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US LAW

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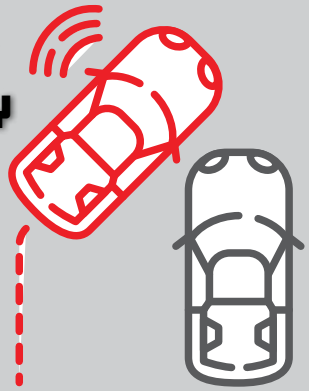

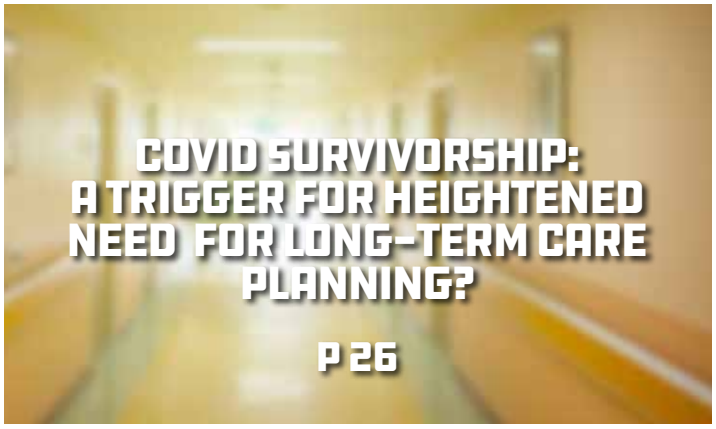

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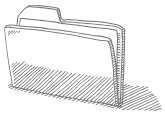

from the CHAIR'S DESK

As we hit the home stretch to 2020 and eagerly await the start of a new year and new opportunities, I extend heartfelt thanks to our USLAW membership, their clients and the broader client community, our dedicated and exclusive corporate partners, and our mighty staff for their collective commitment, support and collaboration during this pandemic. The combined efforts have resulted in our ability to pivot and deliver virtual programs, events, networking, and service nearly nonstop since the start of the pandemic. In addition, our members have continued to deliver insightful and timely content, alerts, compendia, and articles such as the ones included in this issue of *USLAW Magazine*.

As you read this issue, you will find content centered around COVID-19, business implications to consider, and how to move business forward in a variety of industries. We also recognize there is much to plan for in 2021 and beyond and you will see articles on artificial intelligence, mergers & acquisitions, drones, long-term care planning, whistleblowing, juror pool composition and much more.

The strength and resilience everyone has shown in the face of this most challenging year is commendable. We still have a long way to go to return to what most might define as "normal," so please know that our USLAW NETWORK community stands ready to support you. Through our exceptional accessibility, rapid response, jurisdictional coverage, and resources, we will help you meet your legal needs.

Please enjoy the current issue of *USLAW Magazine*. Please connect with us and take advantage of the many complimentary resources available via uslaw.org. As always, thank you for your support of USLAW NETWORK.

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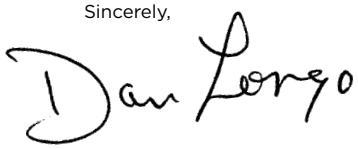

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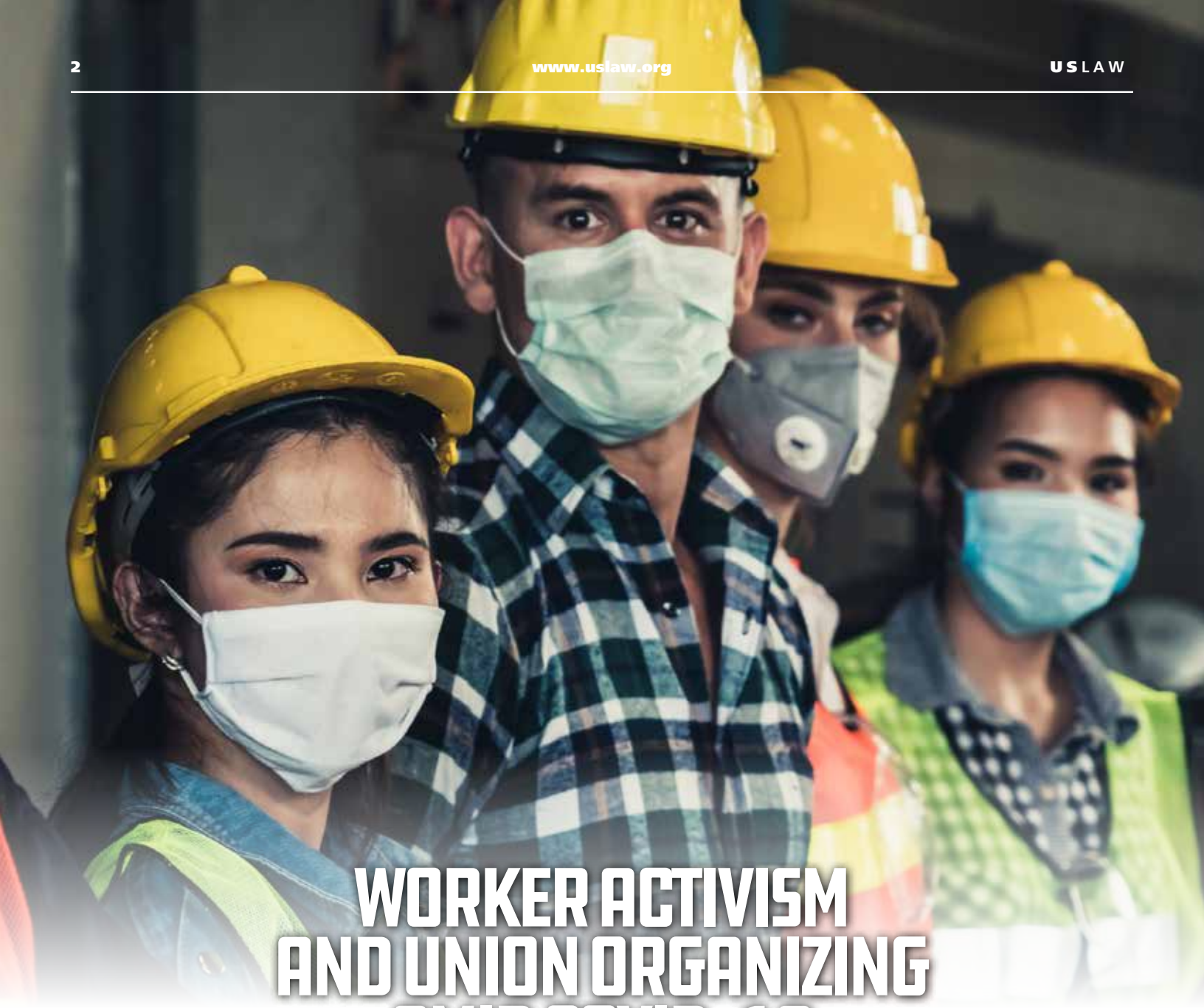

WORKER ACTIVISM AND UNION ORGANIZING AMID COVID-19

Beverly P. Alfon SmithAmundsen LLC

As the pandemic has worn on, and more "essential workers" have fallen ill with COVID-19, worker activist groups ("worker centers") and labor unions have come into view, front and center.

WHAT IS THE DIFFERENCE BETWEEN A WORKER CENTER AND A LABOR UNION?

Labor Unions: These are the traditional organizations that most of us are familiar with. They are usually industry-specific and legally recognized as the exclusive bargaining representative of a majority within a group of workers (a bargaining unit). Unions are required by federal law to bargain with the employer of the bargaining unit, regarding work terms and conditions, most of which are documented within a collective bargaining agreement (CBA). A CBA typically includes a "no strike" clause that prohibits the union from engaging in a strike or work stoppage during the effective period of the CBA. It also usually requires the union to raise its gripes through an agreed upon grievance and arbitration process.

Worker Centers: These are typically grassroots, nonprofit organizations, with ties to a particular community through language, culture, or religion. These groups commonly identify their purpose as helping workers to "organize," become knowledgeable about their rights as workers, and obtain support for their exercise of those rights. Unlike traditional labor unions, these groups do not operate under strict federal reporting and financial disclosure

requirements or the constraints of "no strike" clauses that are often part of a CBA between a union and employer.

The pandemic has given many labor unions a platform to revitalize and actively promote their purpose to the public and their members. Since mid-March, labor unions have been highly visible in the press. In May, the AFL-CIO (the largest federation of international labor unions in the U.S.) filed a lawsuit in federal court against the Occupational Safety and Health Administration (OSHA), seeking to compel the agency to issue an emergency temporary standard that would mandate certain safety actions by employers. At the end of July, the United Food and Commercial Workers International Union (UFCW) and other local unions sued the U.S. Department of Agriculture (USDA), claiming that the federal waivers that the agency granted to Tyson Foods to speed up operations at chicken processing plants were increasing the likelihood of coronavirus spread and putting workers in danger. The UFCW has even started its own contact-tracing programs for its 1.3 million members. More recently, we've also seen teachers' unions in a number of states sue to block officials from reopening schools over safety concerns. There is no question that labor unions are using the pandemic as an opportunity to reinvigorate the labor movement.

The pandemic has also spurred many non-union workers to take action. Afterall, non-union employees can walk off the job to protest safety concerns and still be protected under federal labor law (the National Labor Relations Act), which protects these concerted activities, regardless of whether the employees are represented by a union. There have been walkouts to protest unsafe work conditions in nonunion workplaces such as Amazon warehouses in Staten Island, New York, and Amazon-owned Whole Foods grocery stores in Chicago and other locations; and McDonald's workers in Chicago have sued the corporation over safety concerns. What is important to note, however, is that much of this "non-union activity" has occurred with the support of worker centers – which are often supported by established labor unions. For example, the Service Employees International Union (SEIU) openly backed the McDonald's workers who fought in court for more safety protections. At the end of July, two business-backed groups filed a complaint with the U.S. Department of Labor, asserting that a worker center in Washington should be subject to the same reporting and disclosure requirements that unions are, because the worker center allegedly received $15.5 million in payments from various labor unions. So while some non-union workers may be more apt to seek assistance from worker centers than the traditional labor unions – make no mistake that these worker centers are a gateway to labor union organization of these workers.

Even the rhetoric from the AFL-CIO has been noticeably focused on "all workers" as opposed to "their members." After facing a continuing decline in membership, unions seemingly recognize that they cannot let this opportunity to organize more workers pass them by. For example, in an April 30 opinion piece published by the CHICAGO SUN-TIMES, Gary Perinar, executive secretary-treasurer of the Chicago Regional Council of Carpenters, declared: "The importance of unions is more obvious than ever during the COVID-19 pandemic…Of all the injustices exposed by this public health crisis, the risks faced by non-union workers are the most apparent." It was a direct call to non-union workers.

At the very least, the recent uptick in worker activism signals that there are groups of employees who are not currently represented by a labor union (and who may have never considered a union before this pandemic), who may be ripe for union organizing. As businesses move forward, and employee concerns increase regarding safety at work, wages, paid sick leave, child care, disability accommodations, and the status of laid off employees, worker activism is likely to continue percolating. Job insecurity, safety concerns, and benefits are the very matters that unions rely upon to organize workers.

IF YOU HAVE ANY NON-UNION EMPLOYEES WHO HAVE VOICED CONCERNS OVER WAGES, JOB INSECURITY, SAFETY, AND BENEFITS OVER THE PAST SEVERAL MONTHS, NOW IS THE TIME TO ASSESS YOUR VULNERABILITY TO ORGANIZATION AND CONSIDER YOUR AVOIDANCE PLAN.

1. Identify who your supervisors are (as defined by the National Labor Relations Act) and get them trained on identifying and dealing with protected, concerted activity and union organizing. A true "supervisor" cannot be represented by a union and is not protected by the NLRA. They are also agents of your company—which means their actions can create liability for your company—so training is key. They need to know what they can and cannot do under the law.
2. Reevaluate your existing policies for clarity, perceived unfairness, and employee relations. What have employees raised concerns about over the last 6 months? Last year? A union will often focus employees on what they consider to be unfair policies.
3. Benchmark wages and benefits. What are the area wages and benefits in your specific industry? A union will often promise more money and better benefits. So, it is best to know now and be prepared with a response.
4. Identify employee relations problems now and deal with them before employees turn to a union. Get feedback from the group of employees who are vulnerable to union organization. Sometimes union avoidance is as simple as tweaking a supervisor's management style.
5. Train management on positive employee relations. Your supervisors need to know about the importance of providing regular feedback to employees and maintaining open communication with them.
6. Get a communications plan in place in the event that union organizing begins or has begun.

Merely being aware of a potential threat of union organizing or other protected, concerted activity at your workplace is not enough. Thorough assessment and planning are necessary now, so that if the need arises, responses can be timely, effective, and within the parameters of the law. Also, keep in mind that if your employees are already engaged in concerted activity to object to or seek to improve their work terms and conditions, their conduct is generally protected by the National Labor Relations Act – whether or not they belong to a union. An employer must tread carefully under these circumstances as any adverse, discriminatory, or coercive actions may be deemed a violation of federal labor law.

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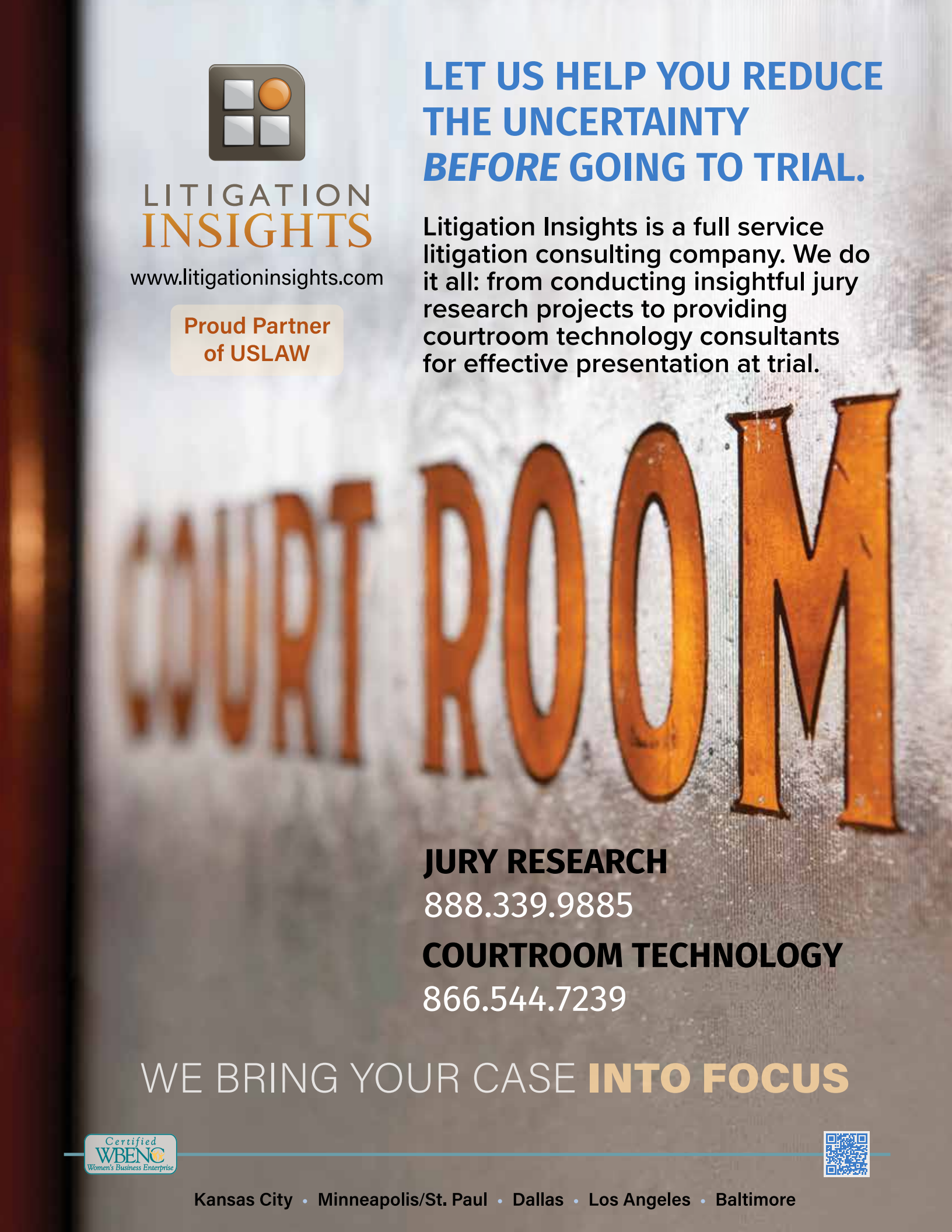
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FAILURE TO SATISFY THREE NEW REQUIREMENTS COULD PUT YOUR TRADEMARK AT RISK

Katie Markert Barclay Damon LLP

The preceding year showcased several procedural changes related to the prosecution and maintenance of trademark filings before the United States Patent & Trademark Office (USPTO). In this article, I take a look at three seemingly benign procedural changes that are showing a lasting consequence on securing and maintaining trademark registration rights in the United States.

These new procedural requirements may feel like a nuisance to trademark holders, but the USPTO's overarching goal is to reduce the increasing number of trademark filings with improper representations and claims and improve the integrity of the register. To accomplish this goal, the USPTO now requires trademark holders to provide an email address and disclose their domicile address, and non-U.S. trademark holders are required to hire licensed U.S. counsel.

Failure to comply with these new requirements can impact a trademark holder's ability to obtain a filing date with the USPTO and may lead to increased time and money spent by trademark holders to secure and maintain rights.

TRADEMARK HOLDER EMAIL ADDRESS

Effective February 15, 2020, all filings made with the USPTO with respect to new or pending applications and registered marks must provide an email address for the trademark holder. This requirement applies regardless of whether the trademark holder is represented by U.S. counsel, in which case counsel also provides its email address.

A filing date for new applications will not issue if this rule is not followed. The

singular exception is a request for an extension of protection under the Madrid Protocol, which will be granted a filing date. Further, the USPTO will not request an email address for the trademark holder of a request for an extension of protection under the Madrid Protocol if the application is otherwise in a condition to proceed to the publication phase.

In the lead up to this rule's implementation, considerable concern was voiced by trademark practitioners regarding practical consequences that may result, which led to several delays of the rule's effective date.

One such concern was, and remains, adequately protecting trademark holders represented by attorneys. When the rule first took effect, the USPTO's position was that it would not disclose in its Trademark Status and Document Retrieval system the trademark holder's email address for those filings submitted by an attorney, but the document filed (and also publicly available) would not be altered to mask the trademark holder's email address. This meant that holder e-mail addresses could be located fairly easily through a review of the USPTO's publicly available records. It was swiftly learned that this system was inadequate to deter bad-faith actors desiring to capitalize on accessibility to the email addresses of trademark holders for purposes of distributing misleading communications. The USPTO responded, and the current practice is that email addresses for trademark holders represented by U.S. attorneys are masked in publicly available documents maintained by the USPTO.

Likewise, concern was expressed that trademark holders with ongoing representation by U.S. counsel may receive USPTO official notices that are also transmitted to counsel and that such duplicative correspondence may cause confusion for trademark holders. At this time, the rule is still too fresh to know the extent to which this concern will come to life.

From a practical perspective, it is well advised for trademark holders, whether or not working with U.S. trademark counsel, to establish a general email account for satisfying this requirement. In doing so, trademark holders mitigate issues related to personnel changes (and the attendant termination of email accounts) and inadvertent disclosure of employee-specific email accounts to bad-faith actors.

FOREIGN TRADEMARK APPLICANTS & REGISTRANTS MUST HIRE U.S. COUNSEL

Effective August 3, 2019, the USPTO implemented a new rule requiring all applicants and registrants with a non-U.S. domicile be represented by an U.S. licensed attorney. Prior to this rule taking effect, a trademark applicant or registrant was able to choose whether or not to hire counsel, regardless of such applicant's or registrant's position as a U.S. or foreign person or entity.

This new rule focuses on the term "domicile" to determine whether a trademark holder is required to comply with the rule and hire an attorney. The Code of Federal Regulations defines "domicile" at 37 C.F.R. §2.2(o) as meaning "the permanent legal place of residence" of an individual or the "principal place of business" of an entity.

Submissions filed following the rule's effective date are reviewed by the USPTO to determine if the domicile address listed in the filing is a foreign address. Where the record reflects a foreign address, the USPTO then checks to see whether the record identifies a U.S. attorney as counsel. Where U.S. counsel is not identified, the USPTO issues a refusal in an official action that provides the trademark holder six months to hire U.S. counsel to appear as attorney of record in connection with the trademark application. Failure to satisfy the requirement can result in the USPTO issuing a final refusal.

Trademark holders who attempt to subvert the U.S. attorney requirement by updating the domicile address to a U.S. address will undergo additional inquiry and be required to provide documentation to support the change of address representation.

As one example, this rule imparts a meaningful change to trademark holders filing with the USPTO for an extension of protection under the Madrid Protocol. The Madrid Protocol is a filing treaty intended to be a cost-effective streamlined procedure for trademark holders to secure rights in multiple countries without the need to hire a local agent at the filing phase. In practice, any party utilizing the Madrid Protocol and designating the United States for a registered extension of protection must be prepared to receive an official action requiring appointment of U.S. counsel regardless of whether there are other substantive or procedural issues warranting refusal by the USPTO.

THE USPTO MUST KNOW WHERE TRADEMARK HOLDERS RESIDE

Contemporaneous with the requirement for foreign trademark holders to hire U.S. counsel, the USPTO implemented a change related to use of post office box addresses. Now that trademark holders must provide a domicile address, a post office box address or other similar variation that lacks a street address alone is insufficient. This change impacts all trademark holders filing at the USPTO regardless of status as a U.S. or foreign individual or entity.

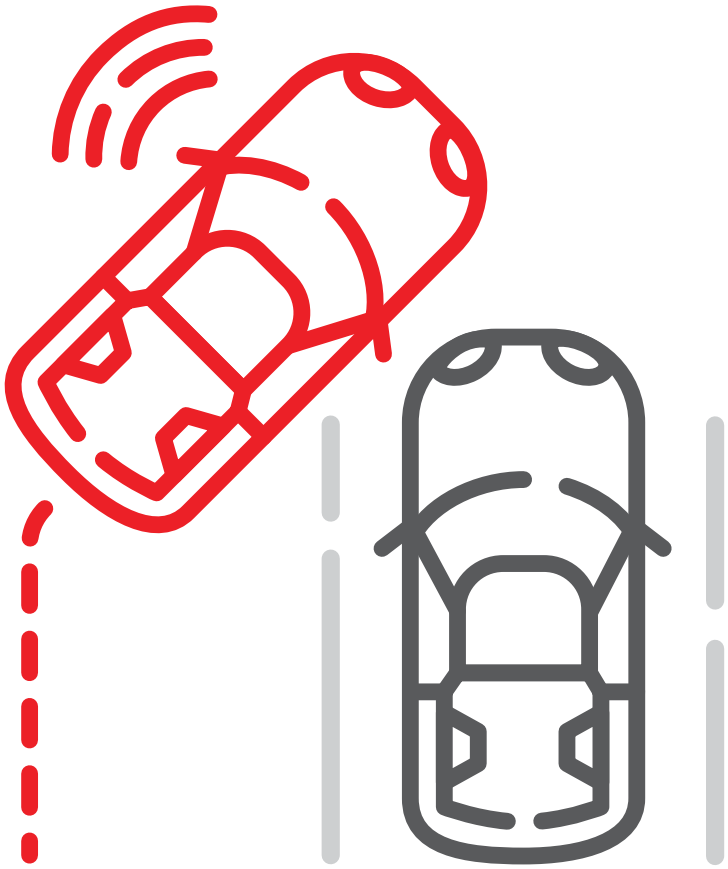
Trademark holders are cautioned against attempts to circumvent this requirement by securing a personal mailbox at businesses like The UPS Store, where a real street address is provided. In other words, this type of address, while displaying a street address, is not a physical address where a trademark holder lives or conducts business. The USPTO has systems in place to identify these types of "improper" addresses.

While a post office box address may be used to file a trademark application and obtain a filing date, the USPTO will refuse registration until such time as the trademark holder provides its domicile address. Likewise, holders of registered marks must comply with this requirement in connection with maintenance filings.

In addition to the USPTO requiring the domicile address, such information is also made a part of the USPTO's public record for applications and registrations. This means that well-intentioned and ill-intentioned actors can easily exploit the USPTO's online database of publicly available records to obtain the domicile address for individuals and businesses. The USPTO recognizes that situations may arise where a trademark holder has a legitimate reason why its domicile address should not be public. To address those situations, the public component of this rule may only be waived in circumstances where a trademark holder makes a successful showing in a petition to the director of the USPTO requesting relief from this rule due to extraordinary circumstances.

Trademark holders are encouraged to be mindful of and appropriately comply with these three procedural changes to avoid unnecessary delay and expense in connection with securing and maintaining U.S. trademark registration rights.

Katie Markert of Barclay Damon LLP concentrates her practice on trademark protection, including selecting, searching, and clearing trademarks; developing brand portfolios; monetizing and licensing intellectual property; and enforcing intellectual property rights. She routinely prosecutes trademark applications before the USPTO and handles appeals of decisions on the registrability of trademarks as well as trademark opposition and cancellation proceedings before the Trademark Trial and Appeal Board.



THE APPLICATION OF STRICT PRODUCT LIABILITY PRINCIPLES TO ACCIDENTS CAUSED BY ARTIFICIAL INTELLIGENCE

Shane O'Bryan and **Samantha R. Wright** Middleton Reutlinger

INTRODUCTION

The year is 2020. A global pandemic, killer wasps, and now …killer robots? At this point, it is hard not to believe all of these as true. In fact, the reality is that all of these are truths. While killer robots sound like the plotline to 2004 science fiction film I, Robot (which ironically was set in 2020), artificial intelligence advancements have made these robots more than science fiction. Today, machines and robots have elite and sophisticated programming that make them both extremely helpful and potentially dangerous.

While the global pandemic has put a pause on many aspects of life, the progress and advancements in the artificial intelligence realm continues. Many industries are responding to this new norm and trying to understand the risks in this new and exciting field. One major question is how do we determine who is responsible when a machine utilizing artificial intelligence fails?

WHAT IS ARTIFICIAL INTELLIGENCE

Artificial Intelligence, or AI, is any computer system or program that is able to recognize an event or situation, and decide to do, or not do, something. These programs "think" and behave in a manner that mirrors that of a person, without the risk of fatigue or exhaustion. Efficiency is the goal for most companies and people in their daily life. AI robots provide an efficiency that humans simply cannot.

Manufacturing industries are utilizing AI to boost efficiency and production numbers. Assembly lines and machines can be programmed to move and perform at levels far beyond that of a person. This capability allows for much greater production. Everyday we utilize a form of AI to make life easier.

We dictate our texts to Siri, and our phones contain and control everything from finances to how we arrive to work. We can lock our doors and set our alarms from hundreds of miles away with the press of a button. Alexa can wake us up, start the coffee maker, and order more pandemic snacks without us lifting a finger. Once upon a time, cruise control was the most our cars could do, now our cars can drive themselves.

The question is what do we do when these machines we have programmed to behave intelligently begin to "think" outside of the programming and capabilities we thought they were capable. Afterall, intelligence is the ability to acquire and apply knowledge and skills. It is not unrealistic to expect AI to learn and adapt as needed.

So, what happens when the AI expands beyond its programming and "malfunctions" to the point of causing an accident? Who is responsible? The manufacturer, designer, programmer, owner or operator? The unknown of AI makes the actual implementation of laws and regulations a difficult path to determine, but one of great importance. If AI is capable of causing damage to persons and property, someone (or something) will be held accountable. But should these claims be governed under a traditional product liability framework?

IS AI A PRODUCT OR A SERVICE?

In order to determine whether product liability principles will apply in the field of AI claims, the initial question that must be answered is whether the courts will consider AI to be a product or a service.

Software has not traditionally been considered a "product" for product liability purposes, under either the Restatement Second or Third of Torts. And although the designation of whether AI should be considered a product is not fully defined, one court has recently waded into the issue. In Rodgers v. Christie, 795 Fed. Appx. 878 (3d Cir. 2020), the Third Circuit Court of Appeals applied the definition of a product contained in the Restatement (Third) of Torts, in holding that a multifactor risk estimation software program, used in evaluating the risk to the community of prisoners considered for release, was not a product for purposes of a strict liability claim brought by the family of a man murdered by a recently released prisoner. The court relied upon the Restatement Third of Torts, which defines a "product" as "tangible personal property distributed commercially for use or consumption." The court declined to deem the software system a product because it was "neither tangible personal property" nor "analogous to" it. Instead, it was an "algorithm" or "formula" that analyzed various factors to estimate the risk of an offender to the community. The court further found that the risk estimation software would not be deemed a "product" because "information, guidance, ideas, and recommendations" could not qualify as a product under the Restatement.

Notwithstanding the Restatement Third definition, the ultimate designation of AI as a product or service is far from settled. Resolution of this issue is extremely important, however, because if AI is a product, strict liability principles apply; if AI is a service, it will not.

STRICT LIABILITY

Strict liability claims fall into one of three categories: Defective design, defective manufacturing, and failure to warn. Some commentators argue that strict liability is the best response to the growing AI industry as these intelligent machines pose an increased risk of harm to individuals. If AI causes an injury or spontaneously malfunctions, negligence will not have to be proven, and an innocent party will not bear the financial burden of such an accident.

It is not yet clear how these principles will be applied in more concrete applications such as self-driving cars. Self-driving cars are a convenience that appeal to many consumers. Even if the car is not fully autonomous, the smart systems in place allow the car to do a lot for the operator. These cars can stop themselves to avoid an accident or parallel park with only the press of a button. However, once the car takes control, is the operator still at fault? If the car is programmed to think and react, one might assume the operator can rely on this intelligence. This may seem true, however, the car is still a car.

With regard to partially autonomous vehicles, strict products liability may not be the best liability structure because an operator should still have ultimate control and responsibility over the vehicle. Of course, the product should be provided with full and adequate warnings and instructions about the limitations of the AI and the role of the operator.

In contrast, some argue the application of strict liability principles to accidents involving fully autonomous vehicles is fair because the manufacturer has implicitly promised to provide a fully autonomous vehicle that does not need human intervention to safely operate. But what is the standard to apply in determining whether a defect exists in the AI? Some jurisdictions apply the consumer expectations test to product liability claims. Arguably in those jurisdictions a plaintiff could argue they reasonably expected the vehicle to avoid collisions as a matter of course. But many jurisdictions apply the risk utility analysis to determine whether a product is defectively designed, asking whether the product creates such a risk of an accident that an ordinarily prudent manufacturer would not have put it on the market. How do you determine whether a defect in the AI exists under this standard? Should you compare the accident incident rate of the autonomous vehicle with that of a human driver? Surely, the autonomous vehicle will have a significantly lower accident rate than human driver. If this is the standard, how are injured persons expected to recover?

An interesting proposal in the AI world is to offer insurance to drivers for accidents involving fully autonomous vehicles. The policy would be used to offset the damages caused by accidents related to AI malfunctions. States could require this insurance for autonomous vehicles. Similar to a warranty with a product, this insurance would provide some protection to the victim, the owner, the manufacturer, and those responsible for designing the AI.

CONCLUSION

The technological advancements we have made with regard to AI are vast and profound. The AI industry is thriving. But in order for this industry to continue to advance we will need to determine how to allocate the risk of loss when things go wrong. Product liability principles seem to provide an obvious framework for determining liability, but as shown above, it is not always that simple and we still have a way to go.

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Business Interruption Insurance Lawsuits Related to COVID-19 SHUTDOWNS EXPLODE

William B. Graham and **Melisa C. Zwilling** Carr Allison

The coronavirus disease pandemic came out of nowhere and has literally shaken almost every individual and business to the core. While the scientific and medical communities bear the tremendous burden of saving human lives, the insurance industry is being called upon, in essence, to save the economic lives of businesses across the country by way of business interruption insurance claims.

The insurance industry has overwhelmingly taken the position that business interruption policies do not cover claims related to COVID-19. As a result of coverage denials, businesses are filing lawsuits requesting that courts force insurance companies to pay. In fact, business interruption lawsuits filed in federal courts increased by 300% from March through June 2020, according to one legal analytics firm. Experts expect the number of cases ultimately filed to be in the thousands.

DIRECT PHYSICAL LOSS OF OR DAMAGE TO PHYSICAL PROPERTY

Many standard business policies provide coverage only for losses caused by direct physical damage. Some plaintiffs have argued that the presence of the coronavirus on their premises constituted physical damage. Others have argued that the forced closure of their business was sufficient to have directly affected the use of the property as required by their policy. Insurers have, in turn, argued that COVID-19 has not caused a direct physical loss and, therefore, the claims are not covered under the policies at issue. Whether a direct physical loss has been suffered by an insured will likely be a key issue in almost all COVID-19 business interruption litigation.

VIRUS EXCLUSIONS

Many commercial policies specifically exclude "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." This language, insurance companies assert, clearly applies to the coronavirus and supports the denial of business interruption claims. Thus, even if a business suffered a direct physical loss or damage, insurers argue that claims for COVID-19 would still be excluded from coverage.

COURT DECISIONS

With several months having passed since the first business interruption cases were filed, some courts across the country have begun to issue decisions which provide some insight into how the novel coverage issues may be resolved. The first opinion came from a circuit court judge in Michigan in *Gavrilides Management Company, et al. v. Michigan Insurance Company.* The court held that no coverage was owed under

the policy because there was no direct physical loss of or damage to property. The court noted that the loss or damage "has to be something with material existence. Something that is tangible. Something . . . that alters the physical integrity of property." According to the court, "direct physical loss or damage" requires more than a loss of use or access. The plaintiff in this case did not allege any physical loss of or damage to the actual restaurants. Instead, the claim was based specifically on closures related to government orders prohibiting restaurants from being open.

The court also noted that, while government acts would have been covered under the policy, those government actions would have to result in direct physical loss or damage. In the *Gavrilides* case, no such loss or damage was alleged. In addition, the court held that the virus exclusion in the policy unambiguously excluded coverage for losses which resulted from COVID-19. Therefore, even if there was physical damage, the virus exclusion would have precluded coverage. Accordingly, the court granted the insurer's motion for summary judgment. That first decision was a big win for the insurance industry.

While state courts in California and the District of Columbia, as well as federal courts in Texas and California, have similarly ruled on behalf of insurance companies, not all courts have been as favorable. In August, a federal court in Missouri declined to grant an insurer's motion to dismiss a business interruption claim in S*tudio417, Inc. v. Cincinnati Insurance Company.* The plaintiffs in that case, a group of restaurant and hair salon owners, asserted that the properties were likely infected with COVID-19 from customers who had visited the properties. They argued that the coronavirus was a physical substance that actually attached itself to and rendered the properties unsafe and unusable, resulting in a suspension of or reduction in operations. The Missouri court decided that the plaintiffs in that case had adequately pleaded a "direct physical loss" to their properties. Central to the court's decision was the distinction between the terms physical damage and physical loss. In the court's opinion, loss meant "the act of losing possession" and "deprivation." The court found that the allegations that COVID-19 was a physical substance that deprived them of use of the property by making it unsafe and unusable was sufficient at that stage of the litigation to survive the motion to dismiss.

The next day, a federal court in Texas reached a completely different result in *Diesel Barbershop, LLC v. State Farm Lloyds.* The court determined that "tangible injury to property" was required in order to establish a "direct physical loss" within the meaning of the policy at issue. While the court acknowledged that other substances such as ammonia, carbon monoxide and E. coli had been deemed sufficient to establish direct physical loss in prior cases, the court opined that a "distinct, demonstrable physical alteration of the property" was required and that it had not been established in the case before the court. In addition, the court noted that the policy language excluded coverage for losses caused by a virus so even if the plaintiffs could have proven direct physical loss, the virus exclusion in the policy would bar the claims. Accordingly, the court granted the defendant's motion to dismiss.

BAD FAITH AND UNFAIR TRADE PRACTICES CLAIMS

In addition to the rapid increase in business interruption litigation, courts have seen a dramatic increase in the number of bad faith and unfair trade practice claims related to COVID-19. Several lawsuits have been filed alleging that insurers have been acting in bad faith by not properly evaluating the facts and circumstances surrounding individual claims before denials are issued. In addition, several complainants have alleged that insurers have engaged in unfair or deceptive trade practices by promising coverage and wrongfully denying claims for which they never had an intention of actually providing coverage.

EFFECT ON INSURANCE INDUSTRY

Most insurers argue that business interruption policies were written to cover natural disasters, not global pandemics, and that paying on the massive volume of claims would likely bankrupt the industry. "Pandemics are not insurable because they are too widespread, severe, and unpredictable to underwrite," said David Sampson, president and CEO of the American Property Casualty Insurance Association (APCIA). The APCIA has estimated that small businesses with 100 or fewer employees were losing between $255 billion and $431 billion per month due to COVID-19 closures. Premiums collected by insurance companies for business interruption coverage only amount to between $6 to $8 billion per month. If insurers had to pay on all of the losses, the insurance industry argues it would be completely gutted. At the very least, the APCIA argues, paying the claims would cause tremendous downstream effects for all Americans who use insurance because the business interruption losses would have to be made up by other policyholders.

STATE AND FEDERAL LEGISLATION

Because most insurance companies are responding to claims for business interruption coverage related to COVID-19 with denials, countless business are left with losses that very well may lead to permanent closure. In an attempt to prevent that, legislators in nine states, the District of Columbia and Puerto Rico have introduced bills that would mandate retroactive business interruption coverage for COVID-19 claims. None of those bills have proceeded very far through the legislative process.

Similarly, the federal government is considering legislative action. The Business Interruption Relief Act, which would create a program whereby insurers who pay claims voluntarily could obtain reimbursement from the federal government, is pending in the House. The Pandemic Risk Insurance Act is also being floated in Congress. It would require insurers to cover the losses up to $250 million, at which point the federal government would step in and serve as a backstop. The National Association of Insurance Commissioners has strongly opposed such legislation, arguing that it is unconstitutional for the government to essentially re-write private contracts. Instead, the insurance industry is urging Congress to do more to provide direct financial relief for small businesses.

OTHER SOLUTIONS

Some believe that businesses, insurance companies and the federal government will likely have to work out some type of resolution to keep both businesses and insurers going. Reaching an agreement on the complex issues involved will not likely be a quick process. In the meantime, the number of COVID-19 business casualties will continue to rise.

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ALL RISE: ACCOUNTANTS AS ARBITRATORS IN M&A DEALS

Drafting Tips to Protect Clients from Unintended Surprises

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Experts estimate that in 2019 alone, the value of global merger and acquisition ("M&A") deals amounted to a staggering $3.7 trillion. It is common for M&A transaction documents to include alternative dispute resolution provisions between and among the parties of the transaction whereby parties agree how disputes or controversies will be resolved. These provisions also often include a mandatory mediation process, which can be binding or non-binding, followed by an arbitration provision or an agreed upon litigation provision that typically includes a venue and choice of law designation ("ADR Provisions").

Practitioners and business owners should be aware that most M&A transaction documents also include significant provisions providing for the resolution of financial disputes by way of an agreed upon submission to forensic accountants. For those not well versed in the specifics and nuances of M&A transactions, these "financial" alternative dispute resolution provisions can – if not drafted properly and negotiated fairly – create unintended consequences and ramifications for the parties.

Typically, buyers and sellers of companies spend considerable time and resources valuing a target company for the purpose of determining a purchase price. In addition, parties spend time reviewing related factors, such as earnings multiples, book values, inventory and cash levels, working capital, growth projections and earn-out values. While the negotiation of the purchase price to be paid at closing is often the most critical economic/business factor to be agreed upon by the parties to a transaction, an often overlooked aspect of M&A transactions includes the impact and relationship of post-closing adjustments to an agreed-upon purchase price and the effect that such adjustments may have on the overall amount paid by a buyer and ultimately received by a seller(s). Sophisticated practitioners and parties to an M&A transaction must spend as much time and energy on the post-closing adjustments as the pre-closing negotiation of a purchase price in order to avoid unwarranted surprises.

Except for strictly asset-based deals, because closings are typically completed on an agreed upon date based on estimated financial projections of the seller, the typical definitive agreement

in connection with an M&A transaction will often include several areas that will trigger the potential for an adjustment to a purchase price after the actual closing, including the following: adjustments regarding the amount of required working capital (which is typically defined as current assets minus current liabilities); adjustments with respect to earnings before interest, taxes, depreciation and amortization ("EBITDA"); adjustments to net book value (which is defined as total assets minus total liabilities); adjustments with respect to indemnification obligations; adjustments with respect to deviations from representations and warranties made at the time of closing by the seller(s); and adjustments related to the calculation of earn-out provisions.

Once a closing date has been established, the legal transfer of ownership will take place as of a closing date based upon estimated financial projections developed by the seller in conjunction with its internal financial team and outside public accountants. Most purchase and sale agreements will provide for a post-closing adjustment period, which provides the opportunity for the purchaser to review actual financial records with respect to working capital (including cash, inventory levels and accounts receivable), net book value and earn-out provisions, and to adjust or reconcile the projections to actual figures, which are typically calculated within 60 to 120 days after the closing. To the extent that the projected numbers are more favorable than the actual, typically the sellers will owe the buyers money back and, conversely, to the extent the actual closing figures are more favorable than the projected numbers, the purchaser will owe the seller an additional payment.

Earn-out provisions can be used in the M&A arena to bridge the gap between respective opinions as to the value of the company. If a seller believes that the value is higher than what a purchaser is willing to pay, one way to bridge that value gap is to allow for an additional payment(s) of purchase price consideration to the seller(s) post-closing if certain financial revenue targets in terms of revenue and profitability are met by the seller(s). These types of arrangements can be helpful in bridging value discrepancy, but they are also fraught with the potential for disagreements and, at a minimum, a mismatch between the expectation of the seller(s) (who no longer owns the company but is dependent on its financial health for the additional payment) and the purchaser, who will have a vested interest and the right to run the company as it deems appropriate even if it means undermining the potential that the seller(s) may meet the financial projections to obtain its earn-out.

Standard adjustments to the purchase price will account for changes in the company's financial condition after the purchase agreement is signed, especially if there is a long delay between the time of signing and the time of closing in order for the parties to obtain third-party regulatory consent. In such a case, post-closing purchase price mechanisms allow a protocol to modify the purchase price to account for changes in the seller's financial condition. As a result, the potential for an adjustment serves to focus the seller's attention on continuing to run the selling company as efficiently and profitably as possible so as to maximize the purchase price and minimize the potential for a negative post-closing purchase price adjustment.

Similarly, post-closing purchase price adjustments provide a purchaser the ability to ensure the financial condition and integrity of the company at the time of closing despite closing on estimated financial figures. Purchasers are negotiating and paying for a company based upon a certain financial condition of the company. In the same way, the seller will be looking for a degree of certainty in terms of receiving the agreed-upon purchase price and net closing proceeds.

Given that most M&A transactions are in fact closed on estimated financial figures, even where the parties are operating with the utmost good faith, there is a significant potential for disagreements to arise with respect to the calculation and applicability of post-closing adjustments. Considering the value of most M&A deals both singularly and in the aggregate, these types of disputes can involve multiple millions of dollars.

While ADR Provisions are fairly standard within M&A transaction documents, practitioners and parties to these transactions need to be aware that financial disputes are often governed by separate detailed provisions within the transaction documents and are handled outside the typical ADR Provisions. Standard practice is to provide that disputes regarding financial issues are to be handled by a "neutral" third party accountant. For lawyers who are used to standard litigation or traditional ADR Provisions, the use of a specific ADR Provision with respect to financial provisions can seem unusual and/or cause surprise. It is common to delegate the analysis of these financial post-closing adjustment issues to accountants who have a degree of familiarity in general with the issues and a background in forensic accounting and analytical financial analysis. For lawyers who are used to arguing over specific legal issues, these types of financial disputes often turn more on accounting issues, such as record keeping, past practice and custom of the seller(s), interpretation of generally accepted accounting principles or "GAAP," and the specific language of the financial provisions and covenants of the definitive agreement, than on legal issues.

For that reason, practitioners and parties to M&A transactions should take great care when entering into an M&A transaction to ensure that financial books and records, especially on behalf of a seller, are as complete as possible and that the language of the financial terms and conditions and the post-closing financial adjustments provision in particular are reviewed closely by the seller's internal financial team and outside regular accountants. Failure to include a detailed review of such provisions and to provide for frequent communication during the negotiation between and among the investment bankers, counsel and the internal and external accounting teams can be a trap for those who are not used to ADR Provisions substantially handled by outside accountants. Past practice and custom of the seller is an extremely important component and consideration. Great care should be given when drafting the definitive agreement to ensure that the appropriate standards of review and compliance are implemented. Similarly, the standard for any deviation that could give rise to a dispute with respect to post-closing financial adjustments and the process to select the neutral financial arbitrator should also be drafted with care. The parties should also specify the time period for submitting disputed issues and the nature and extent of the authorized submissions and presentation to the arbitrator.

Ultimately, while the use of financial ADR, just as with more traditional ADR Provisions for purely legal issues, can be a cost-effective and efficient way to resolve disputes, care must be given and close attention to detail must be paid when drafting the definitive agreement so as to ensure that the parties to the M&A agreement have their expectations reasonably met, and that surprises and financial issues are minimized and avoided.

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WHAT THE CONSTRUCTION INDUSTRY NEEDS TO KNOW TO NAVIGATE COVID-19

Peter J. Martin and **Thomas P. Banas** Hinckley Allen

In early March of this year, the global coronavirus pandemic ("COVID-19") entered all of our lives creating disruption, concern, and uncertainty. While the construction industry, for the most part, was considered essential, construction projects nevertheless continue to be impacted by COVID-19. The declared states of emergency nationwide, travel restrictions, quarantines and current and future COVID-19 cases have caused, and will cause, project delays, labor shortages and supply-chain effects. This will likely lead to project delays and increased costs, including extended general conditions, lost productivity, material escalation, labor escalation, storage costs, extended home office overhead, increased travel costs and increased shipping costs. While stemming this pandemic and ensuring public safety is of the utmost importance, construction industry professionals must also take practical steps to mitigate project impacts and financial harm. We examine some of the hurdles COVID-19 presents and potential strategies for navigating those challenges.

UNDERSTAND AND PROTECT YOUR RIGHTS

It remains exceedingly important that parties review contract provisions to understand and assess their obligations, risks and rights. Importantly, parties should pay particular attention to notice provisions, claim dispute provisions, change order procedures, time extension provisions and force majeure clauses. While some contracts specifically spell-out pandemics as qualifying as a force majeure event, many are silent. Given the novel situation presented by COVID-19, there is little case law to guide the courts or arbitration panels who will interpret contract language.

Additionally, real time documentation of COVID-19 impacts is key to presenting and pursuing time and cost claims and, in many cases, such documentation is required by contract to be submitted with such claims. This documentation consists of contempo-

raneous project records, including notice letters, schedules, progress reports, daily logs, change orders, meeting minutes, cost reports and other project records. These records tell the story of what actually happened in real time and are the foundation of any future claim. Triers of fact, such as judges and arbitrators, will review these records in evaluating claims.

Proper documentation of changes or impacts to a project can often be overlooked, as all parties are typically focused on building the project and maintaining ongoing business relationships. It may take years to resolve COVID-19 related claims and the hand-shake deals or oral promises made on the construction site will not hold up to scrutiny by a court or arbitrator. Parties should provide notice, follow contract provisions regarding claims and maintain complete, clear and accurate records that provide facts and details of what actually transpired on site to memorialize the real time impact of COVID-19.

LABOR AND MATERIAL SHORTFALLS

As COVID-19 continues to impact workflow, contractors are forced to deal with ever-tightening fiscal obligations and potential health impacts to their work force. These will undoubtedly lead to labor shortages, which can result in delays and cost increases to any project. Additionally, many contractors, particularly those with specialized skill sets, will seek work opportunities in neighboring states. The travel restrictions implemented by each individual state further complicate a contractor's ability to perform such work. In order to prevent or minimize any disruptions to the flow of work, contractors should seek to develop relationships with local tradesmen to insure they are able to adequately staff a project if a travel restriction is put in place.

Similar to labor, COVID-19 has adversely affected the flow and availability of materials. It is imperative that parties consider alternative suppliers for project materials as COVID-19 has had far-reaching implications on global trade creating a scarcity of construction materials and delaying delivery of others. In order to overcome any supply chain issues, we suggest taking proactive steps to develop relationships with multiple material suppliers or in the alternative build into the contract protections for supply shortages.

SITE SAFETY IS PARAMOUNT

Safety is a primary concern in the construction industry. COVID-19 only increases the vigilance with which contractors must adhere to safety protocols and must adapt to ever-changing industry and governmental regulations. Unlike some other safety risks, COVID-19 has the potential to completely halt a construction project. In order to prevent this, parties are encouraged to take proactive measurements to limit the spread of the virus. Contractors should conduct a job hazard analysis to identify activities that require work to be conducted in enclosed spaces or require individuals to work in close proximity with one another. After identifying potential hazards, contractors should strategize on how to limit or prevent potential exposure through project scheduling and the use of personal protection equipment or "PPE" (masks, visors, eye protection, gloves, etc.).

In addition to providing safety equipment, contractors should train their workers on the signs and symptoms of COVID-19 by explaining how the disease is potentially spread, including that many who contract the disease are asymptomatic and can still spread the disease, even if they themselves are not experiencing symptoms. Contractors should also advise employees to avoid unnecessary physical contact with others and to maintain proper social distancing (6 feet) whenever possible. In order to further limit the potential spread of COVID-19, contractors should adopt appropriate cleaning practices, including hand washing and the regular cleansing of work surfaces and equipment.

The Occupational Safety and Health Administration, the Center for Disease Control and Prevention, as well as the individual state government websites have all published recommended guidelines for construction. These resources can be extremely informative and assist parties in proceeding with construction projects in a safe and responsible manner. Additionally, contractors are also strongly encouraged to revisit their own site safety plans to ensure they meet or exceed the personal protection equipment and site safety regulations needed.

NEW BUSINESS IN THE AGE OF COVID-19

As COVID-19 cases continue to spike, all parties to construction projects must be cognizant of the negative impact it can have on their businesses. It has become imperative to account for these potential impacts at the bidding and contract drafting stage of the construction process to ensure the risks associated with COVID-19 are allocated appropriately and that the contract accounts for any potential impacts. Parties should pay closer attention to the claims and *force majeure* provisions in their contracts, as they will likely need to be broadly written to account for pandemics and declared states of emergency. Sharp drafters may try to limit a party's ability to recover for COVID-19 related expenses or delays by arguing that COVID-19 is now a foreseen condition and therefore should have been contemplated by the parties at the time the contract was executed. This risk-shifting strategy can have wide-spread implications for all those involved.

In addition, forging new business relationships has become exceedingly difficult in light of COVID-19. In the past, the best way to develop new business was through in-person communication. This was often accomplished through networking, marketing and industry events, all of which have been placed on hold as a result of COVID-19. In order to overcome this change, parties must adapt and develop new methods for developing relationships and marketing their skills. Construction industry associations have developed alternative methods of bringing people together virtually through Zoom meetings or online presentations. Additionally, many in the construction industry have taken to social media to advertise and solicit work. These alternative methods are critical to developing new business and will continue long after COVID-19.

CONCLUSION

COVID-19 has adversely impacted us all, but the construction industry is uniquely situated to adapt and overcome. In order to do so, we need to reevaluate how we do business, focus more on our core strengths and become more versatile in how we perform our work. Ultimately, this will lead to a stronger industry that is equipped and prepared to handle even the most turbulent waters.

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How Drones Can Benefit the Insurance Industry

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Not long ago, the idea of unmanned vehicles roaming the skies at our behest seemed something out of science fiction. Very soon, it will just be business as usual. There are already nearly half a million drones registered for commercial use in the United States.[1] They are being used across a wide range of industries as an innovative and cost-effective solution to various challenges.

The insurance industry is particularly well-suited to benefit from the use of drones. Insurers that implement drone programs stand to enhance worker safety, improve work efficiency, and save substantial cost. Following is a brief overview of drone design and some practical ways insurers can use drones, including a case study that shows the advantages of drones.

All drones share certain features that make them useful to insurers. To begin with, they are small, easily maneuverable, and far less expensive than manned aircraft.[2] They can cover large areas quickly and, because they have no onboard pilot, can access places that are unsafe for human travel. An insurer can accomplish most drone-related tasks with just two models: the multi-rotor drone and the fixed-wing drone.

Multi-rotor drones are best suited when one needs a small camera in the air for a short period of time.[3] Their multiple rotors allow for precise controls, making them perfect for aerial photography. However, their flight duration and speed are limited. Current battery technology limits flight time to around 25 minutes when carrying lighter camera equipment. A heavier payload will shorten the flight time. As such, multi-rotor drones might not be suitable for projects requiring long distance travel.

Fixed-wing drones rely on wings instead of rotors to provide vertical lift—a more energy efficient design than the multi-rotor variety. They can also run on fuel engines, as opposed to electric, with some models capable of staying aloft for over 16 hours. This longer flight time lends itself to large-scale aerial mapping, a task ill-suited for multi-rotor drones. While fixed-wing drones are more efficient, they are not as flexible as their multi-rotor counterparts. Their design prevents them from hovering in one location, making them a poor candidate for general aerial photography.

The areas of claims adjustment, risk assessment, disaster management, and fraud monitoring can all benefit greatly from incorporating drones into an insurance company's operations. When put to the task, these drones offer insurers increased efficiency and productivity from their workforce, a corresponding improvement in customer satisfaction, and long-term financial gains.

Drones also enhance safety in two major ways: they reduce the number of workers needed in the field, and they provide safer working conditions for the field workers who are needed.

Claims adjusters often encounter hazardous situations. They climb ladders to access roofs and chimneys. Complex fire investigations may require scissor lifts or box trucks to evaluate the scene and determine the fire's origin.[4] Where damage is extensive, adjusters might need expert advice on a building's structural integrity and whether toxic materials are present.[5] Harsh weather conditions exacerbate these dangers and present risks of their own.[6]

Using drones eliminates these and other hazards. No longer would a claims adjuster need to scale a ladder with a camera in one hand and a notepad in the other. Instead, the drone performs the dangerous work, while also providing features that make adjusting claims more efficient and

productive. For example, a drone equipped with an infrared camera can more easily detect potential air or water leaks, saving an adjuster significant time. With drones, claims adjusters can quickly obtain high resolution images of roofs, interiors of large warehouses, and other difficult to reach areas. Moreover, drone technology allows for the sharing of drone-captured data in real time. This gives adjusters in the field easy access to remote specialists, enabling more accurate decision-making and faster claims processing–all while the claims adjuster is a safe distance away from any hazards.

Natural disasters are unfortunately increasing worldwide, both in frequency and severity. In these scenarios, claims adjusters encounter blocked roadways, downed power lines, unstable buildings, and flooding, to name a few. Further, civil authorities might limit access to certain areas in a catastrophe's wake to facilitate rescue or other public safety efforts. For example, when a tornado struck Joplin, Missouri, in 2011, access issues and the sheer scope of the damage prevented insurers from identifying the perimeter of the loss for three full days—usually a half-day job.[7] Resolving total loss claims took two weeks, even with adjusters working 18-hour days.

Using drones to assess damages gives adjusters access to disaster sites without compromising their safety, enabling faster claims processing. Even if a site is accessible, using drones still provides advantages. Drones can travel faster than people, and the images they capture provide adjusters with a richer data set to use during the claims process.[8]

Drones can also be useful to monitor fraud arising out of disasters and other situations. For example, before a hurricane makes landfall, a fixed-wing drone can survey a large area and document pre-existing damages to structures.[9] Once the storm passes, an insurer can then use the images to discern pre-existing damages and disprove false claims.

Risk assessment is another area that can benefit from drones. To assess property and liability risk, risk engineers must often travel to various locations to conduct surveys and gather data. With a drone operator in the field, the need for risk specialists to travel is eliminated, saving time and cost. Instead of being in-person, the risk engineer can view the property in real-time, provide instructions to the drone operator, and even remotely control a drone's camera system. Further, drone technology allows multiple specialists to actively participate in a survey, from virtually anywhere with internet access. Doing so also allows all the necessary work to be performed in a single site visit.

Iowa-based insurer EMC Insurance Group has already begun to reap the benefits of a successful drone program.[10] Because the Midwest is often exposed to severe convective storms, roof-related claims represent a significant portion of EMC's property losses. For safety reasons, EMC does not send its personnel onto rooftops, so they could only provide insureds with general information regarding roof risks and control measures.

EMC was looking for a way to provide its customers with personalized, value-added roof assessments and loss control solutions to improve roof longevity and resiliency in this valuable market segment. Kespry is a Silicon Valley-based startup company that offers drone piloting software and expertise to companies looking to use commercial drones. Their aerial intelligence platform gives businesses a starting point to integrate drones into their operations.[11]

EMC embarked on a trial run using Kespry's drone technology platform. The trial started with EMC using drones for roof assessments on insured schools in Iowa, Wisconsin, and Kansas. Over a nine-month period, EMC conducted more than 160 flights with the Kespry systems. Roof assessment reports were generated for many schools, providing insureds with insights on repair planning and preventative roof maintenance.

Though EMC originally intended to use the drones only in loss prevention during the trial run, a devastating tornado that directly hit Marshalltown, Iowa, in July 2018 changed those plans. In the disaster's wake, EMC's loss control and claims teams quickly collaborated to conduct flights over damaged commercial buildings using the Kespry system. This enabled the claims team to safely assess the damage and start processing claims days before they would have without the drones.

Following the trial run, EMC decided to scale drone operations across the company. As a result, EMC now proactively informs its insureds about roof conditions and steps they can take to improve their roof system's performance. EMC's underwriters can now access higher-quality property risk assessments, which in turn leads to better underwriting decisions. And EMC's claims processing is safer and faster, improving both the employee and customer experience.

The success of EMC's trial run and its decision to scale drone operations across the company show that drones have a promising future in the insurance industry. While the idea of flying robots may seem futuristic, for companies like EMC, the future is indeed happening right now

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THE EXCLUSIVE REMEDY RULE OR, HOW I LEARNED TO STOP WORRYING AND LOVE WORKERS' COMPENSATION

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INTRODUCTION

California's Workers' Compensation Act, and any other state that adopts such a rule, subjects employers to strict liability for injuries sustained by employees while in the course and scope of employment, whether inflicted by the employer, a co-employee, or by the employee themselves. The Act also makes workers' compensation benefits the employee's sole and exclusive remedy against the employer – the so-called Exclusive Remedy Rule.[1] Under this system, employers assume liability without regard to fault for work-related injuries in exchange for limitations on the amount of liability, while the injured employee obtains relatively swift and certain benefits without having to prove liability. The Exclusive Remedy Rule as it pertains to parent-subsidiary entities is an entire body of law that will not be addressed in this article.

In many instances, however, a third party is exclusively or concurrently at fault for an injured employee's work-related injuries. The limitation on employer's liability does not extend to third parties, however, and the employee may sue a third party for damages caused by its negligence. But what happens if the third-party tortfeasor cross-complains against the employer for defense and indemnity? Does the Exclusive Remedy Rule protect the employer from this cross-complaint?

This article addresses the question under California law: to what extent is an employer liable to a third-party tortfeasor on cross-complaint for injuries to an employee?

THIRD PARTY ACTIONS

A third party to a lawsuit may attempt to file a cross-complaint against the employer of an injured employee. At first, it may proceed, but there are mechanisms for the employer to eventually get out of the cross-complaint. Alternatively, the third party may also assert an affirmative defense in its answer to the worker's complaint, asserting comparative liability on the part of the employer.[2]

If the third party does file a cross-complaint against the employer, then the employer must answer and will be brought into the lawsuit.[3] The Exclusive Remedy Rule will not work on demurrer, but will work on Motion for Summary Judgment. Lawsuits can be very expensive and thus is an undesirable outcome for any employer, who to begin with should not be in the lawsuit. The employer will have to engage in discovery, including written discovery and depositions.[4] This requires money and time and only takes away from the business's true purposes.

If the third party does not bring a cross-complaint against the employer, they may still assert affirmative defenses in their answer to a worker's complaint. The third party may argue the worker's injuries were due to someone else's negligence, such as the employer.[5] However, it is the third party's burden of proof and the third party must prove that the worker's injury was a result of the employer's actions and not its own.

HOW TO PROTECT YOUR CLIENT FROM THIRD PARTY CROSS-COMPLAINTS

The bar against third party tortfeasor cross-complaints is codified in Labor Code § 3864, and interpreted by a number of California Appellate and Federal Courts.[6]

There are however two notable exceptions: (1) express defense and indemnity agreements between the employer and the third party tortfeasor; or (2) if the employer has made a claim for reimbursement of its workers' compensation costs against the third party tortfeasor, then a cross-complaint may be brought for implied or express defense and indemnity.[7] There are other minor exceptions, too, such as an employer acting outside the scope of employment by committing fraud, not possessing valid workers' compensation insurance, however those exceptions are not discussed here.

It invariably occurs that third party tortfeasors bring cross-complaints for defense and indemnity against our clients, as discussed above in Section II. This frequently occurs in the entertainment and construction industries. There are a number of things to keep in mind to protect your client's interest and get them out from under the cross-complaint for implied indemnity.

First, ensure there is no written contract clause between your client and the third-party tortfeasor creating express defense and indemnity rights. Such a clause supersedes Section 3864 and therefore allows a cross-complaint by a third party for express indemnity.

Second, make sure your client has valid workers' compensation insurance. If the employer fails to carry workers' compensation insurance, then the Exclusive Remedy Rule does not apply and the injured employee and any other third-party tortfeasors may sue your client.

Third, make sure neither your client nor its workers' compensation carrier makes a claim for reimbursement of its workers' compensation costs. This could be in the form of a lien, a Complaint-In-Intervention, or even a written demand for reimbursement. This opens the door for the third-party tortfeasor to cross-complaint against your client for defense and indemnity.

If your client has valid workers' compensation insurance, has not made any claims for reimbursement of workers' compensation costs, and does not have an express defense and indemnity agreement with the third party tortfeasor, but the third party tortfeasor brings a cross-complaint for implied defense and indemnity anyways, your client has a few options.

The first, easiest, and most cost-effective option is to meet and confer. Outline Labor Code § 3864's bar against employer's third-party liability under equitable indemnity theories. You should also point opposing counsel to California Appellate Court cases *C.J.L. Construction, Inc. v. Universal Plumbing, Difko Admin. v. Sup. Ct.*, and *State of Cal. v. Sup. Ct. (Glovsky)*, and the Federal case *Hall v. North American Indus. Services, Inc.*

If this is not enough to persuade your hardheaded opposing counsel to dismiss of the cross-complaint, unfortunately, your client's next best option is a Motion for Summary Judgment. The cases cited above provide the perfect template for your Motion for Summary Judgment, as those cases affirm granting of Motions for Summary Judgment on this exact issue.

However, one method that might work for you, which saves time and money compared to a Motion for Summary Judgment, is to settle for a nominal amount with plaintiff pending court approval of a Motion for Determination of Good Faith Settlement. The grounds for the Motion for Determination of Good Faith Settlement are straightforward and obvious: your client would win a Motion for Summary Judgment anyway, making the nominal settlement with plaintiff in good faith. Once the Motion is granted, your client is effectively dismissed with prejudice, *including from the third-party tortfeasor's cross-complaint*. You are now out of the case without having to file a Motion for Summary Judgment. If the Motion for Determination of Good Faith Settlement is denied, then your client is not obligated to pay the nominal settlement to Plaintiff, and you bring the Motion for Summary Judgment against the cross-complaint.

AB 5

On January 1, 2020, California Assembly Bill 5 ("AB 5") went into effect for all employers. It requires a stricter standard for classifying workers as either employees or independent contractors. If a worker is classified as an employee, then the employer must obtain workers' compensation insurance for its employees and is entitled to the benefits that the Exclusive Remedy Rule provides. However, if a worker is classified as an independent contractor, the employer is not entitled to the protection the Rule gives. Thus, an independent contractor who is injured on the job may file suit against both the "employer" who obtained the independent contractor's services and any third parties. This means a third party may also file a cross-complaint against your client if a worker is designated as an independent contractor. Note that there are numerous industries which are not under the stricter test for employee status including, insurance agents, physicians, attorneys, direct salespersons, and others.

CONCLUSION

The law is clear that a third party may not assert a cross-complaint for implied indemnity against an employer of an injury employee.[8] However, this rule does not prevent a third party from filing a cross-action against an employer. This rule serves to protect employers who obtain workers' compensation insurance from complete liability in civil court. Only an express agreement between an employer and a third party allowing for indemnification may allow for a cross-complaint by the third party against an employer. Further, employers may want to re-consider classifying their employees as independent contractors after AB 5. While AB 5 has made it more difficult to classify workers as independent contractors, it also allows business to receive the protection of the Exclusive Remedy Rule against third parties.

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1 *See* Labor Code §§ 3602 and 3864.
2 *See* Judicial Council of California Civil Jury Instruction 432 (Third-Party Conduct as Superseding Cause).
3 *See* California Code of Civil Procedure § 428.10, et seq.
4 *See* California Code of Civil Procedure § 2017.010.
5 *See* Judicial Council of California Civil Jury Instruction 432 (Third-Party Conduct as Superseding Cause).
6 *See C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376; *Difko Admin. v. Sup. Ct.* (1994) 24 Cal. App.4th 126; *State of Cal. v. Sup. Ct. (Glovsky)* (1997) 60 Cal.App.4th 659; *Hall v. North American Indus. Services, Inc.* (E.D. Cal., Oct. 11, 2007, No. 1:06CV00123 OWWSMS) 2007 WL 3020075.
7 *See Hall* at 16.
8 *See* California Labor Code § 3864.

I KNOW WHAT YOU DID LAST SUMMER

Whistleblowing in the European Union and German Employment Law Arena

Dr. Jan Tibor Lelley, LL.M. and **Diana Ruth Bruch** Buse Heberer Fromm

INTRODUCTION

Wikileaks, LuxLeaks, Dieselgate and Cambridge Analytica have recently become prime examples of so-called "Whistleblowers." The European Union has now followed up on the increasing number of whistleblower cases and, after a long debate, issued the "Directive on the protection of persons who report breaches of Union law" (*Directive*). This article will first outline the current situation in Germany, followed by a comparison with France and the United Kingdom, and finally examine the changes for Europe resulting from the Directive in more detail.

WHERE ARE WE WITH WHISTLEBLOWING IN GERMANY TODAY?

To put citizens' jobs at risk, in order to prioritize disclosure of misconduct and breaches of the law in the public interest may appear honorable and selfless. In Germany, however, individuals coming forward as whistleblowers are by no means treated in such a way. Quite the opposite: for whistleblowers, dismissal and other sanctions including "blacklisting," being condemned by colleagues, bullying, and being passed over for promotions are strong deterrents/real threats. Why? Because Germany, like many other European Union (EU) Member States, has not yet implemented an effective legal mechanism to protect whistleblowers from such sanctions. Instead, even rulings from the Federal Labor Court declare such terminations as lawful in lawsuits against illegal termination. A mere internal disclosure to the employer, who may or may not take the necessary measures, is thereby given priority over the involvement of the competent external authorities. In doing so, the courts regularly classify the employee's interest in external whistleblowing as secondary to the employer's interest in confidentiality. Protection of the "sacrificed" employee, who puts the interests of the community above his own, should look different.

WHAT ABOUT FRANCE AND THE UNITED KINGDOM?

Comparing the legal situation in France or the United Kingdom with the legal situation in Germany, shows that Germany is trailing behind when it comes to whistleblower protection.

France enacted an extensive set of regulations for the protection of whistleblowers as part of an anti-corruption law only recently, in 2018. The main goal was to improve the standard of protection and encourage reporting of misconduct, which has thus far been very limited due to fear of retaliation. Now, every company with more than 50 employees must set up a system for dealing with whistleblowers. Nonetheless, the procedure for whistleblowers is strict: a disclosure must initially be made to the supervisor internally and only once the internal disclosure proves ineffective, to an external authority.

The United Kingdom has also regulated the treatment and protection of whistleblowers with the Public Interest Disclosure Act 1998 (the *Act*), which covers most workers in the public, private and voluntary sectors. In summary, the *Act* protects employees from detrimental treatment and retaliation from their employer after reporting wrongdoings. The *Act* contains

provisions on the regulatory body for disclosures, the type of disclosures protected and the procedure that follows afterwards. The government also provides advice and guidance through informational websites and brochures for potential whistleblowers.

WHAT DOES THE EUROPEAN WHISTLEBLOWER DIRECTIVE COVER? WHAT IS ITS IMPACT IN THE FUTURE?

In essence, the content of the *Directive* can be divided into three key regulations:

- Regulation of the reporting procedure;
- Establishment of reporting channels; and
- Protective measures and prohibition of repressive discrimination and sanctions (retaliation).

1. In order to be protected under the Directive, the whistleblower must follow a certain reporting procedure: First, she/he must either use the internal reporting channels within the company (see 2.) or contact the responsible authority externally. Public disclosure through media or press is the last resort. It is only an option if no suitable measures have been taken within a maximum period of 3 or 6 months, if there is a threat to the public interest or if there is a risk of reprisals when using the reporting channels.

2. Another key provision to ensure an effective reporting mechanism is the establishment of reporting channels. Art. 8 of the Directive directs companies with 50 or more employees to set up internal reporting channels and ensure certain procedures. In doing so, confidentiality, transparency, feedback within a certain period and subsequent follow-up measures must be ensured. The same principles also apply to the external reporting channels provided by the regulatory authorities.

3. As part of the protection measures for whistleblowers, Member States have to provide access to support measures (e.g. advice and effective assistance from competent authorities) and measures to protect against retaliation and sanctions (e.g. protection against liability for the procurement of information). Additionally, EU Member States need to ensure that retaliations or the threat of such are prohibited by means proportionate and dissuasive penalties.

These key regulations will lead to some significant changes for whistleblowers in Germany in terms of protection against unlawful termination and the compliance responsibility of public listed companies' management boards.

Due to the new reporting system, an employee will now enjoy protection against unlawful termination even if she/he contacts the responsible external authority directly, instead of only reporting internally first. This is due to the fact that internal and external reporting channels are classified on the same level under the *Directive* (see above).

In the future, public listed companies could be obliged to set up a whistleblower system regardless of the number of employees. In this respect, Art. 8 of the Directive allows EU Member States to make an exception regarding the minimum threshold of employees (50 or more) for companies exposed to a special risk. Thus, the management board's decision, whether to establish a whistleblower system, would no longer be a discretionary one, but would be a legal obligation.

IMPLEMENTATION IN GERMANY

Although the *Directive* is a step in the right direction, it is rather fragmentary, as it only applies to violations of European Union law, not the national law of each EU Member State. As a consequence, the Directive does not cover the disclosure of breaches of national law. Notwithstanding this, national lawmakers can decide to implement the Directive extensively and regulate the disclosure of violations of national law accordingly. This is certainly required for effective protection of whistleblowers: for non-lawyers, the difference between a violation of EU law and national law is often difficult to identify - not to say it is impossible. Additionally, extensive implementation to cover breaches of national law is necessary in order for Germany to stay competitive internationally. Due to the still ongoing lawmaking process, it is not foreseeable whether Germany will decide in favor of an extensive implementation as described above.

WHAT NOW? - AN ACTION PLAN FOR COMPANIES AND THEIR EXECUTIVES

Many companies will ask themselves this question and wonder what to do with the new European whistleblower framework. Many businesses with ties to the U.S. may already have a whistleblower system in place, due to whistleblower legislation in America. Of course, these are not necessarily identical with the new EU *Directive* and require additional action. The following checklist can help identify where companies stand:

• Implementing the defined internal whistleblower system and reporting channels is a must

Those channels must be easily accessible and completely confidential. The best way to achieve this is through in-house trainings for managers who will deal with or are typically be in touch with whistleblower reports (supervisors, HR). Such an internal system can also reveal many benefits: Staff will be more likely report through easily accessible internal channels, rather than involving external authorities. This way companies can avoid external inquiries and conduct the investigation internally.

• Follow-up measures and deadlines

Companies need to confirm receipt of a whistleblower report within one week and must provide feedback on the report within 3, maximum 6 months. Should companies remain inactive or refuse to carry out follow-up measures, the whistleblower would be free to make the disclosure public.

• Comprehensive documentation

It is crucial for companies to document the reporting procedure thoroughly to prove that any termination or missed promotion or other sanction is not connected to the whistleblower report and therefore cannot be labeled as retaliation.

CONCLUSION

The new EU whistleblower *Directive* gives the much-needed push towards a uniform whistleblower protection in the EU. While the issue of an extensive implementation by national lawmakers is unresolved, companies with operations in the EU should nevertheless prepare themselves for an extensive implementation into the national laws of EU Member States. We recommend using the time until December 17, 2021 (deadline for implementing the *Directive* into German law), to work on the various protective measures. We recommend that even companies with existing whistleblowing systems in place review their systems and prepare for the new EU whistleblowing landscape.

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JUROR POOL COMPOSITION POST COVID-19

Katrina Cook, Ph.D. Litigation Insights

In March of 2020, when the COVID-19 pandemic first began to take hold in the United States, it was hard to imagine the extent to which this disease would change the fabric of American life. Common cultural touchstones that many took for granted suddenly became fraught with danger. Something as simple as going out to eat at a restaurant was no longer an option in many places. And the legal system was no exception. Across the country, jury trials abruptly slammed to a halt, as it was no longer safe to have groups of people congregate indoors for long periods of time.

It has been nearly a year since that initial phase of lockdowns in the United States. And with a backlog of trials that only swells as time passes, many jurisdictions are desperate for measures that would allow jury trials to proceed. Some jurisdictions have begun conducting jury trials via electronic means, using videoconferencing software like Zoom. But this is not feasible in all areas and has the potential to exclude certain demographics, including older jurors and those of lower socio-economic classes, who may be unfamiliar with or unable to afford the technology required to participate in a virtual trial. Other venues have begun conducting in-person jury trials with appropriate social distancing policies in place. However, in-person trials bring their own unique set of concerns and anxieties to address.

With all these obstacles to normalcy in place, clients express valid concerns about what to expect as they return to trial: How is COVID-19 affecting the composition of jury pools? How concerned are jurors about appearing for jury service? Will high-risk groups, such as the elderly, be more likely to be dismissed due to health concerns? Having conducted a national survey on these issues and after assisting with some of the first jury selections in the country since the start of the pandemic, Litigation Insights has some preliminary answers to these important questions.

CONCERNS ABOUT COVID-19

One of the most discussed facets of the pandemic has been just how polarized the public's response has been. Some individuals express little to no concern and have changed very little about their habits. Yet others say they are extremely worried and have cut off nearly all outside contact to mitigate the risk of the disease. In a May 2020 national survey conducted by Litigation Insights, 28% of potential jurors reported being **very** concerned about catching COVID-19, and another 36% indicated they were **moderately** concerned. However, 13% of jurors were **not very** concerned and 3% were **not at all** concerned. While these numbers show differing attitudes toward COVID-19 and have likely changed in recent months, it is clear that a significant number of jurors would potentially be concerned about the infection risks inherent in an in-person jury trial.

Given the higher mortality risks for older individuals, one would expect concerns about COVID-19 complications to increase as juror age increases. Interestingly, in our survey, older individuals were significantly less concerned about complications from COVID-19, as compared to younger individuals. While lower anxiety around complications does not necessarily translate into older jurors being willing to serve during a pandemic, it does raise questions as to whether older jurors will truly be less represented on jury pools going forward.

Although in-person jury trials have not yet been conducted frequently enough to examine this trend adequately, two recent case studies offer insight into how jury pools may be composed going forward.

CASE STUDIES REGARDING POST-COVID JURY POOL COMPOSITION

In-person jury trials have resumed to a limited extent in some jurisdictions. In two such recent trials in a major metropolitan county, a comparison of juror demographics before and after the judges granted hardship excusals demonstrate interesting findings concerning how dismissals for COVID-19 fears may affect jury composition.

In one trial, the demographics of which are shown in the charts below, jurors were asked if they would like to be dismissed due to concerns regarding COVID-19. Of the 89 total jurors initially in the pool, 26 requested dismissal due to COVID concerns. Of those 26 jurors, three were in their 20s, six were in their 30s, four were in their 40s, four were in their 50s, two were in their 60s, six were in their 70s, and one was in their 90s. An additional nine jurors requested dismissal due to concerns unrelated to COVID.

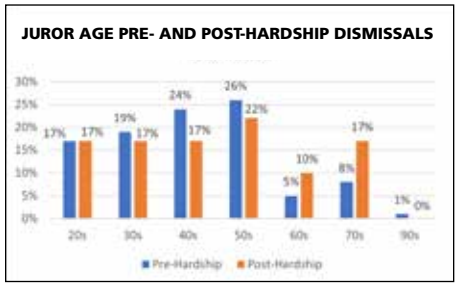
When examining the pre-hardship jury pool, it should be noted that the values for some age groups are somewhat different than would be found in the total population pool for the jurisdiction. For example, according to the U.S. Census, individuals in their 60s represent approximately 13% of the jurisdiction's population; however, in the initial pool

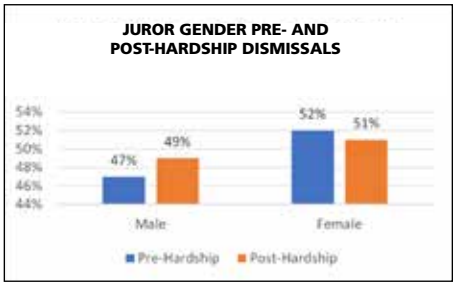
of reporting jurors, they represented only 5%. Overall, individuals in their 60s and 70s appeared at a rate somewhat lower than the population, while those in their 40s and 50s were slightly over-represented.

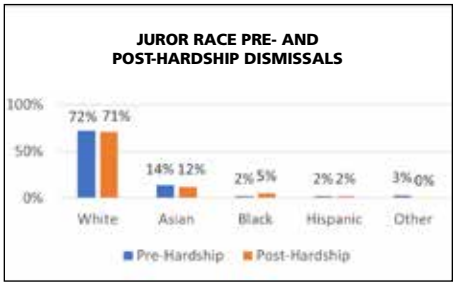
Interestingly enough, as shown in the following charts, the jury pool composition before and after hardship dismissals was not significantly different for any demographic. Further, contrary to what might be expected, juror attrition was higher for somewhat younger individuals, with the greatest loss occurring in the 40s age range. Indeed, although jurors in their 70s tied for the highest levels of requested hardships, older individuals still represented a larger percentage of the total jury pool following hardship dismissals, which had the added effect of drawing the percentages more in line with the overall population demographics. In fact, although older jurors expressed concerns regarding COVID-19, when questioned further, most indicated they were willing to serve despite those concerns. It is possible that those in their 60s and 70s with concerns were more likely not to appear at all, while those in their 40s and 50s with concerns responded to the jury summons, but then requested and received hardship dismissals. Ultimately, older individuals were not under-represented on the jury; indeed, the final seated jury in the case was comprised of six jurors over age 50.

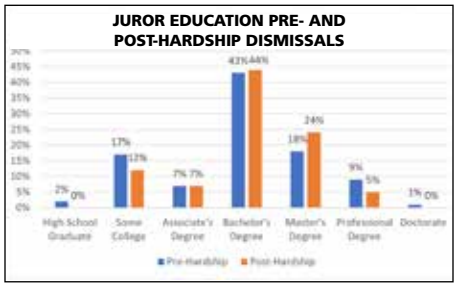
The second trial in the jurisdiction revealed similar findings. First, it should be noted that the initial demographic pool was more in line with the overall population demographics, although there were slightly fewer individuals in their 40s than would be expected. Given that this trial took place nearly two months after the first trial, it is possible that older individuals with concerns are becoming more comfortable responding to a jury summons.

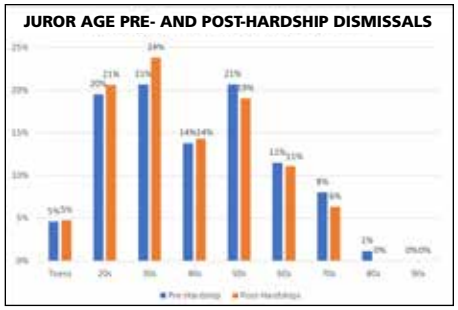
While fewer demographic markers were collected here, juror demographics for both education and age showed no significant differences between the pre- and post-hardship jury pool, although older jurors were excused at a slightly higher rate than younger jurors. Notably, however, unlike the previous case trial, dismissals were made on the basis of questionnaire responses only, so the attorneys were not afforded the opportunity to rehabilitate on the issue. Additional oral voir dire may have revealed that the jurors would have been comfortable serving despite their concerns, just as many had voiced in the first trial. Nevertheless, older jurors were still well represented in the final jury, which was comprised of 10 jurors over age 50 (including three in their late 60s and 70s).

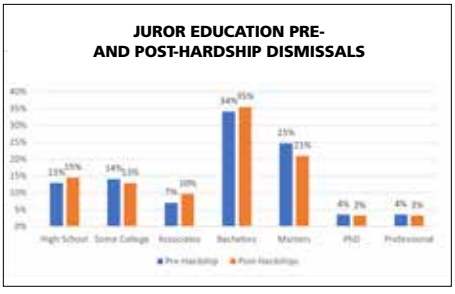












GOING FORWARD

As these case studies suggest, the impact of COVID-19 on older jurors' willingness to serve has not manifested. However, this data indicates some areas that should be considered going forward.

First, anxiety regarding COVID symptoms does not automatically translate into unwillingness to serve on a jury. While older individuals may recognize they are more at risk for complications from the virus, they are not necessarily more concerned about those complications than younger individuals. Nor are they inevitably more likely to be reluctant to participate in in-person jury service.

That said, if the goal is to preserve older jurors on the panel, who are often preferred by defendants in personal injury matters, then we recommend requesting further questioning for those who indicate they have hesitations regarding COVID-19. Had counsel in the first trial not requested additional questioning, several jurors would likely have been dismissed who would have been willing to serve. In particular, given the somewhat low initial percentage of individuals in their 60s and 70s who responded to the first trial summons, it was even more crucial that additional questioning helped retain those who were willing to look past their concerns.

FINAL THOUGHTS

COVID-19 has had a truly unprecedented effect on how the world conducts its daily life – and in many ways, we are still adapting to this new reality. As such, it will be important to continue to track and reflect upon how such changes affect the courtroom going forward. While these initial cases show promising results regarding older juror attrition, they also reveal some important actions we can take to help ensure post-pandemic jury pools truly reflect the population.

Dr. Katrina Cook a consultant with Litigation Insights has 11 years of practical application, study, and research in legal communication, jury research, and cognitive psychology. She has conducted and designed mock trials and experimental studies assessing juror attitudes toward the facts of a case and how other factors, such as attorney gender, may influence jurors' judgments. Further, she has assisted counsel in implementing themes discovered during this research into their case argument.

Stopping It Before It Starts:

HEADING OFF DISCOVERY ABUSE AT THE EARLIEST STAGES

Martin S. Driggers Jr., Richard E. McLawhorn, and **Brandon R. Gottschall** Sweeny, Wingate & Barrow, P.A.

Discovery is increasingly expensive and contentious in today's litigation. Parties seemingly request endless documents and notice endless depositions. Often, the connection between discovery and the actual issues at play appears tenuous, at best. These issues are not always imaginary: one court recently described modern discovery practice as "a cottage industry" that relegates the merits of a claim "to a secondary status."[1] Yet, enforcement of discovery limits occurs far too infrequently, and your adversary likely has little to lose in attempting to exceed those limits.

Given the potential benefits and low costs of pursuing overbroad discovery, along with the sparse enforcement of discovery limitations in some jurisdictions, litigators should proactively consider how to protect their client from abusive discovery while also avoiding unnecessary discovery disputes.

BE SURE ONLY PROPER PARTIES ARE NAMED

The most important first step a party can take to help control the scope of discovery may be narrowing the party or parties responsible for responding to discovery. A complaint, cross-claim, or counterclaim may name innocent subsidiaries, parent or sister companies, and others in an effort to broaden the pool of available discovery sources.

To help cut short this type of discovery abuse, parties and their counsel should communicate as soon as possible regarding the corporate structure, the named corporate defendants, and the corporation that employs any named individual defendants. In the event incorrect parties are named, counsel should first contact opposing counsel and request amendment of the complaint to eliminate improper parties. This may be especially important when a parent corporation has been improperly named: some courts have held that the parent corporation is in possession of the documents of its subsidiary corporations but not vice versa.[2]

When negotiating to have a party dismissed, remember the rule of reciprocity: if possible, offer something in exchange. Can you accept service for the properly named defendant? Can you offer other procedural assistance? These and other small concessions may pay dividends by limiting sources of potential discovery and liability.

CONSIDER ANSWERING DISCOVERY FOR EACH PARTY SEPARATELY

Opposing parties often send affiliated parties a single set of joint discovery requests. By default, responding attorneys frequently respond jointly on behalf of all

affiliated defendants. Carefully consider the pros and cons of joint responses.

In some cases, joint responses may offer certain benefits. For example, they may be more time and cost efficient. They may also help centralize discovery responses for later reference.

On the other hand, these up-front benefits are often outweighed in the long run. The party seeking discovery may argue for amalgamation of the responding parties on the grounds that they acted as one by responding jointly. Joint responses may also trigger an increased deposition load. For example, the opposing party may notice multiple 30(b)(6) depositions to sort out which responding party has access and control of which documents.

As a result, in analyzing whether to answer discovery jointly or separately for associated parties, consider whether your case may benefit from the potential clarity that separate answers may provide, as well as the potential benefits gained by delineating between associated entities. Clear delineation between the entities may prove invaluable in arguing dispositive motions, addressing discovery disputes, and, if necessary, in presenting the case at trial.

INVOLVE CLIENT EARLY IN DISCOVERY RESPONSE DRAFTING

The work of an attorney is demanding, but clients have demanding schedules too. This makes it all the more important to begin seeking a client's assistance early when responding to discovery. Delay in seeking assistance with discovery inevitably results in an unhappy client and could result in limited time to complete discovery responses. Not only can delay prevent thorough investigation and properly preserved objections, but incomplete and rushed discovery responses may appear suspect to opposing parties. Suspect discovery responses encourage discovery disputes.

To head this off, counsel and clients should work together to anticipate discovery requests from the moment counsel is retained. Even before discovery is received, counsel and clients can begin gathering and reviewing documents and materials. When discovery requests are eventually served, counsel should immediately forward those requests to the client. This proactive approach helps provide time to gather materials, to develop objections, and to identify any potential issues. This will also allow counsel time to request appropriate extensions, to fully engage in discovery, and to respond in a way that may head off future discovery disputes.

CONSIDER CONFIDENTIALITY ORDERS OR AGREEMENTS EARLY IN DISCOVERY

Confidentiality orders and agreements allow parties to label production as confidential and protect production from use outside of the litigation. They may also require opposing parties to destroy or return confidential documents at the end of litigation, preventing the opposing party from using it in later litigation. While jurisdictions differ in their approach to confidentiality orders and agreements, early consideration of confidentiality issues may help stave off later discovery disputes.

Parties who address confidentiality early will negotiate with more leverage than a party who waits until discovery is due. In addition, the last-minute effort to seek confidentiality may create the impression that the party is dragging its feet, prompting opposition discovery disputes. As a result, early discussion of confidentiality may achieve important protection early while helping to avoid discovery disputes later.

MAKE CLEAR AND PROPER OBJECTIONS

The temptation to object frequently and to resort to boilerplate objections may feel enticing, especially where a suit feels frivolous or overblown. Also, boilerplate objections may appear time and cost efficient. However, any short-term benefit gained by the overuse of objections and the use of boilerplate objections may be outweighed exponentially by the costs and time that must be invested into discovery disputes down the road. Also, courts disfavor boilerplate objections and may disregard them, potentially resulting in disclosure of discovery that might have been protected by a proper objection.[3]

If a request is objectionable, clearly explain why, and consider citing legal authority. While this may take time, a thorough and proper objection provides the opposing party and, if necessary, the court with a full explanation. Thoughtful objections are more likely to dissuade discovery disputes in the first place, and they are more likely to be upheld if a dispute arises. Similarly, consider whether all your objections are necessary. A party who objects to everything is more likely to lose credibility and face discovery disputes than a party who uses objections selectively.

CONCLUSION

While some discovery disputes are inevitable, a proactive and intentional approach to discovery may prevent many disputes while also providing protection if a dispute arises. As a result, these and other strategies may save both counsel and client a great deal of time, money, and stress.

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1 *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 388, 692 S.E.2d 920, 924 (2010).

2 *See, e.g., Hubbard v. Rubbermaid, Inc.*, 78 F.R.D. 631, 637 (D. Md. 1978) ("The crucial factor is that the documents must be in the custody, or under the control of, a party to the case.").

3 *See, e.g., Adelman v. Boy Scouts of Am.*, 276 F.R.D. 681, 688 (S.D. Fla. 2011) ("[J]udges in this district typically condemn boilerplate objections as legally inadequate or meaningless.").

COVID Survivorship

A TRIGGER FOR HEIGHTENED NEED FOR LONG-TERM CARE PLANNING?

Richard R. Marsh Flaherty Sensabaugh Bonasso PLLC

COVID has dictated our lives during the never-ending year that is 2020. Moreover, the virus is clearly going to overshadow everything in the upcoming months. However, we will eventually put the matter in our proverbial rear-view windows and return to the "old" normal. What that "old" normal will look like post-COVID is another question and what changes it will bring. Some of those changes will be readily apparent, as retailers keep plastic barriers in place, some employees remain working from home, and a portion of the general population continue wearing masks when ill.

Less readily apparent changes will be the long-term health effects on COVID survivors. Medical researchers are beginning to discover that COVID creates the possibility of long-term health problems. As with any COVID discussion, these findings are an ever-evolving target. Potential issues include heart and lung damage and ongoing chronic fatigue. It is too early to tell, but there are preliminary indicators that the disease could increase the risk of stroke, Parkinson's disease, and Alzheimer's disease. And it is important to note that current research is not strictly focused on survivors of severe cases of COVID: the concern is present for those who experience mild symptoms. As of this writing, one out of almost forty-four people in the United States has contracted COVID. That is a significant population who may suffer from latent long-term negative health effects.

The possibility of latent long-term effects creates the question: does being a survivor of COVID increase your risk for long-term care and correspondingly increase the need for long-term care planning? The short answer to this is "yes" based upon existing guidelines. The National

Institute on Aging recognizes that it is difficult to predict if a person will need long-term care and if a person does, then the intensiveness of the care necessary. Factors that increase the risk of needing long-term care (and more intensive care) are age, gender, marital status, lifestyle, health and family history. COVID would slot into the health history category. For example, we know that diabetes creates a higher risk of needing long-term care, not necessarily because of the disease itself, but because of the potential complications. I assert that COVID, with its potential increased risk of latent long-term effects, should be a catalyst for considering long-term care planning, similar to how someone who has a family history of Alzheimer's or who is single should be engaged in the same sort of planning.

The takeaway is that being a COVID survivor should act as a prompt to start planning. Frankly, everyone needs to plan for this possibility. It is also not an assertion that being a COVID survivor should prompt you to qualify yourself for Medicaid if you need to become a nursing home resident. Rather, it is an assertion that you should take stock of your current health, financial situation, and overall support system to determine what steps you should take now to secure some protections.

You can either easily put several protections into place now or begin to formulate so that they will be ready to go if they are needed. The first and most basic is the creation of powers of attorney. Every person needs a financial power of attorney and medical power of attorney. These powers of attorney can be executed at any time; there is no downside to having them in place. The financial power of attorney allows you to nominate an agent to manage your finances if you cannot. Further, a properly drafted financial power of attorney will allow your agent to make transfers of your assets for creditor and Medicaid protection purposes. A medical power of attorney allows you to name an agent to make medical decisions on your behalf. It also allows you to dictate future directives based upon predictable issues, such as whether you desire to continue to receive life support in a vegetative state or factors to consider before committing you to a nursing facility.

The next protection to explore is long-term care insurance. Most long-term care insurance policies are structured to pay a maximum amount per day for a maximum time period. To purchase a sufficient policy to pay for the entirety of your care is likely not cost-effective. However, it is important protection because it can increase the number of assets you can protect and qualify for Medicaid. Generally, the percentage of principal you can protect in Medicaid planning is significantly based on your passive monthly income. Therefore, the higher your monthly passive income is, the more principal you can defend. By adding the income flow of the long-term care policy, you will be able to place more of your assets into a Medicaid trust, which you keep, and less in a Medicaid annuity, which you do not, and still ultimately qualify for Medicaid.

One of the problems with qualifying for Medicaid is the dreaded "look-back" period. The most succinct summary of the look-back period is that if you have transferred any assets for less than fair market value within the five years before your Medicaid application, then you are going to be disqualified from receiving long-term care Medicaid benefits for a period of time. This penalty period is based upon the total fair market value of the assets transferred less any consideration received for them divided by the average monthly cost of a nursing home in a particular state, referred to as the penalty divisor. The penalty divisor is different in each state. For example, in 2020, the penalty divisor in West Virginia is $6,482. Therefore, if you gave your son $16,000 three years before your Medicaid application date, then you would be disqualified from receiving long-term care benefits for 2.47 months.

The penalty period trips people up in several ways, one of which is transfers to family caregivers. It is extremely common for a family member to care for a loved one to avoid a nursing home. Occasionally, the family member is paid for this. However, if done improperly, this creates a transfer that triggers the penalty period. Planners get around this issue by having the client and the family caregiver enter into a personal care agreement. With a proper personal care agreement, the transfer does not trigger the penalty period. A key to the agreement is that it must be entered into before the caregiver services are rendered. Often, clients begin paying for the caregiver services and then want an agreement after the fact, which is generally a no-no. The agreement should be similar to one you would make with a third party, such as detailing expectations of services and hours. In terms of planning, nothing stops you from contemplating this agreement ahead of time.

Planning on how or when to transfer assets is another early planning opportunity. Generally, if you are interested in creditor or Medicaid protection, the rule is the more control you give up, then the more protection you have. And timing influences what benefits you can receive from a transfer. Normally, assets having minimal liquidity and having minimal desire to sell are candidates for early transfer. The best example of this in my area is the family hunting property that has been in the family for years. In other areas, it could be a vacation home that you want the kids to have. Those are assets that may be worthwhile to move to a trust early. On the opposite end of the spectrum, someone active in day trading certainly would not want to transfer stock to a trust. By reviewing these assets early and considering how, when, and if to transfer them, you will put yourself in a position to maximize your creditor and Medicaid protection while also balancing your need for control of the asset.

The final reason for planning now is to develop a relationship with the appropriate professionals early. An attorney versed in estate planning will be able to walk you through the potential benefits and pitfalls of your plans. Importantly, by returning periodically to the same attorney, you will develop a relationship with the attorney that may help you later. Unfortunately, a growing problem is elderly financial exploitation. Having a third-party professional who is familiar with your assets and your desires may help thwart wrongdoing. These types of relationships can extend to your insurance agent, financial planner, and others. For that reason, taking that first step in contacting someone is worthwhile.

Looking towards the future, COVID will continue to dictate many aspects of our lives. For people who have recovered from COVID, even those who suffered mild symptoms, the disease may reappear in unexpected ways by having caused damage to the heart, lungs, brain, or other organs. These potential long-term latent effects mean that COVID survivors are at a higher, albeit unclear, risk of needing long-term care in the future. For that reason, COVID survivorship should act as a catalyst to begin estate planning, with an eye towards long-term care planning.

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SINGULARITY VS THE SPECIAL INVESTIGATIONS UNIT

Implications for the AOE/COE and Cargo Theft Investigation

Juan Antonio Rodriguez Marshall Investigative Group, Inc.

I was born and raised in Chicago, home to the innovators and creators of the cell phone, the skyscraper, and softball. As a child, I dreamed that one day in the future, automobiles would fly and that screens would replace rotary telephones. I know what you are thinking, but unfortunately, life would lead me on another path and direction. Despite the angst of having lost out on that fortune by failing to chase those dreams, I became an attorney. After a successful career as a litigator for a global insurance carrier, I transitioned into the world of private investigations, and fortunately for me, into the fertile learning grounds of the Special Investigations Unit for Marshall Investigative Group.

With my childhood dreams serving as a backdrop and while being sound asleep on my way into the office in my fully self-autonomous driving 2021 Tesla Cyber Truck, I had a nightmare revelation. What impact might the dawning of Singularity and Artificial Intelligence have on future investigations? Notably, the Special Investigations Unit (SIU), responsible for conducting the AOE/COE and Cargo Theft Investigation in the transportation industry.

According to the Department of Transportation Federal Motor Carrier Safety Administration, as of April 2020, there were 928,647 for-hire motor carriers, 799,342 private motor carriers, and other motor carriers combined for a total of 84,763. Approximately 8 million people are employed in the trucking economy, excluding about 4 million self-employed truck drivers.

WHAT IS SINGULARITY?

The technological Singularity hypothesizes that the invention of artificial superintelligence (AI) will abruptly trigger runaway technological growth, resulting in unfathomable changes to human civilization. This powerful superintelligence will, qualitatively, far surpass all human intelligence.

Artificial Intelligence (AI) is prevalent across all major industries, and the private investigative industry is not immune. In all facets, the industry is impacted in important

and vital ways. The simplistic view is to regard the dawning of Singularity and AI with skepticism, fear, and distrust. Let's face it, it is a valid concern that 'we' will be replaced. The investigative industry in general, and the Special Investigations Unit in particular, will be obsolete and in peril. The impact is real and formidable but not insurmountable. There is no alternative but to accept the changing landscape from the old to the new. The ongoing development of applications coupled with the creation of more advanced machine learning algorithms will attempt through efficiency and reduced operating costs to eventually replace human beings.

In investigations, tools that utilize artificial intelligence make information gathering and analysis quicker and cheaper while proving to be reliable. The vital component is that we will consistently provide our business partners with timely, accurate, and corroborated evidence critical to any investigation's success. Unequivocally, there is no room for ongoing debate or controversy that the practical and useful application of AI technology will expedite the time-consuming activities of collecting and analyzing data. This technology allows the SIU investigator to accelerate fast-paced investigations geared towards providing consistent, efficient, and swift conclusions translating into our business partners' successful results.

To combat our replacement, MIG-SIU has embraced the age of Singularity and AI by implementing simple yet effective steps to remain viable and competitive in this ever-evolving landscape. MIG-SIU has adopted policies and procedures to accommodate a delicate balance between implementing the new technology and techniques with their long-standing and established investigatory practices.

WHAT IS AN AOE/COE INVESTIGATION?

AOE means "arising out of employment," and COE means "in the course of employment." An AOE/COE is an investigation to determine the facts surrounding an alleged injury to a worker on the job to establish whether the employee's alleged injury was, in fact, work related and occurred while in the course and scope of employment.

The traditional AOE/COE investigation initiates when a truck driver notifies their employer that they have sustained an injury while working. During processing, the claim's professional may notice "red flags," which may prompt an investigation and subsequent SIU assignment. Currently, the AOE/COE investigations conducted by MIG-SIU in the transportation industry have been straightforward with excellent results for our business partners. This success begins with our team at MIG-SIU: comprising former practicing attorneys, law enforcement officials, insurance industry experts, psychologists, and medical consultants. Fast forward to the age of Singularity and self-autonomous tractor-trailers. What will be the new model to conduct an AOE/COE investigation under these circumstances?

Fortunately, the new model is easy to envision, with retrained truck drivers operating multiple tractor-trailers across the country from a command center. Undoubtedly, at some point, due to human error, accidents will happen. Immediate change and effect will be realized on many levels, with the most concrete and manageable scenario to envision the types of injuries investigated. How will we determine compensability? The simple "slip and fall" with broken bones will not be the most common accident in this scenario. The more traditional orthopedic injuries will be supplanted by the more difficult to defend: psychological injuries.

At Marshall, the SIU approach will begin an investigation at the pre-employment stage and monitor throughout his/her tenure. They will utilize traditional investigative techniques while also using AI technology to support the underlying research. Moreover, the advent and increased efficacy of predictive modeling will also be a key component in investigating and rooting out any potential fraudulent claims through this revamped approach. Investigators spearheading the investigation and AI as their trusted partner will be an easy, seamless transition to manage during the dawn of Singularity and AI in a similar fashion involving the Cargo Theft investigation.

WHAT IS A CARGO THEFT?

Cargo theft is defined as "the criminal taking of any cargo including, but not limited to, goods, chattels, money, or baggage that constitutes, in whole or in part, a commercial shipment of freight moving in commerce, from any motor truck, or other vehicle or from any intermodal container, intermodal chassis, trailer, container freight station, warehouse, freight distribution facility, or freight consolidation facility."

According to CargoNet, there was a 300% year-over-year increase in cargo theft activity in April 2020. The majority of the thefts were inside jobs committed by employees. What does the cargo theft investigation look like now in the face of Singularity?

In the age of Singularity, the traditional cargo theft investigation procedures will essentially remain intact. The theft investigation will begin with the reported loss and immediate requests to review and evaluate the complete file. The pertinent witnesses are identified, located, and interviewed to complete the relevant documentation related to the loss. Thereafter, recorded statements will be obtained and synopsized with analysis and recommendations by MIG-SIU.

Again, the MIG-SIU approach will build on its already successful results for its business partners by enacting a new mitigation strategy before the theft happens, early in the process, and the time of recruitment of prospective employees. Before hiring, we will encourage clients to conduct a thorough forensic analysis of any potential applicant's background. In correlation, we work a more robust holistic investigation using AI and specific algorithms to investigative known associates both personally and professionally to look for specific indicators. The monitoring with the use of AI will continue uninterrupted throughout employment. To combat our replacements, MIG-SIU will handle these new types of investigations by focusing and hiring investigators with backgrounds and degrees in cybersecurity, software engineering and management information systems.

AI is prevalent and vital in today's digital environment. I am (somewhat) reassured by the fact that in all likelihood, we will not be replaced as private investigators anytime soon. AI may use its automated algorithms to calculate and predict patterns in data and human behavior, but only humans can comprehend and relate to humans. Human beings perpetuate insurance fraud and all types of fraud. Even the most advanced AI algorithm cannot and will not be able to entirely process what it means to be human and/or to process nuances of body language and the importance of eye contact.

The Special Investigations Unit at Marshall accepts the value of AI in the private investigation industry. Marshall Investigative Group Special Investigations Unit will strive to continue to harness the use of AI positively for the benefit of the sector going forward.

Juan Antonio Rodriguez is general counsel and vice president of Marshall Investigative Group's Special Investigations Unit. With more than 15 years as general counsel for a global insurance carrier, Juan brings vast experience and knowledge to lead a nationwide team of SIU investigators in the arenas of criminal and civil liability claims, casualty and workers' compensation, intellectual property, premise liability, truck and cargo thefts, statements and examinations under oath and other various types of investigations.

Untangling the Web of Medicare Compliance with Casualty Programs, Claims and Litigation Management

Thomas S. Thornton, III Carr Allison

Medicare, and its influence upon the casualty industry, is not going away. In fact, it now appears that Medicare is positioning itself to begin enforcing civil monetary penalties against defendants/carriers failing to comply with Section 111 Reporting requirements pursuant to SCHIP and the SMART Act. As an industry, we should expect 2021 to bring increased scrutiny from Medicare.

Socrates once wrote "the secret of change is to focus all of your energy not on fighting the old, but on building the new." In applying this philosophy, the industry will have to begin to accept the reality that we need to change the terms we include in our negotiations, settlements, and release language to achieve compliance and mitigate risk.

The Medicare Secondary Payer (MSP) Act has been described by several courts as the most convoluted legislation ever drafted. However, by understanding and accepting several statutory and regulatory requirements, the industry will be able to adapt, improve compliance under the Act, and more easily navigate a casualty claim. This article will attempt to provide clarity to the web of confusion which is the MSP.

WHAT IS GENERALLY REQUIRED BY MEDICARE OF THE LIABILITY INDUSTRY

- With every settlement, judgment, or payment involving the claim and/or release of medical damages, and where the consideration paid is greater than $750, we must confirm whether the Releasor(s) is a past or current Medicare beneficiary.
- Where each of the above elements is answered in the affirmative, the parties to the settlement must understand and appreciate that a Section 111 Reporting Obligation exists.
- Where a Section 111 reporting obligation exists, the party responsible for reimbursing any and all liens per the terms of settlement must affirmatively, timely and appropriately afford Medicare the opportunity to research and assert a conditional payment demand.
- Where Medicare asserts a conditional payment demand, that payment must be timely reimbursed.
- A decision should be made regarding whether to, when to, or how to document the steps taken to avoid any unreasonable burden shifting to Medicare relating to the provision of future medical coverage by the Client we are representing.

MEDICARE WILL LEARN OF YOUR SETTLEMENT, JUDGMENT AND/OR PAYMENT

42 U.S.C. Section 1395y(b)(8) creates mandatory reporting requirement for defendants and insurance carriers. This obligation arises when (1) the claimant is a past or current Medicare beneficiary; (2) medicals have been claimed or released by a plaintiff; and (3) the consideration paid is greater than $750. Where the answer to these three questions is in the affirmative, then the defendant will have a Section 111 reporting obligation. It is mandatory and there is no "discretion."

The purpose of Section 111 reporting is to place Medicare, and by extension a Medicare Advantage Plan, on notice of every conditional payment claim recovery opportunity. This ensures that Medicare (1) had an opportunity to identify and collect conditional payments; and (2), that Medicare receives information about the settlement they believe is germane to allow it to "fully" recover its conditional payment lien. In general, the Defendant/Responsible Reporting Entity ("RRE") must submit 140+ fields of information relating to:

- The claimant.
- The Plaintiff's attorney if applicable.
- The Defendant.
- The Date of Accident.
- ICD-10 codes relating to medical conditions claimed and released.
- The amount of settlement (Total Payment Obligation to the Claimant ("TPOC")).
- The date of TPOC.

The date of TPOC is an important element for compliance. Absent a judgment, it is the date upon which a conditional payment claim comes into existence by operation of law. (Medicare Secondary Payer Manual, ch. 7, 50.4.1 (Feb. 22, 2008) *and* 42 U.S.C 1395y(b)(2)(B)(ii)). Medicare has defined the date of settlement as "the date the release was signed." This is evidenced by the NGHP (Non-Group Health User Guide) which instructs the Defendant/RRE to input the date the release was signed as the date of TPOC. Likewise, the user guide for the web portal instructs the plaintiff/plaintiff's counsel to provide the date the

release is signed as the date of settlement. *Medicare Secondary Payer Recovery Portal (MSPRP) User Guide, pp 2-9, Version 4.7 dated October 7, 2019.*

It is not a question of if Medicare will be placed on notice of the settlement with the 140+ fields of information, but when is the Defendants/RRE's assigned reporting window. The Section 111 Report empowers Medicare to open either its first, or even a new, conditional payment recovery file to investigate *whether Medicare believes* it has made conditional payments that have not been reimbursed by a responsible party as of that date. Actions by a third party based upon information inconsistent with that submitted in the Section 111 report will not extinguish the risk of additional conditional payment claims under a three-year statute of limitations. Strengthening Medicare and Repaying Taxpayers Act of 2012 (SMART Act)

MEDICARE'S SUPER LIEN

"Super Lien" is a phrase largely, and accurately, utilized to describe Medicare's power to recover conditional payments. However, it should likewise apply to Medicare's power to investigate and determine the related conditions for which a payment may be recovered.

In relevant part, the MSP provides that a plaintiff, plaintiff's counsel and/or defendant have an equal responsibility and obligation to reimburse Medicare or a Medicare Advantage Plan when there is a settlement, judgment, or payment. Actual or perceived responsibility is irrelevant Shapiro v. Sec'y of HHS, No. 15-22151-Civ-COOKE/TORRES, 2017 U.S. Dist. LEXIS 42278 (S.D. Fla. Mar. 23, 2017).

See also, 42 U.S.C. § 1395y(b)(2)(B)(ii). Medicare's recovery contractors will view medical records and bills submitted from the date of accident through the date the release was signed. Just because, for example, a right knee claim is reported to Medicare as being related to an accident on a specific date, it does not preclude Medicare from *attempting* to include additional conditions based upon ICD-10 and other billing coding which Medicare deems to have naturally arisen or to have been aggravated by the underlying claimed accident.

The result is that parties to a liability settlement who are aware that a Section 111 reporting obligation will exist should expect the unexpected when it comes to Medicare's recovery of a conditional payment claim. In essence, that case will be subjected to a separate "litigation process" established by Medicare to address, identify, and determine what, if any, conditional payments Medicare deems related. While a party does have the ability, within the context of Medicare's recovery process, to dispute the inclusion of questionable conditional payment claims, this undertaking mandates a five-level administrative appeal process before a party has standing to assert its dispute in federal court. See Wetterman v. Sec'y of HHS, No. 2:18-cv-85, 2019 U.S. Dist. LEXIS 118115 (S.D. Ohio July 16, 2019). However, if you miss a deadline within the appeal process, the debt becomes final.

There are two additional entanglements with Medicare's recovery process that most commonly arise in liability settlement scenarios. First, a party's reliance upon a conditional payment notice letter from a recovery contractor as being an accurate or final accounting of Medicare's ultimate demand before the release is signed. Several published cases reflect significant changes in Medicare's demand in only a matter of weeks between written communication from Medicare/BCRC. Second, a Medicare Advantage plan having been elected by the claimant, whether known or unknown to the attorneys; or the mistaken belief that a Section 111 reporting obligation does not still exist and the possibility of Medicare still asserting a lien when such plans have been elected. Humana Ins. Co. v. Bi-Lo, LLC, No. 4:18-cv-2151-DCC, 2019 U.S. Dist. LEXIS 163063 (D.S.C. Sept. 24, 2019).

THE POWER OF A RELEASE

We work in an industry where approximately 95% of our claims are settled. As it relates to the liability industry, the release creates our obligations under the Medicare Act, and thus, should reflect our compliance. The Release should reflect and/or confirm (1) whether a Section 111 reporting obligation exists, (2) if so, strategically employing options to ensure Medicare's conditional payment claims are timely and properly reimbursed; or (3) addressing Medicare's future interest.

While the Release creates the obligation, the Release in and of itself does not provide a defense to Medicare's effort to subsequently collect a conditional payment claim that has not been properly reimbursed. Courts have made it clear that a defendant, in essence, has an affirmative duty to make advance arrangements to ensure that the party assigned the responsibility of reimbursing Medicare, or a potential Medicare Advantage Plan, in fact does so timely and appropriately consistent with the Defendant's Section 111 reporting obligation. Humana Med. Plan, Inc. v. W. Heritage Ins. Co., 880 F.3d 1284 (11th Cir. 2018); Humana Ins. Co., 2019 U.S. Dist. LEXIS 163063

The result will be a Defendant is looking at a potential conditional payment claim asserted by Medicare through either the U.S. Treasury Department, lawsuit by a U.S. Attorney, or lawsuit by a Medicare Advantage Plan; with double damages and interest as available penalties to be asserted. The indemnification language will mean little to that defendant at that stage Shapiro, 2017 U.S. Dist. LEXIS 42278; Trostle v. Ctrs. For Medicare & Medicaid Servs., 709 F. App'x 736 (3d Cir. 2017).

CONCLUSION

As National Medicare Compliance Counsel for numerous businesses, carriers and TPAs, I endeavor to create an acceptable path for clients to navigate claims internally, or litigation externally, which allows them to meet their overall claim objective and navigate the Medicare Act in accordance with their risk tolerance. This includes interjecting available strategies into the settlement and compliance processes which Medicare has afforded the industry and are often unused.

When speaking to parties in a specific case in support of these endeavors, the two most frequently spoken words that give me concern are "I KNOW." The risks associated with Medicare's web of requirements are very real, and they require careful planning to navigate to the maze and avoid additional costs, penalties, and other exposure.

Thomas S. Thornton, III has focused his litigation practice on the defense of premises liability, product liability, transportation, general liability, as well as catastrophic workers' compensation matters. Tom also serves as National Medicare Compliance Counsel for many of his business, insurance and TPA clients ensuring compliance with the Medicare Secondary Payer Act and Section 111 Reporting while bringing strategic solutions to the forefront for claim closure.

[1] On February 18, 2020, CMS published the proposed rule "Medicare Secondary Payer and Certain Civil Monetary Penalties;" its second proposed rule publication on this issue.

[2] For purposes of this article it is assumed that a Medicare Advantage Plan's authority to recover a conditional payment claim is the same as Medicare.

EFFECTIVE USAGE OF COMPULSORY MEDICAL EXAMINATIONS

Avoiding tricks and traps of the Plaintiff's Bar in the age of Nuclear Verdicts

E. Holland "Holly" Howanitz and **Catherine Higgins** Wicker Smith

A Compulsory Medical Examination ("CME") can be a useful tool in defending and/or resolving a personal injury case. While CMEs, also known as Independent Medical Examinations in some jurisdictions, can bolster your defenses as to medical causation, that is not their only use. An effective CME can not only support causation defenses, it can also serve as a benchmark to help determine value of a claim, thereby facilitating negotiation.

IDENTIFYING THE NEED FOR A CME

It is imperative for the defense team to begin its review of a case with an eye to what expert testimony may be required, including when to incorporate a CME into the defense plan. It is important to have clear communication between client and counsel as to the goal of the CME, as well as how that integrates with the larger trial preparation strategy. The most obvious example of when to use a CME is where your personal injury plaintiff has a prior history of similar complaints. In this case, an effective CME can be used to delineate any potential change between the claimant's pre-existing health and any potential new injury. Or, alternatively, a CME can be used to confirm that the claimant's current complaints are, in fact, symptoms of the natural progression of their prior pathologies.

Another instance where a CME is likely to be beneficial is when a claimant is alleging injuries that either appear to be out of proportion with the subject incident or a novel condition. For example, claims of traumatic brain injury (TBI), even after minor incidents, are increasing in many states. In previous years, claims of a TBI would be limited to incidents with visible, severe injuries and/or property damage. In

these cases, it can be difficult to formulate a defense where a sympathetic plaintiff has alleged that his personality has irrevocably changed due to a TBI. In these cases, a thorough neurological or neurophysiological evaluation often disproves the plaintiff's claims of cognitive deficits associated with the subject accident. In cases of alleged TBIs, neurological and neuropsychological testing is effective in identifying the claimant's baseline level of function and compare it to the current level of cognitive functions. The tests are also designed to identify malingering or exaggerative behavior. In effect, it pays (or, more accurately, saves) to be curious when determining what kind of experts to retain and rely upon for CMEs, particularly when faced with novel and/or subjective complaints.

BANG FOR YOUR BUCK: USING YOUR EXPERT TO HIS OR HER FULLEST POTENTIAL

In recent years, we have identified increased instances of obstructive behavior by opposing counsel during CMEs. In order to ensure that the defense expert is able to obtain the necessary information to conduct his evaluation, it is important to prepare him for anticipated tactics from the plaintiff's counsel. Likewise, the expert needs to be aware of jurisdictional rules relating to the presence of court reports and videographers. The presence of outside participants can be a large point of contention during neuropsychological examinations and needs to be addressed in advance of the examination. It is also critical that your chosen expert is familiar with any jurisdictional limitations imposed on what kind of examination may be conducted, or if there are any controversies over the type of inquiries the expert may make of the plaintiff during the exam. In this vein, it can be helpful to provide any initial paperwork or written histories that your expert may want completed as part of the CME to the plaintiff's attorney in advance of the examination. Additionally, should the plaintiff issue any objections to the CME, provide and discuss those with your expert prior to the examination as well.

It is equally important to have your medical expert prepared for what the rest of his or her involvement in this litigation will look like. Prior to the CME, discuss the plaintiff's theory of liability with your expert to ensure that he or she is aware of the claimed injuries. Ask him or her detailed questions about what the expected treatment for such injuries would be, and be prepared to speak intelligently with regard to the plaintiff's medical records to direct your expert's attention to any prominent inconsistencies that you believe exist.

After the CME, confer with your expert and obtain his or her impressions. If the expert cannot be supportive, you will want to know prior to the issuance of any medical report. In many jurisdictions, it is required that the expert issue a report and that the report be provided to opposing counsel. If you are facing the receipt of a harmful report, consider whether you can resolve the case before the report is issued.

Defer to the Experts: Valuation Benchmarks Increase Negotiation Efficiency

An effective CME is not simply an opportunity for a doctor to provide a blessing for your defense strategy. Rather, a CME can provide a baseline as to the severity and/or veracity of the claims asserted which in turn allow both the client and the defense attorney to determine an informed, reasonable negotiation standard. An important component of this strategy is to find medical experts who can be forthcoming with you and inform you as to what the potential exposure could be at a potential trial. Effective CMEs rely on finding and cultivating relationships with medical experts who not only understand the process, but who are also not afraid of being honest with you about the strength of your case.

Cost-Saving Alternative: CMEs vs. Records Reviews

CMEs are not the sole way to effectively utilize medical experts, though. Another, at times more cost effective, way to obtain expert opinions is to obtain a records review. This is useful particularly if you are seeking expert opinions early in the case and/or if you are working on a tight timeline. In many cases, as soon as defense counsel can provide comprehensive records to a medical expert that expert can begin formulating opinions. Another benefit of obtaining an early records review is that there is no signaling event to opposing counsel that you are obtaining these opinions. As such, you have the ability to conduct depositions or written discovery with a more targeted plan of attack. Moreover, you can always discuss the usefulness of a subsequent CME with your retained expert after a records review.

Records reviews can also be helpful in the event when you are seeking to confirm the extent of causation, rather than dispute it entirely. In this scenario, the records review could serve as barometer to ensure informed reserves are placed on the case and provide an educated background from which to negotiate a resolution. In addition, an early records review can provide a baseline for intelligent questioning during a plaintiff's deposition to determine whether or not the plaintiff's testimony comports with medical science. This is doubly useful if the plaintiff later submits to a CME, as the expert will have the plaintiff's own testimony to point to should the expert's opinion be supportive.

Other considerations: Timing and Expense

While the cost of defending claims is certainly at the forefront of the minds of clients, it behooves both attorneys and clients to begin the defense work up of a case with the end in mind. Each case will be different regarding what kind of expert review is the most helpful. Often, obtaining objective medical opinions early in the life cycle of a case provides a strong footing from which to combat a plaintiff's subjective complaints. This is particularly true where a case involves a novel injury, prior history of similar complaints, or subsequent complication; it may be necessary to invest in a well-credentialed expert (sometimes at a steep price) early on.

Early retention of experts in complex cases or cases involving a novel or unique injury can provide direction to defense counsel relating to investigation, written discovery, questions for depositions, and even deposition questions for the plaintiff's treating physicians. In many cases, the best defense is putting on a strong offense. The added value of having a seasoned expert on the defense team early on often outweighs the cost.

E. Holland "Holly" Howanitz is a shareholder in Wicker Smith's Jacksonville (FL) and Brunswick (GA) offices. She focuses her practice on defending claims, including general negligence, personal injury, products liability, automobile negligence, construction defect, and professional malpractice. She was recently inducted into the American Board of Trial Advocates (ABOTA).

Catherine Higgins is an associate in Wicker Smith's Jacksonville, Florida, office. She focuses her practice on defending claims including general negligence, personal injury, automobile negligence, and construction defects.

INNOVATION FOR THE LONG HAUL

Protecting Injured Individuals with Trucking Settlements

Mark Doherty Ametros

RISK ON THE ROAD

Working on the road has become increasingly more dangerous for truck drivers over the past decade. The possibility of an accident remains a constant risk on the road despite certain federal and state standards that trucking drivers must meet for preventative road safety measures. The Federal Motor Carrier Safety Administration's annual edition of *Large Truck and Bus Crash Facts* crash statistics reveal:

"From 2009 to 2015, injury crashes increased 62 percent to 97,000. From 2016 to 2018, according to NHTSA's CRSS data, large truck and bus injury crashes increased 8 percent (from 112,000 in 2016 to 121,000 in 2018)" and "Single-vehicle crashes made up 23% of all property damage only crashes involving large trucks in 2018."

It's not easy being a truck driver. Between long hours on the road, transporting hazardous materials, and the physical demands of the job, there are plenty of chances for a driver to become seriously injured or ill. Some of these injuries or illnesses require ongoing medical care and support after the accident.

As the risk for injury and property damage crashes increases, so does the chance of liability and workers' compensation claims, which can turn into long-term expenses for employers over time as they age.

"Liability Claims are not like fine wine – they do not improve with age," says Robert Milane, General Counsel for ARC Claims Management Inc. "It is imperative that liability claims be promptly investigated and resolved – especially claims with potential bodily injury exposure. Investing the time and expense to make same-day contact with a claimant to control the claims is the cornerstone of prudent claims management."

EMPLOYER SOLUTIONS FOR COMPLEX WORKERS' COMP AND LIABILITY CLAIMS

Employers often want a reduction in large, complex, and aged pending files that remain open with carriers and Third-Party Administrators (TPA), claims that lead to long-term costs overtime. Ultimately, complex trucking claims involving ongoing future medical care can lead to long-term costs and greater exposure each year for the employer as they age. Even seemingly small liability claims can become more complex the longer they remain open and escalate if not resolved quickly.

As the number of trucking claims increase, it's important to stay ahead of claims that can lead to long-term costs. Involving a best-in-class professional administrator early on is an effective way to support claim closure for lingering claims with open medical.

PROFESSIONAL ADMINISTRATION AS A SOLUTION FOR TRUCKING SETTLEMENTS

Injured individuals' fears about settlement are often a large component of why some cases become difficult to settle. Many injured individuals want to settle their case to have more freedom

to treat but are scared to lose the support of their nurse case manager, adjuster, or attorney on their case. They may fear the proposed Medicare Set Aside allocation won't be enough to cover their lifetime medical costs, managing Medicare reporting, or that they won't be able to treat after settlement. In many cases, the injured individual's attorney, primary caregiver, and family members are also involved in important settlement decisions and weigh in on settlement outcomes. Having a neutral party offer a unique perspective to alleviate concerns in early settlement conversations can help push settlement forward.

"Engaging a neutral and experienced third party increases the probability of resolving a claim before it spins out of control," says Milane. "A claimant is more likely to consider the opinion of the settlement value from someone whose experience gives him/her credibility and who has 'no ax to grind' with either party. This also provides the claimant attorney a means of controlling what may be unrealistic expectations of his/her client."

Administrators provide comfort and savings to injured individuals by fully overseeing and managing their future medical funds after settlement.

Professional administration provides numerous benefits, including:

- **Savings on Healthcare** - Discount networks save individuals on provider bills and all other medical expenses, allowing medical funds to last as long as possible.
- **Never Touching a Bill** - All medical billing is handled after settlement by the administrator so injured individuals do not have to worry about payments.
- **Full Medicare Set Aside Reporting –** In the case of a Medicare Set Aside, an administrator compiles any necessary reporting to The Centers of Medicare and Medicaid Services (CMS).
- **Support –** Injured individuals can rely on a team of settlement and Medicare Set Aside experts available to answer questions about their medical treatment and any reporting responsibilities.

Not all professional administrators are created equal. Beyond these core benefits, forward-thinking professional administrators invest in their back-end technology to provide solutions for even the most complex settlement needs. These administrators continue to maintain the most up-to-date technology, including online member portals and mobile applications for tracking and managing settlement funds on the go.

PREPAID CARDS LEAD TO EARLY RESOLUTION FOR LIABILITY ACCIDENTS

Best-in-class administrators continue to develop solutions to support faster settlement. For example, adapting to the needs of the trucking industry with fast resolution liability settlements (i.e. injury and property damage crashes) through an innovative prepaid card solution. This solution can resolve liability cases faster by offering an opportunity for instant settlements on the road.

A prepaid card can deliver funds to the injured individual instantly. If future medical is required, a combination of a prepaid card and professional administration can be a great option to ensure the injured individual has their medical care properly managed after the accident. This unique solution helps avoid obstacles that prevent liability settlements from closing, including bank restrictions with settlement funds and offers an alternative way to access the settlement proceeds.

An innovative prepaid card solution provides:

- **Fast resolution settlements –** Cards can be used to facilitate expedited settlements.
- **Funding in minutes –** Cards can be funded in 20 minutes or less.
- **Convenient access –** Funds are already pre-loaded onto the card and ready for use.
- **Works for small and large settlements –** Up to $99,999.99 can be loaded onto a single card.
- **Avoid settlement obstacles –** Can provide a way to deliver settlement proceeds to individuals with bank restrictions, or with no SSN or Tax IDs.

"While it may seem counter-intuitive, it is the small claims that present the most risk," says Milane. "Preventing the $2,000 claim from becoming a $20,000 claim is best controlled by a first call settlement. The opportunity to resolve the claim of an individual who is 'shaken up' in an accident decreases exponentially the longer the claim is open. A prepaid card that allows the adjuster the opportunity to settle a claim 'on the spot' is a valuable tool."

Prepaid cards offer a creative strategy to facilitate closure, especially for smaller property damage claims, that may not get resolved quickly due to stretched resources and limited bandwidth. Employers can save on long-term expenses and improve company reputation by offering a fully loaded prepaid card to victims of trucking liability accidents with a short turnaround.

A PREPAID SOLUTION IN PRACTICE

A 55-year old mechanic from Texas was involved in a rear-end motor vehicle accident with a box truck this past May. Luckily there were no incapacitating injuries, but they did suffer neck, back, and general soreness, which impacted the individual's ability to perform at their self-employed service. The liability claim was referred to Ametros and within just one day's turnaround, a settlement offer was made through the combination of a loaded prepaid card and Ametros' professional administration solution, CareGuard. The offer of $15,000 settled with $10,000 on the prepaid card to be provided instantly at the time of settlement, and $5,000 to be professionally administered for any medical expenses related to the accident.

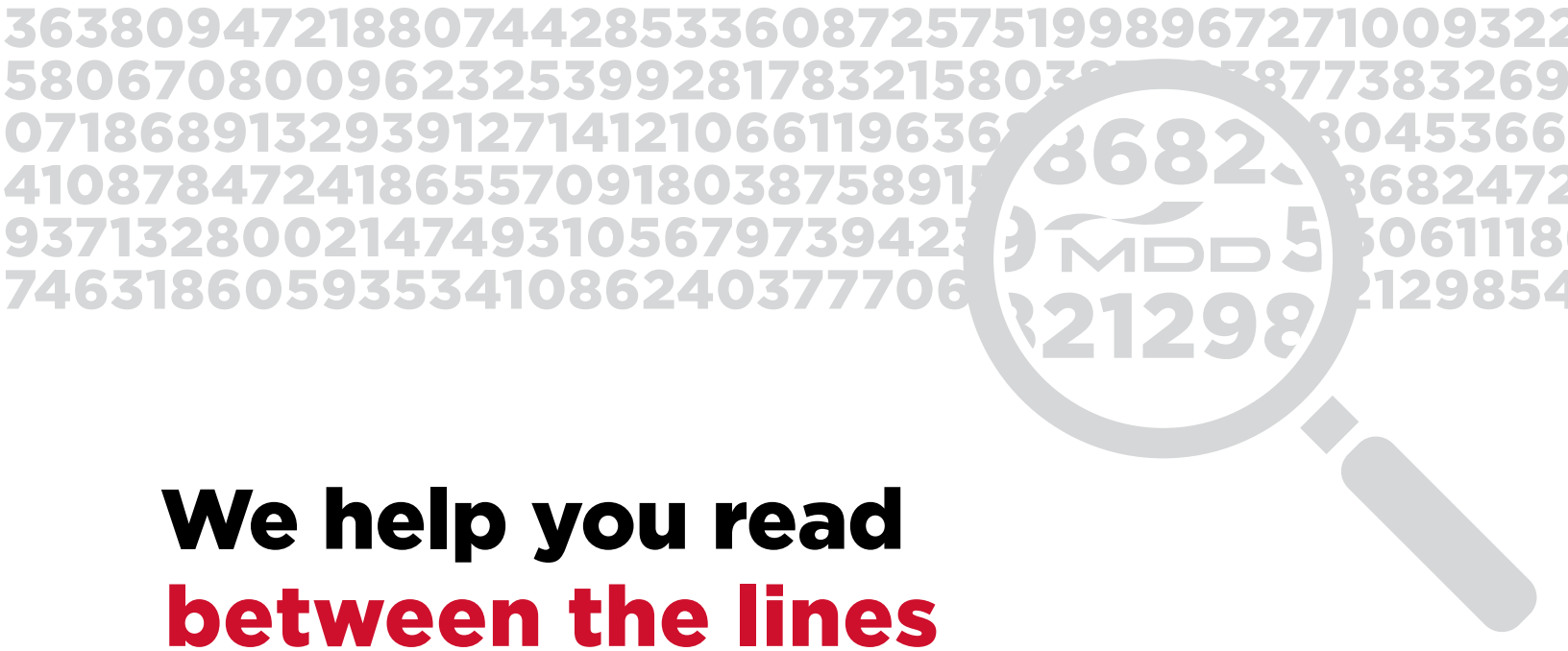
The solution made for a quick and simple transaction. Over a day's time, the adjuster called the injured individual and went by their home to make the settlement offer. After a brief conversation with their wife, the injured individual signed all the necessary paperwork to accept the settlement offer, receiving access to the settlement funds on the same day. Both settlement parties walked away satisfied from the timeliness and convenience of the offer. Leaving limited time for the accident to escalate, this smaller liability claim closed with a successful resolution.

CONCLUSION

Involving a professional administrator helps injured individuals feel confident settling and provides coverage for both employers and injured individuals from potential liabilities after settlement.

Staying ahead of claims that can become more complex as they age with professional administration or a unique prepaid card solution, supports a long-term strategy to free up reserves, maintain control and reduce future costs with workers' comp and liability trucking claims.

Mark Doherty, executive vice president, brings more than 15 years of sales leadership to Ametros along with a wealth of workers' compensation industry knowledge and relationships. Mark oversees Ametros' sales teams, including field sales, and national account teams. He is responsible for developing sales strategies across all channels of the workers' compensation system. For questions regarding Ametros' professional administration and prepaid card trucking settlement solutions, contact Mark at mdoherty@ametros.com.



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Adler Pollock & Sheehan, P.C. (AP&S) in Rhode Island offers a Diversity Fellowship - the Honorable Walter R. Stone 2L Diversity Fellowship - to an outstanding second year law student. The Fellowship provides a $10,000 scholarship and a summer associate position at Adler Pollock & Sheehan during the summer of 2021. The Fellowship is named in Honor of the late Judge Walter R. Stone. Judge Stone was the first African American attorney in the Rhode Island Attorney General's Office, the first African American Shareholder at AP&S, a member of the AP&S Diversity Committee and a champion of promoting inclusion for all. For more information about the fellowship and the firm's diversity efforts, click HERE.


Keely Duke with Rich Hall

USLAW's Idaho member firm, Duke Evett, is sad to report that long-time USLAW member, Richard E. Hall, passed away on October 6, 2020, after a two-and-a-half year battle with pancreatic cancer. Rich had recently retired on December 31, 2019, and was an incredible mentor and dear friend to Keely E. Duke, whom he worked with for the last 21 years.

Rich is a legal legend in Idaho and beyond. He was a brilliant trial attorney and was the consummate professional no matter the situation. His incredibly successful legal career was founded on a respect for the law, rules and all involved.

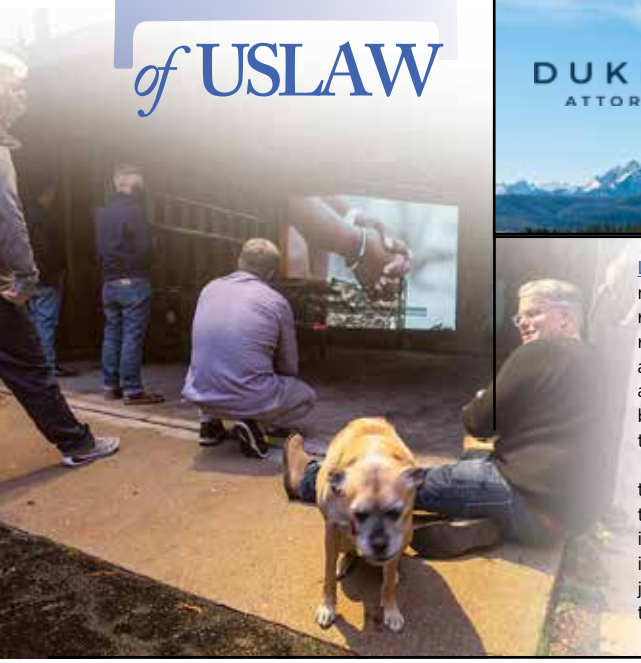
Rich was also a whole lot of fun to be around. As many of you know, there was never a lonely person in the room when Rich was around. He could talk to anyone about anything and would have strangers laughing by night's end. A true gift.

Rich is survived by his wife, Tonya, and his four daughters and many grandchildren. A Celebration of Rich's life will happen next year when it is safe again to be in large groups. Rich will certainly pack the house when his Life's Celebration occurs!

Rich will be so very missed in Idaho and beyond. For inquiries as to contact information for Tonya Hall and the family, please email Keely Duke at ked@dukeevett.com.

Baird Holm LLP in Nebraska has launched a monthly podcast devoted to current topics from the world of law. "Baird Holm Banter" will be hosted by a Baird Holm attorney and bring you their experienced perspective on today's legal issues. To learn more or to listen in, click HERE.

USLAW's Idaho member firm has a new name, logo, and website. Duke Evett PLLC, led by longtime USLAW member Keely E. Duke, is USLAW's Idaho member firm based in Boise. For more information about Keely E. Duke, Josh Evett and the team, visit dukeevett.com.



Laffey, Leitner & Goode LLC (LLG) in Wisconsin has been a longtime supporter of Centro Legal, a nonprofit legal services firm headquartered in Milwaukee's Walker's Point. Centro Legal has represented countless individuals and families in Wisconsin who could not afford to seek quality representation elsewhere. Centro Legal, which is best supported with monetary donations, hosts an annual gala that serves as an important fundraiser. Because of the pandemic, party plans changed and Laffey, Leitner & Goode, presenting sponsor of the annual gala, held a socially distanced celebration at the home of one of its founding partners, Joseph S. Goode. The event raised $120,000 that will help thousands of Wisconsin families find justice.

In his remarks at the event, LLG founding partner Jack Laffey noted how honored the firm is to be a partner with Centro Legal and how privileged it was to be able to assist in a small way with the good works and incredible services Centro Legal provides to its clients. "We love Milwaukee; it's a wonderful town with wonderful people. That said, our city still has a long way to go to reach its full potential. Centro Legal plays a crucial role in leveling the playing field for its clients in a judicial system that may not always treat them the way they should be treated."

Laffey, Leitner & Goode LLC

Pierce, Couch, Hendrickson, Baysinger & Green, LLP in Oklahoma City, Oklahoma, participated in a statewide clothing drive benefitting a local organization that serves women in Oklahoma by providing professional clothing and career development services. Pierce Couch attorneys and staff generously donated approximately one hundred pieces that included everything from suits to shoes. The clothing drive was organized by Pierce Couch attorney, April Kelso, (pictured above), who serves as co-chair of the Service Subcommittee of the Oklahoma Bar Association's Women in Law Committee.

Martin S. Driggers, Jr., of Sweeny, Wingate & Barrow in South Carolina, served as the attorney advisor to the South Carolina Governor's School for Science and Mathematics ("GSSM"), which was the runner up in the 2020 South Carolina Bar High School Mock Trial State Competition, sponsored by the South Carolina Bar Association. The GSSM is a statewide residential high school for exceptional students that excel in science and mathematics. As attorney advisor, Driggers prepared the student attorneys and witnesses for their participation in the model case selected by the South Carolina Bar Association. The Mock Trial Program is sponsored by the South Carolina Bar's Law Related Education (LRE) Division, which was developed in 1976 to improve the ability of teachers to instruct law-related education.

Nicolas AbouAssaly is a member of Simmons Perrine Moyer Bergman PLC in Iowa where he serves clients in large real estate transactions, real estate tax protests and corporate and business transactions. Mr. AbouAssaly also is the Mayor of Marion, Iowa, a fast-growing city in the Cedar Rapids Metro Area. After the devastating Aug. 10 derecho hit Eastern Iowa with 140 MPH winds, damaged 90% of buildings, and devastated the tree canopy, Mayor AbouAssaly jumped in to lead the response and recovery efforts. Among his many contributions, Mayor AbouAssaly helped to set up an aid distribution center that served thousands of people and coordinated humanitarian relief efforts in his community. For several weeks he canvassed neighborhoods to assess needs and deliver food and was engaged directly with residents by phone and on social media to answer questions and ensure they received the resources and help they needed. He also lobbied for state and federal assistance and toured the damage on several occasions with Iowa Gov. Kim Reynolds.

Matthew Berlin, Rubin and Rudman's Trusts and Estates Partner and jazz & blues bassist, joined forces with two of his old friends and bandmates, Samoa Wilson and Jim Kweskin, to produce their most recent album, "I Just Want to Be Horizontal," on June 12, 2020. This album has steadily topped *The Roots Music Report's Top 50 Jazz Album Chart at #1.*

Every Thursday since mid-March 2020, Baird Holm LLP attorneys have proudly helped to staff the Heart Ministry Center's Drive-Thru Pantry. The Drive-Thru Pantry provides boxes of food staples each week to those in need and is a program that has grown exponentially given the COVID-19 crisis. The Heart Ministry Center is a local nonprofit organization committed to providing food, clothing, shelter, and financial assistance to areas of the city with greater economic needs. Other services provided by the Heart Ministry Center include a health and dental clinic, job placement services, case management assistance, and volunteer programs. For more information, click HERE.

LAW360'S 2020 GLASS CEILING REPORT

Law360's 2020 Glass Ceiling Report has ranked USLAW member firms among its 2020 list of firm rankings of female representation at all levels. In the category of firms with fewer than 100 attorneys, Franklin & Prokopik, P.C. in Maryland ranked 7th on the "ceiling smashers" list, which is female equity partner representation, and 14th for the overall number of female attorneys. In the category of firms with 101-250 lawyers, Hanson Bridgett LLP (4) in San Francisco and SmithAmundsen (31) in Illinois were included. For this national ranking, Law360 surveyed more than 300 U.S. firms.

firms ON THE MOVE

Jill Robb Ackerman of Baird Holm LLP in Nebraska was named president of the Nebraska State Bar Association. Her term runs through October 2021.

Brenda Baddam of Barclay Damon LLP in Albany, New York, has been selected as a CDTA 2020 Community Champion by the Capital District Transportation Authority. A CDTA Community Champion is someone who goes out of their way to help others and is a role model in the community.

Barclay Damon LLP and the firm's Outdoor & Wildlife Team were given a certificate for "dedication to the promotion of archery and bow hunting and support for the industry" from the Archery Trade Association.

Oliver Young of Barclay Damon LLP in Buffalo, New York, has been appointed to the New York State Bar Association Task Force on Racial Injustice and Police Reform.

Janae Cummings of Barclay Damon LLP in Syracuse, New York, has been named assistant director for the Ms. JD Fellowship. Ms. JD, a nonprofit, nonpartisan organization dedicated to the success of aspiring and early career female lawyers, founded the Ms. JD Fellowship in partnership with the ABA Commission on Women in the Profession to promote mentoring and professional development for future female attorneys.

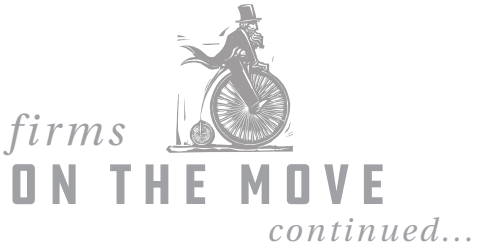
John F. Wilcox, Jr., a shareholder/director of Dysart Taylor in Kansas City, Missouri, has been elected president of the Transportation Lawyers Association. He becomes Dysart Taylor's seventh TLA president; Dysart Taylor currently has more former TLA presidents than any other firm.

Caleb P. Knight of Flaherty Sensabaugh Bonasso PLLC in Charleston, West Virginia, was selected by the American Health Lawyers Association (AHLA) to serve a fourth term on its Young Professionals Council. In addition, he was named Vice Chair of Educational Content for the group. His term is for one year, effective July 1, 2020. AHLA is the nation's largest educational organization devoted to legal issues in the healthcare field. The Young Professionals Council is the governing body that provides insights and direction to the American Health Lawyers Association's Board of Directors.

Andrew T. Stephenson of Franklin & Prokopik, P.C. in Maryland has received the honor of being invited to join the American College of Transportation Attorneys (ACTA). This select group limits membership to only 25 members, comprised of transportation defense lawyers, all serving more than 20 years in the trucking industry.

Howard Ashcraft, a partner in Hanson Bridgett LLP's Construction Practice Group, recently received an appointment as an associate fellow of the Saïd Business School at the University of Oxford. The status of associate fellow is equivalent to an adjunct professor status. This significant appointment indicates a recognition by the University of Oxford of Ashcraft's contributions to the MSc in Major Programme Management, in which he manages and teaches the module on Commercial Leadership. In addition to his legal practice, he advises research projects related to building information modeling, project delivery, and sustainability and is an adjunct professor in the Civil and Environmental Engineering Department at Stanford University.

Hinckley Allen Partner Noble F. Allen recently completed the Third Edition of his eBook "Connecticut Landlord and Tenant Law with Forms" published by The Connecticut Law Tribune and ALM Media.



Robert Berk of Jones, Skelton & Hochuli in Arizona has been elected into the American Board of Trial Advocates (ABOTA). ABOTA is a national association of experienced trial lawyers and judges. Created in 1958, ABOTA and its members are dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to our United States Constitution.

Klinedinst P.C. Shareholder Nadia P. Bermudez has been selected to serve on the San Diego Superior Court's Committee on the Elimination of Bias, a group devoted to providing equal access to justice for all. She will aid in the development of procedural changes impacting the Superior Court's ability to recognize and eliminate bias, impacting all San Diego citizens.

David M. Majchrzak of Klinedinst P.C. in San Diego, California, was appointed to director of the Association of Professional Responsibility Lawyers (APRL). APRL is a national group comprised of lawyers, law professors, and judges holding an interest in lawyers' professional responsibility, legal ethics, and legal malpractice. APRL encourages the study, development, and implementation of sound ethical standards in addition to providing cutting edge analysis in the area of professional responsibility.

Steven W. Quattlebaum of Quattlebaum, Grooms & Tull PLLC in Arkansas has been elected to the position of national vice president of the American Board of Trial Advocates (ABOTA) beginning in 2021. He will become national president of ABOTA in 2023. Earlier this year, Quattlebaum also was chosen to chair the ABOTA COVID-19 Task Force, which published a comprehensive guide to conducting civil jury trials during the COVID-19 pandemic.

Denise I. Murphy, Partner and Co-Chair of Rubin and Rudman's Labor and Employment department was appointed president of the Massachusetts Bar Association (MBA) for the 2020-21 association year. Denise's mission as MBA President is to place an emphasis on the importance of diversity in the profession, give voices to marginalized groups, and bridge the gap between the various voices in the legal industry.

Ginni Klier, Rubin and Rudman's human resources director, was elected as the secretary of the Association of Legal Administrators (ALA) Boston Chapter for the second year in a row.

The Iowa Supreme Court has appointed Paul D. Gamez of Simmons Perrine Moyer Bergman PLC in Iowa to the Advisory Committee on Rules of Civil Procedure. The Court issued an order Oct. 2 appointing him to the Advisory Committee for a term ending Sept. 30, 2023. The full order can be read here.

Chad D. Brakhahn of Simmons Perrine Moyer Bergman PLC in Iowa has been elected to the Iowa State Bar Association Board of Governors for District 6. Brakhahn is one of five representatives who have been elected to represent District 6, which includes Benton, Iowa, Johnson, Jones, Linn, and Tama counties.

Bill Hackney of SmithAmundsen in Illinois was recently appointed to the Panel of Chapter 7 Trustees in the Northern District of Illinois. As a chapter 7 trustee, Bill will be a fiduciary responsible for the preservation, liquidation, and distribution of assets in both consumer and commercial chapter 7 cases.

SmithAmundsen's Gary Zhao was accepted to State Farm's Rising Star Academy, an exclusive program recognizing select outside counsel for their leadership and business acumen. The Academy was established in tandem with the American Bar Association's (ABA) Resolution 113, which was put in place to increase diversity within the legal industry. Through this program, State Farm connects with diverse counsel to expand business relationships and support diversity in the legal industry.

On October 23, 2020, Sweeney & Sheehan Partner Patrick J. Sweeney was elected second vice-president of the Defense Research Institute (DRI). DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

VERDICTS

Adler Pollock & Sheehan, P.C. (Providence, RI)

Adler Pollock & Sheehan, P.C. successfully represented Encompass Health in its Certificate of Need Application to establish a 50-bed Rehabilitation Hospital Center in Johnston, Rhode Island. On August 26, 2020, the Director of the Rhode Island Department of Health, Nicole Alexander-Scott, M.D., MPH, issued her decision approving the Application. Encompass' proposal will establish a specialty hospital facility to provide physician-driven, intensive inpatient rehabilitative care, requiring more than one therapy modality, for medically complex patients. The $42.5 million project will provide approximately 100 union construction jobs in the short term and result in over 160 full-time employees. The AP&S team of attorneys Patricia K. Rocha, Richard R. Beretta, Jr., and Leslie D. Parker worked with Encompass to prepare the extensive certificate of need application, present at four Health Services Council meetings, respond to numerous public comments and the Rhode Island Department of Health's expert consultant, and navigate the governing statutory and regulatory issues. As a result of these efforts, Encompass will now be able to provide access to its proven quality inpatient rehabilitation services to Rhode Island patients and their families – including those suffering strokes, traumatic brain injuries and neurological disorders.

Baird Holm LLP (Omaha, NE)

On behalf of Union Pacific Railroad Company, Baird Holm attorneys Scott Moore, Allison Balus, and David Kennison participated in an appeal to the U.S. Court of Appeals for the Eighth Circuit that reversed a district court's order certifying a class action under the Americans with Disabilities Act (ADA). The Eighth Circuit held that class certification was not warranted given the many individualized inquiries necessary to adjudicate liability under the ADA. Union Pacific successfully argued that determining whether its fitness-for-duty policy was job-related and consistent with a business necessity depends on each individual's unique circumstance and cannot be determined on a class-wide basis.

Duke Evett, PLLC, (Boise, ID)

Keely E. Duke of Idaho member firm, Duke Evett, PLLC, successfully defended a local hospital system in a case challenging the Chargemaster billing practices of the client's Emergency Department. This is a nationwide battle hospital systems are fighting across the country.

In the case, the plaintiffs alleged that the hospital system could not bill uninsured patients at its customary Chargemaster rates. The plaintiffs sought declaratory relief requesting the District Court review the hospital system's billing agreement and find that the hospital was only entitled to bill and seek collection of the reasonable value of the treatment provided to them and other similarly situated self-pay patients.

The District Court granted Summary Judgment in favor of Duke Evett's client and the Idaho Supreme Court unanimously affirmed that decision in Duke Evett's client's favor.

Franklin & Prokopik, P.C. (Baltimore, MD)

Franklin & Prokopik, P.C. attorney Michael T. Bennett successfully defended a workers' compensation claim for benefits by convincing a jury that the claimant's actions amounted to willful misconduct. The case was tried before the Honorable Dwight Jackson in the Circuit Court for Calvert County on February 13 and 14, 2020. The jury's decision saved the employer, a treatment facility that provides mental health services exclusively for first responders, considerable exposure due to the nature of the injuries involved in the accident.

The claimant was employed as a nursing assistant and was attempting to gain access to the nurses' station to assist a patient who had just finished treatment. The door that normally would have been used to gain access to the station was locked, resulting in the claimant being separated from the station by a barricade that was approximately three feet tall and four feet wide. The evidence showed that there were numerous options available to the claimant to unlock the door and safely gain access to the station, including three master keys within just a short walk. Instead of exploring these options, the claimant decided to transverse the barricade with the assistance of the patient, and in the process, ended up with numerous injuries that required multiple surgeries.

Generally, it can be very difficult for employers and insurers to prevail on a willful misconduct defense for several reasons. For starters, there is a statutory presumption that an injured worker did not engage in willful misconduct. If the defense can overcome this presumption, they must then prove that an accident meets five separate and distinct elements. If any of those elements fail, so does the entire defense of willful misconduct.

One of the five elements of willful misconduct is that the employer has a rule prohibiting the action that caused the accident. This particular element forced the defense to get creative as the employer did not have an explicit rule against employees climbing over barricades. Instead, Bennett argued to the jury that there was an implied rule against this specific action. To buttress this position, the defense introduced testimony from witnesses that they collectively have never seen or heard of anyone climbing over a nurses' station while working in the field. The jury agreed with Bennett in convincing fashion, as it took just 15 minutes to reach its verdict.

Jones, Skelton & Hochuli, P.L.C. (Phoenix, AZ)

Jones, Skelton & Hochuli, P.L.C. (JSH) attorneys Michael E. Hensley and John D. Lierman obtained summary judgment for the owner/operator of a family-style restaurant, Sal & Teresa's Mexican Restaurant (Restaurant). The case concerned a traffic incident in which Defendant Necaise, driving a pickup 45-50 mph, lost control and collided with a car driven by Plaintiff Baca. After the collision, Necaise's passenger tumbled out of his truck, obviously intoxicated and totally naked. Necaise was clothed, but also obviously intoxicated. Police found numerous open containers of alcohol in and around Necaise's truck. Necaise was found to have a BAC of 0.22 two hours after the accident.

Necaise's passenger told police that she and Necaise consumed alcohol at the Restaurant earlier that day. Plaintiff brought suit, alleging that Necaise was overserved alcohol by Sal & Teresa's which therefore bore fault in the accident. After litigation began, Necaise fled the jurisdiction and was never located. His passenger was also never located.

JSH moved for summary judgment, arguing that Plaintiff had no admissible evidence that anyone was overserved, nor that Necaise was even at the Restaurant that day.

Plaintiff opposed our motion with a Rule 56(d) motion to be allowed more discovery. The court denied Plaintiff's motion because the deadline to disclose an expert had already passed and there was no evidence offered that any additional discovery would support Plaintiff's case. Plaintiff then argued that the statement made by Necaise's passenger qualified for an exception for hearsay, most plausibly as an "excited utterance."

JSH argued that the passenger's statement did not qualify for a hearsay exception and that with no evidence to show the alcohol in Necaise's system was from the Restaurant, Plaintiff could never make out a case for causation. The court agreed and granted summary judgment in our client's favor.

TRANSACTIONS

Baird Holm LLP

Baird Holm LLP in Nebraska represented Berkshire Hathaway Inc. in its sale of BH Media Group's newspaper and digital news operations to Lee Enterprises for $140 million and Berkshire's long-term financing to Lee Enterprises of approximately $576 million. The sale included a 10-year lease of all of BH Media Group's real estate to Lee Enterprises. The transaction closed on March 16, 2020. The Baird Holm team on this transaction included J. Scott Searl, Aaron Johnson, Kevin Tracy, Brian Schumacher, Austin Graves and Adam Ripp.

pro bono SPOTLIGHT

BARCLAY DAMON LLP

HansonBridgett

Barclay Damon LLP

Combining its pro bono and diversity efforts, Barclay Damon LLP has several minority-owned small business initiatives underway. In August, Corey Auerbach reached out to Barclay Damon LLP's pro bono partners at LASNNY (Albany), ECBA VLP (Buffalo), VSLP (Rochester), and OVLP (Syracuse) to work with each of them on screening and intake of minority-owned businesses to assist with pro bono virtual services. In addition to providing virtual services at a small business workshop, Barclay Damon's outreach to their pro bono community partners has resulted in four new pro bono matters:

- Representing a minority-led not-for-profit corporation in purchasing real property to house a theatre company;
- Creating business contracts and labor and employment policies from an upstart minority-owned cleaning company;
- Providing intellectual property assistance to a minority-owned family-oriented sound-system business; and
- Formation of a minority-led not-for-profit to operate a halfway home for men who have been recently incarcerated.

Also, New York is on the precipice of a deepening and dire housing crisis as a result of the COVID-19 pandemic. A staggering number of New Yorkers have lost their jobs and over 1 million households currently face a risk of housing instability or rent shortfalls. Unaddressed, this will lead to an astounding number of eviction proceedings and consequent evictions. Barclay Damon attorneys, including many who do not normally handle housing court matters, have participated in CLEs conducted by OVLP and LASNNY to receive training to assist with the avalanche of eviction proceedings that are anticipated to overburden the courts.

Hanson Bridgett LLP

After the onset of the pandemic back in March, Hanson Bridgett LLP's Pro Bono Committee reached out to several community partners to ask how they could provide support. Recent Hanson Bridgett pro bono initiatives include the representation of families seeking asylum in the U.S. through a partnership with the Lawyers Committee for Civil Rights. Hanson Bridgett's attorneys helped secure continued long-term safety and peace of mind for numerous families.

Hanson Bridgett's Pro Bono Committee also approved several amicus matters this year, including one on behalf of the Tahirih Justice Center in the case of Rosa Rivera-Perez v. William Barr where a Salvadoran woman was threatened with deportation because the immigration judge and the Board of Immigration Appeals failed to consider circumstantial evidence regarding El Salvador's gruesome machismo and femicide culture. Hanson Bridgett drafted and filed an amicus brief in support of Ms. Rivera-Perez's petition for review. Currently, the appeal is ongoing in the Ninth Circuit.

about USLAW NETWORK

2001. The Start of Something Better.

Mega-firms...big, impersonal bastions of legal tradition, encumbered by bureaucracy and often slow to react. The need for an alternative was obvious. A vision of a network of smaller, regionally based, independent firms with the capability to respond quickly, efficiently and economically to client needs from Atlantic City to Pacific Grove was born. In its infancy, it was little more than a possibility, discussed around a small table and dreamed about by a handful of visionaries. But the idea proved too good to leave on the drawing board. Instead, with the support of some of the country's brightest legal minds, USLAW NETWORK became a reality.

Fast forward to today.

The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client's legal success. Now as a diverse network with more than 6,000 attorneys from more than 60 independent, full practice firms across the U.S., Canada, Latin America and Asia, and with affiliations with TELFA in Europe, USLAW NETWORK remains a responsive, agile legal alternative to the mega-firms.

Home Field Advantage.

USLAW NETWORK offers what it calls The Home Field Advantage which comes from knowing and understanding the venue in a way that allows a competitive advantage – a truism in both sports and business. Jurisdictional awareness is a key ingredient to successfully operating throughout the United States and abroad. Knowing the local rules, the judge, and the local business and legal environment provides our firms' clients this advantage. The strength and power of an international presence combined with the understanding of a respected local firm makes for a winning line-up.

A Legal Network for Purchasers of Legal Services.

USLAW NETWORK firms go way beyond providing quality legal services to their clients. Unlike other legal networks, USLAW is organized around client expectations, not around the member law firms. Clients receive ongoing educational opportunities, online resources, including webinars, jurisdictional updates, and resource libraries. We also provide *USLAW Magazine*, compendia of law, as well as an annual membership directory. To ensure our goals are the same as the clients our member firms serve, our Client Leadership Council and Practice Group Client Advisors are directly involved in the development of our programs and services. This communication pipeline is vital to our success and allows us to better monitor and meet client needs and expectations.

USLAW Abroad.

Just as legal issues seldom follow state borders, they often extend beyond U.S. boundaries as well. In 2007, USLAW established a relationship with the Trans-European Law Firms Alliance (TELFA), a network of more than 20 independent law firms representing more than 1000 lawyers through Europe to further our service and reach.

How USLAW NETWORK Membership is Determined.

Firms are admitted to the NETWORK by invitation only and only after they are fully vetted through a rigorous review process. Many firms have been reviewed over the years, but only a small percentage were eventually invited to join. The search for quality member firms is a continuous and ongoing effort. Firms admitted must possess broad commercial legal capabilities and have substantial litigation and trial experience. In addition, USLAW NETWORK members must subscribe to a high level of service standards and are continuously evaluated to ensure these standards of quality and expertise are met.

USLAW in Review.

- All vetted firms with demonstrated, robust practices and specialties
- Organized around client expectations
- Efficient use of legal budgets, providing maximum return on legal services investments
- Seamless, cross-jurisdictional service
- Responsive and flexible
- Multitude of educational opportunities and online resources
- Team approach to legal services

The USLAW Success Story.

The reality of our success is simple: we succeed because our member firms' clients succeed. Our member firms provide high-quality legal results through the efficient use of legal budgets. We provide cross-jurisdictional services eliminating the time and expense of securing adequate representation in different regions. We provide trusted and experienced specialists quickly.

When a difficult legal matter emerges – whether it's in a single jurisdiction, nationwide or internationally – USLAW is there.

For more information, please contact Roger M. Yaffe, USLAW CEO, at (800) 231-9110 or roger@uslaw.org

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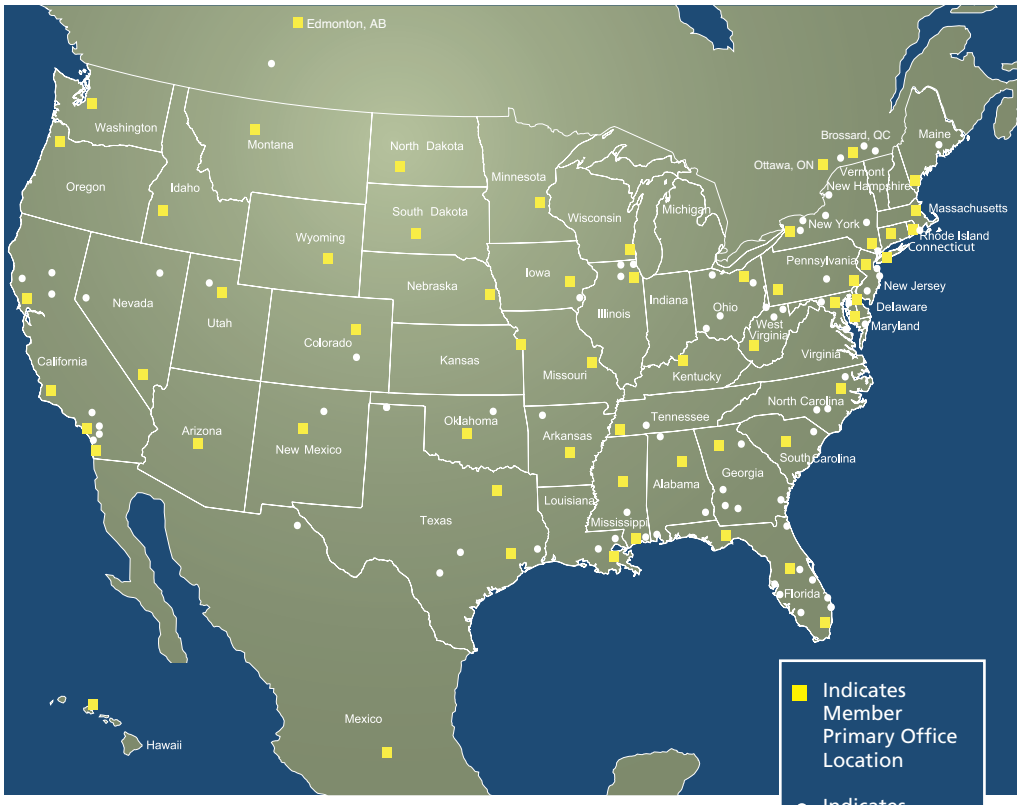

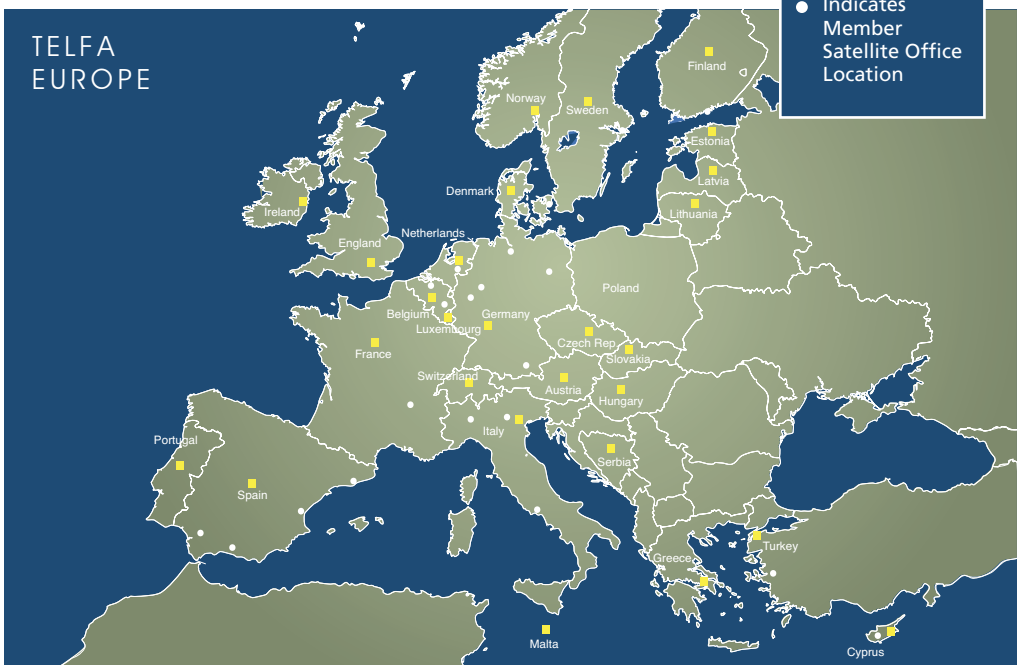

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the complete USLAW SOURCEBOOK

USLAW NETWORK offers legal decision makers a variety of complimentary products and services to assist them with their day-to-day operation and management of legal issues. The USLAW SourceBook provides information regarding each resource that is available. We encourage you to review these and take advantage of those that could benefit you and your company. For additional information, contact Roger M. Yaffe, USLAW CEO, at roger@uslaw.org or (800) 231-9110, ext. 1.

USLAW is continually seeking to ensure that your legal outcomes are successful and seamless. We hope that these resources can assist you. Please don't hesitate to send us input on your experience with any of the products or services listed in the SourceBook as well as ideas for the future that would benefit you and your colleagues.

EDUCATION

It's no secret – USLAW can host a great event. We are very proud of the industry-leading educational sessions at our semi-annual client conferences, seminars, and client exchanges. Reaching from national to more localized offerings, USLAW member attorneys and the clients they serve meet throughout the year not only at USLAW-hosted events but also at many legal industry conferences. In light of COVID-19, we continue to evaluate and look forward to events in 2021. We are re-focusing on in-person meetings where and when possible, and we are considering adding smaller, regional, driving distance practice group events to our portfolio of live events. Regardless of the live events calendar, we will continue to be creative with virtual event offerings. CLE accreditation is provided for most USLAW educational offerings.

A TEAM OF EXPERTS

USLAW NETWORK undoubtedly has some of the most knowledgeable attorneys in the world, but did you know that we also have the most valuable corporate partners in the legal profession? Don't miss out on an opportunity to better your legal game plan by taking advantage of our corporate partners' expertise. Areas of expertise include forensic engineering, legal visualization services, jury consultation, courtroom technology, forensic accounting, structured settlements, future medical fund management, and investigation.

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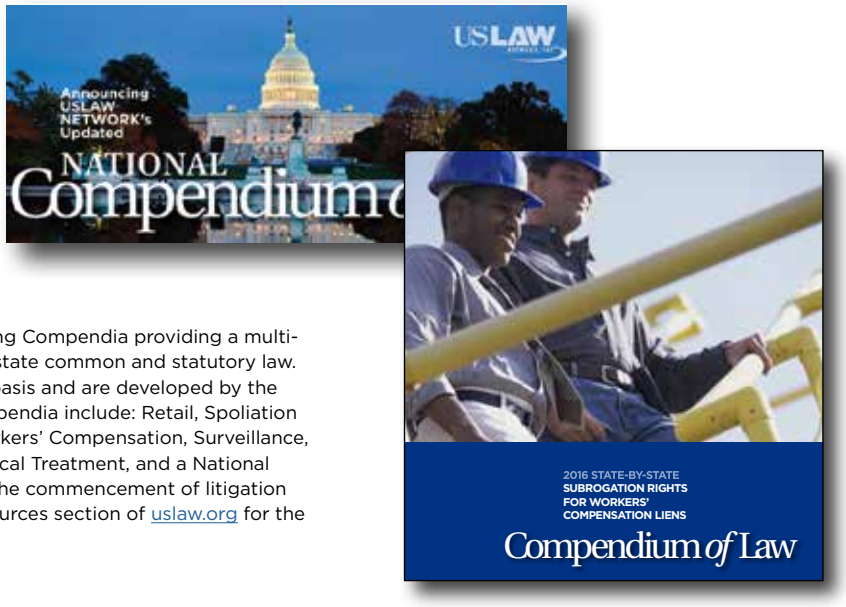
What is the value in having individual access to 4-8 highly experienced USLAW member attorneys from around the country and around the world (if necessary) roundtable specific issues you may be facing, including actual cases or hypotheticals? USLAW is pleased to provide this free consultation that will give you a sense of comfort that you are managing a specific issue/case in an appropriate manner and make you aware of unforeseen roadblocks and variables that may pop up. It never hurts to phone a friend!

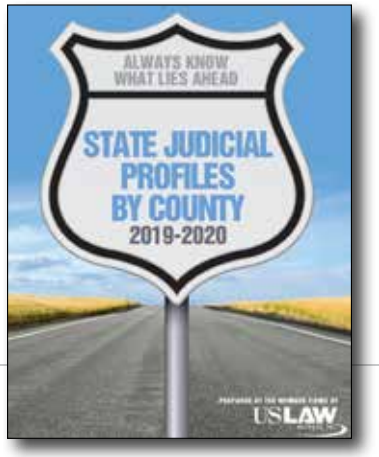
LAWMOBILE

We are pleased to offer a completely customizable one-stop educational program that will deliver information on today's trending topics that are applicable and focused solely on your business. We focus on specific markets where you do business and utilize a team of attorneys to share relevant jurisdictional knowledge important to your business' success. Whether it is a one-hour lunch and learn, half-day intensive program or simply an informal meeting discussing a specific legal matter, USLAW will structure the opportunity to your requirements – all at no cost to your company. In light of COVID-19, consider hosting a virtual LawMobile event for your team.



COMPENDIA OF LAW

USLAW regularly produces new and updates existing Compendia providing a multi-state resources that permits users to easily access state common and statutory law. Compendia are easily sourced on a state-by-state basis and are developed by the member firms of USLAW. Some of the current compendia include: Retail, Spoliation of Evidence, Transportation, Construction Law, Workers' Compensation, Surveillance, Offer of Judgment, Employee Rights on Initial Medical Treatment, and a National Compendium addressing issues that arise prior to the commencement of litigation through trial and on to appeal. Visit the Client Resources section of uslaw.org for the complete USLAW compendium library.



STATE JUDICIAL PROFILES BY COUNTY

Jurisdictional awareness of the court and juries on a county-by-county basis is a key ingredient to successfully navigating legal challenges throughout the United States. Knowing the local rules, the judge, and the local business and legal environment provides a unique competitive advantage. In order to best serve clients, USLAW NETWORK offers a judicial profile that identifies counties as Conservative, Moderate or Liberal and thus provides you an important Home Field Advantage.

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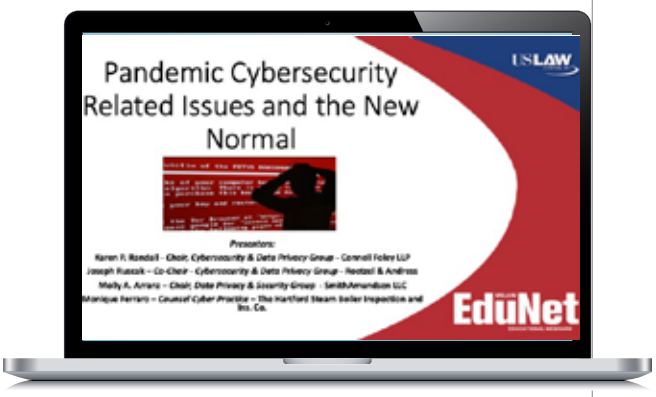

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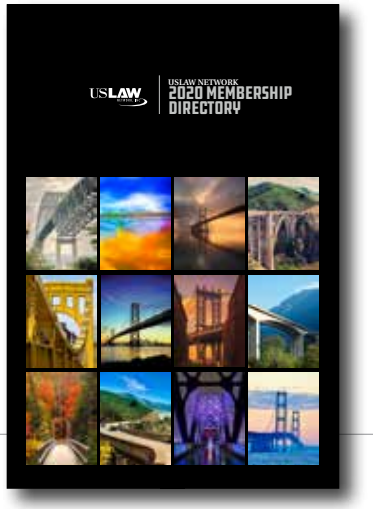

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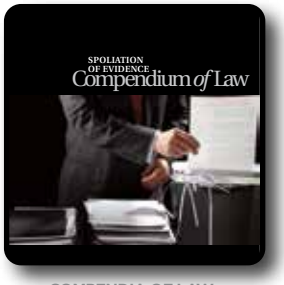

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