



April 21, 2023 -- Issue 168

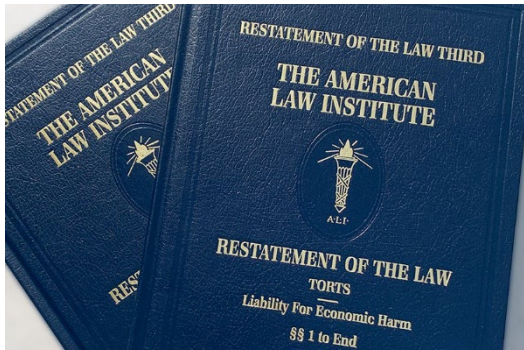


BUILDING NETWORKS BUILDING FRIENDSHIPS

Good Morning!

Here are your 5+ things to know on developments, upcoming events and progress being made on initiatives the Federation of Defense & Corporate Counsel is undertaking on behalf of all our members.

**#1 ALI's Restatement (Third) of Torts:
Comments Requested**



FDCC Members will recall the controversy surrounding the American Law Institute's Restatement of the Law, Liability Insurance. In 2019, the ALI started work on several parts of the Restatement (Third) of Torts, including a project now titled "Miscellaneous Provisions."

Last summer the Reporters decided to add a section (20 A) titled "Bad-Faith Performance of First-Party Insurance Contract." It's controversial but has largely flown under the radar. Some members may not even be aware of it. [This letter from Laura Foggan](#) (the industry liaison to the ALI project) outlines some of the concerns. The ALI has fast-tracked this effort and the **first party bad faith section** will be put to a membership vote at the ALI Annual Meeting taking place May 22-24 in Washington D.C. FDCC Defense Counsel member [Michael Aylward](#) has also been working on providing comments to the Reporters on 20 A.

Michael reports that the ALI may or may not get to Section 20 A on May 22. Less than two hours have been allotted for floor debate and the project Reporters stated last month that their main priority was to get through the sections addressing medical monitoring and "right of sepulcher," which are two of the lengthier and more controversial sections of the Miscellaneous Provisions project. Once those two topics are dealt with, the Reporters will seek consideration of Medical Malpractice, which was spun off as a separate volume in 2022. Only then will they turn to the seven remaining Miscellaneous Torts sections, including Section 20 A. Under the circumstances, and especially if there is significant interest and motion activity concerning Section A, further debate may be postponed to May 2024.

Here is an [analysis of the evolution and content of Section 20 A](#) that Michael has prepared.

The [current agenda](#) indicates Section 20A and other provisions of Miscellaneous Provisions are scheduled for discussion and a vote beginning at 10:30 a.m. on Monday May 22. Any [motions](#) with respect thereto must be filed by Friday May 12.

Please share any comments you may have on this important issue directly with [Laura A. Foggan](#) at Crowell & Moring.

#2 Skills Training Track at the FDCC Annual Meeting

By: Marisa Trasatti - Program Chair

This week we want to focus on some of our Skills Training Track presentations. These programs occur after the personal development sessions, and the topics include: the growing captive insurance market; social media crisis management, creative resolution strategies from the settlement of mass claims and more! We hope you can join us and participate in these thought-provoking conversations.



- On Tuesday, July 25th at 11:00AM, Sean Griffin, David MacKenzie, Rod Hughes, and Adam Sorini will discuss **“Why Go Captive? What’s on the Horizon and What is Fueling the Growing Captive Market”** Learn about the basics of captive formation so you can understand how companies can reduce total risk exposure.
- On Wednesday, July 26th at 9:45AM, Timothy Pratt and Simon Barker will present **“Managing a Crisis in the Social Media Age: Tips for Lawyers and Leaders.”** Our speakers will show you what to do when reputations are being attacked by the media, internet, employees, shareholders, and others.
- Lastly, on Thursday, July 27th at 10:00AM, John Morgenstern and Andrew Johnson will discuss **“Resolving Mass Claims – Lessons from Boy Scouts Trial and Drug and Device MDLs.”** Learn how to successfully navigate a multi-billion-dollar settlement with thousands of claimants. Our speakers will provide tips for reaching a settlement, selecting mediators, categorizing claims, and more!

Register here for the FDCC's Annual Meeting at Colorado Springs, CO at The Broadmoor Hotel, July 23-28, 2022. [Register Now!](#)

[Marisa Trasatti](#) is an FDCC Defense Counsel and Board member, She is also General Counsel of Sciton, Inc., and Program Chair of the 2023 Annual Meeting.

#3 Got Podcasts? New Episodes Released



FED
SPEAKS
A PRODUCTION OF THE FEDERATION
OF DEFENSE & CORPORATE COUNSEL

We've released three new FedSpeaks podcast episodes this week, which you can listen to at your leisure, and from wherever you may be. Simply click on any of the links below and stream the Podcasts directly from your phone or mobile device; or you can also get them directly from the FedNOW App

(click on the "... " in the bottom right hand corner of the App's home page); or on the FDCC website by clicking on the "Podcast's" tab at the top.

This week, we are pleased to provide the following interesting episodes:

- [A look behind the scenes of this year's Annual Meeting at The Broadmoor Resort](#). Listen in as FDCC Past President and Defense Counsel member, Mills Gallivan chats with Convention Chair, Casey Stansbury and Program Chair, Marisa Trasatti.
- **How FDCC Members are Getting it Done**: Defense Counsel member Valerie Kellner sits down with two fellow Defense Counsel members [Tarush Anand](#) and then also with [Jennifer Hoffman](#), to get their personal insights and reflections on their day-to-day efforts and interests.

You can also find the FDCC Podcast's on Apple iTunes, Spotify, Stitcher or wherever you get your Podcasts. Don't miss out on what 5,335 people have already discovered, by learning more about your Federation and the awesome people that comprise our membership!

#4 FL Tort Law Reforms Update By: Frank Ramos

On March 24, 2023, Governor DeSantis signed into law HB 837, transforming Florida tort law. With limited exceptions, the tort act applies to lawsuits filed after March 24, which prompted plaintiff firms to file tens of thousands of lawsuits on or before March 24. **That date, March 24, will be a battleground between plaintiffs and defendants. Let's discuss why.**



The Effective Date of the Tort Law At the end of HB 837, we learn its effective date. With two exceptions, the new tort law applies to new lawsuits filed after March 24. The two exceptions are:

1. The reduction of the statute of limitations from four to two years. This change applies to causes of action accruing after March 24.
2. Any right under any insurance contract in effect on or before March 24.

To the extent the tort law affects a right under an insurance policy, this act applies only to insurance policies issued or renewed after March 24. Some may argue that portions of the tort law are procedural and should be applied retroactively. Those making this argument must confront an earlier version of the bill, HB 837 c2, dated March 9. In that version, Section 17 states, "the procedural changes within this act are remedial in nature and shall apply to all pending prospective claims." This sentence did not make it into the final version of the bill. By considering this language and rejecting it, the legislature may have implied that no part of the law is remedial and, therefore, no part is retroactive. For defendants arguing that some aspects of the law should apply to suits filed on or before March 24, they must prepare to address this revision.

[Please click here to read the entire article](#)

Frank Ramos is an FDCC Defense Counsel Member and a Partner with [Clarke & Silverglate](#) in Miami, FL. Contact him at: framos@cspalaw.com.

#5 Application of "Eichleay" Delay Damages In Construction Disputes

By: Jeffrey D. Van Volkenburg



As states across the country continue to see new construction projects break ground, whether federal funding is involved or not, delays are an almost certainty due to labor shortages as well as the myriad of other issues that can arise.

For decades, courts have relied on what is commonly referred to as the “*Eichleay*”

formula as the proper method for computing delay damages arising from extended home office overhead costs.

The formula first appeared in *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688, 1960 WL 538 (July 29, 1960); see also *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1580 (Fed. Cir. 1994) (noting that the *Eichleay* formula as “the exclusive means available for calculating unabsorbed overhead” on federal construction projects); *George Hyman Const. Co. v. Washington Metro. Area Transit Auth.*, 816 F.2d 753, 759 (D.C. Cir. 1987) (noting that except “when parties have contracted specifically to use an alternate formula, courts and boards of contract appeals have applied the *Eichleay* formula to calculate the exact amount of recovery for home office overhead costs.”).

While not universally embraced, some courts have further extended the “*Eichleay*” method of computation of damages in disputes between exclusively private companies.

[Please click here to read the entire article](#)

[Jeffrey D. Van Volkenburg](#) is an FDCC Defense Counsel member and a Partner with [Varner & Van Volkenburg, PLLC](#), in Clarksburg, West Virginia. This article is submitted on behalf of the FDCC's [Construction Substantive Law Section](#).

#5.1 Welcome to Our New Members!



Please welcome our newly vetted and approved members!



[Jeffrey W. Johnson](#) is the founder and a Partner with the [Johnson Law Group](#) in Boca Raton, FL where he specializes in defending insureds and self-insureds in relation to their tort liability litigation and claims. He has been defending wrongful death, personal injury, premises liability, products liability, commercial, construction and transportation related matters since 1987.

He is the prior President of the Florida Defense Lawyers Association; and a current member of the Board of Directors of the International Amusement and Leisure Defense Association (IALDA); an active member of Council of Litigation Management (CLM); Defense Research Institute (DRI); Transportation Industry Defense Association (TIDA); National Restaurant and Retail Defense Association (NRRDA); and the local bar associations. Jeffrey and his wife [Beth](#) reside in Boca Raton.



[Christine J. Viggiano](#) is the Corporate Counsel for Litigation with [Caesars Entertainment, Inc.](#), in Las Vegas, NV, where she oversees and manages all of the general liability litigation for Caesars, as well as its subsidiaries, nationwide.

Christine is experienced in the areas of Insurance Litigation, Medical Malpractice, Health Law, Music (Synch and Sample Licenses and Negotiations), Entertainment, Sports Agency, Intellectual Property, New Media, Technology, Mobile, Internet, Sexual Assault & Molestation, Casino Litigation and General

Transactional Law. Prior to her current responsibilities, Christine was an attorney with Reilly, McDevitt & Henrich, P.C. in Cherry Hill, NJ.

Welcome Aboard!

#5.2 What's on the Docket? FDCC's Upcoming Events



Please register and mark your calendar to attend the following FDCC events of relevant and timely substantive content:

- **April 25th from 5:30PM - 7:30PM FedMEETS** at [One Market Restaurant](#) located in One Market Plaza, One Market Square in **San Francisco**. The event is being organized by FDCC Defense Counsel **Carla Hartley at Dillingham Murphy**. [Please RSVP to Karen Nguyen](#) no later than next Wednesday, April 19th.
- **April 28 - 30, 2023: FedTechU** at the Headquarters of Veritext in Philadelphia, PA. [Click here to register.](#)
- **May 17, 2023 at 2:00PM ET / 11:00AM PT: Roundtable for In-House Insurance Members.** [Click Here to Register.](#)
- **June 14, 2023 at 1:00PM ET - FDCC Law Practice Management Town Hall Meeting: "Strategic Planning: process, purpose & goals."** Join Moderator Jody Briandi and her guests: John Trimble; Steve Embry & Frank Ramos. [Click here to register.](#)

- **July 23 - 28, 2023: FDCC's Annual Meeting at The Broadmoor Resort & Hotel** in Colorado Springs, CO. Convention Chair: [Casey Stansbury](#). Program Chair: [Marisa Trasatti](#). Registration coming soon.
- **October 22 - 24, 2023: FDCC's Corporate Counsel Symposium** at the Philadelphia Downtown Marriott Hotel in Philadelphia, PA. *"The Leader in WE"*. Co-Chairs: [Alison Christian](#) and [Bill Vita](#).
- **November 8 - 10, 2023: FDCC's Insurance Industry Institute (I-3)** at the Sheraton Times Square Hotel. *"Insights, Innovation & Inspiration: New Approaches for Insurance Leaders."* Co-Chairs: [Micalann Pepe](#) and [Alycen Moss](#).
- **February 25 - 29, 2024: FDCC's Winter Meeting at the Vinoy Renaissance Hotel** in St. Petersburg, FL. Convention Chair [Sean Griffin](#); Program Chair: [Frank Ramos](#)

...and finally...
**Have a Nice Day
Kelley Barnett!**



If you have not yet had the chance to meet Kelley Barnett, you need to put that on your "To Do" list.

"Multi-talented," "trusted," "passionate," and "widely respected" are but a start to the attributes and accolades used to describe her many professional talents. Kelley is Senior Vice President and Counsel at [AmTrust Financial Services](#) in Cleveland, OH and Chair of the FDCC's Ladder Down Program. She has been a valued Corporate Counsel member of the FDCC since 2017.

Kelley has been practicing law for nearly 24 years, having worked in the public sector for several years as a criminal prosecutor, the private sector for 12 years as a law

firm partner, and currently as in-house counsel. Her legal experience includes commercial contract, employment, M & A due diligence, product liability, and business litigation matters, as well as experience conducting internal investigations into a variety of issues.

Currently, Kelley is a senior advisor to the AmTrust executive team and businesses in the U.S., Mexico, and U.K. on a variety of legal and regulatory issues, including antitrust matters, data governance and data privacy, corporate commercial and employment litigation issues, and discrimination, DOL, EEOC, OSHA, and M&A due diligence matters. She is also responsible for negotiating and drafting the commercial contracts for AmTrust's third-party business partners and service providers for AmTrust's claims, finance, HR, underwriting, and marketing functions.

Aside from her daily responsibilities, Kelley is also passionate about promoting initiatives focused on diversity, equity, inclusion and belonging. She founded the Cleveland chapter of our Ladder Down initiative in 2019 and assists in running its programs. She is also a member of the FDCC's national Ladder Down committee and an active member in the [Cleveland Metropolitan Bar Association's Racial Equity and the Law Workgroup](#): "Interrupting the Legal Profession's Systemic Inequities."

Kelley has developed a respected reputation for constantly looking for ways to build relationships, perfect her legal skills, and pursue justice for some of Ohio's most vulnerable victims.

Wednesday was Kelley's birthday! Would you please join us in sending her a slightly belated congratulatory email, and thanking her for all she is doing - not just for the FDCC - but in also elevating the professionalism of our industry? Her email is:

Kelley.Barnett@amtrustgroup.com

Congratulations Kelley, and all the very best to you, Edgar and the family in the years to come!

Why FDCC?

"To be the inspired community of vetted defense counsel, exceptional leaders and even better people."

FEDERATION OF DEFENSE & CORPORATE COUNSEL



FDCC

DEFENSE LAWYERS. DEFENSE LEADERS.



**KEEP
CALM
AND
DEFEND
ON**

Be Exceptional Today!