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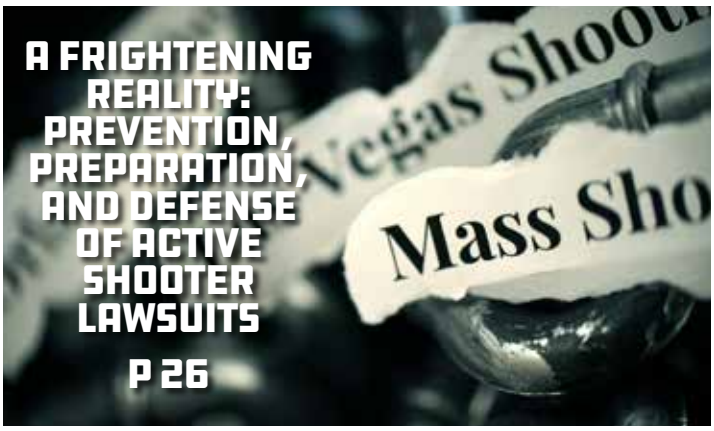

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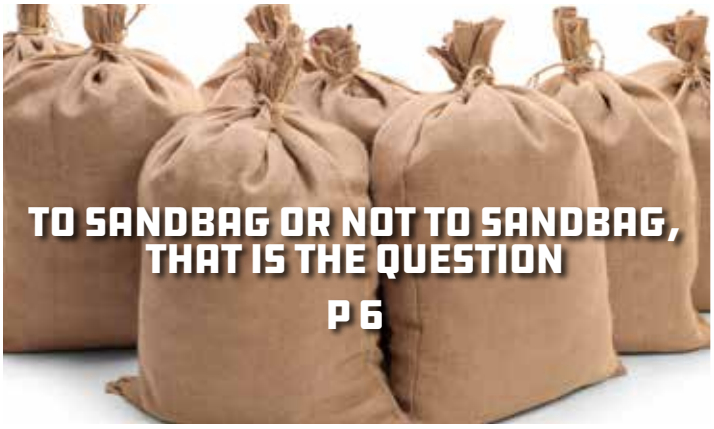

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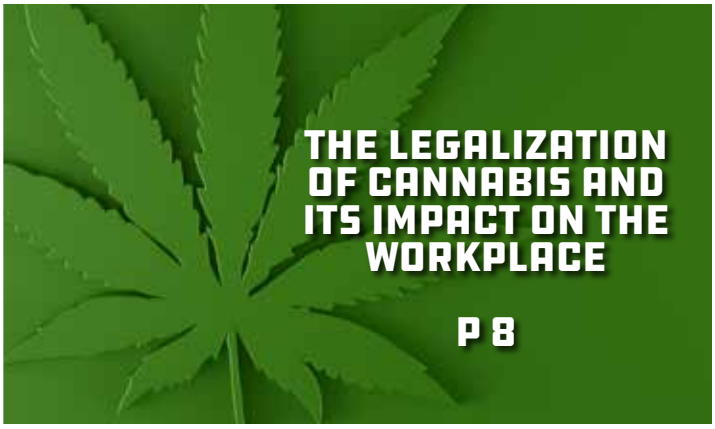

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BANKRUPTCY'S EVOLVING IMPACT ON HIGHER EDUCATION

Student Loan Dischargeability and Tuition Claw Back

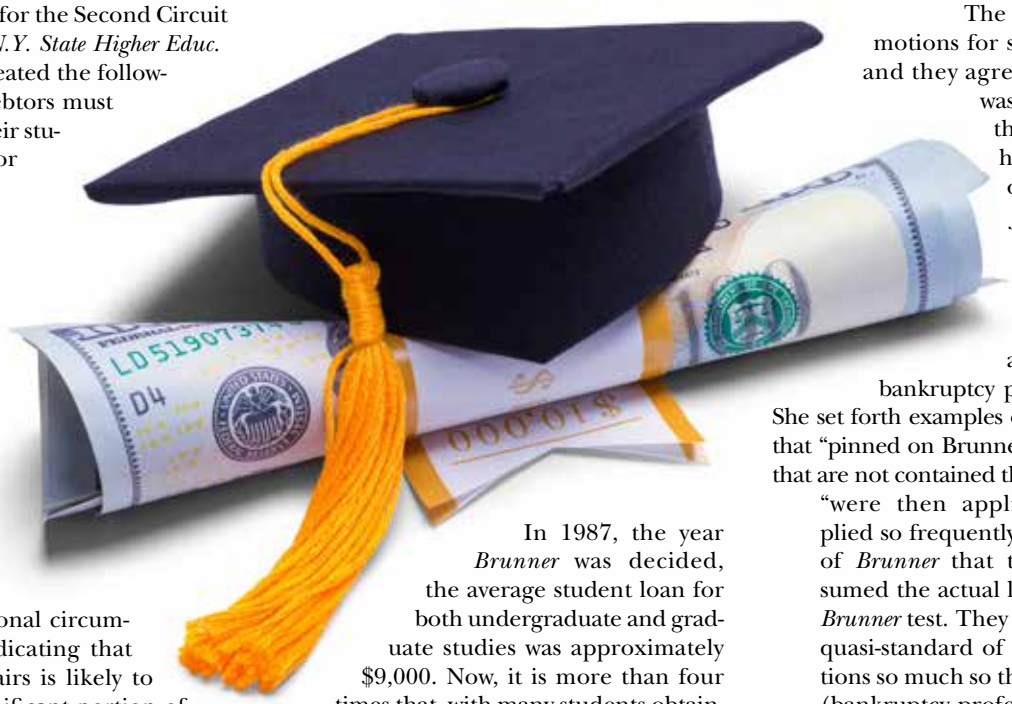
Ilan Markus Barclay Damon LLP

STUDENT LOAN DISCHARGEABILITY

The U.S. Bankruptcy Code provides that students loans are not dischargeable in bankruptcy cases unless not discharging the student loans "would impose an undue hardship on the debtor and the debtor's dependents" 11 U.S.C. § 523(a)(8). In 1987, the Court of Appeals for the Second Circuit decided *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, which created the following high standard debtors must meet to discharge their student loans in whole or in part:

1. "That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
2. That additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
3. That the debtor has made good faith efforts to repay the loans."

Some bankruptcy courts—before and after *Brunner*—seemed to make the test even more difficult, with some requiring proof of "certainty of hopelessness" to discharge student debts and others concluding a debtor's mere attempt to discharge student loan debt constituted bad faith. Eventually, consumer bankruptcy attorneys were discouraged from attempting to discharge any student loans other than those incurred by borrowers with the most severe disabilities. Perhaps not surprisingly, of the approximately 250,000 student loan borrowers who file for bankruptcy each year, only about 400—or .0016 percent—seek to discharge their student loans.[1]



In 1987, the year *Brunner* was decided, the average student loan for both undergraduate and graduate studies was approximately $9,000. Now, it is more than four times that, with many students obtaining higher education loans that collectively exceed six figures. Given *Brunner* and its progeny, what should a debtor do when his monthly expenses exceed his monthly income, he owes more than $200,000 in college and law school loans, he left his first job out of law school after less than three months, and, 25 years since taking out his first student loan, he works as a hiking and camping guide earning $37,500 annually?

On March 12, 2018, that debtor, Kevin Rosenberg, filed a *pro se* chapter 7 bankruptcy case in the U.S. Bankruptcy Court for the Southern District of New York. Rosenberg's bankruptcy schedules disclosed his substantial student loan debt. Without a lawyer, Rosenberg sued the holders of his student loan promissory notes, seeking the court's declaration that his entire student loan debt was dischargeable as an "undue hardship" under section 523(a)(8) of the Bankruptcy Code.

The parties filed cross motions for summary judgment, and they agreed the *Brunner* test was the correct test for the court to apply. In her written decision on the matter, Chief Judge Morris noted that "*Brunner* has received a lot of criticism for creating too high of a burden for most bankruptcy petitioners to meet." She set forth examples of bankruptcy courts that "pinned on Brunner punitive standards that are not contained therein" and which

> "were then applied and reapplied so frequently in the context of *Brunner* that they have subsumed the actual language of the *Brunner* test. They have become a quasi-standard of mythic proportions so much so that most people (bankruptcy professionals as well as lay individuals) believe it impossible to discharge student loans … The court will not participate in perpetuating these myths."

Judge Morris then proceeded to "apply the *Brunner* test as it was originally intended."

After finding that Rosenberg's current expenses exceeded his current income by more than $1,500, his student loan debt totaled $221,385.49, and he was not eligible for a repayment plan, the court concluded the first prong of the *Brunner* test was met. The second prong—that this state of affairs was likely to persist for a significant portion

of the repayment period—was deemed satisfied because the court determined the repayment period under the student loans had already ended. Judge Morris also decided that Rosenberg's loan repayment history and instances of taking positive initiative in communicating and working with the student loan lenders were sufficient to satisfy the test's third prong. Consumer bankruptcy attorneys have described Judge Morris' opinion in the *Rosenberg* case as a watershed moment for the dischargeability of student loans in bankruptcy. A motion for leave to appeal the decision has been filed.

Will directly challenging the manner in which many bankruptcy courts have applied the decades-old rule in *Brunner* result in a change in practice for the bankruptcy bench and bar? It is not a stretch to expect more potential debtors and their bankruptcy counsel to expend the necessary time, money, and effort in exchange for a potentially improved chance to discharge significant student loan debt. Will other bankruptcy judges, none of whom are bound to follow Judge Morris' ruling, nevertheless be persuaded by her analysis until the appellate process in this adversary proceeding is complete?

In addition to questions regarding the dischargeability of loans that were incurred to pay higher education tuition, there are separate questions regarding whether and when tuition payments received by an institution of higher education can be recovered as a fraudulent transfer by the bankruptcy trustee in the parents' bankruptcy case. As more bankruptcy trustees have filed lawsuits to recover tuition payments after parents of adult students file for bankruptcy, some answers have begun to materialize.

TUITION CLAW BACK

In 2012, the Palladinos' 18-year-old adult daughter enrolled as an undergraduate at Sacred Heart University in Fairfield, Connecticut. Between March 2012 and March 2014, the Palladinos paid $64,656.22 in tuition to the university. In April 2014, the Palladinos filed a chapter 7 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts.[2]

In July 2015, the chapter 7 trustee sued Sacred Heart to claw back the tuition payments from the Palladinos to the university. The trustee's best claim was under Section 548(a)(1)(B)(i) of the Bankruptcy Code, which allowed the trustee to avoid any debtor transfers made in the two years before the bankruptcy filing in exchange for which the debtor received less than reasonably equivalent value. The trustee's counsel argued that reasonably equivalent value was lacking because the tuition payments reduced the Palladinos' estate by almost $65,000 without a concomitant tangible increase in value. The Palladinos' counsel argued the daughter's tuition provided substantial value because the Palladinos "believed that a financially self-sufficient daughter offered them an economic benefit."

Faced with these facts and because courts in tuition claw back cases interpreted reasonably equivalent value differently, the bankruptcy court determined the value received by the Palladinos in helping secure their daughter's college education was reasonably equivalent value for the tuition payments. The bankruptcy court then, on its own, certified its decision to the U.S. Court of Appeals for the First Circuit.

On November 12, 2019, the First Circuit issued its written decision. Referring to the answer as "straightforward," though noting one might argue for a different outcome in the case of a minor child, it concluded that "the tuition payments here depleted the estate and furnished nothing of direct value to the creditors who are the central concern of the code provisions at issue." The First Circuit reversed and remanded the bankruptcy court's decision.

Palladino closed the door in the First Circuit on arguments by colleges and universities regarding "indirect" value received by parents who pay tuition for their adult children. Bankruptcy courts in Massachusetts, New Hampshire, Puerto Rico, and Rhode Island are bound to follow the *Palladino* decision, and other bankruptcy courts around the country will certainly consider it when faced with similar issues.

All is not lost for higher education, however, as there are other ways to defeat tuition claw back claims in the right instances. For example, in *Novak v. University of Miami (In re Demitrus)*, a Connecticut bankruptcy case before Judge James Tancredi, the trustee sued the University of Miami to claw back approximately $66,000 in parent tuition payments using the same arguments as the trustee in *Palladino*.[3] In that case, however, the university moved to dismiss the lawsuit because the tuition payments at issue were made via a Parent PLUS loan in which the tuition payments were made directly from the Department of Education to the university without the parents ever gaining possession, custody, or control of the tuition funds.

In dismissing the trustee's lawsuit against the university, Judge Tancredi stated that "the clear consensus forming in the courts on this issue is reflective of the purpose underlying the trustee's avoidance powers, namely, to prevent the depletion of assets that otherwise would have been available to creditors." He determined the funds paid to the university could not possibly have been the parents' property or reached by the parents' creditors and, as a result, dismissed the trustee's tuition claw back lawsuit. Whereas depleting the parent/debtor's bankruptcy estate benefited the trustee's arguments in *Palladino*, the absence of depleting the estate derailed the trustee's claims against the University of Miami.

Schools have also avoided tuition payment claw back in cases where the student has access to the tuition funds provided by the parents as well as the institution. In another case before Judge Tancredi—*Mangan v. University of Connecticut (In re Hamadi)*—refundable tuition payments were made by the parents into an account maintained by the University of Connecticut. Afterwards, the parents filed a bankruptcy case in Hartford, Connecticut. Relying on an increasing amount of bankruptcy court precedent, Judge Tancredi determined the refundable tuition funds belonged to the student because the university did not have the immediate right to use the funds for its own purposes. Treating the student as the first recipient of the tuition funds and the university as a subsequent recipient (once the tuition funds became nonrefundable) opened up a potential good-faith defense under the Bankruptcy Code, which helps higher education defendants bypass tuition claw back liability.

Litigation and precedent involving tuition claw back cases will continue to evolve, and lawsuits based on diminution to the estate will continue to expand into new areas.

Ilan Markus of Barclay Damon LLP handles bankruptcy and other types of insolvency matters, representing debtors, creditors, secured lenders, landlords, equipment lessors, creditors' committees, trustees, assignees for the benefit of creditors, and purchasers. Specifically, Ilan routinely represents financial institutions, biomedical companies, managed services providers, telecommunications companies, health care providers, tenants, retailers, and hotels.

1 Debra Weiss, *Law Grad Wins Discharge of His Student Debt in Opinion Criticizing 'Punitive Standards,'* ABA J., Jan. 9, 2020 (citing research by Jason Iuliano, assistant professor of law at Villanova University).
2 In January 2014, the Palladinos pled guilty in state court to fraud in connection with operating a multi-million-dollar Ponzi scheme.
3 The author defended the University of Miami in that tuition claw back lawsuit.

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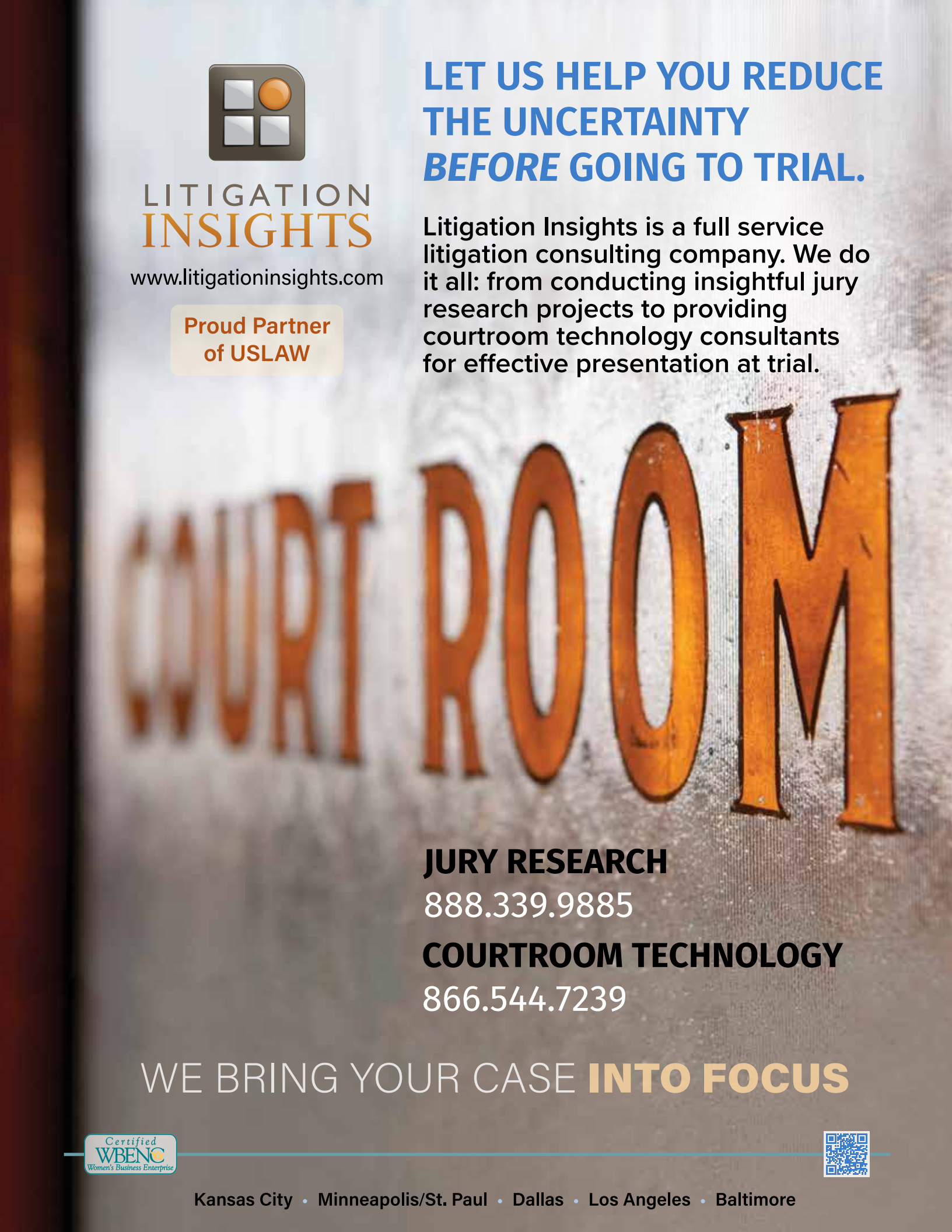
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TO SANDBAG OR NOT TO SANDBAG, THAT IS THE QUESTION

Steven Howard Roth and **Christopher Reuscher** Roetzel & Andress LPA

Anyone who has been involved in a private merger or acquisition knows that one of the most heavily negotiated aspects of any transaction involves the indemnification provisions. This universal fact holds true regardless of whether the deal is structured as a stock or an asset purchase, with the focus on these terms typically increasing as the value of the deal ascends. Indemnification, at its core, is all about risk allocation; it details the rights and duties of the parties when a specific event occurs post-closing, a representation is inaccurate, or a warranty, and/or covenant is breached. Not surprisingly, buyers aim for such terms to be broad and unlimited, while sellers want indemnification provisions to be very narrow and limited. The end result is typically a balance of these competing interests that involves a combination of various mechanisms designed to either create hurdles to recovery or make it easier. One of the most important indemnification concepts, however, is frequently overlooked by both buyers and sellers and can have far reaching consequences: "sandbagging."

In mergers and acquisitions, the concept of sandbagging refers to a situation when the buyer, before closing, discovers, typically through the due diligence process, a misrepresentation or breach of a warranty or covenant by the seller, but chooses not to say anything about it before the transaction closes, and then brings an indemnification claim under the agreement after closing. To prevent this type of situation from occurring, sellers often attempt to negotiate an anti-sandbagging clause, which prevents a buyer from making an indemnification claim in such circumstances. From the seller's perspective, it is completely unfair for a buyer to make an indemnification claim regarding something it knew about and could have addressed prior to closing but chose to ignore. Ironically, at first glance, many people, including buyers, would probably agree that making an indemnification claim in such a situation is unreasonable, but, in reality, the determination of whether a buyer has "knowledge" of a particular fact is not always straightforward. Depending upon if and how a buyer's "knowledge" is defined in an agreement, a buyer could be deemed to have "knowledge" of every single fact, circumstance, or document contained in the disclosure schedules, even if nobody from the buyer's organization actually saw or noticed the specific fact or circumstance at issue.

Given that disclosure schedules may contain exorbitant amounts of informa-

tion, buyers can easily miss or overlook something. The situation is often even more problematic if the scope of the buyer's "knowledge" is also deemed to cover any document or information contained in a transaction data room, regardless of whether or not it is specifically listed or included in the disclosure schedules. In some circumstances, even if the seller is required to list a document on a schedule, but fails to do so, the buyer could be deemed to have "knowledge" if the information is in the data room. At the same time, anti-sandbagging provisions can prevent a buyer from making an indemnification claim post-closing on any matter actually listed in the disclosure schedules. As a result, anti-sandbagging clauses can place a significant burden on a buyer and shift an extraordinary amount of risk away from a seller.

Due to the impact sandbagging can have on the indemnification rights of buyers and sellers, it is critical for both buyers and sellers to carefully consider and understand the implications the concept can have in each transaction they enter and form a comprehensive strategy for dealing with the same. To that end, there are three different approaches buyers and sellers can take with respect to sandbagging in an agreement: (1) include a pro-sandbagging clause; (2) include an anti-sandbagging clause; or (3) remain completely silent on the concept. The best approach and position for a buyer or seller depends upon a variety of factors, including, perhaps, most importantly, the state whose laws will govern the agreement between the parties.

PRO-SANDBAGGING PROVISIONS

Pro-sandbagging provisions, as one might expect, benefit the buyer, and permit the buyer to make an indemnification claim for the inaccuracy of a representation or breach of a covenant or warranty by the seller following the closing of a deal, even if the buyer was aware of the inaccuracy of the representation or breach of the covenant or warranty prior to closing. The inclusion of a pro-sandbagging clause prevents the buyer from needing to prove or show that the buyer did not know about the misrepresentation or breach of the warranty or covenant, because the buyer's knowledge is essentially irrelevant.

ANTI-SANDBAGGING CLAUSES

In contrast to pro-sandbagging provisions, anti-sandbagging clauses benefit the seller, and prevent a buyer from making an indemnification claim arising out of the inaccuracy of a representation or breach of a covenant or warranty by the seller following the closing of a deal if the buyer knew of the misrepresentation or breach of the warranty or covenant prior to closing. Anti-sandbagging provisions can not only effectively provide sellers with an affirmative defense against some indemnification claims, but also require a buyer to both prove the existence of the misrepresentation or breach of warranty or covenant and that the buyer did not have knowledge of the same prior to closing. When an agreement contains an anti-sandbagging provision, the definition of "knowledge" becomes extraordinarily important for buyers, as having a broad definition can preempt and eradicate otherwise valid indemnification claims. Sellers should seek to keep the definition broad enough to cover and incorporate implied and constructive "knowledge," and to include phrases that require "reasonable due inquiry" in the definition. Buyers, on the other hand, should attempt to require actual "knowledge," and keep the "knowledge group" to a limited number of relevant individuals.

SANDBAGGING SILENCE

While it is obvious that including or not including a pro-sandbagging or anti-sandbagging provision in an agreement will have an effect on the indemnification rights of the parties to an agreement, many people fail to realize or appreciate that silence on the concept also has repercussions, some of which may be undesirable or unintended. If an agreement is silent on sandbagging, the state law governing the transaction will be applied to determine whether the buyer's knowledge will preclude indemnification claims. Since each state's laws are different, remaining silent could have adverse consequences. As a result, it is extremely important for both buyers and sellers to know how the state law governing an agreement treats silence on sandbagging, so they can effectively factor the same into their decision making and not unnecessarily use precious negotiating capital. For example, states such as New York and Delaware allow some forms of sandbagging in the event an agreement is silent on the concept, while other states, such as California generally do not permit sandbagging, unless the agreement explicitly allows it. With that being said, however, in New York, silence on sandbagging by itself is not enough to make sandbagging claims permissible; rather, the buyer must believe it was purchasing a "vendor's promise as to the truth," meaning the buyer must not have been told about the inaccuracy of a representation or breach of a warranty or covenant directly from the seller. It is also important to note that the Delaware Supreme Court recently suggested the scope of sandbagging claims is not without some limitation by acknowledging in a footnote of the 2018 case of *Eagle Force Holdings, LLC v. Stanley Campbell* that there is an ongoing debate about whether a buyer can make an indemnification claim for an inaccurate representation or breach of warranty or covenant when it knew at closing about the inaccuracy or breach.

While buyers and sellers can employ a number of tactics, such as baskets, mini-baskets, materiality qualifiers, materiality scrapes, exceptions, and caps, in order to successfully protect their interests in connection with indemnification, it is equally, if not more important, to take into account the effects the governing law has on an agreement, especially with respect to sandbagging claims. Choice of law clauses, while seemingly innocuous, can have long-lasting implications on the range of indemnification claims permitted. Accordingly, buyers and sellers should make sure they have a firm understanding of how the governing law treats sandbagging, so they can form a more effective negotiating strategy, and avoid any unintended consequences.

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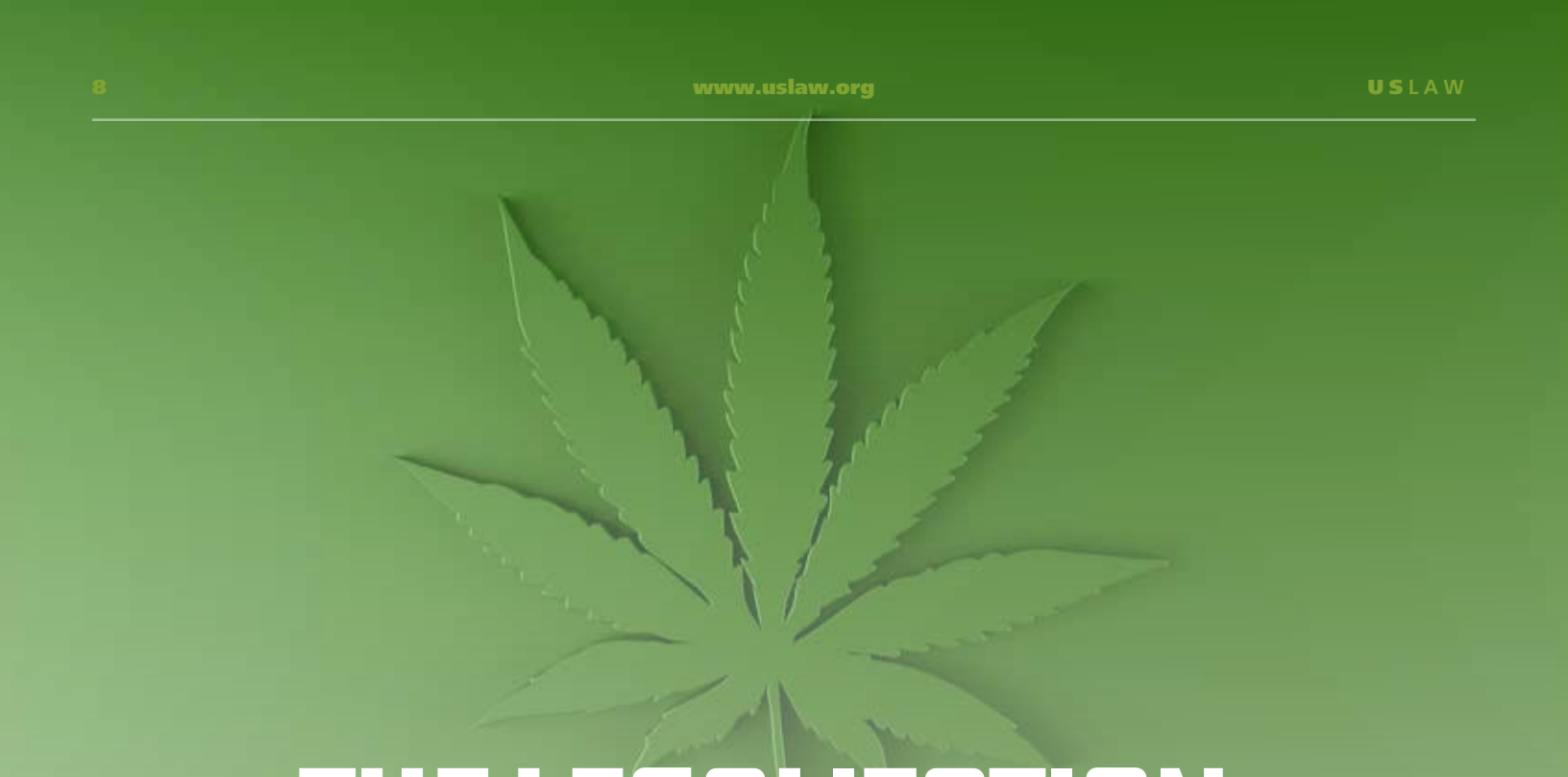

THE LEGALIZATION OF CANNABIS

and its Impact on the Workplace

By Michael D. Wong SmithAmundsen

The legalization of cannabis is not a fad that will be going quietly into the night anytime soon. If anything the fact that the legal sales of cannabis in Illinois during the first twelve (12) days reached $20 million and that the legal cannabis industry in 2018 was a $10.4 billion industry, demonstrates that it is here to stay. Currently there are 11 states that legally allow the sale of recreational cannabis, including Illinois, California, Colorado, Alaska, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington, and 33 states that have approved medical marijuana programs. In Washington D.C., possession of up to two ounces of recreational cannabis is legal (but sales remain illegal).

What makes these issues so difficult for employers though is that each of those states have their own laws and provisions, which create headaches and confusion for multi-state employers. To add to the headache, despite cannabis being a Schedule I illegal drug under federal law, the federal legislature did legalize a type of cannabis, hemp.

Hemp was legalized in the 2018 Farm Bill and is defined as the marijuana/cannabis plant with less than 0.3% concentration of delta-9 tetrahydrocannabinol (THC). This means that now employers are struggling with understanding not only the legality of cannabis, but also hemp and legal products such as CBD oils, balms, flower and derivatives, which are now technically legal under both state and federal law.

What does all of this mean for employers though? Does it mean the death knell of drug testing? Quite simply, no, employers will still be able to have drug testing policies and drug test employees. However, it has brought into focus (and scrutiny) drug testing policies and practices, as well as disability accommodations. Just like law enforcement, who are now having to re-evaluate their drug tests and behavioral tests in order to determine when a driver is impaired, employers are also faced with the same issue identifying impairment, rather than use.

In understanding this new world, it should go without stating, that employers MUST understand the "new" cannabis drug. The cannabis being sold at dispensaries currently is much different than the street drug of the '70s and even '90s and much like with texting comes with what may seem at times to be a different language. The cannabis plant itself that used to be referred to as "bud" or "weed" is now called "flower." In addition to "flower" with the prevalence of research and money, many different products have been derived from "flower" that can be used by an individual, including edibles (hard candy, baked goods, sodas, teas, tinctures). Another derivative is concentrates that can be used with vape pens and are called "shatter," "wax," "oil," "butter," and "sugar." The terms used to describe cannabis are not the only difference. The strength of the products has greatly increased. In the '70s, street-level cannabis had a THC potency of approximately 1%. In the '90s, the THC potency of street-level cannabis increased to approximately 3-4%. Currently, dispensaries are selling cannabis flower that has THC potencies higher than 35% and concentrates that are as high as 98% THC.

DIFFERENT STATE LAWS

Next, is understanding the different state laws where your facilities are located. Each state has implemented different laws regarding cannabis. Even though some may be similar, most if not all, have significant differences. For example, the states on the west coast, which generally were the first states to legalize, primarily have laws that do not include any employment protections. However, the states on the east coast, which legalized later on, primarily have laws that do include employment protections. As such, in many of the older legal cases, which were issued by courts on the west coast, the courts found in favor of the employer. In many of the newer legal decisions, issued by courts on the east coast, the findings have shifted to being in favor of employees. In recent cases, courts in Arizona, Massachusetts, Connecticut and New Jersey, have held that a positive drug test alone is not sufficient to terminate an employee or revoke a job offer – especially if it is in relations to an individual who is a registered medical marijuana user.

UNDERSTANDING POLICIES AND PROCEDURES

After you understand the drug and the applicable state law, the next step is reviewing and understanding your drug testing policies and procedures. In doing such, you must evaluate when and how you are drug testing (i.e. pre-employment, reasonable suspicion, post-accident/incident, return to work and follow-up). For example, with reasonable suspicion, are you using a reasonable suspicion checklist and have you trained your managers and supervisor in how to identify drug and alcohol impairment. Similarly, do you understand the drug testing procedures? For example, it used to be standard that if an employee tested positive for a drug, but had a legitimate prescription, that the Medical Review Officer (MRO) would report it as a negative test. Now, especially for employees in safety sensitive positions, your MRO should qualify a positive drug test (for any drug, not just cannabis) where the individual has a prescription or is a legal registered user, by stating that the employee may need to provide a note from his or her treating physician clearing him or her to work or identifying any work restrictions.

Likewise, do you know what your testing levels are and are they in line with the state laws? In many of the states where recreational cannabis has been legalized, much like with alcohol having a blood alcohol content "BAC" level, the state has set a level for cannabis which indicates when an individual is impaired for purposes of driving while impaired (DWI) charges. This is helpful for employers as it provides a state-determined testing level for when an individual is impaired. For example, in Illinois the legislature amended the vehicle code to provide that an individual with 10 nanograms or more of THC in his or her bodily fluid is impaired by cannabis. For Illinois employers, this means that if they set their testing level at 10 nanograms or more and a person tests positive, then they can use that as a good faith basis of impairment while at work. However, there are still questions on how to address drug testing that is done when the individual is not at work, such as pre-employment drug testing.

After reviewing how you are drug testing, the next step is evaluating what you do with the results of a drug test. Before taking any action, again it is important to understand the applicable state law and case law. For example, in Illinois the recreational cannabis law and medical cannabis law provide that before an employer terminates an employee, the employee must be provided an opportunity to explain. While this is a simple step, it is important step that employers in Illinois must now take. Additionally, before disciplining an employee or applicant who has tested positive, it is important to review whether a medical condition was involved. Court cases out of Massachusetts, Connecticut and New Jersey have all held that employers should engage in the interactive process before taking steps to discipline, terminate or revoke a job offer to a candidate who has tested positive for marijuana, but advised that they use it due to a serious medical condition or disability.

EMPLOYEE EDUCATION

It is also vitally important to educate all employees on the company policy, as well as the reason for the company's policy. Education is especially important if the company is prohibiting employees from possessing it on company property. There is no better example of this than the city attorney for the city of Seattle. When Washington legalized cannabis in 2014, the city attorney of Seattle, who was a proponent of cannabis, was one of those in line to purchase cannabis on the first day. After purchasing cannabis, the city attorney walked right back into his office with the cannabis still in his possession. By returning to work with the cannabis in his possession, even though he had not used it, it was a violation of the city's drug free workplace policy, a policy that he had probably reviewed and approved. As such, it is important to recognize that if an attorney who likely wrote the drug free workplace policy forgot about the policy, it will likely be easy for employees without a legal background to forget. Thus, it is vitally important for employers to remind employees of the policies that are in place and compliance with such.

Finally, it should be recognized that being a federal contractor or receiving federal funding based upon a requirement that you have a drug free workplace policy, does not automatically exempt you from updating your policies and procedures. Many federal contracts or funding simply require that the employer implement a drug free workplace policy in compliance with the Federal Drug Free Workplace Act. The problem with the Federal Drug Free Workplace Act is that it does not have any requirements regarding drug testing. In fact, a court in Connecticut recently held that compliance with the Federal Drug Free Workplace Act simply requires employers to have a drug free workplace policy and does not require drug testing or prohibit federal contractors from employing someone who uses illegal drugs or medical marijuana outside of the workplace.

While many questions still remain and medicinal usage requires a different analysis from recreational use (for now), employers can still take steps to limit their exposure and to maintain a safe and healthy workplace through reasonable drug testing policies. That being said, employers must continue to carefully examine their own unique industry, risks and risk tolerances, together with their geographic footprint and applicant pool. In doing so, it is strongly recommended that employers engage competent legal counsel, who is well versed in labor and employment law, as well as cannabis laws, to assist you in the reviewing process and in addressing difficult situations before they lead to costly and time-consuming litigation.

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PROFESSIONAL ADMINISTRATION 101

Porter Leslie Ametros

When settling a personal injury case there are many obstacles to overcome. One of the most frequent challenges is reaching a settlement for the injured individual's future medical costs.

For severe or chronic injuries, the uncertainty surrounding medical care and costs can often make an already difficult situation worse, typically resulting in more tension and frustration for both parties. While the insurance carrier or payer is often concerned about cost development, the injured party may also be concerned about their ability to manage their injury and the ongoing medical treatment. After all, for many injured individuals, just because the cases settle does not mean their medical care will stop. Providing a service to help the injured person save money on their ongoing medical expenses and to help coordinate their care can be a huge benefit and can move the case to settlement more quickly.

WHAT IS A PROFESSIONAL ADMINISTRATOR?

A professional administrator is a neutral third party who oversees and manages an injured individual's future medical funds after settlement. The administrator provides core benefits such as medical support services and bill-review technology to capture savings on medical bills. In settlement conversations, the administrator acts as a neutral third party who will create a plan for the injured person's future medical care and will be there to support them upon settlement through the rest of their life. The professional administrator's role is to be the injured individual's "healthcare concierge" after they settle.

Upon settlement, the professional administrator establishes a dedicated bank account for the individual's medical settlement funds. Most administrators provide the individual with a unique card that works just like a health insurance card. When the individual shows the card at their pharmacy or doctor, the administrator receives the bill, applies group purchasing discounts, and then pays the bill automatically on behalf of the injured person from their settlement proceeds. The injured individual never has to touch the bills, but still has insight into their account balance, the discounts and transactions via statements and online portals. In addition to handling bills and securing discounts, the administrator also has staff available to answer the individual's questions about their care and to help them find providers, facilities, equipment, prescriptions, etc.

In addition to handling the injured individual's medical concerns, a professional administrator may also automatically file reporting for Medicare Set Aside (MSA) accounts to The Centers for Medicare & Medicaid Services (CMS), thereby protecting the individual's Medicare benefits.* The service can be used for any medical allocation, whether is an MSA or not, as the many benefits of the service extend beyond just Medicare reporting.

HOW CAN A PROFESSIONAL ADMINISTRATOR HELP EASE AN INJURED INDIVIDUAL'S FEARS ABOUT FUTURE MEDICAL CARE?

Professional administrators will often speak with the injured individual and/or their attorney prior to settlement to address their concerns about managing their future medical care. The administrator will explain to the injured individual the benefits of their service which can provide them with sense of security in knowing they will have a team of healthcare advocates at their

side to assist with their treatments. With an administrator, the injured individual is free to seek treatment for their injury the way they want with the support of professionals who can secure them discounts on medical bills and ensure Medicare compliance. This enhances their quality of life and helps make their settlement dollars last as long as possible.

For workers' compensation cases in particular, some injured parties are hesitant or unwilling to settle their cases because they have fears about managing their future medical and/or remaining compliant with the law. A professional administrator is experienced in navigating these issues and will talk with the injured party about how they can minimize the risks so that the benefits of the settlement are front and center.

HOW DO ATTORNEYS ENGAGE A PROFESSIONAL ADMINISTRATOR?

Like with many services, the earlier the concept is introduced to the client, the greater impact it can have in settlement conversations. Bringing up the benefits of a professional administrator to an insurance carrier or employer client can be helpful so that they understand how it will be an effective service to offer as a negotiating tool for cases that may come up. A professional administrator can address concerns that injured individuals may have, while making them feel comfortable knowing they will be protected after settlement. By providing this service, this allows for a smoother settlement process for all parties involved.

When it comes to MSAs, many attorneys recognize the complexity of abiding by the Medicare Secondary Payer statute. The injured individual is required to report their spending annually to CMS and perhaps more frequently if they exhaust funds. Attorneys know that misuse of MSA funds could potentially eliminate the injured individual's chances of being able to receive Medicare benefits if they exhaust the MSA inappropriately.

In the case of MSAs, professional administration automates annual reporting, and ensures treatments are related to the initial injury and are Medicare-covered expenses. Many attorneys view professional administration as essential in minimizing the potential for any liability in the future. By incorporating administration, they have fulfilled their duty to their client and increased the chance that the injured individual will abide by the MSP statutes and be protected after settlement.

WHAT DOES MEDICARE SAY ABOUT THE USE OF PROFESSIONAL ADMINISTRATION?

A common use of professional administration is to manage Medicare Set Asides. CMS has come out in full support of the service. In 2017, CMS announced that it "highly recommends" professional administration in its Workers' Compensation Medicare Set Aside Reference Guide (Sec 17). In addition, in 2019, CMS included that it "highly recommends professional administrators where a claimant is taking controlled substances." (ibid)

MSAs and the use of professional administration are quite common in workers' compensation settlements. For liability settlements, allocating a portion of the settlement for future medical expenses can sometimes be more of an art than a science. Either way, the MSP statute applies to any non-group health settlements and Medicare's preferred approach to how injured individuals manage medical funds from settlement to protect their interests is with the assistance of a professional administrator.

HOW DO I EVALUATE A PROFESSIONAL ADMINISTRATION PROVIDER?

Not all professional administrators are created equal. One single factor should not drive the overall decision on which company to utilize. The service, tools, professionalism, and savings provided by the administrator on behalf of the injured individual can vary drastically.

When it comes to cost, administrative fees charged by different administrators may vary, but it's critical to investigate the administrator's ability to secure discounts on medical treatments. These discounted rates will often have a far larger impact on the amount of money the injured party will save over time versus the administrative fees; often it is the savings rates that indicate how powerful of a benefit the service can provide. Find out if the administrator has multiple pharmacy, provider and equipment networks to help minimize the costs and if they display all of their savings.

Finally, it is worthwhile to compare the service levels of the administrators. A service-focused professional administrator puts a strong emphasis on personalized attention for the injured individual to ensure all of their questions and concerns are handled to get them back to health. This level of assistance can be captured by customer feedback. It can be helpful to check out current member testimonials and to ask for references from clients that can speak about their experiences.

HOW DO I GET STARTED ON A CASE?

Any settlement with ongoing medical costs can be a good fit for professional administration and administrators are more than willing to have a conversation about the case. Administrators do not charge for these consultations so there is no risk in reaching out to learn more. They only charge when the case settles and becomes administered.

It's worth sharing the option of professional administration with clients. It helps improve the chances of the case settling quickly and the injured individual understanding and being comfortable with how they will manage their medical care after settlement.

***The Omnibus Reconciliation Act of 1980.** 42 U.S.C. Section 1395y established the Medicare Secondary Payer (MSP) Statute which asserts that CMS will be the "secondary payer" for medical costs when a primary payer exists. This Act applies to all workers' compensation, no fault and liability settlements. On July 23, 2001, CMS circulated the "Patel Memorandum" which informed the industry that CMS would be demanding compliance and implementing guidelines specifically for workers' compensation claims and settlements. A Medicare Set Aside projection seeks to satisfy this requirement. An MSA establishes the value of future medical expenses that CMS would otherwise pay related to an injury and thus designates the amount of funds from the settlement that must be depleted before CMS will pay. In addition, CMS has released the Workers Compensation Medicare Set Aside Reference Guide which details how MSAs are to be created and includes guidelines for annual reporting to CMS to be done by the MSA accountholder.

As president of Ametros, Porter Leslie directs Ametros' growth and works with their many partners. Prior, Porter worked in investment banking, private equity and corporate development. He earned a B.A. from Columbia University, and an MBA from the Wharton School. Porter is fluent in Spanish and Portuguese and resides in Boston.

ADA WEBSITE COMPLIANCE

Continued Uncertainty for Businesses

Thomas L. Oliver, II and Alison H. Sausaman Carr Allison

In the last several years, there have been unprecedented numbers of website accessibility lawsuits filed against both governmental and private entities for alleged violations of the Americans with Disabilities Act of 1990, as amended, ("the ADA"), especially in New York, Florida, Pennsylvania, Massachusetts, and California. Any entity with a website or smart device application ("app") is vulnerable to litigation if its website or app contains inaccessible content; thus, businesses should proactively take measures to ensure the accessibility of any content they choose to disseminate.

ADA website lawsuits are primarily being filed by visually impaired individuals who access the internet by utilizing screen reading software, such as JAWS or NVDA, which translates written text and images into spoken words. While less prevalent, ADA website lawsuits are also filed by hearing impaired individuals who are able to access video content on the internet by utilizing closed captioning. Plaintiffs filing such claims typically seek declaratory and injunctive relief, as well as attorney's fees under the ADA.

Several unique characteristics of ADA website lawsuits are fueling this seemingly indomitable tide of litigation: (1) a form-based practice that allows use of serial litigants or "testers," (2) the potential for attorneys' fee awards, (3) the uncertainty plaguing this area of the law, and (4) the absence of clear rules or guidance for entities publishing content on a website or app. Unfortunately, a law intended as a means for redress for disabled individuals has morphed into a cottage industry for plaintiffs' attorneys attempting to capitalize on the juxtaposition of the lack of governing regulations and the fear of attorneys' fees

awards. As a result, the staggering rise of ADA website lawsuits has sparked tremendous controversy among businesses, attorneys, the courts, and the disabled alike. This windfall of litigation will likely only be thwarted by unequivocal governmental intervention, either in the form of binding legal precedent or clear guidelines promulgated by the Department of Justice ("DOJ").

STEPS TOWARDS REGULATORY GUIDANCE

Since 2003, the DOJ has promulgated and receded from various levels of agency guidance on ADA website accessibility issues. On several occasions, the DOJ has issued notices expressing an intent to promulgate specific website accessibility guidelines and noted the absence of clear guidance on what the ADA requires. In 2018, nearly one hundred members of Congress sent letters to Attorney General Jeff Sessions urging the DOJ to intervene and resolve the uncertainty plaguing website accessibility obligations under the ADA. The senators emphasized that clarity in the law would encourage private investment in technology that would improve conditions for the disabled.

On September 25, 2018, the assistant attorney general responded to these letters and reaffirmed the DOJ's earlier position that the ADA applies to the websites of places of public accommodation (https://www.adatitleiii.com/wp-content/uploads/sites/121/2018/10/DOJ-letter-to-congress.pdf). In the letter, he stated that the DOJ's "interpretation is consistent with the ADA's Title III requirement that the goods, services, privileges, or activities provided by places of public accommodation be equally accessible to people with disabilities." He further explained that "absent the adoption of specific technical requirements for websites through rulemaking, public accommodations have flexibility in how to comply with the ADA's general requirements of nondiscrimination and effective communication" and that "noncompliance with a voluntary technical standard for website accessibility does not necessarily indicate noncompliance with the ADA."

To date, the DOJ has not implemented mandatory rules or guidelines for website accessibility, but it has encouraged people to reference the Web Content Accessibility Guidelines (WCAG). WCAG are voluntary international guidelines or recommendations for web accessibility promulgated by the Web Accessibility Initiative (WAI) of the World Wide Web Consortium (W3C) as an accessibility resource. Thus, businesses should look to WCAG 2.0 AA or WCAG 2.1 AA for guidance on making their websites or apps more accessible and enjoyable for all users.

GUIDANCE FROM THE COURTS

The key issue before courts grappling with ADA website lawsuits against private businesses is whether Title III applies to businesses' websites and apps. Currently, there is not a clear consensus among the courts as to whether the ADA limits the definition of places of public accommodation to physical spaces. As one court recently noted, "[t]he spate of these cases has outpaced any regulations from the Department of Justice on what businesses must do to have ADA compliant websites, and courts have reached no consensus." *Price v. Escalante - Black Diamond Golf Club, LLC*, 2019 U.S. Dist. LEXIS 76288, *1-2 (M.D. Fla. April 29, 2019) (Moody, J.). While some courts have held that the definition of places of public accommodation is limited to physical, brick and mortar locations, others have held that websites or apps may be public accommodations under the ADA. Some courts have taken a middle ground, focusing on whether the alleged inaccessibility of the businesses' website or app impedes access to the goods and services of the businesses' physical location(s). *See e.g. Robles v. Domino's Pizza, LLC*, 913 F. 3d 898 (9th Cir. 2019); *Haynes v. Dunkin' Donuts*, LLC, 741 Fed. Appx. 752, 754 (11th Cir. 2018).

In many cases, the parties agree to a settlement without adjudicating the legal issues, often in the form of a payment and the entry of a consent decree. In Florida, the settlements are typically in the $10,000-20,000 range. Additionally, the defendant business will agree to ensure that it(s) website(s) and/or app(s) substantially conform to WCAG 2.0 AA within 12-24 months. Many such agreements specifically state that the business is not responsible for ensuring compliance of third-party content or plug-ins whose coding is not solely controlled by the business, even if such content is located on the business's website or linked therefrom.

In other cases, businesses are successfully defending against such claims by raising arguments based on lack of Article III standing. In such cases, the defendant business typically files a dispositive motion claiming that the plaintiff failed to satisfy Article III standing requirements due to the lack of an immediate threat of future injury based on three factors: plaintiff's connection with the defendant business, the type of information that is inaccessible, and the relationship between the inaccessible information and plaintiff's alleged future harm. The availability of such a defense is extremely fact specific, and while it may be a meritorious defense in certain cases, especially involving "testers," this is a short term solution at best since it does not address the underlying issue of the website's alleged inaccessibility. Thus, while businesses may want to raise such defenses to allow them additional time to get their websites and apps into compliance, working with professionals to improve the accessibility of all content is the best practice.

CONCLUSION

Currently, any business with a website or app displaying content that is not equally accessible to individuals with disabilities using adaptive technology is vulnerable to ADA website accessibility litigation. Website accessibility lawsuits are extremely daunting due to plaintiffs' potential for attorneys' fees awards and the threat of multiple, repeat lawsuits. While some businesses have successfully defended against these types of claims, the future of these lawsuits remains ominous and daunting for businesses navigating in the absence of legislative intervention and clear guidance for compliance.

Businesses have some flexibility in implementing accessibility measures. The best practice is to work with website accessibility professionals to satisfy WCAG 2.0/2.1 AA success criteria to ensure businesses' websites and apps can be accessed and enjoyed by audiences with disabilities.

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Not losing it in translation

HANDLING CROSS-BORDER LITIGATION

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Representing a U.S. entity in litigation in a foreign jurisdiction, i.e., cross-border, presents various nuances and challenges beyond the substance and facts of the dispute itself. Over the past several years, we have represented a U.S. company in related toxic tort matters around the globe. This article will share some observations and perspective from that experience.

Challenges of course arise from the differing procedures encountered. The process employed in the U.S. courts is considerably different from the process employed in civil law jurisdictions (e.g., European Union nations except the United Kingdom, Ireland and Cyprus, South Korea, Japan, etc.). First and foremost, a civil law tribunal does not ultimately try a matter before a jury with live testimony; rather, the judges decide on the parties' written submissions. Accordingly, the other litigation basics – discovery, motion practice, evidentiary standards, use of experts, etc. – are different.

But, another area of nuance and challenge relates to what is lost in translation, both literally and figuratively. As a very practical matter, engaging a top-notch translator is imperative (as is making sure to budget for such costs, which might not be insignificant, particularly insofar as verbatim translations are done, as is frequently the case). The figurative nuance and challenge in cross-border litigation arises out of how to replicate or adapt a U.S. strategy in the foreign forum. This requires good collaboration with cross-border counsel, balancing U.S. tactics with the local practice.

JURISDICTION, *FORUM NON CONVENIENS* AND RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

The challenges in litigating a cross-border action should not be overlooked at the very outset of a dispute, when a party considers if and where to appear. For example, a case involving claims of toxic exposure in a foreign country might be brought against a U.S. company operating there, or those foreign plaintiffs might sue in their own country. In the former circumstance, the initial reaction might be to seek dismissal based on *forum non conveniens* grounds,

since the acts and witnesses are located in the foreign jurisdiction, thereby avoiding U.S. procedure allowing for a class or coordinated mass action and the common risks of a runaway jury award. In the latter scenario, the initial notion might be to simply default, relying on a lack of personal jurisdiction.

A *forum non conveniens* transfer needs to be considered carefully under the idiom, "be careful what you wish for." An extreme example of this might be the protracted dispute involving Ecuadorian pollution claims against Chevron, which, after transfer to Ecuador, resulted in a multi-billion dollar judgment (and ensuing years of litigation over its legitimacy in multiple venues, including findings of fraud in the U.S. courts). A party needs to assess how the foreign litigation might compare with a U.S. litigation; among other things, the evidentiary standards are likely to be more lax, *Daubert* safeguards will not exist, there will be little discovery, etc. The decision is not necessarily as open-and-shut as it might initially appear.

"Recognition and enforcement" of a judgment ultimately rendered is another contingency implicated in the decision regarding where to appear in a cross-border dispute. In contrast to "the full faith and credit" afforded to judgments of one state in another state, which allows for their enforcement against assets present in the other state, for a foreign country judgment to be enforceable, it first must be "recognized" as valid. Based on international comity, the laws and courts tend to favor recognition of foreign country judgments, although a foreign country judgment may be denied recognition on grounds such repugnancy to the public policy (e.g., a foreign defamation judgment being repugnant to Free Speech rights), or lack of due process. But the judgment debtor faces a high burden in resisting recognition.

Deciding where to appear in a cross-border dispute must include consideration of the recognition and enforcement scenarios, including possible grounds for non-recognition and where the party has assets its adversary might attempt to seize to satisfy a judgment. The latter element comes into play because recognition of foreign country judgments is a matter of state law and there is some variation among the states, which utilize some version of either a 1962 or 2005 uniform act, or rely on common law principles of international comity in some states. Note that the 2005 uniform act provides a less burdensome "due process" challenge in that it allows for a challenge based on the process in the particular proceeding in which the judgment was rendered, whereas the 1962 version required a showing of a systemwide lack of due process. So, if an anticipated recognition venue is governed by the 2005 uniform act, a due process challenge could be viable, but one will need to make a record in the foreign proceedings to show where due process was deprived.

LITIGATING UNDER FOREIGN RULES

Needless to say, the process and rules in a foreign venue will be different from the U.S. courts; it will be important to gain an understanding of these as early as possible as part of the decision-making as to which forum to seek and to plot out strategy and tactics for the case. Comparing U.S. and civil law litigation as an example, the following are key areas of distinction.

Submission on papers. In a civil law jurisdiction, the case will be submitted on the papers. There will not be a trial with live testimony before a jury. There may be an oral argument before the panel of judges, but this will typically not involve live testimony and the parties will be limited to the arguments and evidence presented in their papers. Corresponding to the lack of live testimony, foreign courts tend to prefer documentary and objective evidence.

Unlike the typical opening/opposition/reply briefing sequence under U.S. procedure, in a civil law system, the parties proceed by exchanging multiple rounds of briefs until the parties and/or the court determine that the briefing is sufficient and should be closed. Because of limits on discovery, this briefing might become a bit of cat-and-mouse, as one might limit their own evidence to avoid disclosing documents that otherwise might not be revealed.

Lack of discovery and lax evidentiary standards. Unlike the U.S. system, in a civil law jurisdiction, discovery is limited and available only by consent or the court's permission. A request for discovery needs to be tailored to specific, identified pieces of evidence. Given the lack of live trial testimony, depositions are generally unavailable.

Inasmuch as, again, a matter is not tried before a jury in a civil law jurisdiction, one is likely to encounter relatively lax evidentiary standards and the introduction of all sorts of material; for example, we have seen newspaper articles and books submitted as exhibits. Perhaps compare this circumstance to a bench trial where a judge will accept exhibits and reserve on their admissibility and weight.

The confluence of these two factors presents a double-edged sword. On one hand, a party is less likely to be compelled to produce documents and evidence and will avoid large-scale disclosures. On the other hand, a party will not know the extent and content of the adversary's evidence and needs to consider anything and everything as fair game. It is important to remain vigilant and apprised of the universe of material pertinent to your case, including public sources of documents.

Expert and scientific testimony. The matter of expert testimony also differs. A major difference from the U.S. system, which typically involves competing expert testimony presented to the fact finder, is a civil law court's reliance on a court-appointed expert to report to the court on technical issues. A party might submit expert testimony as part of its case (and its expert might argue before the court-appointed expert), but in the context of strategy for party experts, it would seem preferable to rely as much as possible on objective, peer-reviewed literature and on academic experts rather than consultant experts. To the extent feasible, even if one has an existing roster or expert team, one should consider retaining experts in the jurisdiction. As with the evidentiary scheme noted above, there is generally no standalone *Daubert*-type challenge to expert testimony; rather, such arguments are wrapped into a party's other arguments.

A goal in handling most cross-border litigation will be to replicate or adapt a U.S. litigation strategy to ensure that the client's case is presented as fully as possible. This will inevitably involve some give-and-take with your cross-border counsel, that is, after being told, "that's not the way it's done here." While the local rules will sometimes be stretched (or bent), it is important to keep in mind the need to protect the "due process" record for recognition and enforcement by making requests, even if they are to be denied. Striking an appropriate balance between the competing systems, in collaboration with cross-border counsel, are key to handing cross-border litigation.

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A HARD ROAD TO TOLL

Imposing vicarious liability against non-motor carriers under the Federal Motor Carrier Safety Regulations

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Holding other parties liable for the acts of truck drivers remains a battleground issue in truck accident cases. Particularly in catastrophic truck accident cases, plaintiffs often just do not sue the truck driver and the motor carrier. Instead, brokers, shippers, third-party logistics providers, equipment owners and others often face claims for agency (*respondeat superior*), joint enterprise, negligent selection of independent contractors, statutory employment, etc. The sometimes enmeshed business relationships between these types of parties in truck accident case opens the door for plaintiffs to pursue these types of claims.

Plaintiffs often utilize federal law, including the Federal Motor Carrier Safety Regulations (FMCSR), as a linchpin to establish vicarious liability in these cases. It is well recognized that plaintiffs can try to establish a "statutory employment" relationship between the motor carrier and independent contractor drivers under Part 376 of the FMCSR. A more recent trend, however, is plaintiffs attempts to use the broad definitions of "motor carrier," "employer" or "employee" under 49 C.F.R. § 390.5 to attempt to impose "statutory employment" liability upon brokers, shippers, equipment owners and others. To date, courts have correctly rejected this wrong-headed theory of liability.

DEFENDING AGAINST VICARIOUS LIABILITY BROUGHT UNDER THE BROAD DEFINITIONS OF 49 C.F.R. § 390.5

At issue, § 390.5 has broad definitions, in pertinent part, for the following:

> • "Employer" means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it . . . .
> • "Employee" means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler . . . .
> • "Motor carrier" means a "for-hire motor carrier" or a "private motor carrier." The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, this definition includes the terms "employer," and exempt motor carrier.
> • "Person" means any individual, partnership, association, corporation, business trust, or any other organized group of individuals.

Plaintiffs try to argue that many types of transportation companies can qualify as a "motor carrier" and "employer" under these definitions even though, for example, the transportation company may not own or lease the commercial motor vehicle involved in the accident, may not have exercised any motor carrier operating authority at the time of an accident, or may not have been actually involved in the transportation of property or passengers at the time of an accident. Based on these broad definitions, entities like brokers, shippers, equipment owners and others face claims that they are liable for the actions of a driver as a statutory employee.

Nevertheless, where there is no lease between the alleged "employer" and "employee", courts have been reluctant to find a statutory employment relationship under the broad definitions of § 390.5. For instance, in *Crocker v. Morales-Santana*[1], the Supreme Court of North Dakota found that Werner Enterprises was not a motor carrier at the time of the accident, in part because Werner had no lease agreement with the driver and, instead, merely owned the trailer and acted as a broker for the load at issue. By its terms, §390.5 defines "employer" to mean "any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it." 49 C.F.R. § 390.5. As such, courts have generally found §390.5 to be inapplicable where the alleged "employer" neither owned or leased the commercial motor vehicle involved, nor assigned a driver to operate it.

Several courts have also adopted a "plain language" interpretation of § 390.5 to hold that a registered motor carrier that is an employer of an individual driver of a commercial motor vehicle cannot be a statutory employee of another registered motor carrier. The courts' analysis in these cases focuses largely on the term "individual" in holding that a corporation or other legal person cannot fit the definition of "employee" which is limited to "individuals." In *Brown v. Truck Connections Intern., Inc.*[2], the Arkansas District Court explained:

> By using a different term to define employer, the language of the regulation itself indicates that in this instance, "individual" and "person" are not synonymous, which further indicates that here, "individual" does refer to human beings and not to corporations or other legal persons.

Thus, a corporate entity is not an "individual" and cannot be an "employee" under the plain meaning of "employee" in § 390.5.

Further, numerous courts have found that it is not enough that an alleged "employer" might meet the definition of "motor carrier" under § 390.5, holding that there must be something more to establish the statutory employment relationship. Specifically, courts have looked at whether the transportation company was "exercising" its motor carrier operating authority at the time of the accident. If not, then vicarious liability is not possible under § 390.5.

In S*chramm v. Foster*[3], a 2004 decision from the United States District Court for the District of Maryland, the court determined that the negligent driver did not meet the § 390.5 definition of "employee" because the plaintiffs had failed to establish the broker in fact acted as a "motor carrier" in the specific transaction at issue. The court held that the critical inquiry must be the transportation company's role in the specific transaction, and not whether the entity simply had motor carrier operating authority.

Moreover, in *Camp v. TNT Logistics Corp.*[4], the Seventh Circuit Court of Appeals held that in order to satisfy the requirements of § 390.5, the company must have been "engaged in the actual movement" of property or passengers at the time of the accident, and not merely have provided "services related to the movement." In *Camp*, the defendant, TNT Logistics, had entered into a contract with a third-party, which provided that the third-party (and not TNT) was responsible for supplying the truck, driver and associated equipment for the movement of the cargo. In the court's eyes there was no question that the third-party provided the services that moved the cargo in question, preventing a finding of liability against TNT.

The Ninth Circuit Court of Appeals reached a similar result in *Alaubali v. Rite Aid Corp.*[5], rejecting plaintiff's attempt to hold Rite Aid, a shipper and trailer owner, liable for negligently entrusting its trailers to a driver employed by another motor carrier who was hired by Rite Aid because the third-party ultimately controlled the execution of the transportation services at issue in the case.

The Supreme Court of Nebraska recently considered this issue in *Sparks v. M&D Trucking*[6], and found the fact that the supposed statutory employer did not have "exclusive control" over the driver and his equipment central to its finding that the defendant was not a "motor carrier" of the load at issue.

Noteworthy, the Moving Ahead for Progress in the 21st Century Act passed by Congress in 2012, now requires motor carriers, freight forwarders, freight brokers, and the shipper customers of each to use written contracts specifying "the authority under which the person is providing such transportation or service." 49 U.S.C. § 13901. The purpose of the law is to require each party to a transportation agreement to specify what hat they are wearing in the transaction. Ideally, this should help clarify what role each party to the transaction is playing thereby avoiding confusion and potential vicarious liability.

CONCLUSION

Undoubtedly, plaintiffs are always looking for new ways to impose liability. Utilizing the broad definitions under § 390.5 is a path that plaintiffs often try to use, but which can be defeated under the right set of facts. If you face a claim involving the broad definitions under § 390.5 and happen to represent an entity that is not a clear employer of the driver, then a careful review of recent cases involving the definitions under § 390.5 is most certainly warranted.

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1 854 N.W.2d 663 (N.D. 2014)
2 526 F.Supp.2d 920 (E.D. Ark. 2007)
3 341 F.Supp.2d 536 (D. Md. 2004)
4 553 F.3d 502 (7th Cir. 2009)
5 320 Fed. Appx. 765 (9th Cir. 2009)
6 921 N.W.2d 110 (Neb. 2018)

SHIELDING PATIENTS FROM SOCIAL MEDIA

How Healthcare Facilities Can Protect Patient Privacy and Limit Liability

Morgan E. Villers Flaherty Sensabaugh Bonasso PLLC

The majority of Americans have a smartphone. And now, more than ever, they are using their smartphones to take photos and videos of everyday interactions that can easily and quickly be disseminated. As these devices have become more ubiquitous and social media more prevalent, the threat they pose to patient privacy has increased. There is now a much higher risk of the distribution of patient photos and videos that could violate patient privacy, and healthcare facilities should take note.

Under the Health Insurance Portability and Accountability Act (HIPAA), healthcare providers must "reasonably safeguard protected health information from any intentional or unintentional use or disclosure."[1] HIPAA protects patients from disclosure of information through which the patient could be identified, which includes photos and videos. While HIPAA only regulates the actions of a healthcare facility and its workforce (not the actions of patients or visitors), facilities should take measures to protect themselves from claims that they negligently permitted third parties to capture photos/videos of patients within the facility's care. Therefore, healthcare facilities should strongly consider adopting and enforcing policies that limit visitors' and patients' ability to photograph or record other patients. Such reasonable measures to protect patient privacy would aid in defense of the facility and its workforce should a claim ever be brought by a patient who was photographed or recorded without consent.

THE PROBLEM

There are often moments family members and visitors may want to capture within a healthcare facility, like births and victories

[1] 45 C.F.R. § 164.530.

in overcoming illness. More often now, with the advent of social media, some will even document the progress of their loved one throughout a hospital stay for their social media followers. However, anyone who has been in a hospital knows the close quarters which patients and visitors can sometimes find themselves in. Patients may be placed in shared rooms or may be seen waiting in hallways or moving about the hospital. If a camera-wielder isn't careful, they may inadvertently capture another patient in the background who did not consent to be in the picture or video. Or the photographer could have malicious intentions, deliberately photographing a patient they don't know without consent. Patients may be particularly vulnerable to falling victim to such violations of privacy, depending on their state of consciousness.

Most facilities likely have policies in place to regulate their workforce's use of cell phones while caring for patients. Health care providers are familiar with HIPAA and know that they must not violate patient privacy. However, many facilities may not have a policy in place for regulating the photographs and videos that may be taken by patients or their visitors. As such a scenario does not present a traditional HIPAA breach, some facilities may not have appreciated the risk and taken steps to manage it. Facilities may also feel that smartphone use is rampant, hard to detect, and therefore uncontrollable. However, the key to risk management here is for a facility to make reasonably diligent efforts to protect patient privacy. Therefore, establishing a policy limiting photo/video taking and making the rules clear to providers, patients, and visitors alike is a valuable step a facility can take in reducing its exposure.

ADDRESSING THE PROBLEM WITH TARGETED AND PRACTICAL POLICIES

Some healthcare facilities have been proactive in addressing the risk posed by smartphones and have policies in place. Facilities have taken different approaches to the issue. Some facilities have instituted an outright ban on photographs and videos, while others allow them to be taken in certain circumstances, with varying degrees of limitation.

While a complete ban would theoretically provide the most protection to healthcare providers and patient privacy, logistically, such a ban would be difficult to enforce across an entire facility at all hours. As smartphone use is so pervasive, a complete ban would likely be violated. If the facility's policy is routinely violated, it could defeat the argument that reasonable measures were taken to enforce the policy and protect patient privacy.

Therefore, a better approach might be to place more reasonable and practical limitations on photography and video recording in the facility. The outlines of the policy would likely depend on the subject of the photo/video, the relationship between the subject and the photographer, and the location where it is being taken. Where a photo or video is being taken by visitors who are family or friends of the patient, and no other patients or patient information are visible, a patient's consent should be sufficient. However, where the photo/video would involve a patient whom the photographer does not know, consent from the patient and/or facility should be obtained.

The need to prevent potential obstacles to the provision of patient care may be a good reason to prohibit photo/video capturing in areas with unstable patients, such as the Emergency Room and the Intensive Care Unit. A common location for the issue to arise is in the labor and delivery room. A good compromise may be only to prohibit photo/video recording during the delivery, so as not to interfere with the provision of care or create a potential risk to the health of the mother and baby. Another idea may be to limit photo and video capturing to patient rooms. This could be a particularly strong policy in facilities where patients are placed in private rooms.

It is also important to include that a health care provider may, at his or her discretion, prohibit photographs and videos of the patient. This will provide the flexibility for a patient's provider to make sure there is no interference with the patient's care in any given circumstance.

ENFORCEMENT

Having a policy in place does not protect if it is not reasonably enforced. The first step to successful enforcement must be making patients, visitors, and the facility's workforce aware of the policy and its restrictions. The workforce must be aware of the policy's guidelines so that they can recognize a violation and step in to protect patient privacy. Of course, employees can't be all-knowing, but they must be expected to intervene where they see or suspect that the policy has been or is about to be violated. Patients should be made aware of the policy upon admission and that they and their visitors will not have unlimited ability to use their cameras, as they may not invade another patient's privacy. As for visitors, the most effective way to enforce the policy would likely be through prominently displayed signs that outline the highlights of the policy in visitor/patient areas, along with posting the information on the facility's website.

DAMAGE CONTROL

Often, by the time a violation is realized, the photograph or video will have already been taken. Even with diligent observation from providers and employees and reasonable efforts to preemptively enforce the policy, the chances are that some unauthorized photos or videos will still be taken. Therefore, a comprehensive policy should lay out a procedure for facility employees to follow when they become aware that an unauthorized photograph or video has been taken. Rapid response is critical, as the content can be quickly disseminated across social media beyond repair.

The first step, of course, would be to politely ask the camera-wielder to stop using the camera and to delete any photos or videos they may have taken in violation of the policy. It is also important to inquire whether any such content has been posted to a social media account or placed in cloud storage, as the photo/video would need to be deleted from those locations as well. If the individual refuses to cease taking the photos/video, there should be a procedure in place for notifying security and seeing that the individual is removed from the facility if necessary (assuming the culprit is not a patient in need of care and treatment). Once again, the policy should only call for reasonable steps to be taken—the facility cannot commandeer an individual's personal property to delete unauthorized photos/videos. Additionally, where it is discovered that an unauthorized photo or video of a patient has been taken, the occurrence and any steps taken to try to rectify it should be documented in the patient's medical record.

While healthcare facilities cannot eradicate the threat to patient privacy that smartphones and social media pose, formulating and implementing a policy that provides reasonable protections is something facilities can do to diminish their risk of future liability for the unauthorized photographing or recording of non-consenting patients.

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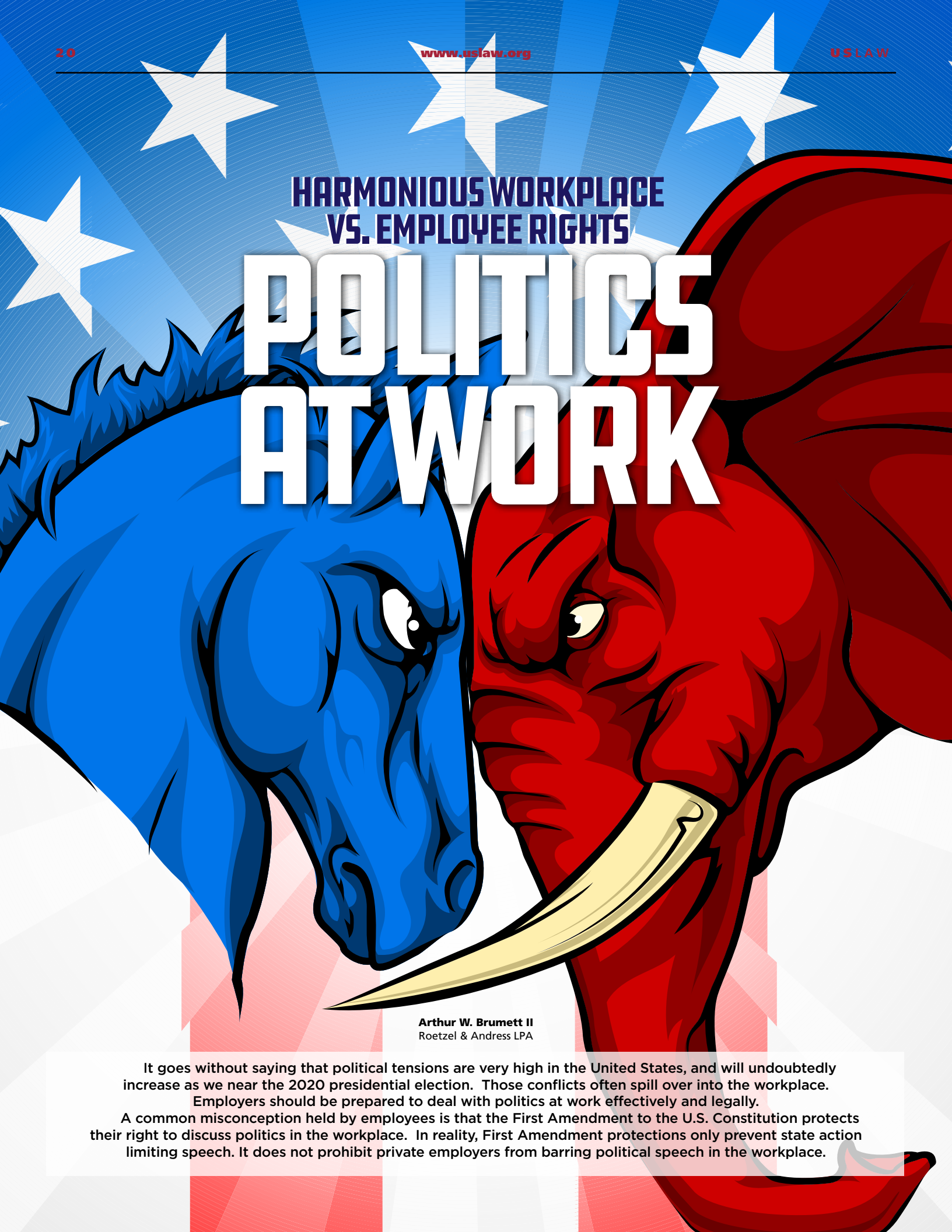
[1] 45 C.F.R. § 164.530.

HARMONIOUS WORKPLACE VS. EMPLOYEE RIGHTS

POLITICS AT WORK



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It goes without saying that political tensions are very high in the United States, and will undoubtedly increase as we near the 2020 presidential election. Those conflicts often spill over into the workplace. Employers should be prepared to deal with politics at work effectively and legally.

A common misconception held by employees is that the First Amendment to the U.S. Constitution protects their right to discuss politics in the workplace. In reality, First Amendment protections only prevent state action limiting speech. It does not prohibit private employers from barring political speech in the workplace.

Similarly, there are no federal laws protecting employees from political discrimination or harassment. For example, while Title VII lists several protected characteristics of employees such as race, religion, age disability, and gender, it does not include political views.

NLRA CONSIDERATIONS

With that said, private employers should not believe they have free rein to bar all political speech from the workplace, nor to coerce employees into supporting a certain political view. The first consideration is the National Labor Relations Act. The NLRA protects employees' ability to engage in concerted activity for their mutual aid and protection. It also generally allows employees to discuss, and even complain, about the terms and conditions of their employment. This has been interpreted to protect political speech reasonably relating to union activities or otherwise affecting employment. This portion of the NLRA applies to both union and non-union employers. It is important for employers to differentiate between general political speech and union-related speech.

CAREFUL TO NOT RUN AFOUL OF NLRA

Several common employer policies limiting speech can run afoul of the NLRA. Neutral dress codes prohibiting employees from wearing buttons, hats, or t-shirts regardless of the content are generally permitted. However, a badge or button with a political message related to union interests likely must be permitted unless it creates a safety hazard or impacts another legitimate business interest. Non-solicitation policies prohibiting political campaigning, posters, signs, or fundraising are generally permissible, as long as the policy is neutral to all forms of solicitation such as selling girl scout cookies or school fundraisers. But again, the NLRA protects employees' discussion of the terms and conditions of employment which could include union-related solicitations. In addition, under a new December 2019 NLRB ruling, employers may now limit the use of company equipment, computers and email to business purposes only and prohibit their use for political speech. This highlights the need for employers to stay updated on changes in the law that could cause a need to revise handbook policies.

Federal law does allow employers some ability to ask certain administrative and executive employees who have policymaking, managerial, professional or supervisor responsibilities to vote for or against a particular political candidate. This does not extend to rank and file employees. It is further limited by laws in nearly all states making it illegal to coerce, unduly influence, or threaten employees to support or oppose certain political candidates or ballot issues. The vast majority of states also require employers to provide employees with time off to vote, and each state's law varies in the amount of time off and whether it is paid or unpaid. The penalties to employers in each state for violating voting laws range from fines to the potential loss of the company's corporate charter.

A COMMON MISCONCEPTION HELD BY EMPLOYEES IS THAT THE FIRST AMENDMENT TO THE U.S. CONSTITUTION PROTECTS THEIR RIGHT TO DISCUSS POLITICS IN THE WORKPLACE. IN REALITY, FIRST AMENDMENT PROTECTIONS ONLY PREVENT STATE ACTION LIMITING SPEECH.

OFF-DUTY CONDUCT LAWS

Several states have so-called "off duty conduct laws," which generally protect employees from adverse employment action for engaging in legal activities outside the workplace. The language, scope and content of the laws vary state-by-state, and potentially include political activities during non-work hours. Employers should review the law in each state when formulating company policies touching upon conduct outside the workplace. Social media policies are an example. Such policies often prohibit a myriad of off-duty conduct, and can violate state laws if not carefully crafted. The NLRA may also be violated if the prohibition could reasonably include speech protected under that Act.

Employers can still protect the workplace from disruption due to political tensions while successfully traversing the minefield of federal and state laws. Well-written handbook policies prohibiting discrimination against employees for reasons protected by Title VII or analogous state laws can allow for discipline or termination if violated. For example, a supervisor saying to employees "I would never vote for a woman for President" could be viewed as evidence of a hostile, discriminatory attitude towards women. Anti-harassment policies are also helpful. If an employee repeatedly tells a co-worker that people of a certain race/religion/gender should not hold political office, that conduct could rise to the level of being "severe and pervasive" and violate federal and state harassment laws. Anti-bullying/workplace violence policies can provide a remedy when political discussions between employees result in intimidation, threats, or outright violence. These types of issues can also be addressed in social media policies prohibiting discriminatory, harassing, or intimidating conduct online.

Now is the perfect time for employers to review workplace policies and enforcement procedures in preparation for the upcoming election season. Engaging experienced labor and employment counsel is essential to that process.

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FOUR WAYS TO BEAT THE H-1B LOTTERY BLUES

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Every year around this time businesses and their foreign employees are subjected to the H-1B lottery. There are 65,000 new H-1B visas available each year for professional employees with at least a bachelor's degree, plus an additional 20,000 for those with a master's degree or higher. In 2019, the Immigration Service received 201,011 applications within the first week of the opening of the H-1B lottery, randomly selecting 85,000 winners from this pool of applicants. Applications for the 2020 lottery are expected to increase due to the backlog of green cards for extremely highly skilled employees (like multinational executives, accomplished scientists, and others) from China and India, whose employers are now stuck with the random selection of the H-1B lottery in order to keep their talented workers in the U.S.

Employees who are randomly selected

in the H-1B lottery can get up to six years of work authorization with their employers and normally have a direct path to a future green card. Those not selected in the lottery may not have alternative means to get work authorization, which is a serious concern for both the employees trying to advance their careers in the U.S. and their employers trying to retain these talented professionals and fill critical workforce gaps.

Historically, since 1990, the Immigration Service accepted applications for the H-1B lottery starting on April 1 each year. Often it would take until as late as August to find out if an employee was selected or rejected in the lottery. This year, for the first time, the Immigration Service will open the lottery one month earlier, on March 1, 2020, indicating that it intends to conduct the lottery and notify applicants by March 31, 2020. While this new accelerated timeline will give employers of lottery winners more advanced notice in planning their future workforce needs, it also means that the applicants who did not win one of the coveted 85,000 visas available need to start thinking about alternatives and taking action earlier. So, whether you're an employer, a foreign professional looking to work for a U.S. business, or a recruiter trying to connect the two, before getting the H-1B lottery blues, consider the four options below.

#1: SKIP DIRECTLY TO GREEN CARD

An employer can choose to bypass the H-1B cap entirely by sponsoring an employee for permanent employment authorization (a "green card"). This process takes longer and requires greater commitment from the employer but avoids the uncertainty of the lottery system. Unfortunately, this alternative will not work for employees born in India or China, because they face such long wait times to receive their green cards due to the backlog.

#2: USE AN EXEMPTION

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 non-profit organizations, as well as non-profit research organizations.

Employers who are subject to the cap can take advantage of this by hiring these employees part-time. For example, an IT company could hire a computer scientist currently working at a university in H-1B status for a part-time position at their company without having to go through the cap.

Similarly, a cap-subject employer can place an employee at a cap-exempt entity full time without going through the cap. For example, a physician staffing company could place its physicians at a non-profit university hospital full time, without having to go through the cap.

#3: SPECIAL IMMIGRATION LAWS

There are several one-off provisions that provide for employment authorization for certain employees without having to go through the H-1B cap. For example, employers hiring extraordinarily skilled and accomplished employees with lengthy CVs can use the O-1 visa to get employment authorization for these employees.

Other provisions apply to certain occupations, such as doctors. The Conrad waiver program makes 30 cap-exempt H-1B visas available each year for hospitals and clinics to hire immigrant physicians to work in specified physician shortage areas in each state.

Special provisions based on international treaties (like NAFTA) also exist for employers to hire citizens of Canada, Mexico, Australia, Chile, and Singapore to work in professional positions.

#4: BETTER LUCK NEXT YEAR

In some cases, little can be done except to try again in the 2021 lottery. Employees cannot keep working if they don't have ongoing employment authorization, so many foreign workers will need to find a way to extend their employment authorization if it's expiring before next year's lottery. For example, the two-year STEM OPT extension for employees who recently graduated from a science, technology, engineering, or mathematics university program can give an employee two additional opportunities at the lottery. Extensions for Dreamers (undocumented immigrants who were brought to the United States as children) are still available as of the writing of this article, but may not be around much longer, as the policy granting them employment authorization (known as "DACA") is on the Supreme Court's docket this summer. Likewise, the spouses of employees already in H-1B status are currently able to get extensions of their employment authorization, but this too is on the Immigration Service's regulatory chopping block and currently being litigated.

An employee can also improve the odds by working toward a master's degree and finishing it before the next lottery. As of 2019, the Immigration Service prioritizes H-1B petitions filed for employees with at least a master's degree. But if the prospect of returning to the classroom does not appeal to you, and none of the other options above work, you might get the H-1B lottery blues. In that case your best bet may be to turn on some B.B. King (or, if you prefer something equally good, but never better), sit back, and wait for April 1st.

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FOR WHOM THE STATUTE WILL NOT TOLL: DEFEATING PRODUCT LIABILITY CLAIMS WITH STATUTES OF REPOSE

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INTRODUCTION

Repose is defined as a state of rest or tranquility, and in many states, a Statute of Repose may offer product manufacturers a similar state of rest or tranquility when a plaintiff brings a claim for product defect many years after the product entered the stream of commerce. Not to be confused with Statutes of Limitations, many states, and even the federal government, enacted repose statutes that bar a cause of action for product defect before the action even arises. This article explores the history, function, exceptions, and conflict-of-law considerations to little known repose statutes.

BRIEF HISTORY AND RATIONALE FOR RULE

From the 1960s through 1980s, states began enacting repose statutes and by 1983, nearly half of all state legislatures had adopted one. These statutes were part of the growing tort reform movement in response to the insurance crisis of the 1970s and 1980s. The rationale for these time-limiting statutes was to address the problem of claims for injuries caused by products manufactured in decades past and the evidentiary issues posed once "evidence has been lost, memories have faded, and witnesses have disappeared."[1]

FUNCTION OF THE RULE

Both Statutes of Repose and Statutes of Limitation serve as time-bars. But repose statutes are more venomous because they sever a plaintiff from her claim after a fixed period even if the injury itself happened long after. And while the all-to-familiar grounds for tolling a Statute of Limitation can range from the injury's delayed discovery to the plaintiff's status as an inmate, these are usually inapplicable to statutes of repose. Rather, the grounds for tolling—if even existent—are far more restrictive.

Repose statutes typically fall into two categories: "time-certain" and "useful life." Both start the repose period when the product was bought, sold, or placed into commerce. Each differs, however, on how it defines the repose period.

Useful life statutes are less common and focus on whether the product caused injury after its "useful life" had expired. That question is left to the factfinder, who first determines "useful life" by deliberating the period someone could reasonably expect to use the product safely. In Kansas, for example, a defendant is generally free from product liability if it proves by a preponderance of evidence that the harm happened after "the product would normally be likely to perform or be stored in a safe manner." [2]

"Time certain" statutes offer far more potency because plaintiffs cannot usually file the claim after a fixed period—even if the injury itself failed to timely surface. The length for repose periods ranges from five years to nearly two decades. North Carolina, for example, bars claims alleging a defective product 12 years after its initial purchase.[3] If involving products manufactured within its borders, Oregon offers plaintiff's no more than 10 years to file suit.[4] In 1994, the United States Congress passed the General Aviation Revitalization Act of 1994, which shields small plane and parts manufacturers from liability for products they manufactured 18 years prior. [5]

BE WARY OF EXCEPTIONS TO THE RULE

Some states have exceptions to their repose statute. One example is when a manufacturer intentionally misrepresents or fraudulently conceals a material fact concerning the product, and that conduct was a substantial cause of the claimant's harm. Another example is where the manufacturer itself creates an exception; for example, if it warranties that the product is safe for a longer period than the applicable repose statute. A third type of exception exists in states that only apply their repose statute to strict liability claims. [6]

Another exception in some states occurs if the manufacturer "revives" a plaintiff's claim or recommences the repose statute. In Indiana, if the manufacturer rebuilds, restructures, or reconditions the product to the point of significantly extending its life and rendering it in like-new condition, the repose statute runs from the time the rebuilt product is delivered into the stream of commerce. Likewise, if a manufacturer incorporates a new but defective component into an old product, the repose statute runs at the time the new component is added, and not from the manufacture of the old product.

CONFLICT OF LAW

Even lawyers in jurisdictions without repose statutes should familiarize themselves with the rule because nearly every state has a statute permitting one jurisdiction to adopt the time-limiting statute of another. And since goods increasingly move through multiple jurisdictions before reaching consumers, plaintiffs have more choice than ever where to file suit.

In almost every state, defense bars have used the repose statutes of one state to eliminate claims in another. Traditionally, courts apply their own procedural rules to matters before them, and with most considering Statutes of Limitation to be procedural, a claim barred in its native forum could survive in another simply because it has a more generous time-limiting statute. This situation often entices what is commonly disdained—forum shopping. To limit themselves as potential prospects, most states have enacted "borrowing statutes."

Borrowing statutes vary by jurisdiction but nearly all work the same: a forum looking to the jurisdiction where the cause of action accrued and adopting its time-limiting statute if it will extinguish the claim before it. Little mind is paid to whether the host forum's own procedural rules would save the claim had it arisen in its jurisdiction. In *Wenke v. Gehl Co.,* for example, a plaintiff injured by a baler in Iowa sued its manufacturer in Wisconsin because Iowa's repose statute barred the claim.[7] Wisconsin's did not, but the baler's manufacturer filed for summary judgment anyway based on the state's borrowing statute.[8] It was eventually granted, which the Wisconsin Supreme Court affirmed. [9]

Statutes of Repose may prove fatal even in states with borrowing statutes but no repose statutes themselves. At least one California Appeals Court rejected the notion that the state's borrowing statute was inapplicable to another's repose statute for products simply because California's was inapplicable to products.[10] The court was persuaded in part by a federal court that had applied California law eight years earlier and had concluded the same. [11]

CONCLUSION

The rush to enact repose statutes has died down since 1983, but they remain a potent weapon for product designers and manufacturers to insulate themselves from claims for older products. However, with the modern rise of planned obsolescence and increase in disposable rather than durable goods, the future effectiveness of repose statutes remains to be seen.

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1 *CTS Corp. v. Waldburger*, 573 U.S. 1, 1, 134 S. Ct. 2175, 2178 (2014).
2 K.S.A. § 60-3303.
3 N.C. Gen. Stat. Section 1-46.1.
4 ORS § 30.905.
5 GENERAL AVIATION REVITALIZATION ACT OF 1994, 1994 Enacted S. 1458, 103 Enacted S. 1458, 108 Stat. 1552, 103 P.L. 298, 1994 Enacted S. 1458, 103 Enacted S. 145.
6 *See e.g. Kellogg v. Willy's Motors,* 140 Ariz. 67, 68, 680 P.2d 203, 204 (Ct. App. 1984); *Galvan v. Krueger Int'l, Inc.,* No. 07 C 607, 2011 U.S. Dist. LEXIS 3443, at *7 (N.D. Ill. Jan. 13, 2011); *Dintelman v. All. Mach. Co.,* 117 Ill. App. 3d 344, 344, 72 Ill. Dec. 823, 824, 453 N.E.2d 128, 129 (1983).
7 *Wenke v. Gehl Co.,* 274 Wis.2d 220, 227.
8 *Id.* at 228.
9 *Id.* at 231.
10 *Rash v. Bomatic, Inc.* (Mar. 4, 2005, E034936) ___Cal.App.4th___ [2005 Cal. App. Unpub. LEXIS 1974].)
11 *Rash v. Bomatic, Inc.* (Mar. 4, 2005, E034936) ___Cal.App.4th___ [2005 Cal. App. Unpub. LEXIS 1974, at *16].)

A FRIGHTENING REALITY

Prevention, Preparation, and Defense of Active Shooter Lawsuits

Elizabeth "Betsy" Burgess Carr Allison

Active shooter events have become more common[1] in the U.S., leading to liability lawsuits against business owners where these tragic events occur. There is no obvious pattern as to when or where shootings happen. Targets have included schools, places of worship, military bases, concert venues, movie theaters, conventions, bars, airports, shopping centers, and a yoga studio. Victims have included men, women, and children from all walks of life. Given the random nature of these events, any business owner or employer may one day find itself named in an active shooter lawsuit.[2]

This article examines current theories of liability, how lawsuits are being litigated, measures business owners and employers can take to mitigate risk and defend litigation, and protective insurance coverage options.

TYPES OF ACTIVE SHOOTER LAWSUITS

Negligent Marketing, Security, and Employee Training

The U.S. Department of Homeland Security defines an Active Shooter as "an individual actively engaged in killing or attempting to kill people in a confined and populated area; in most cases, active shooters use firearms(s) and there is no pattern or method to their selection of victims." [3]

Plaintiffs have advanced multiple theories of liability in suits arising from active shootings. Families of victims of the shooting at Sandy Hook Elementary School in 2012 sued a gun manufacturer directly, alleging it marketed the military-style rifle used in that shooting "for use in assaults against human beings." The plaintiffs argued this was an exception to a 2005 law[4] protecting firearms manufacturers from liability for crimes committed by gun purchasers. The Connecticut Supreme Court ruled the suit could proceed, and on appeal the U.S. Supreme Court agreed, rejecting an appeal by the gunmaker.[5]

However, most active shooter lawsuits allege negligent security and planning by the premise's owner. In conventional negligent security lawsuits, liability is premised on the foreseeability of the threat.[6] To determine whether a crime is foreseeable, one looks to the existence of other similar violent incidents in the immediate vicinity.

In some active shooter suits, Courts and juries have applied this reasoning and have ruled in favor of defendants where the shooting deemed unforeseeable. For example, following the Aurora, Colorado, theater shooting in 2012, during which the shooter opened fire in a dark movie theater, the plaintiffs in a state court suit alleged armed guards and a silent alarm could have thwarted the shooting. The defendant argued no security measures would have predicted or stopped the random, carefully premeditated shooting. The case proceeded to trial, where a jury found no liability.

Since then, theories of liability have evolved. These suits now allege that the proliferation of active shooting events put every public accommodation or business owner on notice that a shooting is reasonably foreseeable. Courts are overwhelmingly allowing them to proceed on this basis.

So, what should business owners be doing? Some cases are instructive. In a shooting at a Northern California festival in July 2019, the shooter cut through a fence and opened fire. The Gilroy Garlic Festival Association had security in the form

of metal detectors, bag searches, and police patrols.

In a subsequent lawsuit, plaintiffs alleged the security was inadequate, and that the Association negligently relied on outdated security methods which did not account for modern-day risks. Specifically, festival organizers did not hire adequate numbers of trained security personnel and did not comb the grounds in advance to identify security issues (in this case, a "flimsy" fence).

This case is pending in California, and in fact most lawsuits are pending or quickly settled, providing little case law to guide business owners. However, business owners should be able to show proactive efforts to update security efforts. One way to accomplish this is to consult security experts and implement modernized methods.

Suits also cite negligent employee training, alleging business owners must plan for active shooters by training staff to identify "red flags," such as unusual behavior, clothing, or bags, and react quickly and appropriately. Private security companies provide such training through modules, videos, and interactive in-person sessions, and many large-scale employers have incorporated this training into their standard employee-training efforts. Implementing such training strengthens the defense of a suit based on this theory.

Negligent Hiring and Retention

Negligent hiring and retention theories are raised where an employee is the shooter. In a 2013 navy yard shooting in Washington, D.C. which resulted in 12 deaths, the shooter had told his co-workers he had been hearing voices in his head. The co-workers reported this to the employer. Additionally, the employee had been involved in a previous shooting at his residence where he shot a gun through the ceiling.

The suit focused on the employer's knowledge of this information and failure to notify authorities or act affirmatively to protect co-workers, and the federal judge allowed it to proceed on this basis. The lesson is simple: employers must pay attention to reports suggesting mental instabilities[7] and violent behavior and treat them as legitimate potential threats.

Employee Suits Citing OSHA Violations

An emerging trend is for employees to file complaints with the Occupational Safety & Health Administration (OSHA) after a shooting event. OSHA's general duty clause states employers must have a place free of recognized hazards, and active shooting incidents are considered such a hazard.[8]

There are no specific OSHA standards for prevention of workplace violence. However, OSHA recommends employers develop workplace violence prevention programs and implement administrative controls, such as physical barriers, alarm systems, lighting, staffing, and other implementations to reduce overall risk.[9] To comply, employers must show they undertook efforts to prepare for what is now considered a legitimate threat to all private enterprises.

HOW CASES ARE BEING RESOLVED

Defendants are taking varied approaches when choosing to settle or to defend. As noted, the defendant in the 2012 Aurora, Colorado, movie theater shooting defended the state case through a jury trial and obtained a favorable defense verdict.

However, as shootings have become more common, defendants frequently choose to negotiate settlements. Following the 2017 shooting at a country music festival outside the Mandalay Bay Hotel and Casino, the defendant initially defended the case under a federal law[10] passed after the September 11, 2001, attacks which shielded private entities from liability for "acts of terrorism." However, the Courts never ruled on applicability of the law, and the parties reached a nearly $800 million settlement through mediation.

Factors which appear to influence the strategy are the individual case facts, the threat of bad publicity, and the sense of a changing public attitude with respect to the preventability of such shootings. This phenomenon is demonstrated by high-profile grass-roots campaigns for stricter gun control laws throughout the country.

MOVING FORWARD: WHAT CAN WE LEARN?

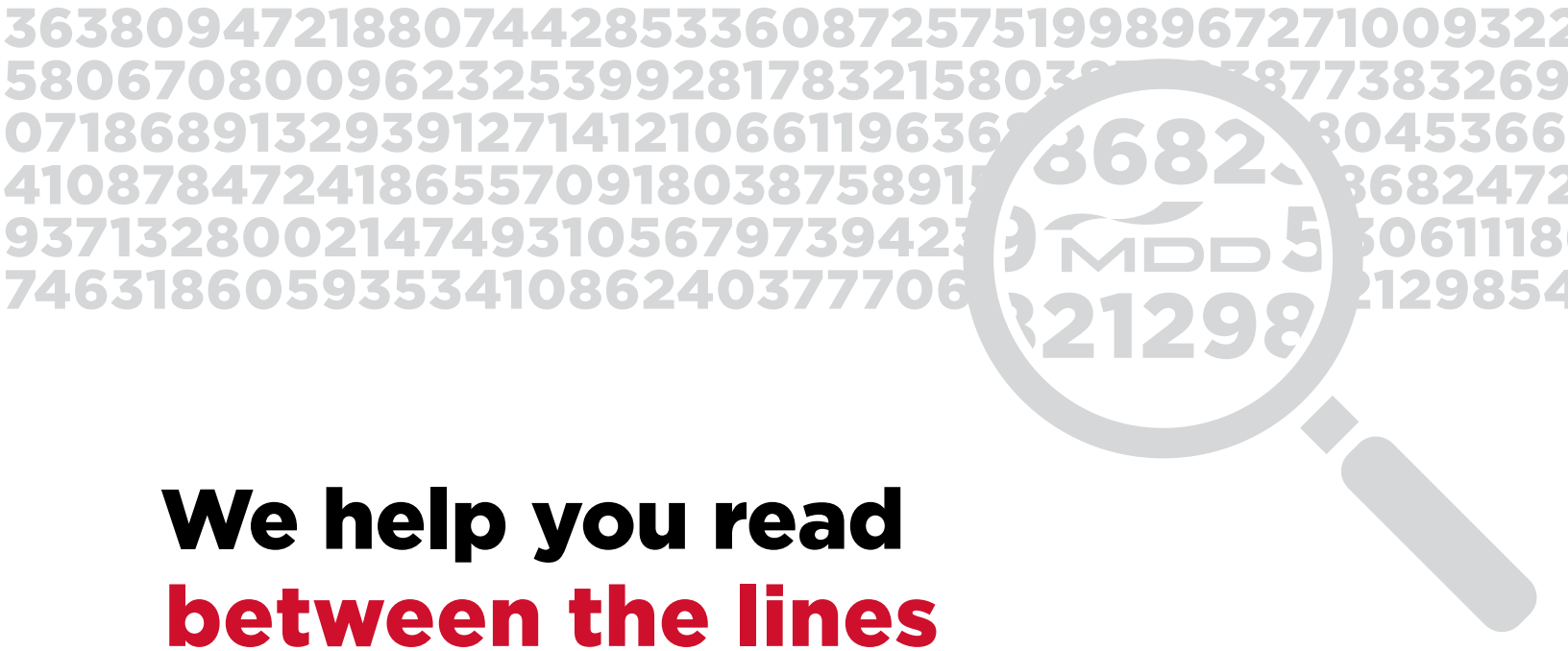
Business owners should examine their existing security plans and look for ways to improve prevention efforts. Even where an attack cannot be prevented altogether, premises owners can reduce risk and create a more defensible position in a lawsuit by taking proactive steps to secure the location. This could include facility upgrades, lighting, additional exits, bulletproof materials, panic buttons, and security vendor contracts. Employee training is also essential, as employees can be trained to recognize and react to potential shooter situations. Training is offered through private vendors and through the U.S. Department of Homeland Security.

Also, business owners and employers should secure appropriate liability insurance coverage. While the probability of an event occurring is low, damage exposure is potentially astronomical. Therefore, business owners should examine their liability policies to ensure coverage is in place. Existing policies may have terrorism exclusions which leave a gap in coverage. Tailored insurance products, such as "active shooter or assailant" policies are now widely available to address such gaps, and provide coverage for counseling for employees, and "loss of attraction" coverage when a shooting causes a loss of revenue because people are no longer coming to the location of the incident. Coverage may also be secured for the cost of upgrading a building and its security, damages to the building, relocation costs, and sometimes the cost of a teardown following an incident.

Courts are receptive to the new theory that all premises owners are on notice of an active shooting, even where a premises owner has no specific basis to believe its business will be targeted. The best defense to this new reality is to diligently assess and improve security features and secure appropriate coverage. While a random shooting may not be preventable, business owners may be able to mitigate risk and reduce liability by being proactive and recognizing the changing risk.

Elizabeth "Betsy" Burgess is a shareholder in the Tallahassee, Florida office of Carr Allison. Betsy focuses on premises, employment practices, and professional liability matters. Betsy has authored numerous articles on timely legal developments in premises and employment liability and enjoys keeping her clients and colleagues apprised of developing legal trends.

1 According to The Violence Project Mass Shooter Database
2 A "mass shooting" was defined by a 2015 Congressional Research Service Report as having four or more victims.
3 https://www.dhs.gov/xlibrary/assets/active_shooter_booklet.pdf
4 The Protection of Lawful Commerce in Arms Act (PLCAA)
5 Remington Arms Co., LLC v. Soto, 2019 U.S. LEXIS 6789
6 Restatement (Second) of Torts.
7 While complying with ADA regulations and state disability laws, which can put employers in a difficult position.
8 https://www.osha.gov/SLTC/emergencypreparedness/gettingstarted_evacuation.html
9 https://www.osha.gov/archive/oshinfo/priorities/violence.html
10 The Support Antiterrorism by Fostering Effective Technologies Act, or Safety Act.



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EXPERTISE BRINGS VALUE

Victoria M. Almeida, senior counsel at **Alder Pollock & Sheehan, P.C.** in Rhode Island, was re-elected Chair of the Board of Directors of Rhode Island Legal Services (RILS). The mission of RILS is to improve the economic and human condition of low-income individuals and families, the elderly, victims of domestic violence, stabilize the family unit and promote self-reliance for its clients.

John Gaughan, a **Barclay Damon LLP** partner in in Buffalo, New York, was recently named president of the Defense Trial Lawyers Association of Western New York.

Baird Holm LLP Partner **Jill Robb Ackerman** has assumed the post of president-elect of the Nebraska State Bar Association, and will serve as president from October 2020 to October 2021 when she succeeds current NSBA President Steven Mattoon.

Richard E. Hall of **Duke Scanlan & Hall PLLC** in Boise, Idaho, received the 2019 Carl Burke Award of Legal Excellence from the Idaho Association of Defense Counsel in recognition of his extraordinary contribution to civil defense practice in Idaho and his distinguished service in the field.

Christopher J. Anderson, of counsel at **Dysart Taylor Cotter McMonigle & Montemore, PC** in Kansas City, Missouri, has been elected to the Kansas City Estate Planning Society's Hall of Fame. Dysart Taylor shareholder **Joe Price** was inducted into the Hall of Fame in 2018.

William M. Toles of **Fee, Smith, Sharp and Vitullo LLP** in Dallas, Texas, was selected as a Trustee for the ABOTA (American Board of Trial Advocates) Foundation. The mission of the ABOTA Foundation is to promote and improve the American civil justice system and to preserve the Seventh Amendment right to civil jury trials for future generations.

Lenny Vitullo of **Fee, Smith, Sharp and Vitullo LLP** in Dallas, Texas, was inducted into the Dallas Chapter of the American Board of Trial Advocates (ABOTA). ABOTA is a national association of trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution. Senior Partners Tom Fee and William Toles are also members of ABOTA.

Flaherty Sensabaugh Bonasso Chief Executive Officer **Michael T. Bumgarner**, CPA, CLM, CGMA, has been named president-elect of the Association of Legal Administrators (ALA) Board of Directors. Mike has been a member of ALA for 17 years and currently serves as the Chair of the Finance Committee for the Board of Directors and is also ALA's Compliance Officer. He was recently selected to become president-elect and will serve in that role for one year, beginning at the ALA Annual Conference in May 2020 before stepping into his role as president at the close of 2021. Mike joined Flaherty in 2002 and was named chief executive officer in 2018.

Albert B. Randall, Jr. of **Franklin & Prokopik** has been inducted into the College of Workers' Compensation Lawyers.

Franklin & Prokopik's **Sarah Lemmert** recently concluded her term as president of the Baltimore Claims Association.

Goodsill Anderson Quinn & Stifel LLP associate **Jennifer Yamanuha** provided expert review of the **Hawai'i Privacy Law Profile** and updated the Risk Environment section for the 2020 Bloomberg Law U.S. State Privacy Profile. Bloomberg Law empowers professionals in government, law, and tax & accounting with expertise, industry knowledge, content, and technology.

Goodsill Anderson Quinn & Stifel LLP partner **David J. Reber** received the Hawaii State Bar Association's **2019 C. Frederick Schutte Award** for his outstanding and meritorious service to the legal community and the profession.

Kristina D. Lawson of **Hanson Bridgett LLP** in San Francisco has been elected to serve as the firm's next managing partner. Lawson becomes the first woman to lead the firm in its more than 60-year history.

Heather Rosing of **Klinedinst** was selected by *The Daily Transcript* as one San Diego's Most Influential Women. She was recognized for her work as the very first president of the California Lawyers Association. The Influential Women showcases the most talented, innovative and hard-working women in San Diego County.

For the 2019 holiday season, **Klinedinst** was proud to serve as a **National Corporate Donor** for Toys for Tots. This marks the 10th consecutive year that the firm has stepped up to serve as a major donor for the organization.

Klinedinst Shareholder **David M. Majchrzak** has officially become the Treasurer of the San Diego County Bar Association (SDCBA). Established in 1899, the SDCBA has over 9,000 members and serves the public and the legal profession by promoting justice, inclusivity, professional excellence, and respect for the law.

Roetzel & Andress attorney **Leighann K. Fink** has been appointed as a member of the Board on the Unauthorized Practice of Law of the Supreme Court of Ohio. She will serve a three-year term beginning January 1, 2020, and ending December 31, 2022. The Board, comprised of 13 members, conducts hearings, preserves the record and makes findings and recommendations to the Supreme Court in cases involving the alleged unauthorized practice of law.

Jonathan Cornthwaite, who has been a partner at **Wedlake Bell LLP** in England for the past 30 years, has been awarded a doctorate by the University of Roehampton. The subject of Dr Cornthwaite's thesis was the impact of the internet on United Kingdom intellectual property jurisprudence (including in particular copyright and trademark law) during the period from 1997 to 2018.

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FACES of USLAW

USLAW NETWORK congratulates Stephanie Fisher, director of risk management and insurance at Quanta Services Inc. and a longtime supporter of USLAW, on her graduation from Pepperdine Caruso School of Law with a Master of Legal Studies.

Modrall Sperling's **Tomas Garcia** sworn-in as State Bar of New Mexico Board of Bar Commissioner

Lewis Roca
ROTHGERBER CHRISTIE

The Denver office of **Lewis Roca Rothgerber Christie LLP** supported the 2019 Golden Senior Santa. Through the efforts of the firm and several other local companies, the charity was able to provide gifts and gift cards to more than 100 seniors. Seniors Resource Center helps seniors continue to live in their homes by having personal care providers visit and also offers daily activities in their center. Lewis Roca staff also provided gifts to residents of a subsidized senior apartment building, where they had the chance to deliver the gifts in person at a holiday party. This year, we had a group of about 15 elves, including several children who handed a gift to each senior at the party, and then went door-to-door to deliver the others.

Bob Brooks of **Alder Pollock & Sheehan, P.C.** in Rhode Island received the President's Award at the 2019 RI Hospitality Association's Stars of the Industry event which recognizes shining stars in the restaurant and hospitality industries. Bob has been representing the RI Hospitality Association for more than 15 years.

MIDDLETON REUTLINGER® ATTORNEYS

Middleton Reutlinger, a Louisville, Kentucky-based firm, has been named USLAW's newest member firm representing Kentucky (middletonlaw.com).

AMETROS

Ametros, the largest professional administration expert in the industry, has been named USLAW NETWORK's official future medical fund management partner. For more information, visit ametros.com.

Paul Majkowski of **Rivkin Radler LLP** in Uniondale, New York, serves as the Lymphoma Research Foundation's Northeast Regional Leadership Council Chair, and is a past president of the Foundation's New York City chapter and a co-founder of the Long Island chapter. In support of these roles, Paul participated in the Lymphoma Research Foundation's North American Education Forum on Lymphoma, the most comprehensive lymphoma-specific educational conference in North America. This annual program provides critical information on treatment options, patient support issues, clinical trials and the latest advances in lymphoma research to people with lymphoma and their loved ones. Paul participated as one of the Foundation's Ambassadors and was featured in the Forum's opening video.

USLAW goes back to school. As a follow-up to the inaugural 2019 USLAW NETWORK Recruitment Forum at Howard University School of Law in Washington, D.C, the USLAW Diversity Council Leadership and Howard University have agreed co-host a 2020 Recruitment Forum. As of press time the date was still being finalized. In addition to conducting interviews, USLAW will lead a half-day educational program for the students focusing on business development. USLAW also is creating a 501(c)(3) foundation to create a scholarship fund to be awarded to a diversity candidate. A quick note about the 2019 Forum - of the 15 firms participating, five firms hired clerks for summer 2020.

Arizona-member firm **Jones, Skelton & Hochuli** (JSH) gave back to their community in a big way 2019. Through several fundraising events, the JSH Charity Committee raised more than $22,000 to sustain its philanthropic endeavors. JSH lawyers and staff generously supported the Committee's efforts through in-house events and activities, including a Silent Auction, Back-to-School Drive and Gift Card Raffle. Committee members include: Jennifer Bernardo (legal secretary), Ruby Castro (hospitality clerk), Maddy Garcia (legal support clerk), Mike Hensley (partner), Kelli Huddleston (legal secretary), Lina Lujan (legal support coordinator), Joseph Popolizio (partner), Lori Voepel (partner), and Anna Walp (director of marketing & business development).

For the 2019 holiday season, **Klinedinst** was proud to serve as a **National Corporate Donor for Toys for Tots**. This marks the 10th consecutive year that the firm has stepped up to serve as a major donor for the organization.

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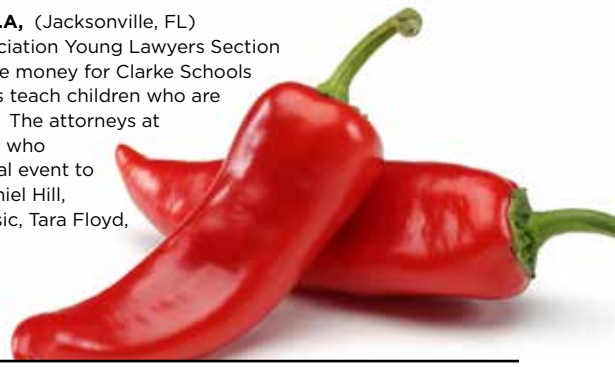
TOYS FOR TOTS

Wicker, Smith, O'Hara, McCoy & Ford, P.A, (Jacksonville, FL) participated in the Jacksonville Bar Association Young Lawyers Section annual Charity Chili Cook-Off to help raise money for Clarke Schools for Hearing and Speech, whose programs teach children who are deaf or hard of hearing to listen and talk. The attorneys at Wicker Smith joined other local law firms who competed and raised money in this annual event to support a worthy cause. Pictured l-r: Daniel Hill, Devon Hill, Catherine Higgins, Natasa Glisic, Tara Floyd, Eric Whitaker and Holly Howanitz.



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RECENT USLAW LAW FIRM VERDICTS

Flaherty Sensabaugh Bonasso PLLC (Charleston, WV)

The Supreme Court of Appeals of West Virginia (WVSCA) recently affirmed an order of the Circuit Court of Raleigh County, granting the defendant physician summary judgment and finding that the physician's duty to the patient terminated when the patient left the hospital against medical advice. The WVSCA concluded: "that when a patient voluntarily leaves a health care facility against medical advice and executes a release of liability indicating that he/she understands and assumes the risks of leaving the health care facility against medical advice, the patient thereby terminates the physician-patient relationship such that the released medical providers do not thereafter have a duty of care to the patient." The defendant was represented by Flaherty Sensabaugh Bonasso Attorneys Rick Jones, Amy Humphreys and Shereen Compton McDaniel.

Lewis Roca Rothgerber Christie LLP (Denver, CO)

Darren Lemieux of Lewis Roca Rothgerber Christie represented Derek Webb, a gaming inventor and litigation financer, in a dispute with Aces Up Gaming, Inc. and two individual defendants in federal court. The dispute involved the Defendants' theft of approximately $1.2 million in proceeds from a $151 million settlement in an antitrust matter in which Mr. Webb was the financer. Mr. Webb's claims included breach of the parties' litigation financing agreement, breach of fiduciary duty, unjust enrichment, conspiracy, civil theft, and exemplary damages. After the addition of the civil theft claim and while Mr. Webb was pursing sanctions over the Defendants' significant discovery violations, the Defendants agreed to settle the case for the full amount of the disputed funds; agreed to pay Mr. Webb's attorneys' fees and costs, and agreed to dismiss (and pay fees and costs in) a related case the Defendants had brought in Colorado state court. Check out the media coverage at Law Week Colorado and Law360 Webb v Aces.

Pierce Couch Hendrickson Baysinger & Green, L.L.P. (Oklahoma City, OK)

On January 31, 2020, Pierce Couch attorneys Bryan Stanton, Carson Smith, and Charlie Schreck obtained a favorable verdict in Adair County District Court after a week-long trial involving claims of agricultural negligence. Plaintiff alleged at trial that in February 2017, his cattle were exposed to metal-contaminated feed, which caused a theoretical risk of an undetermined future injury. According to plaintiff, this risk diminished the value of about 132 cows and three bulls. Plaintiff's minimum claimed economic damage was $360,000, the purported cost to replace the herd. Defendant took ownership of the metal exposure just months into the case and, as a result, the primary issue in the case was whether an exposure - without a physical injury - actually damaged the value of plaintiff's herd.

During defendant's case-in-chief, defense counsel secured a stipulation from plaintiff in the form of an agreed jury instruction stating that he was not claiming physical injury or physical impairment to any of the cattle herd. This likely assisted the jury in its determination. Ultimately, the unanimous 12-person jury placed 20% negligence on plaintiff and awarded plaintiff a fraction of the sought damages. The reduced award, $42,400, was far less than prior offers to resolve the claim. In fact, it was almost half of an Offer to Confess made in 2018. The nominal award was in spite of the fact that the jurors were not given instructions about mitigation but were provided multiple punitive damage instructions. Further, defendant was not permitted to put on evidence about the physical condition of plaintiff's cattle, even though testing from October 2019 showed many of the cows had conditions unrelated to potential metal ingestion.

The verdict was the culmination of about three years of litigation wherein opposing counsel over-aggressively pursued multiple theories of liability, including the one stipulated as no longer being claimed during the trial. For more information about Pierce Couch's agricultural claim defense team, please contact Mr. Stanton, Mr. Smith, or Mr. Schreck.

Rivkin Radler LLP (Uniondale, NY)

David M. Grill and Evan R. Schieber received an extremely important victory for the landlord of a well-known Long Island, New York, shopping center regarding the interpretation of a co-tenancy provision. In Morton Village Realty Co., Inc. v. Sleepy's LLC, et al., Supreme Court, Nassau County Index No. 610652/2018, the Court rejected Mattress Firm's attempt to prematurely terminate its commercial lease.

The tenant attempted to validate its lease termination pursuant to a "co-tenancy" provision in the lease. A provision found in many leases of shopping center tenants, the co-tenancy clause permits a tenant to terminate its lease in the event that the specified anchor tenant ceases operations in the shopping center. The tenant argued that the co-tenancy provision requires that: (i) the lease for a replacement tenant be signed within one year after the prior anchor tenant ceased operations in the shopping center, and (ii) the new anchor tenant open for business within one year after the prior anchor tenant ceased operations in the shopping center.

Rivkin Radler rejected the tenant's purported termination arguing that the lease did not permit the tenant to terminate its lease because a lease with a new anchor tenant was, in fact, executed within one year after the prior anchor tenant vacated from the shopping center. Rivkin Radler's position was that, contrary to the tenant's interpretation, the co-tenancy provision did not also require that the new anchor tenant open for business within the same one-year period.

Relying on black letter rules of contract construction, the Court rejected the tenant's interpretation that it was permitted to terminate its lease. The Court, instead, adopted Rivkin Radler's interpretation, and held that the tenant was not permitted to terminate its lease because the co-tenancy provision only required that landlord enter into a lease with a new anchor tenant within one year after the prior anchor tenant ceased business operations.

This case is significant to the owners of shopping centers in the ever-changing retail landscape.

Sweeny, Wingate & Barrow, P.A. (Columbia, SC)

Sweeny, Wingate & Barrow, P.A. attorneys Mark Barrow and Marshall Crane obtained a defense verdict after jury deliberations in a six-day medical malpractice trial in Aiken County South Carolina. Barrow and Crane represented a neurologist in a wrongful death action. The plaintiffs alleged that the neurologist violated the standard of care with regard to treatment and diagnosis of intracranial hypotension. They further allege that this condition caused the death of decedent. The trial featured testimony from numerous witnesses and medical experts in the fields of neurology, neurosurgery, radiology, and emergency medicine. The jury found that the neurologist's care of the decedent was appropriate, and the neurologist did not deviate from the standard of care in treating the decedent.

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RECENT USLAW LAW FIRM TRANSACTIONS

Simmons Perrine Moyer Bergman PLC (Cedar Rapids, IA)

Forward Air Corporation (NASDAQ:FWRD) entered into an agreement to acquire substantially all of the assets of Linn Star Holdings, Inc., Linn Star Transfer, Inc. and Linn Star Logistics, LLC (collectively referred to as "LSHI"), for cash consideration of $57.2 million. The transaction did not include LSHI's California operations. The transaction closed January 20, 2020. Simmons Perrine Moyer Bergman PLC attorneys, Randy Scholer, Matt Adam and Tom DeBoom handled the transaction on behalf of Linn Star.

pro bono SPOTLIGHT

BARCLAY DAMON LLP

RIVKIN RADLER ATTORNEYS AT LAW

THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER ATTORNEYS

Jerry Mackey, a **Barclay Damon LLP** partner in Rochester, New York, was awarded the New York State Bar Association Senior Lawyers Section Jonathan Lippman Pro Bono Award during the NYSBA Annual Meeting on January 30. The award recognizes attorneys over age 55 who "have provided outstanding pro bono legal service to a low-income New Yorker in need or to a NY organization serving the legal needs of low-income New Yorkers."

In 2019 alone, Jerry provided more than 70 hours of pro bono service, assisting prisoners pursuing civil claims in federal court as well as clients of the Volunteer Legal Services Project of Monroe County who don't earn more than 125 percent of the federal poverty index. Jerry also helps individuals facing legal problems in family law, name changes, and residential foreclosure matters where litigants who can't afford an attorney aren't entitled to one.

An experienced trial attorney, Jerry primarily concentrates his practice on providing general counsel and litigation services to individuals, corporations, and municipalities. He has tried more than 100 NYS cases involving commercial transactions, shareholder and partner disputes, real property disputes, truck and bus accidents, products liability, and personal injury and wrongful death actions. Jerry routinely serves as lead counsel, interfacing with municipalities and civic groups on high-profile matters. He also served as an arbitrator and mediator on matters submitted to him by other attorneys.

BARCLAY DAMON LLP

For the third year in a row, every one of **Barclay Damon LLP**'s full-time attorneys provided pro bono legal services to low-income individuals in need of legal assistance and organizations serving those seeking access to justice.

Through its multi-award-winning **pro bono program**, the firm dedicated more than 3,500 hours of time valued at nearly $1 million to pro bono efforts in 2019, with attorneys actively participating in firm-sponsored family court clinics, litigating civil rights violations, drafting wills for veterans, assisting with clemency applications, and providing online legal aid through initiatives such as the American Bar Association's Free Legal Answers program. The firm's investment in communities across its office platform supported legal matters involving many of today's critical issues, including immigration, housing, women's rights, prisoners' rights, and community building and economic development. In addition to the firm's significant level of pro bono service, it contributed approximately $2 million in 2019 in charitable board service, legal work for not-for-profits, and additional partnerships with key community programs.

The firm's dedication to pro bono work has been recognized with numerous honors, including being named a Free Legal Answers™ Firm Honoree by the New York State Bar Association (NYSBA). On January 30, Barclay Damon was additionally honored as an Empire State Counsel Honoree by NYSBA at its annual Justice for All Luncheon for the fourth year straight. Among other accolades, Barclay Damon has also been ranked the number one firm for pro bono service in Western New York by Buffalo Law Journal.

David Gise and **Jennifer Abreu** of **Rivkin Radler LLP** in Uniondale, New York, brought a matter they handled pro bono for The Safe Center LI to a successful conclusion. The Safe Center helps victims of domestic and dating abuse, rape, sexual assault and human trafficking by offering them crisis intervention, emergency safe housing, counseling and legal representation.

An owner of a multifamily home rented a second-floor apartment to a man who was subsequently arrested on criminal charges. The Safe Center enlisted Rivkin Radler's help to evict the tenant and his co-tenants, all of whom had stopped paying rent on their month-to-month lease.

Gise and Abreu successfully terminated the tenancy and started a holdover proceeding in Nassau District Court. Despite the tenants' attempted delays, the attorneys made sure the tenants vacated the apartment, thanks to a surrender-of-possession, which Abreu negotiated.

THORNDAL ARMSTRONG

Thorndal, Armstrong, Delk, Balkenbush & Eisinger ("TADBE") in Nevada was established more than 45 years ago. During that time TADBE has maintained a strong pro bono presence and has eagerly promoted pro bono programs. For the past 10 or more years, TADBE has focused on promoting the "Children's Attorneys Project," which is a program administered through the Legal Aid Center of Southern Nevada. Children's Attorneys Project ("CAP") attorneys provide counsel, advice and representation to abused and neglected children. Before this project began in 1999, representation only existed for the State and the parent(s) of the victimized children. CAP attorneys represent the children directly, free of charge, and serve as the child's voice before the court and community, allowing the children to take an active role (and responsibility) in their own lives. The involved children are typically, and unfortunately, in foster care placement, institutions or wards of the state. Many TADBE attorneys handle CAP cases, representing children of all ages. In addition to appearing for the children in Court, TADBE attorneys visit/meet with their young clients at their client's residence or school to discuss issues like family, school, medical needs, adoption, reunification, etc.

about USLAW NETWORK

2001. The Start of Something Better.

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

Fast-forward to today.

The commitment remains the same as originally envisioned. To provide the highest quality legal representation and seamless cross-jurisdictional service to major corporations, insurance carriers, and to both large and small businesses alike, through a network of professional, innovative law firms dedicated to their client's legal success. Now as a diverse network with more than 6,000 attorneys from more than 60 independent, full practice firms with roots in civil litigation 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 a quarterly *USLAW Magazine*, compendiums of law, as well as annual membership directory. To ensure our goals are the same as the clients our member firms serve, our Client Leadership Council and Practice Group Client Advisors are directly involved in the development of our programs and services. This communication pipeline is vital to our success and allows us to better monitor and meet client needs and expectations.

USLAW Abroad.

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

How USLAW NETWORK Membership is Determined.

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

USLAW in Review.

- All vetted firms with demonstrated, robust practices and specialties
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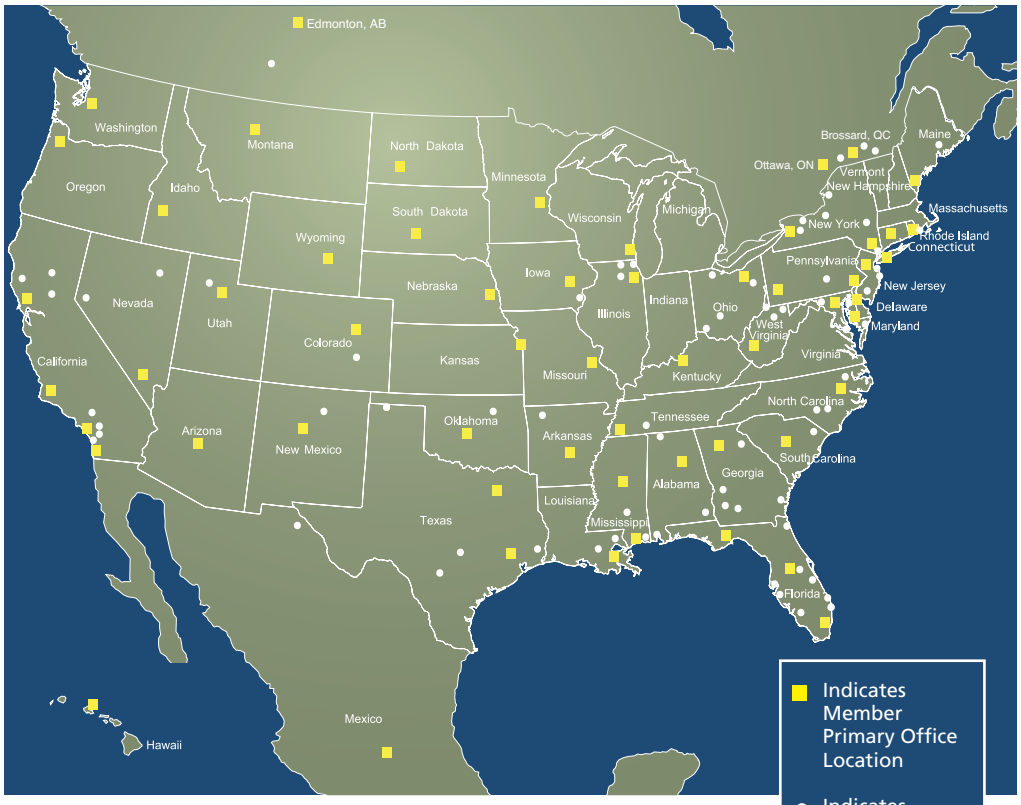

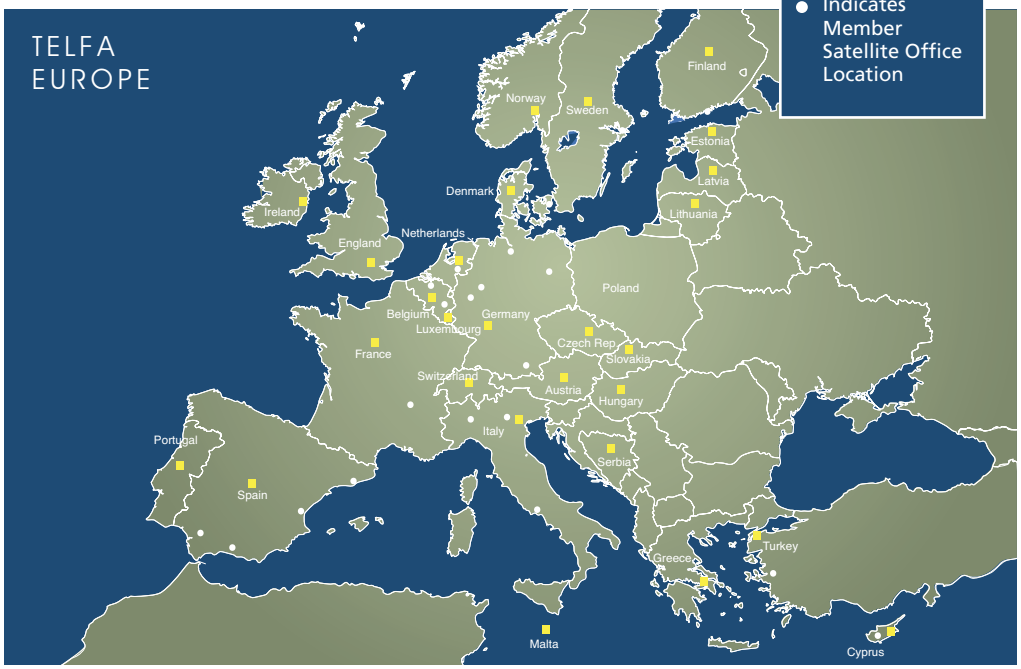

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the complete USLAW SOURCEBOOK

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

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

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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. CLE accreditation is provided for most USLAW educational offerings.

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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, court reporting, jury consultation, courtroom technology, forensic accounting, structured settlements, eDiscovery, cyber security and data forensics, and investigation.

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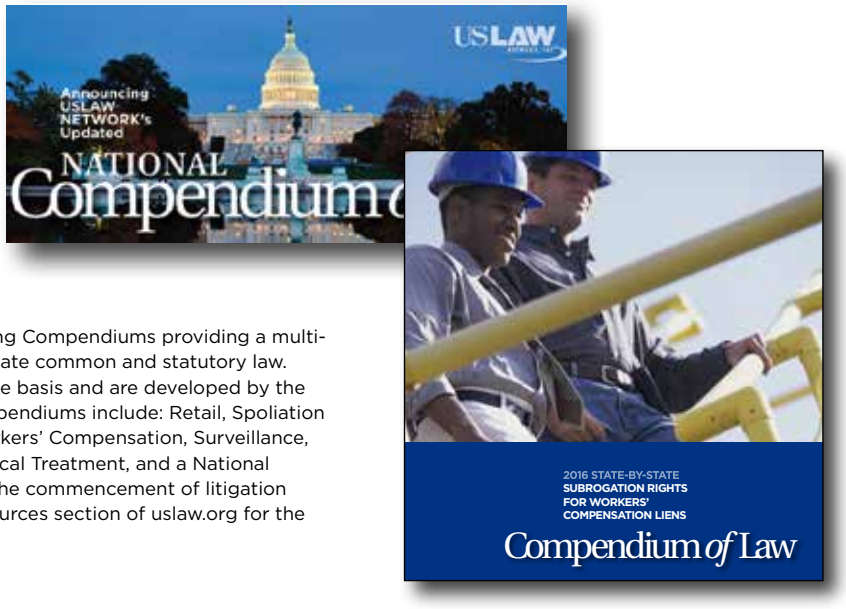

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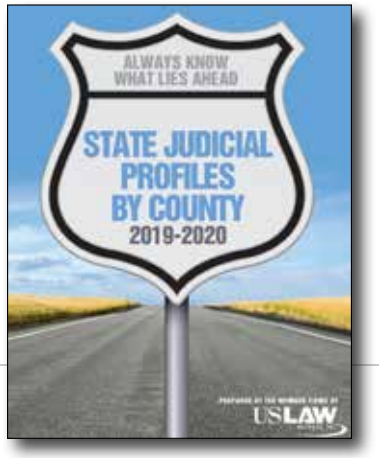

STATE JUDICIAL PROFILES BY COUNTY

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

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USLAW Magazine is an in-depth publication produced quarterly and designed to address legal and business issues facing commercial and corporate clients. Recent topics have covered cyber security & data privacy, 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, patent troll taxes, allocating risk by contract and much more.

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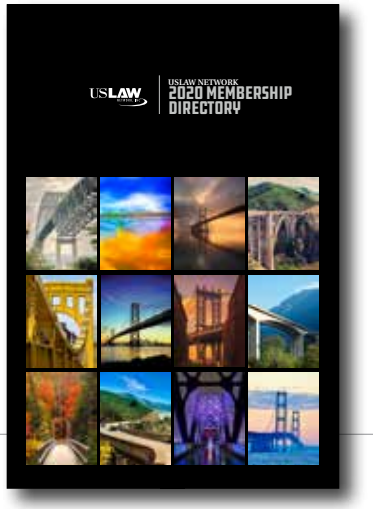

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