanctions. The Act gives FDA power to suspend a registration which renders a manufacturer incapable of doing business.

As the marketplace strives for newer, more complex, novel, and effective ways to improve the appearance of humans and animals, FDA has a daunting task of keeping up. Prior to MOCRA, the cosmetics industry was not exempt from oversight, regulation and enforcement for adulteration and mislabeling. What the law does accomplish is to provide FDA and its state partners with a roadmap to what is in the marketplace and an efficient mechanism for removing products that do not comply.

The changes to the law under MOCRA are not merely "cosmetic" and, as with any significant change in the law and regulatory framework, it is not what you know but what you do not know that causes time consuming and expensive business disruption. Reach out with questions and for guidance before a compliance or litigation issue arises might ensure compliance, no disruption and peace of mind.

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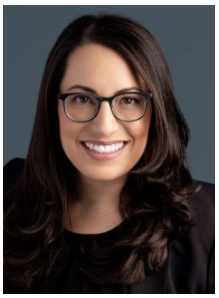
Canadian Personal Injury Damages Emulating the South by Creeping North

By Rachel Cooper



Rachel Cooper

It used to be the case that we could quite reliably tell our American clients and counterparts two things about Canadian personal injury litigation:

1. Litigation moves at a frustratingly slow pace; and
2. Our damages are nowhere close to the damages received in the US.

The first one is still true. The second, however, is changing. In the past couple of years, there have been some decisions that are shifting the personal injury damages landscape in Ontario. Two such decisions are discussed below.

Reframing Claims to Raise the Bar for Personal Injury Damages

One of the reasons we usually say damages are lower in Canada is *Andrews* – a personal injury case from the 1970s arising from a motor vehicle accident. The Supreme Court limited the award of general damages (ie. damages for pain and suffering) to $100,000 CAD. Adjusted for inflation, this amount is now over $400,000 CAD.

The Supreme Court established the *Andrews* cap out of concern that the cost of excessive damages awards would pass onto, and negatively impact, broader society and concern about the inconsistency of awards. Dickson J. explained, on pp. 261-63:

> ...[T]his is the area where the social burden of large awards deserves considerable weight. The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years. Statistically, it is the area where the danger of excessive burden of expense is greatest.

Enter *Barker v. Barker*, a 2022 Ontario Court of Appeal case about 28 individuals involuntarily admitted to a mental health centre in the 1960s and held in the Social

Therapy Unit (STU). They allege they received inhumane treatment, including psychological and physical abuse, due to three STU programs. The individuals sued the government and the doctors administering the programs, seeking damages for breach of fiduciary duty, assault, battery and intentional infliction of emotional distress.

The trial judge concluded that the *Andrews* cap did not apply and made several awards of general damages above the cap, stating as follows:

> [54] The policy considerations underlying the damages cap do not apply here. The *sui generis* nature of the STU programs, which ended in the early 1980s and have never been repeated, do not compare with the ubiquitous nature of motor vehicle accidents, however catastrophic the results may be. Plaintiffs' counsel point out that since damage awards in cases of institutional abuse or physicians' breach of fiduciary duty are infrequent in Canada, a cap is unnecessary to control disparity of assessments or a burden on insurance premiums for psychiatric institutions and physicians. The social cost, as the Supreme Court put it, of a damages award in this unique case is not the same as one in which the insurance industry must continuously spread losses throughout a society in which the vast majority of drivers are insured.

The Court of Appeal agreed with this reasoning, making two further important notes: the claim for general damages did not overlap with any cost of care awards and there was no concern about double recovery.

Other appellate courts outside of Ontario have not applied the Andrews cap in cases involving intentional wrongdoing or breach of fiduciary duty.

Main takeaways:

1. Plaintiffs' lawyers will be incentivized to reframe negligence claims as claims for breach of fiduciary duty, so as to get past the *Andrews* cap on damages for pain and suffering; and

2. There will still likely be a good defence where the general damages would overlap with the cost of care awards.

Family Members to Access "Moore" Money

One of the Ontario Court of Appeal precursors to *Barker* was *Moore v. 7595611 Canada Corp*, which upped the ceiling for claims by family members for guidance, care and companionship damages after the deaths of loved ones. In *Moore*, the respondents' daughter died from severe injuries after her rooming house apartment caught fire. The apartment's windows were barred and the victim's only exit was engulfed in flames. The daughter died of her injuries a few days later in the hospital. The parents sued their daughter's property owner and were awarded $250,000 CAD each. Historically, damages of this sort were around $50,000.

The Ontario Court of Appeal reasoned that the damages award was appropriate given that the Ontario legislature has not capped these types of non-pecuniary damage awards and that there was no mathematical way to assess these damages. The Court relied on an evidentiary record showing a strong familial relationship between the parents and daughter.

Main Takeaways:

1. *Moore* raises the unofficial ceiling for non-pecuniary damage awards under the *Family Law Act*; and

2. The evidentiary record of the relationship is of central importance. The Court considered both that the respondents had lost their only child and the strong emotional support she had played in their lives.

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Professional Liability Law

There'll be Time Enough for Counting When the Dealing's Done: Collectability in Legal Malpractice Claims

By Kenneth A. McLellan

Kenneth A. McLellan

I hope you are familiar with the song *The Gambler*, by the late, great Kenny Rogers, and, if you're not, stop right now --- go listen to it --- and then come back and continue reading when you're finished. The lyrics tell some great life lessons. In that song, Kenny Rogers regales us with a tale of a mysterious gambler he meets on a train. In return for a bit of whiskey, the gambler dispenses advice about how to play poker. The gambler advises that you should never count your money when you're sitting at the table. There'll be time enough for counting, when the dealing's done.

The gambler's advice comes to mind when defending a legal malpractice claim. When defending a claim, its very important to think not about what damages the Plaintiff may be able to prove, but, instead, what damages he could have *collected* in the underlying case. Plaintiff shouldn't count his money (at the table) based on his damages. Plaintiff can only recover what he could have collected (based on what "cards were dealt" in the underlying case).

Before discussing collectability as a defense to a legal malpractice claim, let's briefly review of the elements of a legal malpractice.

The Elements of a Legal Malpractice Claim

As a New Yorker, I will look at New York law here. Other states are discussed later in this article.

An attorney representing a client is expected to use a "reasonable degree of skill and be familiar with the applicable rules of practice and the settled principles of law and is expected to exercise reasonable care in representing the client." Reasonable care is defined as a "degree of care commonly exercised by an ordinary member of the legal profession." The Plaintiff must prove by a preponderance of the evidence that a Defendant-Attorney did not exercise that degree of skill.

If the alleged malpractice occurs within the context of representation in litigation, "but-for" causation becomes relevant. A trier of fact deciding such a case must

"in effect, decide a lawsuit within a lawsuit." Plaintiff must show that he would have been successful in his lawsuit, which sometimes is called the "Underlying Case."[1]

Collectability

New York's highest court, the Court of Appeals, has held that "[where] the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost."[2] However, the Plaintiff's damages in a legal malpractice action are limited to the amount "that would have been collectable" against the Defendants in the Underlying Case. To hold otherwise would create the opportunity for a "windfall."[3]

1 This description is derived from New York's Pattern Jury Instr.—Civil 2:152.
2 *Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38 (1990).
3 *McKenna v. Forsyth & Forsyth*, 280 A.D.2d 79 (4th Dep't. 2001).

Split in New York Intermediate Level Courts over Burden of Proof on Collectability

Notably, there is a split among the four Appellate Division Departments, i.e., intermediate level appellate courts in New York, about the burden of proving collectability, or, non-collectability, as the case may be. The Fourth Department has held that "the burden of proving collectability [is] on the client." That Court noted this is the majority view. The Court further noted that "[a] minority of jurisdictions take the view that (un)collectability is an affirmative defense that must be pleaded and proved by the attorney." The Second Department has agreed with the view that Plaintiff in a legal malpractice action must show that damages were collectible.[4]

In contrast, another New York intermediate level appellate Court, the First Department, has held that "the issue of non-collectability should be treated as a matter constituting an avoidance or mitigation of the consequences of the attorney's malpractice … and the erring attorney should bear the inherent risks and uncertainties of proving it [.]"[5]

The Majority View is that Proving Collectability is the Plaintiff's Burden

In a recent case, a Florida court held that "[T]he client/plaintiff in a legal malpractice action must prove both that a favorable result would have been achieved in the underlying litigation but for the negligence of the attorney/defendant and that any judgment which could have been recovered would have been collectible." That Court focused on the fact that the only evidence of collectability was the existence of an insurance policy with a shared $250K limit per claim, and therefore the Court reduced a $4.5MM judgment down to $250K. The Court refused to "shift the burden of collectability to the legal malpractice defendants."[6]

A California Court agreed with this position, holding that a "plaintiff who establishes legal malpractice *in prosecuting a claim* must also prove careful management would have resulted in a favorable judgment and collection of same."[7] Illinois' approach is stated succinctly in a legal malpractice case that arose out of a medical malpractice case. The Court held: "a legal malpractice plaintiff is only entitled to recover those sums which he would have recovered if his underlying suit was successfully prosecuted." [8] A Texas Court held in a legal malpractice case, that "the proper measure of damages is the amount that the plaintiff would have recovered and collected in the underlying suit if it had been properly prosecuted."[9]

The Supreme Court of Colorado held that Plaintiff bears the burden of proof of proving collectability. The Court observed that "[because] the collectability of the underlying judgment is essential to the causation and damages elements of a client's negligence claim against an attorney, we hold that the client-plaintiff bears the burden of proving that the lost judgment in the underlying case was collectible."[10]

An Anomalous Louisiana Case, Legislatively Overruled

Of the cases I reviewed, one stood out as highly unusual. In *Ewing v. Westport Insurance Corp.*, 315 So. 3d 715

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4 *Jedlicka v. Field*, 14 A.D.3d. 596 (2nd Dep't. 2005).
5 *Lindenman v. Kreitzer*, 7 A.D.3d 30 (1st Dep't. 2004).
6 *Morgan & Morgan v. Pollock*, 306 So.3d 1251 (2020).
7 *DiPalma v. Seldman*, 27 Cal.App.4th 1499 (1994).
8 *Bloome v. Wiseman*, 279 Ill.App.3d 469 (1996).
9 *Kelley and Witherspoon LLP v. Hooper*, 401 S.W.3d 841 (2013).
10 *Lehouillier v. Gallegos*, 434 P.3d 156 (2019).

(2020), the Louisiana Supreme Court held that proof of collectability of an underlying judgment is not an element necessary for a plaintiff to establish a claim for legal malpractice, nor can collectability be asserted by an attorney as an affirmative defense in a legal malpractice action. The Court stated: "We will not allow a malpractice defendant to assert a defense based on the wealth or poverty of the underlying tortfeasor when a defendant in any other type of tort action could not assert a similarly based defense."

From a defense perspective, and, indeed, from any attorney's perspective, this opens up a Pandora's box of exposure. The case renders an attorney liable to pay for whatever his client might have been able to prove as damages in the underlying case, regardless of whether his client would have been able to actually collect the damages. Thankfully, the decision was legislatively overruled last year. See 2022 La. Sess. Law Serv. Act 285 (S.B. 103) (WEST). The statute permits a collectability defense, but the defendant-attorney bears the burden of proof on the defense.

The Takeaway

When defending a legal malpractice claim, research your jurisdiction's position on collectability. Check to see if it is an element the Plaintiff must prove as part of his claim, or if the attorney has the burden to raise it as a defense and prove that damages should be capped at a certain amount based on Plaintiff's ability to collect in the Underlying Case.

Legal malpractice plaintiffs shouldn't count their money at the table. They can only count on what they could have collected in the Underlying Case.

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Property Law

COVID 19 Business Interruption and Extra Expense Litigation May Be Nearing an End

By John C. Trimble

John C. Trimble

In March 2020, the world as we knew it changed, and everyone old enough to remember will never forget the stay at home orders that closed businesses and schools and kept us at home for months at a time. Those of us who practice first-party property insurance law will also never forget the immediate onset of business interruption and extra expense claims and the ensuing litigation. Now, after nearly three years of litigation and appeals the majority of claims and suits are nearing an end.

For those who may be unfamiliar with it, Business Interruption and Extra Expense coverage are coverages that may be purchased with commercial property insurance policies to provide lost profits and extra expenses when a business has been temporarily closed due to a casualty event. In general, they cover lost profits and extra expenses incurred by a business when there has been a "direct physical loss or damage." Subject to the particular policy's limits and language, the coverages are available for the period of time needed to get the business rebuilt, repaired, and reopened after a catastrophe such as a fire, flood, tornado, or hurricane.

When COVID hit businesses of all kinds were immediately shut down, much like they might be after a sudden casualty loss. So, businesses everywhere turned to their insurance for help. Many insurers were caught by surprise, but within a short time most of them were investigating the claims and trying to determine whether their coverages applied. Uniformly, the industry determined that the stay-at-home orders were not "direct physical loss" and that the COVID-19 virus did not cause physical alteration or damage to property. Some policies had virus exclusions. Claims were uniformly denied, and within no time, hundreds of individual and class action lawsuits were filed. New filings occurred in very substantial numbers for the first year and then peaked again at the two-year mark in March of 2022 because most policies had an internal two-year suit limitation.

As the litigation proceeded the University of Pennsylvania Law School tracked the cases and studied the outcomes. Slowly trial courts made decisions on motions to dismiss and motions for summary judgment and the cases made their way to the appellate courts. Today, nearly three years later, the rulings across the country have been resoundingly in favor of the insurance industry.

The Law School's studies have developed some interesting findings. Not surprisingly, the vast majority of litigants were food, restaurant, and retail

hospitality businesses. Rulings on the merits for insurers have been as high as 70% in the state courts and nearly 87% in the federal courts. To the extent that any cases have not been dismissed, it has been because the trial court believed that the plaintiff had plead sufficient facts to overcome dismissal. A few courts have also left open the door to the argument, if proven, that the COVID-19 virus can cause "physical loss or damage."

At their peak, there were more than 2000 cases on file. Those numbers have been whittled down significantly. It remains to be seen whether any of the remaining lawsuits will be successful, but a situation that seemed catastrophic to the insurance industry has now faded to the extent that it is no longer the hottest topic when insurers and defense lawyers get together. It is likely that almost all of the cases will be gone within the next two years. The insurance industry paid millions in legal fees, but all in all it dodged a bullet. We are likely to see significant changes and endorsements to commercial policies to hedge against a similar litigation challenge if and when another pandemic strikes.

Prediction: The COVID-19 business interruption and extra expense litigation will be largely over within two years.

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Dealing with Possible Fraudulent Public Adjusters

By Karen Karabinos

Karen Karabinos

Public adjusters, those individuals who are hired by insureds to assist them with preparing their insurance claim, can provide valuable assistance to an insured. Increasingly, however, some public adjusters are proving to be a hindrance to effectively and efficiently resolving an insured's claim. Even some are attempting to defraud the insured and the insurance company. This article will address some of the recent tactics by public adjusters and what strategies an insurance company might consider in response.

Tactic #1: "You Cannot Directly Contact My Insured"

The public adjuster often tries to bar the insurance carrier from directly contacting the insured. The prohibition may come in the form of the public adjuster advising the carrier that the adjuster may not contact the insured directly. We have learned that in some contracts executed between the insured and the public adjuster, the insured is specifically prohibited from contacting the carrier directly.

While the contract the insured executed with the public adjuster may authorize the public adjuster to communicate directly with the insurance company on his/her behalf, carriers should not allow a public adjuster to prevent direct contact with its insured. The insurance policy is a binding contract between the carrier and its insured that sets forth duties owed by each in connection with a claim. Due to that contract, an insurer carrier should continue to directly contact the insured as needed, but in deference to the fact that the insured has hired a public adjuster, carriers should copy the public adjuster on any and all communications. If the insured contacts the carrier directly, or vice versa, an email or letter to the public adjuster should be sent confirming any phone calls in which the public adjuster was not involved.

Some states have enacted legislature specifically prohibiting a public adjuster from entering into a contract with the insured that prohibits the insured from initiating or maintaining direct communications with the insurance company. For example, in May 2022, the Georgia Legislature enacted House Bill 254, now O.C.G.A. §§ 33-23-43, 33-23-43.2 and 33-23-43.3 addressing public adjuster's authority in the state of Georgia. One provision provides that a public adjuster contract may not contain a term that "[r]estricts an insured's right to initiate and maintain direct communications with his or her attorney, the insurer, the insurer's adjuster, the insurer's attorney, or any other person regarding settlement of the insured's claim." §§ 33-23-43.2(c)(1). Therefore, it is important to obtain a copy of the contract between the insured and the public adjuster to ensure that the provisions do not violate any statutory restrictions.

Tactic #2: Public Adjuster Citing Law
Frequently, public adjusters are using the tactic of citing law in its correspondence to the adjuster, citing to a state's bad faith statute or unfair claims settlement practice act or case law. Because a public adjuster likely is not a licensed attorney, and because the insured is copied on those communications, a carrier should request that a public adjuster confirm whether a licensed attorney. For an example, a carrier might write back:

> *I see that you have quoted various statutes and case law in your recent communication. A quick search of the state bar's website does not show that you are a licensed attorney in this state. If you are, please provide your state bar number, and we will have our attorney contact you do discuss this claim.*

In the cases in which a response has been provided either by my office or the carrier, the public adjuster has ceased citing case law in all subsequent correspondence.

Tactic #3: Invoking Appraisal Without Providing An Estimate of Damage
Invoking appraisal is increasingly becoming the normal in first party property claim. The public adjuster is invoking appraisal immediately after being retained by an insured and before providing any estimate showing that the carrier's estimate is not correct. While appraisal is a method by which the carrier and its insured has agreed to resolve the amount of loss, appraisal is only appropriate if the parties "fail to agree" on the amount of loss. Until there is a disagreement, invoking appraisal is premature.

In response to an appraisal where neither the insured, a contractor or the public adjuster has submitted an estimate that differs from the adjuster's estimate, the adjuster should sent correspondence to the public adjuster and the insured confirming receipt of the appraisal demand. The adjuster should also advise that no information has been received by the insured or the public adjuster showing the areas of disagreement with the carrier's estimate, and until such areas have been confirmed and evaluated for possible resolution, the appraisal demand is premature. In response, public adjusters generally provide an estimate that is considerably higher than the carrier's estimate. The carrier can then determine whether there is a dispute regarding the amount of loss or scope of damages, which brings us to Tactic #4 below.

Tactic #4: Attempting to Appraise Scope of Damages
What can be the subject of an appraisal in a first party property claim differs from state to state. Therefore, it is important to review the appraisal demand and the estimate submitted to ensure the scope of appraisal sought by the public adjuster is valid.

For example, in Georgia, appraisal can only resolve a disputed issue of value. It cannot be invoked to resolve the broader issues of liability. See *Lam v. Allstate Indemnity Co.*, 2014 WL 1228118 (Ga Ct. App. Mar. 26, 2014). Public adjusters in Georgia frequently seek appraisal of the cost of replacing the entire roof in claims in which the carrier has determined that only a limited number of shingles have been damaged by a covered loss, and that those shingles can be repaired. In Lam, the insurer had conceded that four shingles had sustained covered damage and agreed to replace those four shingles. The insured, however, sought coverage for the complete replace of all shingles on the roof. The Georgia Court of Appeals held that the parties' disagreement was over coverage, which is not a proper basis for an appraisal, where the dispute was not over the value, but scope of covered damaged.

If the carrier confirms that the issue is one of coverage, not amount of the loss, the carrier has a couple of options. First, the carrier could deny coverage for any disputed damage, and agree to appraise the cost of the undisputed damage. Second, the carrier could propose a memorandum of appraisal detailing what

Case Number	Description	Results: Saving
1	In response to appraisal demand, requested insured produced requested documents and submit to an EUO. First setting, no response. Sent another demand, and PA advised that PA and insured were "no longer pursuing claim"	Appraisal Withdrawn: PA's Estimate: $1,773,695.77 Carrier's Estimate: $760,332.50 Gross Savings: $1,013.363.27
2	In response to appraisal demand, requested insured produced requested documents and submit to an EUO. First setting, no response. Sent another demand, and insured advised he was withdrawing appraisal demand	Appraisal Withdrawn: PA's Estimate: $52,780.76 Carrier's Estimate: $798.09, but below $2500.00 deductible Gross Savings: $50,280.76
3	In response to appraisal demand, requested insured produced requested documents and submit to an EUO. Found insureds had committed fraud; submitted POL that contained claim for damages they admitted did not exist and was just created high "to negotiate"	Result: Claim Denied
4	In response to appraisal demand, requested insured produced requested documents and submit to an EUO. Insured testified she never hired PA, PA was for roofer; never met or spoke with PA, no idea payments had been made for undisputed ACV to insured and PA; no idea that appraisal had been invoked. Learned PA owns both the roofing company and the adjusting company and did not disclose that to insured.	Result: Referred claim to DOI
5	The insureds and their PA (same PA for all 3 claims) submitted to EUOs; learned from the insureds that PA had told them that carrier had not paid ACV, when carrier had. PA forged signature on checks. Lead to TBI investigation.	Result: PA plead guilty to numerous counts of fraud; currently in jail.

issues or damages will be part of the appraisal and those issues that will not. Public adjusters generally reject such memoranda and threaten to proceed with a "empty-chair" appraisal in which the insured's appraiser and the umpire proceed with the appraisal with the carrier's appraiser and issue an award. To prevent that scenario, carriers could proceed with filing a declaratory judgment action with the court asking the court to

confirm whether appraisal is appropriate under the circumstances of the loss. Filing a declaratory judgment action along with a motion for a temporary restraining order has successfully prevented an "empty-chair" appraisal to go forward.

Tactic #5: Public Adjusters Submitting Inflating Estimates
Public adjuster's property damage estimate increasingly are at least double, if not more, than the carrier's estimate for the covered damage. The estimates may come in the form of a contractor's one line estimate or in Xactimate. In order to determine whether the estimates are the public adjuster's attempt to fraudulently seek costs for damages unrelated to the covered damages or to fraudulently increase the cost of covered damages, carriers should obtain any and all information they can to determine whether the public adjuster is committing fraud. Some of my clients have taken the strategy of demanding the examination under oath of the insured, and if provided under the terms of the policy, the public adjuster as well. With the demand for the examination under oath, a request for production of documents led to uncover fraud committed by the insured and the public adjuster as well as the withdrawal of the claim or appraisal demand.

See the chart on the previous page for results.

Consider all of these strategies with your clients to show that in dealing with public adjusters, sometimes a good defense is a good offense.

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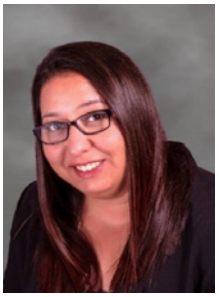
Florida Legislature Overhauls Property Insurance Law and Litigation

By Christina May Bolin



Christina May Bolin

It has been a long time coming, and the devastation of Hurricane Ian was likely the proverbial straw that broke the insurance industry's back. Reports have circulated for years about the "insurance crisis" facing Florida. Insurance rates continued to climb while carriers pulled out of the market. In December, the Florida Senate finally acted. Florida Senate Bill 2-A was signed into law on December 16, 2022, and made some significant changes in Florida property law. Here's a summary of some of the high points.

Assignments of Benefits

One of the changes that is going to have an enormous impact on what has become the property claims industry is the elimination of post-claim assignment of benefits. Florida contractors and mitigation companies have created a niche industry in the insurance claims area. Generally, contractors would repair damage caused by ostensibly covered causes of loss and obtain an assignment of benefits to pursue repayment against the carrier directly thus standing in the place of the insured. The amended statute now states:

Except as provided in subsection (11), a policyholder may not assign, in whole or in part, any post-loss insurance benefit under any residential property insurance policy or under any commercial property insurance policy as that term is defined in s. 627.0625(1), issued on or after January 1, 2023. An attempt to assign post-loss property insurance benefits under such a policy is void, invalid, and unenforceable.

This prohibition will apply to admitted carriers only.

The effect that this might have on the surplus lines market remains to be seen. However, this is likely to spark a critical evaluation of the business practices of many Florida contractors.

Attorney Fees

This change likely has the greatest impact on how litigation will proceed in Florida for property claims. Previously, insureds were entitled to an award of attorneys' fees. Florida Statute 626.9373 and Florida Statute 627.428 eliminate the right to attorney fees for residential and commercial property lawsuits for both admitted and surplus lines carriers. (However, attorney fees may still be awarded under FS 57.105, the frivolous lawsuit statute, and 768.79 the statute that outlines the Offer of Judgements and Demand for Judgement in property claims.)

This will not affect pending litigation or the upcoming Hurricane Ian litigation, but

future litigation is going to change. Time frames Related to Adjustment of Claims effective March 1, 2023

Of immediate import for carriers is the change to certain time frames set out during the adjustment process. Florida Statute 626.9541(1)(i)4 has amended the time for residential carriers to issue payments for undisputed amounts. The prior statute required undisputed payments to be issued within 90 days. This amendment decreases it to 60 days unless payment of the undisputed amount is prevented by factors "beyond the control of the insurer" as defined in Section 627.70131(5).

Such factors are defined as follows:

- The Office of Insurance Regulation issued an order finding that all or certain residential property insurers are reasonably unable to meet the time requirements of the statute in specified locations and ordering that such insurer or insurers may have additional time as specified by the Office.

- Actions by the policyholder or the policyholder's representative which constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed when such actions reasonably prevent the insurer from complying with any requirement of this section.

This definition is also used in the section requiring timely payment of claims (within 60 days). The new statute mandates that:

(7)(a) Within 60 days after an insurer receives notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer... Any payment of an initial

or supplemental claim or portion of such claim made 60 days after the insurer receives notice of the claim, or made after the expiration of any additional timeframe provided to pay or deny a claim or a portion of a claim made pursuant to an order of the office finding factors beyond the control of the insurer, whichever is later, bears interest ….

Section 627.70131 has been changed to specify the following:

(1)(a) Insurers now have 7 calendar days to review and acknowledge receipt of communications.

(3)(a) Insurers now have 7 days after the insurer received proof of loss statements to begin an investigation as is reasonably necessary.

(3)(b) If an inspection is required, an insurer has 30 days (reduced from 45 days) after receiving proof of loss statements for the insurer to conduct that inspection of the property.

(3)(e) If an estimate is prepared, the insurer must send the policyholder a copy of the estimate within 7 days after the estimate is generated by the adjuster.

Notice of Claims
Section 627.70132 reduces the time to report a claim or reopened claim from 2 years after the date of loss to 1 year. The time to report a supplemental claim is reduced from 3 years after the date of loss to 18 months. This change affects both admitted and surplus lines carriers doing business in Florida.

Breach of Contract Necessary for Bad Faith
Florida Statutes Section 624.155 permits bad faith claims under first-party property insurance policies. This section has been replaced with the following:

Notwithstanding any provision of s. 624.155 to the contrary, in any claim for extracontractual damages under s. 624.155(1)(b), no action shall lie until a named or omnibus insured, or a named beneficiary has established through an adverse adjudication by a court of law that the property insurer breached the insurance contract, and a final judgment or decree has been rendered against the insurer. Acceptance of an offer of judgment under s. 768.79 or the payment of an appraisal award does not constitute an adverse adjudication under this section. The difference between an insurer's appraiser's final estimate and the appraisal award may be evidence of bad faith under s. 624.155(1)(b) but is not deemed an adverse adjudication under this section and does not, on its own, give rise to a cause of action.

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California Supreme Court Refines Rules of Policy Interpretation

By Andrew B. Downs

Andrew B. Downs

This past November, the California Supreme Court issued its long-awaited decision in *Yahoo Inc. v. Nat'l Union Fire Ins. Co. etc.*, 14 Cal. 5th 58, 301 Cal. Rptr. 3d 1, 519 P.3d 992 (2022). While the immediate issue before the court was whether there was coverage under a non-standard policy provision for invasions of the seclusion prong of the right of privacy based upon Telephone Consumer Protection Act (TCPA) violations, the long-term implications of the case will flow from how the court interpreted the policy language.

National Union issued a General Liability policy to Yahoo! which had been endorsed to remove the TCPA exclusion, as well as to remove any coverage for advertising injury, leaving personal injury coverage, including for invasion of the right of privacy, intact. The Supreme Court ultimately concluded invasion of the right of seclusion claims could be covered under the policy as written if that coverage was consistent with the policyholder's objective reasonable expectations. What matters for future cases is *how* the court reached that result.

In a discussion sure to interest English teachers everywhere, the Supreme Court explained the phrase "arising out of oral or written publication, in any manner, of material that violates a person's right of privacy" contained a restrictive relative clause "that violates a person's right of privacy." The question then was whether that clause modified only the word "material" in which case it would not apply to right of seclusion claims, or whether it applied to the entire phrase. Because it was unclear to the court what the restrictive relative clause modified, the court concluded the coverage provision was "facially ambiguous." The court also held the trial court's use of the last antecedent rule (under which a modifier following a list of items is interpreted to modify only the last item in the list) did not resolve the ambiguity.

The Supreme Court did not stop at that point. It then attempted to apply the standard rules of contract interpretation to resolve the potential ambiguity. It observed that the mere presence of multiple meanings did not create an ambiguity. It also looked for an interpretation that did not render any of the words in the policy redundant. After concluding the application of those rules did not eliminate the ambiguity, the court did not jump to interpret the clause adversely to the drafting party. Rather, it followed existing, if sometimes ignored, California law that first the court should attempt to determine whether one of the interpretations is consistent with the policyholder's objectively reasonable expectations, and only if that process does not resolve the ambiguity, is the language interpreted against the drafting party.

The opinion contains a number of nuggets likely to be cited in the future by both policyholder and insurer counsel. For example, the court acknowledged that negotiated manuscript language may not necessarily be interpreted adversely to the insurer, but noted the manuscript language here was copied from other insurance industry forms, so if necessary the language would be interpreted adversely to the insurer.

Because the policy at issue contained non-standard provisions, the fact the court found that TCPA violations might be covered probably is the least important part of the holding in the long run. Like *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253 (1990) and Bank of the W. v. Superior Court, 2 Cal. 4th 1254, 10 Cal. Rptr. 2d 538, 833 P.2d 545 (1992) over 30 years ago, the long-term implications of this case are more likely to be on how courts interpret policy language.

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Trends in Property Coverage Litigation

By Christina May Bolin

Christina May Bolin

One of benefits of membership in the property section is that we produce a monthly case law update. We try to keep it narrowed down to cases that either represent a novel area of law, a changed area of law, an anomaly, or may have wider reaching implications. In doing so, it is easier to spot the patterns that are developing. One significant thing that we are watching is the replacement of the appraisal provision with an arbitration provision.

The Replacement of Appraisal Provisions with Arbitration Provisions:

In late 2021/early 2022, American Integrity Insurance Company asked the Florida Office of Insurance Regulation to approve the addition of an arbitration endorsement in its policies. It was approved in February of 2022. The endorsement read...

b. BINDING ARBITRATION

i. **Confidential Binding Arbitration**

All Disputes, including disputes arising out of or related to this Agreement, between **us** and **you**, or any additional insured, omnibus insured, other person making a claim under the policy, or an assignee of post-loss benefits, (hereinafter referred to as "party" or collectively as "the parties") whether arising out of State or Federal law, and whether based upon statutory duties, breach of contract, tort theories, punitive damages or other legal theories, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be exclusively and finally resolved through confidential binding arbitration (the "Arbitration") as provided herein, in the county of residence premises and shall not be filed in a court of law, except any suit requesting injunctive relief, any action pursuant to §682.02(1), Florida Statutes, and any supplemental relief requested therein may be filed in the Circuit Court in and for the county of residence premises. **The Disputes that are subject of this Binding Arbitration exclude your civil remedies to bring a civil action under section 624.155, Florida Statutes. Resolution through Binding Arbitration must be requested within five (5) years from the date of loss, and you must comply with all other provisions of this policy.**

ii. **Venue**

The parties agree that venue for the binding arbitration shall be in the county of residence premises and any civil judicial action concerning this Binding Arbitration Agreement shall be in the circuit courts in and for the county of residence premises.

iii. **Rules Governing Arbitration**

The Arbitration shall be conducted in accordance with the provisions of the Revised Florida Arbitration Code, chapter 682, Florida Statutes, this Agreement and pursuant to the Florida Rules of Civil Procedure, Florida Evidence Code, and substantive Florida law (including statutes, rules, regulations, case law, and common law). Further, nothing in this Agreement is to be construed to contradict an applicable Florida statutory grievance or mediation procedure.

(A copy of the full endorsement can be found at Florida Department of Insurance Regulation website www.floir.com).

Other carriers are looking at arbitration as a replacement for appraisal. If they do replace appraisal with arbitration (and all indications are that at least some will), this will have a significant impact on the industry. First, we anticipate litigation regarding the appropriateness of an arbitration provision in an insurance contract and whether those provisions are binding as written in a contract of adhesion (look for fights over font size, signatures, etc.,). The next significant issue will be whether you can now arbitrate coverage issues as well as scope. In some states, like Alabama, appraisal cannot determine coverage as coverage is deemed to be a question and matter of law. Participants in appraisal are generally adjusters (independent and public) and/or contractors. Lawyers may sometimes be appointed umpires, but for the most part, it is to a procedure run by lawyers. Arbitration is. Further, the under most policies with an appraisal

provision, the appraisers are required to be "independent," "disinterested," "impartial" or neutral. They are to evaluate the claim and try to resolve it. They are not supposed to be advocates on behalf of the insured or carrier.

Arbitration would change that into a process where each side appoints an advocate. Appraisals are expensive. Arbitration is likely more expensive. If arbitration provisions become more common, look for fee shifting statutes to emerge.

Finally, while it is hard to overturn an appraisal award, it is really hard to overturn an arbitration award. Moreover, now carriers could be looking at a non-appealable coverage determination as well.

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Toxic Tort Law

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State PFAS Requirements for Consumer Products Set to Go into Effect in 2023 and Beyond

By Ally Cunningham, Jessie Rosell, Matt Walker, Shanna McCormack and Mara Cohara

[1]A wave of PFAS-related regulatory requirements in consumer products is here and impacted industries should be prepared to track state legislative and regulatory developments. Beginning this year in 2023, many states will require certain industry sectors to limit or eliminate PFAS in certain consumer products. State restrictions take the form of statutory amendments or new statutes and cover industries from clothing to food packaging to cosmetics and personal care products. While the bills outlining these requirements were proposed in prior legislative sessions, effective dates of the new requirements began on December 31, 2022 and continue through 2030.

Broad Bans of Intentionally Added PFAS Compounds

In Maine, LD 1502 bans intentionally added PFAS from all products of any kind sold in the state. Parties selling products in Maine will be subject to intermediate deadlines, which are fast approaching, but are designed to allow industry sectors to find alternatives to intentionally added PFAS. The first of these requirements began January 1, 2023, requiring a phaseout of rugs, carpet, and fabric treatments containing PFAS, with a total ban on the chemicals in all products effective by 2030.

Restrictions on the Use of PFAS in Food Packaging and Apparel

In the food packaging context, laws in New York and California took effect December 31, 2022 and January 1, 2023, respectively, prohibiting the sale or distribution of intentionally-added PFAS in food packaging. Three additional states are set to restrict the use of intentionally added PFAS in food packaging in 2023. In February of this year, Washington will ban the use of paper wraps and liners, food boats, pizza boxes, and plates with intentionally added PFAS. On July 1, 2023, Vermont Bill S20 goes into effect which prohibits the use of intentionally added PFAS in food packaging. Lastly, on December 31, 2023, Connecticut Public Act No. 21-191 goes into effect and will also ban the use of intentionally

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added PFAS in food packaging. In 2024, Colorado, Maryland, Minnesota, Rhode Island, and Hawaii all have restrictions on the use of PFAS in packaging set to go into effect.

New York Gov. Kathy Hochul recently signed legislation banning the use of PFAS in everyday apparel starting at the end of 2023. Along with California, apparel manufacturers in New York will now be required to evaluate product lines for intentionally added PFAS and take steps to implement alternatives. So far, California and New York are the only states that have enacted legislation banning the use of PFAS in apparel, but this may change, and impacted industries will want to track developments in this area.

Safer Alternatives and Cost Evaluation Factors

While most state laws prohibiting the use of PFAS do not consider cost, some do. For example, Washington's food packaging restrictions take effect only after a state agency determines that a safer alternative is available. This is why Washington will ban the use of intentionally added PFAS only in paper wraps and liners, food boats, pizza boxes, and plates this year and not in other types of food packaging. The law also requires that safer alternatives used in the packaging be available in sufficient quantity, be found at a comparable cost to the PFAS compounds used in the product, and perform as well or better than PFAS used in the packaging.

Industries subject to the restrictions should evaluate their product lines for PFAS, as some state laws permit parties to avoid enforcement by acquiring a certificate of compliance from their suppliers. In addition, parties may receive customer requests for certificates of compliance to the new laws, which manufacturers should carefully evaluate for compliance with the specific requirements of the states where they have operations, along with future regulatory compliance concerns and litigation risks.

Tracking Upcoming PFAS Laws

Industries impacted by upcoming PFAS legislation should track proposed bills during this legislative session and work with industry groups to provide comments and proposals to the bills. Comments to bills could include asking that industries subject to PFAS use restrictions be given additional time to adjust to the new requirements as well as propose that the requirements be contingent on state agencies – the experts in their field – finding that safer and cost-effective alternatives to PFAS exist for the products impacted.

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Transportation Law

Plaintiffs' Use of Federal Regulations – Creating New Rules Everyday!

By John M. Nunnally

John M. Nunnally

Many of us are familiar with plaintiff attorneys' attempts to use the Federal Regulations to bolster their negligence claims. They attempt to elevate a standard of care violation into the violation of a safety rule. The source of much of their claims are the Federal Motor Carrier Safety Regulations (FMCSR). While we could spend a great deal of time discussing the plaintiff's arguments and attempts, this brief article will focus on one of the biggest issues plaintiffs' attorneys use to attempt to create an issue, namely, drug and alcohol testing.

49 C.F.R Parts 40 and 382 deal with drug and alcohol testing. It is important to know when they apply, and perhaps even more importantly, when they do not. It is also critical to understand the purpose behind the rule. It is amazing how plaintiffs' attorneys will attempt to interpret and create "rules" that simply do not exist. Know the rules better than plaintiff's attorneys so you are ready to combat them and their experts.

There are several times that drug and alcohol tests are required: pre-employment, reasonable suspicion, random, post-accident, return to duty, and follow up to a positive drug-test. The one we deal with most often is post-accident testing for truck drivers. § 382.303 states that a motor carrier must test a driver for alcohol and controlled substances after an accident that involves a fatality or traffic citation to the driver. However, in addition to the citation to the driver there also has to be bodily injury with immediate medical treatment away from the scene, or disabling damage to any motor vehicle requiring that it be towed away, before the testing becomes required.

If the alcohol test is not conducted with two hours, the company can and should maintain a record stating the reason the test was not promptly administered. The company can cease attempts to get a test after eight hours; but again, the reason the test was not promptly administered need to be maintained. Finally, a driver that receives a citation more than eight hours after an accident does not need to be tested, assuming no fatality has occurred.

Plaintiffs' attorney will argue that a post-accident test was required simply because the vehicle was damaged, or that there was a citation, or will create numerous other reasons to imply that the rules were not properly followed, and therefore, there was a safety violation. Trial judges are not experts on the Federal Regulations and can be swayed by carefully selected and edited arguments. Defense attorneys need to be ready to combat those arguments.

It is important to note that FMCSR applies to the company. Many times we forget this basic point when focusing on the claims. § 390.11 states that when a duty or prohibition is imposed on the driver, it is the motor carrier that is required to observe such duty or prohibition. § 390.13 prohibits anyone from aiding or abetting any motor carrier or its employees from violating the rules, and finally, § 392.1 the motor carrier has the obligation to instruct its drivers to comply with the rules.

I realize that many defense attorneys are going to be reading this brief overview of just one small topic from this very involved issue and have many comments and clarifications, but the purpose of this short article is to provide a quick reference and reminder of the challenges we need to prepare our associates, paralegals, and experts when dealing with the forthcoming claims from plaintiffs' attorneys.

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Hoping for a Conflict: Thoughts on When the Supreme Court Will Address FAAAA Preemption for Broker Liability

By Jennifer Eubanks

Jennifer Eubanks

Attorneys are no strangers to conflict. We initiate it and resolve it every day. We are comfortable managing conflict. So it should come to no one's surprise that the defense bar representing transportation brokers is spoiling for a conflict.

On June 27, 2022, the United States Supreme Court denied certiorari in *C.H. Robinson Worldwide, Inc. v. Miller*, 142 S.Ct. 2866. Miller presented the question of whether a transportation freight broker can be sued for state common law torts, specifically negligent hiring, or whether the Federal Aviation Administration Authorization Act of 1994 ("FAAAA" or "F4A") pre-empts such claims. If the claims are preempted by the F4A, plaintiffs are not able to bring claims against freight brokers for negligent hiring, claims that are frequently made when the plaintiff's attorney believes the case is worth more than the motor carrier's insurance limits.

The Ninth Circuit Court of Appeals, the first federal appellate court to rule on this question, decided that the F4A applied to the claim of negligent hiring of an unsafe motor carrier in that the claim was "related to" the broker's services. *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1025 (9th Cir. 2020). However, it held that a "safety exception" in the F4A act applied. *Miller*, 976 F.3d 1031. The safety exception provides that the preemption of claims does not apply to "the safety regulatory authority of a State with respect to motor vehicles." 49 USCA § 14501(c). The Miller Court favored a broad interpretation of the safety exception, falling back on an approach the disfavors preemption. *Miller*, 976 F.3d 1027. Thus, the industry was left with an unfavorable decision in one circuit, and the appeal to the U.S. Supreme Court was denied.

Since then, all eyes have been on cases coming out of other circuits, with the hope that a conflict in the circuit courts of appeal might lead to the U.S. Supreme Court taking another look. The leading contender is *Ye v. Global Sunrise, Inc.*, 2020 WL 1042047 (N.D. Ill. March 4, 2020). In *Ye*, the district court granted a transportation broker's motion to dismiss the negligent hiring claims against it based on F4A preemption. The judge found that the connection of the broker to the safety of motor vehicles was too attenuated given that the broker did not own or operate vehicles. *Ye* at *4. Moreover, the court found that the plaintiff was not without remedy because she could still maintain an action against the motor carrier, which

was clearly encompassed by the safety exception. *Id. Ye* is currently pending in the Seventh Circuit Court of Appeals, and oral arguments were on December 5, 2022. Assuming the district court's decision is upheld, the industry has the circuit conflict that makes this issue more attractive for certiorari.

Another contender is *Gauthier v. Hard To Stop, LLC*, 2022 EL 344557 (Feb. 4, 2022). In *Gauthier*, the district court for the Southern District of Georgia sided with a transportation broker on the issue of the F4A preemption. That case is currently on appeal in the Eleventh Circuit. It's likely, therefore, we will eventually get a circuit split on the issue of broker liability preemption. When do we get the U.S. Supreme Court to seriously look at the issue? My guess is within the next five years. But don't hold me to it.

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Approaching and Litigating a "Traumatic Brain Injury" Case

By Jennifer Mauer Lee

Jennifer Mauer Lee

Everyone knows that a case involving a brain injury is a serious case to defend. The case becomes even more difficult when it is questionable if a brain injury truly occurred or if someone is diagnosed with post-concussive syndrome with continuing symptoms. This is largely difficult because most medical professionals will testify that someone with post-concussive syndrome has a lasting brain injury.

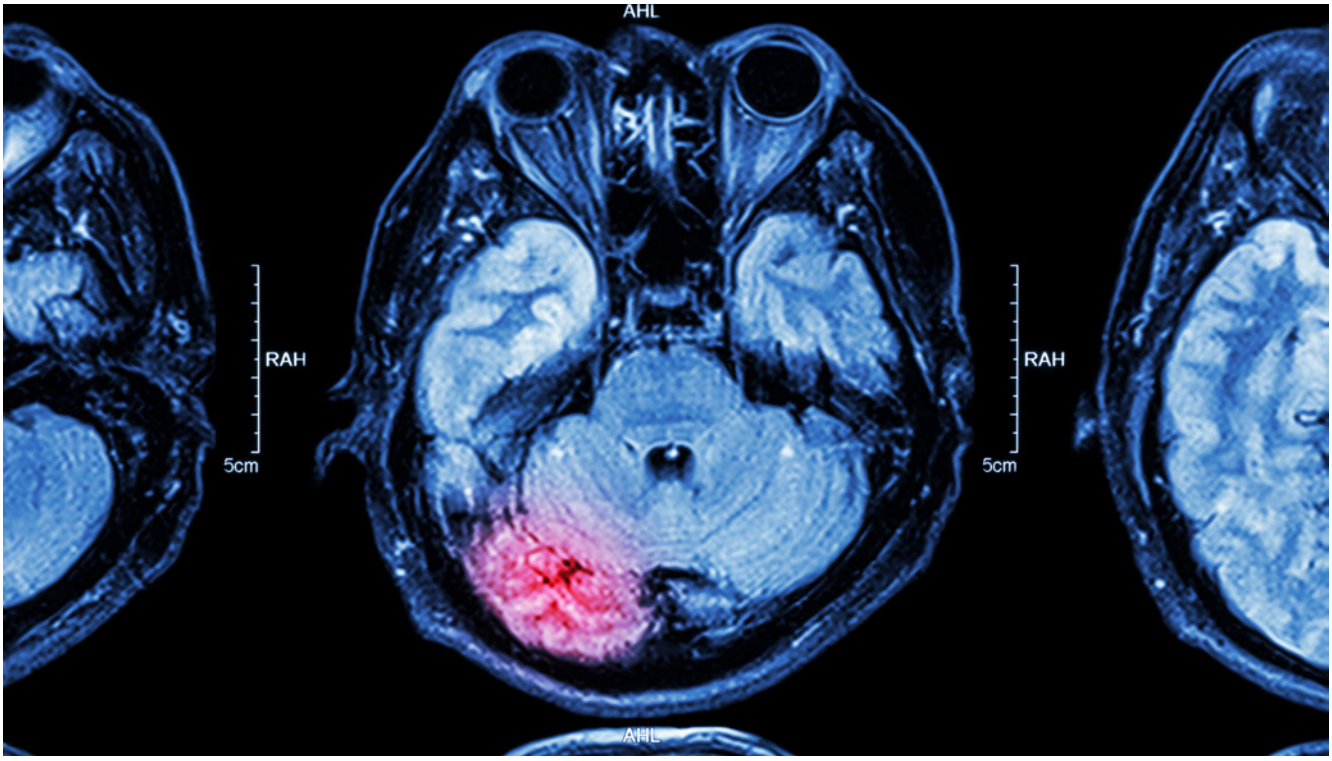
In the State of Texas, verdict awards in brain injury cases have ranged between $2,000,000.00 and $20,000.000 and even more in the past few years. In Dallas County, a recent verdict of over $4,000,000.00 was awarded for what the defense argued was a questionable mild traumatic brain injury. Thus, developing the facts surrounding the claimed brain injury is an essential part of valuing and defending your case.

Many doctors will diagnosis a person with post-concussive syndrome if they suffered any level of loss of consciousness or possibly without loss of consciousness at all. Post-concussive syndrome is considered by many as a brain injury; especially in light of much discussion about concussions in relation to the National Football League. So, what does one look at to develop evidence about an alleged brain injury?

Medical professionals look for a blow or a jolt to the head as the cause of a brain injury. Loss of consciousness is also important, but not essential. The Glasgow Coma scale is generally used by medical professionals to determine if a person had a concussion and if so, to what degree. The Glasgow Coma scale attributes numbers to different categories which are totaled to determine the level of loss of consciousness and/or brain injury. But, even if a person did not lose consciousness, other symptoms such as confusion may be viewed to support a diagnosis of post-concussive syndrome or another brain injury description.

CT scans of the head that return normal findings also do not mean that a brain injury did not occur. A CT of the head is a view of the structure of the head meaning that fractures or structural damage to the brain will be identified but post-concussive syndrome or other complications will not be shown. Thus, much of what the medical professional has to go on when determining if a brain injury is occurring, is the description of the patient. There are developments in the medical field that are attempting to make diagnosing a brain injury more concrete.

Diffusion Tensor Imaging is a type of "scan" that picks up tears in the white matter of the brain. This is important because white matter links areas of gray matter of the brain to produce thinking functions such as attention or memory. Thus, if



the white matter is damaged by a concussion, the connections may be disrupted and affect attention and memory. This, of course, has not been as widely used as other scans such as MRIs thus, the impact of DTI on brain injury cases is not yet widely known.

So, without use of scientific evidence such as a DTI, what supports a diagnosis of post-concussion syndrome? Doctors claim "ice-pick headaches" are one of the most common indicators of post-concussive syndrome. These are described as headaches that come on suddenly with severe pain as if someone is poking an ice-pick through the head. These headaches cannot be treated as they come on suddenly and then likely go away just as quickly. There are no studies to support how long these headaches will plague a person. Additionally, persons with post-concussive syndrome generally experience sleeplessness or any other symptom not experienced before the claimed incident. In terms of resolving these symptoms, one can take sleep aides and ibuprofen but there is no definitive cure other than time, if any at all.

From a defense standpoint, the key is to identify from the initial medical records if there is the possibility of a brain injury. Detailed review of the accident and medical records to determine if the mechanism of injury supports such a claim is necessary as well. Then, depending on treatment sought, it is important to determine any experts that can be retained to assist with defense of the case and understanding of the claims. Also, deposition of the Plaintiff and Plaintiff's main medical care provider is essential. Jury verdict research for your venue in regard to similar claims is helpful in assessing the value of your case as well. This information is a brief overview of how to litigate a brain injury case but the most important thing to note is that special care must be paid as most cases involving a brain injury will get the attention of most any jury.

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Cell Phone Usage: How Relevant is it Really?

The Supreme Court of Texas Ruling on Cellphone Discovery

By Melanie Cheairs

Melanie Cheairs

Often times, we find that Texas is on the cutting edge of legal trends. Unfortunately, of late, that cutting edge has given Texas the dubious honor of being home to some of the largest verdicts in the history of our nation. These verdicts are often produced as a result of trial court judges who are prone to let the Plaintiff's Bar run wild with discovery and thereafter, admissibility in trial. Fortunately, there are our occasional rulings that come down from the highest court in Texas, that may be able to bring a sense of reason back to one of the hottest issues in Transportation cases today- cell phone usage. Below is an analysis of recent Texas Supreme Court ruling, that while not directly dealing with a truck case, will have long reaching effect on companies who are invaded for information well beyond that which should be relevant for any litigation purpose.

On December 9, 2022, the Supreme Court of Texas granted mandamus relief to a corporate Defendant in an action arising from a chemical release at the Defendant's chemical plant.[1]

Plaintiffs in the action filed a motion to compel Defendant Kuraray America Inc. ("Kuraray") to produce months' worth of cellphone records from employer-issued cellphones assigned to five employees – two supervisors and three board operators.[2] After oral argument, the trial court granted Plaintiffs' motion and ordered Kuraray to produce the records.[3]

Kuraray filed for a writ of mandamus with the Supreme Court of Texas to vacate the trial court's orders. Defendant argued that the Plaintiffs had not shown that there was any causal connection between cellphone use and the chemical release, making cellphone data irrelevant to the Plaintiffs' allegations and rendering the trial court's orders overbroad and beyond the permissible scope of discovery.

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1 Cause No. 20-0268; *In re Kuraray America, Inc.*

2 These employees were tasked with monitoring a chemical reactor that over-pressurized over a 17-hour period, causing the reactor to release ethylene vapor and catch fire.

3 While Kuraray offered to produce information regarding cellphone activity by the employees from the day before the release to the time of the release, the trial court instead ordered Kuraray to produce cellphone data from its supervisors for a six-week period before the release, and from its board operators for a four-month period before the release.

The Court granted Kuraray's writ of mandamus, finding that the trial court abused its discretion by ordering production of months' worth of cellphone records without a showing that each individual employee's use of his cellphone could have been a contributing cause of the chemical release.

The Court issued a per curium opinion and ruled that:

- To be entitled to production of cellphone data, the party seeking it must allege or provide some evidence that the person of interest's cellphone use could have been a contributing cause of the incident on which the claim is based.
- If the party seeking the production of cellphone data satisfies this initial burden, the trial court may order production of cellphone data, provided its temporal scope is tailored to encompass ONLY the period of time in which cellphone use could have contributed to the incident.
- A trial court may not order production of a person's cellphone data for a time at which his use of the cellphone could not have been a contributing cause of the incident.
- Only if an initial production of cellphone data indicates that cellphone use could have contributed to the incident may a trial court consider whether additional discovery regarding cellphone use beyond that timeframe may be relevant.

In its ruling on this case, the Court found that:

- While there was evidence showing that Kuraray previously had issues with employee cellphone use in the control room, Plaintiffs did not allege that cellphone use by any Kuraray employee constituted negligence or was a cause of or contributing factor to the chemical release.
- Though Plaintiffs argued that the extended period of cellphone data is relevant because they alleged that Kuraray negligently failed to supervise its employees and failed to implement adequate policies to protect against cellphone use, Kuraray's policies and alleged failure to supervise cellphone use was relevant ONLY if there is some evidence that cellphone use could have been a contributing cause of the release.

This ruling imposes an important limit on the discovery of cellphone data in many of the typical cases involving our Transportation clients both on and off the road.. This ruling will be an important tool for defense attorneys to use in cases where plaintiffs try to abuse the discovery process to retrieve irrelevant information to bolster their arguments.

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Trial Tactics

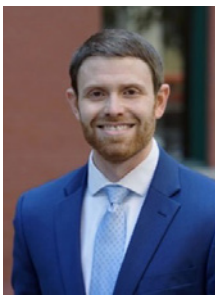
Covid Litigation: It's a New Dawn. It's a New Day. It's a New Life... and I'm Feeling Good!

Introduction

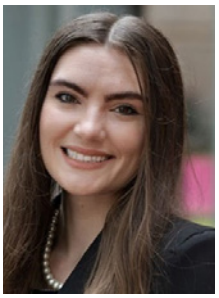
Along with its general impact on everyday life, the COVID-19 pandemic brought a wave of new challenges and concerns for litigators. In addition to being suddenly forced to adapt to the remote practice of law and its accompanying technical difficulties, litigators have had to juggle their ethical obligations to their clients with the new cybersecurity and practical issues presented by virtual work. Lawyers are faced with finding a way to embrace the positive aspects of remote work while also recognizing its detriments. Lawyers must also keep abreast of changes to the law resulting from the pandemic, including interpretation of once-standard contractual provisions.

To top it off, some courts are embracing their new remote capabilities, and law firms are seeing an increased demand for remote work among employees, which can be expected to continue into the future. It is anticipated that the remote practice of litigation is here to stay. As such, the following articles address these issues and provide timely considerations for litigators as we embark on the post-COVID era.[1]

1 Footnotes appear at the end of this section of articles.



Jason A. Proctor



Michaela L. Cloutie

Virtual Litigation: Practical Considerations

By Jason A. Proctor and Michaela L. Cloutier

If you're struggling to adjust to virtual court proceedings, you're not alone.[1] While attorneys, clients, and judges report positive experiences with virtual proceedings, most prefer final hearings and mediations occur in person,[2] and many attorneys report experiencing remote hearing mishaps.[3] But Covid-era litigation doesn't have to be stressful. Some simple suggestions can have you clicking "join meeting" anxiety-free in no time.

Preparation

Check the hearing notice in advance so you know where to "show up," and confirm that you have the correct link or passwords required for access. Restart your computer and open the programs you will be using ahead of time to confirm that your software is up-to-date, and to allow time to obtain IT support if necessary.[4] Be sure to check your computer's power source or battery level before the proceeding begins.

Familiarize yourself with the controls when using a new system—especially the camera and microphone functions. Take advantage of a court's "technology test drive" if one is offered—especially ahead of trials or other proceedings where appearances are paramount.[5] If no practice time is offered, most virtual meeting software has some variation of a "test call" option to ensure everything is working properly. If you have questions regarding the software you can or must use during the proceeding, contact the court staff or the meeting host in advance.

Dress Yourself, Your Background, and Your Computer for the Best

Judges appear to agree that the dress code for virtual court is the same as the dress code for in-person court.[6] While business attire "on the top" is the bare minimum, it's safer to also wear court-appropriate clothing on your lower half. You may need to step away from the camera during the proceeding,[7] and some courts might require participants to pan their camera around the room to demonstrate that they're alone.[8] It's important to display a professional environment.[9] If you are unable to curate a presentable backdrop, consider using a virtual background instead. Make sure your image is well-lit and that your camera is positioned near eye level.[10]

To avoid potentially embarrassing situations if you need to share your screen—and to ensure that your virtual meeting software operates as efficiently as possible—close all unnecessary programs and tabs. Remove unnecessary folders from your computer desktop to make it presentable,[11] or avoid showing your desktop altogether. And remember to hide any client communications or work product prior to sharing your screen.

During the proceeding, keep up good appearances by maintaining eye contact

with the camera. Avoid eating and drinking,[12] and minimize external noises, including sounds coming from your own computer, whenever you are unmuted.[13]

Establish the Ground Rules

Early in the pandemic, the Conference of State Court Administrators and National Center for State Courts recommended that judges check with each participant at the beginning of virtual proceedings to ensure they understood the procedure that would be followed and the manner in which they would be able to participate.[14] While judges may have ceased this practice over the past three years, attorneys shouldn't. Procedures and expectations related to party participation, camera usage, the mute button, and technological requirements vary between courts and types of proceedings.[15] The best practice is to confirm that you understand the manner and method of participation *before* the proceeding begins. Be sure to understand whether all participants should have their cameras on, whether microphones should be muted unless participants are ready to speak (including for objections), whether objections will be reserved due to potential internet lag, and how courts will handle a total loss of internet connection by one or more participants.

Exhibits

Verify that you have the latest version of any software you might need to show exhibits. Some courts have adopted litigation-specific exhibit software for virtual proceedings, while others allow litigants to use whatever software they already have.[16] Some courts request submission of exhibits ahead of time. Additionally, you should inquire about the court's procedures for physical evidence ahead of time, as it may require obtaining stipulations regarding authenticity or delivery of physical evidence to the court in advance of the proceeding.[17]

Attorney-Client Communications

Determine whether there is a designated procedure for attorney-client communications. Some courts create "breakout rooms" within Zoom sessions for attorneys to consult with their clients during breaks in the proceedings. But breakout rooms are typically controlled by the meeting host, meaning you must monitor the breakout room participant list to ensure you are alone with your client. According to Zoom,[18] breakout rooms can be recorded, but only by participants in the room. Ensuring you and your client are alone in the room will likely be sufficient to ensure your conversation is confidential, at least in a proceeding using the Zoom platform. Other methods of client communication—such as a phone call—may be less cumbersome, but be sure to confirm your computers are muted before calling. Also be wary the chat function within Zoom and similar platforms, as it can be difficult to ensure such messages are private, [19] and texts or emails should be safer options.

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Mohamed N. Bakry

A Lawyer's Obligations Under the ABA Model Rules in the Virtual Courtroom

By Mohamed N. Bakry

The ABA's Model Rules of Professional Conduct, Rule 1.1, states "A lawyer shall provide competent representation to a client." This includes legal knowledge and skill reasonably necessary for the representation. In 2012, the ABA added technological competency to Rule 1.1:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[20]

To date, forty states have adopted the amendment to Rule 1.1. Attorneys have accordingly improved their understanding of data security as it relates to emails, storage of documents, office software, e-discovery, and transfer of data. In March of 2021, the ABA explained, in an ethics opinion, that so-called technological competence is essential for virtual practices.[21]

The ABA Standing Committee on Ethics and Professional Responsibility declined to endorse strict rules relating to a lawyer's duty of technological competence but adopted a "reasonable efforts standard" and "fact-specific approach" based on the ABA Cybersecurity Handbook.[22] With the transition to remote work, attorneys and law firms were required to develop systems and processes to ensure compliance with the rules of professional responsibility, with a focus on the duties of confidentiality, technology competence, communication, and supervision. Law firms were tasked with identifying technological solutions sufficient to permit lawyers to reasonably access client files while working remotely, while also preventing data loss.

The legal industry experienced a sharp spike in the use of technology as a result of the pandemic. Overnight, attorneys were required to utilize and master virtual software to conduct depositions, mediations, conferences, jury deliberations, and trials. Law firms and attorneys were practically required to spend thousands of dollars on new technology or else be deemed incompetent, as the duty to render competent legal services is not excused by the circumstances of the pandemic. Attorneys are now required to navigate virtual depositions, utilizing exhibits, and impeaching witnesses in an effective manner to further the cause of their clients. Failure to do so could be viewed as a violation of Rule 1.1, because there is an expectation – by courts and clients – that lawyers be conversant in technology. It is widely accepted that attorneys cannot provide competent representation to clients if they do not know how to use email. It is becoming clear that the same will be true for attorneys who are not equipped to handle hearings, depositions, and conferences virtually.

Courts have signaled the use of video in certain types of proceedings could become the norm, avoiding rescheduled hearings and reducing back logs. For example, the U.S. Tax Court allows for remote mediation proceedings and document subpoena hearings. The judicial system has moved to e-filing, migrated a lot of motions practice, status hearings and "accelerated pre-COVID experimentation with online dispute resolution platforms, including diversion programs for evictions and other high-volume case types," said David Freeman Engstrom, co-director of the Stanford Center on the Legal Profession.[23]

Law firms will need to utilize increased technology with increasingly more attorneys engaging in full-time remote work. Increased remote practice is here to stay, after virtual offices open as law firms look to cut costs or meet new workforce expectations. More remote work has also demonstrated why attorneys need to master technical skills such as how to properly back up data and participate in virtual proceedings. Technical competence also means understanding how to safely store and transmit information and how to satisfy the ethical obligation to safeguard client information in the post-pandemic era. Other measures to take when working virtually include making sure third parties cannot access confidential client information, which includes listening-enabled devices.

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Jeffrey D. Van Volkenburg

Litigation Trends

By Jeffrey D. Van Volkenburg

Discussion concerning force majeure issues prior to 2020 usually focused on natural disasters and other events that, while significant and serious, were somewhat isolated to a particular geographic region or involved some type of one-time event that led to temporary change in operating conditions. As the dust begins to settle and we begin to take stock of where we are, versus where we were in late 2019 and early 2020, the concept of "force majeure" has obtained new vitality within the law of contract interpretation.

"In the parlance of contract law, '*force majeure*' (superior or irresistible force) generally means that a party to a contract is excused of its obligations because some unforeseen event beyond that party's control has prevented performance of those obligations or made performance excessively burdensome."[24] "A claim of '*force majeure*' is equivalent to an affirmative defense."[25] Force majeure appears to have been first referenced in United States case law as early as 1817 in *Beverly v. Brook*[26] and *Levy v. Stewart*.[27] If we fast forward to 2020, litigation involving assertions of force majeure expanded dramatically. A quick search revealed close to 250 reported decisions across the country (state appellate and federal courts only) that discussed application of force majeure in the context of COVID related issues.

Courts have been relatively uniform in noting that application of a force majeure clause, usually in the context of commercial contracts, is a question of contract interpretation. See, *Gap Inc. v. Ponte Gadea New York LLC*, 524 F. Supp. 3d 224, 234 (S.D.N.Y. 2021) ("In this case, Gap has not framed a genuine issue of material fact in connection with its frustration defense. First, to the extent Gap contends that New York State's blanket prohibition on non-essential business between March 22 and June 8, 2020, frustrated the purpose of the Lease, the possibility of just such a prohibition was referenced in the Lease itself, defeating any claim that the possibility was "wholly unforeseeable." (Lease § 1.7(H) (defining a "Force Majeure Event" to mean "a strike or other labor trouble, fire or other casualty, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, or any other cause beyond Tenant's reasonable control.") (emphasis added).

The *Gap, Inc.* opinion, and other writers on the subject, confirm that most pre-2020 commercial contracts did not maintain force majeure clauses that addressed pandemic related issues.[28] Consequently, courts have been asked to shoehorn the pandemic-related claims into more standard language, which usually listed some, or all, of the following: floods, fire, acts of God, embargoes, war, governmental laws, regulations or restrictions, riots and strikes, labor shutdowns and insurrections.[29] The near uniform reliance on mostly boilerplate language prior to 2020 led to significant issues as the pandemic impacted contractual relationships.

Many courts were faced with the analysis of whether a force majeure clause involving COVID-initiated contract issues fit within the "governmental" actions such as laws, regulations or restrictions. Courts attempting to draw on pre-COVID analysis have also examined whether mere economic hardship is sufficient to trigger application of the clause.[30] The issue of "proximate cause" also weighs heavily on the analysis of many courts, whether or not it is explicitly framed in such a manner.

In attempting to disseminate trends in litigation involving application of a force majeure clause moving forward, it appears that courts are trending away from permitting reliance on it to excuse performance, as related to the pandemic.[31] This is especially true in instances where courts examined situations where governmental restrictions had been lifted in whole or in part.[32] As a result, litigants should be aware and consider the potential scope of the relief that could be applicable, which differs from many pre-COVID force majeure considerations.

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Lindsey R. Freihoff

COVID-19's Impact on Litigation; Virtual Litigation Long-Haulers

By Lindsey R. Freihoff

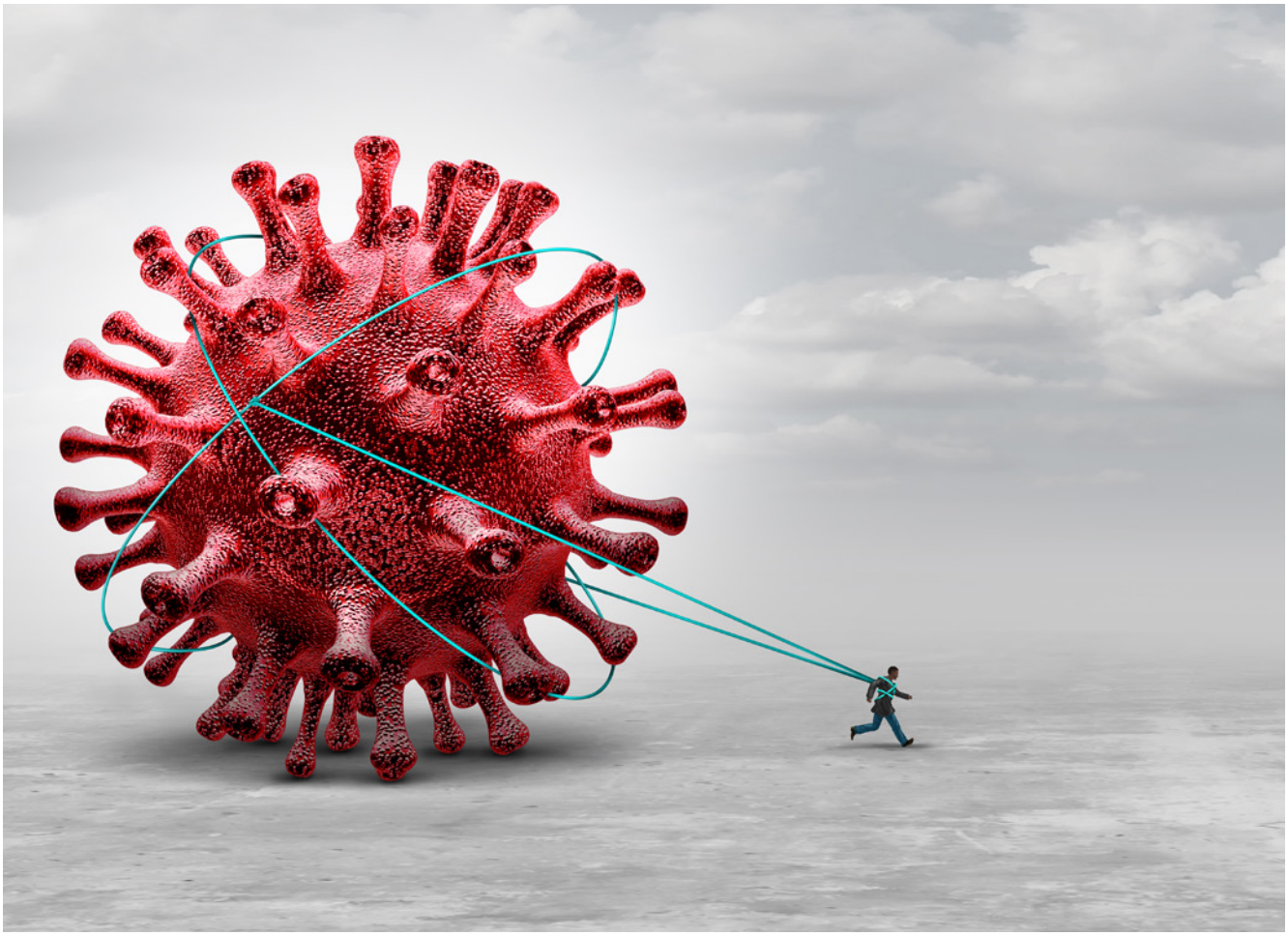
While COVID-19 continues to evolve, so does its impact on litigation. The viral effect on law firms, clients, courtroom operations and procedure has been no exception and is likely to continue.

According to an article by Chandler Ford published by the National Law Review, "the major changes in law firms nationwide include: law office management of remote workers, new types of attorney-client relationships, work-life balance for all firm employees and changes in billables and firm expenses."[33] Remote work has transformed to a critical incentive with attorneys and staff having more leverage than ever before and law firms having to be more creative and aggressive to retain and attract talent.[34] As many as forty-four percent of young lawyers surveyed in September 2022 opined that they "would leave their current jobs for a greater ability to work remotely elsewhere."[35]

Though presenting initial challenges, the shift to remote work has yielded unique opportunities for clients. The pandemic has instilled a new convenience with cost effective savings.[36] With limited travel expenses, representation is more accessible to clients. Hearings and mediations that were previously all-day events that required travel now may occur online. Hearings are also no able to be scheduled much more spontaneously.

Multiple courts have also started conducting remote jury trials with jurors appearing on-screen. Certain commentators have opined that this method was not "inherently worse or better," but instead was "a legitimate way of going forward . . . considerably better than the alternative, which would be no trial at all."[37] Even with recognition that jurors reported poor internet access problems or inability to acquire technology to appear, anecdotal experiences of judges interviewed by NPR reflected "that remote jury proceedings in the U.S. have increased participation, boosted efficiency [ ] reduced travel expenses . . . [and] [shown] more diverse jury pools."[38] In some states, it appears that this will remain an option for the future, as "[a] new law in California allows litigants to attend civil trials on video, rather than in person. King County Superior Court [told] NPR that it hopes to keep running remote jury trials and has proposed a rule to the Washington State Supreme Court that could allow remote jury selection to continue for both criminal and civil trials throughout the state." [39]

Despite reports of positive experiences, there are still underlying concerns that set preference for in-person proceedings. Attorneys report that "they have caught jurors driving, watching YouTube, and even asking for a break – mid-testimony – to tend to a dog."[40] Similarly, in depositions attorneys "cannot be sure what the deponent is looking at. In other words, deponents can be reviewing documents, communicating with their attorney or other persons by use of their iPhone, or even looking up information on the internet, all of which



might be impermissible in the normal setting."[41] There is also inherent difficulty in witnesses being able to review documents and actually mark on exhibits during questioning. Although a cost-efficient system has its benefits, it is not always the most effective for legal representation.

Clients' business obligations and their ability to enforce legal actions have also been impacted.[42] Arguably, one of the greatest of such impacts was the toll of the statute of limitations by administrative orders. For example, in Kansas, the Supreme Court "issued several administrative orders suspending 'all statutes of limitations' from March 19, 2020 through April 15, 2021."[43] This allowed plaintiffs additional time to comply with time limitations.[44]

Though the pandemic has caused myriad problems, its impact on the legal industry is ever-changing. It has created new opportunities and avenues to pursue justice, some for better and some for worse. We will continue to see a shift in the legal industry as it adapts to these challenges.

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Endnotes

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