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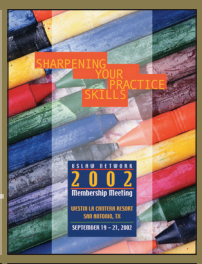

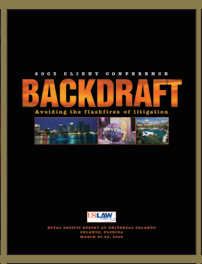

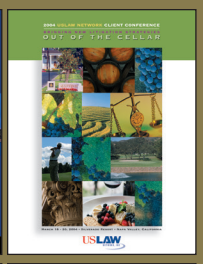

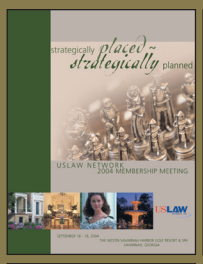

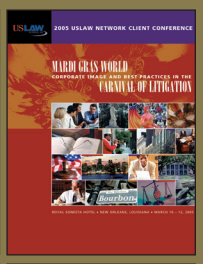

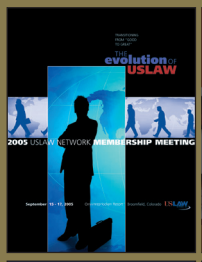

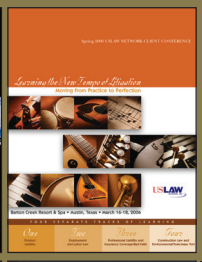

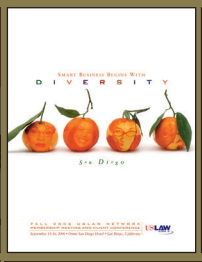

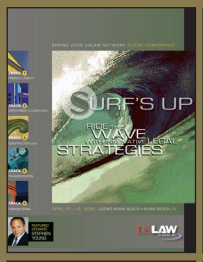

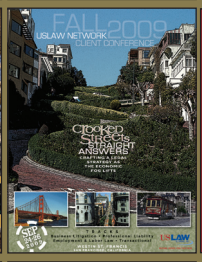

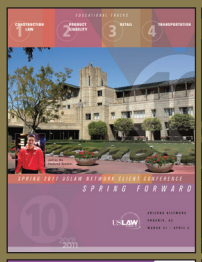

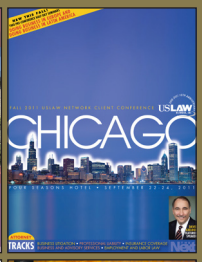

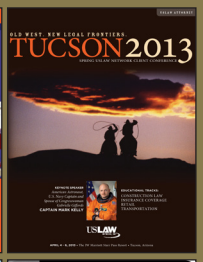

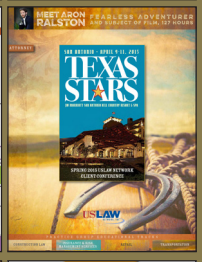

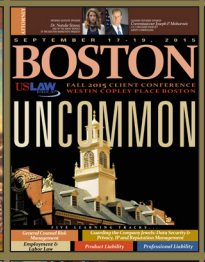

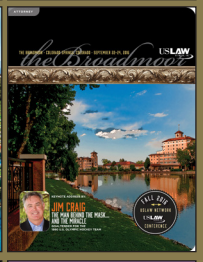

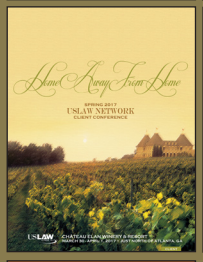

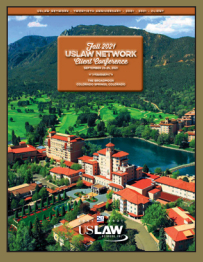

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from the INCOMING CHAIR'S DESK

Hi Folks! As the incoming Chair of USLAW NETWORK, I am delighted to welcome you to USLAW via the fall issue of USLAW Magazine. As many of you know, our member attorneys are committed to providing legal decision-makers and business leaders with timely, forward-thinking and relevant information on the latest issues impacting various industries and jurisdictions, and USLAW Magazine is one of the platforms where we provide this information.

As a global community, we collectively continue to navigate the challenging seas of the COVID-19 pandemic. Additionally, we face data privacy and cyber-security threats, a changing tax landscape, insurance litigation and many more interesting issues. As you peruse the magazine, you will read about healthcare provider liability immunity during COVID-19, appealing orders compelling arbitration under the FAA, the explosion of ransomware attacks, carbon pricing, hiring immigrant doctors, and a cautionary tale for the digital age.

As we face these interesting legal challenges in the months ahead, we also will be celebrating our 20th anniversary! As part of our celebrations, we reflect on our history while also committing to firmly building for the future. Highlights include the following: (1) We are developing an innovative technology initiative to deliver even greater efficiency both across the network and between attorneys and clients to help secure even better outcomes; (2) we are raising funds for the USLAW Foundation that provides scholarship funding to diverse law students pursuing a legal education; and (3) together with S-E-A, our long-time premier corporate partner, we are unveiling Live Better, an ongoing health and wellness initiative focusing on our USLAW community.

I am truly honored to serve as USLAW NETWORK Chair for the coming year, and I will do my best to live up to the standards established by those who served in this position before me. As we continue to move business forward and adapt to the changing landscape, please let us know how we can support your legal needs.

Sincerely,

Rodney L. Umberger
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HIRING IMMIGRANT DOCTORS

Changes During the COVID-19 Pandemic and Beyond

Iosif V. Sorokin and **Madison Fernandez** Larson • King LLP

The shortage of physicians in the U.S. continues to grow, with recent studies estimating that by 2033 there will be a shortage of 139,000 physicians nationally. The COVID-19 pandemic has magnified this urgent need for more doctors, especially in rural and lower-income areas where some hospitals lacked enough doctors to treat patients infected with COVID-19 during the height of the pandemic.

Foreign-born doctors make up over 25% of all doctors in the U.S., making them a vital resource for hospitals and clinics looking to alleviate this shortage and fully serve patient's needs. To tap into this talent pool and successfully recruit, hire, and retain immigrant doctors, employers need to be aware of the special immigration restrictions and options that apply to them. These issues are discussed below, along with two significant changes to J-1 waiver programs for immigrant doctors brought about by the COVID-19 pandemic.

CONRAD 30 J-1 WAIVER PROGRAM

All immigrant doctors who come to the U.S. for their graduate medical training are required to return to their home country for two years after completing their program unless they get a J-1 waiver. One of the most effective ways to recruit physicians to underserved practice sites is by using the Conrad 30 J-1 waiver program. This program makes 30 spots available each year for healthcare providers to hire immigrant doctors to work in specified physician shortage areas in each state. To get a J-1 waiver the immigrant doctor must sign a contract to work for at least three years at the specified facility. For this reason, many immigrant doctors completing their graduate medical training specifically seek out hospitals and clinics that offer Conrad waiver sponsorship, since they need it to remain in the U.S.

In some states, Conrad waivers are highly competitive in large measure because they offer such a solid means to recruit and hire physicians for difficult to fill positions. For employers, this program offers unique benefits, allowing foreign-born doctors to make critical contributions to rural communities looking to fill gaps in their medical workforce. Another major benefit of this program is that it obligates the immigrant doctor to work for at least three years at the specified clinic or hospital. The hope is that the program will bring new doctors into these communities, where they will ultimately stay longer than three years to address the growing local healthcare needs.

HHS CLINICAL J-1 WAIVER PROGRAM

The U.S. Department of Health and Human Services (HHS) also administers a J-1 waiver program similar to the Conrad 30 program discussed above. Prior to the COVID-19 pandemic, only Federally Qualified Health Centers (FQHC) could sponsor applicants for this type of J-1 waiver, which greatly limited its use. Other

non-FQHC medical facilities had to rely primarily on the 30 waivers per state provided annually by the Conrad waiver program. But in the midst of the COVID-19 pandemic, HHS made a sweeping change to its guidelines, allowing any medical facility located in a Health Professional Shortage Area with a score of 7 or higher to file a J-1 waiver for as many primary care doctors as the facility needs. This change significantly altered the recruiting environment for hospitals, private practices, and other non-FQHC medical facilities, since it effectively eliminated the annual limit of 30 J-1 waivers per state set by the Conrad waiver program. Now employers have the opportunity to hire as many primary care physicians as needed in states like Minnesota, Texas, Georgia, and others where there are frequently more applicants than there are Conrad waiver spots available. Employers also no longer need to wait for state health departments to open up their application periods each year, as they can file applications to HHS at any time.

Another major change caused by the COVID-19 pandemic allows immigrant doctors who are completing their three-year service requirement under the Conrad 30 or HHS waiver programs to work remotely by providing telehealth services. Previously, U.S. Citizenship and Immigration Services (USCIS) and the Department of State (DOS)—the two government agencies that adjudicate J-1 waiver applications—were silent as to whether telehealth services could be used to meet the three-year full-time service requirements under the J-1 waiver programs, leaving employers and doctors who wanted to provide telehealth services in a precarious position.

While this new policy provides much needed guidance to employers seeking to hire immigrant doctors to provide telehealth services, it is set to end when the Public Health Emergency declared on January 27, 2020, ends. It is difficult to envision USCIS and DOS reversing course on the use of telehealth services in J-1 waiver programs after the end of the Public Health Emergency, especially in light of the rapidly growing use of telehealth services by healthcare providers for non-COVID related services. This burgeoning acceptance of the use of telehealth for J-1 waivers, coupled with the major expansion in the availability of HHS clinical J-1 waivers discussed above, opens up significant new avenues to hire and retain more immigrant doctors to work in medically underserved areas remotely.

NATIONAL INTEREST WAIVER

Similar to the J-1 waiver programs discussed above, an immigrant physician can qualify for permanent residence (a "green card") in the U.S. by working in a medically underserved area of the country for five years. U.S. immigration law deems this work to be in the national interest and will therefore waive the usual requirement that an employer test the labor market before sponsoring an employee for a green card. This program further incentivizes immigrant doctors to work in medically underserved areas—or remain at their practice site in the case of a doctor completing their three- year J-1 waiver service obligation—since they can qualify for permanent residence upon completing a total of five years of service. It is a good option for hospitals and clinics looking to fill openings on a long-term basis.

CAP-EXEMPT H-1BS

Each year 85,000 new H-1B visas are available through a lottery system run by USCIS. While employers may enter immigrant physicians into the lottery, the uncertainty and shrinking chance of winning the lottery, even during the major labor market disruptions caused by COVID-19, make this an unattractive hiring strategy. (For a more in-depth discussion of the H-1B lottery, see the article "Four Ways to Beat the H-1B Lottery Blues" in the Spring 2020 edition of *USLAW Magazine*.)

But some employers do not need to use the H-1B lottery process and may instead apply for H-1B status for employees at any time. These "cap-exempt" employers are primarily universities and their affiliated nonprofit organizations, as well as nonprofit research organizations.

Employers who are subject to the cap can also take advantage of this by hiring these employees part-time. For example, a specialty clinic can hire a physician currently teaching at a university in H-1B status for a part-time position, without having to go through the cap. Similarly, a cap-subject employer can place an employee at a cap-exempt entity full time. For example, a physician staffing company can place its physicians at a nonprofit university hospital full time, without having to go through the cap.

In addition, doctors who receive a J-1 waiver through the Conrad 30 program get a lifetime exemption from the H-1B cap. This allows employers to freely hire these doctors without going through the lottery.

O-1 VISAS

Employers looking to hire extremely accomplished doctors with lengthy CVs can get O-1 visas. These visas are available to a small percentage of doctors who are nationally or internationally renowned in their field. They are a good way for employers to hire accomplished medical researchers, businesspeople, surgeons, and inventors, among others. O-1 visa status is beneficial to employers for several reasons, one being that it does not have an annual quota. Second, it is beneficial because employers may also use these visas to hire doctors who are subject to the two-year home residency requirement discussed above.

TREATY BASED VISAS

Special provisions based on international treaties also exist for employers to hire doctors from Canada, Mexico, Australia, Chile, and Singapore. For example, under the USMCA (formerly NAFTA), U.S. employers can readily hire doctors from Canada or Mexico for teaching or research positions.

The expansion of HHS clinical J-1 waivers and acceptance of the use of telehealth for J-1 waivers are welcome changes that will help alleviate the shortage of doctors in the U.S., but more needs to be done. This requires both an understanding of the many ways to hire immigrant doctors, as well as innovative approaches to serving patient's needs and delivering care. Through this article we hope we have contributed to this effort by providing a basic overview of how to hire immigrant doctors and the changes during the COVID-19 pandemic, and that it will prove useful in the years to come as the COVID-19 pandemic recedes and we begin to craft a path forward.

Iosif V. Sorokin, an associate with Larson • King LLP, focuses his practice in the areas of immigration, employment, and business litigation. Iosif helps employers and individuals obtain work authorization and comply with immigration laws. He has counseled national healthcare organizations, academic institutions, multinational companies, and small businesses on immigration matters.

Madison Fernandez is a summer associate at Larson • King LLP and 2022 J.D. Candidate at the University of St. Thomas School of Law. Madison acts as editor-in-chief of the Law Review, as well as vice president and co-founder of the Business Law Society. Madison received her undergraduate degree from Baylor University.

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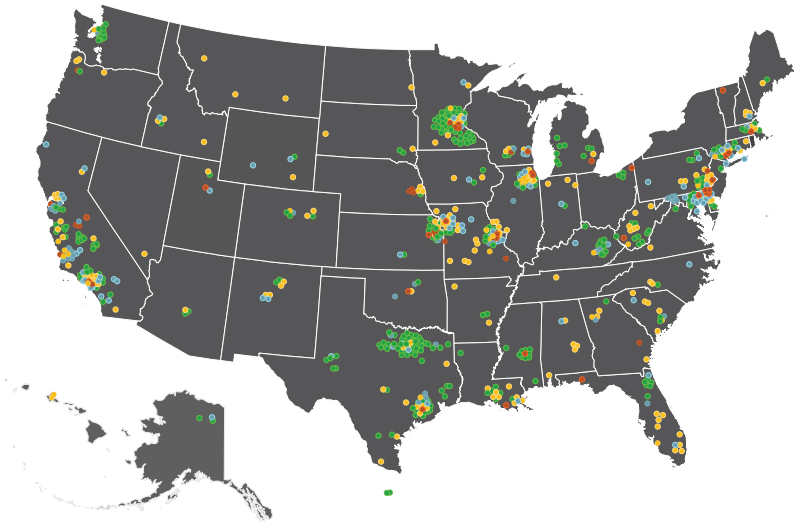

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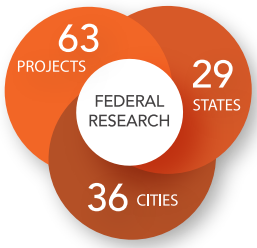

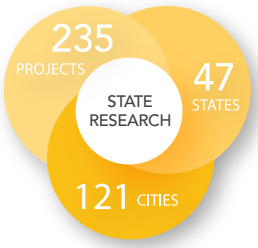

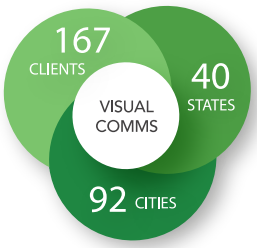

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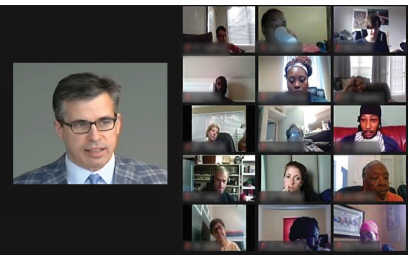

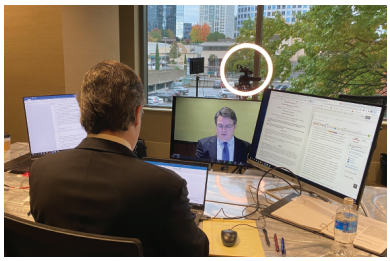

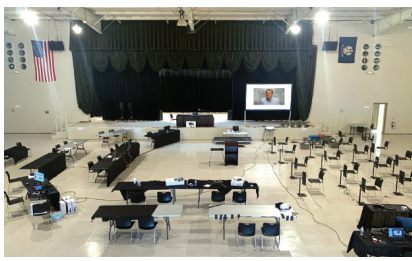

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A Cautionary Tale for the Digital Age

J. Michael Kunsch Sweeney & Sheehan, P.C.

February 26, 2011, started as just another day for Timothy Fedele, senior vice president and general counsel of Excela Health, who was investigating the medical necessity of certain cardiology procedures performed by physicians at Excela's hospital in Pennsylvania. To assist in planning for and handling anticipated publicity from the results of that investigation, Excela had retained a public relations firm. On this day, Fedela received an e-mail containing legal advice about the matter from Excela's outside counsel. Consistent with his practice during the investigation, and with it coming to a close, Fedela forwarded counsel's e-mail to the public relations and crisis management consultant. The following week, Excela Health had a press conference during which it acknowledged the results of the investigation and named the doctors it believed may have performed procedures that were not medically necessary. A year later, those physicians filed a complaint seeking damages for defamation and interference with contract. Eight years later, the Pennsylvania Supreme Court held that by forwarding the e-mail to the third-party consultant, Fedela waived the attorney-client privilege for that communication. *BouSamra v. Excel Health*, 653 Pa. 365, 210 A.3d 967 (2019).

Even had the Court upheld the assertion of privilege over the e-mail, the years, time and expense litigating the issue highlight the dangers that accompany the ease of communication facilitated by the digital age. To many e-mail users, the "Reply All" option is the bane of their existence, filling their inboxes with messages copied to everyone possible to "keep them in the know." In terms of protecting privileged communications, however, the "Forward" button gives "Reply All" a run for its money. It's not just e-mail though. Each day brings an onslaught of new electronic communica-

tions that potentially contain privileged information, from texts to instant messages to chats in Zoom and Teams meetings. Often, this technology advances quickly and precedes updating information handling policies to deal with potential record creation.

A separate article could be devoted to exploring all of the ways people communicate electronically and the determination of which of those communications can be considered "documents" for purposes of discovery. This much is clear, however - failing to properly train and remind employees on best practices for electronic and other communications can make yours the next unfortunate name forever memorialized in a reported privilege decision.

UNDERSTANDING THE ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege has its roots in the common law and serves as the cornerstone to facilitating the free and open exchange of information between attorney and client to ensure effective legal representation. Generally speaking, four elements are required in order to fall under the protection of the privilege: (1) the person who would receive or received the legal advice is or sought to become a client; (2) the person to whom the communication was made was an attorney or a subordinate acting on the attorney's behalf; (3) the communication related to the securing or rendering of legal advice; and (4) the communication was confidential. The specific requirements of falling within the protection of the privilege vary by jurisdiction.

It is clear that certain communications to and/or in the presence of third parties may also be privileged if they were necessary to the attorney being able to provide legal advice to the client. For example, where the opinion of an accountant is required for an attorney to understand a client's tax issues and render advice, the presence of that accountant does not destroy the privilege. *See U.S. v. Kovel*, 296 F.2d 918 (2d. Cir. 1961). And information gathered by an accident reconstruction expert hired by an attorney to assist in preparing for litigation is also privileged. *See Commonwealth v. Noll*, 662 A.2d 1123 (Pa. Super. 1995). When third parties are involved, the focus is on the third-party's specific purpose and actions toward helping the attorney provide legal advice.

Once attached, the attorney-client privilege is absolute unless waived. If challenged, the party claiming privilege has the burden of proving that it was properly invoked. That burden must be carried with knowledge that courts view the assertion of privilege as an obstacle that stands in the way of truth gathering and not an inalienable right not to be questioned.

IN-HOUSE ATTORNEYS WEAR MANY HATS

Corporate counsel perform a variety of roles to serve their internal clients, including business and legal functions. They may also serve as de facto claims adjusters. Simply providing the in-house attorney with information (or, in the digital age, merely labeling e-mails as privileged or copying the attorney on e-mails) does not immediately cloak the communication within the protection of the attorney-client privilege. While specific standards vary by jurisdiction, it is clear that to be protected from disclosure, information must have been provided to the attorney for the primary purpose of seeking or providing legal assistance, or the advice given for predominately legal and not business purposes. And the communication must have been made for the client's need for legal advice or services. When the in-house attorney is involved in investigations, the privilege attaches when the investigation is related to providing legal services but may not where the attorney is simply monitoring claims.

THE *BOUSAMRA* PROBLEM

In forwarding the outside counsel e-mail to the third-party public relations expert, Fedela did not solicit its input, advice, or opinion in forming or facilitating legal advice for dealing with the results of the investigation. He appeared to have forwarded the message for information only. Had Fedela specifically sought the assistance of the consultant in determining how to proceed, the Court would likely have affirmed assertion of the attorney-client privilege.

THE WORK PRODUCT PRIVILEGE

Separately, Excela Health withheld the e-mail asserting the protection afforded by the work product doctrine, which protects documents prepared in anticipation of litigation and prevents disclosure of the mental impressions, conclusions, opinions and/or legal theories of a party's attorney concerning the litigation. In contrast to its decision that disclosure to a third party generally waives the attorney-client privilege, the Pennsylvania Supreme Court in *BouSamra* held that such disclosure did not automatically waive the work product privilege as long as the documents was not shared with an adversary or disclosed in a manner that increased the likelihood that an adversary would obtain it. The Court remanded the case for findings of fact on that issue.

BEST PRACTICES FOR THE DIGITAL AGE

Privileged documents were much easier to control and limit when documents were formal and existed only in hard copy. Technology has brought us copiers, scanners, mobile devices with cameras, and videoconferencing platforms with document sharing features, each of which multiply the ability to copy and transmit documents and information. Experience tells us that less formal communications carry the greatest risk for over dissemination. Internal policies must remind employees that digital communications are not different than, and must adhere to the same formalities of, formally written and printed documents.

What does this mean in practice? Assuming a phone call isn't an option of viable alternative, think before you write. Be purposeful when sending electronic communications, and especially when forwarding or responding to e-mails, considering each recipient and the purpose of including them. When communicating with an attorney or necessary third party about a privileged matter, add a header that the message is being sent subject to the attorney-client and work product privileges, and affirmatively state in the message why you are communicating with the recipient. In the end, privileged electronic communications must be written with the expectation that someone may eventually have to read it, determine its purpose, and conclude that you had intentionally sought or provided legal advice.

In addition, document management and information technology policies must be constantly reviewed and updated to include handling communications created by various platforms, and making those communications subject to your retention policies. Proper planning and execution will ensure that technology makes our lives better and easier, and not more complicated and unpredictable.

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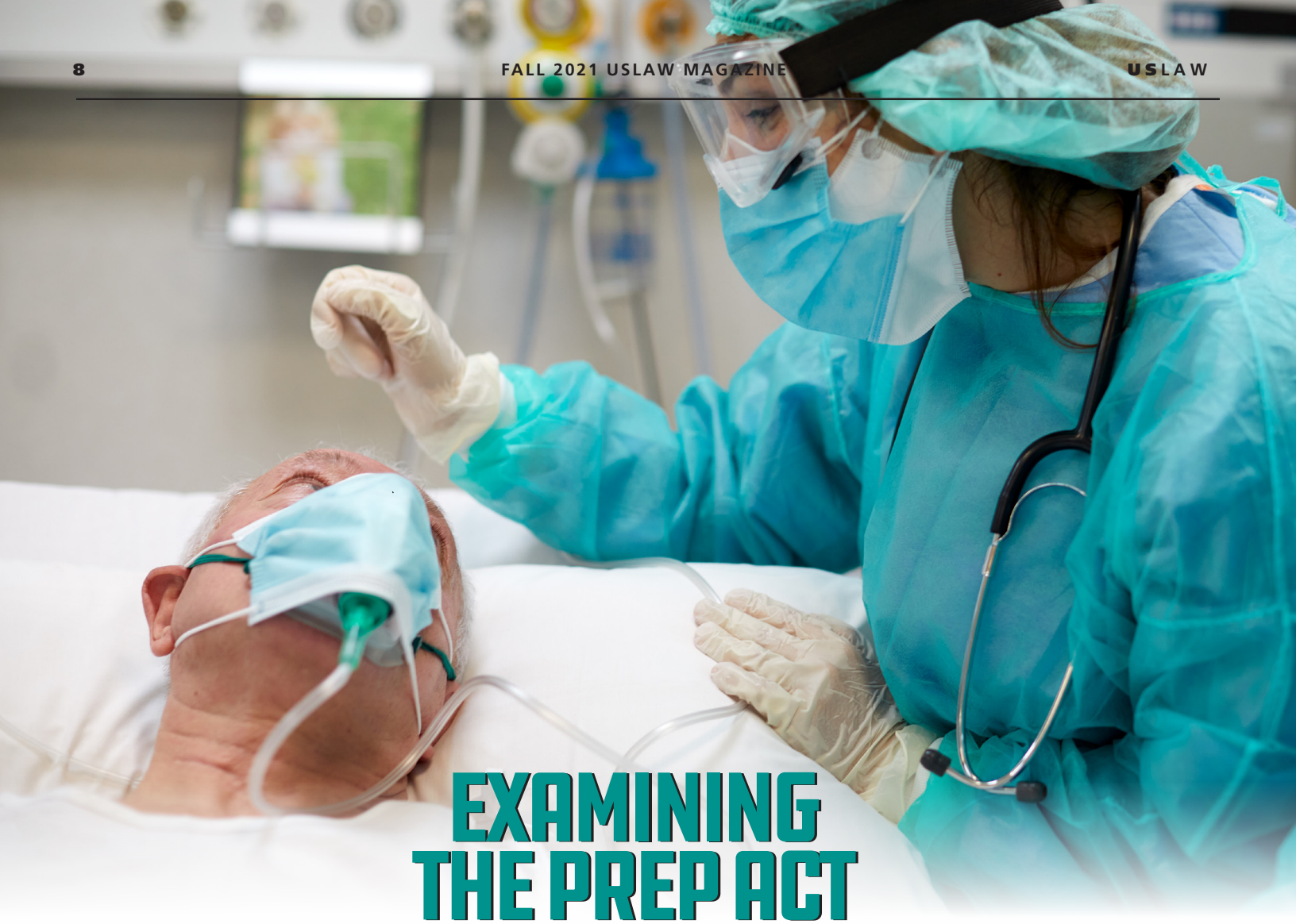

EXAMINING THE PREP ACT

Healthcare Provider Liability Immunity During the COVID-19 Pandemic

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In 2020, the COVID-19 pandemic swept the globe, resulting in millions of hospitalizations and hundreds of thousands of deaths in the United States.[1] The healthcare provider industry, at the forefront of combatting this insidious virus, faced severe challenges, including unprecedented inundation of medical facilities with severely sick patients, equipment, medication, and bed shortages and overburdened, under rested, and often sick, staff to treat patients. Healthcare providers were given little guidance and support in handling the pandemic and confronted with quickly shifting executive orders and regulations from state and government officials. Within a few months, our society was thrown into a state of deep economic and social disrepair. The effects of the pandemic will be felt throughout the world and legal and healthcare communities for years to come.

This is not the first time the United States faced a health crisis with the potential to disrupt the operation of our health care system. The avian flu posed a real risk of overwhelming all aspects of the United States healthcare system, prompting Congress' enactment of the Public Readiness and Emergency Preparedness Act ("PREP Act") in 2005.[2] The PREP Act authorizes the Secretary of Health and Human Services ("Secretary") to issue a declaration providing immunity from Federal and State liability, to persons involved in the manufacture, testing, distribution, administration and use of countermeasures, arising from public health emergencies. On March 17, 2020, the Secretary published a declaration to the PREP Act, extending liability protections to countermeasures against Covid-19.[3]

The PREP Act provides immunity to any person or entity that manufacturers, distributes, prescribes, or administers countermeasures, including licensed health professionals that have treated patients with defined countermeasures. Countermeasures are defined as qualified pandemic or epidemic products, drugs, biological products, or devices the Secretary deems a priority for use during the public health emergency. The PREP Act provides immunity for any loss that has a causal relationship with the administration or use by an individual, of a covered countermeasure during the declaration's effective period. This includes a causal relationship with the design, development, clinical testing, investigation, manufacturing, labeling, distribution, and other activities, of covered countermeasures.

Congress, understanding the need for some limitation on blanket immunity, carved out an exception for causes of action for death or serious physical injury caused by the willful misconduct of a cov-

ered person.[4] Willful misconduct is any "act or omission that is taken intentionally to achieve a wrongful purpose, knowingly without legal or factual justification, and in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit."[5] This criterion is construed to establish a more stringent standard of liability than ordinary negligence or recklessness.

Herein we explore the Court's interpretation of PREP Act immunity in lawsuits against healthcare providers for failure to prevent COVID-19 transmissions to its patients.

COURTS' INTERPRETATIONS OF THE ACT

With over 33 million COVID-19 diagnoses, the United States is experiencing a rise in state and federal lawsuits against healthcare facilities based on an alleged failure to use appropriate countermeasures to prevent the spread of COVID-19.[6] Typically, defendant healthcare providers sued in State Court seek removal to Federal Court, arguing the PREP Act completely pre-empts state law. Courts' interpretation of the PREP Act has been decidedly "black and white," with the majority of courts holding the PREP Act inapplicable if allegations in the complaint do not fall within the narrow language of the statute.

For example, pending before the Kentucky Federal District Court are 12 related cases stemming from COVID-19 deaths at a single post-acute rehabilitation facility. Defendants in each of the cases successfully removed the case from State Court, and then moved to dismiss based on immunity afforded under the PREP Act. Plaintiffs, in turn, sought to remand the cases to State Court arguing that the PREP Act does not apply. In *Brown v. Big Blue Healthcare, Inc.*,[7] one of the 12 cases decided by the Court, plaintiff alleges decedent died of COVID-19 because defendants failed to take preventative measures to stop its spread within the facility. The Court, in remanding the case, explained that plaintiff's allegations are not "causally connected to the administration or use of any drug, biological product, or device," and accordingly, the PREP Act is inapplicable. The Court distinguished allegations of inaction, as opposed to action, stating that those who employ countermeasures are protected by the Act, not those who decline to employ them.

The District Courts in Pennsylvania, Florida, New Jersey, and California have made similar holdings in remanding cases to State Court, finding that the PREP Act does not apply to allegations that a facility failed to use countermeasures to prevent patients from contracting COVID-19.[8]

The Courts' decisions in the above cases are consistent with former Secretary Alex Azar's March 2020 Declaration that "Administration of the Covered Countermeasure means (i) physical provision of the countermeasures to recipients, or (ii) activities and decisions directly relating to public and private delivery, distribution and dispensing of the countermeasures to recipients, management and operation of countermeasure programs, or management and operation of locations for the purpose of distributing and dispensing countermeasures."[9] However, evolution of treatment and a focus on prevention of COVID-19 through vaccination has forced refinement of PREP Act definitions. On December 3, 2020, Secretary Azar issued a Fourth Amendment to the Declaration interpreting "Administration of a Covered Countermeasures" to include "not administering a Covered Countermeasure to one individual in order to administer it to another individual."

This amendment clearly contemplates a scenario where the failure to administer a countermeasure will fall within the immunity protection of the PREP Act. Thus, the Kentucky District Court in *Maltbia v. Big Blue Healthcare, Inc.*,[10] was forced to revisit its prior holding in *Brown* and its sister cases. The Court, evaluating the new amendment and relevant Federal Court jurisprudence on this issue, held that two conditions are required for PREP Act immunity in 'inaction claims': (i) the claim alleges liability for not administering a covered countermeasure; and (ii) close causal relationship between the injurious inaction and corresponding administration or use that caused it.[11] The Court, in remanding the case, held that plaintiff's complaint contains no allegations that decedent's death is related to the provider's failure to administer a covered countermeasure, nor from a failure to administer the countermeasures because it was administered to another individual.

CONCLUSION

Interpretation of the applicability of the PREP Act will continue to evolve as the pandemic persists, treatments expand, and Amendments are issued. However, as current case law establishes, plaintiff's complaint must allege the specific PREP Act terms that trigger immunity if defendant is to avoid remand and achieve dismissal.

Finally, while healthcare providers have a limited ability to take advantage of immunity under the PREP Act, many states enacted favorable immunity statutes during the pandemic that may allow for dismissal of a case for failure to prevent the transmission of COVID-19.

1 https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendsdeaths.
2 42 U.S.C. §247d-6d.
3 85 FR 15198 (https://www.federalregister.gov/documents/2020/03/17/2020-05484/declaration-under-the-public-readiness-and-emergency-preparedness-act-for-medical-countermeasures). Declaration was published on March 17, 2020, and was made retroactively effective from February 4, 2020, thru October 1, 2024.
4 42 U.S.C. §247d-6d(c)
5 *Id.*
6 https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases
7 *Brown*, 480 F.Supp.3d 1196, 1196 (D. Ky. Aug. 19, 2020).
8 *See, e.g., Sherod v. Comprehensive Healthcare Management Services, LLC*, 2020 WL 6140474 (W.D. Pa. Oct. 16, 2020) (plaintiff's claim falls outside the PREP Act because the complaint alleges defendant failed to provide decedent with any protection/countermeasures); *Gunter v. CCRC OPCO-Freedom Square, LLC*, 2020 WL 8461513 (M.D. Fla. Oct. 29, 2020) (allegations including the failure to provide necessary medical supplies, reducing the cleaning practices in the facility and failing to effectively communicate with defendants' residents and families had nothing to do with "the administration of a qualified pandemic or epidemic product, drug, biological product, or device for which the PREP Act provides immunity"); *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, 478 F. Supp. 3d 518, 531 (D.N.J. Aug 12, 2020) (claims alleging countermeasures were not used are not preempted by the PREP Act); *Martin v. Serrano Post Acute LLC*, No. CV 20-5937 DSF (SKX), 2020 WL 5422949 at *1-2 (C.D. Cal. Sept. 10, 2020) (PREP Act does not apply when plaintiff alleges defendants failed to staff the nursing facility, failed to take proper precautions to prevent the spread of COVID-19 and failed to react properly to the infections).
9 85 Fed. Reg. at 79, 1973.
10 *Maltbia*, No. CV 20-2607 DDC (KGG), 2021 WL 1196445 at *1 (D. Ky. March 30, 2021).
11 *Id.*

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CARBON PRICING IN THE UNITED STATES AND NEW YORK AS A CASE STUDY

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As policymakers continue to grapple with ways to combat climate change, carbon pricing, as a market mechanism in reducing greenhouse gas (GHG) emissions, has emerged as a front-runner among environmentalists, economists, and regulators alike.

WHAT IS CARBON PRICING?

Put simply, carbon pricing places a price on carbon dioxide (CO2) emissions that result from the generation of electricity from nonrenewable resources such as fossil fuels. The goal of carbon pricing is to create an economic mechanism that would internalize the externality that fossil-fuel generators have historically benefited from, as they emit carbon dioxide or other GHGs into the atmosphere without accounting for the cost of those emissions. Carbon pricing essentially embeds a cost per ton of CO2 emissions in the sale of wholesale electricity, which creates a price signal for investment in new clean energy resources as well as for existing generators to minimize their CO2 emissions through upgrades and efficiency improvements. If implemented at a regional level, meaning through a regional transmission organization (RTO) or an independent system operator (ISO)'s wholesale competitive market, carbon pricing allows for the market to reflect the negative impacts of emitting greenhouse gases. This ultimately leads to the dispatch of renewable energy or non-carbon emitting generators and, in turn, reduces GHG emissions.

It is important to note that carbon pricing is different from a carbon tax. A carbon tax usually results in laws or regulations that establish a fee per ton of carbon emissions from a sector or the whole economy. Owners of emission sources subject to the tax would be required to pay taxes equivalent to the per-ton fee times their total emissions. A carbon price is different, as it adds a market mechanism that sets a "price" on carbon emissions and relies on a competitive wholesale market to dispatch the most reliable, cost-effective generation fleet to

power the grid.

Cap-and-trade programs are also discussed in the context of reducing CO2 emissions. Under a cap-and-trade program, regulators may implement a cap on the amount of carbon emissions in either a region or industry sector and issue allowances or permits up to the level of the cap. Every source of emissions subject to the cap (for example, power plants or refineries) would be required to purchase and hold permits equal to the amount of emissions they produce. Typically, these permits are procured through auctions, and entities can buy and sell their permits. This encourages emitting entities to reduce their emissions. Some cap-and-trade regimes may have a declining cap, which also encourages emitters to prioritize emission reduction.

Carbon pricing is gaining popularity due to its flexibility as a market-based tool that could set clearer price signals in competitive wholesale energy markets with the goal of ultimately reducing GHG emissions. This past year, the Federal Energy Regulatory Commission (FERC) held a technical conference to explore the feasibility of a national carbon-pricing regime and to discuss FERC's jurisdiction over a state-determined carbon price. This resulted in two FERC policy statements presenting a framework on FERC's jurisdiction and encouraging RTOs and ISOs to reach out to stakeholders, including states, market participants, and consumers, to explore and develop the value of incorporating a state-determined carbon price. While a national carbon price is not off the table, it appears as though these types of policies will largely fall on states to implement through their respective RTOs and ISOs.

CARBON PRICING CASE STUDY AND NEW YORK'S MODEL

There are currently 12 states considering carbon-pricing legislation. The types of carbon pricing can vary between either a cap-and-trade approach, as discussed above, or a set carbon price, based upon the social cost of carbon (SCC).[1] At least 11 states that already have carbon-pricing legislation in place use the SCC approach to better account for the impact of GHG emissions.[2] To better understand how a state may implement a carbon-pricing regime through a RTO or ISO, New York's model serves as a good case study. In 2019, New York codified one of the most aggressive GHG emissions in the country. In its 2019 Climate Leadership and Community Protection Act (CLCPA), the state mandated that 70 percent of the electricity consumed in New York come from eligible zero-emitting assets by 2030, with 100 percent being derived from those resources by 2040. To reach its aggressive climate-protection goals, the state will likely implement a carbon-pricing policy in the near future.

The New York Independent System Operator (NYISO) is the organization responsible for managing New York's electric grid and its competitive wholesale electric marketplace. The NYISO does not generate power or own transmission lines, but it is tasked with reliably operating New York's grid and plans the power system for the future. The NYISO carries out its mission through working with stakeholders, independent power producers, and utility companies to create policies and facilitate the competitive wholesale market.

The NYISO has been studying the feasibility of implementing a carbon price for the past few years. It determined that a market-based approach to pricing CO2 emissions will leverage the success of wholesale energy markets to develop the broadest possible set of low-cost, innovative carbon-abatement measures. The NYISO's carbon-pricing concept would operate in conjunction with how the state historically procures renewable energy through the purchase of renewable energy credit (REC) and zero-emission credit (ZEC) mechanisms, the Regional Greenhouse Gas Initiative (RGGI), and other existing state public policy programs. The NYISO argues that a transparent carbon-pricing concept will benefit consumers by reducing the cost of RECs and ZECs while also stimulating dynamic market responses. For instance, carbon pricing will incentivize a reduction of GHG emissions by providing a price signal for investment in upgraded fossil fuel generators or in renewable energy generators to replace energy production from older, less efficient fossil fuel units.

Another state agency in New York is also grappling with pricing carbon: the New York Department of Environmental Conservation (NYSDEC). New York's clean energy goals include generating 70 percent of the electricity consumed in the state from eligible renewable resources and reducing economy-wide CO2 emissions by 40 percent by 2030 (when compared to 1990 levels). Per the state's request, the NYSDEC finalized a guidance document on the value of carbon in December 2020. This guidance is different from a regulation and does not propose a carbon price, fee, or compliance obligation. It is a metric that will be broadly applicable to all state agencies and authorities to demonstrate the global societal value of implementing actions to reduce GHG emissions. This guidance is meant to be used by other state agencies to aid in decision-making. The NYSDEC, after public comments, decided to use a lower central discount rate, which translates into a 2020 central value of $125 per ton of carbon dioxide; $2,782 per ton of methane; and $44,727 per ton of nitrous oxide. While the NYISO is not mandated to use the NYSDEC's social cost of carbon, it may incorporate it in its carbon adder. Lastly, the state's energy regulator, the New York State Public Service Commission (NYSPSC), has also been analyzing the environmental value of adding the SCC to the value stack for distributed energy resources to reflect the 2021 interim SCC. These additions are the first of their kind and the changes in the components of the value stack for distributed energy resources will ultimately determine the energy compensation many renewable projects receive from utilities. Under this program, each project gets assigned a credit based on their SCC, and this new calculation could be used to determine the environmental component of these projects.

As the NYISO continues to evaluate its carbon-pricing policy, two state agencies in New York continue to use SCC as a price signal and a way to evaluate agency decisions. While it remains to be seen how carbon pricing gets implemented in the United States at the federal level, we will likely see these regimes implemented in states like New York.

1 "The Carbon Cost Coalition," National Caucus of Environmental Legislators, accessed July 21, 2021, https://www.ncel.net/carbon-pricing/#coalition

2 "States Using the SCC," The Cost of Carbon Pollution, accessed July 21, 2021, https://costofcarbon.org/states.

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MAKING THE WISE MOVE WITH YOUR COLLATERAL

What Lenders Should Know About Perfecting Their Security Interests in Intellectual Property

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A business's intellectual property often represents its identity, reputation, and the very basis for which it is in operation. But a business's intellectual property can also serve as valuable collateral in an asset-based lending transaction, opening the door to important financing. However, lenders, and the attorneys who serve them, are often unfamiliar with intellectual property laws, which can be complex and confusing. Consequently, lenders will often take a "belt and suspenders" approach towards protecting their intellectual property collateral by filing with the applicable federal office and by filing a UCC-1 financing statement with the state-approved UCC filing office. While this approach is the most cautious (and likely unnecessary), it remains prudent given the current state of the case law surrounding these transactions.

Under the Uniform Commercial Code ("UCC"), intellectual property is considered a "general intangible."[1] In order to perfect a lien in a commercial borrower's intellectual property, lenders may believe simply taking a "blanket lien" of all of the borrower's assets under the security agreement and identifying "general intangibles" in the lender's UCC-1 Financing Statement is sufficient. However, the analysis does not stop there. The confusion surrounding security interests in intellectual property stems primarily from the preemption language under Article 9-109(c) of the UCC.

Under the former version of Article 9-109(c), a security interest was excluded from the regulations of Article 9 if it was "subject to any statute of the United States, to the extent such statute governs the rights of parties to and third parties affected by transactions in particular types of property."[2] This broad language left the door open to interpretation as to when Article 9 governed a transaction, particularly for transactions involving intellectual property, which are governed by federal law. When the revised version of Article 9 was issued in 1999, the drafters noted that courts were "erroneously" deferring to federal law even when federal law did not preempt Article 9.[3] Under the revised version of Article 9-109(c)(1), the drafters made it clear that federal law only applies when it preempts Article 9.[4] Further, under Section 9-311(a), the drafters made it clear that, in order to perfect its security interest, a secured creditor must continue to file a financing statement unless there is "a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt [Article 9]." A plain reading of these two sections suggests that a lender must continue to file a financing statement with the state-approved filing office unless federal law expressly requires the lender to take an alternative action with respect to obtaining priority. While the issue of when the UCC is preempted can be confusing, the case law discussed below provides some clarity.

"Intellectual property" commonly falls under the three categories: patents; trademarks; and copyrights. Each category is

governed by its own federal statute: patents (the Patent Act, 35 U.S.C. §§ 1 *et seq*); trademarks (the Lanham Act, 15 U.S.C. §§ 1051 *et seq*); and copyrights (the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq*). Below is a discussion of each category, and the application of the UCC to the corresponding federal law for each form of intellectual property.

PATENTS

Patents involve the invention of "any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof…"[5] Under the Patent Act, the U.S. Patent and Trademark Office ("USPTO") maintains a register of all interests in patents and applications for patents.[6] Further, the Patent Act provides that any "assignment, grant or conveyance" of a patent shall be recorded with the USPTO in order to provide notice to any subsequent purchaser or mortgagee of the patent.[7] However, the Patent Act is silent as to the perfection of a security interest in a patent.

Since the Patent Act only addresses the "assignment, grant or conveyance" of a patent, courts have interpreted this to mean the Patent Act only applies to the actions affecting the transfer of ownership of a patent, and not the granting of a security interest.[8] Indeed, the act of only recording a security interest with the USPTO may result in a lender losing its secured status.[9] While recording a security interest with the USPTO may provide additional notice of a party's security interest, the applicable case law suggests secured creditors should continue to follow the process in Article 9 when perfecting a security interest in a patent.

TRADEMARKS

Trademarks involve words, phrases, logos, or other sensory symbols used by a seller to distinguish its products or services from others.[10] While the trademarks can be registered at the state and federal level, this article focuses on those that are registered at the federal level since that is where the issue of preemption occurs. Federally registered trademarks are governed by the Lanham Act, which was enacted by Congress in 1946. Similar to patents, the Lanham Act provides a process for the registration of trademarks through the USPTO and, similarly, the process is silent as to the perfection of a security interest in a trademark. As it pertains to trademarks, courts have once again declined to preempt the UCC in favor of federal law, given the Latham Act's failure to provide a process for the treatment of a security interest in a trademark.[11] Accordingly, secured creditors should continue to follow Article 9 when perfecting a security interest in a trademark.

COPYRIGHTS

Copyrights involve original works of authorship, including works in literature, music, drama, pantomime, picture and graphics, motion picture, sound, and architecture.[12] Copyrights can be registered and unregistered. In order to register a copyright, a party must register the copyright with the federal Copyright Office.

Similar to the Patent Act and the Lanham Act, the Copyright Act does not provide a process for perfection of a security interest in a copyright similar to Article 9. However, unlike patents and trademarks, the Copyright Act casts a broader net for the transfer of any right, title, or interest in a copyright. Under the Copyright Act, a "transfer of copyright ownership" is "an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or any of the exclusive rights comprised in a copyright, whether or not it is limited in time place or effect…"[13] The Copyright Act allows for any "transfer of copyright ownership" to be recorded in the Copyright Office.[14] With the broad definition of a transfer of ownership, and the opportunity to record such transfer with the Copyright Office, the court in *In re Peregrine Entertainment, Ltd.*, 116 B.R. 194 (C.D. CA 1990), held that the Copyright Act preempted the UCC in relation to the perfection of security interests. The *Peregrine* court reasoned that because the definition of a "transfer of copyright ownership" includes the "mortgage" and "hypothecation" of the copyright, such terms included a pledge of property as security for a debt.[15] As a result, the *Peregrine* court held that a lender can only perfect a security interest in a registered copyright by filing in the Copyright Office.[16]

To complicate matters, in instances where a lender has perfected its security interest in an unregistered copyright by filing with the state-approved UCC filing system, the lender may have to record its security interest with the Copyright Office at a later date and time in the event the borrower later registers its copyright. A lender should monitor the copyright's status when conducting its loan file review.

It is important to note that much of the case law interpreting how a lender can perfect its security interest in intellectual property remains at the district court and appellate level. The U.S. Supreme Court has not weighed in on this process, and one circuit is not necessarily obligated to follow the holding of another circuit. Until a federal law is passed that expressly preempts Article 9 and provides a bright line process for a lender to perfect a security interest in intellectual property, the law governing perfection of security interests in intellectual property will remain murky at best and subject to change. In order to ensure perfection of their security interest in these types of collateral, lenders should consider filing with the appropriate federal office and the state-approved UCC filing office out of an abundance of caution. While it may be unnecessary, it remains the most cautious move to avoid the risk of an attack on the lender's priority.

1 Article 9-102(42)
2 Article 9-109, cmt. 8.
3 Article 9-109 cmt. 8.
4 Article 9-109(c)(1).
5 35 U.S.C. § 101.
6 35 U.S.C. § 261.
7 *Id.*
8 *In re Cybernetic Services, Inc.*, 252 F.3d 1039, 1059 (9th Cir. 2007).
9 *In re Coldwave Systems, LLC*, 368 B.R. 91, 97 (Bankr. Mass. 2007).
10 Black's Law Dictionary (11th ed. 2019), trademark.
11 *See In re 199Z, Inc.*, 137 B.R. 778, 782 (Bankr. C.D. Calif. 1992).
12 17 U.S.C. § 102(a).
13 17 U.S.C. § 101.
14 17 U.S.C. § 205(a).
15 *Peregrine*, 116 B.R. at 199.
16 *Id.*

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WEATHERING THE STORM OF FIRST PARTY PROPERTY LITIGATION:

Identifying the key players, combating suspicious claims, and reducing the Insurers risk

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During the 2020 hurricane season, the United States suffered an estimated $25 billion in insured losses and over $60 billion in economic losses.[1] What is not accounted for in these numbers are the billions of dollars in losses to insurance carriers attributed to the increasing amount of litigation that follows each storm, which leads to rising insurance premiums. Financial incentives of roofing contractors, public adjusters, and attorneys have led some within their profession to exploit weather events, leading to increased litigation costs. This article explores common tactics conducted in concert by roofing contractors, public adjusters, and plaintiff's attorneys in first party property claims; the impact recent legislation may have on curbing the litigation costs associated with first party property claims; and tools and strategies available to insurance carriers and defense attorneys to combat these claims.

IDENTIFYING THE TRIPARTITE COHORT AND THEIR FIRST PARTY PROPERTY CLAIMS TACTICS

The following illustrates a common example of how these professionals become key players in a claim following a weather event:

A thunderstorm, tornado, or hurricane passes through an area with anecdotal reports of high winds and hail. In the following days, a homeowner is informed through mailers or a charismatic salesperson that they may be eligible for a free roof replacement. A frugal homeowner inquires and is told "all you need to do is file an insurance claim for hail or wind damage to your property." This conversation occurs before any professional has inspected their roof to verify whether the roof has storm related damage. The homeowner, unaware of any roof damage but knowing his or her roof in this geographical area is near the end of its useful life, agrees to sign the documents. The executed documents include an Assignment of Benefits (AOB), which transfers, in part, the homeowner's right to insurance proceeds under a roof claim to the roofing contractor in exchange for the possibility of obtaining a new roof. Heeding the salesperson's guidance, the homeowner files a claim for a roof replacement citing wind and/or hail damage. The insurer inspects the roof to find no recent hail or wind damage but acting in good faith offers the homeowner an amount to repair a few sections of worn-out shingles. The homeowner rejects this offer of repair believing that they are owed a new roof.

Following the partial claim denial, the salesperson instructs the homeowner to contact a public adjuster explaining that the roofing contractor has a great relationship with this public adjuster and the public adjuster has a high success rate at getting insurance carriers to pay on roof claims. The public adjuster agrees to assist the homeowner with his claim in exchange for a contingency fee on the recovery of the insurance proceeds. The public adjuster performs an inspection and creates an inflated estimate that calls for an entire roof replacement caused by the recent storm. The insurer orders a second inspection, but still finds no wind or hail damage. The claim remains partially denied.

At this point, the claim is ripe for litigation. The roofing contractor or the public adjuster then introduces the homeowner to a *trusted attorney who has a high success rate at getting insurance carriers to pay roof replacement claims.* Litigation ensues.

The above hypothetical highlights a common practice in the roofing industry. Each participant has a financial interest. With each participant's entrance into the claim, the amount of money required to resolve the claim and compensate each participant increases. Thus, each participant brings value to the claim by inflating the damages. The roofer finds storm related damage. The public adjuster recommends replacement rather than repair. The attorney, in some jurisdictions, leverages a statutory claim for attorney's fees which, in many instances, is

unrelated to the homeowner obtaining a new roof. For example, in Florida, prior to the implementation of the recently enacted SB 76 legislation, Florida had an attorney fee shifting statute that applied to first-party insurance disputes. Florida Statute § 627.428 provided, if an insured is required to resort to litigation and is successful against his insurer, the insured will be entitled to recover attorney's fees from his insurer. This fee shifting statute also incentivized contractors and public adjusters with relationships with plaintiff's attorneys to litigate the dispute in an effort to increase the recovery from the insurer. Often, this leads to the roofing contractor, public adjuster, and attorney obtaining a substantial recovery in the form of fees and leaving little for a replacement or repair of the homeowners' roof.

RECENT LEGISLATION IN FLORIDA AIMED AT CURBING EXCESSIVE FIRST PARTY PROPERTY CLAIMS AND LITIGATIONS COSTS

In speaking about the rise of first party property litigation in Florida, Mark Wilson, president and CEO, Florida Chamber of Commerce, explained, "when Florida accounts for only 8 percent of the nation's property insurance claims but 76 percent of national property insurance litigation, you know there is a problem." Addressing this problem, in May of 2021, Florida enacted SB 76. The new law went into effect on July 1, 2021, and takes aim at many of the issues discussed above. In the applicable provisions of SB 76, the legislation:

- Prohibits roofing contractors or any person acting on their behalf from:
  - Making a "prohibited advertisement," including an electronic communication, phone call or document that solicits a claim.
  - Offering anything of value for performing a roof inspection, an offer to interpret an insurance policy, file a claim, or adjust the claim on the insured's behalf.
  - Providing repairs for an insured without a contract that includes a detailed cost estimate of the labor and materials required to complete the repairs.
- Replaces the plaintiff-friendly attorney fee-statute to make the recovery of attorney fees and costs contingent on obtaining a judgment for indemnity that exceeds a pre-suit offer made by the insurance company.
- Requires claimants to file a pre-suit demand at least 10 days before filing a lawsuit against an insurer that includes an estimate of the demand, the attorney fees and costs demanded and the amount in dispute.
- Prohibits pre-suit notices to be filed before the insurance company can make a determination of coverage.
- Allows an insurer to require mediation or other form of alternative dispute resolution after receiving notice.

Proponents of SB 76 believe the law is a step in the right direction but note more is required. The impact SB 76 may have on the amount of litigation and resulting costs to insurers and homeowners is to be determined. However, roofing contractors, public adjusters, and plaintiff's attorneys are already modifying their marketing tactics and positioning themselves to remain successful in this arena. In that regard, insurers too must pivot and use the tools and strategies discussed below to combat these claims.

TOOLS AND STRATEGIES AVAILABLE TO INSURERS AND DEFENSE ATTORNEYS

Most homeowner policies include post-loss conditions requiring insureds to sit for an examination under oath, provide a sworn proof of loss, and provide documents to the insurer. Insurers may also choose to take the insured's recorded statement after the first notice of the loss. A recorded statement can help the insurer verify the facts of the claim and identify other key players involved.

Insurers should use the above tools early in the claims process to preserve time-sensitive information, identify key players and financial biases, and to solicit the insured's cooperation at the outset. Information leading to the availability of a policy exclusion is usually discovered in the initial investigation of the claim. Further, insureds bringing suspicious claims are often hesitant to cooperate which may lead to a defense for the insurer under the cooperation clause of the policy.

The majority of policies also contain an appraisal provision. Requesting an early appraisal is a useful way to prevent claims from becoming inflated. In some jurisdictions, the appraisal process is voluntary for contractors operating under an AOB. However, as noted above, Florida's SB 76 and related case law allows an insurer to require an insured or a contactor operating under an AOB to participate in an appraisal, pre-suit mediation, or other form of alternative dispute resolution.[2]

Importantly, once a claim falls into litigation many jurisdictions have separate attorney fee shifting statutes that can be used as tools to shift some of the financial risk back onto plaintiffs. This typically comes in the form of an Offer of Judgment or Proposal for Settlement. In short, in order for the insurer to recover its attorney's fees, the insurer must estimate what the value of a potential judgment will be and make an Offer or Proposal that comes under the ultimate judgment by a specified percentage. In Florida the threshold percentage is 25%. For example, if the insurer files a Proposal for Settlement for $100,000 and the Plaintiff rejects this Proposal and a judgment is entered for $75,000 or less, the insurer will recover its fees.[3] Although the enactment of SB 76 provides its own attorney fee provision, it does not appear this will impact the above.

CONCLUSION

As first-party property claims continue to rise across the country, so does litigation and the costs associated therewith. Although legislation is underway in many jurisdictions, insurers must be aware of the tactics being employed by the professionals in this industry and take pro-active steps early in the claims process to identify suspicious claims, the players involved, and the tools and defenses available to combat these claims.

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1 Source – Insurance Information Institute & Artemis

2 *See Certified Priority Restoration v. State Farm Fla. Ins. Co.*, 191 So. 3d 961, 962 (Fla. Dist. Ct. App. 2016) (Compelling appraisal of loss for which assignee sought payment from homeowner's insurer was permissible over assignee's objection.)

3 *See* Fla. R. Civ. P. 1.442; *see also* Fla. Stat. 768.79(1)

EXPLOSION OF RANSOMWARE ATTACKS ADDRESSED BY DFS

Shari Claire Lewis Rivkin Radler LLP

On June 30, 2021, New York State's Department of Financial Services (DFS) issued its Ransomware Guidance to alert the financial industry to the upsurge in ransomware attacks and to provide education and standards for addressing cybersecurity issues. The Guidance provides valuable information for all businesses and organizations, not just for the financial industry that DFS regulates. The Guidance may be found here.

THE RANSOMWARE CRISIS

An explosion of the number and severity of ransomware incidences has been reported on by news outlets almost daily. Nevertheless, because news reports focus on massive ransomware attacks on Fortune 500 companies, other companies may underestimate the risk that ransomware presents to their businesses. The Guidance's analysis starkly demonstrates the pervasiveness of the problem. It notes that, according to U.S. Homeland Security Secretary Alejandro Mayorkas, ransomware attacks increased by 300% in 2020.

The Guidance also describes the crip-

pling impact that a ransomware attack may have, as it sidelines organizations and prevents them from performing key functions, such as providing consumer services or patient care or enabling employees to work. Magnifying the problem, since mid-2020, ransomware criminals have more frequently engaged in "double extortion," whereby they steal the victim's data before deploying ransomware, which they then use to extort the victim a second time by threatening to publish the data after the ransomware event has concluded.

In addition to the growth in the frequency of attacks, DFS reported that the amounts demanded as ransom have increased 171% from 2019 through 2020 and are expected to continue to grow. Nevertheless, DFS, like the FBI, recommends against paying ransom for a variety of reasons:

- The payment funds ever more sophisticated attacks;
- The payment may violate a variety of laws, so that the victim may itself risk fines and sanctions, such as under the Office of Foreign Assets Control;
- Victims who have paid have not been able to gain access to all their data or have had the data leaked anyway; and
- 80% of victim organizations that paid experienced subsequent attacks.

WHAT IS AN ORGANIZATION TO DO?

Depending on the event and type of business, organizations may have obligations to promptly report any ransomware attacks on its systems to criminal, government or regulatory agencies, such as DFS. Additionally, the Guidance identifies nine actions that organizations should take to either prevent or respond to a ransomware incident.

DFS recommends that businesses employ a "multilayered approach" using a combination of security tools to reduce the risk of a ransomware attack and minimize its damage. DFS "expects" regulated companies to implement a "defense in depth" approach, when possible, as set forth in DFS' Cybersecurity Regulation (23 NYCRR § 500 et seq). The multilayered approach includes:

1. DFS' Recommendations for "Protecting Ransomware"

A. Email Filtering and Anti-Phishing Training – According to DFS, employee training is critical. Thus, employers should have robust cybersecurity awareness programs for employees, such as recurrent and remedial phishing training, periodic phishing exercises and testing. 23 NYCRR § 500.14(b). At the same time, emails should be filtered to block spam and malicious attachments from reaching users, as set forth in 23 NYCRR § 500.3(h).

B. Vulnerability/Patch Management – Companies should establish and document programs to identify, track and remediate vulnerabilities (23 NYCRR § 500.03(g)) that should include periodic penetration testing. 23 NYCRR § 500.05(b). When possible, regulated companies should enable automatic updates.

C. Multi-Factor Authentication (MFA) – DFS requires MFA for remote access to an organization's network and third-party applications or other external programs that may expose the organization's systems. 23 NYCRR § 500.12. DFS also recommends MFA be enabled for logins to all privileged accounts (whether remote or internal). 23 NYCRR § 500.3(d) & (g); 500.12.

D. Disable RDP – DFS recommends that regulated entities disable Remote Desktop Protocol (RDP) access from the internet when possible. 23 NYCRR § 500.03(g). If RDP access is deemed necessary, as it has become for businesses that are operating remotely, access should nevertheless be restricted to only approved (white-listed) originating sources and should require MFA and strong passwords.

E. Password Management – Regulated entities should ensure that strong, unique passwords are used. 23 NYCRR § 500.03(d). DFS suggests that organizations ensure that privileged user accounts require passwords that are at least 16 characters and ban commonly used passwords entirely. Additionally, in larger organizations with dozens or hundreds of privileged accounts, organizations are encouraged to consider a "password vaulting PAM" (privileged access management solution) to require employees to request and check out passwords. In all cases, password caching should be turned off.

F. Privileged Access Management – Privileged access refers to increased access or abilities given to certain users (or computer programs) beyond that given to standard users, to enable them to perform their job functions. DFS encourages organizations to implement the principle of "least privileged access" and give users only the minimum access necessary to perform their job. 23 NYCRR § 500.03(d). 23 NYCRR § 500.07. Moreover, because privileged accounts are a frequent source of compromise, privileged accounts should be highly protected, universally require MFA and strong passwords, and should be periodically audited and inventoried.

G. Monitoring and Response – It is essential that companies have a way to monitor their systems for intruders and respond to alerts of suspicious activity. 23 NYCRR § 500.03(h). DFS recommends that all companies employ an "Endpoint Detection and Response (EDR) solution" to detect anomalous activity. EDR, in certain versions, may be able to stop ransomware from executing and from encrypting the entire system.

2. DFS' Recommendations for "Preparing for An Incident"

A. Tested and Segregated Backup – It is recommended that companies maintain comprehensive, segregated backups that will allow recovery in the event of a ransomware attack. 23 NYCRR §§ 500.03(e), (f) and (n). Having at least one set of offline backups that is segregated from the company's network is the best way to avoid ransomware criminals from being able to delete or encrypt the backups. Backups should be tested – before an event occurs – to make sure they will function in the event of an attack.

B. Incident Response Plan – Regulated companies are required to have an incident response plan that explicitly addresses ransomware attacks. 23 NYCRR § 500.16. This is something that all companies should do. The plan should be regularly revisited and tested to ensure that it will, in fact, work if needed.

The Guidance provides concrete steps that all organizations should consider in response to the explosive growth of ransomware attacks. Commitment by multiple stakeholders in the organization (including leadership, information technology and employees) and consultation with appropriate cybersecurity and legal professionals may help an organization reduce the risk of a ransomware event and its impact if one occurs, as well as help an organization navigate the various regulations that may apply.

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The Future of Power Generation

Sean Buczek, P.E. S-E-A

The future of power generation in the United States seems to change direction whenever the oval office changes its occupant. One thing, however, seems to be clear over the past decade: fossil fuel and nuclear power generation is phasing out, and renewable generation is phasing in. Large corporations such as Verizon Wireless have entered into renewable energy purchase agreements in the past two years which total nearly 1.7 gigawatts[1]. Meanwhile, Lloyd's of London, one of the world's largest insurance markets, will phase out the investment in fossil fuel power plants, coal mines, and other energy exploration work by 2030[2]. With these continuing trends in mind, it's crucial to explore each generation class, expand upon where power generation will be in the future, and analyze the types of construction and operational issues that can be expected in our country's transition from fossil fuel to renewable generation.

GENERATION CLASSES

Fossil Fuels and Nuclear

This generating class consists of fossil fuel power plants that burn coal or natural gas, and nuclear power plants that utilize uranium fuel and a process called fission to create heat. The heat created by either burning the fuel or fission is absorbed by water flowing throughout a boiler, or heat exchanger, to create steam. The steam is then piped to a steam turbine generator that rotates. As this turbine rotates, a generator coupled to the turbine rotates as well, producing power.

Fossil fuels can also be burned through a gas or combustion turbine. In this process, natural gas is being burned which rotates a large turbine. Similar to the steam turbine generator, this combustion turbine is coupled to a generator that also rotates, creating power.

Renewable

Renewable power generation includes many different asset types. The most popular of the renewable power assets are hydro, wind, and solar. Hydroelectric power utilizes the power of water to rotate one, or many, hydroelectric turbines. By storing (damming) water at a higher elevation and allowing it to flow to a lower elevation, the potential energy of the water turns a hydroelectric turbine coupled to a generator where power is produced.

Wind power generation utilizes vastly differing sizes of wind turbines to generate power. Very simply, the wind pushes large surface area blades that cause a shaft within the wind turbine nacelle (the top component of the wind turbine) to rotate. That shaft attaches to a gearbox that changes the relatively low rotational speed of the wind turbine blades into a high rotational speed shaft that rotates the generator, creating power.

The last of the popular renewable generation assets is solar. There are many sub-asset types within solar, but the most common of those is photovoltaic (PV) generation or solar panels. Solar panels are comprised of PV cells and other conductive materials to assist in the transfer of electrons. When light energy hits a PV cell, part of the light energy is absorbed, allowing the flow of electrons.

WHERE ARE WE NOW AND WHERE WILL WE BE IN THE FUTURE?

The power generation industry and class mixture direction seem to change every four years. Some administrations push for the utilization of the coal and natural-gas reserves within our borders, and others push for the "cleaner" renewable generation. As displayed below in Figure 1, regardless of each administration's agenda, coal generation is on the decline with wind and solar on the rise.

BUT WHAT ABOUT NATURAL-GAS GENERATION?

Why has its net generation almost doubled in the last 10 years?

The answer lies in the term "base load demand" or "base load." Throughout the nation, there is always a constant base load (power) demand being provided via base load supply power plants. Base load supply must be reliable, run constantly, and fluctuate power output throughout the day with

a "turn of a knob." Base load demand was largely covered by nuclear and coal power plants in the past; however, with the retirement and mothballing of coal-fired power plants, other types of generation are needed to take its place. Natural-gas generation is the current solution.

NUCLEAR STALEMATE?

As seen in Figure 1, the nuclear generation class shows a straight, horizontal line for the past 10 years. Nuclear power is a base load supply asset and has proven to be very reliable for long-term, continuous operation. So why don't we build more? Environmentally speaking, these power plants are clean in the fact that they do not have any emissions, unlike those of a coal or natural-gas power plant. But they are not clean in the fact that the highly radioactive spent uranium fuel rods need to be put somewhere after they are replaced with new rods. Additionally, lack of containment of the radioactive core has proven devastating in some situations (2011 Fukushima, 1986 Chernobyl, 1979 Three Mile Island). These types of accidents have made the containment measures, permitting, and construction near impossible for a utility to swallow, resulting in the lack of new nuclear power plants. The latest completed nuclear power plant finished construction in 2016, the next youngest entered service in 1996.

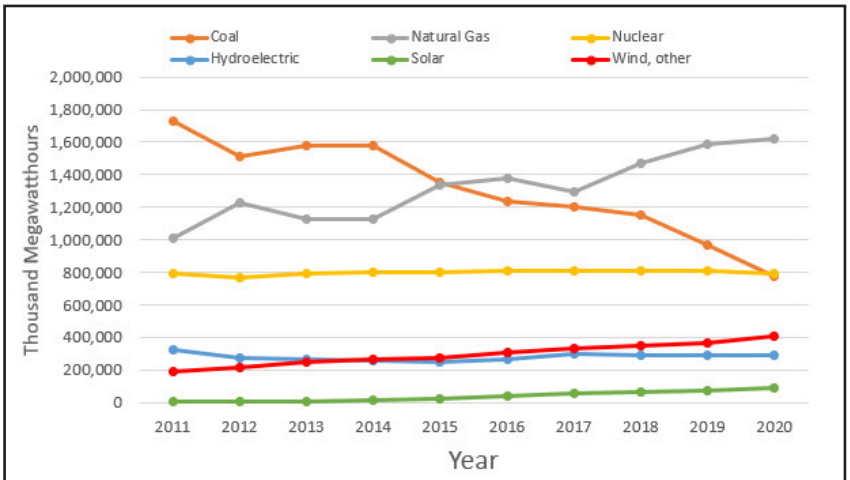

Figure 1: National Net Generation Changes (data via eia.gov).

IS THIS THE RISE OF WIND, SOLAR, AND HYDROELECTRIC?

Due in part to the federal tax credits granted to those who purchase, construct, and begin production of power, wind turbine and PV power generation has become increasingly popular in the past decade. Other reasons for its popularity include an aging fossil fuel fleet, demand for more peak energy producers, consumer opinion, and the competitive prices to construct versus fossil-fuel power plants.

Keeping these facts in mind, will the future include landscapes packed with wind farms and solar arrays? According to Xcel Energy[3], one of the largest electric utilities in the nation, they will be cutting greenhouse-gas emissions from fossil-fuel generation plants by 85% by the year 2030 and will retire their remaining coal-fire fleet by 2040. The power currently being produced by the fossil fleet will need to be produced by other means. That is why Xcel Energy plans on building a combined 5,500 megawatts of combination wind, solar, and battery storage, which will need technological advances to be cost effective.

CONSTRUCTION AND OPERATIONAL ISSUES-RENEWABLE ENERGY

Insurance claim and legal professionals can expect a rise in matters in the renewable energy sector as we move forward into the future. Construction of utility scale wind and solar farms is similar work to that of an assembly line. There are multiple different crews of workers that perform the same tasks every day, however, the risks within the wind turbine erection process during construction outweigh those of solar farm construction. The most at-risk task is erecting a wind turbine. This involves multiple critical lifts that in most cases, require engineered lifting plans due to the weight of individual turbine components, available crane capacities, and dangers with varying environmental conditions. These lifts can be hazardous, often resulting in injury if procedures are not properly followed.

Operation of both wind and solar farms presents unique problems that were not displayed in the fossil-fuel and nuclear-generating classes, having double or triple redundancy on most critical pieces of equipment. This prevents down time and keeps larger pieces of equipment (i.e., steam turbine generators and boilers) from catastrophically failing . There is no such redundancy in the wind and solar generating class. As a result, you have more assets that can experience failure. For example, think of a wind farm with 300 individual wind turbines. That is 300 individual assets that can experience a minor failure in a lube oil system, which can trigger a much larger failure in a gearbox. This brings the asset to a standstill, resulting in loss of generation revenue and often high-dollar repair work that requires third party cranes and crews.

Another example of the differences in operation between a coal-fired power plant and a 300 wind-turbine farm is the amount of personnel attending to the unit(s). In this example, both the coal-fired and wind farm generation facilities produce a total of 600 megawatts. The coal-fired power plant will have maintenance, electrical, instrument and controls, engineering, and operating staff monitoring and attending to the unit at all times. On the wind farm, however, there may be a handful of operation staff onsite full time. The maintenance work is usually carried out by third party contractors who come onsite at scheduled maintenance intervals. There is rarely anyone onsite checking over the "machine" every day.

Major corporations are making big statements on their intention to invest in renewable energy. In turn, the increase in demand for more renewable power indicates the need for more utilities to keep pace on construction and operation of new renewable generation facilities. While the failures we will see in the commercial, renewable class generating facilities may not be as catastrophic as a fossil fuel or nuclear failure, it is anticipated that the quantity and frequency of failures will increase as we move into the future of power generation.

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GOT MULTIPLE DEFENDANTS? HOW YOUR VERDICT FORM CAN AFFECT JURORS' ASSESSMENTS OF LIABILITY AND DAMAGES

Nick Polavin, Ph.D. Litigation Insights

In a recent products liability trial that Litigation Insights assisted with, which involved a dozen defendants, the judge grouped the defendants according to their "function": manufacturers, distributors, or retailers. On paper, a minor change. But while the judge may not have realized it, he had just affected how jurors would view the verdict form – and perhaps even their entire verdict.

Some larger and longer-term defendants were grouped with smaller defendants with much less time in the industry. Further, each defendant had its own individual liability issues and potential damages amounts. Could that grouping together affect how jurors perceive defendant behavior and liability among all defendants, or do jurors judge each defendant independently of the others regardless of grouping? Will jurors' damage awards for one defendant company affect the size of the damage awards for other defendants?

A verdict form is, in essence, a questionnaire – it is a series of questions jurors answer as a way to determine what they believe happened, who is responsible, and how much, if any, damages are owed. There is a great deal of psychological research about questionnaires and how phrasing, context effects, and question order can influence responses. Verdict forms are therefore no different; how questions are grouped and phrased can have a significant influence on how jurors fill them out. This article examines psychological research on decision making to determine how grouping co-defendants on a verdict form may influence the decisions reached by jurors.

TO GROUP OR NOT TO GROUP?

In instances like our products liability trial above, a client may be helped or hindered depending on whether they are grouped with similar or dissimilar co-defendants on the verdict form or not. The format chosen can impact how jurors evaluate your individual client – as well as whether jurors can distinguish between each defendant – during deliberations.

How these findings impact co-defendants depends on their comparative position in jurors' eyes. That is, will a jury believe your client is *more* or *less* liable than the others? If there is no difference, then the strategy may not matter. On the other hand, research suggests that different strategies should be used for defendants that are going to receive the brunt of jurors' anger versus defendants that are "small

players" in the action at hand.

For example, in the products liability case with many defendants, there were several layers of issues. First, some companies' functions were dissimilar to others (e.g., manufacturer versus retailer). Second, some defendants, even with similar functions, were likely going to be viewed in a much worse light than other co-defendants. Our client asked what effect it might have if the verdict form was structured such that each verdict question included the dozen defendants, with each defendant simply having its own line under every question. The alternative was that each verdict question would be asked and considered separately for each and every defendant (i.e., jurors complete all verdict questions for Defendant 1 before moving to all verdict questions for Defendant 2). Might grouping the defendants together in a single verdict question take some attention away from our client and prevent jurors' anger from snowballing? Or might it instead create a "contrast effect," amplifying jurors' anger toward our client in comparison to the small, relatively innocuous co-defendants?

UNPACKING & TYPICALITY

The Unpacking Effect is a decision-making phenomenon regarding how breaking down evaluative judgments into components can affect decision making. For example, if we asked you to estimate "the GDP of all European countries combined," that would be a "packed" version of the question. An "unpacked" question, in contrast, splits the broad categorization into more specific components: "Please estimate the GDP of England, Germany, France, and all other European countries combined."

One factor that affects answers to unpacked questions is whether the specific components listed could be considered "typical" or "atypical." Typical components are those that easily come to mind when thinking about the global decision, while atypical items are those that do not come to mind (or if they do, not easily). To your average American, "England, Germany, and France" would be considered "typical" items. Whereas, if we asked for an estimate of "the GDP of Latvia, Monaco, Luxembourg, and all other European countries combined," this question would involve "atypical" items. Research shows that unpacked questions using atypical items lead to lower estimates than unpacked questions that use typical items.[1]

In fact, we conducted our own study to examine the effect of an atypical category within an unpacked question. Our prompt unpacked the global judgment of "non-economic damages" for a hypothetical trucking accident case into the following components: pain and suffering, loss of enjoyment of life, disfigurement, and anxiety. For a plaintiff who is paraplegic because of the accident, we expected that the first three components would be considered "typical," while the last ("anxiety") would be "atypical" (i.e., it is not representative of what a juror primarily would think they need to award damages for).

Our study found that the inclusion of this single atypical category actually lowered respondents' damages decisions for the other three categories. That is, jurors awarded more money when they were asked only about pain and suffering, loss of enjoyment of life, and disfigurement than when they were asked about those categories plus anxiety. Consequently, we observed that the effect of an atypical category takes attention away from the typical categories and serves as a lower anchor for those categories.

But how does this apply to co-defendants on a verdict form? Well, the listing of co-defendants creates an unpacked question; it takes the global category of "those who may have harmed the plaintiff" and breaks it down into identifiable parties. Therefore, if there is a party that will likely receive very little blame, it would be an "atypical" item on the verdict form. Meanwhile, the party or parties most likely to receive the bulk of fault would be the "typical" item(s). Similar to our study results, it is likely that having jurors decide on the typical and atypical defendants at the same time will take some attention away from the "worse" defendant(s). Additionally, the atypical defendant will serve as a lower anchor, helping bring down judgments against the typical defendant(s).

AVERAGING V. ADDITIVE EFFECTS

Another psychological phenomenon relevant to our study above examines what happens when something of perceived high value is grouped together with something of perceived low value. Rationally speaking, adding something of small value to something of large value should increase the total. Surprisingly, however, the grouping of the two tends to have an *averaging effect* rather than an *additive effect*.

Multiple studies have shown that people tend to think the high-value item is worth more by itself than in combination with the low-value item.[2] For example, one of the original studies that tested this concept showed that people were willing to pay much more for a 24-piece dishware set than they were for a 31-piece dishware set that had a couple chipped pieces.[3] Note that the larger set still included the exact same 24-piece set, perfectly intact, and even some additional intact pieces. However, as the researchers postulate, the feeling that goes with seeing a complete set that is perfect is better than the feeling of seeing a larger set with a couple of imperfections. Therefore, people put a higher value on it, despite receiving fewer perfect pieces overall.

This phenomenon relates to co-defendants on verdict forms wherein one defendant carries significantly more responsibility than the other(s). Think of the defendant that will likely receive most blame as the high-value item: If that is your client, then a primary goal is to reduce anger toward them, as anger tends to be the strongest predictor of damages. Consequently, grouping your client with the innocuous co-defendant (which can be thought of as the low-value item) may be beneficial to your client – jurors' anger may diminish via an *averaging effect* with the less liable party. This should result in reduced anger and damages for the "worse" defendant.

CONCLUSION

These two lines of research show that grouping items together for decision making tends to have an *averaging effect*, which can help or hurt your client depending on the position they are in. If they are the party with whom jurors will be most upset, grouping the defendants so that jurors must answer for each party within each question may be beneficial. However, if your client is a smaller player with fewer liability issues, the optimal strategy will likely be to separate the riskier defendant(s) from your client to isolate jurors' anger elsewhere.

Dr. Nick Polavin has eight years of experience in jury research and the legal field. He uses this knowledge and experience both in-court during jury selection and in developing themes and recommendations for trial based on mock trials and focus groups.

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New Act broadens possibilities for class actions in the Netherlands

Daan Baas, Wim Weterings and **Jonathan Overes** Dirkzwager legal & tax

When it comes to class action-type suits, the Netherlands has historically been ahead of the curve in Europe. Since the early '90s, there has been an option to file collective actions, similar to the "class-action lawsuit" in the United States. In 2020, the Netherlands introduced new legislation, the Act on Redress of Mass Damages in a Collective Action (Wet Afwikkeling Massaschade in Collectieve Actie, or WAMCA). This act makes it possible not only to establish liability but also to obtain compensation of damages in collective actions. The WAMCA introduces American-style class actions in the Netherlands and (also) makes filing a class action in the Netherlands even more attractive for foreign injured parties.

NEW ACT: WAMCA

Group damage may be the result of a one-time event, for example an explosion, fire, or plane accident – something in which a large number of people suffer damage at the same moment. But group damage can also be the result a series of identical events, with the damage generally arising over an extended period of time and the victims generally being spread out over a wider geographic area; this could be damage caused by a defective product, for example, or by financial mismanagement.

The Netherlands has long had the option for special interest groups to launch a collective action on behalf of a group of injured persons to seek a declaratory judgment that the alleged responsible party is liable towards these injured persons. Until recently, however, the claim in such collective actions could not extend to collective damages. This meant that after the defendant's liability was established in a collective action, the injured parties had to initiate individual proceedings to claim damages or try to reach a collective settlement. A collective settlement could be declared generally binding on the basis of the Act on Collective Settlement of Mass Damage (*Wet Collectieve Afwikkeling Massaschade,* or WCAM).

A collective settlement has certain advantages of efficiency, but it is also voluntary in nature. Because of that voluntary aspect, the Netherlands has now instituted the Act on Redress of Mass Damages in a Collective Action (*Wet Afwikkeling Massaschade in Collectieve Actie,* or WAMCA).

The most significant change that the WAMCA makes is that a special interest group filing an action on behalf of a group of injured persons can now seek damages in the collective action, thus establishing both the liability of the party causing the damage and the compensation in a single lawsuit.

ADMISSIBILITY REQUIREMENTS FOR THE SPECIAL INTEREST GROUP

Under the WAMCA, the special interest group must be a nonprofit organization, be sufficiently representative, and represent a suitably large group of aggrieved parties. The interest group must also fulfill a number of other conditions, including having (1) a supervisory body, (2) a suitable and effective mechanism for the participation or representation of the persons involved in the claim in the decision-making process of the interest group, (3) adequate financial resources to bear the costs of the collective action, (4) adequate experience and expertise to be able to conduct a collective action, and (5) a publicly accessible web page presenting specific information relating to the structure and working method of the interest group.

Also, the court also reviews whether the case is fit to be dealt with through collective action proceedings. This review of the claim is similar to the "motion to dismiss" stage of litigation in the U.S. The questions of law and fact to be answered (regarding the various claims of the various persons involved) must be sufficiently similar. In addition, the group of represented persons must be sufficiently large. Furthermore, the persons represented

individually and jointly must have a sufficiently large financial interest. If the interest group does not meet these requirements, the collective action will be inadmissible.

INTERNATIONAL DIMENSIONS

Unlike the scope of the collective redress under the recent EU directive ((EU) 2020/1828), collective actions in the Netherlands are not restricted to consumer cases. All types of actions may be brought under the new collective action system, including securities claims, product liability claims, and climate change claims. This unrestricted application of the collective actions system makes the Netherlands an attractive jurisdiction.

Under the WCAM, the Amsterdam Court of Appeal accepted broad international competence in declaring a collective settlement generally binding. It is sufficient that the paying party is in the Netherlands or that the rights of non-Dutch injured persons are closely interwoven with the rights of Dutch injured persons.

On this basis, the Amsterdam Court of Appeal assumed international jurisdiction in the Shell case (2009), in which the injured persons were domiciled in 105 different countries, as well as in the Converium case (2012), in which the parties causing the damage were not seated in the Netherlands and over 98% of the injured persons had its residence outside the Netherlands. With these decisions, the Court of Appeal made the WCAM an attractive venue for settling international mass claims on a class-wide basis. The question is whether foreign courts will respect a decision by a Dutch court. This may differ from country to country and from case to case, but will no doubt be a complicated question every time. Recognition within the EU would appear to be possible, but this will presumably depend on the way in which the foreign aggrieved parties are informed of the WCAM suit and the existence of any other litigation on the matter in the EU.

The WAMCA introduces what is referred to as the "scope rule." A special interest organization can only start a collective action if the claim has a sufficiently close connection with the Netherlands. This connection will generally be deemed to be present if one of the following three conditions is met:

- The majority of the injured persons are Dutch residents who have their domicile in the Netherlands.
- The defendant resides in the Netherlands and additional circumstances suggest a sufficient relationship with the Netherlands.
- The damage-causing event occurred in the Netherlands.

This scope rule is stricter than the corresponding admissibility requirement in international WCAM cases. In combination with the opt-in system for foreign injured parties in WAMCA cases (see below), this limits the international scope of the Dutch collective action. This limitation, presumably, has to do with the fact that WCAM cases involve a voluntary settlement between the parties involved, whereas in a collective action a decision is made by the court.

However, the scope rule is still broad. A sufficiently close relationship with the Netherlands is soon deemed to exist, making the collective action in the Netherlands an attractive option for foreign injured parties, also because of a number of other factors, such as the fact that the courts can still assume jurisdiction in cross-border cases, can apply foreign law if necessary, are accustomed to working in English, and have now the ability to determine collective compensation.

EXCLUSIVE REPRESENTATION, OPT-OUT AND OPT-IN (FOREIGN AGGRIEVED PARTIES)

An interest organization has to register its collective action in a central register within two (business) days after filing the summons. After registration, there is a waiting period of three months during which other interest organizations may file alternative collective actions related to the same event(s). The collective action of any other interest organizations must then be filed in the same court as the original collective action. The various collective actions will be consolidated.

If the court grants standing to multiple interest organizations, it will appoint the most suitable organization as an "Exclusive Representative." This is comparable to the "lead plaintiff" in the U.S. This exclusive representative will litigate the collective action on behalf of all persons represented and the other interest organizations. The court also decides on the scope of the collective action and determines for which persons the exclusive representative will act. Persons who are considered not to be part of this so-called "precisely specified group" ("class") are excluded from the collective action.

Injured parties residing in the Netherlands have the option to opt out. Their interests will, in theory, be represented (by default) by the exclusive representative unless they indicate that they do not wish to be part of the group of represented persons. The court determines the opt-out period, which is at least one month.

An opt-in system applies to non-Dutch injured persons. They have the option of voluntarily joining the Dutch collective action and be represented in the proceedings by the exclusive representative. The court has the authority, by way of exception, to determine that the opt-out system also applies to foreign injured parties that are relatively simple to identify.

COLLECTIVE SETTLEMENT OR RULING OF COLLECTIVE COMPENSATION OF DAMAGES

After the court appoints the exclusive representative, it will set a term for the parties to try to reach a settlement. If the court approves the settlement agreement, the collective settlement will be declared generally binding. The injured parties then have a second opt-out term, once again of at least a month.

If no collective settlement is reached or the court rejects the settlement, the proceedings will continue. The court may dismiss the collective claim, establish liability, or award damages if requested to do so. In this last case the court may use a compensation scheme with different amounts of compensation per category of injured persons. If the court opts for damage scheduling, it can order the parties to make a proposal for collective compensation. The court has to ensure that the amount of compensation is reasonable and that the interests of the injured parties represented are otherwise sufficiently protected.

The court's ultimate ruling is binding on all Dutch injured parties who have not made use of the opt-out option(s), and on all foreign injured parties who have previously opted in. The court's judgement can be appealed.

Daan Baas, Wim Weterings and Jonathan Overes are part of the liability and insurance section at Dirkzwager legal & tax in the Netherlands. They focus on D&O liability, professional liability, corporate liability insurance, product liability, and coverage disputes and are regularly involved in major cross-border and international disputes.

APPEALING ORDERS COMPELLING ARBITRATION UNDER THE FAA

Gary A. Watt and **Patrick Burns** Hanson Bridgett LLP

Can an immediate appeal be taken from a federal court's determination on whether parties must arbitrate their dispute? The answer is it depends. The Federal Arbitration Act ("FAA") allows parties to appeal orders *denying* arbitration. But appealing an order that *compels* arbitration depends on whether the district court dismisses the civil action and the law of the appellate circuit with jurisdiction over the appeal.

BACKGROUND

Courts have recognized that in enacting the FAA, Congress intended that disputes proceed quickly to arbitration without being stalled by appeals upfront. As a result, the FAA is designed to facilitate appeals from a court's *denial* of a party's right to arbitration and to limit appeals when arbitration is ordered. Thus, the FAA specifically provides that a district court's denial of a motion or petition to compel arbitration is appealable. 9 U.S.C. § 16(a)(1)(A).

But what about an order *compelling* arbitration? The answer is more complicated. First, the FAA explicitly prohibits appeals from interlocutory orders staying the action. 9 U.S.C. § 16(b)(1). Separately, the FAA allows for an appeal of any "final decision with respect to an arbitration that is subject to" the FAA. 9 U.S.C. § 16(a)(3). The phrase "final decision" is similar to language used in another federal statute for the general rule that the Court of Appeals has jurisdiction over "final decisions" of the

district courts. 28 U.S.C. § 1291.

But what does "final decision" mean, exactly, within the context of an FAA order compelling arbitration and *dismissing* the action? The United States Supreme Court has answered that question and determined that a district court's order compelling arbitration and dismissing the action is appealable as a "final decision with respect to arbitration." *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 86 (2000). So, it all turns on whether there is a dismissal, right? In theory, perhaps, but in the circuit courts, it's not quite that simple.

THE COURT OF APPEALS SPLIT

Must the district court avoid dismissing the action and issue a stay after it orders the parties to arbitration? The Supreme Court has not answered that question, and the circuit courts have split on whether a district court is required to enter a stay or may dismiss the action pending arbitration of all claims. The divide among lower courts revolves around the text of the FAA, which elsewhere provides that a district court ordering arbitration "*shall* on application of one of the parties *stay* the trial of the action until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3 (emphasis added).

The Second, Third, Seventh, and Tenth Circuits have interpreted the FAA's language as mandating a stay of proceedings when arbitration is compelled on all of the claims. *See, e.g., Lloyd v. HOVENSA, LLC*, 369 F.3d 263, 269 (3d Cir. 2004). According to these circuits, the plain language of the FAA affords them "no discretion to dismiss a case" as long as a party applies for a stay. As one court put it: "It is axiomatic that the mandatory term 'shall' typically creates an obligation impervious to judicial discretion." *Katz v. Cellco P'ship*, 794 F.3d 341, 345-46 (2d Cir. 2015). Requiring a stay and thereby avoiding an appealable "final decision," is also consistent with the FAA's purpose of promoting immediate arbitration of disputes.

However, the First, Fourth, Fifth, Sixth, Eighth and Ninth Circuits have adopted a more flexible rule that allows the district court to manage its docket by dismissing an action when all claims in the civil action are compelled to arbitration. *See, e.g., Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). In these circuits, if the district court dismisses the action, the Court of Appeals has jurisdiction under the FAA's provision for appeals from final decisions. The rationale of these circuit courts is that the FAA rule prohibiting appeals of orders staying claims "was not intended to limit dismissal of a case in the proper circumstances." *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992).

VOLUNTARY DISMISSALS

If the district court compels arbitration and invokes a stay, can a plaintiff voluntarily dismiss an action to sidestep FAA section 16(b)'s prohibition of appealing orders staying the action? In a pair of recent decisions, the Ninth Circuit said "no." *Langere v. Verizon Wireless Servs. LLC*, 983 F.3d 1115, 1124 (9th Cir. 2020); *Sperring v. LLR, Inc.*, 995 F.3d 680, 682 (9th Cir. 2021).

In *Langere*, after the court ordered a stay pending arbitration, the plaintiff dismissed the action without court approval under Federal Rule of Civil Procedure 41(a)(1). The plaintiff argued that under 12 U.S.C. § 1291 and FAA section 16(a)(3), the court had jurisdiction because the dismissal was a "final decision." Under prior Ninth Circuit authority, the plaintiff would then have been permitted to appeal the order compelling arbitration. But in *Langere*, the Ninth Circuit concluded that under superseding Supreme Court precedent a party can no longer "create appellate jurisdiction" by voluntarily dismissing claims. Thus, the voluntary dismissal was not a "final decision" under either 28 U.S.C. § 1291 or FAA Section 16(a).

In *Sperring*, after the district court approved plaintiffs' request to dismiss the action, plaintiff attempted to appeal the order compelling arbitration. The plaintiff argued that because the court approved the dismissal under Federal Rule of Civil Procedure 41(a)(2), it should have the right to an appeal from an FAA "final decision." But the panel in *Sperring* rejected the argument, reasoning that the permissive voluntary dismissal was still an *impermissible* attempt to create appellate jurisdiction.

The Fourth Circuit has issued a similar decision refusing to allow an appeal from a voluntary dismissal following a district court's order to arbitrate all claims, reasoning that a plaintiff may not "transform" an interlocutory order into a "final decision." *Keena v. Groupon, Inc.*, 886 F.3d 360, 364 (4th Cir. 2018).

ANALYSIS

What will the Supreme Court do if it grants certiorari to resolve the circuit split? Given its pro-arbitration outlook, it is likely to side with the circuits that require district courts to issue a stay. After all, the FAA is clear that upon application of a party, a court "shall" stay the claims until the arbitration proceedings are complete. Such an interpretation is more consistent with the pro-arbitration policy goals of Congress in enacting the FAA. And since the parties will likely return to court seeking to modify, vacate, or confirm the award, is it so unreasonable to require a district court to stay the action, especially when the FAA language appears to require it?

Moreover, what fairness is gained from a legal landscape where some parties have to proceed to arbitration without being permitted to appeal, and yet some parties may appeal because the district court dismissed the action? Does it make any sense for a party to *commence* arbitration while an appeal from the order requiring arbitration is underway?

What is the takeaway for parties litigating whether a dispute must proceed to arbitration? Determine the current circuit law applicable to appellate jurisdiction if arbitration is compelled: Does the circuit follow the rule requiring the district court to enter a stay, or has it adopted the rule that allows the court discretion to dismiss the action? When seeking arbitration, it would be wise to seek a stay as well, citing to the FAA language that courts "shall" stay cases pending arbitration. For parties seeking to avoid arbitration, if opposing arbitration is unsuccessful then (in those circuits countenancing such requests), seek dismissal of the action in order to appeal a "final decision" under the FAA.

All of which begs the question that whatever Congress thought the FAA would mean, could it have intended the statute to operate so differently in different federal circuits? And for businesses capable of bringing an action in more than one jurisdiction, wouldn't it be helpful to know what side of the split the particular circuits come down on?

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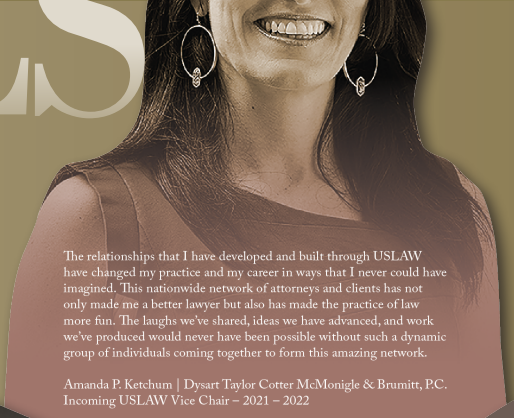
Patrick Burns is a senior associate with Hanson Bridgett LLP's Appellate Practice. Patrick focuses on writs and appeals, as well as law and motion in the state and federal courts. A former litigator at a global law firm, Patrick has experience litigating high-stakes disputes. He can be reached at pburns@hansonbridgett.com and his blog posts can be read at www.appellateinsight.com.

VOICES of USLAW



The relationships that I have developed and built through USLAW have changed my practice and my career in ways that I never could have imagined. This nationwide network of attorneys and clients has not only made me a better lawyer but also has made the practice of law more fun. The laughs we've shared, ideas we have advanced, and work we've produced would never have been possible without such a dynamic group of individuals coming together to form this amazing network.

Amanda P. Ketchum | Dysart Taylor Cotter McMonigle & Brumitt, P.C.
Incoming USLAW Vice Chair – 2021 – 2022

For me, the highlight - and value - of USLAW has been great partners, contacts and relationships around the country and world, and even better friends. During my term as USLAW chair, I learned a great deal about crisis management; I think our current leadership can say the same after dealing with COVID. I have also learned to avoid having Brad Wright or Kevin Fritz calling my mobile phone at inopportune times! Thanks to the entire USLAW team and past leaders who have contributed to our growth and success. Here's to the next 20 years of this great organization.

John D. Cromie | Connell Foley LLP
USLAW Chair - 2017 – 2018

Twenty-two years ago, former USLAW Chair Jim O'Hagan and I sat on the back of a charter boat headed to Daufuskie Island, South Carolina. I shared with him a dream I had to start a network of law firms from throughout the United States that could help us better serve our clients. Two years later that dream came true. Not a year has gone by that I haven't stood back in awe and watched how that dream succeeded so far beyond my wildest expectations. As I reflect on what this has meant to my family and me, I realize the number one benefit is the friendships that have developed. Every year a group of USLAW attorneys and clients participate in a series of weekly benefits to raise funds for the charity of our choice centered around each member's love for their college alma mater. The laughs, the taunting, and the lying that goes on about the merits of each university's football program makes grown men act like teenage kids. Thousands of dollars have gone to our respective charities. Yet, all the time we were creating an unsurpassed bond of friendships that will last forever. The same holds true with friends I have met at annual seminars, lunches and dinners, golf outings, and all manner of special events. These people are my closest friends and yet many of them live thousands of miles away. There is nothing I wouldn't do to help them, and I feel they would do the same for me. What a dream!!

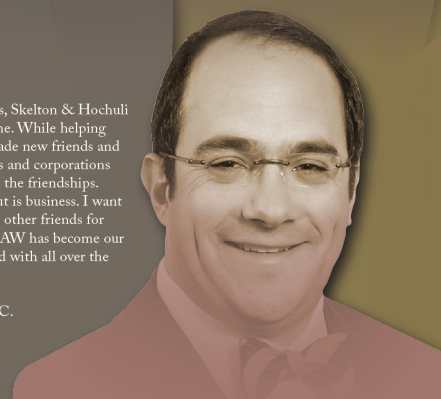
Charles F. Carr | Carr Allison
USLAW Chair - 2003 – 2005

It is hard to put into words what USLAW has meant to me. As an active member of one of the founding firms, I've seen USLAW grow from its infancy to the full-grown organization it is now. Through that time, I've developed so many close friends in terms of both lawyers and clients. As has been said before, many of the lawyers are closer to me than some of my own law partners. Clients likewise have become friends, and we have watched our families grow. In the end, these are the people I love and trust the most.

Thomas L. Oliver, II | Carr Allison
USLAW Chair - 2015 – 2016

My association with USLAW began in 2001. Jones, Skelton & Hochuli was the only firm west of the Mississippi at the time. While helping build the membership west of the Mississippi, I made new friends and connected with old friends in advocating that firms and corporations become members. As the membership grew, so did the friendships. When I attend a meeting, the last thing I talk about is business. I want to know how my friends are doing. Friends look to other friends for help. Whether personal or business dealings, USLAW has become our family and our friends we have worked and traveled with all over the U.S. Thank you, all!

Donald L. Myles | Jones, Skelton & Hochuli, P.L.C.
USLAW Chair - 2005 – 2007



Personally, and professionally, USLAW has meant everything to me. I have made friends from around the world that I never would have had without USLAW. Those friends are some of my deepest and best of my entire life; nothing is more important than that. The experiences I have been allowed to have and share with my family and friends have been nothing short of unbelievable. Aside from the "business" opportunities, this group has given me mentors and role models, insights, and guidance, and enhanced my career in ways I never would have envisioned 30+ years ago.

Lew R.C. Bricker | SmithAmundsen LLC
USLAW Chair - 2016 – 2017

The friends and relationships that I have developed through USLAW changed my life and continue to nourish my career by supporting my goals, challenging me, encouraging me, motivating me, listening to me, and celebrating with me. We are so fortunate to have created an organization comprised of individuals who are not only great at their jobs, but also truly good human beings who care about each other in both a professional and personal context. USLAW adds joy to my life and for that I am very grateful.

Rodney L. Umberger | Williams Kastner
Incoming USLAW Chair – 2021- 2022

When I look back on my legal career, without question, the best part of it has been my involvement with USLAW. While I am extremely proud of my law firm and legal accomplishments, I would not be close to the lawyer or person I am today without the influence of USLAW. Being able to learn from industry greats like Bill Burns, Keith Dunlap, and many others, as well as Charles Carr and seasoned attorneys just like him, was simply invaluable. And, maybe most importantly, the friendships forged with many, many USLAW attorneys and clients over the years will stay with me the rest of my life. The culmination of all of this was serving as USLAW chair from 2018 to 2019, of which I will never forget. Now, as we start to turn this organization over to the next group of leaders, just as our founders did with us, USLAW will continue to be the gold standard of legal networks worldwide.

Kevin L Fritz | Lashly & Baer, P.C.
USLAW Chair - 2018 – 2019

I thoroughly enjoyed all my years associated with USLAW NETWORK, primarily because of the lifelong friendships I developed. I have been absent from events since I retired from the practice of law, (and thankfully the NFL!), but the friendships remain. Cathie and I keep in touch with several of our friends from USLAW and even get to visit some of them during our RV travels. Of special note, I particularly enjoyed undoing most of the policies my law partner and close friend, Don Myles, put in effect, as I followed him by a couple years as chair.

Edward G. Hochuli | Jones, Skelton & Hochuli, P.L.C.
USLAW Chair - 2012 – 2013

Over the past 15 years, I have made friendships that will last a lifetime. We vacation with USLAW members, we celebrate their great achievements and mourn with them during their greatest losses. They have become some of my wife and my best friends. We would do anything for them. This is not limited to just the lawyers. We have made lifelong friends with many of our clients through the experiences we have had with USLAW. Obviously, it has been an extremely valuable organization for business development and has changed the volume and complexity of the work I develop. In the beginning, that may have been the main reason to attend USLAW events. As you get older, you realize that the friendships mean more.

Bradley A. Wright | Roetzel & Andress
USLAW Chair - 2013 – 2014

I will never forget sitting at a conference room table at SmithAmundsen in Chicago with four lawyers I had not previously met when the organization was first formed. The objective was clear – develop a marketing network but do it differently by recruiting the best trial lawyers in the country who will gather at seminars where clients will feel at ease. It worked. In addition to achieving our business objectives, we developed lifelong friendships. We laughed, argued, and supported each other during difficult times. David Maister's presentation on law firm management, the Give-to-Get Campaign, the 911 NYC firefighter, motivational speakers, bad cover bands, a certain corporate partner swimming in the coy pond in South Beach, bus rides and drivers who did not know where they were going, and over the top afternoon activities will never be forgotten. USLAW remains the most rewarding and worthwhile use of my time and firm resources.

Mark A. Solheim | Larson • King LLP
USLAW Chair - 2007 – 2008

USLAW is lifelong friendships. Having gone through a family tragedy early, caring clients and members uplifted us. The collective energy, positive will, and comradery combined with memorable events make for a continuing fulfilled life. USLAW was never about work, but it has profoundly impacted my life. After Katrina, many stepped into the gap for our firm and family. To say USLAW is a legal network does not do it justice. It has become a feeling rarely experienced, sustained by many smiling faces, selfless deeds, and shared wisdom. Many legal organizations abound, but there is only one USLAW. I am blessed.

Michael R. Sistrunk | McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch, LLC
USLAW Chair - 2009 – 2010

Many of the people my wife Marti and I have met through USLAW have become not just friends in the legal profession, but lifelong friends who will continue be so long after we have stopped practicing law. We have traveled together (any place with good red wine is a plus), attended children's weddings, celebrated birthdays along with the arrival of grandchildren and just generally had a great time. We are there to support each other through whatever life brings. Marti and I know people throughout the country and abroad (we cannot forget our UK friends) who would not be part of our lives if not for USLAW. For that, we are eternally grateful.

Dan L. Longo | Murchison & Cumming, LLP
USLAW Chair - 2019 – 2021

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FACES of USLAW

Strong & Hanni in Utah participated in a recent day of service today. Employees volunteered at three different locations in the Salt Lake Valley: Salt Lake County Youth Services, Red Butte Garden, and Discovery Gateway Children's Museum. The team helped with maintenance, remodeling and exterior beautification projects at all these locations and looks forward to the next opportunity to help within their community.

Lashly & Baer, P.C. attorney Patrick Foppe received the Transportation Lawyers Association (TLA) Distinguished Service Award at its annual conference in Lake Tahoe, California. The award recognized his "distinguished and outstanding service" to TLA and is in appreciation of his "countless hours of unselfish dedication and many contributions to the betterment of the Association." Foppe has served as co-chair of TLA's Membership and Recruiting Committee since 2015, co-chair of TLA's Federal Regulations Committee since 2020, and as a representative-at-large on TLA's Executive Committee from 2016 to 2018. Pictured: Foppe with and Fritz Damm, chair of TLA's Membership and Recruiting Committee.

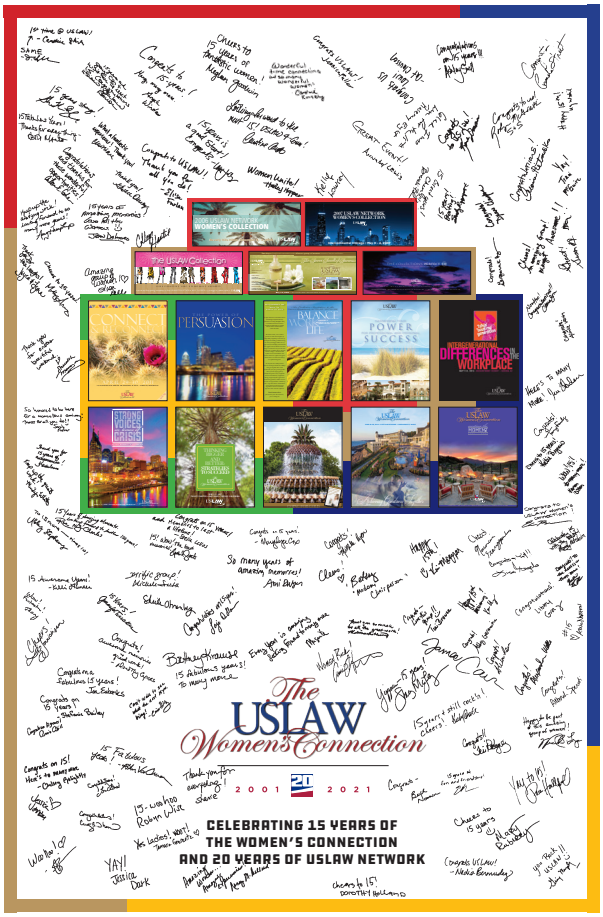
Williams Kastner helped provide over 3 million meals to its Seattle community through Food Lifeline's #foodfrenzy campaign! William Kastner's team gave more generously than ever, earning a 2021 "Double Down" award.

Members of Hanson Bridgett LLP in San Francisco have been helping their community by volunteering their time at the San Francisco Education Fund, as well as the firm's partner school, Tenderloin Community Elementary School. Hanson Bridgett's tech savvy volunteers helped train teachers and families at the SF Education Fund on Zoom, Google Meet/Hangouts, Google Classroom, Google Chromebooks, Google Suite, and Seesaw! At the Tenderloin Community, firm members helped teachers with various tasks around their classrooms, such as bulletin board setup, rearranging furniture, organizing textbooks, and general classroom cleaning needed for students coming back to in-person learning! They also printed packets and materials for more than 300 students, ensuring that all students had access to hard copies of lessons. The pandemic exposed many educational inequities, but this donation ensured that no student missed class content due to a lack of internet access.

Baird Holm LLP associate Brian Moore annually volunteers for Mustaches for Kids Omaha by growing a mustache and raising money for local children's charities during the month of May. For 2021, Moore was awarded the Stachey Award for "Most Fundraisingest" after raising $41,271 for inCOMMON Community Development and NorthStar Foundation. Moore's fundraising efforts broke the national record for most funds raised by an individual in Mustaches for Kids America's 23-year history.

The USLAW Women's Connection

USLAW NETWORK returned to in-person events with the **2021 USLAW Women's Connection** in Park City, Utah, in June, which marked the **15th** staging of the event. A special **commemorative poster** was created with the comments of those in attendance.



...from the Welcome luncheon to the Farewell dinner.

FACES of USLAW

Program Presenters...

Elizabeth Noonan, Adler Pollock & Sheehan, P.C.
Brandi Blair, Jones, Skelton & Hochuli, P.L.C, and
Colleen Hastie, Traub Lieberman

Robyn McGrath, Sweeney & Sheehan, P.C. and
Betsy Burgess, Carr Allison

Lisa Rolle, Traub Lieberman, and
Mandy Ketchum, Dysart Taylor Cotter
McMonigle & Brumitt, P.C.

Christine Anto, SmithAmundsen LLC and
Tamara Goorevitz, Franklin & Prokopik, P.C.

Holly Howanitz, Wicker Smith O'Hara McCoy & Ford P.A.
and Jennifer Tricker, Baird Holm LLP

Sandra Rappaport, Hanson Bridgett, LLP, Erin Diaz, Wicker
Smith O'Hara McCoy & Ford P.A., and Hailey Hopper, Pierce
Couch Hendrickson Baysinger & Green, L.L.P.

Susan Leach DeBlasio, senior counsel at Adler Pollock & Sheehan, has received the prestigious Associate Justice Florence K. Murray Award from the Rhode Island Bar Association. This esteemed award is presented to an attorney or jurist who has shared his or her legal talents and time to influence women to pursue legal careers, opened doors for women attorneys, or advanced opportunities for women within the legal profession, and has been a recognized mentor for women in every sense of the word. The award is named in honor of the first recipient, the Hon. Florence K. Murray, who, in a distinguished 56 years at the Bar, pioneered the causes of women in the law as the first woman attorney elected to the Rhode Island Senate, the first woman justice on the Superior Court, the first woman presiding justice of the Superior Court, and the first woman on the Rhode Island Supreme Court.

Penny Mason of Barclay Damon LLP has been elected as the first female to lead the board of the John B. Pierce Laboratory, a not-for-profit, independent research institute affiliated with Yale University. Penny has been a member of the board of directors for many years, previously serving as a vice president.

Sharon Brown of Barclay Damon LLP was selected again as a Top 100 Lawyer for New York by the National Black Lawyers Top 100, based on her continued dedication and excellence in the legal field. Sharon was also selected to join the Law360 Federal Tax Editorial Advisory Board. She is one of 10 members elected to the editorial advisory board, which provides feedback on Law360's coverage and insight on how best to shape future coverage.

Caleb Knight of Flaherty Sensabaugh Bonasso PLLC was selected by the American Health Lawyers Association (AHLA) to serve as Young Professional Delegate to the Board of the Young Professionals Council. His term is for one year, effective July 1, 2021. 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. The Council also coordinates networking events and oversees other initiatives of interest for young professional members.

Josephine Petrick, senior counsel in Hanson Bridgett's Appellate Practice, has been approved as a certified appellate law specialist by the State Bar of California and the California Board of Legal Specialization. With this noteworthy certification, Petrick joins firm Partners Gary Watt and Adam Hofmann bringing Hanson Bridgett's total certified appellate specialists to three. Petrick's practice focuses on appeals and law and motion in both state and federal courts. She also provides strategic and law and motion support in complex and high-stakes business, commercial, securities, and environmental matters, including class actions and multidistrict litigation.

Governor Newsom reappointed Hanson Bridgett Partner Kathryn Doi to serve on the California New Motor Vehicle Board. Doi, a partner in the firm's Health & Senior Care Practice, has served on the Board since 2013 when former Governor Jerry Brown initially appointed her. During her tenure, Doi has served as both vice president in 2017-2018 and president in 2019-2020 of the board. As president, in 2020, Doi created the New Motor Vehicle Board's Ad Hoc Committee on Equity, Justice, and Inclusion in response to California State Transportation Agency Secretary David S. Kim's June 12, 2020, statement on racial equity, justice, and inclusion in transportation.

Bianca Kratt, a partner in the Calgary office of Parlee McLaws LLP, is the new president of the Canadian Bar Association (CBA) Alberta Branch, which represents roughly 5,000 lawyers, judges, law teachers, and law students from across Alberta.

J. Cliff McKinney of Quattlebaum, Grooms & Tull PLLC has been appointed a council member of the legislative committee of the Uniform Law Commission (ULC). First appointed to the ULC in 2017 by Governor Asa Hutchinson, McKinney was recently reappointed to the commission by the governor for a second term ending in 2025. A managing member of the law firm, McKinney concentrates his practice on real estate, land use and business transactions.

Eric Santos of Rivkin Radler LLP became the Hudson Valley Hispanic Bar Association's (HVHBA) first president. The HVHBA is an organization Santos formed with a few colleagues that has grown to about 150 lawyers, judges and other legal professionals. Santos, on behalf of the HVHBA, attended a virtual meeting with several members of then-New York Gov. Cuomo's chamber to advocate for the appointment of qualified Hispanic applicants to the New York State Court of Claims considering the many recent openings.

Gene Kang and Lawrence Han of Rivkin Radler LLP, both of whom have been active in the Korean American Lawyers Association of Greater New York (KALAGNY) for several years, have ascended within the association to become officers. Kang is president and Han is executive vice president.

Steven M. Carr, a partner in Rubin and Rudman's Trusts & Estates and Corporate departments, was recently elected to be the Boston Estate Planning Council's (BEPC) new president, effective July 1, 2021.

Robert A. Vigoda, a partner in Rubin and Rudman's Trusts & Estates practice group, received the Foundation for MetroWest Distinguished Advisor Society Inductee award. Foundation for MetroWest helps donors plan their charitable giving to those in need throughout many Massachusetts communities.

Marlee S. Cowan, a partner in Rubin and Rudman's Trusts & Estates department was recently elected to the Boston Estate Planning Council's (BEPC) Board of Directors, effective July 1.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

VERDICTS

Barclay Damon LLP (Buffalo, NY)

Beth Ann Bivona and Janice Grubin of Barclay Damon LLP were successful in obtaining the dismissal of a $2.3 million preference lawsuit on behalf of a client, a leader in the national commercial toll-management industry. The plaintiff, a post-confirmation litigation trustee of five debtor trucking companies, filed a complaint identifying 60 suspect transactions after the debtors failed to resolve certain alleged preferential payments asserted in demand letters sent to the client eight months prior for approximately 10 percent of the amount sought in the complaint.

Barclay Damon LLP (New York, NY)

Michael Case and Rob Gross of Barclay Damon LLP obtained the dismissal of a $200 million federal Defend Trade Secrets Act (DTSA) case at the pleading stage with prejudice. The 25-page decision by U.S. District Judge John Cronan holds that a DTSA plaintiff cannot claim federal trade secrets protection where the pleading acknowledges disclosures to multiple parties who did not agree to maintain the secrecy of allegedly proprietary information, even where the plaintiff alleges the existence of confidential relationships.

Duke Evett, PLLC (Boise, ID)

Keely Duke and Liz Sonnichsen of Duke Evett won a million dollar jury verdict on a multi-week commercial litigation case in which Duke Evett's client was suing a competitor for tortiously interfering with Duke Evett's client's contracts with its former employees. As part of that award, the jury also awarded punitive damages against the defendants. Duke and Sonnichsen also won summary judgment on misappropriation of trade secrets and tortious interference of contract in a commercial litigation case.

Fee, Smith, Sharp and Vitullo LLP (Dallas, TX)

Fee Smith gets a big win for general contractors at the Texas Supreme Court

On May 7, 2021, the Texas Supreme Court issued an opinion in favor of a Fee, Smith, Sharp and Vitullo LLP (FSSV) client in a case of great concern to general contractors throughout the State of Texas — JLB Builders, LLC v. Hernandez. The Court reversed an 8-5 en banc opinion from the full Dallas Court of Appeals that may have significantly broadened general contractor liability for injuries to subcontractor employees.

Briefly, FSSV's client was the general contractor on a high-rise construction project when the employee of a concrete subcontractor, Hernandez, fell from a collapsing "rebar tower" while the subcontractor was engaged in erecting a concrete column, which landed on top of him. Hernandez sued JLB for negligence and gross negligence, alleging that JLB was responsible for his injuries because it retained contractual and actual control over the subcontractor's work, and thus owed him a duty of care. In the trial court, FSSV Senior Partners Brett Smith and Daniel Karp successfully obtained a summary judgment in favor of JLB arguing that, under Texas case law, JLB did not owe any duty to an employee of an independent contractor absent contractual or actual control over the means, methods, or details of the employee's work.

Hernandez appealed to the Dallas Court of Appeals, where FSSV attorneys Smith and Karp, joined by Senior Appellate Counsel Timothy George, successfully defended and upheld the trial court's judgment. Thereafter, however, following an election that significantly changed the composition of the appellate court, Hernandez moved for reconsideration en banc and the entire Dallas Court of Appeals, in an opinion split 8-5, decided to overrule the panel and reverse the trial court's judgment. The majority concluded that a "cluster of factors" suggested that JLB had enough control over the work to be found liable, including such things as having the ability to schedule work, requiring the use of safety harnesses, performing safety inspections, and perhaps being able to stop the use of a crane on what may have been a "windy day." FSSV then took the case to the Texas Supreme Court, who agreed to hear JLB's petition for review on the basis of briefing by Senior Appellate Counsel Timothy George and Appellate Counsel Nathan Winkler, and then heard oral argument from FSSV Senior Partner Brett Smith. In its subsequent opinion, issued today, the Texas Supreme Court has clarified and emphasized what has long been the law in Texas — a general contractor cannot be liable for injuries to subcontractor employees on the basis of mere general supervisory authority, but must instead have controlled the work or had the right to control the work down to the level of operative detail over the work being performed so as to be truly responsible, at least in part, for the injury that occurred. By upholding this basic principle, FSSV has come to the aid of general contractors throughout the State of Texas, who should not now be afraid that simply scheduling work, conducting inspections or requiring basic safety precautions can lead to unwarranted liability.

Flaherty Sensabaugh Bonasso PLLC (Charleston, WVA)

Defense verdict obtained in Kanawha County

J. Dustin Dillard and Mark A. Robinson of Flaherty Sensabaugh Bonasso PLLC successfully defended a radiologist in the Circuit Court of Kanawha County, West Virginia. The plaintiff alleged that the firm's client failed to identify an arteriovenous malformation (AVM) on a CT scan leading to neurologic injury. On June 15, 2021, after a seven-day trial, the jury returned a verdict finding that our client met the standard of care. The jury trial was held before Judge Joanna Tabit. Kanawha County Civil Action # 17-C-446.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

(Continued)

Hanson Bridgett LLP (San Francisco, CA)

Hanson Bridgett secures $156m jury verdict after a decade of litigation

On May 7, 2021, after 10 years of hard-fought litigation, Hanson Bridgett LLP secured a $156 million fraud verdict for its long-time client McWhinney, a leading real estate investment and development company headquartered in Denver. Hanson Bridgett Partners Andrew Giacomini and Brian Schnarr led the firm's trial team. The case is McWhinney Holding Co. v. Poag Civil Action (1:17-cv-02853). Federal District Court Judge Brooke Jackson presided over the in-person jury trial. McWhinney lost one of its assets to foreclosure in 2009, the result of complex fraud committed by its then-partner Poag & McEwen and the Tennessee-based company's three individual owners. The jury unanimously confirmed that McWhinney's loss was the result of the fraud.

The dispute involved development of The Promenade Shops at Centerra retail center located in Loveland, Colorado. In 2004, McWhinney partnered with Poag & McEwen to develop and manage the Shops, which opened in 2005 and were lost to foreclosure in 2009. The suit began in state court in 2011, where Hanson Bridgett obtained a $42 million judgment in 2017 against one of Poag & McEwen's subsidiaries. The subsidiary appealed, and Hanson Bridgett's Appellate Group, led by co-chairs Gary Watt and Adam Hofmann, not only defeated the appeal, but in a cross-appeal, obtained a published Colorado State Court of Appeals opinion reinstating additional claims against the subsidiary. See McWhinney Centerra Lifestyle Center LLC v. Poag & McEwan Lifestyle Centers-Centerra LLC, (2021) 486 P.3d 439. While the appeal was pending, McWhinney pursued the individuals behind the company in federal court for fraud and aiding and abetting liability. The jury found in favor of McWhinney on four counts, awarding the $156 million.

Hinckley Allen (Hartford, CT)

Hinckley Allen successfully defends Atkins & Linkletter heirs in the Game of Life dispute

Hinckley Allen won a significant victory in the First Circuit Court of Appeals involving the copyright authorship of the iconic Game of Life. The win comes after years of litigation involving the copyright grant for the Game of Life and whether it is eligible for termination under the Copyright Act. In its decision, the appeals court adopted the arguments Hinckley Allen made to the district court concerning the proper test to employ when assessing whether a work was a "work for hire" for copyright purposes and also agreed that the testimony elicited at trial established that the Game of Life was a work for hire. As a result, the copyright grant for the Game of Life is not eligible for termination under the Copyright Act and the parties' relationship preserved.

Simmons Perrine Moyer Bergman PLC (Cedar Rapids, IA)

Paul Morf and Nicolas AbouAssaly assist with sale of Garst family farmland totaling $19.3 million

Simmons Perrine Moyer Bergman PLC attorneys, Paul Morf and Nicolas AbouAssaly represented the Garst family in a complex and unprecedented sale of 2,000 acres in West Central Iowa. This auction was unprecedented because it is the first time a family has sold row crop agricultural land at auction while restricting the future use of the land by requiring conservation practices such as no-til farming methods and cover crops to ensure continuous living roots in the soil.

The goal is to honor the family's legacy of commitment to soil health and water quality, even as they exit ownership. Unique conservation easements, developed by Morf, will restrict the future use of the land, and will be held by a private land-trust established by the Garst family with a campus of roughly 5,000 contiguous acres maintained for ecological health, sustainable agriculture, education, and public recreation. This campus includes the farm where Roswell Garst hosted Soviet leader Nikita Khrushchev in 1959. The eight parcels sold for $19,262,308 at auction, with the buyers taking title subject to these permanent conservation easements.

It came as a surprise to some that all five bidders who purchased the tracts of land are farmers, but the simplicity of the easements made farmers comfortable buying despite the restrictions. Garst credits the clarity and simplicity of Morf's conservation easement design, stating "Everyone involved was impressed with how well the easements were drafted."

AbouAssaly was also instrumental in the sales through his work on drafting the real estate purchase agreements and other work related to ensure good legal title and access to the parcels. AbouAssaly will continue to handle all aspects of the real estate matters, working with the sellers and buyers, until closings are completed on all the parcels. Each winning bidder has an option to carve out a 15-acre building envelope before the easements are recorded by the sellers prior to closing on the farm sales.

Strong & Hanni (Salt Lake City, UT)

In *Anderson-Wallace v. Rusk*, 2021 UT App 10, Stuart Schultz and Spencer Brown of Strong & Hanni successfully appealed a $1.85 million verdict against the firm's client. That case involved a collision between a semitruck and an intoxicated man whose family claimed he was walking along I-15 late at night. The semi-driver and a witness both claimed the man ran in front of the truck, committing suicide.

The district court excluded evidence that the man was found with a blood-alcohol level nearly three times the legal limit, and the jury found the truck driver and trucking company liable for his death. The Utah Court of Appeals reversed the trial court and awarded the firm's client a new trial. It held that the fact that the deceased man was intoxicated was relevant and probative to the firm's client's defense. The client should have been allowed to put on that evidence to prove the man's comparative fault, and to disprove the amount of his family's damages. The plaintiff petitioned for certiorari to the Utah Supreme Court, but the Court denied the petition.

successful RECENT USLAW LAW FIRM VERDICTS & TRANSACTIONS

(Continued)

Traub Lieberman (Hawthorne, NY)

Traub Lieberman Partner Lisa M. Rolle Obtains Pre-Answer Motion to Dismiss in Favor of Defendant

Traub Lieberman Partner Lisa M. Rolle obtained a motion to dismiss in favor of an international hotel chain. In the case brought before the U.S. District Court, Southern District of New York, the plaintiff sustained a slip and fall injury in a Portuguese hotel ("Hotel"), which was allegedly caused by violations of building codes and New York and Portuguese negligence laws. The plaintiff notes that the hotel utilized the branding affiliated with the international hotel chain, and the named corporate entities are subsidiaries of the parent company of the international hotel chain. Further, plaintiff alleged that the named corporate entities "owned, operated, maintained, and controlled" the hotel where the accident occurred, as the international hotel had previously acquired the entity which owned the spa branding utilized.

In moving for pre-answer dismissal, Traub Lieberman acknowledged purchase of the managing agent of the hotel, which became a subsidiary of their operations. However, Traub Lieberman asserted that the international hotel chain had not owned, operated, maintained, or managed the hotel. Under New York law, parent corporations cannot be held liable for the actions of their subsidiaries, except in cases that support piercing the corporate veil. Traub Lieberman argued that the motion should be granted as a parent company cannot be held liable for acts committed by its subsidiary and further claimed that the parent company has never owned or operated the Hotel.

The claims against the international hotel chain were dismissed, as there was not sufficient cause to support a veil-piercing claim. The plaintiff's allegations were insufficient to establish that the international hotel chain bears any liability with respect to negligence at the hotel. As a result of these findings, the case was dismissed.

Wicker Smith O'Hara McCoy & Ford P.A. (Jacksonville, FL)

Motion for Summary Judgment Granted in Wicker Smith Jacksonville Professional Liability Case

Wicker Smith O'Hara McCoy & Ford P.A. Jacksonville Managing Partner Richard E. Ramsey, Partner Karina Haycook and Associate John P. McDermott successfully defended a university in a Volusia County professional liability case. The Court had already ruled in favor of the plaintiff on their effort to claim punitive damages. A motion for summary judgment was granted by the Court after a very substantial amount of money had been offered prior to the hearing, which was rejected by the plaintiff. The ruling was based on a signed exculpatory clause which waived claims such as this wrongful death claim of a 19-year-old football player with an undiagnosed heart condition.

In this case, it was alleged the university's trainers failed to follow up on the player's complaints and failed to properly monitor him on the day of his passing during football practice. However, the court granted Wicker Smith attorneys' motion for summary judgment based on an exculpatory clause the player previously signed. The clause waived all ability to bring claims arising out of participation in the football program.

TRANSACTIONS

Poyner Spruill (Raleigh, NC)

Poyner Spruill LLP Advises Client in $750M Sale

In the spring of 2021, the affiliated owners and operators of healthcare facilities based in the southeast completed a sale of assets in a transaction valued in excess of $750 million. Poyner Spruill LLP was lead counsel to sellers in the transaction.

Poyner Spruill LLP's team was led by partner Dave Krosner and included associates Chris Dwight and Frank Pray on mergers and acquisitions (M&A) matters; partners Sam Johnson and Stephanie Sanders for real estate; partner Mike Slipsky on M&A and antitrust matters; partner Jesse St.Cyr on employee benefits; partner Kevin Ceglowski on employment; partner Keith Johnson on environmental matters; and associate Charlie Davis on tax matters.

Poyner Spruill LLP is a full-service business law firm that provides comprehensive services to clients ranging from small family-owned companies to publicly traded corporations.

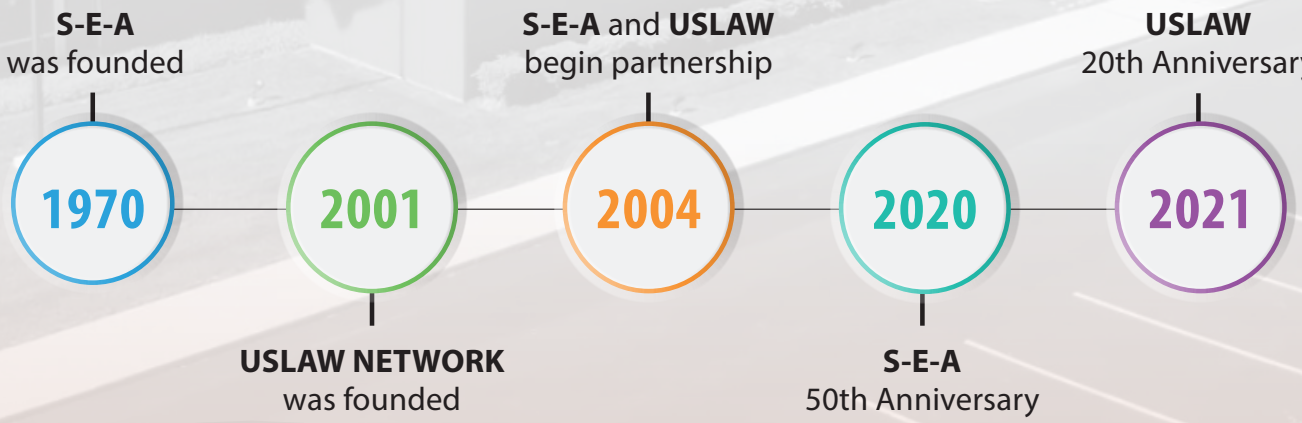
Rivkin Radler LLP (Uniondale, NY)

Rivkin Radler's Cornachio and Twersky close on $50M real estate loan

William Cornachio and Michael Twersky of Rivkin Radler closed on a $50 million CMBS loan received from Citi Real Estate Funding on behalf of the firm's client. The loan iss secured by mortgages on 19 multi-family residential properties located in Brooklyn Heights, Columbia Heights and the Upper West Side, all bearing New York City landmark status. Matthew Spero and Stuart Gordon prepared the required substantive non-consolidation (bankruptcy) opinion, and Evan Rabinowitz handled title examination.

SOME THINGS GET BETTER WITH AGE.

LIKE THE S-E-A AND USLAW PARTNERSHIP.



As we celebrate 17 years of collaboration and friendship, we are proud to continue to
make our partnership and communities stronger
with the Live Better initiative.

LiveBetter
MIND. HEART. HEALTH.

S-E-A USLAW NETWORK, INC.

Mental and physical health is of critical importance to personal and professional well-being. To promote wellness within our "community," S-E-A and USLAW have jointly initiated a new program called, "Live Better" focused toward our members, associates, and our families.

DIVERSITY, EQUITY AND INCLUSION

Thanks to an introduction by Janice Grubin, Ray McCabe and Bridget Steele of Barclay Damon LLP have been retained by the LGBT Bar Association of Greater New York (LeGaL) to review and update its corporate bylaws and the bylaws of its affiliated foundation, as well as to advise on related corporate governance issues. The firm was able to leverage its Upstate New York platform and rate structure to provide a "lo bono" bid to LeGaL that beat out a bid from a major downstate firm prominent in representing not-for-profits. While securing fees comparable to standard upstate rates, the engagement allows the firm to assist a leader in LGBTQ+ advocacy whose impact on the LGBTQ+ community, judicial, and legislative circles and beyond far exceeds the size of its almost 500-member organization.

Elaine Anastasia and Cindy Brennan of Rubin and Rudman in Boston, each completed courses to engage in the firm's Diversity, Equity and Inclusion initiatives. Anastasia, the firm's executive director, completed the Association of Legal Administrators' DEI&B and Harassment Prevention workshop. Brennan, Rubin and Rudman's director of marketing, business development and attorney recruitment, completed the Greater Boston Chamber of Commerce Transformational DEI Certificate Program to engage in the firm's diversity, equity and inclusion initiatives. In partnership with Diversity Workplace Consulting Group, this six-week program aims to increase fluency in DEI concepts and equip participants with actionable tools to take back to their workplaces.

Hanson Bridgett LLP, Hinckley Allen, Roetzel & Andress Participate in the Mansfield Rule Certification Program

Hanson Bridgett LLP in San Francisco announces its participation in the Mansfield Rule 5.0 certification process. The firm signed on in 2020 for the Diversity Lab's Mansfield Rule diversity in law leadership initiative. After diligently approaching the Mansfield Rule's 4.0 certification for the first time this past year, the firm will continue its participation in the Mansfield Rule 5.0 certification process this upcoming year, which includes newly raised standards that must be met.

Hanson Bridgett has long considered diversity and inclusion as a core value of the firm and has remained dedicated to establishing a workforce that reflects the needs and interests of its clients, attorneys, staff, and community members. Since embarking on the firm-wide project in 2020, the firm has set up systems, established a position for a full-time chief diversity equity and inclusion officer, held mandatory bias and anti-racism trainings, and identified ways to incorporate diversity, equity, and inclusion standards in its hiring and retention goals and policies and promoting these essential social values in the legal community and beyond.

Hinckley Allen in Connecticut will be adopting the Mansfield Rule for mid-sized law firms. The Mansfield Rule, which is named after Arabella Mansfield (the first female lawyer in the United States) measures whether law firms have affirmatively considered historically under-represented candidates – women, attorneys of color, LGBTQ+ attorneys, and attorneys with disabilities – for recruiting, leadership and governance roles, equity partner promotions, and inclusion in formal pitches to clients. The goal of the Mansfield Rule is to increase the representation of diverse lawyers in law firm leadership by broadening the pool of candidates considered for these roles and opportunities. In 2021, more than 160 law firms, including many in the AmLaw 200, will be participating in the Mansfield Rule program. Hinckley Allen's 18-month certification program runs from September 15, 2021, to March 14, 2023. For more information about the Mansfield Rule Certification program, please visit the Diversity Lab's website.

Roetzel & Andress is participating in Diversity Lab's Mansfield Rule 5.0 Certification process as part of the firm's ongoing commitment to Diversity and Inclusion. Roetzel is one of 160 large law firms in the United States and Canada participating in the Mansfield Rule 5.0 Certification Process.

"Diversity and inclusion are critically important to our organizational success," said Roetzel Chairman Bob Blackham. "A diverse and inclusive team will not only make us a stronger firm, but it will help us create real change in our quest for inclusivity. We are proud to seek Mansfield Rule Certification and we firmly believe Roetzel should reflect the diverse communities we serve."

Diversity Lab works with participating firms to measure their outcomes annually and, based on those outcomes, redefines the Mansfield Rule program to ensure that the goal of diversifying firm leadership progresses as inclusively and impactfully as possible.

pro bono SPOTLIGHT



Barclay Damon LLP

Megan Bahas, Mike Ferdman, and Sarah O'Brien (pictured above L-to-R) of Barclay Damon LLP have been named to the Western District of New York Pro Bono Honor Roll for their pro bono work over the past 18 months.

Hanson Bridgett LLP

Hanson Bridgett LLP appoints Samir Abdelnour as Hanson Bridgett's first director of pro bono and social impact. Since taking the reigns as acting managing partner in January, Kristina Lawson has prioritized putting diversity, equity, inclusion, and social and community impact work at the forefront of her strategic plan. With the previous appointment of Jennifer Martinez as the firm's chief diversity, equity and inclusion officer, now the addition of Abdelnour as the director of pro bono and social impact will allow the firm to further its work toward taking real action in these spaces.

In 2020, Hanson Bridgett attorneys contributed nearly 7,500 hours of pro bono work with a focus on assisting businesses and individuals impacted by the COVID-19 pandemic, supporting racial justice movements, representing families seeking asylum in the U.S., and aiding victims of domestic violence.

Rivkin Radler

The Nassau County Bar Association (NCBA), The Safe Center LI (TSCLI) and Nassau Suffolk Law Services (NSLS) have named Rivkin Radler a top law firm in pro bono service for 2020. The annual awards rank law firms by total number of pro bono service hours within their category. Rivkin Radler logged the second-largest number of pro bono hours (668 hours) among large service providers.

The firm's pro bono work is in three core areas:

1. Through Nassau/Suffolk Law Services, the pro bono team makes dozens of court appearances annually on behalf of indigent tenants facing eviction.
2. In conjunction with KIND (Kids in Need of Defense), the team represents unaccompanied immigrant and refugee children in their deportation proceedings.
3. Through The Safe Center Long Island, the team represents victims of abuse.

"Public service is part of our firm's culture," said Alan Rutkin (pictured), who leads the firm's pro bono committee. "Our lawyers volunteer in the courts and communities. Service makes us better lawyers and better people."

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 nearly 100 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 IN EUROPE.

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 1,000 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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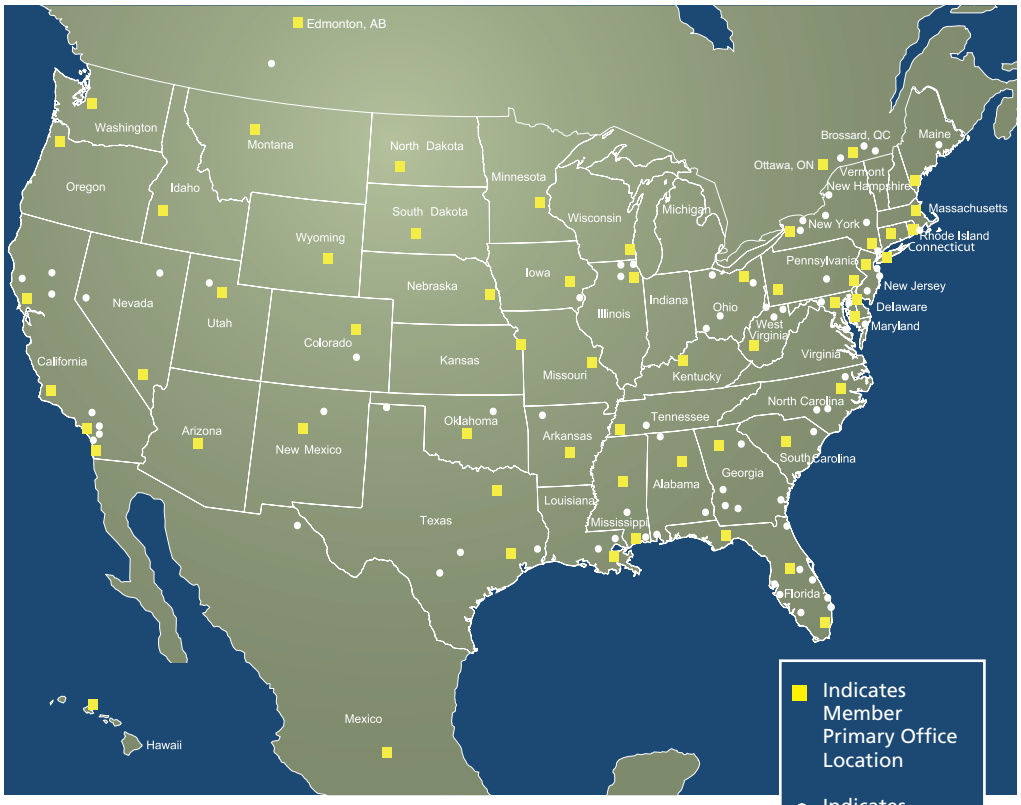

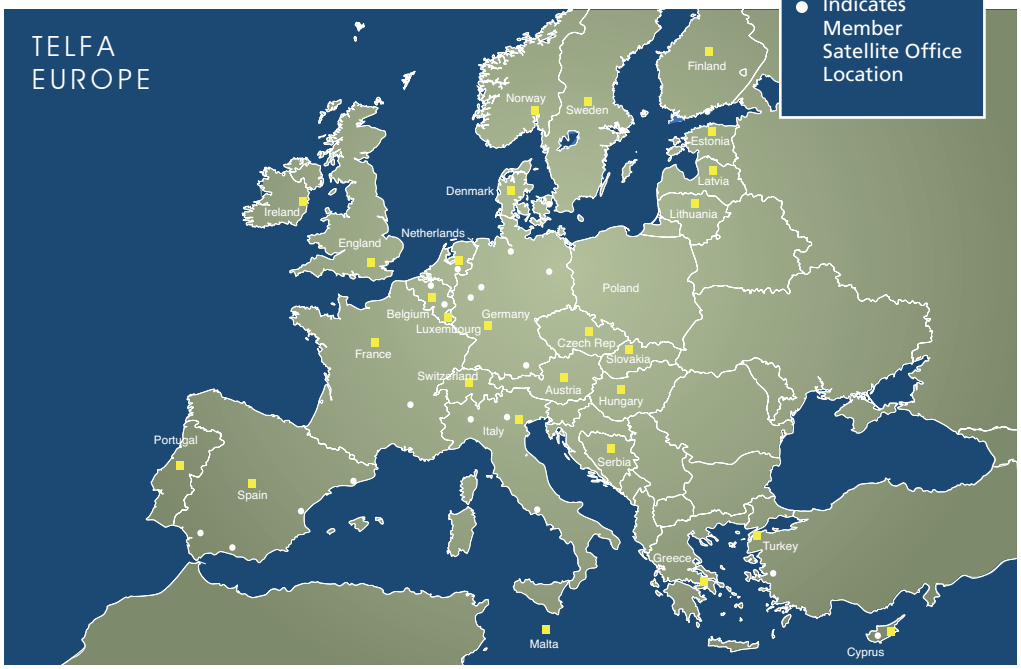

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the complete USLAW SOURCEBOOK

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. USLAW Client Resources provide 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 USLAW client resources products or services listed as well as ideas for the future that would benefit you and your colleagues.

VIRTUAL OFFERINGS

As a result of the COVID-19 pandemic, USLAW has successfully explored and executed new and different ways to help members virtually connect with their clients, and we anticipate doing so for the foreseeable future. From USLAW Panel Counsel Virtual Meetings to exclusive social and networking opportunities to small virtual roundtable events, industry leaders and legal decision-makers have direct access to attorneys across the NETWORK to support their various legal needs. Moving forward, we will promote a hybrid virtual approach to our future live events.

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. 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.

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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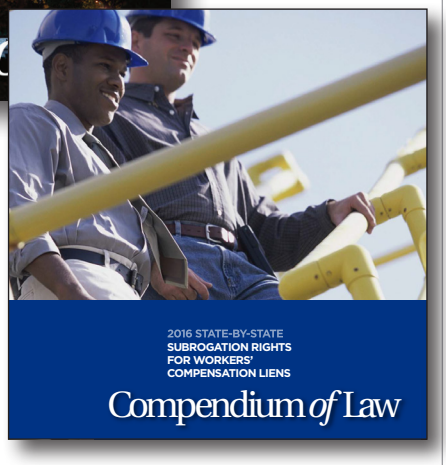
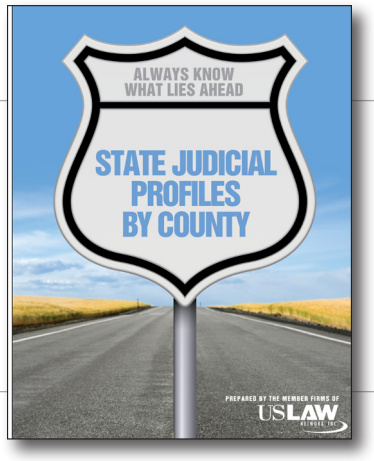
LAWMOBILE

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 multi-state resources that permit 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. We've also added several COVID-19-specific compendia that focus on civil immunity, general liability, force majeure and more. Visit the Client Resources section of uslaw.org for the complete USLAW compendium library.



STATE JUDICIAL PROFILES BY COUNTY

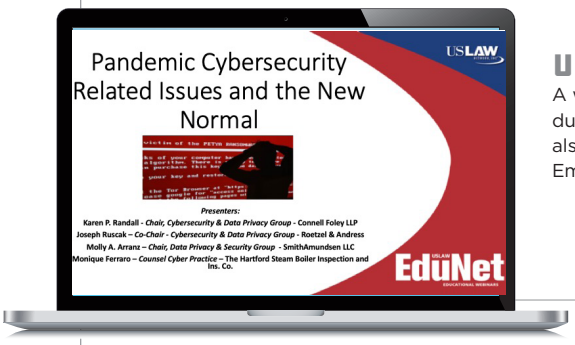
Jurisdictional awareness of the court and juries on a county-by-county basis is a key ingredient to successfully navigating legal challenges throughout the United States. Knowing the local rules, the judge, and the local business and legal environment provides a unique competitive advantage. In order 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.

USLAW MAGAZINE

USLAW Magazine is an in-depth publication produced and designed to address legal and business issues facing commercial and corporate clients. Recent topics have covered cybersecurity & data privacy, COVID-19 impacts, medical marijuana & employer drug policies, management liability issues in the face of a cyberattack, defending motor carriers performing oversized load & heavy haul operations, employee wellness programs, social media & the law, effects of electronic healthcare records, allocating risk by contract and much more.

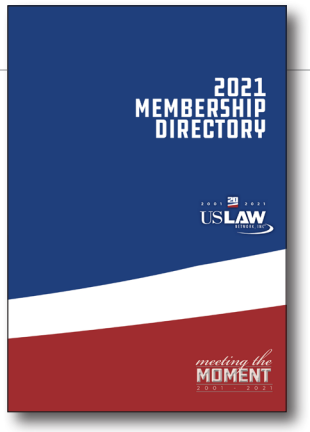
USLAW CONNECTIVITY

In today's digital world there are many ways to connect, share, communicate, engage, interact and collaborate. Through any one of our various communication channels, sign on, ask a question, offer insight, share comments, and collaborate with others connected to USLAW. Please check out USLAW on Twitter @uslawnetwork and our LinkedIn group page.



USLAW WEBINARS

A wealth of knowledge offered on demand, USLAW offers a regular series of interactive webinars produced by USLAW practice groups. The one-hour programs are available live on your desktop and are also archived at USLAW.org for viewing at a later date. Topics range from Cybersecurity to Medicare to Employment & Labor Law to Product Liability Law and beyond.



USLAW MEMBERSHIP DIRECTORY

Each year USLAW produces a comprehensive membership directory. Here you can quickly and easily identify the attorney best-suited to handle your legal issue. Arranged by state, listings include primary and alternate contacts, practice group contact information as well as firm profiles. If you would like to be added to the distribution list, contact us here.

CLIENT LEADERSHIP COUNCIL AND PRACTICE GROUP CLIENT ADVISORS

Take advantage of the knowledge of your peers. USLAW NETWORK's Client Leadership Council (CLC) and Practice Group Client Advisors are hand-selected, groups of prestigious USLAW firm clients who provide expertise and advice to ensure the organization and its law firms meet the expectations of the client community. In addition to the valuable insights they provide, CLC members and Practice Group Client Advisors also serve as USLAW ambassadors, utilizing their stature within their various industries to promote the many benefits of USLAW NETWORK.

PRACTICE GROUPS

USLAW prides itself on variety. Its 6,000+ attorneys excel in all areas of legal practice and participate in USLAW's nearly 20 substantive active practice groups and communities, including Banking and Financial Services, Commercial Law, Complex Tort and Product Liability, Construction Law, Data Privacy and Security, eDiscovery, Employment and Labor Law, Energy/Environmental, Healthcare Law, Insurance Law, International Business and Trade, IP and Technology, Professional Liability, Retail and Hospitality Law, Transportation and Logistics, White Collar Defense, Women's Connection, and Workers' Compensation. Don't see a specific practice area listed? Not a problem. USLAW firms cover the gamut of the legal profession and we will help you find a firm that has significant experience in your area of need.

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S-E-A is proud to be the exclusive partner/sponsor of technical forensic engineering and legal visualization services for USLAW NETWORK.

A powerful resource in litigation for 50 years, S-E-A is a multi-disciplined forensic engineering, fire investigation and visualization services company specializing in failure analysis. S-E-A's full-time staff consists of licensed/registered professionals who are experts in their respective fields. S-E-A offers complete investigative services, including: mechanical, biomechanical, electrical, civil and materials engineering, as well as fire investigation, industrial hygiene, visualization services, and health sciences—along with a fully equipped chemical laboratory. These disciplines interact to provide thorough and independent analysis that will support any subsequent litigation.

S-E-A's expertise in failure analysis doesn't end with investigation and research. Should animations, graphics, or medical illustrations be needed, S-E-A's Imaging Sciences/Animation Practice can prepare accurate demonstrative pieces for litigation support. The company's on-staff engineers and graphics professionals coordinate their expertise and can make a significant impact in assisting a judge, mediator or juror in understanding the complex principles and nuances of a case. S-E-A can provide technical drawings, camera-matching technology, motion capture for biomechanical analysis and accident simulation, and 3D laser scanning and fly-through technology for scene documentation and preservation. In addition, S-E-A can prepare scale models of products, buildings or scenes made by professional model builders or using 3D printing technology, depending on the application.

You only have one opportunity to present your case at trial. The work being done at S-E-A is incredibly important to us and to our clients – because a case isn't made until it is understood. Please visit www.SEAlimited.com to see our capabilities and how we can help you effectively communicate your position.

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Ametros is the largest and most trusted professional administration expert in the industry, working closely with everyone involved in the settlement process to drive resolution and provide support, security and potential savings for injured individuals once they settle their case. Ametros becomes the injured individual's main resource to help guide them through their medical treatment and any necessary reporting after settlement. Ametros helps ease settlement fears and assists in settling difficult and complex claims, including workers' compensation, liability, trusts, life care plans, Medicare Set Asides, and all other future medical allocations.

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